

BAR BULLETIN

February 7, 2018 • Volume 57, No. 6



Sandia Strength, by Valerie Fladager

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Meetings

February

7 Employment and Labor Law Section Board

Noon, State Bar Center

8 Business Law Section Board

4 p.m., teleconference

9 Prosecutors Section Board

Noon, State Bar Center

13 Appellate Practice Section Board

Noon, teleconference

14 Tax Section Board

11 a.m., teleconference

14 Children's Law Section Board

Noon, Juvenile Justice Center

16 Family Law Section Board

9 a.m., teleconference

20 Solo and Small Firm Section Board

11 a.m., State Bar Center

20 Real Property Trust and Estate Section: Trust and Estate Division

Noon, teleconference

Workshops and Legal Clinics

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

March

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

About Cover Image and Artist: Valerie Fladager photographs a plethora of images that catch her interest and each image selected represents a series of multitude. The best are chosen for their striking design, light and color which she then interprets with digital imaging, pastels or watercolor. Her work has been sold through several galleries and arts and crafts venues. She has taught art and science and is a member of the National League of American Pen Women. Additional work can be viewed at <http://valeriefiadager.com/>. She can also be contacted by email, kvfladager@aol.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.

New Mexico Court of Appeals Gov. Susana Martinez Announces Judicial Appointments

On Jan. 19, Gov. Susana Martinez announced appointments to the New Mexico Court of Appeals. **Jennifer Attrep** of Santa Fe will fill the vacancy created by the resignation of Hon. Timothy L. Garcia and **Daniel Gallegos** of Albuquerque will fill the vacancy created by the resignation of Judge Jonathan B. Sutin.

First Judicial District Court Notice of Judge Assignment

Pro Tem Judge Sarah M. Singleton has been assigned to preside over criminal cases assigned to Division 5 from Feb. 26–May 25 or until a newly assigned judge takes office, whichever occurs first. This assignment is in the interest of judicial efficiency, pursuant to NMSC Rule 23-109, the chief judge rule. This reassignment is effective upon Judge Attrep vacating her position from Division 5 and is under the terms agreed to by Judge Singleton and the First Judicial District Court.

Eleventh Judicial Court Judicial Candidate

The Eleventh Judicial District Court Nominating Commission convened on Jan. 25 in Farmington and completed its evaluation of the three applicants for the vacancy on the Eleventh Judicial District Court. The Commission recommends the following one candidate to Gov. Susana Martinez: **Sarah Veronica Weaver**.

Professionalism Tip

With respect to other judges:

I will endeavor to work with other judges to foster a spirit of cooperation and collegiality.

Bernalillo County District 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.

U.S. District Court for the District of New Mexico Appointment of Chief Judge

Hon. William P. Johnson will be appointed the 13th chief judge for the District of New Mexico, effective Feb. 8. Judge Johnson has served the Federal Court for more than 16 years, appointed by President George W. Bush in 2001. His appointment follows Hon. M. Christina Armijo, who has retired from active service.

STATE BAR NEWS

Attorney Support Groups

- 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#.

- March 5, 5:30 p.m.

First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)

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

2018 Licensing Notification Late Fees Begin Feb. 2

2018 State Bar licensing fees and certifications are due. Late payments or late disclosure penalties were assessed after Feb. 1 and delinquency certification is sent to the New Mexico Supreme Court after March 31. Complete annual licensing requirements online at www.nmbar.org/licensing or email license@nmbar.org to request a PDF copy of the license renewal form. Payment by credit card is available (payment by credit card will incur a service charge). For more information, call 505-797-6083 or email license@nmbar.org. For help logging in or other website troubleshooting, email clopez@nmbar.org. Those who have already completed their licensing requirements should disregard this notice.

Board of Bar Commissioners Commissioner Vacancy

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

A vacancy exists in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. The Board will make the appointment at its Feb. 23 meeting to fill the vacancy until the next regular election of Commissioners, and the term will

run through Dec. 31, 2018. Active status members with a principal place of practice located in the Third Bar Commissioner District are eligible to apply. The remaining 2018 Board meetings are scheduled for May 18 in Albuquerque, Aug. 9 at the Hyatt Regency Tamaya Resort in Santa Ana Pueblo 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.

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/CannabilPetition> or contact Carlos N. Martinez at carlos@legalsolutionsofnm.com or Breanna Henley at bhenley@nmbar.org.

Young Lawyers Division UNMSOL Summer Fellowship Open Now

The YLD offers two \$3,000 summer fellowships to UNM School of Law students who are interested in working in public interest law or the government sector. The fellowship awards are intended to provide the opportunity for law students to work for public interest entities or in the government sector in an unpaid position. To be eligible, applicants must be a current law student in good standing. Applications for the fellowship must include: 1) a letter of interest that details the student's interest in public interest law or the government sector; 2) a résumé; and 3) a written offer of employment for an unpaid legal position in public interest law or the government sector for the summer. Applications containing offers of employment that are



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contingent upon the successful completion of a background check will not be considered unless verification of the successful completion of the background check is also provided. Email applications to Breanna Henley at bhenley@nmbar.org by 5 p.m., March 23 for consideration.

Volunteers Needed for Homeless Legal Clinic

The Homeless Legal Clinic is open in Albuquerque from 9-11 a.m. (orientation at 8:30 a.m.), on the third Thursday of each month, at Albuquerque Healthcare for the Homeless, located at 1220 First Street NW and in Santa Fe from 10 a.m.-noon each Tuesday, at the St. Elizabeth Shelter, located at 804 Alarid Street in Santa Fe. Volunteer attorneys are needed to staff the clinics, serve as an "information referral resource" and join the pro bono referral list. For those staffing the clinic or providing other services, a trained attorney will assist you until you feel comfortable by yourself. Even if you are a new lawyer, you will be surprised at how much you have to offer these clients and how your help can make such a major difference in their lives. Visit www.nmbar.org/HLC to volunteer. Direct questions to YLD Region 2 Director Kaitlyn Luck at luck.kaitlyn@gmail.com.

Volunteers Needed for Rio Rancho Wills for Heroes

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

to serve at witnesses and notaries. Visit <https://www.jotform.com/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.
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Depositions CLE with Steve Scholl

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

Free CLE: Balancing the Scales

State Bar members and UNM law students are invited to attend a screening of the documentary "Balancing the Scales" followed by a moderated discussion with New Mexico attorney and executive coach Elizabeth Phillips from 5-7:30 p.m., March 1, at the UNM School of Law. The documentary delves into the challenges women lawyers have faced historically and still face today, including the additional hurdles faced by women lawyers of color, and illustrates how U.S. culture has accepted less than full equality for women and how few women lawyers have really broken the glass ceiling. Explore how the intersectionality of gender and race creates additional challenges and what impact we can have on the profession. Dinner will be served beginning at 5 p.m. and the program begins at 5:30 p.m. This program has been approved by MCLE for 2.0 EP,

sponsored by the UNM School of Law. Dinner is provided by the Committee on Women and the Legal Profession and the UNMSOL Women's Law Caucus. Special thank you to New Mexico PBS for supplying a copy of the film and permitting this special showing. R.S.V.P. to Laura Castille at lcastille@cuddymccarthy.com by Feb. 28.

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 ydenning@yahoo.com or 505-844-3558.

American Bar Association Health Law Section 19th Annual Conference on Emerging Issues in Healthcare Law

The American Bar Association Health Law Section will be convening the "19th Annual Conference on Emerging Issues in Healthcare Law" on Feb. 21–24 in Scottsdale, Ariz. State Bar of New Mexico members receive a 10 percent discount. Registration is additionally discounted to \$595 for first time attendees (representing a savings of \$450). Attendees will have the opportunity to network with healthcare bar leaders from across the country and take home meaningful insights from 16 cutting edge CLE programs including immigrant access to healthcare, antitrust enforcement, billing disputes, human trafficking and more. Visit ambar.org/EMI2018 for more information or to register.

American Bar Association Section of Litigation Appellate Practice Regional Meeting 2018: Colorado

The American Bar Association Section of Litigation presents "Appellate Practice Regional Meeting 2018:

Colorado at the U.S. Supreme Court with Solicitor General Ted Tzafiris" on March 6 in Denver. Registration is \$55 for section members, \$120 for non-section members and \$25 for government attorneys and students. Visit <http://ambar.org/ltappellate> for more information or to register.

New Mexico Criminal Defense Lawyers Association

Prisons, Pimps and Prejudices: Federal Practice CLE Seminar

Jeff Carson, retired operations manager for the Bureau of Prisons, returns to NMCDLA's "Prisons, Pimps & Prejudices: Federal Practice CLE" (6.0 G) on Feb. 23 in Albuquerque to give attorneys the inside scoop on everything to know about the BOP. Also on the agenda for this seminar is sex trafficking 101, the DOJ and the new war on drugs, implicit bias and a federal case law update. Visit www.nmcdla.org to register and renew membership dues for 2018 today.

OTHER NEWS

Center for Civic Values Manzano High School Seeks Attorney Coach

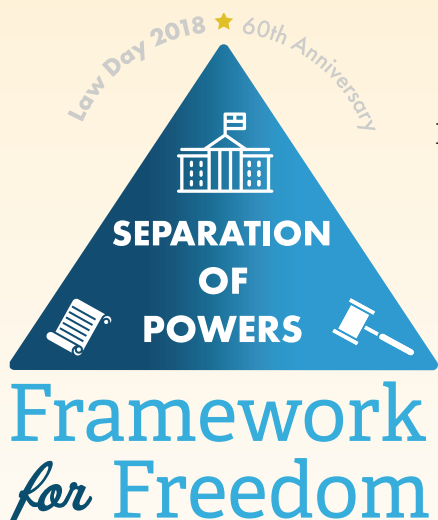
Manzano High School in Albuquerque seeks an attorney coach to help with its mock trial team. For more information, contact Kristen Leeds, director, Center for Civic Values and Gene Franchini New Mexico High School Mock Trial Program, at 505-764-9417 or kristen@civicvalues.org.

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.

Opportunities for High School Students

Win up to \$1,000!



State Bar Essay Contest

Sponsored by the

Modrall Sperling Law Firm in honor of James E. Sperling

Students will discuss what “checks and balances” exist within New Mexico’s three branches of government. The essay contest question will spark a debate regarding how “separation of powers” coupled with “checks and balances” impact the power of democratic majority over the minority. Open to New Mexico high school juniors and seniors. Essays should be 1,000-1,500 words and are due on March 2. Visit www.nmbar.org/EssayContest for the rules, the official prompt and legal writing tips.



**Who needs civil
legal services in New
Mexico and why are
they important?**

Breaking Good Video Contest

Sponsored by

Ron Bell Injury Lawyers and the Rodey Law Firm

Nearly 50 million Americans live in poverty. Civil legal services help the underprivileged members of our society obtain improved access to justice. New Mexico high school students (grades 9–12) will create a 60 second video advocating for the need for legal services. Videos are due by March 30. Visit www.nmbar.org/BreakingGood for the official rules packet and more information.



For more opportunities for students and educators, visit www.nmbar.org > for Public.

Call for Nominations

{ 20 STATE BAR OF NEW MEXICO 18 Annual Awards }

Nominations are being accepted for the **2018 State Bar of New Mexico Annual Awards** to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2017 or 2018. The awards will be presented during the 2018 Annual Meeting, Aug. 9-11 at the Hyatt Regency Tamaya Resort, Santa Ana Pueblo. All awards are limited to one recipient per year, whether living or deceased. Previous recipients for the past three years are listed below. To view the full list of previous recipients, visit www.nmbar.org/Awards.

{ Distinguished Bar Service Award—Lawyer }

Recognizes attorneys who have provided valuable service and contributions to the legal profession and the State Bar of New Mexico over a significant period of time.

Previous recipients: Scott M. Curtis, Hannah B. Best, Jeffrey H. Albright

{ Distinguished Bar Service Award—Nonlawyer }

Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

Previous recipients: Cathy Ansheles, Tina L. Kelbe, Kim Posich

{ Justice Pamela B. Minzner* Professionalism Award }

Recognizes attorneys or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism.

Previous recipients: Hon. Elizabeth E. Whitefield, Arturo L. Jaramillo, S. Thomas Overstreet

*Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994–2007.

{ Outstanding Legal Organization or Program Award }

Recognizes outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

Previous recipients: Young Lawyers Division Wills for Heroes Program, Self Help Center at the Third Judicial District Court, Pegasus Legal Services for Children

{ Outstanding Young Lawyer of the Year Award }

Awarded to attorneys who have, during the formative stages of their legal careers by their ethical and personal conduct, exemplified for their fellow attorneys the epitome of professionalism; nominee has demonstrated commitment to clients' causes and to public service, enhancing the image of the legal profession in the eyes of the public; nominee must have practiced no more than five years or must be no more than 36 years of age.

Previous recipients: Spencer L. Edelman, Denise M. Chanez, Tania S. Silva

{ Robert H. LaFollette* Pro Bono Award }

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance over his or her career to people who could not afford the assistance of an attorney.

Previous recipients: Stephen. C. M. Long, Billy K. Burgett, Robert M. Bristol

*Robert LaFollette (1900–1977), director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.

{ Seth D. Montgomery* Distinguished Judicial Service Award }

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and the bar; generally given to judges who have or soon will be retiring.

*Previous recipients: Hon. Michael D. Bustamante,
Justice Richard C. Bosson, Hon. Cynthia A. Fry*

*Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989–1994.

A letter of nomination for each nominee should be sent to Kris Becker, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax 505-828-3765; or email kbecker@nmbar.org. Please note that we will be preparing a video on the award recipients which will be presented at the awards reception, so please provide names and contact information for three or four individuals who would be willing to participate in the video project in the nomination letter.

Deadline for Nominations: June 1

For more information or questions, please contact Kris Becker at 505-797-6038.



Legal Education

February

- | | | |
|--|--|---|
| <p>7 Ethics Update Part II
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>16 New Mexico Liquor Law for and Beyond (2017)
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>23 Drafting Waivers of Conflicts of Interests
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>9 Negotiating (and Renegotiating Leases) Part I
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>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</p> | <p>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</p> |
| <p>9 Regional Seminar
20.5 G
Live Seminar, Santa Fe
Trial Lawyers College
307-432-4042</p> | <p>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</p> | <p>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</p> |
| <p>9 Litigation and Argument Writing in the Smartphone Age (2017)
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 Sophisticated Choice of Entity, Part I
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>23 2017 Family Law Institute Day 1
5.0 G, 1.0 EP
Live Replay, Albuquerque
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| <p>12 Negotiating (and Renegotiating) Leases, Part II
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1.0 G
Teleseminar
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| <p>16 2017 Real Property Institute
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | | |

March

- | | | |
|--|--|--|
| <p>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</p> | <p>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</p> | <p>6 Successor Liability in Business Transactions
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>1 Service Level Agreements in Technology Contracting
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>2-4 Taking and Defending Depositions (Part 1 of 2)
31.0 G, 4.5 EP
Live Seminar, Albuquerque
UNM School of Law
goto.unm.edu/despositions</p> | <p>7 Family Feuds in Trusts: How to Anticipate & Avoid
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |

9	Drafting Professional and Personal Services Agreements 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org	22	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	26	Federal and State Tax Updates (2017 Tax Symposium) 3.5 G Live Replay, Albuquerque 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	22	2017 Mock Meeting of the Ethics Advisory 2.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org	27	Lawyer Ethics When Clients Won't Pay Fees 1.0 EP Teleseminar Center for Legal Education of NMSBF www.nmbar.org
14	Role of LLCs in Trust and Estate Planning 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org	23	How to Practice Series: Probate and Non-Probate Transfers 4.0 G, 2.0 EP Webcast/Live Seminar, Albuquerque 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
16	Current Immigration Issues for the Criminal Defense Attorney (2017 Immigration Law Institute) 5.0 G, 2.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org	23-25	Taking and Defending Depositions (Part 2 of 2) 31.0 G, 4.5 EP Live Seminar, Albuquerque UNM School of Law goto.unm.edu/depositions	28	Cybersluth: Conducting Effective Internet Research (2017) 4.0 G, 2.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org
16	Civility and Professionalism (2017 Ethicspalooza) 1.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org	26	Trial Know-How! (The Rush to Judgment- 2017 Trial Practice Section Annual Institute) 4.0 G, 2.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org	28	The Ethics of Using Lawyer Advertisements Using Social Media (2017) 1.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org
16	New Mexico Liquor Law for 2017 and Beyond (2017) 3.5 G 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	28	Attorney vs. Judicial Discipline (2017) 1.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org
22	2017 Appellate Practice Institute 6.0 G, 1.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org	26	Conflicts of Interest (2017 Ethicspalooza) 1.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org	28	Human Trafficking (2016) 3.0 G Live Replay, Albuquerque 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.

29 Convincing the Jury: Trial Presentation Methods and Issue Presented by Mark Fidel, Applied Records Management
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 What's the Dirtiest Word in Ethics?
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
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April

3 Drafting Employment Agreements, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 Domestic Self-Settled Trusts
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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24 Drafting Ground Leases, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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4 Drafting Employment Agreements, Part 2
1.0 G
Teleseminar
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17 Protecting Client Trade Secrets & Know How from Departing Employees
1.0 G
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Center for Legal Education of NMSBF
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25 Drafting Ground Leases, Part 2
1.0 G
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10 Closely Held Stock Options, Restricted Stock, Etc.
1.0 G
Teleseminar
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18 Equipment Leases: Drafting & UCC Article 2A Issues
1.0 G
Teleseminar
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26 Defined Value Clauses: Drafting & Avoiding Red Flags
1.0 G
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27 Lawyer Ethics in Real Estate Practice
1.0 EP
Teleseminar
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May

1 The Law of Consignments: How Selling Goods for Others Works
1.0 G
Teleseminar
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8 Ownership of Ideas Created on the Job
1.0 G
Teleseminar
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15 Reps and Warranties in Business Transactions
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

2 Valuation of Closely Held Companies
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 2018 Trust Litigation Update
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 The Ethics of Confidentiality
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 How Ethics Rules Apply to Lawyers Outside of Law Practice
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
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Opinions

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

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Effective January 26, 2017

PUBLISHED OPINIONS

A-1-CA-33064	State v. L Branch	Affirm/Reverse/Remand	01/23/2018
A-1-CA-34709	State v. G Luna	Affirm/Reverse/Remand	01/23/2018

UNPUBLISHED OPINIONS

A-1-CA-35493	H Shaver v. Board of Ethics	Affirm/Remand	01/22/2018
A-1-CA-35788	State v. R County	Affirm	01/22/2018
A-1-CA-35958	State v. L Garcia	Affirm	01/22/2018
A-1-CA-36524	W Gardner v. E Rivera	Affirm	01/22/2018
A-1-CA-35354	J Carriere v. D Carriere	Dismiss	01/23/2018
A-1-CA-36257	State v. E Ortega	Affirm/Reverse/Remand	01/23/2018
A-1-CA-35235	State v. M Spitzer	Affirm	01/24/2018
A-1-CA-35670	CYFD v. Sally H. P. & Pierre G	Affirm	01/24/2018
A-1-CA-36551	State v. D Arenas	Affirm	01/24/2018
A-1-CA-36576	CYFD v. Camille A	Affirm	01/24/2018
A-1-CA-35984	State v. R Sotelo	Affirm	01/25/2018

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

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

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From the Clerk of the New Mexico Supreme Court

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
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Effective February 7, 2018

PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:			Civil Forms		
		Comment Deadline			
10-166	Public inspection and sealing of court records	02/09/2018	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
RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2017 NMRA:			Domestic Relations Forms		
		Effective Date			
Rules of Civil Procedure for the District Courts			4A-200	Domestic relations forms; instructions for stage two (2) forms	12/31/2017
1-015	Amended and supplemental pleadings	12/31/2017	4A-201	Temporary domestic order	12/31/2017
1-017	Parties plaintiff and defendant; capacity	12/31/2017	4A-209	Motion to enforce order	12/31/2017
1-053.1	Domestic violence special commissioners; duties	12/31/2017	4A-210	Withdrawn	12/31/2017
1-053.2	Domestic relations hearing officers; duties	12/31/2017	4A-321	Motion to modify final order	12/31/2017
1-053.3	Guardians ad litem; domestic relations appointments	12/31/2017	4A-504	Order for service of process by publication in a newspaper	12/31/2017
1-079	Public inspection and sealing of court records	03/31/2017	Rules of Criminal Procedure for the District Courts		
1-088	Designation of judge	12/31/2017	5-105	Designation of judge	12/31/2017
1-105	Notice to statutory beneficiaries in wrongful death cases	12/31/2017	5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
1-121	Temporary domestic orders	12/31/2017	5-123	Public inspection and sealing of court records	03/31/2017
1-125	Domestic Relations Mediation Act programs	12/31/2017	5-204	Amendment or dismissal of complaint, information and Indictment	07/01/2017
1-129	Proceedings under the Family Violence Protection Act	12/31/2017	5-211	Search warrants	12/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017	5-302	Preliminary examination	12/31/2017
Rules of Civil Procedure for the Magistrate Courts			5-401	Pretrial release	07/01/2017
2-105	Assignment and designation of judges	12/31/2017	5-401.1	Property bond; unpaid surety	07/01/2017
2-112	Public inspection and sealing of court records	03/31/2017	5-401.2	Surety bonds; justification of compensated sureties	07/01/2017
2-301	Pleadings allowed; signing of pleadings, motions, and other papers; sanctions	12/31/2017	5-402	Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
Rules of Civil Procedure for the Metropolitan Courts			5-403	Revocation or modification of release orders	07/01/2017
3-105	Assignment and designation of judges	12/31/2017	5-405	Appeal from orders regarding release or detention	07/01/2017
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			

Rule-Making Activity

<http://nmsupremecourt.nmcourts.gov>

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	12-313	Mediation	12/31/2017
9-513	Withdrawn	12/31/2017	12-314	Public inspection and sealing of court records	03/31/2017
9-513A	Juror summons	12/31/2017	12-502	Certiorari from the Supreme Court to the Court of Appeals	12/31/2017
9-513B	Juror qualification	12/31/2017	Uniform Jury Instructions – Civil		
9-513C	Juror questionnaire	12/31/2017	13-24 Appx 1	Part A: Sample fact pattern and jury instructions for malpractice of attorney in handling divorce case	12/31/2017
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017	13-2401	Legal malpractice; elements	12/31/2017
9-701	Petition for writ of habeas corpus	12/31/2017	13-2402	Legal malpractice; attorney-client relationship	12/31/2017
9-702	Petition for writ of certiorari to the district court from denial of habeas corpus	12/31/2017	13-2403	Legal malpractice; negligence and standard of care	12/31/2017
9-809	Order of transfer to children's court	12/31/2017	13-2404	Legal malpractice; breach of fiduciary duty	12/31/2017
9-810	Motion to restore right to possess or receive a firearm or ammunition	12/31/2017	13-2405	Duty of confidentiality; definition	12/31/2017
Children's Court Rules and Forms			13-2406	Duty of loyalty; definition	12/31/2017
10-161	Designation of children's court judge	12/31/2017	13-2407	Legal malpractice; attorney duty to warn	12/31/2017
10-166	Public inspection and sealing of court records	03/31/2017	13-2408	Legal malpractice; duty to third-party intended - No instruction drafted	12/31/2017
10-166	Public inspection and sealing of court records	12/31/2017	13-2409	Legal malpractice; duty to intended beneficiaries; wrongful death	12/31/2017
10-166	Public inspection and sealing of court records	01/15/2018*	13-2410	Legal malpractice; expert testimony	12/31/2017
10-169	Criminal contempt	12/31/2017	13-2411	Rules of Professional Conduct	12/31/2017
10-325	Notice of child's advisement of right to attend hearing	12/31/2017	13-2412	Legal malpractice; attorney error in judgment	12/31/2017
10-325.1	Guardian ad litem notice of whether child will attend hearing	12/31/2017	13-2413	Legal malpractice; litigation not proof of malpractice	12/31/2017
10-570.1	Notice of guardian ad litem regarding child's attendance at hearing	12/31/2017	13-2414	Legal malpractice; measure of damages; general instruction	12/31/2017
10-611	Suggested questions for assessing qualifications of proposed court interpreter	12/31/2017	13-2415	Legal malpractice; collectability – No instruction drafted	12/31/2017
10-612	Request for court interpreter	12/31/2017	Uniform Jury Instructions – Criminal		
10-613	Cancellation of court interpreter	12/31/2017	14-240	Withdrawn	12/31/2017
10-614	Notice of non-availability of certified court interpreter or justice system interpreter	12/31/2017	14-240B	Homicide by vehicle; driving under the influence; essential elements	12/31/2017
Rules of Appellate Procedure			14-240C	Homicide by vehicle; reckless driving; essential elements	12/31/2017
12-202	Appeal as of right; how taken	12/31/2017	14-240D	Great bodily injury by vehicle; essential elements	12/31/2017
12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017	14-251	Homicide; "proximate cause"; defined	12/31/2017
12-205	Release pending appeal in criminal matters	07/01/2017	14-1633	Possession of burglary tools; essential elements	12/31/2017
12-210	Calendar assignments for direct appeals	12/31/2017	14-2820	Aiding or abetting; accessory to crime of attempt	12/31/2017
12-307.2	Electronic service and filing of papers	07/01/2017	14-2821	Aiding or abetting; accessory to felony murder	12/31/2017
12-307.2	Electronic service and filing of papers	08/21/2017			

* The 2018 amendment to Rule 10-166 suspends and republishes for comment the amendments approved by the Court effective December 31, 2017.

14-2822	Aiding or abetting; accessory to crime other than attempt and felony murder	12/31/2017	16-701	Communications concerning a lawyer's services	12/31/2017
14-4201	Money laundering; financial transaction to conceal or disguise property, OR to avoid reporting requirement; essential elements	12/31/2017	16-803	Reporting professional misconduct	12/31/2017
14-4202	Money laundering; financial transaction to further or commit another specified unlawful activity; essential elements	12/31/2017	Rules Governing Discipline		
14-4203	Money laundering; transporting instruments to conceal or disguise OR to avoid reporting requirement; essential elements	12/31/2017	17-202	Registration of attorneys	07/01/2017
14-4204	Money laundering; making property available to another by financial transaction OR transporting; essential elements	12/31/2017	17-202	Registration of attorneys	12/31/2017
14-4205	Money laundering; definitions	12/31/2017	17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service	07/01/2017
14-5130	Duress; nonhomicide crimes	12/31/2017	Rules for Minimum Continuing Legal Education		
Rules Governing Admission to the Bar			18-203	Accreditation; course approval; provider reporting	09/11/2017
15-103	Qualifications	12/31/2017	Code of Judicial Conduct		
15-104	Application	08/04/2017	21-004	Application	12/31/2017
15-105	Application fees	08/04/2017	Supreme Court General Rules		
15-301.1	Public employee limited license	08/01/2017	23-106	Supreme Court rules committees	12/31/2017
15-301.2	Legal services provider limited law license	08/01/2017	23-106.1	Supreme Court rule-making procedures	12/31/2017
Rules of Professional Conduct			Rules Governing the New Mexico Bar		
16-100	Terminology	12/31/2017	24-110	"Bridge the Gap: Transitioning into the Profession" program	12/31/2017
16-101	Competence	12/31/2017	Rules Governing Review of Judicial Standards Commission Proceedings		
16-102	Scope of representation and allocation of authority between client and lawyer	08/01/2017	27-104	Filing and service	07/01/2017
16-106	Confidentiality of information	12/31/2017	Local Rules for the Second Judicial District Court		
16-108	Conflict of interest; current clients; specific rules	12/31/2017	LR2-308	Case management pilot program for criminal cases	01/15/2018
16-304	Fairness to opposing party and counsel	12/31/2017	LR2-308	Case management pilot program for criminal cases	01/15/2018*
16-305	Impartiality and decorum of the tribunal	12/31/2017	*The Court approved amendments to LR2-308 on December 4, 2017, to be effective January 15, 2018, and approved additional amendments on January 9, 2018, also to be effective January 15, 2018.		
16-402	Communications with persons represented by counsel	12/31/2017	Local Rules for the Thirteenth Judicial District Court		
16-403	Communications with unrepresented persons	12/31/2017	LR13-112	Courthouse security	12/31/2017

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

Certiorari Granted, November 13, 2017, No. S-1-SC-36669

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-090

Nos. A-1-CA-34190, A-1-CA-34191,
and A-1-CA-34192 (consolidated) (filed August 24, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

MILLARD DOYLE YANCEY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY

MARK TERRENCE SANCHEZ, District Judge

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BENNETT J. BAUR
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for Appellant

Opinion

Michael E. Vigil, Judge

{1} This case requires us to determine what happens when a defendant enters into a plea agreement with the State but does not actually plead guilty. We conclude that in the absence of an express guilty plea on the record, a judgment and sentence that is entered pursuant to the plea agreement is void, and that it must be vacated.

I. BACKGROUND

{2} Three separate criminal complaints were filed against Defendant making the following allegations. Defendant was the bookkeeper for High Plains Refrigeration, Inc. and Duncan Farms, and paid the monthly payroll taxes to the Internal Revenue Service for both businesses. Representing that it would facilitate payment of the taxes, Defendant asked the businesses to make the checks payable to his bookkeeping firm. However, instead of paying the taxes, Defendant kept the money. Defendant was also the treasurer of the Lovington Men's Prayer Group, which

met every week and collected donations from its members. As treasurer, Defendant was responsible for depositing the donations into the prayer group's bank account. Defendant did not deposit thousands of dollars into the account, and he also transferred funds from the prayer group account to his own account. We refer to these respectively as the High Plains, Duncan Farms, and Prayer Group cases.

{3} Defendant was arrested three separate times. Defendant was first arrested on the Duncan case. While he was still in jail, a search warrant was executed at Defendant's office. After Defendant posted a \$50,000 bond and was released in the Duncan case, Defendant was arrested a second time on the High Plains case, and Defendant was released after he posted an additional \$100,000 bond. Defendant was arrested a third time, on the Prayer Group case, and he was released after posting a third bond in the amount of \$20,000.

{4} Defendant's rights to preliminary hearings in the magistrate court to determine if there was probable cause to believe Defendant committed the crimes

set forth in the criminal complaints were waived when Defendant's attorney, Joy Pendleton, filed waivers in all three cases on the same day. Defendant thereby agreed that the State could proceed with the filing of a criminal information in the district court, and Defendant was bound over to the district court for trial.

The Charges

{5} In the district court a criminal information was filed charging Defendant with fraud over \$20,000, embezzlement over \$20,000, and racketeering in the Duncan case, all of which are second degree felonies. Identical charges were filed in a separate criminal information in the High Plains case, and in the Prayer Group case, a third criminal information was filed charging Defendant with fraud over \$2,500 and embezzlement over \$2,500, both of which are third degree felonies. On Pendleton's advice, Defendant waived arraignment and entered a not guilty plea in all three cases.

The Plea Agreements

{6} Defendant made a separate plea agreement in each case with a second attorney, Jon Fredlund. In the High Plains case, Defendant agreed to plead guilty to two second degree felonies: fraud over \$20,000, and embezzlement over \$20,000, as charged in Counts 1 and 2 of the criminal information, with no agreement as to the sentence, and the State agreed to dismiss the racketeering count charged in Count 3. An identical agreement was made with respect to the charges contained in the criminal information in the Duncan case. In the Prayer Group case, Defendant agreed to plead guilty to the two third degree felonies charged in that criminal information: fraud over \$2,500, and embezzlement over \$2,500. Defendant's exposure for pleading guilty to four second degree felonies and two third degree felonies was significant. The basic sentence for a second degree felony is nine years, and a fine of \$10,000, followed by two years of parole, and the basic sentence for a third degree felony is three years and a fine of \$5,000, followed by two years of parole. In addition, in all three proposed plea agreements, Defendant agreed "to make restitution on all charges whether or not dismissed or not filed."

The Plea Hearing

{7} A plea hearing was set for all three cases at the same time. Fredlund presented the proposed plea agreements to the district court, and after the district court administered the oath to Defendant

and began the plea colloquy, it noticed that Defendant had not signed the plea agreements. Fredlund asked if the district court “wanted them signed before [it] goes through everything” and the district court replied that it did. Apparently pointing to where Defendant was to sign, Fredlund told Defendant, “by signing here, you’re acknowledging that you understand the charges you’re pleading to, the range of sentencing, the maximum sentence, and the various constitutional rights that you’re giving up by entering the plea.” After less than a minute of silence the signed plea agreements were handed back to the district court, and the colloquy was restarted. {8} In the colloquy the district court did not explain the elements of the offenses to Defendant. Referring to the proposed plea agreement in the High Plains case, the district court only asked Defendant, “Do you understand the allegations in the criminal information?” and Defendant answered, “Yes sir.” The district court then told Defendant the range of the sentences that could be imposed for the fraud and embezzlement charges in the proposed agreement. Next, the district court turned to the proposed plea agreement in the Duncan case and again asked Defendant, “Do you understand the allegations in the criminal information in that [Duncan] case?” and Defendant again answered, “Yes sir,” which was followed by an explanation of the range of sentences that could be imposed. The same pattern was followed with the proposed plea agreement in the Prayer Group case. The district court inquired, “Do you understand the charges in connection with that court case?” to which Defendant responded, “Yes sir.” The district court then told Defendant the possible range of sentences that could be imposed for the third degree felonies in that case.

{9} The district court next explained to Defendant that under the plea agreements, Defendant would be giving up important constitutional rights with respect to all three cases. These would include the right to trial by jury, the right to an attorney, including an appointed attorney if Defendant could not afford an attorney, the right to confront and cross-examine witnesses, the right to present evidence on his own behalf, including the right to compel the attendance of witnesses at a trial, and the right to remain silent, and to be presumed innocent until proven guilty beyond a reasonable doubt. The district court asked Defendant, “Is it your intention to give up all those

important rights?” and Defendant answered, “Yes sir, it is.” The district court then informed Defendant that under the proposed plea agreements, it could deviate from any sentence recommended by the State.

{10} To address whether there was a factual basis for the proposed pleas, the district court first asked counsel, “Does there exist a basis of fact, Mr. Fredlund, for believing that your client is guilty of the charges in all cases?” and he responded, “There does, your Honor.” Turning to Defendant, the district court then asked, “All right, and so, Mr. Yancey, do you acknowledge and agree that the State has some evidence to prove your guilt of all the charges in all three cases?” and Defendant answered, “Yes.”

{11} The district court asked Defendant if he understood the proposed plea agreements and consented to their terms, and Defendant said he did. The district court next asked Defendant, “Is your plea voluntary not the result of force, threats, or promises other than promises made in the plea agreements?” and Defendant answered, “Yes.” When the district court next inquired of Fredlund if it was reasonable, under the circumstances, that Defendant would plead guilty, it was disclosed that there was another promise, that the Taxation and Revenue Department also agreed that it would not pursue additional charges against Defendant. There followed a short colloquy in which it was confirmed that Defendant is a United States citizen, but the district court nevertheless asked, and Defendant acknowledged that he knew the charges were deportable offenses. The district court concluded the colloquy by announcing:

On the basis of these findings, then, I shall conclude that the Defendant has knowingly, voluntarily, and intelligently pled guilty . . . to the charges that remain in the three cases that are under consideration today. These findings will be made part of the record in this case—in each of the three cases. And so, I will approve the pleas.

The district court then signed the plea and disposition agreements, approving them. The district court asked if the parties were ready to proceed to sentencing, and was informed that there was an agreement to request a pre-sentence report. The district court ordered a pre-sentence report and the hearing was adjourned.

The Sentences

{12} Sentence was imposed in all three cases in a single hearing. The probation officer who prepared the pre-sentence report and the district attorney both recommended a sentence of twelve years. After hearing statements from the victims, family and friends of Defendant, Fredlund, and Defendant, the district court sentenced Defendant to be incarcerated for a total of twenty-one years. In the High Plains case, Defendant was sentenced to two concurrent nine year terms on the second degree felony fraud and embezzlement charges, to be followed by two years of parole. An identical sentence was imposed for the two second degree felony fraud and embezzlement charges in the Duncan case, which were to be served consecutive to the sentence in the High Plains case. Finally, Defendant was sentenced to concurrent three year terms for the two third degree felony fraud and embezzlement charges in the Prayer Group case, followed by one year of parole, to be served consecutive to the sentences in the High Plains and Duncan cases.

The Motions to Withdraw Pleas and Motion to Reconsider Sentence

{13} Defendant filed a motion to withdraw his plea in each case, asserting that the pleas were not knowing, voluntary, and intelligent. Defendant also filed a motion to reconsider the sentence in each case. The latter motions pointed out that Defendant was seventy-one years old, and in declining health. Defendant asserted that for all practical purposes, the twenty-one year sentence, which deviated from the recommendation of the probation officer and the State, amounted to a life sentence. {14} The district court denied the motions to withdraw the guilty pleas, ruling that Defendant had said he understood the factual basis and possible sentences in the plea colloquy and signed the plea agreements, which said there was no agreement on the sentence. The motion to reconsider the sentence was also denied. Amended orders denying the motions were filed in each case, and Defendant appeals.

II. ISSUE ON APPEAL

{15} Defendant argues that the district court abused its discretion by denying Defendant’s motion to withdraw his guilty pleas, because in accepting the pleas, the district court did not adequately inform Defendant of the nature of the charges to which the pleas were offered, the district court did not make a sufficient inquiry on whether there was a factual basis for the

pleas, and the district court did not inform Defendant of the maximum possible penalty resulting from the pleas. In addition, for the first time on appeal, Defendant argues that his pleas were not knowing, intelligent, and voluntary because Defendant's pleas were the result of ineffective assistance of counsel.

{16} We are, however, compelled to address a more fundamental and serious issue which was not raised. In our review of the plea hearing record on appeal, we noted a glaring omission: Defendant never was asked to, nor did he ever, expressly plead guilty in open court to any crime on the record. We therefore submitted a draft opinion to the parties, proposing to reverse the convictions and to remand all three cases to the district court with instructions to vacate the judgments and sentences. We also requested that the parties submit simultaneous briefs responding to the proposed opinion. We have received the parties' responses, and remain persuaded that our proposed disposition is correct.

{17} The issue before us is whether the district court had jurisdiction to enter judgments finding Defendant guilty and impose prison sentences when Defendant never actually entered a guilty plea to any charge in any of the cases. *See State v. Tafoya*, 2010-NMSC-019, ¶ 7, 148 N.M. 391, 237 P.3d 693 (“[A] court’s sentencing power properly is considered part of its subject matter jurisdiction.”); *State v. Trujillo*, 2007-NMSC-017, ¶ 8, 141 N.M. 451, 157 P.3d 16 (“Because a trial court does not have subject-matter jurisdiction to impose a sentence that is illegal, the legality of a sentence need not be raised in the trial court.”). Moreover, we are obligated to address jurisdictional issues on our own motion when they come to our attention. *See State v. Favela*, 2013-NMCA-102, ¶ 6, 311 P.3d 1213 (“The question of jurisdiction is a controlling consideration that must be resolved before going further in a proceeding and may even be raised by the appellate court on its own motion.” (internal quotation marks and citation omitted)), *aff’d*, 2015-NMSC-005, 343 P.3d 178; *see also Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300 (“[I]t is incumbent upon the appellate court to raise jurisdiction questions sua sponte when the Court notices them.”).

III. DISCUSSION

Standard of Review

{18} “We review jurisdictional issues de novo.” *Favela*, 2013-NMCA-102, ¶ 6.

Moreover, analysis of the jurisdictional issue before us requires us to construe applicable statutes and rules of criminal procedure, and ultimately, to determine whether Defendant’s adjudications and incarceration comply with the United States and New Mexico Constitutions. Our review of the issue presented is therefore de novo. *See State v. Rapchack*, 2011-NMCA-116, ¶ 8, 150 N.M. 716, 265 P.3d 1289 (stating that the meaning of a statute “is a question of statutory interpretation which we review de novo”); *State v. Miller*, 2008-NMCA-048, ¶ 11, 143 N.M. 777, 182 P.3d 158 (stating that in construing and determining the proper application of procedural rules adopted by our Supreme Court, “our review is de novo”); *State v. Isaac M.*, 2001-NMCA-088, ¶ 4, 131 N.M. 235, 34 P.3d 624 (stating that when we are required to “interpret constitutional and statutory provisions, our standard of review is de novo”).

Analysis

{19} New Mexico law defines a crime as “an act or omission forbidden by law and for which, upon conviction, a sentence of either death, imprisonment or a fine is authorized.” NMSA 1978, § 30-1-4 (1963).¹ A conviction is a factual finding that the defendant committed a crime—that the defendant is guilty. *See State v. Garcia*, 1983-NMCA-017, ¶ 26, 99 N.M. 466, 659 P.2d 918 (“A conviction refers to a finding of guilt and does not include the imposition of sentence.”). A finding that the defendant is guilty is determined either in a trial or by a plea. “A conviction may be entered when the defendant is found guilty of a criminal charge by verdict of the jury, upon the defendant’s confession of guilt or a plea of nolo contendere, or after trial to the court without a jury followed by a finding by the court that the defendant is guilty of the crime for which he is charged.” *Id.*; *see State v. Larranaga*, 1967-NMSC-047, ¶ 7, 77 N.M. 528, 424 P.2d 804 (approving the definition of “[c]onvicted” as “the establishing of guilt whether by [an] accused’s admission in open court by plea of guilty to the charges presented, or by a verdict or finding of a court or jury”) (quoting *State v. O’Dell*, 225 P.2d 1020, 1022 (1950); *see also Henderson v. Morgan*, 426 U.S. 637, 647-48 (1976) (“There are essentially two ways under our system of criminal justice in which the factual guilt of a defendant may be established such that he may be deprived of his liberty consistent with the Due Process Clause of the Fourteenth Amendment to the United

States Constitution. The first is by a verdict of a jury which, or a decision [of] a judge who, concludes after trial that the elements of the crime have been proved beyond a reasonable doubt. The second is by the defendant’s own solemn admission in open court that he is in fact guilty of the offense with which he is charged[.]” (White, J., concurring) (internal quotation marks and citation omitted)). In other words, a conviction requires an adjudication of guilt—that is, a factual determination made in a judicial proceeding that the defendant committed acts prohibited by the criminal law.

{20} In our adversarial system of criminal justice the full power of the government is available to the state to accuse a person of committing a crime, to convict that person, and ultimately, punish that person with a prison term. As a check on that awesome power, our constitutional democracy dictates that a conviction can only result after a trial when procedural and substantive rights secured and safeguarded by the United States and New Mexico Constitutions are strictly observed and complied with. For example, and without limitation, a person accused of committing a crime has constitutional rights to be informed of the nature and cause of the accusation; the right to plead not guilty, and to persist in that plea; to have the assistance of an attorney; to a speedy and public trial; to confront and cross-examine the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have an impartial jury decide the facts of the case; to remain silent; and to be presumed innocent until proven guilty beyond a reasonable doubt. *See U. S. Const. amends. V-VI*; N.M. Const. art. II, §§ 14-15, 18. In addition, a defendant has a right to raise all available legal defenses, and to object to the admission of evidence obtained in violation of state and federal constitutional requirements.

{21} All this changes, however, with a guilty plea. A guilty plea “is the defendant’s admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so. . . . But the plea is more than an admission of past conduct; it is the defendant’s consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge.” *Brady v. United States*, 397 U.S. 742, 748 (1970); *State v. Daniels*, 1968-NMSC-039, ¶ 6, 78 N.M.

768, 438 P.2d 512 (stating that “when a plea of guilty is made and accepted nothing remains for a jury to consider”). In addition, by pleading guilty, a defendant waives the constitutional rights that a defendant is entitled to in a criminal trial. See *Florida v. Nixon*, 543 U.S. 175, 187 (Fla. 2004). Constitutional rights which are waived include the privilege against compulsory self-incrimination, the right to confront one’s accusers, and the right to a jury trial. See *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *State v. Hodge*, 1994-NMSC-087, ¶ 14, 118 N.M. 410, 882 P.2d 1 (recognizing that a valid guilty plea “waives objections to prior defects in the proceedings and also operates as a waiver of statutory or constitutional rights”).

{22} For the foregoing reasons, it has long been a constitutional requirement that “courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.” *Kercheval v. United States*, 274 U.S. 220, 223 (1927). This means that there must be “an affirmative showing that [the guilty plea] was intelligent and voluntary[.]” and that the defendant understood the nature of the charges against him or her and the relationship of the law to the facts. *Boykin*, 395 U.S. at 242, 243 n.5. A valid guilty plea “requires the accused has been informed of the nature of the charges, acts sufficient to constitute the offense, the right to plead ‘not guilty,’ the right to a jury trial, the right to counsel, and the permissible range of sentences.” *State v. Garcia*, 1996-NMSC-013, ¶ 9, 121 N.M. 544, 915 P.2d 300 (internal quotation marks and citation omitted). Finally, because the waiver of a defendant’s constitutional rights cannot be presumed “from a silent record[.]” these requirements must affirmatively appear on the record at the time the guilty plea is made. *Boykin*, 395 U.S. at 243. A “record of other proceedings occurring either before or after the taking of the plea, such as a sentencing hearing or a hearing on a motion to withdraw the plea” is not sufficient. *State v. Martinez*, 2002-NMSC-008, ¶ 77, 132 N.M. 32, 43 P.3d 1042 (citation omitted). In summary, “there must be a showing on the record that the plea was voluntarily, knowingly, and intelligently made.” *Marquez v. Hatch*, 2009-NMSC-040, ¶ 6, 146 N.M. 556, 212 P.3d 1110.

{23} It is also a constitutional requirement that the defendant must actually admit he is guilty in open court on the record because it entails a decision of whether to

exercise or waive basic constitutional trial rights. “A defendant, this Court affirmed, has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.” *Nixon*, 543 U.S. at 187 (internal quotation marks and citation omitted). Thus, the defendant’s attorney “lacks authority to consent to a guilty plea on [the defendant’s] behalf[.]” moreover, a defendant’s tacit acquiescence in the decision to plead is insufficient to render the plea valid[.]” *Id.* at 187-88 (citations omitted).

{24} The State’s response “concedes” that “the ceremonial exchange between the district court [asking Defendant how he pleads] and Defendant [answering “guilty”] did not take place.” The State, however, contends that because Defendant: signed the plea agreement in open court; admitted that the State possessed some evidence of his guilt on all the charges; expressed his consent to the terms of the plea agreement; and acknowledged that he was voluntarily entering a plea of guilty, Defendant actually pleaded guilty, and that the “absence of a ceremonial exchange” does not render the Defendant’s convictions invalid. We reject both contentions.

{25} Our Rules of Criminal Procedure for the District Courts clearly set forth what is required *before* a guilty plea may be accepted. First, Rule 5-304(B) NMRA requires that when a plea agreement has been reached which contemplates the entry of a guilty plea, “it shall be reduced to writing substantially in the form approved by [our] Supreme Court. The [trial] court shall require the disclosure of the agreement in open court at the time the plea is offered and shall advise the defendant as required by Paragraph F of Rule 5-303 NMRA.” That was done here. However, none of the plea agreements can even be remotely construed as a guilty plea. In each case, the plea agreement only recites that Defendant “agrees to plead guilty.” We also reject the argument that Defendant pleaded guilty because he admitted that the State possessed some evidence of his guilt on all the charges; expressed his consent to the terms of the plea agreement; and acknowledged that he was voluntarily entering a plea of guilty, as required by the Rules of Criminal Procedure for the District Court *before* a guilty plea can be accepted.

{26} When a guilty plea is contemplated, Rule 5-303(F) sets forth what advice the district court must personally give to a

defendant in open court as follows:

The court *shall not accept a plea of guilty* or no contest *without first*, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands the following:

(1) the nature of the *charge to which the plea is offered*;

(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense *to which the plea is offered*, including any possible sentence enhancements;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made;

(4) that *if the defendant pleads guilty* or no contest there will not be a further trial of any kind, so that by pleading guilty or no contest the defendant waives the right to a trial;

(5) that, *if the defendant pleads guilty* or no contest, it may have an effect upon the defendant’s immigration or naturalization status, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;

(6) that, if the defendant is charged with a crime of domestic violence or a felony, *a plea of guilty* or no contest *will affect* the defendant’s constitutional right to bear arms, including shipping, receiving, possessing or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and

(7) that, *if the defendant pleads guilty* or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act.

(Emphasis added.) Another prerequisite

is ensuring that the proposed plea is voluntary: “The court *shall not accept a plea of guilty* or no contest *without first*, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement.” Rule 5-303(G) (emphasis added). Finally, the district court is required to determine that there is a factual basis for a guilty plea. See Rule 5-304(G) (“Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.”).

{27} We reject the State’s argument that compliance with the foregoing prerequisites set forth in Rules 5-303 and 5-304 results in an actual guilty plea. These prerequisites must be complied with *before* a guilty plea can be entered. A defendant is always entitled to change his mind right up to the point that he is asked to plead. In fact, Rule 5-303(F)(3) requires the district court, *before* accepting a guilty plea, to advise the defendant that he has a right to persist in a not guilty plea if it has already been made. Instances in which a defendant has changed his or her mind after entering into a guilty plea, or during the plea colloquy itself are well known. See *State v. Amanza*, 2007-NMCA-073, ¶ 2, 141 N.M. 751, 160 P.3d 932 (noting that after the parties had negotiated a plea agreement to be presented to the trial court, the defendant changed his mind); *Commonwealth v. Kidd*, No. 3477-2009, 2010 WL 2510980 (Pa. Com. Pl. 2010) (noting that after receiving a full plea colloquy the defendant said he wanted to re-evaluate his situation to withdraw his proposed guilty plea); *People v. Cocuzza*, 318 N.W.2d 465, 465 (Mich. 1982) (noting that during the plea hearing the defendant changed his mind about pleading guilty); *Banks v. United States*, 262 A.2d 110, 110-11 (D.C. 1970) (noting that during the guilty plea hearing it became apparent that the defendant did not desire to confess his guilt, and a trial date was set). The district court here attempted compliance with the first step, but omitted the second, which was for Defendant to actually state his admission of guilt in open court and plead guilty on the record. In other words, insuring that a proposed guilty plea will be voluntary and intelligent does not equate to an affirmative admission of guilt made in open court on the record.

{28} The State also argues that the “*mere* failure to comply with [the] precise ceremonial or verbal formality in respect to the arraignment and entry of plea should not amount to denial of due process for which a conviction can be set aside.” In support of its argument, the State refers us to *Crain v. United States*, 162 U.S. 625 (1896), *overruled in part by Garland v. State of Washington*, 232 U.S. 642 (1914). However, as discussed below, we conclude that the State means to rely on *Garland*, which overruled *Crain*. The State also cites to *Mayes v. United States*, 177 F.2d 505 (8th Cir. 1949); *Herold v. Haugh*, 145 N.W.2d 657 (Iowa 1966); *Parrott v. Haugh*, 158 N.W.2d 766 (Iowa 1968); and *State v. Straley*, No. 09CA4, Slip op., 2009 WL 4021379, 2009-OHIO-6170 (non-precedential), in support of its argument. We conclude these cases do not support a finding that Defendant entered a guilty plea here.

{29} In *Crain*, a jury was selected, impaneled, and sworn, and following a trial, found the defendant guilty of the offenses charged in the indictment. 162 U.S. at 632-33. The defendant’s motion to set aside the verdict on grounds that the record failed to show he was ever formally arraigned, or that he pleaded to the indictment was denied. *Id.* at 636-37. Referring to several earlier English authorities and state court cases with approval, *id.* at 637-43, the United States Supreme Court held the “prevailing rule” in felony cases to be that, “a plea to the indictment is necessary before the trial can be properly commenced, and that, unless this fact appears affirmatively from the record, the judgment cannot be sustained. Until the accused pleads to the indictment, and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try[.]” *Id.* at 643. *Crain* clearly offers no support to the State here.

{30} In *Garland*, an information filed in a Washington state court charged the defendant with larceny, to which a not guilty plea was entered. 232 U.S. at 643. A new trial was granted, and a second information was filed making the identical charge. *Id.* at 643-644. There was no arraignment or plea on the second information. *Id.* A jury again found the defendant guilty, and the defendant argued for the first time on appeal before the Washington Supreme Court that he was entitled to a new trial because he had not entered a not guilty plea to the second information. *Id.* at 644. The Washington Supreme Court rejected the defendant’s argument and affirmed the

defendant’s conviction. *Id.* In the United States Supreme Court the defendant argued that *Cain* required the conviction to be set aside. *Garland*, 232 U.S. at 645. The Supreme Court noted that the defendant had received the due process he was entitled to in that he had sufficient notice of the charge and an adequate opportunity to defend, and “it cannot for a moment be maintained that the want of a formal arraignment deprived the [defendant] of any substantial right, or in any wise changed the course of trial to his disadvantage.” *Id.* Under the circumstances, the Court said, the defendant was attempting “to gain a new trial for want of compliance with what in this case could have been no more than a mere formality.” *Id.* The Court further observed that *Crain* had relied on reasoning and authorities that were no longer required in the administration of criminal justice, and it overruled *Crain*. *Garland*, 232 U.S. at 646-47.

{31} *Mayes* is a case in which the defendant argued error in denying his motions to vacate judgments and sentences of imprisonment, contending that he never pleaded guilty. 177 F.2d at 506. The record showed that the defendant, his attorney, and the prosecutor stood before the trial court, and the prosecutor announced, “we would like to dispose of these cases.” *Id.* (internal quotation marks omitted). The trial court thereupon called upon an F.B.I. agent for his report concerning his investigations of the defendant. *Id.* at 506-507. The agent “stated specifically and in detail” what the defendant was charged with, and when the agent finished, the defendant’s attorney told the court, “I have talked with this defendant and he wishes to enter a plea of guilty.” *Id.* at 507 (internal quotation marks omitted). The trial court asked the defendant if he wanted to make a statement, and the defendant responded, “No, Sir.” *Id.* (internal quotation marks omitted). The trial court then said, “You have heard the charges. They are correct?” and the defendant answered, “Yes, Sir.” *Id.* (internal quotation marks omitted). The court held that the defendant’s “yes” response when asked if the charges were correct, “had no fair meaning other than that he admitted the charges were true.” *Id.* The court added, “The admission of guilt when called upon by the court to answer to the charges is all that a plea of guilty on arraignment amounts to, and when [the defendant] was called upon and he made his answer his plea was complete.” *Id.* Referring to *Garland*’s overruling of *Crain*, the court declared, “it can no longer be said

that mere failure to comply with precise ceremonial or verbal formality in respect to arraignment and entry of a plea is a denial of due process for which conviction must be set aside.” *Mayes*, 177 F.2d at 507.

{32} *Herold* was a habeas corpus case. Denying habeas corpus relief, the lower court found that when the judge in the criminal case asked the defendant if he wanted to change his plea from not guilty to guilty, his attorney answered that the defendant wished to enter a guilty plea, and the judge asked the defendant two or three times if that was in fact the plea he wished to make, to which the defendant replied in the affirmative. 145 N.W.2d at 673. Iowa’s statute directed that a guilty plea could only be made in open court by the defendant himself in the presence of counsel, substantially in the following form: “The defendant pleads that he is guilty of the offense charged in the indictment[.]” *Id.* at 672 (internal quotation marks and citation omitted). The Iowa Supreme Court concluded that the departure from the statutory procedure did not amount to a denial of due process which entitled the defendant to habeas corpus relief. *Id.* at 672-73. The court first followed *Mayes* in concluding that departure from the strict statutory procedure did not automatically result in a denial of due process. *Herold*, 145 N.W.2d at 673. In addition, the court followed cases which allow counsel to plead guilty on behalf of a defendant who was present, understood what was being done, and acquiesced in the plea. *Id.* at 673-74. These authorities are at the very least questionable today. See *Nixon*, 543 U.S. at 187-88 (“[C]ounsel lacks authority to consent to a guilty plea on a client’s behalf[;] moreover, a defendant’s tacit acquiescence in the decision to plead is insufficient to render the plea valid[.]” (citations omitted)).

{33} The Iowa Supreme Court again construed its statute in *Parrott*, another case in which a defendant was denied habeas corpus relief. The defendant testified that he voluntarily signed a written plea of guilty in the presence of his counsel, that “he read the plea and understood he waived his rights to a ‘regular trial.’ ” 158 N.W.2d at 770. The defendant later appeared in open court before the judge in the criminal case with his attorney, “acknowledged he signed the written plea of guilty of his own free will and that he understood it.” *Id.* The Iowa Supreme Court concluded that “Such an acknowledgment in open court in the presence of his attorney is tantamount

to an open court plea as required [by the statute]” and referring to its opinion in *Herold*, the court added, “Minor deviations from statutory procedure do not amount to a denial of due process entitling [the defendant] to relief in a collateral proceeding such as habeas corpus.” *Parrott*, 158 N.W.2d at 770.

{34} Finally, the State refers us to the memorandum opinion of the Ohio Court of Appeals in *Straley*, 2009-OHIO-6170. In this case, the defendant was charged in a fourteen count indictment. *Id.* ¶ 2. In connection with a plea agreement, the defendant signed a “Plea of Guilty” which recited in part, “I withdraw my former not guilty plea and enter a plea of guilty to the following offense(s)” and the defendant pleaded guilty to eight counts of a fourteen count indictment. *Id.* ¶ 4 (internal quotation marks omitted). The defendant’s attorney also signed the “Plea of Guilty.” *Id.* (internal quotation marks omitted). At the plea and sentencing hearing at which the defendant subsequently entered oral guilty pleas, the trial court inadvertently skipped one of the counts, and the defendant argued on appeal that the trial court erred in finding him guilty on that count, contending he did not actually plead guilty to that count. *Id.* ¶¶ 9-10. The appellate court first noted that Ohio’s rule did not require a defendant to orally plead guilty because the rule proves that “[a]ll other pleas [other than a plea of not guilty by reason of insanity] may be made orally.” *Id.* ¶ 11 (internal quotation marks and citation omitted). Furthermore, because the trial court complied with the requirements for insuring a valid guilty plea before it accepted the defendant’s written plea agreement, the court concluded that the trial court had authority to accept the defendant’s written guilty pleas and convict the defendant on all eight counts. *Id.* ¶¶ 18-21.

{35} To summarize, *Crain* and *Garland* are clearly inapplicable, as they address whether a court has jurisdiction to try a criminal case in the absence of a ‘not guilty’ plea during preliminary proceedings. *Mayes* is distinguishable to the facts before us here. In *Mayes*, the prosecutor, defense counsel, and the defendant appeared before the court stating they wanted to dispose of the cases. The charges having been described in detail by the F.B.I. agent, defense counsel stated that the defendant wished to plead guilty. The court asked the defendant, whether the charges as described were true, and the

defendant admitted that they were. Unlike the defendant in *Mayes*, Defendant was never asked to admit his guilt to any charge. Defendant was only asked if the State had “some evidence” to prove all the charges to satisfy the district court if there was a factual basis for a plea which never occurred. In *Herold*, in contrast to the case here, the defendant said he wished to make a guilty plea in response to multiple questions from the court. Finally, *Parrott* and *Straley* clearly do not assist the State here because the defendants in those cases, with the assistance of counsel, signed written guilty pleas as opposed to an agreement to plead guilty at a later time.

{36} We reject the suggestion that actually admitting guilt in open court on the record is a mere ceremonial or verbal formality. When a defendant pleads guilty, a criminal case makes a pivotal and decisive turning point, assuming an entirely new character. It is a critical moment. With full knowledge, the defendant makes a voluntary and binding choice to strip himself of his constitutional rights and defenses, and agrees to be punished as provided by law. The guilty plea is final and conclusive. For this reason the fundamental requirement is that the defendant actually make an admission of guilt in open court on the record, or there is no guilty plea. This is recognized by our Rules of Criminal Procedure for the District Courts. Rule 5-303(H) states: “A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or no contest, the record shall include, without limitation, the court’s advice to the defendant [as required by Rule 5-303(F)], the inquiry into the voluntariness of the plea including any plea agreement [as required by Rule 5-303(G)], and the inquiry into the accuracy of a guilty plea [as required by Rule 5-303(G)].” Here, a verbatim recording was made of the hearing to present the plea agreements to the district court and for the district court to conduct the colloquy required to accept Defendant’s proposed guilty pleas. However, the district court never specifically asked Defendant to plead, and he never expressly admitted his guilt to anything in open court on the record in the hearing.

{37} NMSA 1978, § 30-1-11 (1963) clearly declares:

No person indicted or charged by information or complaint of any crime shall be sentenced therefor, unless he has been legally convicted of the crime in a court

having competent jurisdiction of the cause and of the person. No person shall be convicted of a crime unless found guilty by the verdict of the jury, accepted and recorded by the court; or upon the defendant's confession of guilt or a plea of nolo contendere, accepted and recorded in open court; or after trial to the court without jury and the finding by the court that such defendant is guilty of the crime for which he is charged.

Because Defendant did not confess his guilt in open court by actually pleading guilty on the record in open court, there is no legal conviction, and the district court had no authority to order Defendant to serve the twenty-one year penitentiary sentence. The judgment and sentence filed in the High Plains, Duncan Farms, and Prayer Group cases are each void. "A trial court's power to sentence is derived exclusively from statute." *Rapchack*, 2011-NMCA-116, ¶ 8 (quoting *State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064), and "[a] sentence or portion thereof that is unauthorized by law is null and void." *State v. Pando*, 1996-NMCA-078, ¶ 14, 122 N.M. 167, 921 P.2d 1285; see *Sneed v. Cox*, 1964-NMSC-250, ¶ 8, 74 N.M. 659, 397 P.2d 308 ("We have recognized that sentences which are unauthorized by law are null and void.").

IV. CONCLUSION

{38} The convictions in each case are reversed and all three cases are remanded to the district court with instructions to vacate the judgment and sentence entered therein.

{39} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

I CONCUR:

TIMOTHY L. GARCIA, Judge
M. MONICA ZAMORA, Judge
(dissenting).

ZAMORA, Judge, (dissenting).

{40} "[A] voluntary guilty plea ordinarily constitutes a waiver of the defendant's right to appeal his conviction on other than jurisdictional grounds." *State v. Chavarria*, 2009-NMSC-020, ¶ 9, 146 N.M. 251, 208 P.3d 896 (internal quotation marks and citation omitted). In this case, it is the Majority that has introduced and developed the jurisdictional issue. Requiring Defendant to verbally state on the record "I plead guilty" is only

one consideration of many in making this determination and by itself does not create jurisdictional grounds justifying an automatic reversal of the district court's order denying Defendant's motion to withdraw his pleas. For these reasons, I respectfully dissent.

{41} It is a general rule that this Court does not consider an issue that was not raised below or raised by the parties on appeal. See *State v. Am. Fed'n of State, Cty., & Mun. Emps. Council 18*, 2012-NMCA-114, ¶ 35, 291 P.3d 600 ("[I]t would be unfair to the parties for us, sua sponte, to conceive of and articulate legal theories that never occurred to the parties and that were not raised in the proceedings below or on appeal. . . . [C]ourts risk overlooking important facts or legal considerations when they take it upon themselves to raise, argue, and decide legal questions overlooked by the lawyers who tailored the case to fit within their legal theories." (internal quotation marks and citation omitted)). Nonetheless and appropriately so, the parties were given the opportunity to be heard on the Majority's proposed opinion.

{42} Defendant, a former certified public accountant, and the State entered into separate plea agreements, in each of the three cases. There are far-reaching consequences for both the State and Defendant in entering into these plea agreements. "A plea agreement is a unique form of contract the terms of which must be interpreted, understood, and approved by the trial court." *State v. Mares*, 1994-NMSC-123, ¶ 12, 119 N.M. 48, 888 P.2d 930. The parties are free "to negotiate the terms of a plea agreement to the full extent allowed by law." *Id.* ¶ 11. As a result, both parties make concessions and gain advantages during these negotiations. See *State v. Trujillo*, 1994-NMSC-066, ¶ 14, 117 N.M. 769, 877 P.2d 575. When a defendant seeks to withdraw his plea, he is also seeking to give up any benefits he received as part of those negotiations. See *State v. Gibson*, 1981-NMCA-099, ¶ 10, 96 N.M. 742, 634 P.2d 1294 (holding that a defendant "may not be relieved of a part of his plea . . . without giving up benefits he received in the bargain"). "Upon review, [appellate courts] construe the terms of the plea agreement according to what [the d]efendant reasonably understood when he entered the plea." *State v. Fairbanks*, 2004-NMCA-005, ¶ 15, 134 N.M. 783, 82 P.3d 954 (internal quotation marks and citation omitted); accord *Mares*, 1994-NMSC-123, ¶ 12 ("In reviewing and interpreting the agreement a court should

construe the terms according to what [the defendant] reasonably understood when he entered his plea." (alteration, internal quotation marks and citation omitted)).

{43} The overriding question when considering the withdrawal of a plea is whether Defendant knowingly and voluntarily entered into a plea agreement, with negotiated terms and conditions, that he accepted. See *State v. Robbins*, 1967-NMSC-091, ¶ 19, 77 N.M. 644, 427 P.2d 10 ("[W]hen a plea of guilty is made voluntarily after proper advice of counsel and with a full understanding of the consequences, the plea is binding."). Our New Mexico Supreme Court has recognized that Rule 5-303 essentially codifies the United States Supreme Court mandate expressed in *Boykin* and followed by New Mexico courts requiring an affirmative showing on the record that the requirements for a voluntary guilty plea have been met. See *Boykin*, 395 U.S. at 242; *Garcia*, 1996-NMSC-013, ¶¶ 9-10. Thus, the underlying purpose of the rule is to ensure that a defendant's plea is both knowing and voluntary. As a component of that overriding question, the Majority has included the consideration of whether Defendant's failure to verbally plead guilty to each of the charges in all three cases negatively impacts the fundamental fairness of the proceedings against him, such that an automatic reversal of his convictions is the only relief.

{44} Our Supreme Court has held that "absent a showing of prejudice to the defendant's right to understand his guilty plea and its consequences, substantial compliance with Rule 5-303(E)² is sufficient." *Garcia*, 1996-NMSC-013, ¶ 12. "Although the court must be certain that the plea is knowing and voluntary, it is more reasonable to require substantial compliance rather than to require the trial courts to strictly adhere to a script." *Id.*

{45} Because the facts and circumstances of each case are different, it is necessary when we are considering whether there was substantial compliance with Rule 5-303, that we do so on a case-by-case basis. See *id.* (reviewing the unique facts of each case). Implicit in the case-by-case approach is the fact that there cannot be a general inflexible script for the district court to follow. See *id.* (recognizing the trial court is not required to be "bound to a strict[,] unvarying formula of words." (alteration, internal quotation marks, and citation omitted)).

{46} Under oath, Defendant confirmed to the district court that he understood the allegations in the criminal information for all three cases. *See* Rule 5-303(F)(1). Defendant also stated to the district court that he understood the possible ranges of sentences and fines for each of the charges in each of the three cases. *See* Rule 5-303(F)(2). The district court also noted that the State would dismiss Count 3, in both the High Plains case and the Duncan case. The district court informed Defendant of the constitutional rights he would be giving up by entering into a plea. *See* Rule 5-303(F)(4). Defendant agreed that it was his intention to give up those constitutional rights. *See* Rule 5-303. Defense counsel agreed that there was a factual basis to believe Defendant was guilty of the charges and Defendant agreed that the State had some evidence to prove the charges in all three cases. *See* Rule 5-304(G) (stating that a court shall make such inquiry as shall satisfy it that there is a factual basis for the plea). Defendant also stated that he understood the plea agreement and consented to its terms. *See* Rule 5-303(G). Although Defendant stated he was a United States citizen, the district court still counseled him on the possible immigration consequences. Rule 5-303(F)(5). The district court specifically asked Defendant if his plea was voluntary and not the result of force, threats, or promises. Defendant stated it was voluntary. *See* Rule 5-303(G). The State informed the district court of an agreement with the Taxation and Revenue Department, Fraud Division (the Department), that if Defendant pled guilty in the three cases, the Department

would not pursue additional charges that are unrelated to the cases. The State also informed the district court that it would let the Department know that Defendant had entered into the plea. Defendant requested a pre-sentence report and the State agreed. Defendant affirmed that he understood that the district court may or may not impose the sentence recommended. *See* Rule 5-304(B) (stating that such recommendations are not binding on the court). Before adjourning, the district court asked the parties if there was anything further and neither party had any further business before the district court.

{47} Each plea agreement begins with “The State of New Mexico and . . . [D]efendant hereby agree to the following disposition of this case[.]” Each plea agreement specifically states “[D]efendant agrees to plead guilty to. . .” and lists those offenses to which he is agreeing to plead guilty. Each of the plea agreements also specifically state, “There are no agreements as to sentencing.” In addition to his attorney informing Defendant that by signing the plea agreements Defendant is acknowledging that he understands the charges to which he is pleading guilty to, and just above Defendant’s signature it states that “I have read and understand the above.” A verbatim record was made of the district court’s advice to Defendant, its inquiry into the voluntariness of Defendant’s pleas, including the plea agreement and its inquiry into the accuracy of the guilty plea. *See* Rule 5-303(H).

{48} The Majority is reading more into Rule 5-303, Rule 5-304, and Section 30-1-11 than what is there. Contrary to the

Majority’s assertion, there is no authority to support a mandatory requirement that a defendant verbally plead guilty on the record before the district court could accept the plea. Majority Op. ¶¶ 36-37. *See Daniels*, 1968-NMSC-039, ¶ 13 (stating that “[a d]efendant cannot be heard to complain since *by his plea he confessed* the charge contained in the information.” (emphasis added)). Nowhere in either Rule 5-303 or Rule 5-304 is there a suggestion much less a requirement that a defendant must verbally plead guilty. *Cf.* Ohio Trial Practice § 4:23 (2017 ed.) (stating that “[a] defendant may orally plead guilty”). Rule 5-303(H) only requires that a verbatim record include “the [district] court’s advice to the defendant, the inquiry into the voluntariness of the plea, including any plea agreement, and the inquiry into the accuracy of the guilty plea.” This requirement was satisfied.

{49} Defendant’s appeal should have been resolved by addressing his five appellate issues and determining whether the record supports the conclusion that not only had there been substantial compliance with Rule 5-303, but that Defendant reasonably understood the terms and conditions of the plea agreement, thereby knowingly and voluntarily entering into the plea agreement.

{50} I respectfully dissent from the Majority Opinion of the Court. The appellate issues as raised by Defendant and briefed by both parties should have been resolved by this Court.

M. MONICA ZAMORA, Judge

¹New Mexico no longer has a death penalty. 2009 N.M. Laws, ch. 11, §§ 1 to 7 (abolishing the death penalty for all crimes committed on or after July 1, 2009).

²Rule 5-303 was amended effective December 10, 2007, whereby subparagraph E was re-lettered as Subparagraph F and adding additional matters within that subparagraph for the district court to review with a defendant prior to accepting their plea of guilty or no contest.

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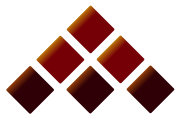
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Paralegal with over 20 years experience available for contract work. Specializing in civil litigation cases, including medical malpractice, involving large record productions which would benefit from integrated approach to data analysis and synthesis. Resume and references available upon request. Jan Gribble at Contract-paralegal@gmx.com

Office Space

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.

1121 4th Street NW Albuquerque, NM 87102

Near downtown courthouse. Up to five offices are available with access to two conference rooms, a large waiting area, and plenty of parking (short term-Trial Launch Pad or long term). Daily, weekly, and monthly rent available. Included in the rent are utilities (except phones), internet, and janitorial service. You will have access to legal research tools and a receptionist to greet clients. Call 505-288-3500.

Office for Lease:

804 Sq. Ft. ground floor, excellent NE Heights location with close proximity to NE Heights neighborhoods including Tanoan and High Desert. Walking distance to grocery stores, banks, restaurants, pharmacy, bus service and a fitness center. Please call Kelly today at (505) 299-8383 to schedule a viewing and for more information.

Office Building For Sale

Build our own net worth and not your Landlord's. Office building for sale. Two stories, 6,000 sq. ft. Lots of parking on-site. Nine attorney offices. Open secretarial spaces. Reception area. Large library. Two smaller conference rooms. Kitchen. Plus 500 sq. ft. storage building. Other amenities. \$750,000. Owner financing available. Call George at 505-243-6721 or 505-980-8320.

Peaceful Oasis, Convenient to Courthouses

Excellent office space for lease. Southwest style. Extra-Sized professional office (20'x 16'), part of private law office suite. Complete with: conference room, waiting area, break room, and restrooms. Ample parking for clients. Quick freeway access. Close to courthouses. Quiet setting with courtyard entrance and mature landscaping. Viga ceilings and adobe walls. Two huge windows. Only \$750/month. Street sign space also available. Contact Carol or Helena at (505) 246-1669.

Miscellaneous

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

Want To Purchase

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

BAR BULLETIN

SUBMISSION DEADLINES

All advertising must be submitted via e-mail by 4 p.m. Wednesday, two weeks prior to publication (*Bulletin* publishes every Wednesday). Advertising will be accepted for publication in the *Bar Bulletin* in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.**

For more advertising information, contact: Marcia C. Ulibarri at 505-797-6058 or email mulibarri@nmbar.org



132ND BIRTHDAY *Celebration*

You're Invited!

The State Bar is proud of the tremendous dedication and service that our membership has given to the legal profession and the public. We hope you will join us for this important celebration.

**State Bar President Wesley O. Pool and
Chief Justice Judith K. Nakamura**

will honor attorneys celebrating 25
and 50 years of service.

Distinguished guests from the New Mexico Supreme Court, New Mexico Court of Appeals and the UNM School of Law have been invited to attend. Participants in Entrepreneurs in Community Lawyering, the State Bar's legal incubator program, will be in attendance to meet members of the State Bar, share the developments of ECL and discuss the launch of their solo practices.

Friday, Feb. 23

Ceremony at 4 p.m. • Reception to follow

State Bar Center, 5121 Masthead NE, Albuquerque



Visit www.nmbar.org/BirthdayParty to R.S.V.P.
Direct questions to Breanna Henley at bhenley@nmbar.org



BUTT THORNTON & BAEHR PC

ATTORNEYS AT LAW

Established 1959

BUTT THORNTON & BAEHR, PC IS PLEASED TO ANNOUNCE:



Agnes Fuentevilla Padilla has been elected President and Managing Partner of the firm.

Brett Eaton is now a Shareholder in the firm.



BUTT THORNTON & BAEHR, PC ALSO WELCOMES
NEW ASSOCIATE ATTORNEYS SARAH SHORE AND MICHELLE TIMM



Sarah Shore attended the New York University School of Law where she obtained her juris doctorate in 2009. Sarah began her legal career serving as a law clerk for the Honorable Robert Kirsch of the Superior Court of Union County, New Jersey, and then for the Honorable Stanley R. Chesler of the United States District Court for the District of New Jersey. Sarah was most recently a litigator for New York's City Administration for Children's Services and served as Director of the Board of Restore NYC, a nonprofit organization.



Michelle Timm attended the University of New Mexico School of Law where she obtained her juris doctorate in 2017. Prior to joining BTB, Michelle gained valuable experience as a legal assistant working in the areas of personal injury, worker's compensation, and domestic relations. While attending law school, Michelle worked as a law clerk for BTB.

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