Official Publication of the State Bar of New Mexico

Bar Bulletin

January 24, 2018 • Volume 57, No. 4

Fly Free, by Margaret Letzkus

Inside This Issue

New!

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

How to Practice Series

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

How to Practice attendees will receive:

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

Now combined with a new date.

Mark your calendars for 2018:

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

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

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

State Bar of New Mexico
Bar Foundation
Center for Legal Education

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

January 24, 2018 - Volume 57, No. 4

Table of Contents

Meetings

January

24
Real Property, Trust and Estate Section Board
Noon, Teleconference

25
Natural Resources, Energy and Environmental Law Section Board
Noon, Teleconference

25
Trial Practice Section Board
Noon, State Bar Center, Albuquerque

25
Alternative Methods of Dispute Resolution Committee
Noon, State Bar Center

26
Immigration Law Section Board
11:30 a.m., New Mexico Immigrant Law Center

February

6
Health Law Section Board
9 a.m., 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, 505-797-6022

16
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

27
Common Legal Issues for Senior Citizens Workshop
Presentation 10–11:15 a.m., Bosque Farms Community Center, Bosque Farms, 1-800-876-6657

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

About Cover Image and Artist: Margaret Letzkus was born and raised in Texas with summers reserved for the southwest destinations of New Mexico, Colorado and Arizona. She has lived on both coasts and currently resides in New Mexico. The rich mix of cultures within Texas and New Mexico had a profound impact on her artwork. The colors of the land, sunsets, textiles, fiestas, excited her at an early age and have become her passion as a painter. She started painting as a child influenced by the color and composition of the Fauves. Her whimsical pieces contain a sense of humor and a great deal of serendipity. View more of her work at www.margaret-letzkus.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

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.

Eleventh Judicial District Court

Applicant Announcement

Three applicants were received in the Judicial Selection Office as of 5 p.m., Jan. 10, for the Judicial Vacancy in the Eleventh Judicial District due to the retirements of Hon. Sandra Price, effective Jan. 1. The Eleventh Judicial District Judicial Nominating Commission will meet on Jan. 25, at the Eleventh Judicial District Courthouse, 851 Andrea Drive, Farmington, to evaluate the applicants for these positions. The Commission meeting is open to the public. Those wishing to make public comment are requested to be present at the opening of the meeting. The names of the applicants in alphabetical order are: **Adam Harrison Bell**, **Kyle Michael Finch** and **Sarah Veronica Weaver**.

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

Professionalism Tip

With respect to other judges:

I will be courteous, respectful and civil in my opinions.

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.

Board of Editors

Call for Articles for Criminal Law Issue of *New Mexico Lawyer*

The New Mexico Lawyer is published four times a year and each issue focuses on a specific area of law. The Board of Editors has chosen criminal law as the topic of the next issue of the *New Mexico Lawyer*, to be published in May. The Board seeks abstracts for articles that address criminal law issues in New Mexico. Abstracts should be at least 300 words. Abstract submissions must include the abstract, the author's full name and address and a brief biography of the author. The deadline for submissions is Feb. 23. Send submissions to Director of Communications Evann Kleinschmidt at ekleinschmidt@nmbar.org. The Board of Editors will choose the abstracts and notify authors in March. Articles for the *New Mexico Lawyer* are approximately 1,500 words. For more information about the publication or the call for abstract submissions, visit www.nmbar.org/NewMexicoLawyer or contact Evann.

Seeking Applications for Open Positions

The State Bar Board of Editors has open positions. The Board of Editors meets at least four times a year to review articles submitted to the *Bar Bulletin* and the *New Mexico Lawyer*. This volunteer board reviews submissions for suitability, edits for legal content and works with authors as needed to develop topics or address other concerns. The Board is also responsible for planning for the future of the State Bar's publications. The Board of Editors should represent a diversity of backgrounds, ages, geographic regions of the state, ethnicity, gender and areas of legal practice and preferably have some experience in journalism or legal publications. The State Bar president, with the approval of the Board of Bar Commissioners, appoints members of the Board of Editors, often on the recommendation of the current Board. Those interested in being considered for a two-year term should send a letter of interest and résumé to Director of Communications Evann Kleinschmidt at ekleinschmidt@nmbar.org. Apply by Feb. 23.

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

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.

Other Bars

Albuquerque Lawyers Club

February Luncheon

The Albuquerque Lawyers Club invites members of the legal community to its meeting at noon, Feb. 7, at Seasons Rotisserie & Grill in Albuquerque. Alex Bregman's father, formerly known as Sam Bregman, is the featured speaker. He will present "Defensive Specialists: the Boyd case and Alex's championship experience." The luncheon is free to members; $30 for non-members in advance; and $35 at the door. For more information, contact Yasmin Dennig at ydennig@yahoo.com or 505-844-3558.

First Judicial District Bar Association

January Luncheon Presentation

The next luncheon for the First Judicial District Bar Association will be noon–1 p.m., Jan. 29, the Santa Fe Hilton (100 Sandoval Street). The presenter will be attorney Hallie N. Love, national CLE

presenter, certified IAYT, E-RYT 500, certified in Positive Psychology, Whole-being Institute workshop facilitator and author of *Yoga for Lawyers—Mind-Body Techniques to Feel Better all the Time* (ABA 2014). Love's presentation is entitled "Start the Year Off Right—Understanding Mindfulness for Better Professionalism." Courses on mindfulness are recommended by the National Task Force Report on Lawyer Well-Being, which represents the ABA, APRL, ALPS, Conference of Chief Justices, NCBE, and NOBC. For more information, please visit www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf. Admission is $15 for members and $20 for non-members. Attendees should note that this presentation will be filmed from the back of the room by Love's assistant. R.S.V.P. with Mark Cox at mcox@hatcherlawgroupnm.com by COB Jan. 25. During this luncheon, FJDBA will also elect a new board member. Contact Mark Cox if you are interesting in joining the board.

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, 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.

Legal Education

January

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

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

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

26 **Legal Malpractice Potpourri (2017)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

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

February

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

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

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

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

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

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

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

12 **Negotiating (and Renogotiating) Leases, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

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

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

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

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

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

23 **Drafting Waivers of Conflicts of Interests**
1.0 EP
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

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

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

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

1 **Service Level Agreements in Technology Contracting**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

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

6 **Successor Liability in Business Transactions**
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

9 **Drafting Professional and Personal Services Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

14 **Role of LLCs in Trust and Estate Planning**
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/despositions

27 **Lawyer Ethics When Clients Won't Pay Fees**
1.0 EP
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 January 12, 2018

UNPUBLISHED OPINIONS

A-1-CA-36045	J Edwards v. L Wright	Affirm	01/08/2018
A-1-CA-36276	State v. A Gibson	Affirm	01/08/2018
A-1-CA-36537	M Martinez v. Central Freight Lines	Affirm	01/08/2018
A-1-CA-36686	State v. J Bequette	Affirm	01/08/2018
A-1-CA-33613	State v. J Kupfer	Affirm	01/09/2018
A-1-CA-36421	Wells Fargo v. K Elder	Affirm	01/09/2018
A-1-CA-36453	State v. H Baeza	Affirm	01/09/2018
A-1-CA-36498	CYFD v. Johnny T	Affirm	01/09/2018
A-1-CA-36650	City of Ruidoso Downs v. J Kimbrell	Affirm	01/11/2018
A-1-CA-36175	Citicorp v. J Gallardo	Affirm	01/12/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

IN MEMORIAM

As of October 26, 2017:
Joel B. Burr Jr.
PO Box 50
Farmington, NM 87409

As of December 11, 2017
Bernard Rosenblum
6024 Placer Drive, NE
Albuquerque, NM 87111

As of December 22, 2017:
Hon. Rozier E. Sanchez
9612 Palo Duro, NE
Albuquerque, NM 87110

CLERK'S CERTIFICATE OF REINSTATEMEN TO ACTIVE STATUS

Effective December 21, 2017:
Lorenzo Curley
PO Box 341
Sanders, AZ 86512
505-979-2221
lorenzcurl@yahoo.com

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

Effective January 1, 2018:
Hon. John A. Darden III (ret.)
200 W. Las Cruces Avenue, Suite D
Las Cruces, NM 88005
575-523-5071
johndardennm@gmail.com

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective January 9, 2018:
Lloyd W. Drager
2724 Virginia Street, NE
Albuquerque, NM 87110

Effective January 9, 2018:
Teresa A. Dubuque
7421 Gila Road, NE
Albuquerque, NM 87109

Effective January 9, 2018:
Paul E. Houston
7421 Gila Road, NE
Albuquerque, NM 87109

CLERK'S CERTIFICATE OF ADMISSION

On January 9, 2018:
Brennon Duane Gamblin
Craig, Terrill, Hale & Grantham, LLP
9816 Slide Road,
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806-744-3232
806-744-2211 (fax)
bgamblin@cthglawfirm.com

On January 9, 2018:
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1100 H Street, NW
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On January 9, 2018:
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On January 9, 2018:
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611 W. Fifth Street,
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Austin, TX 78701
512-467-6060
512-467-6161 (fax)
patton@haylegal.com

CLERK'S CERTIFICATE OF WITHDRAWAL AND CHANGE OF ADDRESS

Effective January 9, 2018:
Raquel D. Montoya-Lewis
PO Box 1144,
Dept. 4
Bellingham, WA 98225

Effective January 9, 2018:
Richard Kenneth Williams
1315 Meridian Ranch Drive
Reno, NV 89523

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

5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017
5-802	Habeas corpus	12/31/2017

Rules of Criminal Procedure for the Magistrate Courts

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

Rules of Criminal Procedure for the Metropolitan Courts

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

Rules of Procedure for the Municipal Courts

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

Criminal Forms

9-207A	Probable cause determination	12/31/2017
9-301A	Pretrial release financial affidavit	07/01/2017
9-302	Order for release on recognizance by designee	07/01/2017
9-303	Order setting conditions of release	07/01/2017
9-303A	Withdrawn	07/01/2017
9-307	Notice of forfeiture and hearing	07/01/2017
9-308	Order setting aside bond forfeiture	07/01/2017
9-309	Judgment of default on bond	07/01/2017
9-310	Withdrawn	07/01/2017
9-513	Withdrawn	12/31/2017
9-513A	Juror summons	12/31/2017
9-513B	Juror qualification	12/31/2017

9-513C	Juror questionnaire	12/31/2017
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
9-701	Petition for writ of habeas corpus	12/31/2017
9-702	Petition for writ of certiorari to the district court from denial of habeas corpus	12/31/2017
9-809	Order of transfer to children's court	12/31/2017
9-810	Motion to restore right to possess or receive a firearm or ammunition	12/31/2017

Children's Court Rules and Forms

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

Rules of Appellate Procedure

12-202	Appeal as of right; how taken	12/31/2017
12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017
12-205	Release pending appeal in criminal matters	07/01/2017
12-210	Calendar assignments for direct appeals	12/31/2017
12-307.2	Electronic service and filing of papers	07/01/2017
12-307.2	Electronic service and filing of papers	08/21/2017
12-313	Mediation	12/31/2017
12-314	Public inspection and sealing of court records	03/31/2017
12-502	Certiorari from the Supreme Court to the Court of Appeals	12/31/2017

Uniform Jury Instructions – Civil

13-24 Appx 1	Part A: Sample fact pattern and jury instructions for malpractice of attorney in handling divorce case	12/31/2017
13-2401	Legal malpractice; elements	12/31/2017
13-2402	Legal malpractice; attorney-client relationship	12/31/2017
13-2403	Legal malpractice; negligence and standard of care	12/31/2017
13-2404	Legal malpractice; breach of fiduciary duty	12/31/2017
13-2405	Duty of confidentiality; definition	12/31/2017
13-2406	Duty of loyalty; definition	12/31/2017
13-2407	Legal malpractice; attorney duty to warn	12/31/2017
13-2408	Legal malpractice; duty to third-party intended - No instruction drafted	12/31/2017
13-2409	Legal malpractice; duty to intended beneficiaries; wrongful death	12/31/2017
13-2410	Legal malpractice; expert testimony	12/31/2017
13-2411	Rules of Professional Conduct	12/31/2017
13-2412	Legal malpractice; attorney error in judgment	12/31/2017
13-2413	Legal malpractice; litigation not proof of malpractice	12/31/2017
13-2414	Legal malpractice; measure of damages; general instruction	12/31/2017
13-2415	Legal malpractice; collectability – No instruction drafted	12/31/2017

Uniform Jury Instructions – Criminal

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

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

Rules Governing Admission to the Bar

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

Rules of Professional Conduct

16-100	Terminology	12/31/2017
16-101	Competence	12/31/2017
16-102	Scope of representation and allocation of authority between client and lawyer	08/01/2017
16-106	Confidentiality of information	12/31/2017
16-108	Conflict of interest; current clients; specific rules	12/31/2017
16-304	Fairness to opposing party and counsel	12/31/2017
16-305	Impartiality and decorum of the tribunal	12/31/2017
16-402	Communications with persons represented by counsel	12/31/2017
16-403	Communications with unrepresented persons	12/31/2017
16-701	Communications concerning a lawyer's services	12/31/2017
16-803	Reporting professional misconduct	12/31/2017

Rules Governing Discipline

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

Rules for Minimum Continuing Legal Education

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

Code of Judicial Conduct

21-004	Application	12/31/2017

Supreme Court General Rules

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

Rules Governing the New Mexico Bar

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

Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	07/01/2017

Local Rules for the Second Judicial District Court

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

Local Rules for the Thirteenth Judicial District Court

LR13-112	Courthouse security	12/31/2017

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

PROPOSED REVISIONS TO THE CHILDREN'S COURT RULES AND FORMS,

RULE 10-166 NMRA

PROPOSAL 2018-01

Effective immediately, the Supreme Court is suspending the amendments adopted on November 1, 2017, to Rule 10-166 NMRA until further order of the Court, and republishing them for comment. *See* Supreme Court Order No. 18-8300-002. The text of the Court's order suspending the amendments follows the republished amendments set forth below.

If you would like to comment on the proposed amendments set forth below before the Court decides whether to withdraw, revise, or reinstate the amendments approved in 2017, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://supremecourt.nmcourts.gov/openforcomment.aspx or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 875040848
nmsupremecourtclerk@nmcourts.gov
5058274837 (fax)

Your comments must be received by the Clerk on or before **February 9, 2018**, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing.

10-166. Public inspection and sealing of court records.

A. **Presumption of public access; scope of rule**. Court records are subject to public access unless sealed by order of the court or otherwise protected from disclosure under the provisions of this rule. This rule does not prescribe the manner in which the court shall provide public access to court records, electronically or otherwise. No person or entity shall knowingly file a court record that discloses material obtained from another court record that is sealed, conditionally under seal, or subject to a pending motion to seal under the provisions of this rule. This rule does not apply to court records sealed under Rule 10-262 NMRA or Section 32A-2-26 NMSA 1978, unless otherwise specified in this rule.

B. **Definitions**. For purposes of this rule the following definitions apply:

(1) "court record" means all or any portion of a document, paper, exhibit, transcript, or other material filed or lodged with the court, and the register of actions and docket entries used by the court to document the activity in a case;

(2) "lodged" means a court record that is temporarily deposited with the court but not filed or made available for public access;

(3) "protected personal identifier information" means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver's license number, and all but the year of a person's date of birth;

(4) "public" means any person or entity, except the parties to the proceeding, counsel of record and their employees, and court personnel;

(5) "public access" means the inspection and copying of court records by the public; and

(6) "sealed" means a court record for which public access is limited by order of the court or as required by Paragraphs C or D of this rule.

C. **Limitations on public access**. In addition to court records protected pursuant to Paragraphs D and E of this rule, court records in the following proceedings are confidential and shall be automatically sealed without motion or order of the court:

(1) proceedings commenced under the Adoption Act, Chapter 32A, Article 5 NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Subsection A of Section 32A-5-8 NMSA 1978;

(2) proceedings for testing commenced under Section 24-2B-5.1 NMSA 1978;

(3) proceedings commenced under the Family in Need of CourtOrdered Services Act, Chapter 32A, Article 3B NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Subsubsections (1) through (6) of Subsection B of Section 32A3B22 NMSA 1978;

(4) proceedings commenced under the Abuse and Neglect Act, Chapter 32A, Article 4 NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Subsubsections (1) through (6) of Subsection B of Section 32A433 NMSA 1978, and disclosure by the Children, Youth, and Families Department as governed by Section 32A433 NMSA 1978;

(5) proceedings commenced under the Children's Mental Health and Developmental Disabilities Code, Chapter 32A, Article 6A NMSA 1978, subject to the disclosure requirements in Section 32A-6A-24 NMSA 1978; and

(6) [~~court records in delinquency proceedings protected by Section 32A232 NMSA 1978~~] proceedings commenced under the Delinquency Act, Chapter 32A, Article 2 NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to the following:

(a) persons and entities listed in Subsection C of Section 32A232 NMSA 1978;

(b) a facility, organization, or person providing care, treatment, or shelter to the child, including a detention facility; and

(c) disclosure by the Children, Youth, and Families Department as governed by Section 32A-2-32 NMSA 1978.

The provisions of this paragraph notwithstanding, the docket number and case type for the categories of cases listed in this paragraph shall not be sealed without a court order.

D. **Protection of personal identifier information**.

(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court's judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a nonsanctionable decision. Protected personal identifier information shall not be made available on publicly accessible court web sites. The court shall not publicly display protected personal

identifier information in the courthouse. Any attorney or other person granted electronic access to court records containing protected personal identifier information shall be responsible for taking all reasonable precautions to ensure that the protected personal identifier information is not unlawfully disclosed by the attorney or other person or by anyone under the supervision of that attorney or other person. Failure to comply with the provisions of this subparagraph may subject the attorney or other person to sanctions or the initiation of disciplinary proceedings.

(2) The court clerk is not required to review documents for compliance with this paragraph and shall not refuse for filing any document that does not comply with this paragraph. The court clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.

(3) Any person requesting public access to court records shall provide the court with the person's name, address, and telephone number along with a governmentissued form of identification or other acceptable form of identification.

E. **Motion to seal court records required**. Except as provided in Paragraphs C and D of this rule, no portion of a court record shall be sealed except by court order. Any party or member of the public may file a motion for an order sealing the court record. The motion is subject to the provisions of Rule 10-111 NMRA, and a copy of the motion shall be served on all parties who have appeared in the case in which the court record has been filed or is to be filed. Any party or member of the public may file a response to the motion to seal under Rule 10-111 NMRA. The movant shall lodge the court record with the court pursuant to Paragraph F when the motion is made, unless the court record was previously filed with the court or good cause exists for not lodging the court record pursuant to Paragraph F. Pending the court's ruling on the motion, the lodged court record will be conditionally sealed. If necessary to prevent disclosure, any motion, response or reply, and any supporting documents, shall be filed in a redacted version that will be subject to public access and lodged in a complete, unredacted version that will remain conditionally sealed pending the court's ruling on the motion. If the court denies the motion, the clerk shall return any lodged court records and shall not file them in the court file.

F. **Procedure for lodging court records**. A court record that is the subject of a motion filed under Paragraph E of this rule shall be secured in an envelope or other appropriate container by the movant and lodged with the court unless the court record was previously filed with the court or unless good cause exists for not lodging the court record. The movant shall label the envelope or container lodged with the court "CONDITIONALLY UNDER SEAL" and affix to the envelope or container a cover sheet that contains the information required under Rules 10-112 and 10-114 NMRA and which states that the enclosed court record is subject to a motion to seal. On receipt of a lodged court record, the clerk shall endorse the cover sheet with the date of its receipt and shall retain but not file the court record unless the court orders it filed. If the court grants an order sealing a court record, the clerk shall substitute the label provided by the movant on the envelope or container with a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)" and shall attach a filestamped copy of the court's order. Unless otherwise ordered by the court, the date of the court order granting the motion shall be deemed the file date of the lodged court record.

G. **Requirements for order to seal court records**.

(1) The court shall not permit a court record to be filed under seal based solely on the agreement or stipulation of the parties. The court may order that a court record be filed under seal only if the court by written order finds and states facts that establish the following:

(a) the existence of an overriding interest that overcomes the right of public access to the court record;

(b) the overriding interest supports sealing the court record;

(c) a substantial probability exists that the overriding interest will be prejudiced if the court record is not sealed;

(d) the proposed sealing is narrowly tailored; and

(e) no less restrictive means exist to achieve the overriding interest.

(2) The order shall require the sealing of only those documents, pages, or portions of a court record that contain the material that needs to be sealed. All other portions of each document or page shall be filed without limitation on public access. If necessary, the order may direct the movant to prepare a redacted version of the sealed court record that will be made available for public access.

(3) The order shall state whether the order itself, the register of actions, or individual docket entries are to be sealed.

(4) The order shall specify who is authorized to have access to the sealed court record.

(5) The order shall specify a date or event upon which it expires or shall explicitly state that the order remains in effect until further order of the court.

(6) The order shall specify any person or entity entitled to notice of any future motion to unseal the court record or modify the sealing order.

H. **Sealed court records as part of record on appeal**. Court records sealed under the provisions of this rule that are filed in the appellate courts shall remain sealed in the appellate courts. The appellate court judges and staff may have access to the sealed court records unless otherwise ordered by the appellate court.

I. **Motion to unseal court records**.

(1) Court records sealed under Rule 10-262 NMRA or Section 32A-2-26 NMSA 1978 shall not be unsealed under this paragraph. In all other cases, a sealed court record shall not be unsealed except by court order or pursuant to the terms of the sealing order itself. A party or member of the public may move to unseal a sealed court record. A copy of the motion to unseal is subject to the provisions of Rule 10-111 NMRA and shall be served on all persons and entities who were identified in the sealing order pursuant to Subparagraph (6) of Paragraph G for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

(2) In determining whether to unseal a court record, the court shall consider the matters addressed in Subparagraph (1) of Paragraph G. If the court grants the motion to unseal a court record, the order shall state whether the court record is unsealed entirely or in part. If the court's order unseals only part of the court record or unseals the court record only as to certain persons or entities, the order shall specify the particular court records that are unsealed, the particular persons or entities who may have access to the court record, or both. If, in addition to the court records in the envelope or container, the court has previously ordered the sealing order, the register of actions, or individual docket entries to be sealed, the unsealing order shall state whether those additional court records are unsealed.

J. **Failure to comply with sealing order**. Any person or entity who knowingly discloses any material obtained from

a court record sealed or lodged pursuant to this rule may be held in contempt of court or subject to other sanctions as the court deems appropriate.

[Approved by Supreme Court Order No. 10-8300-008, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 10-8300-023, temporarily suspending Paragraph D for 90 days effective August 11, 2010; by Supreme Court Order No. 10-8300-037, extending the temporary suspension of Paragraph D for an additional 90 days, effective November 10, 2010; by Supreme Court Order No. 11-8300-010, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016; amendments provisionally approved by Supreme Court Order No. 16-8300-003 withdrawn by Supreme Court Order No. 16-8300-037, effective retroactively to May 18, 2016; as amended by Supreme Court Order No. 17-8300-002, effective for all cases pending or filed on or after March 31, 2017; as amended by Supreme Court Order No. 17-8300-019, effective for all cases pending or filed on or after December 31, 2017; amendments approved by Supreme Court Order No. 17-8300-019 suspended and republished for comment by Supreme Court Order No. 188300002, effective January 9, 2018.]

Committee commentary. — Prior to 2017, Subparagraph (C)(6) of the rule provided that court records in delinquency proceedings were sealed to the extent that they are "protected by Section 32A-2-32 NMSA 1978." This language proved to be subject to differing interpretations because, although Section 32A-2-32(A) provides that "[a]ll records pertaining to the child" are confidential, the statute does not include court records in the extensive list of records that are specifically protected. The result was a patchwork of public access to court records in delinquency cases, depending on a court's interpretation of the statute. Some districts permitted public inspection of court records upon request, while others restricted access to those persons and entities listed in Section 32A-2-32(C).

Subparagraph (C)(6) was amended in 2017 to establish a uniform requirement to seal all court records in delinquency proceedings automatically without motion or order of the court. The amended rule includes limited exceptions to automatic sealing for the persons and entities identified in Section 32A-2-32(C), for a facility, organization or person providing care, treatment, or shelter to the child, including a detention facility, and for CYFD. The decision to seal all court records in delinquency proceedings automatically is consistent with the trend of protecting the privacy of children who come in contact with the courts, particularly in the digital age. See NMSA 1978, § 32A-2-32.1 (prohibiting state agencies and political subdivisions from posting on a publicly accessible website information about a child's arrest, delinquency proceedings for a child, an adjudication of a child, or an adult sentence imposed on a child); see also NMSA 1978, § 32A-2-26 (setting forth procedures for sealing all records in a delinquency proceeding, including "legal and social files and records of the court, probation services, and any other agency in the case," such that "the proceedings in the case shall be treated as though they never occurred"); Rule 10-262 NMRA (same); cf. Rule 12-305.1(C)(1) NMRA (providing that a child named as a party in an appeal from a proceeding under the delinquency act shall be identified by the child's first name and the first initial of the child's last name).

This rule recognizes the presumption that all documents filed in court are subject to public access. This rule does not address public access to other records in possession of the court that are not filed within the context of litigation pending before the court, such as personnel or administrative files. Nor does this rule address the manner in which a court must provide public access to court records.

Although most court records are subject to public access, this rule recognizes that in some instances public access to court records should be limited. However, this rule makes clear that no court record may be sealed simply by agreement of the parties to the litigation. And except as otherwise provided in this rule, public access to a court record may not be limited without a written court order entered in accordance with the provisions of this rule. Unless otherwise ordered by the court, any limitations on the public's right to access court records do not apply to the parties to the proceeding, counsel of record and their employees, and court personnel. While employees of a lawyer or law firm who is counsel of record may have access to sealed court records, the lawyer or law firm remains responsible for the conduct of their employees in this regard.

Paragraph C of this rule recognizes that court records within certain classes of cases should be automatically sealed without the need for a motion by the parties or court order. Most of the classes of cases identified in Paragraph C have been identified by statute as warranting confidentiality. However, this rule does not purport to cede to the legislature the final decision on whether a particular type of case or court record must be sealed. Paragraph C simply lists those classes of cases in which all court records shall be automatically sealed from the commencement of the proceedings without the need for a court order. Nonetheless, a motion to unseal some or all of the automatically sealed court records in a particular case still may be filed under Paragraph I of the rule.

Aside from entire categories of cases that may warrant limitations on public access, numerous statutes also identify particular types of documents and information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, NMSA 1978, § 7-1-4.2(H) (providing for confidentiality of taxpayer information); NMSA 1978, § 14-6-1(A) (providing for confidentiality of patient health information); NMSA 1978, § 24-1-9.5 (limiting disclosure of test results for sexually transmitted diseases); NMSA 1978, § 29-10-4 (providing for confidentiality of certain arrest record information); NMSA 1978, § 29-12A-4 (limiting disclosure of local crime stoppers program information); NMSA 1978, § 29-16-8 (providing for confidentiality of DNA information); NMSA 1978, § 31-25-3 (providing for confidentiality of certain communications between victim and victim counselor); NMSA 1978, § 40-8-2 (providing for sealing of certain name change records); NMSA 1978, § 40-6A-312 (providing for limitations on disclosure of certain information during proceedings under the Uniform Interstate Family Support Act); NMSA 1978, § 40-10A-209 (providing for limitations on disclosure of certain information during proceedings under the Uniform ChildCustody Jurisdiction and Enforcement Act); NMSA 1978, § 40-13-7.1 (providing for confidentiality of certain information obtained by medical personnel during treatment for domestic abuse); NMSA 1978, § 40-13-12 (providing for limits on internet disclosure of certain information in domestic violence cases); NMSA 1978, § 44-7A-18 (providing for limitations on disclosure of certain information under the Uniform Arbitration Act). However, Paragraph C does not contemplate the automatic

sealing of such items. Instead, if a party believes a particular statutory provision warrants sealing a particular court record, the party may file a motion to seal under Paragraph E of this rule. And any statutory confidentiality provision notwithstanding, the court must still engage in the balancing test set forth in Subparagraph (1) of Paragraph G of this rule before deciding whether to seal any particular court record.

Paragraph D of this rule recognizes that certain personal identifier information often included within court records may pose the risk of identity theft and other misuse. Accordingly, Paragraph D discourages the inclusion of protected personal identifier information in a court record unless the court or a party deems its inclusion necessary for the effective operation of the court's judicial function. Although the decision to include protected personal identifier information in the court record is a nonsanctionable decision, the rule nonetheless prohibits public access to protected personal identifier information on court web sites and also prohibits the court from publicly displaying protected personal identifier information in the courthouse, which would include docket call sheets, court calendars, or similar material intended for public viewing.

The court need not review individual documents filed with the court to ensure compliance with this requirement, and the clerk may not refuse to accept for filing any document that does not comply with the requirements of Paragraph D. Moreover, the clerk is not required to screen court records released to the public to prevent the disclosure of protected personal identifier information. However, anyone requesting public access to court records shall provide the court with his or her name, address, and telephone number along with a governmentissued form of identification or other acceptable form of identification. The court may also consider maintaining a log of this information.

Paragraphs E and F set forth the procedure for requesting the sealing of a court record. Any person or entity may file a motion to seal a court record, and all parties to the action in which the court record was filed, or is to be filed, must be served with a copy of the motion. Any person or entity may file a response to the motion to seal the court record, but, if the person or entity filing the response is not a party to the underlying litigation, that person or entity does not become a party to the proceedings for any other purpose.

Ordinarily, the party seeking to seal a court record must lodge it with the court at the time that the motion is filed. A lodged court record is only temporarily deposited with the court pending the court's ruling on the motion. Accordingly, a lodged court record is not filed by the clerk and remains conditionally sealed until the court rules on the motion. To protect the lodged court record from disclosure pending the court's ruling on the motion, the movant is required to enclose the lodged court record in an envelope or other appropriate container and attach a cover sheet to the envelope or container that includes the case caption, notes that the enclosed court record is the subject of a pending motion to seal, and is clearly labeled "conditionally under seal." If necessary to prevent disclosure pending the court's ruling, the motion, any response or reply, and other supporting documents should either be lodged with the court as well or filed in redacted and unredacted versions so that the court may permit public access to the redacted pleadings until the court rules on the motion.

Although a lodged court record is not officially filed with the court unless and until the motion to seal is granted, the clerk need not keep lodged court records in a physically separate location from the rest of the court file. In this regard, the rule does not purport to require the clerk to maintain lodged court records in any particular manner or location. As long as the lodged record is protected from public disclosure, each court retains the discretion to decide for itself how it will store lodged court records, and this rule anticipates that most courts will choose to store and protect lodged and sealed court records in the same way that those courts have traditionally stored and protected sealed and conditionally sealed court records filed with the court before the adoption of this rule.

When docketing a motion to seal, the clerk's docket entry should be part of the publicly available register of actions and should reflect that a motion to seal was filed, the date of filing, and the name of the person or entity filing the motion. However, any docket entries related to the motion to seal should avoid including detail that would disclose the substance of the conditionally sealed material before the court has ruled. If necessary to prevent disclosure, in rare cases, a court order granting a motion to seal may provide for the sealing of previous or future docket entries related to the sealed court records provided that the court's register of actions contains, at a minimum, a docket entry containing the docket number, an alias docket entry or case name such as Sealed Pleading or In the Matter of a Sealed Case, and an entry indicating that the pleading or case has been sealed so that anyone inspecting the court's docket will know of its existence.

If the court denies the motion to seal, the clerk will return the lodged court record to the party, it will not become part of the case file, and will therefore not be subject to public access. However, even if the court denies the motion, the movant still may decide to file the previously lodged court record but it then will be subject to public access.

If the court grants the motion to seal, it must enter an order in accordance with the requirements of Paragraph G. The order must state the facts supporting the court's decision to seal the court record and must identify an overriding interest that overcomes the public's right to public access to the court record and that supports the need for sealing. The rule itself does not identify what would constitute an overriding interest but anticipates that what constitutes an overriding interest will depend on the facts of the case and will be developed through case law on a case by case basis. The rule further provides that the sealing of the court record must be narrowly tailored and that there must not be a less restrictive alternative for achieving the overriding interest. To that end, the rule encourages the court to consider partial redactions whenever possible rather than the wholesale sealing of pages, documents, or court files. Paragraph G also requires the court to specify whether any other matter beyond the court record (such as the order itself, the register of actions, or docket entries) will be sealed to prevent disclosure. The sealing order also must specify who may and may not have access to a sealed court record, which may include prohibiting access to certain parties or court personnel. In addition, the sealing order must specify a date or event upon which the order expires or provide that the sealing remains in effect until further order of the court. Finally, the order must list those persons or entities who must be given notice of any subsequently filed motion to unseal the court record or modify the sealing order.

Any court records sealed under the provisions of this rule remain sealed even if subsequently forwarded to the appellate court as part of the record on appeal. However, sealed court records forwarded to the appellate court as part of the record on appeal

may be reviewed by the appellate court judges and staff unless otherwise ordered by the appellate court. Any other motions requesting modification to a sealing order in a case on appeal must be filed with the appellate court.

Motions to unseal previously sealed court records are governed by Paragraph I of this rule. A party or any member of the public may move to unseal a court record, and the rule does not provide a time limit for filing a motion to unseal a court record. Motions to unseal follow the same general procedures and standards used for motions to seal. A copy of a motion to unseal must be served on all persons and entities identified in the sealing order as entitled to receive notice of a future motion to unseal. Although most court records should remain available for public access, when a court record is sealed under this rule, all persons and entities who do have access to the sealed material must act in good faith to avoid the disclosure of information the court has ordered sealed. That said, the protections provided by this rule should not be used to effect an unconstitutional prior restraint of free speech. But in the absence of a conflict with a countervailing First Amendment principle that would permit disclosure, any knowing disclosure of information obtained from a court record sealed by the court may subject the offending person or entity to being held in contempt of court or other sanctions as deemed appropriate by the court.

[Approved by Supreme Court Order No. 108300008, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 118300010, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites or after February 7, 2011; as provisionally amended by Supreme Court Order No. 168300003, effective for all cases pending or filed on or after May 18, 2016; amendments provisionally approved by Supreme Court Order No. 16-8300-003 withdrawn by Supreme Court Order No. 16-8300-037, effective retroactively to May 18, 2016; as amended by Supreme Court Order No. 17-8300-019, effective for all cases pending or filed on or after December 31, 2017; amendments approved by Supreme Court Order No. 178300019 suspended and republished for comment by Supreme Court Order No. 188300002, effective January 9, 2018.]

January 9, 2018

NO. 18-8300-002

IN THE MATTER OF THE SUSPENSION OF THE 2017 AMENDMENT OF RULE 10-166 NMRA OF THE CHILDREN'S COURT RULES

ORDER

WHEREAS, this matter came on for consideration upon recommendation of the Children's Court Rules Committee on December 6, 2016, to amend Rule 10-166 NMRA of the Children's Court Rules to revise the provisions in the rule and committee commentary governing the automatic sealing of court records in delinquency proceedings in accordance with NMSA 1978, Section 32A-2-32 (2009);

WHEREAS, the proposed amendments were published for comment on March 6, 2017, with a comment deadline of April 5, 2017, and no comments were received;

WHEREAS, no comments having been received during the public comment period, the proposed amendments were recommended to the Court for final approval as published for comment, whereupon Supreme Court Order No. 17-8300-019 was issued on November 1, 2017, approving the amendments to be effective for all cases pending or filed on or after December 31, 2017;

WHEREAS, after the amendments to Rule 10-166 NMRA went into effect, this Court began to receive feedback from interested parties questioning the application of the amendments in delinquency proceedings and indicating that they were not aware that the amendments had been published for comment and subsequently approved by this Court; and

WHEREAS, in light of the foregoing, and the Court wishing to give all interested parties another opportunity to comment before the Court decides whether to withdraw, revise, or reinstate the previously approved amendments and being otherwise sufficiently advised, Chief Justice Judith K. Nakamura, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Charles W. Daniels, and Justice Barbara J. Vigil concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Rule 10166 approved by Supreme Court Order No. 17-8300-019 are SUSPENDED, effective immediately and until further order of the Court;

IT IS FURTHER ORDERED that the Clerk of the Court shall publish for comment the suspended amendments for a new thirty (30)day comment period; and

IT IS FURTHER ORDERED that the Clerk of the Court is authorized and directed to give notice of the abovereferenced suspension and republication for comment by posting it on this Court's website and the New Mexico Compilation Commission website and publication in the Bar Bulletin and New Mexico Rules Annotated.

IT IS SO ORDERED.

WITNESS, Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 9th day of January, 2018.

_____

Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico

New Mexico Supreme Court
Rule-Making Notice

LR2-308 NMRA

The Supreme Court has approved amendments to LR2-308 NMRA, effective January 15, 2018. The full text of the amended rule is available on the New Mexico Compilation Commission's website, http://www.nmcompcomm.us/nmrules/NMRuleSets.aspx.

Certiorari Denied, August 3, 2017, No. S-1-SC-36497

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-087

No. A-1-CA-34379 (filed May 25, 2017)

DAVID C. YOUNG,
Plaintiff-Appellant,
v.
TODD J. WILHAM and JOURNAL PUBLISHING COMPANY,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
VALERIE HULING, District Judge

STEPHEN E. LANE
Albuquerque, New Mexico

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VEGA LYNN LAW OFFICES, LLC
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for Appellant

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GREGORY P. WILLIAMS
PEIFER, HANSON & MULLINS, PA
Albuquerque, New Mexico
for Appellees

Opinion

J. Miles Hanisee, Judge

{1} Plaintiff David Young brought defamation and false light invasion of privacy claims against Defendants Todd Wilham and Journal Publishing Company concerning a number of statements contained within articles written by Wilham, a reporter, and published in the *Albuquerque Journal* (the *Journal*), a local newspaper for which he worked. The articles questioned aspects of Plaintiff's dichotomous service to the Albuquerque Police Department (APD) as a paid civilian employee and an unpaid reserve officer. The district court dismissed some of Plaintiff's claims pertaining to the published statements under Rule 1-012(B)(6) NMRA and granted Defendants summary judgment on the others. Plaintiff appeals both dispositive orders. He also appeals the district court's legal conclusion that he is a public official who, under *New York Times Co. v. Sullivan*, 376 U.S. 254, 283-86 (1964), must prove Defendants acted with "actual malice" in publishing the challenged articles. Plaintiff also contends that rejection of his claims deprives him of heightened protections afforded only by the New Mexico Constitution. We affirm.

BACKGROUND

Factual Background

{2} Plaintiff was employed as a civilian by APD. Beginning in 1999, he was assigned to APD's Special Investigations Division (SID) as a fleet manager and certified technical specialist. Plaintiff was responsible for setting up and monitoring electronic surveillance in support of SID operations, during which he frequently worked alongside detectives in the field. When this sparked safety concerns, the SID commander asked that Plaintiff be trained as a reserve officer so that he could carry a gun and a badge when assisting with field operations. In 2005 Plaintiff resumed work with SID as a civilian technician, certified also to act as a reserve officer during SID operations. At the time, SID was short two detectives, so a supervisory APD lieutenant obtained authorization for Plaintiff to assist SID in a tactical capacity during enforcement activities.

{3} In this arrangement, Plaintiff (as a civilian employee) set up and monitored electronic surveillance for SID operations, and also (as a reserve officer) performed undercover detective work when asked to do so by SID supervisors. According to one such supervisor, it was not uncommon for Plaintiff to switch between both roles in the same SID operation. Plaintiff was entitled to be paid for the work he performed as a civilian technician, but reserve officers are volunteers who receive no pay for their work. Yet there is no dispute that neither Plaintiff nor SID supervisors adequately documented the amount of time Plaintiff spent performing each of his roles. According to Plaintiff, he accounted for reserve officer time by adjusting his time sheets, deducting that time he spent performing reserve officer duties from the total time he recorded in a given shift. For example, if Plaintiff worked until one o'clock in the morning and had spent one hour performing reserve officer duties, he would record on his time sheet that he had only worked until midnight. Thus, Plaintiff explained that the civilian duties for which he was paid as an APD employee were in fact differentiated from his unpaid volunteer activities as a reserve officer. However, Plaintiff's time sheets did not show any deductions, and there were no "other contemporaneous records" reflecting the differentiation between Plaintiff's paid and unpaid overtime activities.

{4} Reporting for the *Journal*, Defendant Wilham obtained Plaintiff's time sheets and payroll information through a public records request. Wilham also obtained court and arrest records from the operations in which Plaintiff participated. Upon his comparison of the documents, Wilham concluded that Plaintiff had been impermissibly paid for performing reserve officer duties, including instances in which he made arrests—a function not allowed reserve officers. That is because the dates and times when Plaintiff recorded making arrests overlapped with time periods for which Plaintiff reported and was paid overtime. To allow "time for . . . [APD] to start an independent investigation and to figure out what [Plaintiff's] status was before any story was published[,]" Wilham provided the information he had gathered to APD's police chief, Ray Schultz, one week before the first article was published. Wilham also made three requests of APD for additional documents, but it was only after publication of his first story that APD responded. Also prior to publication, Wilham contacted APD's public information officer to request an interview with Plaintiff and unsuccessfully attempted to

contact Plaintiff directly. Wilham eventually spoke with Plaintiff's attorney, but Plaintiff never responded to Wilham and no interview with Plaintiff was arranged by APD. In fact, APD ordered Plaintiff and his supervisors not to speak with Wilham and told them that "Chief Schultz was going to handle it."

{5} Between August 19, 2009, and October 20, 2009, the *Journal* published a series of articles concerning Plaintiff and the APD reserve officer program. Earlier articles focused on Plaintiff's reserve officer activities—stating that Plaintiff made arrests and collected overtime pay for doing police work—in the context of explaining that state law and city ordinance prohibited reserve officers from making arrests and being paid for reserve-related work. Later articles reported on APD's reserve officer program more generally, including APD's temporary suspension of it and changes APD made to it subsequent to an internal investigation. The *Journal* published additional aspects of the story as its series evolved, including that many of the cases based on arrests Plaintiff made had been dismissed, the "cozy" relationship between Plaintiff and high-ranking APD officials, and the $175,000 settlement the city paid to three women who had been arrested by Plaintiff.

Procedural Background

{6} In 2012 Plaintiff sued Defendants, seeking damages for defamation and false light invasion of privacy. Plaintiff claimed that the published articles defamed him by: (1) characterizing him as a "wannabe cop," (2) stating that he fraudulently collected pay for reserve officer activities, (3) stating that he lacked proper training to perform police functions, (4) stating that he had committed illegal and unethical conduct, (5) stating that he was not a police officer, (6) asserting that he had violated APD standard operating procedures and New Mexico law in actions as a reserve officer, (7) asserting that he had engaged in misconduct in his work as a reserve officer, and (8) suggesting that he was responsible for the suspension of the APD reserve officer program. Plaintiff also claimed that Defendants "placed him before the public in a false light by . . . labeling [him as] a 'wannabe cop[,]' . . . stating that he had collected overtime pay for perform[ing r]eserve [o]fficer duties[,] and[] attempting to portray him as unqualified to perform police functions."

{7} Defendants moved to dismiss the entirety of Plaintiff's complaint for failure to state a claim pursuant to Rule 1-012(B)(6). The district court granted Defendants' motion in part, allowing Plaintiff to proceed only with his claims of defamation and false light invasion of privacy "aris[ing] from Defendants' statements concerning Plaintiff's collection of overtime pay and the related statements concerning Plaintiff's collection of overtime pay while making arrests and performing police work."

{8} Following discovery, Defendants moved for summary judgment. Finding that Plaintiff was a public official and thus applying the actual malice standard set forth in *New York Times Co.*, the district court granted Defendants' motion because Plaintiff produced no evidence that Defendants acted with actual malice. This appeal followed.

DISCUSSION

{9} On appeal, Plaintiff argues that the district court committed reversible error when it: (1) deemed Plaintiff a "public official" required to establish "actual malice" in order to succeed on his claims of defamation and false light, (2) applied Rule 1-012(B)(6) to dismiss Plaintiff's defamation and false light claims arising from Defendants' characterization of Plaintiff as a "wannabe cop," (3) granted Defendants summary judgment on the remaining claims, and (4) failed to afford Plaintiff protections conferred by the New Mexico Constitution.

I. The District Court Properly Found That Plaintiff Is a Public Official and That the *New York Times Co.* "Actual Malice" Standard Applies to Both His Defamation and False Light Claims

{10} Whether a plaintiff is a public official is a question of law that we review de novo. *See Marchiondo v. Brown*, 1982-NMSC-076, ¶ 24, 98 N.M. 394, 649 P.2d 462; *see also Davis v. Devon Energy Corp.*, 2009-NMSC-048, ¶ 12, 147 N.M. 157, 218 P.3d 75. "Ascertaining the status of [a] plaintiff is necessary since it dictates the standard of proof applicable in the law suit." *Coronado Credit Union v. KOAT Television, Inc.*, 1982-NMCA-176, ¶ 33, 99 N.M. 233, 656 P.2d 896. A private plaintiff need only prove that the defendant acted negligently in publishing a defamatory statement, *see Newberry v. Allied Stores, Inc.*, 1989-NMSC-024, ¶ 17, 108 N.M. 424, 773 P.2d 1231, whereas a public official must prove that the defendant acted with actual malice. *New York Times Co.*, 376 U.S. at 279-80. This heavier burden on "public official" plaintiffs reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. Notably for purposes of this appeal, plaintiffs deemed public officials "must hurdle the same constitutionally-based limitations on false light recovery as apply to defamation claims." *Andrews v. Stallings*, 1995-NMCA-015, ¶ 59, 119 N.M. 478, 892 P.2d 611; *see also* Restatement (Second) of Torts § 652E (1977) (providing that a false light claim is actionable only if "the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed"); *see also id.* cmt. d (explaining that in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the United States Supreme Court "held that the rule of *New York Times Co.* . . . also applies to false-light cases" and that despite some uncertainty as to the state of *Time, Inc.* as applied to private individuals after *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), "the reckless-disregard rule would [still] apply if the plaintiff is a public official or public figure").

{11} While Plaintiff concedes that New Mexico case law clearly establishes that police officers are public officials for purposes of defamation claims, *see Ammerman v. Hubbard Broadcasting, Inc.*, 1977-NMCA-127, ¶ 12, 91 N.M. 250, 572 P.2d 1258, he argues that the district court erred in classifying *him* as a public official because as a reserve officer, he lacked the status or authority characteristic of public officials. We are not persuaded.

{12} In *Ammerman*, this Court recognized police officers "from the lowest to the highest rank" as public officials, citing with approval state court cases from across the country holding patrolmen to be public officials. *Id.* As one such court explained, although patrolmen are "the lowest in rank of police officials[,]" their "duties are peculiarly governmental in character and highly charged with the public interest." *Coursey v. Greater Niles Twp. Pub. Corp.*, 239 N.E.2d 837, 841 (Ill. 1968) (internal quotation marks omitted). The *Coursey* court reasoned that "[t]he abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under [s]tate libel laws." *Id.* And the Tenth Circuit similarly observed:

> The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of this authority can result in significant deprivation of constitutional rights and personal freedoms . . . . The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official.

Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir. 1981). Thus, it is the plaintiff officer's influence, responsibility, and control—and, critically, the potential abuse thereof—rather than his title, level of certification, or visibility that justifies his designation as a "public official" for defamation and false light purposes. *See Britton v. Koep*, 470 N.W.2d 518, 522-24 (Minn. 1991) (holding that a probation officer was a "public official" based on the fact that under state law, probation officers possessed authority similar to police officers and because "[t]he same opportunity to exploit the probation officer's official position exists . . . as for other peace officers").

{13} Despite his concurrent status as a civilian employee and reserve officer, Plaintiff was a commissioned, sworn law enforcement officer who wore a department-issued uniform when performing his reserve officer duties. He was issued a detective badge and assigned by APD to perform undercover detective work. He carried a gun, made arrests, identified himself as an officer or detective in criminal complaints, and appeared in court as such. It was precisely Plaintiff's conduct as a reserve officer—specifically carrying a detective badge, announcing his status as a detective, and making arrests while appearing to be paid, all of which were beyond Plaintiff's authority—that was the subject of Defendants' reporting.

{14} Plaintiff's view that even if *Ammerman* applies to him it would only be "to the times [Plaintiff] was operating as a reserve officer and not when he was operating as a civilian employed by APD" is unavailing. That is because the resolution of Plaintiff's status as a private individual or public official necessarily focuses on the subject matter of the allegedly defamatory statements, i.e., whether or not the statements concerned a matter of public interest or related to Plaintiff's "public official" conduct. *See Furgason v. Clausen*, 1989-NMCA-084, ¶ 33, 109 N.M. 331, 785 P.2d 242 (explaining that in determining a defamation plaintiff's status, the court's "examination focuses on whether the defamatory material concerns a public controversy or topic of legitimate public concern, together with the nature and extent of [the plaintiff's] participation in the controversy"); *see also New York Times Co.*, 376 U.S. at 279-80 (announcing the rule that "prohibits a public official from recovering damages for a defamatory falsehood *relat*[*ed*] *to his official conduct* unless he proves that the statement was made with 'actual malice' " (emphasis added)). Here, Defendants' statements criticized Plaintiff's conduct as a reserve officer, not his activities as a civilian, and concerned the larger public controversy regarding management of APD's reserve officer program. Even if Defendants' interpretation of Plaintiff's time sheets was incorrect as Plaintiff alleges, it does not change the fact that the published statements related to Plaintiff's conduct as a reserve officer, i.e., that of a public official.

{15} We hold that Plaintiff acted under the color of authority of a sworn police officer, and his use of that authority is what Defendants called into question in the series of articles they published in the *Journal*. As such, the district court correctly determined Plaintiff to be a public official for purposes of his defamation and false light invasion of privacy claims.

II. The District Court Properly Dismissed Plaintiff's Claims Related to Defendants' Characterization of Him as a "Wannabe Cop"

{16} Plaintiff argues that the district court erred when it dismissed his defamation and false light invasion of privacy claims premised upon Defendants' published characterization of Plaintiff as a "wannabe cop." Plaintiff alludes as well to other published statements he contends the district court was wrong to declare not defamatory as a matter of law. He fails, however, to develop specific arguments to support these further contentions. Just as defendants "do not bear the burden to discern how [an] article has defamed [a plaintiff,]" we will not guess at what Plaintiff's undeveloped arguments may be. *Andrews*, 1995-NMCA-015, ¶ 14 (explaining that defamation plaintiffs "must plead precisely the statements about which they complain" (internal quotation marks and citation omitted)); *see Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (declining to entertain a cursory argument that included no explanation of the party's argument and no facts that would allow this Court to evaluate the claim). We therefore limit our review to Plaintiff's challenge to the district court's ruling that the descriptive term "wannabe cop" was not defamatory as a matter of law.

A. Standard of Review

{17} We review a district court's dismissal of a claim under Rule 1-012(B)(6) de novo. *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917. A district court's ruling that a statement is not defamatory as a matter of law is also reviewed de novo. *See Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). Likewise, "the question of whether a statement portrays an individual in a false light . . . is a matter of law to be determined by the court[,]" which we review de novo. *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 751 (R.I. 2004).

{18} A Rule 1-012(B)(6) motion to dismiss for failure to state a claim "tests the legal sufficiency of the complaint[.]" *Derringer v. State*, 2003-NMCA-073, ¶ 5, 133 N.M. 721, 68 P.3d 961. "In determining the sufficiency of a defamation pleading, [courts] consider whether the contested statements are reasonably susceptible of a defamatory connotation." *Davis v. Boeheim*, 22 N.E.3d 999, 1003 (N.Y. 2014) (internal quotation marks and citation omitted). "An action for defamation lies only for false statements of fact and not for statements of opinion." *Mendoza v. Gallup Indep. Co.*, 1988-NMCA-073, ¶ 4, 107 N.M. 721, 764 P.2d 492. The same is true for false light claims. *See Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983) (explaining that "the defense available in a defamation action that the allegedly defamatory statements are opinions, not assertions of fact, is also available in a false light privacy action"). If a statement is "unambiguously opinion, the trial court may properly rule as a matter of law." *Mendoza*, 1988-NMCA-073, ¶ 5.

B. "Wannabe Cop" Is a Statement of Opinion and Therefore Absolutely Privileged Speech

{19} The parties disagree whether "wannabe cop" reflects Defendants' opinion of Plaintiff—in which case the district court properly found it was not defamatory as a matter of law—or could be interpreted as a factual allegation—in which case a jury would have to decide whether it was defamatory. Defendants argue that their use of the term "wannabe cop" is non-actionable opinion because in conjunction with the characterization, they

disclosed supporting facts. Plaintiff argues that Defendants failed to disclose why they characterized Plaintiff as a "wannabe cop," thus making resolution of the claims fact-dependent and therefore inappropriate for dismissal under Rule 1-012(B)(6).

{20} As this Court and many others have acknowledged, "[n]o task undertaken under the law of defamation is any more elusive than distinguishing between fact and opinion." *Moore v. Sun Publ'g Corp.*, 1994-NMCA-104, ¶ 24, 118 N.M. 375, 881 P.2d 735 (alteration, internal quotation marks, and citation omitted); *see Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) ("While courts are divided in their methods of distinguishing between assertions of fact and expressions of opinion, they are universally agreed that the task is a difficult one."). The challenge arises from the fact that "expressions of 'opinion' may often imply an assertion of objective fact." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990); *cf. Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1338-39 (2015) (considering whether questions posed in an article may themselves be defamatory and, while acknowledging that "a question's wording or tone or context sometimes may be read as *implying* the writer's answer to that question[,]" affirming dismissal under Fed. R. Civ. P. 12(b)(6) and noting its refusal to "usher D.C. law down such a new and uncertain road"). This is particularly true where the facts underlying the so-called opinion are not fully disclosed because the danger exists that "a writer could escape liability for accusations of defamatory conduct simply by using, explicitly or implicitly, the words 'I think.' " *Milkovich*, 497 U.S. at 19 (alteration, internal quotation marks, and citation omitted). New Mexico courts presented with this question must consider three things: "(1) the entirety of the publication[,] (2) the extent that the truth or falsity may be determined without resort to speculation[,] and (3) whether reasonably prudent persons reading the publication would consider the statement as an expression of opinion or a statement of fact." *Marchiondo*, 1982-NMSC-076, ¶ 35. "If the material as a whole contains full disclosure of the facts upon which the publisher's opinion is based and which permits the reader to reach his own opinion, the court in most instances will be required to hold that it is a statement of opinion, and absolutely privileged." *Id.* ¶ 56 (alteration, internal quotation marks, and citation omitted); *see also* Restatement (Second) of Torts § 566 (1977) ("A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."). In other words, "when a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment." *Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995). That is because when "the bases for the conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related." *Id.* (omission, internal quotation marks, and citation omitted); *see Marchiondo*, 1982-NMSC-076, ¶ 57 (explaining that "the crucial difference between statement of fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact" (alteration, internal quotation marks, and citation omitted)); *cf. Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d. Cir. 1977) (explaining that an expression of opinion may be actionable "when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader"). This type of opinion cannot be false and therefore is not actionable, even if defamatory. *See Kutz v. Indep. Publ'g Co.*, 1981-NMCA-147, ¶ 7, 97 N.M. 243, 638 P.2d 1088.

{21} In *Standing Committee on Discipline of United States District Court for Central District of California v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995), the Ninth Circuit provided a helpful discussion and illustration of the dichotomy between actionable and non-actionable opinion statements. Writing for the court, Judge Kozinski noted that the Restatement (Second) of Torts § 566 "distinguishes between two kinds of opinion statements: those based on assumed or expressly stated facts, and those based on implied, undisclosed facts." *Yagman*, 55 F.3d at 1439; *see also Kutz*, 1981-NMCA-147, ¶ 26 (Donnelly, J., specially concurring) (describing the "two kinds of expressions of opinion" as articulated in the Restatement (Second) of Torts). Judge Kozinski offered the example "I think Jones is an alcoholic," which he described as "an expression of opinion based on implied facts . . . because the statement gives rise to the inference that there are undisclosed facts that justify the forming of the opinion[.]" *Yagman*, 55 F.3d at 1439 (internal quotation marks and citations omitted). Such a statement would be actionable because it fails to provide the reader or listener with the factual basis for the speaker's conclusion that Jones is an alcoholic, thus making the statement potentially defamatory. *Id.* By contrast, the following is a non-actionable statement: "Jones moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a drink in his hand. I think he must be an alcoholic." *Id.* (alteration, omission, internal quotation marks, and citation omitted). Here, where the speaker has provided the specific factual basis for his opinion that Jones is an alcoholic, his conclusion is considered pure opinion—i.e., non-defamatory as a matter of law—because the reader or listener has the ability to draw his or her own conclusion as to whether Jones is an alcoholic.

{22} Judge Sack's leading treatise on defamation provides additional helpful illustrations:

> To say that a man is 'insane' may be defamatory; but to explain first that he, a political newcomer, is planning a campaign against the most popular politician in the county makes it clear that 'insanity' reflects no more than the speaker's view of the candidate's judgment or chances of success. The statement is hyperbolic and is not demonstrably false.

1 Robert D. Sack, *Sack on Defamation* § 4:3.2 at 4-48 (4th ed. 2016). Consider, also, the following:

> To say that an agent 'screwed' his client may imply knowledge of facts demonstrating that the agent unfairly dealt with the client; the opinion could, therefore, be defamatory. If it were based on an accurate statement of facts—for example, that the plaintiff received an unusually high commission—the statement would be hyperbole. To say a person was engaged in a 'scam' might be an actionable allegation of fact, but where the statement is accompanied by the fact that what the plaintiff was selling commercially was available elsewhere free or at significantly lower cost, it is opinion.

Id. at 4-50 (footnote omitted). In other words, publication of the predicate facts upon which the writer's subjective surmise is based transforms what may otherwise be an allegation of defamatory fact into nothing more than the writer's pure opinion with which the reader is free to agree or disagree. *See id.* at 4-52 ("Once the facts are correctly stated, an author's views about them are neither provably true nor provably false and therefore are protected[.]").

{23} In this case, Defendants did not merely label Plaintiff a "wannabe cop" without disclosing any facts about Plaintiff but rather disclosed the facts on which their characterization was based. Each of the articles containing the term "wannabe cop" identified Plaintiff as a reserve officer, explained the differences between reserve officers and certified law enforcement officers, and made clear that Plaintiff was not a certified law enforcement officer. Each article informed readers that state law does not allow reserve officers to make arrests but that court records indicated that Plaintiff had made numerous arrests during his many years as a reserve officer. The context of the articles makes clear to a reasonable reader that Defendants used the term "cop" to refer to a certified law enforcement officer, i.e., an officer with arrest powers; thus the term "wannabe cop" would reasonably be understood as shorthand for Defendants' criticism of Plaintiff for acting like a certified law enforcement official (i.e., being a "wannabe cop") when he was not one. *Cf. Kutz*, 1981-NMCA-147, ¶¶ 18, 20 (finding error in the district court's dismissal of the plaintiff's complaint when "there are implications . . . that the writer has private, underlying knowledge to substantiate his comments about [the] plaintiff[,]" but "none of the privately-held information appears in the article that would permit a reader to draw his own independent characterization or opinion of [the] plaintiff"). The fact that Plaintiff switched from civilian to police roles so fluidly without clear separation of them at any given time bolstered this impression. Given this context, an ordinary person reading Defendants' articles would not understand "wannabe cop" to be a statement of existing fact but rather Defendants' subjective characterization—i.e., opinion—of Plaintiff based on their interpretation of the facts. *See Marchiondo*, 1982-NMSC-076, ¶ 57.

{24} Importantly, not only does Plaintiff not dispute any of these underlying facts or claim that they are false, *see Yagman*, 55 F.3d at 1439 (explaining that "[a] statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false"), he has alternatively relied on them (in vain, as we have already concluded) to support his argument that he is not a public official. Specifically, in his brief-in-chief, Plaintiff prevaricates that "[a]lthough [Plaintiff] is a sworn, commissioned law enforcement officer, he did not acquire certification which is typically only obtained by full-time, salaried officers." Plaintiff also attempted to avoid being designated a public official by pointing to the fact that "[a]s a reserve officer, he was supervised at all times by certified, sworn law enforcement personnel" and arguing that while New Mexico has held that police officers are public officials, that designation "has not yet attached to reserve police officers." Plaintiff cannot claim *not* to be a police officer in order to avoid the public official designation and at the same time claim he "*is* a cop" in order to argue the defamatory or false nature of the label "wannabe cop." In other words, when Plaintiff himself argues that there is a distinction between a certified officer and a reserve officer, he cannot fault Defendants for pointing out that very distinction in their reporting through the use of hyperbolic headlinese.

{25} Considering the context of the publications as a whole and Defendants' disclosure of the undisputed facts on which its conclusion was based, we conclude that Defendants' labeling of Plaintiff as a "wannabe cop" was pure opinion and thus absolutely protected by the First Amendment. The district court did not err in finding as a matter of law that Plaintiff failed to state a claim for defamation or false light invasion of privacy based on Defendants' published use of the term "wannabe cop."

III. The District Court Properly Granted Defendants Summary Judgment on Plaintiff's Remaining Claims

{26} Following discovery, Defendants sought summary judgment on Plaintiff's claims that related to Defendants' statements that Plaintiff received overtime pay for police-related work. Defendants argued that Plaintiff lacked evidence of falsity, actual malice, and reputational injury. The district court granted Defendants' motion based on its conclusion that Plaintiff failed to meet his burden of proving that any genuine issue of material fact existed as to the question of actual malice and therefore did not address the other possible bases supporting summary judgment.[1]

{27} On appeal, Plaintiff appears to proffer two bases to support reversal of summary judgment: (1) that the district court "mistakenly granted summary judgment on the supposition that 'confusing' records excused [Defendants'] actions" because whether the records were confusing "is an issue of fact for the jury[,]" and/or (2) that the district court "erred by concluding that there was insufficient evidence from which a jury could conclude that the Defendants acted with actual malice or with reckless disregard for the truth." We note that Plaintiff dedicates less than one page to explaining his first basis, developing no facts and citing no authority to support his assertion. As to his second basis, Plaintiff does nothing more than make conclusory statements, cite our UJI that defines "wrongful acts," and cite Lt. Smith's testimony regarding his opinions of Defendants' characterization of Plaintiff as a "wannabe cop." Importantly, Plaintiff fails to develop any argument whatsoever regarding Defendants' published statements that he collected overtime pay for police-related work.[2] We limit our analysis to Plaintiff's arguments as presented. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("We will not review unclear arguments, or guess at what a party's arguments might be." (alteration, internal quotation marks, and citation omitted)). To do otherwise "creates a strain on judicial resources and a substantial risk of error. It is of no benefit either to the parties or to future litigants for this Court to promulgate case law based on our own speculation rather than the parties' carefully considered arguments." *Id.*

A. Standard of Review

{28} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. "[W]e view the facts in a light most favorable to the party opposing the motion and draw all reasonable inferences in support of a trial on the merits[.]" *Handmaker v. Henney*, 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879. "The standard of review on appeal from summary judgment is de novo." *Farmers Ins. Co. of Ariz. v. Sedillo*, 2000-NMCA-094, ¶ 5, 129 N.M. 674, 11 P.3d 1236.

B. Summary Judgment Appellate Review in a Defamation or False Light Case Involving a Public Official

{29} In New Mexico, summary judgment is generally considered a "drastic remedial tool which demands the exercise of caution in its application[.]" *Woodhull v. Meinel*, 2009-NMCA-015, ¶ 7, 145 N.M. 533, 202 P.3d 126 (internal quotation marks and citation omitted). However, "summary judgment may be proper when the moving party has met its initial burden of establishing a prima facie case for summary judgment." *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280. In a defamation or false light case, a defendant establishes a prima facie case by "produc[ing] evidence by deposition or affidavit that [it] did not have knowledge of the falsity of the statements made . . . or that [it] did not [publish] the false statements with reckless disregard of the truth." *Ammerman*, 1977-NMCA-127, ¶ 40. "If this duty is performed, the burden shifts to [the plaintiff] to establish that a genuine issue of material fact exists." *Id.* Additionally it is well recognized that summary judgment procedures are "essential" in cases involving the First Amendment. *See Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). That is because at stake "is free debate." *Id.* As this Court recognized in *Andrews*, "[t]he failure to dismiss an unwarranted libel suit might necessitate long and expensive trial proceedings that would have an undue chilling effect on public discourse." 1995-NMCA-015, ¶ 6. As a result, the rule in New Mexico is that district courts must determine at the earliest possible stage whether a public-official plaintiff can establish that the statements regarding him are false and, if so, that there exists evidence that they were made with actual malice. *See id*. Thus, defamation and false light defendants typically seek summary judgment by either (1) "removing the issue of actual malice from the case," or (2) presenting evidence of the "truth of its statement[s]" as an absolute defense. *Ammerman*, 1977-NMCA-127, ¶¶ 15, 22 (internal quotation marks and citation omitted); *see also Rinsley*, 700 F.2d at 1307 ("[E]ssential to both a false light privacy claim and a defamation claim is a determination that 'the matter published concerning the plaintiff is not true.' Thus, in a false light privacy action, as in a defamation action, truth is an absolute defense." (quoting Restatement (Second) of Torts § 652E cmt. a)). If a defendant successfully negates any essential element of the plaintiff's claim, it is entitled to summary judgment. *See Mayfield Smithson Enters. v. Com-Quip, Inc.*, 1995-NMSC-034, ¶ 22, 120 N.M. 9, 896 P.2d 1156 ("Summary judgment is appropriate when a defendant negates an essential element of the plaintiff's case by demonstrating the absence of an issue of fact regarding that element.").

{30} "A reviewing court, in deciding whether summary judgment is proper, must look to the whole record and take note of any evidence therein which puts a material fact in issue." *Koenig v. Perez*, 1986-NMSC-066, ¶ 10, 104 N.M. 664, 726 P.2d 341 (internal quotation marks and citation omitted). "[W]e step into the shoes of the district court, reviewing the motion, the supporting papers, and the non-movant's response as if we were ruling on the motion in the first instance."[3] *Farmington Police Officers Ass'n v. City of Farmington*, 2006-NMCA-077, ¶ 13, 139 N.M. 750, 137 P.3d 1204. In the specific context of reviewing an order granting summary judgment in a public official defamation or false light case, "an appellate court must independently examine the record to determine whether the plaintiff has proffered sufficient evidence to prove actual malice." *CACI Premier Tech. Inc. v. Rhodes*, 536 F.3d 280, 293 (4th Cir. 2008); *see Andrews*, 1995-NMCA-015, ¶ 59 (explaining that such plaintiffs "must hurdle the same constitutionally-based limitations on false light recovery as apply to defamation claims"). Independent review is particularly important in such cases because "the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *New York Times Co.*, 376 U.S. at 285. "In cases where that line must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment . . . protect." *Id.* (internal quotation marks and citation omitted); *see Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984) (explaining that the *New York Times Co.* requirement of independent appellate review "reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution"). The operative question before us is "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice . . . or that the plaintiff has not." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986).

{31} Now decades ago, *New York Times Co.* defined "actual malice" to mean "with knowledge that [a statement] was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. "The actual-malice standard does not require objectivity, a balanced presentation, or even a fair one. Rather, the standard focuses on the defendant's state-of-mind—whether [he] knew something to be false when [he] reported it, or whether [he] acted with reckless disregard to its falsity." *Anaya v. CBS Broad. Inc.*, 626 F. Supp. 2d 1158, 1217 (D.N.M. 2009). Thus, a plaintiff's burden is to present evidence "showing that a false publication was made with a high degree of awareness of probable falsity" or "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (internal quotation marks and citation omitted). This Court has described the plaintiff's burden at summary judgment as "difficult and in many cases impossible to meet, inasmuch as affirmative evidence of a knowing state of mind cannot be produced." *Ammerman*, 1977-NMCA-127, ¶ 18.

{32} There is no hard and fast rule delineating what a plaintiff must show with respect to the defendant's state of mind, specifically his or her reckless disregard for the truth, in order to survive a motion for summary judgment. *See St. Amant*, 390 U.S. at 730 ("Reckless disregard, it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication[.]"). Courts recognize that plaintiffs typically rely on circumstantial evidence and inference to prove actual malice. *See Herbert v. Lando*, 441 U.S. 153, 170 (1979); *Levesque v. Doocy*, 560 F.3d 82, 90 (1st Cir. 2009) ("Because direct evidence of actual malice is rare, it may be proved through inference and circumstantial evidence[.]" (citation omitted)); *Keogh*, 365 F.2d at 967-68 (explaining that recklessness "is ordinarily inferred from objective facts"). In *St. Amant*, the United States Supreme Court identified possible ways for a plaintiff to meet his burden, such as by proffering evidence that: (1) the defendant fabricated the story, (2) the story is the product of the defendant's imagination,

(3) the false statement was "based wholly on an unverified anonymous telephone call," (4) the "allegations are so inherently improbable that only a reckless man would have put them in circulation," or (5) "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." 390 U.S. at 732. In a recent, high-profile case, a federal district court surveyed "what other courts have determined is and is not sufficient evidence" for a defamation plaintiff to survive summary judgment on the issue of actual malice and provided the following, illustrative list:

> [I]t is well settled that failure to investigate will not alone support a finding of actual malice. Similarly, departure from journalistic standards is not a determinant of actual malice, but such action might serve as supportive evidence. Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted. Furthermore, while actual malice cannot be inferred from ill will or intent to injure alone, it cannot be said that evidence of motive or care never bears any relation to the actual malice inquiry. Finally, evidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice, and may often prove to be quite powerful evidence.

Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862, 871 (W.D. Va. 2016) (alteration, internal quotation marks, and citations omitted) (denying, in part, the defendant's motion for summary judgment because the court concluded that the plaintiff presented sufficient evidence—specifically, extensive deposition testimony and the reporter's notes, which indicated the reporter's doubts as to her source's credibility—that, taken as whole, could establish actual malice). *See also* 1 Sack, *supra*, § 5:5.2[A] at 5-85 (listing cases describing the myriad ways to establish evidence of actual malice); [B] at 5-95 (identifying evidence that is insufficient to show actual malice). Thus, although the actual malice standard is high, evidence that a publisher invented, prejudged, or knowingly mischaracterized facts may allow a plaintiff to survive summary judgment. However, courts generally agree that a single piece of circumstantial evidence is insufficient to establish actual malice and that cumulation of evidence is necessary to reach the requisite constitutional threshold. *See Tavoulareas v. Piro*, 763 F.2d 1472, 1477-78 (D.C. Cir. 1985) (en banc) (rejecting the publisher's argument that "evidence of actual malice does not gain probative force through 'cumulation' "); *see also Eramo*, 209 F. Supp. 3d at 872 (explaining that "[a]lthough failure to adequately investigate, a departure from journalistic standards, or ill will or intent to injure will not singularly provide evidence of actual malice, the court believes that proof of all three is sufficient to create a genuine issue of material fact"). And it is beyond debate that "[a] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial[,]" making summary judgment appropriate. *Goradia*, 1991-NMSC-040, ¶ 18 (internal quotation marks and citation omitted).

C. Defendants Made a Prima Facie Showing That They Were Entitled to Summary Judgment, and Plaintiff Failed to Rebut That Showing in Oder to Survive Summary Judgment

{33} In this case, Plaintiff has failed to identify a single objective fact sufficient to establish evidence of actual malice, let alone the cumulative evidence necessary to create a genuine issue of material fact. In both responding to Defendants' motion for summary judgment and now on appeal, Plaintiff has not pointed to any affirmative evidence showing that Defendants published statements that Plaintiff collected overtime pay for police-related work with a high degree of awareness of their probable falsity or having entertained serious doubts as to their truth. This is particularly noteworthy given that the record supplies more than merely circumstantial evidence to support Defendants' defense that they acted without actual malice. But Plaintiff simply argues that the district court erred in granting summary judgment "based on its finding that the records were confusing." Plaintiff interprets the district court's reference to "confusing" records—meaning Plaintiff's time sheets and arrest records—as being evidence of the existence of a genuine issue of material fact, which would preclude summary judgment. But the opposite is true here. In the context of establishing the existence of a genuine issue of material fact regarding actual malice, the very fact that the records were confusing points towards, not away from, granting summary judgment.

{34} We observe, in fact, that the district court's basis for granting Defendants summary judgment was not that the records were "confusing" but rather that Plaintiff failed to rebut the "appearance that [Plaintiff] collected overtime while a reserve officer" and thus could not prove actual malice.[4] That "appearance" was made evident by numerous pieces of evidence proffered by Defendants in support of their motion for summary judgment. First, Defendants' comparative analysis of Plaintiff's time sheets and court records showed that Plaintiff had claimed overtime during the same periods when he had made arrests. For example, on Saturday, May 10, 2008, Plaintiff claimed seven-and-one-half hours of overtime on his time sheet, using the overtime authorization code "IN" for "investigation." On that day, he arrested two people for possession of a controlled substance. Plaintiff provided the following synopsis in his incident report: "While working a vice tact plan [, I noticed] a male and a female rolling and smoking a marijuana joint. . . . The female . . . admitted to me that [they were both] 'smoking' and she was on her way to work. They both were arrested without incident[.]" Plaintiff listed himself on the incident report as the "reporting officer" and identified his rank as "detective," both of which indicate reserve-related—as opposed to civilian-related—work. There are numerous other similar examples where Plaintiff claimed overtime for "investigation" work, made arrests during those periods as evidenced by uniform incident reports, described himself in those reports as "working under[]cover with the Vice Unit[,]" named himself as the "reporting officer," and identified his rank as "detective"—all at times that records reflect he was being compensated as an employee of APD. Importantly, Plaintiff does not contend that the time sheets, court records, or the spreadsheet Wilham created based on those documents were falsified or contained any errors at all. In fact, he concedes that Wilham's spreadsheet "in which he document[ed Plaintiff's] overtime pay . . . represents the sum of all of [Plaintiff's] overtime hours and overtime pay." *Cf. Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520-25 (1991) (holding that evidence that the defendant fabricated

or materially falsified statements may suffice to meet the plaintiff's burden to show actual malice in order to survive summary judgment).

{35} Next, Lt. Rob Smith—Plaintiff's direct supervisor who reviewed and approved Plaintiff's time sheets—admitted that (1) there was a "system failure" that resulted in records indicating that Plaintiff "was earning overtime when he was working as a reserve officer[,]" and (2) a person looking at Plaintiff's time sheets and comparing them to arrest records "would reasonably believe that [Plaintiff] was getting paid overtime [as] a reserve [officer]." Lt. Smith stated that not only would it be reasonable for someone to reach that conclusion, but he would expect it. In addition, APD's own investigation concluded that Plaintiff "was allowed to collect overtime pay for working as an undercover detective and reserve officer."

{36} Finally, Defendants pointed to two key admissions Plaintiff made to further buttress the presumption that they acted without actual malice. First, Plaintiff admitted that he knew of no one who informed Defendants that he was not paid overtime for police-related work. Well after publication, Plaintiff attempted to account for the apparent overlap between his overtime pay and performance of reserve-officer duties by explaining that "[i]t was the unit practice when accounting for [Plaintiff's] overtime to deduct any time spent in a reserve capacity from the end of his shift, and therefore from his total hours earned." According to Plaintiff, his entire chain of command knew about these subtractive adjustments and approved the practice. The critical person who did not know about this practice, however, was Wilham.[5] Absent responsive communication from Plaintiff or APD, how could he have?

{37} Second, Plaintiff admitted that not only did his time sheets not show any of the purported deductions, they in fact showed that Plaintiff claimed overtime while doing police-related work. And while he argued that the time sheets "do not accurately reflect everything that was done" during his claimed overtime periods, he also admitted that he was not aware of "any other contemporaneous records" that would have made clear to someone reviewing his records that he was only claiming overtime for non-reserve work. These admissions confirm what seems obvious: Wilham could not have known about the "unit practice" of making deductions or that Plaintiff was only claiming overtime for non-reserve work based on his review and comparison of Plaintiff's time sheets and court records because the documents themselves gave no such indication. All of this evidence was more than enough for Defendants to meet their burden of making a prima facie showing that there was no genuine issue of fact as to actual malice and supported the district court's conclusion that there was—at the very least—an appearance that Plaintiff collected overtime pay for police-related work. *See Goodman*, 1972-NMSC-043, ¶¶ 9, 11 (explaining that "[t]he burden on the movant does not require him to show or demonstrate beyond all possibility that no genuine issue of fact exists" and that such a burden "would be contrary to the express provisions of Rule [1-056]" which "serve[s] a worthwhile purpose in disposing of groundless claims, or claims which cannot be proved").

{38} In the face of this evidence, it was incumbent upon Plaintiff to identify or produce other evidence that eliminated that appearance and definitively established that the records could only be interpreted one way—as showing that his overtime pay was for non-reserve work—in order to survive summary judgment. *Ammerman*, 1977-NMCA-127, ¶ 40 (explaining that once a defendant produces evidence that it acted without actual malice, "the burden shifts to [the plaintiff] to establish that a genuine issue of material fact exists"); *see Time, Inc. v. Pape*, 401 U.S. 279, 290-91 (1971) (holding that a publisher's "adoption of one of a number of possible rational interpretations of a document" is not actionable). He failed to do so. In opposing summary judgment, Plaintiff singularly argued that Defendants failed to interview people with "personal knowledge of [Plaintiff's] job description, activities, and payroll" and that Defendants could not "duck behind the argument that 'nobody corrected us before we published it.'" But a defendant's failure to investigate does not "constitute[] sufficient proof of reckless disregard." *Ammerman*, 1977-NMCA-127, ¶ 22 (internal quotation marks omitted); *see St. Amant*, 390 U.S. at 730 (explaining that failing to verify potentially defamatory information with persons "who might have known the facts" is not sufficient to establish evidence of actual malice). Moreover, the defense of ignorance is, in fact, a valid defense to a defamation claim. *See St. Amant*, 390 U.S. at 731 (acknowledging that "[i]t may be said that [the actual malice] test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant[']s testimony that he published the statement in good faith and unaware of its probable falsity[,]" but nonetheless affirming the *New York Times Co.* standard). And in any event, Plaintiff's argument regarding Defendants' failure to further investigate and interview additional sources rings particularly hollow given that Wilham not only gathered documents through two public information requests, but in fact attempted to interview the person with the greatest personal knowledge of Plaintiff's job description, activities, and payroll: Plaintiff himself. But Plaintiff refused to speak with Wilham, despite having learned from an APD deputy chief prior to the first article being published that there was "an article coming out on a wannabe cop . . . that didn't have the facts or the story straight." While it is true that "reckless disregard for the truth can be shown where there is evidence of an intent to avoid the truth, such as where failure to conduct a complete investigation involved a deliberate effort to avoid the truth," that is simply not what happened in this case. *Anaya*, 626 F. Supp.2d at 1218 (internal quotation marks and citations omitted). It was not Defendants who made deliberate efforts to avoid the truth but rather Plaintiff—and to an extent APD officials—who deliberately avoided Defendants, thus stymieing Defendants' efforts to seek and report the truth. *See Don King Prod., Inc. v. Walt Disney Co.*, 40 So. 3d 40, 46 (Fla. Dist. Ct. App. 2010) (affirming issuance of summary judgment where the defendant "tried to interview [the plaintiff] to no avail[,]" leaving "no obvious reasons for ESPN to doubt the challenged statements").

{39} In the end, Plaintiff failed to proffer a scintilla of evidence that Defendants in fact entertained serious doubts as to the truth of the statements that Plaintiff collected overtime pay for police-related work. *See St. Amant*, 390 U.S. at 731 ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."). Accordingly, we can only hold that Plaintiff failed to meet his burden of establishing the existence of a genuine issue of fact on the question of actual malice, and must affirm the district court's grant of summary judgment.

IV. Plaintiff's Constitutional Argument Is Without Merit

{40} Plaintiff contends that this Court's application of the actual malice standard in *Andrews* violates Article II, Section 17 of the New Mexico Constitution. We understand Plaintiff to argue that Article II, Section 17 confers greater rights than those afforded by the First Amendment to the United States Constitution, in this instance not a right *to* speech, but to restriction *of* it. Plaintiff misconstrues the New Mexico Constitution's capacity to supplant the United States Constitution and overlooks that the core citizen's right established by both constitutional provisions is *to* freedom of speech. *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); N.M. Const. art. II, § 17 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.").

{41} By arguing that Article II, Section 17's assignment of responsibility to those that abuse the right to speak curtails the breadth of the First Amendment and cases that interpret it, Plaintiff suggests that constitutionally protected words spoken elsewhere ought to be nonetheless subject to speech-restrictive litigation in New Mexico. As authority for this unlikely proposition, Plaintiff misreads *Blount v. TD Publishing Corp.*, 1966-NMSC-262, 77 N.M. 384, 423 P.2d 421, to require jury resolution of questions of fact that involve matters of public concern and rights of privacy. Indeed, the proposition Plaintiff advances requires that we reject what he calls the "federal interpretation" that differentiates public and private citizens and assigns a higher plaintiff's burden to the former. Of course, while restrictions on speech and its abuses exist in law and jurisprudence, the birth of an individual right to restrict speech would exist in a state of inexorable tension with the First Amendment. *See generally* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 Stan. L. Rev. 1049, 1107-09 (2000) (considering "the unwritten constitutional 'value' of privacy" and cautioning that "changing First Amendment doctrine to let free speech rights be trumped by other 'constitutional values' derived by analogy from constitutional rights would permit a broad range of speech restrictions").

{42} But we needn't grapple today with conflicting rights nor determine a victor between one which is classically constitutional (speech) versus one that is offered as such (restriction of speech). That is because *Blount* does not stand for the far broader proposition Plaintiff advances; rather, it considered the "constitutional [rights] to freedom of the press[,]" the "right of the public to be informed[,]" and a non-public plaintiff's "right of privacy of the individual" and determined that summary judgment was improper as to the question of whether the publication was privileged because the contents were of public interest or a matter of public record. 1966-NMSC-262, ¶¶ 5, 8, 10. *Blount* had nothing to do with the distinction between a public and private plaintiff, did not discuss or apply *New York Times Co.*, and cannot be read to elevate privacy over speech as a matter of constitutional priority. Indeed, *Blount* observed that "the right of privacy is generally inferior and subordinate to the dissemination of news." 1966-NMSC-262, ¶ 10.

{43} Ultimately, it is well established that while state courts generally may find greater degrees of protection under their state constitutions where state and federal constitutional provisions overlap, we may not "restrict the protection afforded by the federal Constitution, as interpreted by the United States Supreme Court[.]" *City of Farmington v. Fawcett*, 1992-NMCA-075, ¶ 27, 114 N.M. 537, 843 P.2d 839. This Court in *Andrews* explained that *New York Times Co.* "constitutionalized the common law tort of defamation [and] set a single standard for libel suits by public officials against the press in every court in the nation." *Andrews*, 1995-NMCA-015, ¶ 4 (internal quotation marks and citation omitted). In asking this Court to "reject the federal interpretation for defamation[,]" Plaintiff would have us ignore our own precedent, *New York Times Co.*, 376 U.S. at 727 ("We hold today that the Constitution delimits a [s]tate's power to award damages for libel in actions brought by public officials against critics of their official conduct."), and the United States Constitution. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). We decline Plaintiff's invitation to violate the United States Constitution by misusing our own.

CONCLUSION

{44} For the foregoing reasons, we affirm the district court's orders.

{45} IT IS SO ORDERED.

J. MILES HANISEE, Judge

I CONCUR:
RODERICK T. KENNEDY, Judge
M. MONICA ZAMORA, Judge (concurring in part, and dissenting in part).

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

{46} I agree with the majority that Plaintiff is a public official, that the actual malice standard applies in both his defamation and false light claims, and that the district court properly dismissed Plaintiff's claims related to the Defendants' characterization of Plaintiff as a "wannabe cop." While I also agree that we affirm summary judgment on Plaintiff's defamation and false light claims that arise from the general overtime statements, I respectfully disagree that summary judgment is appropriate on Plaintiff's defamation and false light claims arising from the specific $12,000 statements, and therefore dissent.

{47} My concern lies with the fact that the majority rests their analysis on the sweeping generalization that Plaintiff was inappropriately paid for overtime work as a reservist, ignoring the emphasis on Plaintiff's collection of over $12,000 specified by Defendants in the initial three articles. The majority's singular treatment of Defendants' series of eleven articles facilitates Defendants' ability to elude any liability where there is a high degree of awareness of probable falsehood and their reckless disregard of the truth is absolved by tucking any potentially defamatory and false light statements within a series of articles that are otherwise appropriate.

{48} In addition to the facts and procedures set forth by the majority, I submit the following supplementary factual and procedural background information.

BACKGROUND

Factual Background

{49} After Plaintiff completed the reserve officer training, he resumed his work with SID as a civilian technician and was

permitted to carry a gun and reserve officer badge when on duty. At the time, SID was short two detectives and an APD lieutenant supervising SID operations received authorization to have Plaintiff assist in tactical operations.

{50} Plaintiff continued to set up and monitor the electronic surveillance for SID operations, but SID supervisors also began using Plaintiff as an undercover detective. According to one supervisor, Plaintiff served dual roles in SID operations. He set up and monitored surveillance in his capacity as a civilian employee, and acted as an undercover detective in his capacity as a reserve officer. It was not uncommon for Plaintiff to serve both roles in one operation, switching between surveillance and tactical duties. However, neither Plaintiff nor the SID supervisors adequately documented the amount of time Plaintiff spent performing each of his roles. As previously noted, in his capacity as a reserve officer, Plaintiff was a volunteer and could not be paid. According to Plaintiff, he accounted for reserve officer time by adjusting his time sheets, subtracting the time he spent performing reserve duties from the total time he recorded.

{51} After reviewing the documents he obtained, Defendant Wilham concluded that Plaintiff was being paid for his civilian duties at the same time he was performing reserve officer duties, such as making arrests. After Wilham provided the information he had gathered to APD's police chief, an internal APD investigation was initiated and the APD reserve officer program was temporarily suspended. Between August 19, 2009, and October 20, 2009, the *Journal* published a number of articles concerning Plaintiff and the APD reserve officer program.

{52} In the first three articles, Defendants reported that Plaintiff collected more than $12,000 in overtime pay for duties he performed as a reserve officer; duties for which he should not have been paid at all. In the remaining articles, Defendants simply reported that Plaintiff collected overtime pay as a reserve officer, omitting references to the $12,000 amount.

Procedural Background

{53} In their motion for summary judgment, Defendants asserted that even though Plaintiff had identified several articles that contained allegedly false statements about his overtime, "the substance of each statement is the same: [w]hile acting as a cop, [Plaintiff] has also made more than $12,000 in overtime working warrant sweeps, stakeouts, undercover prostitution stings, and making arrests."

{54} Defendants argued that: (1) the statements were materially true, (2) if the statements were false there was no evidence of malice, and (3) the statements did not harm Plaintiff's reputation. Defendants also argued Plaintiff was unable to demonstrate the actual malice required to establish defamation and invasion of privacy of a public official or a public figure. The district court agreed that there was no evidence of malice and granted summary judgment in favor of Defendants. This appeal followed.

DISCUSSION

Defamation

{55} Defamation actions are rooted in the common law torts of libel and slander. *See Smith v. Durden*, 2012-NMSC-010, ¶¶ 8, 9, 276 P.3d 943. At a fundamental level, defamation actions serve to compensate individuals for injury to reputation. *See id.* ¶ 10. Under New Mexico law, a prima-facie case for the tort of defamation includes: (1) a published communication by the defendant; (2) the communication includes an asserted statement of fact; (3) the communication was concerning the plaintiff; (4) the statement of fact is false; (5) the communication was defamatory; (6) the persons receiving the communication understood it to be defamatory; (7) the defendant knew the communication was false or negligently failed to recognize that it was false, or acted with malice; (8) the communication caused actual injury to the plaintiff's reputation; and (9) the defendant abused its privilege to publish the communication. UJI 13-1002(B) NMRA. The Use Note points out that because Plaintiff is a public official, UJI 13-1002(B)(4) places the burden of proof of falsity upon the plaintiff. *See* UJI 13-1006 NMRA ("To support a claim for defamation, the communication must be false."); *see also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (holding that the burden is on the public official plaintiff to prove the alleged defamatory statement is false).

{56} "For years, federal and state courts, including those in New Mexico, have been confronted with the problem of achieving a proper balance between the laws of defamation and the laws of constitutionally protected freedom of speech and of the press." *Marchiondo*, 1982-NMSC-076, ¶ 40. And "actions for defamation have evolved in many ways due [in part] to the tort's maturing constitutional infrastructure." *Durden*, 2012-NMSC-010, ¶ 10.

False Light

{57} New Mexico recognizes the tort of invasion of privacy, which is broken down into four categories: "false light, intrusion, publication of private facts, and appropriation." *Andrews*, 1995-NMCA-015, ¶ 58. "False light invasion of privacy is a close cousin of defamation." *Id.* ¶ 59 (internal quotation marks and citation omitted); *see Zeran v. Diamond Broad., Inc.*, 203 F.3d 714, 719 (10th Cir. 2000) (distinguishing defamation from false light invasion of privacy by noting that in a defamation action recovery is sought primarily for injury to one's reputation while in a false light action it is the injury to the person's own feelings). A false light plaintiff is required to prove three things: (1) that the plaintiff was portrayed in a false light, i.e., "the matter published concerning the plaintiff is not true[,]" Restatement (Second) of Torts § 652E cmt. a; (2) that the false portrayal would be highly offensive to a reasonable person such that the plaintiff would be "justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity[,]" Restatement (Second) of Torts § 652E cmt. c; and (3) that the publisher "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." Restatement (Second) of Torts § 652E(b).

Summary Judgment Evidence

1. Defendants' Evidence

{58} In their motion for summary judgment Defendants sought to negate three elements of Plaintiff's defamation claim: the falsity of their statements, malice, and actual injury to Plaintiff's reputation. To this end, Defendants provided the district court with a sworn affidavit by Plaintiff; excerpts from the deposition testimony of Plaintiff, Wilham, and three of Plaintiff's APD supervisors; portions of the parties' discovery responses; internal APD policies, reports, and memoranda; Plaintiff's time sheets; and records of arrests made by Plaintiff that include time sheets, corresponding arrest records, and court documents.

{59} In his responses to interrogatories, Wilham states that he received information from a confidential source that Plaintiff was being paid by APD to work as a reserve officer or to perform police work. Wilham submitted a request to the City of Albuquerque for public records and reviewed some of Plaintiff's time sheets as well as court and arrest records. During his deposition, Wilham testified that he

created a spreadsheet from which he concluded that Plaintiff received overtime pay in the amount of $12,666.94 as a reserve officer.

{60} The time sheets, arrest records and court documents Defendants presented show that Plaintiff made arrests during periods of time for which he was claiming civilian overtime. For example, Plaintiff's time sheet for May 31, 2007, shows that between 7:30 a.m. and 4:00 p.m. Plaintiff worked eight hours in his civilian capacity. Plaintiff also logged six hours of overtime that day. Assuming the overtime began at the end of Plaintiff's normal shift, Plaintiff would have worked overtime in his civilian capacity between 4:00 p.m. and 10:00 p.m. An offender booking sheet from the Bernalillo County Detention Center reflects that Plaintiff made an arrest on May 31, 2007, at 7:15 p.m. Defendants presented similar documentation for approximately twenty dates between May 2007 and July 2009. Plaintiff and one SID supervisor both admit in their deposition testimony that these documents create the appearance that at the time Plaintiff made some arrests, he was also claiming civilian overtime.

{61} Similarly, there is overlap between the civilian overtime claimed on Plaintiff's time sheets and the reserve officer hours logged on his reserve officer activity report. For example, Plaintiff's time sheet for September 10, 2008, shows that between 7:30 a.m. and 4:00 p.m. Plaintiff worked eight hours in his civilian capacity. Plaintiff also logged eight hours of overtime that day. Again, assuming the overtime began at the end of Plaintiff's normal shift, Plaintiff would have worked overtime in his civilian capacity between 4:00 p.m. and 12:00 a.m. on September 11, 2008. A report detailing Plaintiff's reserve officer activity shows that Plaintiff worked as a reserve officer for eight hours September 10, 2008. Unless Plaintiff worked twenty-four straight hours on that day, logic would dictate that some of his reserve time would have overlapped with his civilian time.

{62} Wilham testified that he requested an interview with Plaintiff to discuss the subject matter of his articles, but that he did not hear back. According to Wilham's discovery responses, the purpose of the request was simply to obtain an interview, not to request an interview in order to verify specific facts for his articles. In his deposition, Plaintiff testified that he did not contact Wilham because he was instructed not to speak with the press.

{63} Wilham also stated that one week before the first article was published, he met with the chief of police and informed the chief of what he thought he had. APD internal documents indicate that APD began investigating the situation concerning Plaintiff and his overtime. In a memorandum to the chief of police detailing the investigation, the investigating lieutenant reported that Plaintiff was permitted to collect overtime as a reserve officer and as an undercover detective. The investigator determined that Plaintiff worked 106 hours of overtime as an undercover detective for which he received $2,696.64 in overtime pay. In a separate report, one APD deputy chief reported that Plaintiff's supervisor authorized payment to Plaintiff for reserve officer work "allow[ing] the roles of a paid civilian to blur with that of a reserve officer."

{64} Concerning the effect that the articles had on his reputation, Defendants presented an excerpt from Plaintiff's deposition in which Plaintiff, when asked, was unable to name anyone who thought less of him as a result of the articles.

2. Plaintiff's Evidence

{65} In response to Defendants' motion for summary judgment, Plaintiff was required to "demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Durden*, 2012-NMSC-010, ¶ 5 (internal quotation marks and citation omitted). Plaintiff was also required to show that any alleged defamatory statements were false. *Garrison*, 379 U.S. at 74; UJI 13-1002(B)(4); UJI 13-1006. Plaintiff's evidence consisted of a sworn affidavit by Plaintiff; excerpts from the deposition testimony of Plaintiff, Wilham, and two of Plaintiff's APD supervisors; and a spreadsheet created by Wilham containing his calculations of the overtime pay received by Plaintiff.

{66} In his deposition testimony, Plaintiff explains that even though his time sheets appear to show overlap between reserve time and civilian time, he actually adjusted his time entries so that he did not get paid for reserve time. As we previously noted, to do this Plaintiff subtracted any time during his shift that was spent performing reserve officer duties from the total hours reported by adjusting the time he logged at the end of his shift. According to Plaintiff, it took him approximately thirty minutes to make an arrest, which he accounted for by documenting the end of his shift as thirty minutes prior to the time he actually ended his shift on that day. Two of Plaintiff's supervisors, in their deposition testimony, confirm that Plaintiff's hours were adjusted in this manner to account for reserve time. The supervisors also state that the practice of adjusting hours was an accepted practice within SID and APD.

{67} Wilham's spreadsheet, from which he calculated $12,666.94 in overtime pay Plaintiff received for reserve officer duties, includes information for approximately sixty-seven dates between January 2008 and July 2009. For each date the spreadsheet reflects the amount of overtime logged, the corresponding amount of overtime pay based on Plaintiff's hourly wage, a description of Plaintiff's assignments for the overtime periods, and information regarding any arrests that were made during the overtime periods. In an affidavit, Plaintiff states that the spreadsheet reflects the total amount of overtime he worked in his civilian capacity from January 2008 to July 2009 and does not include any overtime for performing reserve officer duties. Plaintiff also disputes the accuracy and authenticity of the reserve officer activity report, claiming that he did not create or approve of the document.

{68} With regard to the harm to his reputation, in his affidavit Plaintiff states that because of Defendants' articles, he was suspended from the reserve officer program and has been denied reinstatement because he is now perceived as "the guy who wrecked the reserve officer program."

3. Summary Judgment Merits

{69} By moving for summary judgment, Defendants bore the burden of showing that Plaintiff failed to produce proof of actual malice. *See Ammerman*, 1977-NMCA-127, ¶ 14. Defendants have not met this burden.

{70} " 'Actual malice' . . . means that [Defendants made] statements with knowledge of their falsity or with reckless disregard of whether they were true or false. 'Reckless disregard' means evidence that [Defendants] had a high degree of awareness of probable falsity, . . . but nevertheless [published] the statements." *Id.* ¶ 16. As to the truth or falsity of the statements, Defendants' summary judgment evidence tends to show that Plaintiff received some overtime pay in connection with his reserve officer work. However, the affidavits and deposition testimony presented by Plaintiff create a factual question as to the amount of overtime pay he actually collected and whether it was for reserve officer work or civilian work. The obvious difficulty in this case is the

impossibility of objectively verifying Plaintiff's time. This is something Defendants should have recognized, and may have apparently done so by leaving the $12,000 amount out of the subsequent articles, and by not relying on Wilham's spreadsheet in support of their motion for summary judgment. This is also an issue worthy of a jury's consideration. Similarly, with respect to Defendants' evidence on the injury to the reputation element of defamation, and the unreasonable and highly objectionable publicity element of false light invasion of privacy, I would conclude that Defendants have not demonstrated that the material facts are undisputed. *See Durden*, 2012-NMSC-010, ¶ 5.

{71} The primary question at this juncture is whether the district court erred in granting summary judgment based on its finding that Defendants acted without actual malice in publishing the $12,000 statements. Under the heightened malice standard "the defendants' state of mind was of central importance." *Marchiondo*, 1982-NMSC-076, ¶ 18 (internal quotation marks and citation omitted). In other words, what Defendants knew or suspected concerning the truth of the statements when they were published is key. *See Ammerman*, 1977-NMCA-127, ¶ 16 (recognizing that actual malice involves the making of statements despite having knowledge of their falsity, a high degree of awareness of probable falsity, or serious doubts as to the truth of the statements (internal quotation marks omitted)).

{72} In the present case, the record indicates that Wilham reviewed Plaintiff's time sheets and payroll information, as well as court documents and arrest records, and that those documents appear to show that Plaintiff was accruing overtime at the same time that he was performing reserve officer duties. And although Wilham requested interviews, neither Plaintiff nor his supervisors were immediately available to comment on the issue. Defendants argue that this evidence supports their assertion that they acted without malice, believing that the overtime statements were true or substantially true. The majority suggests that Defendants' unsuccessful attempts to interview Plaintiff or those familiar with Plaintiff's job description, activities, and payroll are sufficient to allow the publication of the $12,000 amount, and if the information was incorrect, Plaintiff's failure to cooperate automatically entitles Defendants to the defense of ignorance. Majority Op. ¶ 38. Because the evidence shows that Wilham was not attempting to verify or confirm specific information or facts, the majority has essentially shrouded Defendants with immunity from liability for defamation. However, "absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation." *Gertz*, 418 U.S. at 341. There has to be some sort of balance between any constitutionally protected speech, responsible reporting, and the laws of defamation.

{73} Defendants' evidence indicates that at the time the statements were published, Defendants believed that Plaintiff had received overtime pay for reserve officer work. However, Defendants' spreadsheet is the only evidence of what they "believed" Plaintiff received for reserve officer work and that was *in excess of $12,000*. There is nothing in the record to establish what information Wilham used of all the documents he gathered, how he interpreted the information, and how he used it for each of his entries in the spreadsheet. It is Wilham's spreadsheet that creates the questions as to how that figure was derived, thereby creating a question of fact as to whether Defendants acted with a high degree of awareness of probable falsity. *Ammerman*, 1977-NMCA-127, ¶ 16.

{74} Nonetheless, Defendants argue that the evidence supports their contention that they acted without malice, believing the statements to be substantially true. I understand Defendants to argue that their state of mind with regard to the $12,000 figure is immaterial.

{75} In order to show the absence of malice, Defendants do not have to show that they believed the statements to be absolutely true in every minute detail. *See Masson*, 501 U.S. at 517. It is sufficient to show that the defendants believed their statements not to contain material falsehoods or to be substantially true. *See id.* at 516-17. In considering the material falsity or the substantial truth of a statement, we consider whether "the substance, the gist, the sting of the libelous charge be justified." *Id.* at 517 (internal quotation marks and citation omitted). Material falsity and substantial truth are two sides of the same coin. The plaintiff, in order to show malice, must show that the defendant knew or suspected the statement to be materially false. *Id.* Where the defendant has the burden of showing the absence of malice on a motion for summary judgment, for example, the defendant must show that in publishing the statement he believed it to be substantially true. *See id.* A statement may be considered substantially true if it produces the same effect on the mind of the recipient, which the pleaded truth would have produced. *See id.* ("[A] statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." (internal quotation marks and citation omitted)).

{76} Thus, in order to show that summary judgment was appropriate Defendants were required to present evidence as to their state of mind with regard to the $12,000 figure. *See Marchiondo*, 1982-NMSC-076, ¶ 22 (recognizing that under the malice standard of the *New York Times* and its progeny, proof regarding the conduct and state of mind of the defendant is essential). In determining whether Defendants' state of mind concerning the $12,000 figure is material, compare the substance of Defendants' statements with and without the figure. The statements that "[w]hile acting as a cop, [Plaintiff] has also made more than $12,000 in overtime working warrant sweeps, stakeouts, undercover prostitution stings, and making arrests[,]" would have a different effect on the mind of the reader than a statement that "[w]hile acting as a cop, [Plaintiff] has made overtime working warrant sweeps, stakeouts, undercover prostitution stings and making arrests." The former statement carries a stronger implication that Plaintiff intentionally lied on his time sheets in order to receive a sensational amount of overtime pay, over $12,000 to which he was not entitled. Whereas the latter statement leaves room in the mind of the reader as to the amount of overtime pay Plaintiff inappropriately received, which turned out to be $2,696.64.

{77} Defendants deny the existence of malice, yet, they fail to attribute the basis for their $12,000 statements. More importantly, Defendants dropped the specific dollar amount out of subsequent articles published within the two month time frame, and never relied on it in defense of the case. Whether summary judgment is precluded under such circumstances "turn[s] on the particular facts which exist therein." *Coronado Credit Union*, 1982-NMCA-176, ¶ 26. The particular facts in this case are that the extraordinary amount of overtime pay reported by Defendants in this case is material.

{78} Here, material issues of fact exist as to the truthfulness of the statements concerning the actual amount Plaintiff

collected in overtime pay. The truth or more appropriately the inaccuracy of these statements must be determined at trial. "In the absence of a showing of privilege, the existence of malice is a fact question, and is not a question of law to be decided on summary judgment." *Id.* Defendants have not shown in their motion for summary judgment that they in fact had any documents or news source that established that Plaintiff had in fact made more than $12,000 for performing reserve officer duties, nor did Defendants publish the statements as privileged statements of opinion. The $12,000 figure appeared in the first two articles and one editorial. However, even in the editorial, the $12,000 is asserted as a fact, and not as part of the opinions expressed in the piece. Nowhere in the record do Defendants argue that the $12,000 was expressed as an opinion. Their argument lies in the materiality of the fact.

{79} Viewing the evidence, as we must, in the light most favorable to Plaintiff, and drawing all reasonable inferences in support of a trial on the merits I would conclude that summary judgment on the issue of malice was premature, at least with regard to the statements referencing the $12,000 in overtime pay. *See Marchiondo*, 1982-NMSC-076, ¶ 22 (holding that the trial court erred in ruling at the summary judgment stage that the defendants acted without actual malice absent evidence concerning the defendants' state of mind, i.e., the thoughts and editorial processes on which the statements were based).

CONCLUSION

{80} On Plaintiff's defamation and false light claims arising from the specific $12,000 statements, I would reverse the district court's judgment and remand for further proceedings.

M. MONICA ZAMORA, Judge

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[1]While Defendants argue both lack of actual malice and the substantial truth of their published statements on appeal, we need not discuss the truth/falsity element of Plaintiff's claims because we agree with the district court's basis for granting summary judgment. See Goradia v. Hahn Co., 1991-NMSC-040, ¶ 18, 111 N.M. 779, 810 P.2d 798 ("A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." (alteration, internal quotation marks, and citation omitted)). In other words, the issue of whether Defendants' statements were true, substantially true, or false is mooted by Plaintiff's failure to establish that Defendants acted with actual malice.

[2]The dissent faults this opinion for making a "sweeping generalization that Plaintiff was inappropriately paid for overtime work as a reservist, ignoring the emphasis on Plaintiff's collection of over $12,000 specified by Defendants in the initial three articles." Dissent ¶ 47. We needn't dissect Wilham's spreadsheet (which was the source of the $12,000 figure), question its reliability or Defendants' choice not to include it with their motion for summary judgment, or speculatively attribute inordinate significance to the fact that the specific dollar amount was only included in Defendants' first three articles as the dissent does. See Dissent ¶¶ 47, 52, 70, 73, 77. It was Plaintiff's burden—not this Court's—to develop such arguments to survive summary judgment, and he failed to do so.

Moreover, we note that Plaintiff's first amended complaint—filed in response to Defendants' Rule 1-012(B)(6) motion to dismiss based on Plaintiff's failure to allege specific false statements that formed the basis of his claim as required by Andrews, 1995-NMCA-015, ¶ 14 (explaining that defamation plaintiffs "must plead precisely the statements about which they complain" (internal quotation marks and citation omitted))—merely alleged that Defendants made false statements "that [Plaintiff] fraudulently collected pay for Reserve Officer activities" and said nothing about the $12,000 statements in particular, contrary to the dissent's suggestion that Plaintiff alleged separate claims "arising from the specific $12,000 statements." Dissent ¶ 46. As this Court stated in Andrews, "[d]efendants do not bear the burden to discern how [an article] has defamed [the p]laintiff[]." Id. Thus the "immateriality" of the $12,000 figure, Dissent ¶ 74, Defendants' decision not to specifically proffer evidence of their state of mind regarding the figure, Dissent ¶ 76, and this opinion's "singular treatment of Defendants' series of eleven articles[,]" Dissent ¶ 47, result from Plaintiff's choice not to allege a defamation claim based on the specific amount reported.

[3]We note that the dissent fails to follow this procedure, focusing exclusively on what it sees as an infirmity in Defendants' summary judgment motion and never addressing that the record as a whole—and particularly Plaintiff's response—fails to provide any evidence indicating the existence of a genuine issue of material fact as to actual malice.

[4]The record reveals that the district court described the records as "confusing" at a hearing on Defendants' motion for a bill for costs held after the district court had already granted Defendants summary judgment, not at the summary judgment hearing.

[5]In any event, we note that even if Plaintiff or someone else had offered the "deduction" explanation to Wilham, Defendants would not necessarily have been precluded from publishing the complained-of statements. That is because even when a reporter has a document that propounds an alternative theory or figure—particularly when it is not "airtight" and may be self-serving—he is " entitled to make legitimate criticisms and present facts based on other, contradictory evidence without losing the New York Times [Co.] privilege." Anaya, 626 F. Supp. 2d at 1218.

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

Bilingual Associate Attorney (Uptown Albuquerque)

Rebecca Kitson Law is growing! We are adding a full time, bilingual associate attorney position. Candidate must have passion and commitment to advocate for immigrants in all areas of relief. We are an inclusive, supportive office culture that welcomes all to apply. Position available immediately. Must be fluent in Spanish. Must be willing to travel for Hearings and Interviews, as needed. Law License from any state accepted but New Mexico preferred. Experience preferred. Salary DOE, full benefits and fun perks offered. Please send letter of interest, resume, and writing sample to lp@rkitsonlaw.com. You will only be contacted if you are being considered for the position. Please note that incomplete applications will not be considered.

Lawyer Position

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

Want to Fulfill Your Pro Bono Obligations?

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

General Counsel & VP HR

HB Construction, an Albuquerque based General Contractor, is seeking to fill an important leadership role with our growing company. You would oversee all legal issues including: Contracts, Compliance, Employment, Litigation and Investment/M&A Transactions. As a member of our Executive Team you would become a key contributor to our sustainable success. To learn more about us visit www.hbconstruction.com. Email resumes to briant@hbconstruction.com.

Legal Notice

Notice is hereby given that Taos Pueblo/Taos Pueblo Tribal Court calls for Sealed Proposals for: RFP #2018-001: Proposal for Legal Services Contract:Draft and Development of a Domestic Relations Code for Taos Pueblo. Interested parties may secure a copy of the Proposal Packet from Volaura Mondragon, Taos Pueblo Tribal Court, 195 Rio Lucero, Taos Pueblo, New Mexico 87571, (575) 751-0488, ext. 201. Proposals must be received no later than:February 23, 2018 at 4:00 P.M. and submitted to: Taos Pueblo, Central Management Systems, Volaura Mondragon, Taos Pueblo Tribal Court Administrator, 1075 Veterans Highway, P.O. Box 1846, Taos, New Mexico 87571. Proposals must be submitted in a sealed envelope that is clearly marked "Proposal for Legal Services: Taos Pueblo Domestic Relations Code." If mail delivery is used, the proposer should mail the proposal early enough to ensure arrival by the deadline.The proposal uses mail or courier service at his/her own risk.Taos Pueblo will not be liable or responsible for any late delivery of proposals.Postmarks will not be accepted. Until the award of the contract, proposals shall be held in confidence and shall not be available for public view.No proposal shall be returned after the date and time set for opening thereof. Taos Pueblo CMS reserves the right to reject any or all proposals and to waive any information in the proposal process.

Transactional Lawyer

Albuquerque firm focusing on representation of Native American Tribes and tribal businesses is seeking an associate attorney with four plus years' experience working as a transactional lawyer. Federal Indian law experience is a plus but is not required. Please submit a cover letter, resume and three references to Barnhouse Keegan Solimon & West LLP at lvera@indiancountrylaw.com.

Senior Trial Attorney
Assistant Trial Attorney
Entry Level Attorney

The 13th Judicial District Attorney's Office is accepting resumes for experienced Senior/Mid-level/Entry Level Trial Attorney's. This position requires a minimum of five years of experience as a prosecutor; and it requires handling complex felony litigation.Salary is commensurate with experience. Send resumes to Krissy Saavedra, Program Specialist, P.O. Box 1750, Bernalillo, NM 87004, or via E-Mail to:ksaavedra@da.state.nm.us. Deadline for submission of resumes:Open until filled.

Oil and Gas Title and Transaction Attorney

Cotton, Bledsoe, Tighe & Dawson, P.C., is a well-known law firm in Midland, Texas, one of the leading energy centers of the Southwest.Cotton Bledsoe (www.cottonbledsoe.com) is highly regarded both by the oil and gas industry and among other law firms in Texas and surrounding states. Cotton Bledsoe has an immediate need for an oil and gas title and transaction attorney. Candidates should have at least 5 years of experience in oil and gas title or transaction work within a law firm environment. Both associate and shareholder level attorneys considered. No portable work necessary. Please forward resumes and law school transcript to Michael Hall at mhall@cbtd.com or P.O. Box 2776, Midland, Texas, 79702-2776.

Government Investigations / White Collar Defense Attorney, Denver, Salt Lake City, and Santa Fe (Reference #10110112)

Holland & Hart LLP is searching for credentialed attorneys to join our vibrant national government investigations / white-collar defense practice.We are looking specifically for attorneys to join the practice group in our Denver, Salt Lake City, and Santa Fe offices. Who we are:Holland & Hart is the preeminent law firm based in the Rocky Mountain West with approximately 500 lawyers in 15 offices in 8 states and Washington DC.We are one of only two Denver-based firms ranked on The American Lawyer's list of the top 200 law firms. Our government investigations / white-collar defense practice is a preeminent practice representing companies and their officers and directors in internal and government investigations at the federal and state levels, and related litigation.Who we are looking for:We are looking for ethical, hardworking lawyers, optimally with the following attributes:outstanding academic achievement; 6 – 10 years of experience in government investigations / white collar defense; driven and hard-working; attention to detail; ability to thrive in a fast-paced environment managing complex, sensitive matters and sophisticated clients; experience at a large law firm; service as a federal judicial law clerk; and experience as an Assistant US Attorney. How to apply: All interested applications should apply through the "careers section" of the firm's website: www.hollandhart.com and be prepared to submit a resume, cover letter, and law school transcript.Please contact Michelle Stoeckel, Recruitment Coordinator, with any questions (mhstoeckel@hollandhart.com).Holland & Hart is an Equal Opportunity Employer.No unsolicited applications from search firms.

Position Announcement Temporary Assistant Federal Public Defender- Las Cruces 2018-02

The Federal Public Defender for the District of New Mexico is seeking two full time, experienced trial attorneys for the branch office in Las Cruces. These are temporary positions, with a term of employment not to exceed one year and one day each. Applicants must understand that there is no promise of permanent employment, and must be prepared to commit to the temporary position. More than one vacancy may be filled from this announcement. Federal salary and benefits apply. Applicant must have one year minimum criminal law trial experience, be team-oriented, exhibit strong writing skills as well as a commitment to criminal defense for all individuals, including those who may be facing the death penalty. Spanish fluency preferred. Writing ability, federal court, and immigration law experience will be given preference. Membership in the New Mexico Bar is required within the first year of employment. The private practice of law is prohibited. Selected applicant will be subject to a background investigation. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C. 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. In one PDF document, please submit a statement of interest and detailed resume of experience, including trial and appellate work, with three references to: Stephen P. McCue, Federal Public Defender FDNM-HR@fd.org. Reference 2018-02 in the subject. Writing samples will be required only from those selected for interview. Applications must be received by February 2, 2018. Position will remain open until filled and is subject to the availability of funding. No phone calls please. Submissions not following this format will not be considered. Only those selected for interview will be contacted.

General Practice Attorney

A busy small town practice in northern New Mexico seeks an attorney with 5+ years of experience in general practice, including domestic, criminal, estate planning, civil litigation and transactional. Start at half time and work your way into ownership. Send resume to: phil@reidgriffithlaw.com.

Attorney Associate

The Bernalillo County Metropolitan Court is accepting applications for a full-time Associate Attorney position in the Office of General Counsel. Education/Experience: Must be a graduate of a law school meeting the standards of accreditation of the American Bar Association; possess and maintain a license to practice law in the state of New Mexico; and have at least three years' experience in the practice of law. Salary: $28.128 to $43.950 hourly DOE plus State of NM benefits package. Please go to https://metro.nmcourts.gov for a complete job description, or one may be obtained at the Human Resource office of the Metropolitan Court. Apply at or send application/resume with a legal writing sample to the Bernalillo County Metropolitan Court, H. R. Division, P.O. Box 133, Albuquerque, NM 87103/ or by Fax (505) 222-4823. Applications/Resume must be submitted by February 16, 2018.

Associate Attorney

Hatcher Law Group, P.A. seeks a new associate attorney with two-plus years of legal experience for our downtown Santa Fe office. We are looking for motivated to excel at the practice of law in a litigation-focused practice. Hatcher Law Group defends individuals, state and local governments and institutional clients in the areas of insurance defense, coverage, workers compensation, employment and civil rights. We offer a great work environment, competitive salary and opportunities for future growth. Send your cover letter, resume and a writing sample via email to juliez@hatcherlawgroupnm.com.

Services

Board Certified Orthopedic Surgeon

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

Office Space

620 Roma N.W.

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

Three Large Offices and Two Secretarial Areas

Reception area with cathedral ceiling and skylights. Refrig. air and great parking. $850.00 per month. Please call (505) 243-4541

Office for Rent

Office (16'8" x 8'9") for rent ($550/mo.), 925 Luna Circle NW - Walking distance from Court, beautiful hardwood floors, storage space, plenty of parking in front and back, includes alarm service, bi-weekly cleaning, shared mini-kitchen/break area, conference room also available upon request.Contact owner at 505-314-8884.

Miscellaneous

Want To Purchase

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

Search for Living Trust

In search for a living trust dated 2012 for Jacqueline L. Morgan and Barbara K. Anderson from Jemez Springs, NM. They are both still alive but are unable to remember who created the trust. If located, please contact Philip J. Dabney, Attorney at Law, 505-662-3911

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