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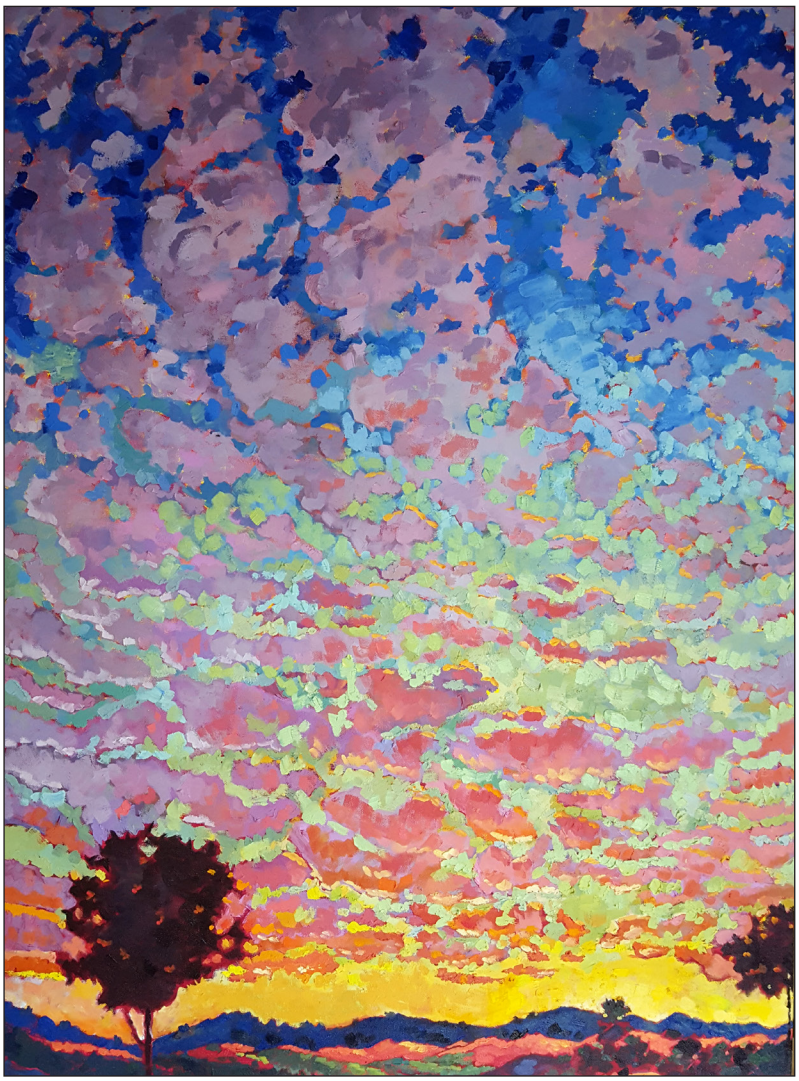
Bar Bulletin

May 16, 2018 • Volume 57, No. 20



The Autumn Sky, by Bhavna Misra (see page 3) https://bhavnamisra.com/

Inside This Issue

New Service for Members!

EMPLOYEE ASSISTANCE PROGRAM

Get help and support for yourself,
your family and your employees.
*New **free** service offered by NMJLAP.*

Services include up to four **FREE** counseling sessions/issue/year for ANY mental health, addiction, relationship conflict, anxiety and/or depression issue. Counseling sessions are with a professionally licensed therapist. Other **FREE** services include management consultation, stress management education, critical incident stress debriefing, video counseling, and 24X7 call center. Providers are located throughout the state.

To access this service call 855-231-7737 and identify with NMJLAP.
All calls are **CONFIDENTIAL.**

Brought to you by the New Mexico Judges and Lawyers Assistance Program
www.nmbar.org/JLAP

STATE BAR of NEW MEXICO
JUDGES AND LAWYERS ASSISTANCE PROGRAM

The Solutions Group

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

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About Cover Image and Artist: Bhavna Misra is a San Francisco based fine artist. She observes life closely and interprets it into her drawings and paintings in her signature realistic-infused-with-expressionistic, full-color-palette style that incorporates bold strokes and rich marks to convey rhythm and emotion in her work. The colors as seen though the planar positioning, relative interplay, and curiosity of unseen are guided to delight and hold the interest to explore more. She likes to surround herself with nature, beauty, and positivity that brings out the motivation to create harmonious, colorful compositions that aim to delight and inspire the sense of calm, cheer, and joy in the viewer. About eight years ago, Misra quit her 9-to-5 job and returned to doing art full time. She now regularly displays her work at various exhibitions and shows. She works as an art contractor for the Alameda County Library System and owns Bhavna Misra Art Studio and Gallery.

Notices

Court News

New Mexico Supreme Court Judicial Standards Commission

Seeking Commentary on Proposed Amended Rules

The Commission has completed a comprehensive review and revision of its procedural rules. Commentary on the proposed amendments is requested from the bench, bar and public. The deadline for public commentary has been extended to May 18. To be fully considered by the Commission, comments must be received by that date and may be sent either by email to rules@nmjsc.org or by mail to Judicial Standards Commission, PO Box 27248, Albuquerque, NM 87125-7248. To download a copy of the proposed amended rules, visit nmjsc.org/recent-news/.

Second Judicial District Court

Notice of Exhibit Destruction

Pursuant to 1.21.2.617 FRRDS (Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy criminal exhibits associated with the following criminal case numbers filed with the Court. Cases on appeal are excluded.

CR-1988-45096; CR-1989-00034; CR-1989-00238; CR-1989-00264; CR-1989-00920; CR-1991-00634; CR-1991-01605; CR-1991-01818; CR-1991-02015; CR-1991-02346; CR-1991-02350; CR-1992-00478; CR-1992-00791; CR-1992-01491; CR-1992-01565; CR-1992-01157; CR-1992-01175; CR-1992-01643; CR-1992-01752; CR-1993-00401; CR-1993-00760; CR-1993-01271; CR-1993-02236; CR-1993-02269; CR-1993-02390; CR-1994-00099; CR-1994-00622; CR-1994-01161; CR-1994-01187; CR-1994-03093; CR-1995-00017; CR-1995-00498; CR-1995-00840; CR-1995-01138; CR-1995-01796; CR-1995-02615; CR-1995-03720; CR-1996-00074; CR-1996-01197; CR-1996-01455; CR-1996-03599; CR-1996-03600; CR-1997-00865; CR-1997-01077; CR-1997-01234; CR-1997-01357; CR-1997-01413; CR-1997-02497; CR-1997-02755; CR-1997-03912; CR-1998-01087; CR-1998-01385; CR-1998-02541; CR-1998-03601; CR-1998-03687; CR-1998-03688; CR-1998-03729; CR-1999-00313; CR-1999-01451; CR-1999-03824; CR-2000-00050; CR-2000-00675; CR-2000-00713; CR-2000-00976; CR-2000-01061; CR-2000-02360; CR-2000-02361; CR-2000-03357; CR-2000-03770; CR-2000-03771; CR-2000-03772; CR-2000-03773; CR-2000-04899; CR-2001-00727; CR-2001-02141; CR-2001-02212; CR-2001-02433; CR-2001-02549; CR-2002-00529; CR-2002-01049; CR-2002-01505; CR-2002-02668; CR-2002-03247; CR-2002-03691; CR-2003-00314; CR-2003-01216; CR-2003-02167; CR-2004-00112; CR-2004-04836; LR-2005-00006; CR-2005-04915; CR-2005-04916; CR-2006-02355; CR-2006-03370; CR-2006-04515; CR-2006-04975; CR-2006-05242; CR-2007-05057; CR-2007-05393; CR-2008-01851; CR-2008-05940; CR-2008-06296

Counsel for parties are advised that exhibits may be retrieved beginning May 6-July 6, Should you have questions regarding cases with exhibits, please call to verify exhibit information with the Special Services Division, at 505-841-6717, from 8 a.m.-4:30p.m., Monday-Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

New Mexico Judicial Compensation Committee Notice of Public Meeting

The Judicial Compensation Committee will meet June 12, from 9:30 a.m.-12:30 p.m., in Room 208 of the New Mexico Supreme Court, 237 Don Gaspar, Santa Fe, to discuss fiscal year 2020 recommendations for compensation for judges of the magistrate, metropolitan and district courts, the Court of Appeals, and justices of the Supreme Court. The Commission will thereafter provide its judicial compensation report and recommendation for FY2020 compensation to the legislature prior to the 2019 session. The meeting is open to the public. For an agenda or more information, call Jonni Lu Pool, Administrative Office of the Courts, 505-476-1000.

Professionalism Tip

With respect to opposing parties and their counsel:

I will be courteous and civil, both in oral and in written communications.

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

Designation of the Acting Clerk of the U.S. District Court for the District of New Mexico

Mitchell R. Elfers has been designated acting clerk of the U.S. District Court for the District of New Mexico, effective April 25, and will continue in that capacity until the vacancy is filled or otherwise ordered by the Court. In this capacity, Mitchell R. Elfers will perform all duties and will assume the responsibilities of the clerk of court.

State Bar News

Attorney Support Groups

- May 21, 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#.
- June 4, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- June 11, 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#.

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

Appellate Practice Section

Luncheon with Judge Gallegos

Join the Appellate Practice Section for a brown bag lunch at noon, May 18, at the State Bar Center with guest Judge Daniel Gallegos of the New Mexico Court of Appeals. The lunch is informal and is intended to create an opportunity for appellate practitioners to learn more about the work of the Court. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. to Carmela Starace at cstarace@icloud.com.

Board of Bar Commissioners

Risk Management Advisory Board

The president of the State Bar of New Mexico is required to appoint one attorney to the Risk Management Advisory Board for a four-year term. The appointee is requested to attend the Risk Management Advisory Board meetings. A summary of the duties of the advisory board, pursuant to §15-7-5 NMSA 1978, are to review: specifications for all insurance policies to be purchased by the risk management division; professional service and consulting contracts or agreements to be entered into by the division; insurance companies and agents to submit proposals when insurance is to be purchased by negotiation; rules and regulations to be promulgated by the division; certificates of coverage to be issued by the division; and investments made by the division. Members who want to serve on the board should send a letter of interest and brief résumé by June 1 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Committee on Women and the Legal Profession

Nominations Open for 2017 Justice Pamela Minzner Award

The Committee on Women seeks nominations of New Mexico attorneys who have distinguished himself or herself during 2017 by providing legal assistance to women who are underrepresented or under deserved, or by advocating for causes that will ultimately benefit and/or further the rights of women. If you know of an attorney who deserves to be added to the award's distinguished list of honorees, submit 1-3 nomination letters describing the work and accomplishments of the nominee that merit recognition to Quiana Salazar-King at Salazar-king@law.unm.edu by June 29. The award ceremony will be held on Aug. 30 at the Albuquerque Country Club. This award is named for Justice Pamela B. Minzner, whose work in the legal profession furthered the causes and rights of women throughout society. Justice Minzner was the first female chief justice of the New Mexico Supreme Court and is remembered for her integrity, strong principals, and compassion. Justice Minzner was a great champion of the Committee and its activities.

Rocky Mountain Mineral Law Foundation Board

The president of the State Bar is required to appoint one attorney to the Rocky Mountain Mineral Law Foundation Board for a three-year term. The appointee is expected to attend the Annual Trustees Meeting and the Annual Institute, make annual reports to the appropriate officers of their respective organizations, actively assist the Foundation on its programs and publications and promote the programs, publications and objectives of the Foundation. Members who want to serve on the board should send a letter of interest and brief résumé by July 2 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

2018 Annual Meeting

Resolutions and Motions

Resolutions and motions will be heard at 1 p.m., Aug. 9, at the opening of the State Bar of New Mexico 2018 Annual Meeting at the Hyatt Regency Tamaya Resort & Spa, Santa Ana Pueblo. To be presented for consideration, resolutions or motions must be submitted in writing by July 9 to Executive Director Richard Spinello, PO Box 92860, Albuquerque, NM 87199; fax to 505-828-3765; or email rspinello@nmbar.org.

Young Lawyers Division

Volunteers Needed for Veterans Civil Legal Clinic

The YLD seeks volunteers to staff the Veterans Civil Legal Clinic from 8:30-10:30 a.m. on June 12, at the N.M. Veteran's Memorial located at 1100 Louisiana Blvd SE in Albuquerque. Volunteers should arrive at 8 a.m. for orientation and complimentary breakfast. The clinics offers veterans a broad range of veteran-specific and non-veteran specific legal services, including family law, consumer rights, worker's comp, bankruptcy, driver's license restoration, landlord/tenant, labor/employment and immigration. To volunteer, visit https://form.jotform.com/71766385703969.

UNM School of Law

Law Library Hours

Through May 26

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.

Notice of Closure

Due to a planned UNM data center outage, the UNM Law Library will be closed to the public Saturday, May 26-28. For more information on Law Library services and hours, please visit our website, lawlibrary.unm.edu or call 505-277-6236.

UNM Law Scholarship Classic presented by U.S. Eagle

Join the UNMSOL and other members of the law school community at 8 a.m., June 8, at the UNM Championship Golf Course to play a part in sustaining over $50,000 in life-changing scholarships for law students. Don't delay! The tournament sells out every year. Register at https://goto.unm.edu/golf.

Utton Center

2018 UNM Water Conference

2018 UNM Water Confernce presents "New Mexico Water: What Our Next Leaders Need to Know" on Thursday, May 17, at 7:30 a.m.-4:30 p.m. This event is being hosted by the Utton Center and the UNM Center for Water & The Environment. Registration will include lunch and parking. Late registration (after April 29): General $50, full time students $20. See program and register

online at: http://cwe.unm.edu/outreach-and-education/2018-water-conference.html. This program has been approved by the CLE for 5.5 G CLE credits. For more information, contact Yolanda at 505-277-3222.

Other Bars

New Mexico Defense Lawyers Association

Save the Date - Women in the Courtroom VII CLE Seminar

The New Mexico Defense Lawyers Association proudly presents Part VII of "Women in the Courtroom," a dynamic seminar designed for New Mexico lawyers. Join us Aug. 17, at the Jewish Community Center of Greater Albuquerque for this year's full-day CLE seminar. Registration will be available online at nmdla.org in July. For more information contact nmdefense@nmdla.org.

New Mexico Criminal Defense Lawyers Association

Expert Essentials CLE

Expert testimony is vital but can be difficult to communicate to a jury of laypersons. To decrease such risks, the New Mexico Criminal Defense Lawyers Association has assembled a robust schedule of experts to explore these issues first-hand. Sign up for the Expert Essentials CLE on June 8th in Albuquerque. Special guests include Professor Christopher McKee from the University of Colorado and Professor Shari Berkowitz from California State University. Afterwards, NMCDLA members and their families and friends are invited to our annual membership party and silent auction. Visit www.nmcdla.org to join NMCDLA and register for the seminar today.

Other News

New Mexico Workers' Compensation Administration

Request for Comments

The Director of the Workers' Compensation Administration, Darin A. Childers, is considering the reappointment of Judge Anthony "Tony" Couture to a five-year term pursuant to NMSA 1978, Section 52-5-2 (2004). Judge Couture's term expires on August 26. Anyone who wants to submit written comments concerning Judge Couture's performance may do so until 5 p.m. on May 31. All written comments submitted per this notice shall remain confidential. Comments may be addressed to WCA Director Darin A. Childers, PO Box 27198, Albuquerque, New Mexico 87125-7198, or emailed in care of Sabrina Bludworth, Sabrina.Bluworth@state.nm.us.

2018 STATE BAR OF NEW MEXICO 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.

STATE BAR of NEW MEXICO

Introducing Pamela Moore

Program Director, New Mexico Judges and Lawyers Assistance Program

A few years ago, my manager told me that I was malcontent. This "compliment" came from a Harvard-educated CEO and president of a high tech firm that I worked for. At first I was pretty sure this was not a compliment and I bristled a bit. I knew he did not mean I was a rebel, agitator or complainer, but rather that I was not satisfied with where I was in my career.

After leaning into the possibility of being a "malcontent", I not only agreed, but embraced it. I tell you this because it partly explains how I came to apply for and accept the position as the New Mexico Judges and Lawyers Assistance Program Director.

I come from a stance of "Why, What, How Come, When, Where?" In other words, I want to know more, explore more and be more. I was not content in my position and wanted something different, something more. I believe the world has endless possibilities and opportunities to create one's self, and it is our job to find our niche, passion, area of focus, our playground. My areas of focus have changed along the way— some planned, some not— but all have been a vital growth or development opportunity for me.

I graduated from Raton High School in 1987 and received a B.S. in Industrial Engineering from New Mexico State University in 1993. This six year path started me out as a business major, transferring to engineering after one year. I was grateful and excited to land a job as an engineer and project manager for Intel, Inc. in Chandler, Ariz., upon my graduation. When the decision was made to start a family 8 years later, I became a stay-at-home mom to my two children and a school volunteering maniac after a move to Albuquerque in 2004. Another year as an engineer working for Xilinx, Inc. in 2007 left me unfulfilled and longing for something different. This is when I started down a path of pursuing a degree in counseling.

In 2013 I received a M.A. in Counseling and worked in the substance abuse field for 3 years. This was not a field I would have imagined myself in, as I grew up in an alcoholic home and, up until that point, I had no desire to be of service in this area. It's funny where life takes us if we let the universe in to help guide and shape us. In this seemingly unlikely field (those struggling with addiction and mental health issues) I found my tribe, but I still felt myself wanting something more. During this

About the New Mexico Judges and Lawyers Assistance Program

Changed Lives… Changing Lives

The New Mexico Judges and Lawyers Assistance Program provides immediate, CONFIDENTIAL and continuing assistance, support and resources to judges, lawyers and law students struggling or living with substance abuse, compulsive behavior, psychological conditions and relationship conflicts that affect well-being and day-to-day living. NMJLAP provides services like professional assessment and referral, peer support networks, professional and peer interventions, monitored program, an employee assistance program, attorney support meetings, education and more.

Help and support are only a phone call away.

Judges: 888-502-1289 • **Lawyers and law students**: 505-228-1948 or 800-860-4914

time, I obtained a Masters Certificate in Human Resources Management and took a job as an HR Manager for a local tech company. Although challenging and different, it still didn't feel like a good fit—queue the "malcontent" conversation—my manager wanted me to stay. The quest for more led me to pursue becoming trained in EMDR, a type of trauma therapy. I loved it! I left the tech company and went into private practice, seeing clients struggling and living with anxiety, addiction, relationship conflict and depression. I felt mostly fulfilled and satisfied. Then I saw the job posting for the director of the New Mexico Judges and Lawyers Assistance Program…

In my short six months as the NMJLAP Director, I have absolutely found my home. This position allows me to bring all my knowledge, skills and experience into play, and has challenged me in new areas that are simultaneously scary and exciting. I am allowed the privilege of supporting and being of service to a profession that in some ways, I understand, but in other ways, have much to learn. So far the best part of the job is getting to know the people that have invited me into their world: the world of recovery in the legal community. These people are kind, generous, supportive souls that have a heart of service, and strive to be a part of something bigger than themselves.

I could go on to tell you my vision and goals for JLAP, but I believe it's more important to disclose my intentions for this program, community and the legal profession; for that is the foundation from where everything will manifest. I intend to fight for those that struggle with or are challenged by life. I believe that if you have a belly button, you will discover that at some point along your journey, you will find life hard, tough, uncomfortable, and possibly even unmanageable. And how you react at those times, with those thoughts and feelings, will make all the difference in moving forward in a healthy, safe way, or unhealthy, dysfunctional way.

No matter what you were born with or what developed along life's path, what matters is what you make of or believe about what happened. In other words, what is the story you tell yourself about your life? And, will you allow the NMJLAP to assist and educate you in approaching and managing your life in a more healthy, safe and productive way?

New! **Employee Assistance Program**

Flip to this week's inside front cover and learn all about JLAP's brand new EAP, for all SBNM members! Services include counseling sessions, stress management, video counseling and a 24/7 call center. ***Best of all... it's free!***

I consider it an honor and privilege to be able to work with compassionate, generous, intelligent people in the legal profession. Greater than that is the opportunity to help create and support an environment of positive mental, emotional, physical and spiritual health and well-being for those that are a huge service to our state.

The term malcontent will always hold a special place in my mind when I think about it, however, what I strive for today is knowing more and stretching myself so that I can be of service to a larger population….one belly button at a time. The term I would say best describes me now is grateful. Grateful for a position where I can grow a program that focuses on the health and well-being of human beings, a program that saves lives. I have the best job in the state of New Mexico. Thank you for letting me share.

Have questions? Reach out to Pam!

pmoore@nmbar.org
505-797-6003 Office
505-228-1948 Mobile
www.nmbar.org/jlap

State Bar of New Mexico
Judges and Lawyers Assistance Program

Legal Education

May

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Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **The Basics of Family Law (2017)**
5.2 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **A Little Planning Now, A Lot Less Panic Later: Practical Succession Planning for Lawyers (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Escrow Agreements in Real Estate Transactions**
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Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Introduction to New Mexico's Uniform Directed Trust Act**
1.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Reforming the Criminal Justice System (2017)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

23 **Ethics and Digital Communications**
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Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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www.nmbar.org

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

30 **Basics of Cyber-Attack Liability and Protecting Clients**
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Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Professionalism for the Ethical Lawyer**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2018 Ethics in Litigation Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **Expert Essentials**
5.5 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
, www.nmcdla.org, 505-992-0050, info@nmcdla.org

8 **Text Messages & Litigation: Discovery and Evidentiary Issues**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Closely Held Company Merger & Acquisitions, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

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

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective May 4, 2018

PUBLISHED OPINIONS

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UNPUBLISHED OPINIONS

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A-1-CA-35226	R Armijo v. J Woods	Affirm	04/30/2018
A-1-CA-36082	City of Deming v. L Nevarez	Affirm	04/30/2018
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A-1-CA-36192	N-Demand Test v. Western Mech	Dismiss	04/30/2018
A-1-CA-36370	D Ohara v. A Angel	Affirm	04/30/2018
A-1-CA-36386	State v. T Tripp	Reverse/Remand	04/30/2018
A-1-CA-36475	State v. G Gonzalez	Affirm	04/30/2018
A-1-CA-36492	J Ramirez v. R Sutton	Affirm	04/30/2018
A-1-CA-36600	State v. E Martinez	Affirm	04/30/2018
A-1-CA-36677	Federal National Mortgage v. T Padilla	Affirm	04/30/2018
A-1-CA-36970	State v. D Ortega	Dismiss	04/30/2018
A-1-CA-36972	State v. D Ortega	Dismiss	04/30/2018
A-1-CA-35867	State v. S Malouff	Affirm	05/01/2018
A-1-CA-35652	L Alford v. D Venie	Reverse	05/02/2018
A-1-CA-36440	CYFD v. Lella L	Affirm	05/02/2018
A-1-CA-36707	State v. T Romero	Affirm	05/02/2018
A-1-CA-35043	State v. D Gabaldon	Reverse/Remand	05/03/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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CLERK'S CERTIFICATE OF ADMISSION

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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The Ad Hoc Guardianship and Conservatorship Rules and Forms Committee has recommended adoption of proposed new Rule 1-140 NMRA and new Forms 4-993, 4-994, 4-995, 4-996, 4-997, and 4-998 NMRA for the Supreme Court's consideration. The proposed new rule and forms are posted to the Supreme Court's website as Proposal 2018-028, and may be found at https://supremecourt.nmcourts.gov/open-for-comment.aspx. Due to the length of the proposal, the full text is not being published in the *Bar Bulletin*.

The committee has proposed the new rule and forms in response to recent amendments to the Uniform Probate Code that will take effect on July 1st, 2018. See 2018 N.M. Laws, Ch. 10. The proposed new rule and forms are intended to implement and supplement these new legislative requirements. The proposed new rule would make use of the proposed new forms mandatory in all guardianship and conservatorship proceedings beginning on July 1st, 2018.

The proposed new forms fall into two categories. Proposed new Forms 4-993, 4-994, and 4-995 are the reports that must be filed periodically by a guardian or conservator to inform the court of the status of the guardianship or conservatorship and the protected person's financial, physical, and emotional health. The proposed reports are intended to allow for improved oversight of guardians and conservators by requiring more detailed information than the suggested forms set forth in the Uniform Probate Code. See NMSA 1978, § 45-5-314 (guardian's 90-day, annual, and final report); § 45-5-409 (conservator's annual report); see also § 45-5-418 (providing that a conservator shall file an inventory of the protected person's estate within 90 days of the appointment).

Proposed new Forms 4-996, 4-997, and 4-998 would implement the new bonding requirements for conservators under amended NMSA 1978, Section 45-5-411. The amended statute will require the court, with limited exceptions, to order a conservator to furnish a bond, "conditioned on faithful discharge of all duties of the conservator." The proposed forms are intended to allow for consistent enforcement and careful monitoring of the new requirements.

If you would like to comment on the proposed amendments before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://supremecourt.nmcourts.gov/open-for-comment.aspx or sending your written comments by mail, email, or fax to:

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Your comments must be received by the Clerk on or before May 21, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing.

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.

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-014
No. S-1-SC-35130 (filed February 12, 2018)

PROGRESSIVE CASUALTY
INSURANCE COMPANY,
Plaintiff-Respondent,
v.
NANCY COLLEEN VIGIL and
MARTIN VIGIL,
Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
Alan M. Malott, District Judge

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Opinion

Petra Jimenez Maes, Justice

{1} This case arises from a dispute between insureds, Nancy Colleen Vigil and her stepson Martin Vigil, and their insurance company, Progressive Casualty Insurance Company, as to whether the Vigils' policy was in force at the time of a November 4, 2002, car accident. The parties' dispute has thus far been the subject of two jury trials and two appeals to the Court of Appeals. *See Progressive Cas. Ins. Co. v. Vigil*, 2015-NMCA-031, 345 P.3d 1096 (*Progressive II*), *cert. granted*, 2015-NMCERT-003; *Progressive Cas. Ins. Co. v. Vigil*, Nos. 28,023, 28,393, mem. op. (N.M. Ct. App. Aug. 18, 2009) (non-precedential) (*Progressive I*). In this opinion we limit our review to the propriety of two evidentiary rulings that the district court made prior to the second trial. The Court of Appeals held that the district court erred by excluding evidence at the second trial of (1) a previous judge's summary judgment ruling that the Vigils lacked coverage on the date of the accident, a ruling that had been reversed in *Progressive I*; and (2) Progressive's payment of $200,000 under the Vigils' policy to settle third-party claims while this litigation was pending. *See Progressive II*, 2015-NMCA-031, ¶¶ 15, 24. We reverse the Court of Appeals and hold that the district court acted within its discretion to exclude the evidence under Rule 11-403 NMRA, which permits the district court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." We remand to the Court of Appeals to address the remaining issues that Progressive raised on appeal. *See Progressive II*, 2015-NMCA-031, ¶ 27.

I. BACKGROUND

{2} At about 1:30 a.m. on November 4, 2002, Martin Vigil was driving a vehicle listed on his parents' Progressive insurance policy when an accident occurred that resulted in the death of one passenger and serious injuries to another. Progressive filed a declaratory judgment action, seeking a ruling that the Vigils lacked coverage at the time of the accident. Progressive asserted that the Vigils' policy expired on November 3, 2002, the day before the accident occurred, and lapsed until 10:29 a.m. on November 4, 2002, about nine hours after the accident occurred. The Vigils counterclaimed, requesting a declaration of coverage and asserting bad faith and other claims against Progressive.

{3} While the parties' respective claims were pending, the Vigils were sued by an injured passenger and by the estate of the deceased passenger. Progressive settled these third-party claims by paying the policy limits for liability of $100,000 to each claimant. Progressive made the settlement payments under a reservation of its right to obtain full reimbursement from the Vigils if it was later determined that the Vigils lacked coverage at the time of the accident.

A. The First Trial: Progressive Obtains Favorable Summary Judgment Rulings on the Coverage and Bad Faith Claims and Favorable Jury Verdicts on the Remaining Claims

{4} Prior to the first trial, Progressive filed a motion for partial summary judgment on the issue of insurance coverage. Progressive argued that the Vigils' insurance policy lapsed on November 3, 2002, due to the Vigils' failure to make a timely premium payment and that the policy was not in force when the accident occurred on November 4, 2002. In response, the Vigils argued that they timely made a payment that was due on October 15, 2002, which provided continuous coverage through November 15, 2002. The district court granted Progressive's motion, finding that there was "no genuine issue as to any material fact on coverage and Progressive is entitled to judgment, as a matter of law, that the Vigils [did] not have insurance coverage for the November 4, 2002, accident." The district court also granted partial summary judgment in favor of Progressive on the Vigils' claim that Progressive acted in bad faith by failing to provide coverage. As a result of these partial summary judgment rulings, the jury at the first trial did not consider the issues of insurance coverage or bad faith failure to provide coverage. The jury issued verdicts in favor of Progressive on the Vigils' remaining claims and on Progressive's claim for reimbursement of the $200,000 it paid to settle third-party claims.

B. *Progressive I*: The Court of Appeals Holds That the District Court Erred by Granting Summary Judgment on Coverage and Bad Faith and Remands for a New Trial on Those Claims

{5} The Vigils appealed. The Court of Appeals held that the district court erred by granting partial summary judgment on the issue of insurance coverage. *Progressive I*, Nos. 28,023, 28,393, mem. op. at 2. The Court of Appeals explained that extrinsic evidence outside the four corners of the Vigils' insurance policy revealed an ambiguity concerning whether the Vigils had coverage on the date of the accident. *Id.* at 7-8. The Court of Appeals concluded that "a jury after hearing all the evidence could reasonably and properly conclude that the Vigils were entitled to coverage under their policy." *Id.* at 12. The Court of Appeals (1) reversed the partial summary judgment rulings on coverage and bad faith failure to provide coverage, (2) vacated the award of reimbursement and costs to Progressive, and (3) remanded this case to the district court for a new trial on coverage, the Vigils' bad faith claim, and Progressive's reimbursement claim. *Id.* at 13.

C. The Second Trial: The Vigils Obtain a Favorable Summary Judgment Ruling on Progressive's Reimbursement Claim and Favorable Jury Verdicts on the Coverage and Bad Faith Claims

{6} On remand this case was assigned to a different district court judge. The parties filed numerous pretrial motions, seeking to limit the claims and evidence submitted to the jury at the second trial. The district court granted partial summary judgment in favor of the Vigils on Progressive's reimbursement claim, ruling as a matter of law that Progressive had no right to seek reimbursement under the terms of the Vigils' insurance policy. The district court held pretrial motion hearings on August 16, 2011, and September 27, 2011, to address additional pending motions. The hearings culminated in an order in limine that prohibited the parties from introducing evidence or making any reference before the jury about (1) any ruling made by a prior judge in the case, (2) Progressive's payment of $200,000 to settle liability claims, (3) Progressive's reimbursement claim against the Vigils, or (4) the seriousness of the accident or the injuries incurred.

{7} The case proceeded to trial on the issues of insurance coverage and bad faith, and the jury found in favor of the Vigils on both claims. The jury awarded the Vigils $37,000 in compensatory damages and $11.7 million in punitive damages. The district court entered a final judgment and awarded the Vigils an additional $40,725 in contract damages and approximately $1.4 million in attorney's fees and $35,000 in costs.

D. *Progressive II*: The Court of Appeals Holds that the District Court Erred by Excluding Evidence Relevant to the Vigils' Bad Faith Claim and Remands for a New Trial on Bad Faith

{8} In the second appeal, Progressive argued that the district court erred by excluding evidence of the prior summary judgment ruling that the Vigils lacked coverage for the accident and evidence that Progressive had paid $200,000 to settle third-party claims. Progressive also asserted that (1) the district court erred by granting summary judgment in favor of the Vigils on Progressive's reimbursement claim, (2) erroneous district court rulings individually and cumulatively deprived Progressive of a fair trial, (3) the award of compensatory and punitive damages to Martin Vigil should be reversed for insufficient evidence, (4) the punitive damages are unconstitutionally excessive, and (5) the award of attorney's fees should be reversed.

{9} The Court of Appeals affirmed the verdict in favor of the Vigils on the issue of insurance coverage, noting that Progressive had not challenged the finding of coverage. *Progressive II*, 2015-NMCA-031, ¶¶ 2, 23. The Court of Appeals also affirmed the district court's grant of summary judgment on Progressive's reimbursement claim, reasoning that the claim was moot due to Progressive's failure to challenge the verdict on coverage. *Id.* ¶ 23. But the Court of Appeals reversed the verdict and judgment finding that Progressive acted in bad faith, holding that the district court erred by excluding evidence of (1) the prior summary judgment ruling concerning coverage, and (2) Progressive's payment of $200,000 to settle third-party claims. *Id.* ¶¶ 2, 15, 24. The Court of Appeals explained that both categories of evidence were relevant to whether Progressive acted in bad faith. *Id.* ¶¶ 15, 24. The Court of Appeals also vacated the award of attorney's fees and costs, reasoning that the award should be "redetermined after the bad faith proceedings are resolved." *Id.* ¶ 26. The Court of Appeals declined to reach Progressive's remaining appellate issues and remanded this case to the district court for a third trial on the Vigils' bad faith claim and any award of attorney's fees and costs. *Id.* ¶¶ 27-28.

E. This Court Granted the Vigils' Petition for Writ of Certiorari, and We Reverse the Court of Appeals

{10} The Vigils filed a petition for writ of certiorari, asking this Court to consider three issues: (1) whether the Court of Appeals erred by holding that the district court must admit evidence of the reversed summary judgment ruling on coverage, (2) whether the Court of Appeals erred by holding that the district court must admit evidence that Progressive paid $200,000 to settle third-party claims, and (3) whether the Court of Appeals erred by vacating the award of attorney's fees and costs. We granted certiorari under Article VI, Section 3 of the New Mexico Constitution and NMSA 1978, § 34-5-14(B) (1972). We hold that the district court acted within its discretion to exclude evidence of the reversed summary judgment ruling and evidence of Progressive's payment of $200,000 to settle third-party claims. Accordingly, we reverse the Court of Appeals, reinstate the award of attorney's fees and costs, and remand to the Court of Appeals for consideration of Progressive's remaining appellate issues.

II. DISCUSSION

{11} We analyze the district court's exclusion of evidence under the framework set forth in Rules 11-401, 11-402, and 11-403 NMRA, which address relevance and its limits. Rule 11-402 states the general rule that relevant evidence is admissible unless otherwise provided by constitution, statute, or rule. Rule 11-401 provides that "[e]vidence is relevant if [1] it has any tendency to make a fact more or less probable than it would be without the evidence, and [2] the fact is of consequence in determining the action." Rule 11-403 gives the district court discretion to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

{12} The district court did not cite Rules 11-401, 11-402, and 11-403 during the pretrial hearings at which the evidentiary rulings were made or in the written orders in limine excluding the evidence. But the record reflects that the parties' arguments and the district court's rulings were guided by the principles set forth in Rules 11-401, 11-402, and 11-403. As described below, the district court considered whether the evidence was relevant and balanced

its probative value against a number of countervailing concerns before deciding to exclude the evidence. The parties had sufficient opportunity at the hearings to present argument regarding the admissibility of the evidence and notice of the concerns underlying the district court's rulings. We therefore review the district court's exclusion of evidence under Rules 11-401, 11-402, and 11-403, even though the district court did not specifically cite these rules in support of its rulings. *See Blacker v. U-Haul Co. of N.M., Inc.*, 1992-NMCA-001, ¶ 12, 113 N.M. 542, 828 P.2d 975 (recognizing that admissibility of relevant evidence generally is subject to the Rule 11-403 balancing test); *cf. State v. Gallegos*, 2007-NMSC-007, ¶ 26, 141 N.M. 185, 152 P.3d 828 ("[W]e will affirm the trial court's decision if it was right for any reason so long as it is not unfair to the appellant for us to do so.").

A. We Review the District Court's Exclusion of Evidence for Abuse of Discretion and Will Reverse Only If the Appellant Demonstrates Prejudice

{13} The decision to exclude evidence rests within the discretion of the district court, "and the court's determination will not be disturbed on appeal in the absence of a clear abuse of that discretion." *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 36, 127 N.M. 47, 976 P.2d 999 (internal quotation marks and citation omitted). "An abuse of discretion occurs when the ruling is clearly against the logic and effects of the facts and circumstances of the case, is clearly untenable, or is not justified by reason." *State v. Balderama*, 2004-NMSC-008, ¶ 22, 135 N.M. 329, 88 P.3d 845. On appeal, a party "must show the erroneous . . . exclusion of evidence was prejudicial in order to obtain a reversal." *Coates*, 1999-NMSC-013, ¶ 37 (internal quotation marks and citation omitted); *see also* Rule 11-103(A) NMRA ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party[.]").

B. The District Court Did Not Abuse its Discretion by Excluding Evidence of the Prior Summary Judgment Ruling That the Vigils Lacked Insurance Coverage for the Accident

{14} Prior to the second trial, the Vigils moved the district court to exclude evidence or argument about the prior judge's rulings, including the summary judgment ruling that the Vigils lacked insurance coverage for the accident. The Vigils argued that the previous rulings, which had been reversed on appeal, were not relevant at a new trial and that admitting evidence of the rulings would prejudice the Vigils, confuse the issues, mislead the jury, and waste time. In response, Progressive argued that the prior judge's ruling that the Vigils lacked coverage for the accident demonstrated that the issue of coverage was fairly debatable and, accordingly, that Progressive did not act in bad faith by contesting coverage. The district court granted the Vigils' motion to exclude evidence of prior rulings.

{15} On appeal the Vigils argue that the summary judgment ruling was not relevant to the disputed factual determinations that the jury was tasked with making because the ruling was based on the judge's legal interpretation of the language of the insurance policy. The Vigils also contend that Progressive cannot rely on the summary judgment ruling to establish that it was reasonable to contest coverage because the district court issued the summary judgment ruling two years after Progressive decided to contest coverage. Finally, the Vigils assert that evidence of the summary judgment ruling would have overwhelmed the jury's ability to fairly consider the issue of coverage due to the power and influence that judges have over juries. *See State v. Sedillo*, 1966-NMSC-093, ¶ 7, 76 N.M. 273, 414 P.2d 500 (noting that the jury tends to "place great emphasis" on what a judge does and says due to the judge's "power and influence").

{16} Progressive argues that the previous district court judge's legal interpretation of the insurance policy was relevant because it suggested that Progressive was reasonable to contest coverage. Progressive relies on cases from other jurisdictions that have found judicial rulings on coverage relevant to whether an insurer acted in bad faith by failing to provide coverage. *See Karen Kane Inc. v. Reliance Ins. Co.*, 202 F.3d 1180 (9th Cir. 2000); *Lennar Corp. v. Transamerica Ins. Co.*, 256 P.3d 635 (Ariz. Ct. App. 2011); *Morris v. Paul Revere Life Ins. Co.*, 135 Cal. Rptr. 2d 718 (Ct. App. 2003).

{17} Progressive's reasonableness in contesting coverage was material to whether Progressive acted in bad faith. The jury was instructed that "[a]n insurance company acts in bad faith when it refuses to pay a claim of the policyholder for reasons which are frivolous or unfounded. An insurance company does not act in fab [sic] faith by denying a claim for reasons which are reasonable under the terms of the policy." *See* UJI 13-1702 NMRA; *see also Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶ 18, 135 N.M. 106, 85 P.3d 230 ("Under New Mexico law, an insurer who fails to pay a first-party claim has acted in bad faith where its reasons for denying or delaying payment of the claim are frivolous or unfounded."). The previous district court judge's determination that the Vigils' policy did not provide coverage, although wrong, tends to show that Progressive may have denied the "claim for reasons which are reasonable under the terms of the policy" and not for reasons that "are frivolous or unfounded." *See* UJI 13-1702. The summary judgment ruling therefore had some relevance to the issue of bad faith.

{18} Although evidence of the prior summary judgment ruling had some relevance to the Vigils' bad faith claim, the evidence was of limited probative value. First, the summary judgment ruling was a legal determination based on a selective portion of the record—i.e. the language of the insurance policy—whereas the jury was tasked with determining bad faith based on an array of extrinsic evidence, including witness testimony and numerous other documents. *See Progressive I*, Nos. 28,023, 28,393, mem. op. at 6-9; *see also Lennar Corp.*, 256 P.3d at 641 ("Whether the reasonableness of an insurer's coverage position may be determined as a matter of law depends on the nature of the dispute and other factors, including whether extraneous evidence bears on the meaning of the contested policy language."). Additionally, the summary judgment ruling did not provide a reasonable basis for Progressive's initial decision to contest coverage in December 2002 because the summary judgment ruling was not issued until April 2004. *See* 14 Steven Plitt et al., *Couch on Insurance* § 207:4 (3d ed. 1999) ("An insurer does not act unreasonably where it bases its denial of coverage on the express language of its policy and upon the court's *prior* construction of that language." (emphasis added)).

{19} The fact-based nature of the coverage dispute in this case distinguishes it from the out-of-state cases on which Progressive relies. In those cases, the determination of coverage turned on a legal interpretation of insurance policy language, and the courts concluded that a judicial ruling on coverage was relevant to the issue of whether the insurer acted reasonably by denying coverage under the terms of the policy. *See Karen Kane Inc.*,

202 F.3d at 1183, 1190 (finding that an insurer's interpretation of the term "occurrence" in a policy was reasonable, noting that the district court had reached the same interpretation); *Lennar Corp.*, 256 P.3d at 641 ("When, as here, the policies are written on a standard industry form, evidence of how these insurers, other insurers and other courts have interpreted the policy language in other cases may bear on whether these insurers acted reasonably in disputing coverage."); *Morris*, 135 Cal. Rptr. 2d at 726 ("If, as in this case, the coverage issue turns upon analysis of a legal point—and assuming the governing law has not changed in the interim—the fact that a court had interpreted that law in the same manner as did the insurer, whether before or after, is certainly probative of the reasonableness, if not necessarily the ultimate correctness, of its position."). In this case, the issues of coverage and bad faith were fact-based and did not depend solely on a legal interpretation of the Vigils' policy.

{20} Having concluded that the prior summary judgment ruling was relevant to the issue of bad faith but of limited probative value, we consider whether the probative value of the evidence was "substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 11-403. At a pretrial motion hearing, the Vigils argued that if the district court allowed Progressive to introduce evidence of the prior summary judgment ruling, the district court would have to allow the Vigils to introduce evidence of the Court of Appeals opinion that reversed the ruling. The Vigils asserted that trying to explain the meaning and effect of these prior legal rulings at trial would confuse the jury and prejudice one or both sides. The district court agreed with the Vigils that trying to explain the "minute processes" of the legal system and appellate law to the jurors would "confuse the heck out of them."

{21} It was reasonable for the district court to exclude evidence of the prior summary judgment ruling to avoid confusing the jury, prejudicing either party, or wasting time at trial. To fairly weigh evidence of the summary judgment ruling, which had been reversed on appeal, the jury would have required significant explanation about summary judgment, appellate procedures, the meaning of reversal and remand, and other legal doctrines.

{22} Additionally, although evidence of the prior summary judgment ruling on *coverage* was relevant to the issue of *bad faith*, it would have been inherently confusing to admit the evidence at trial because the jury was tasked with determining *both coverage and bad faith*. *See Progressive II*, 2015-NMCA-031, ¶ 21 (emphasizing that the summary judgment ruling was "only relevant to the issue of Progressive's reasonableness under the bad faith claim"). At the pretrial hearing, Progressive suggested that this confusion could be avoided by bifurcating the trial so the jury could determine the issues of coverage and bad faith separately. The district court agreed that bifurcation was an alternative and invited Progressive to file a motion to bifurcate. *See Martinez v. Reid*, 2002-NMSC-015, ¶ 27, 132 N.M. 237, 46 P.3d 1237 (noting that "the decision whether to bifurcate a trial ordinarily rests in the sound discretion of the trial court"). It appears from the record that Progressive never filed such a motion. The district court ultimately permitted Progressive to present evidence of its justification for contesting coverage, including the facts on which the prior summary judgment ruling was based, but not evidence of the ruling itself.

{23} We hold that the district court did not abuse its discretion by excluding evidence of the prior summary judgment ruling. The evidence had only limited probative value, and there was a significant danger that the evidence would have confused the jury and unnecessarily protracted the trial with tangential testimony and evidence. *See State v. Guerra*, 2012-NMSC-014, ¶ 36, 278 P.3d 1031 ("[R]ulings on matters of doubtful relevance under Rule 11-402 and the counterbalances to relevant evidence under Rule 11-403 are left to the broad discretion of the district court."); *see also Blacker*, 1992-NMCA-001, ¶¶ 12-13 (holding that the district court did not err by excluding evidence that "would have been subject to explanation and rebuttal" and "would have unduly protracted the trial without good reason").

{24} Additionally, while not necessary to our holding that the district court did not abuse its discretion, we conclude that Progressive did not demonstrate the prejudice necessary to obtain a reversal on this issue. *See Coates*, 1999-NMSC-013, ¶ 37. The jury was instructed on four theories of bad faith as follows:

> To establish the claim of bad faith, the Vigils have the burden of proving *at least one* of the following:
> 1. Progressive did not deal fairly with the Vigils; or
> 2. Progressive refuses to pay the claim for reasons which are frivolous or unfounded; or
> 3. Progressive did not act reasonably under the circumstances to conduct a fair evaluation of coverage; or
> 4. Progressive failed to act honestly and in good faith in the performance of the insurance contract.

(Emphasis added.) *See O'Neel v. USAA Ins. Co.*, 2002-NMCA-028, ¶ 9, 131 N.M. 630, 41 P.3d 356 (recognizing that a finding of bad faith may be based on conduct separate from refusal to pay). The jury also received UJI 13-1701 NMRA, which described Progressive's duty to the Vigils as follows:

> A policy of insurance is a contract. There is implied in every insurance policy a duty on the part of the insurance company to deal fairly with the policyholder.
>
> Fair dealing means to act honestly and in good faith in the performance of the contract.

See Salas v. Mountain States Mut. Cas. Co., 2009-NMSC-005, ¶ 13, 145 N.M. 542, 202 P.3d 801 ("[W]ith insurance contracts, as with every contract, there is an implied covenant of good faith and fair dealing that the insurer will not injure its policyholder's right to receive the full benefits of the contract." (internal quotation marks and citation omitted)). As discussed above, the prior summary judgment ruling was relevant to whether Progressive acted in bad faith by refusing to pay the Vigils' claim for reasons that were frivolous or unfounded. But based on the jury instructions, it appears that the jury could have found that Progressive acted in bad faith by failing to deal fairly with the Vigils, failing to act reasonably under the circumstances to conduct a fair evaluation of coverage, or failing to act honestly and in good faith in the performance of the insurance contract. The special verdict does not specify the theory of bad faith on which the jury relied. Progressive has not challenged these jury instructions on appeal. *See Am. Nat. Prop. & Cas. Co. v. Cleveland*, 2013-NMCA-013, ¶¶ 14-15, 293 P.3d 954 (recognizing that the legal theories presented

in the jury instructions "become the law of the case"). Under these circumstances, Progressive failed to demonstrate that exclusion of evidence of the prior summary judgment ruling affected the outcome of the trial. *See Kilgore v. Fuji Heavy Indus. Ltd.*, 2009-NMCA-078, ¶ 64, 146 N.M. 698, 213 P.3d 1127 (explaining that to obtain a reversal on evidentiary grounds the appellant must "show a high probability that the improper [evidentiary ruling] may have influenced the factfinder" (internal quotation marks and citation omitted)).

C. The District Court Did Not Err by Excluding Evidence That Progressive Paid $200,000 to Settle Third-Party Liability Claims

{25} We next consider whether the district court erred by excluding evidence of Progressive's payment of $200,000 to settle third-party claims. After the district court granted partial summary judgment in favor of the Vigils on Progressive's reimbursement claim, Progressive filed a motion to preclude the Vigils' expert witness from testifying that Progressive acted in bad faith by suing the Vigils for reimbursement. Progressive's motion to exclude evidence focused on the reimbursement claim and did not address the related issue of Progressive's payment of $200,000 to settle third-party claims.

{26} The district court considered Progressive's motion over the course of two pretrial motion hearings held August 16, 2011, and September 21, 2011. At the August 16, 2011, hearing, the Vigils argued vehemently that they should be permitted to introduce evidence of Progressive's reimbursement claim to demonstrate that Progressive acted in bad faith by suing its own policyholders. The Vigils further argued that they should be permitted to introduce evidence that Progressive paid $200,000 to settle third-party claims because that evidence demonstrated that Progressive thought the Vigils had insurance coverage for the accident. The Vigils asserted that admitting evidence of Progressive's settlement payments but not Progressive's reimbursement claim would create the impression that Progressive acted in the interests of its policyholders, which would mislead the jury and prejudice the Vigils' ability to present their bad faith claim. The Vigils argued that evidence of the settlement payments and evidence of the reimbursement claim were "all one part" and "can't be taken apart."

{27} The district court agreed with the Vigils that evidence of Progressive's settlement payments was inextricably intertwined with evidence of Progressive's reimbursement claim. The district court expressed concern that admitting any evidence related to the reimbursement issue would confuse the jury by injecting a legal issue into the case that the court had decided as a matter of law. The district court observed that if the Vigils were permitted to introduce evidence of the reimbursement claim, the court would need to instruct the jury that Progressive was not entitled to reimbursement as a matter of law, which would prejudice the jury against Progressive. The district court worried that the jury would be confused if the Vigils were allowed to argue that Progressive acted in bad faith by denying the Vigils' first-party claim yet paid third-party claims. The district court suggested that the best way to avoid confusing and misleading the jury or prejudicing one or both parties would be to exclude all evidence related to the reimbursement issue.

{28} At the August 16, 2011, hearing, Progressive concurred with the district court that evidence of the reimbursement issue should not be admitted at trial to any extent. Progressive argued that the mere act of seeking reimbursement cannot constitute bad faith, noting that previous judges had concluded that it was legally permissible for Progressive to seek reimbursement. Progressive also explained that it settled the third-party claims due to the severity and details of the accident, and not because Progressive believed that the Vigils had coverage at the time of the accident.

{29} At the beginning of the September 21, 2011, motion hearing, the district court reiterated its proposed ruling to exclude evidence of Progressive's settlement payments and Progressive's reimbursement claim. Progressive asked for clarification regarding the proposed exclusion of the settlement payments. The district court explained that the settlement payments were part of the reimbursement claim and were irrelevant to the issue of coverage because Progressive settled due to the details of the accident, not because Progressive believed there was coverage. The district court also pointed out that admitting evidence of the settlement payments would lead the jury to speculate about the severity and details of the accident, which both parties wanted to avoid. Progressive expressed concern that excluding evidence of its settlement payments would allow the Vigils to argue that Progressive left the Vigils "hanging out there" for ten years without any payment under the policy. The district court acknowledged this concern but observed that there did not appear to be a better way to avoid misleading the jury. The district court worried that if the jury heard evidence that Progressive had already paid claims under the policy, the jury might conclude that this case was unimportant or "legal mumbo jumbo" and might fail to execute its job. The district court conceded that excluding the evidence was not a perfect solution and invited the parties to come up with a better way to balance the competing concerns. Neither party offered an alternative. The district court ultimately concluded that the only way to keep the jury focused and to avoid unfair prejudice, confusing the issues, or misleading the jury was to exclude all evidence concerning Progressive's settlement payments, Progressive's reimbursement claim, and the specific details of the accident.

{30} On appeal, the Vigils contend that Progressive failed to preserve its argument that the district court erred by excluding evidence that Progressive paid $200,000 to settle third-party claims. The Vigils assert that Progressive made a tactical decision to keep evidence of its settlement payments from the jury because such evidence would have conflicted with Progressive's theme at trial that an insurance company has a fiduciary obligation to protect the premiums paid by its policyholders by denying claims that are not owed. Progressive argues that it sufficiently challenged the exclusion of the evidence and that the district court excluded the evidence on its own initiative.

{31} Under the Rules of Appellate Procedure, "[t]o preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked." Rule 12-321(A) NMRA. The preservation rule is intended to ensure that (1) the district court is timely alerted to claimed errors, (2) opposing parties have a fair opportunity to respond, and (3) a sufficient record is created for appellate review. *See State v. Bell*, 2015-NMCA-028, ¶ 2, 345 P.3d 342. In a situation where the district court "feels compelled to exclude evidence sua sponte, the parties should first be informed of the judge's specific concerns. This should be done on the record, before excluding the evidence, and outside the presence of the jury." *See Balderama*, 2004-NMSC-008, ¶ 20. Progressive conceded at a post-trial motion hearing that it never asked the district court to admit evidence of its

settlement payments. Although Progressive did not move the district court to admit or exclude evidence of its settlement payments, and therefore did not directly invoke the district court's ruling, the issue of admissibility of Progressive's settlement payments was fairly presented to the district court, and the district explained its proposed ruling and invited the parties to respond at two pretrial motion hearings prior to excluding the evidence. Accordingly, the objectives of the preservation rule were met in this case, and the issue was sufficiently preserved for appellate review.

{32} We next examine whether the district court acted within its discretion to exclude evidence of Progressive's payment of $200,000 to settle third-party claims. Neither party disputes that evidence of Progressive's settlement payments was relevant to the coverage and bad faith claims that the jury had to decide at the second trial. Concerning coverage, evidence of the payments would have supported the Vigils' position that their insurance policy was in force at the time of the accident. Concerning bad faith, evidence of the payments would have supported Progressive's position that it acted in good faith by compensating third-party claimants and shielding the Vigils from potential lawsuits while this underlying litigation was pending.

{33} Although the evidence was relevant, we hold that the district court did not err by excluding the evidence under Rule 11-403. The district court carefully considered a number of competing concerns in this complex case and invited input from the parties before deciding that the best approach was to preclude evidence of the reimbursement claim and the settlement payments. The district court rationally concluded that admitting the evidence could cause unfair prejudice to one or both parties, confuse the issues at trial by inserting a legal issue that the district court had decided as a matter of law, lead the jury to believe its coverage determination was not important, and cause the jury to speculate about the severity and details of the accident. The district court sought to ensure that the evidence at trial was cohesive so the jury would focus on the issues at stake: (1) whether the Vigils had coverage, and (2) whether Progressive acted in bad faith. We conclude that the district court properly fulfilled the function of gatekeeper by filtering the evidence presented at trial to ensure that the jury's conclusions were "not based on improper considerations or evidence." *See State v. Campos*, 1996-NMSC-043, ¶ 27, 122 N.M. 148, 921 P.2d 1266; *see also Guerra*, 2012-NMSC-014, ¶ 38 (holding that the district court did not abuse its discretion by excluding evidence that "could have led the jury to speculate" about "complicated disputes that did not need to be addressed in [the] case"). We hold that the district court did not abuse its discretion by excluding evidence of Progressive's payment of $200,000 to settle third-party claims.

D. The Award of Attorney's Fees Is Reinstated

{34} On appeal to the Court of Appeals, Progressive argued that the award of attorney's fees should be reversed because (1) the award was punitive and therefore duplicative of the punitive damage awards, and (2) the district court erred by not segregating recoverable fees from non-recoverable fees and by using a multiplier to calculate the fees. The Court of Appeals vacated the award of attorney's fees and costs without reaching these arguments because the Court of Appeals reversed the bad faith judgment on evidentiary grounds and remanded for a new trial. *Progressive II*, 2015-NMCA-031, ¶ 26. Because we reverse the Court of Appeals, we reinstate the award of attorney's fees and costs, subject to the Court of Appeals' consideration on remand of Progressive's unaddressed arguments.

III. CONCLUSION

{35} We hold that the district court did not abuse its discretion by excluding evidence of either the prior summary judgment ruling on coverage or the liability payments that Progressive made to settle third-party claims. We therefore reverse the Court of Appeals and remand to the Court of Appeals to address the remaining issues that Progressive raised on appeal.

{36} IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:

JUDITH K. NAKAMURA, Chief Justice
EDWARD L. CHÁVEZ, Justice
BARBARA J. VIGIL, Justice
SARAH SINGLETON, Judge, sitting by designation

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-015
No. S-1-SC-35995 (filed February 15, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
COREY FRANKLIN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Fernando R. Macias, District Judge

BENNETT J. BAUR,
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for Appellant

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Opinion

Barbara J. Vigil, Justice

I. INTRODUCTION

{1} The New Mexico Constitution ensures that "[n]o person shall be . . . denied equal protection of the laws." N.M. Const. art. II, § 18. The sole issue in this case is whether equal protection mandates that an offender who is guilty of first-degree murder be afforded the same opportunity to present evidence of mitigating circumstances at sentencing as an offender convicted of a categorically less serious offense.[1] We conclude that this distinction does not violate equal protection, as first-degree murderers and lesser offenders are not similarly situated.

II. BACKGROUND

{2} Defendant Corey Franklin pled guilty to one count of first-degree, willful and deliberate murder, the only offense currently designated as a "capital felony," in exchange for life in prison with a possibility of parole. *See* § 30-2-1(A). Due to his first-degree murder conviction, Defendant was subject to sentencing pursuant to Section 31-18-14. *See* § 30-2-1(A). Defendant was sentenced to life imprisonment with the possibility of a five-year period of parole after serving thirty years in prison.

{3} Prior to sentencing, Defendant filed a motion seeking the opportunity to present mitigating evidence which could eventually shorten his sentence. While Defendant acknowledged that Section 31-18-14 does not expressly provide an opportunity to present mitigating evidence at the time of sentencing to those convicted of first-degree murder, he argued that this violates his due process rights under Article II, Section 18 of the New Mexico Constitution and his right to be free from cruel and unusual punishment under Article II, Section 13 of the New Mexico Constitution.

{4} In his motion, Defendant noted that persons convicted of a lesser offense are provided with an opportunity to present mitigating circumstances at sentencing, which places them in a stronger position for parole than first-degree murderers. NMSA 1978, § 31-18-15.1(A)(1) (2009); *see, e.g.*, *State v. Juan*, 2010-NMSC-041, ¶¶ 35-39, 148 N.M. 747, 242 P.3d 314 (holding that the defendant, a noncapital offender, was permitted to present mitigating evidence under Section 31-18-15.1). Defendant contended that the lack of opportunity to present mitigating evidence "effectively diminishe[d his] due process rights with respect to the parole process."

{5} Defendant also argued that his sentence was excessive and violated his right to be free from cruel and unusual punishment. Defendant urged the district court to declare "Section 31-18-14 and the sentencing consequences thereunder unconstitutional to the extent it does not allow for mitigation of the sentence in violation of [Defendant's] due process rights [and] right to be free from cruel and unusual punishment."

{6} The district court denied Defendant's motion to declare Section 31-18-14 unconstitutional and concluded that it was within the Legislature's authority to decline to provide the opportunity to present evidence of mitigating circumstances to the most serious offenders. On May 16, 2016, the district court entered final judgment and sentenced Defendant to life imprisonment with the possibility of a five-year period of parole after he served thirty years in prison. On appeal, Defendant abandons these particular constitutional arguments, and instead challenges the sentencing distinction on equal protection grounds. Defendant advances this issue pursuant to *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, 428 P.2d 982, and *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655, 712 P.2d 1.

III. ANALYSIS

A. Standard of Review

{7} "We review the constitutionality of legislation de novo." *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 10, 378 P.3d 13. In doing so, "we will not question the wisdom, policy, or justness of legislation enacted by our Legislature, and will presume that the legislation is constitutional." *Id.* (internal quotation marks and citation omitted). The Legislature has broad authority to "define criminal behavior and provide for its punishment." *Santillanes v. State*, 1993-NMSC-012, ¶ 41, 115 N.M. 215, 849 P.2d 358; *see also Ewing v. California*, 538 U.S. 11, 25 (2003) (explaining that sentencing rationales are policy decisions

[1]This opinion refers to Defendant and others eligible for sentencing under NMSA 1978, Section 31-18-14 (2009) as "first-degree murderers" to avoid any confusion caused by the Legislature's use of the term "capital" following the 2009 repeal of the death penalty. *See* NMSA 1978, § 30-2-1(A) (1994) ("Whoever commits murder in the first degree is guilty of a capital felony.").

that are within the authority of state legislatures). Unless unconstitutional, we will not disturb the Legislature's proscription of criminal conduct and its consequences. *See State v. Maestas*, 2007-NMSC-001, ¶ 25, 140 N.M. 836, 149 P.3d 933.

B. Preservation

{8} As a preliminary matter, we must determine whether the equal protection issue was preserved for review. Defendant concedes that "the issue was not expressly preserved as an equal protection issue," but argues that the essence of his due process argument at the district court was an equal protection claim. We disagree. In order to preserve a question for review, a party must fairly invoke a ruling or decision by the district court. Rule 12-321(A) NMRA."[I]t is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked." *State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (internal quotation marks and citation omitted).

{9} Defendant did not develop an equal protection claim to the extent necessary to invoke a ruling by the district court. His motion touched on equal protection only insofar as it noted that the sentencing scheme places first-degree murderers at a disadvantage in arguing for parole, as compared to lesser offenders who are also eligible for a life sentence. The district court did not address the implications of the dissimilar treatment from an equal protection standpoint. We conclude that Defendant failed to preserve an equal protection challenge to Section 31-18-14 for review on appeal.

{10} Nonetheless, we have the discretion to consider unpreserved matters of general public importance. *See* Rule 12-321(B)(2)(a). Defendant's claim raises an issue of unusual importance in the development of New Mexico law. Prior to the repeal of the death penalty, first-degree murderers were constitutionally entitled to the opportunity to present mitigating arguments at sentencing. *See Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987). We exercise our discretion to review Defendant's claim in light of the Legislature's abolition of the death penalty and the uncertainty attaching to the different statutory treatment of homicides that the Legislature continues to refer to as "capital felon[ies]" but which are no longer punishable by death.

C. Equal Protection

{11} We begin by applying the two-step equal protection analysis adopted in *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, ¶ 9, 138 N.M. 331, 120 P.3d 413. *See Griego v. Oliver*, 2014-NMSC-003, ¶¶ 4, 27, 316 P.3d 865 (applying the two-part test and determining that same-sex couples were similarly situated to opposite-sex couples with respect to marriage); *see also Rodriguez*, 2016-NMSC-029, ¶ 2 (applying the two-part test and determining that farm workers were similarly situated to other agricultural workers). First, we determine whether first-degree murderers are similarly situated to lesser offenders with respect to the purpose of the statute. *See Rodriguez*, 2016-NMSC-029, ¶¶ 11-22. If they are not, the analysis ends. Second, if the offenders are similarly situated, we determine the appropriate level of scrutiny and whether the Legislature was adequately justified in requiring that noncapital offenders have the opportunity to present mitigating circumstances while declining to guarantee that opportunity to capital offenders. *See id.* ¶ 22.

{12} Defendant, following his conviction of first-degree murder, was sentenced in accordance with Section 31-18-14. Section 31-18-14 states simply: "[w]hen a defendant has been convicted of a capital felony, the defendant shall be sentenced to life imprisonment or life imprisonment without possibility of release or parole." Section 31-18-14 does not provide for the opportunity to present evidence of mitigating circumstances at sentencing. By contrast, Section 31-18-15.1 requires the district court to hold a sentencing hearing for lesser offenders.

{13} The relevant inquiry in determining whether two classes are similarly situated is whether "individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement." *City of Cleburne. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985); *see also Rodriguez*, 2016-NMSC-029, ¶ 17 (concluding that "there [was] no unique characteristic that distinguishes injured farm and ranch laborers from other employees of agricultural employers"). Defendant and other offenders punishable under Section 31-18-14 have the distinguishing characteristic of a first-degree murder conviction. In making his equal protection argument, Defendant erroneously assumes that these categories of offender are similarly situated because both could receive life sentences. This ignores the fact that first-degree murderers are guilty of a categorically more serious offense. *See* § 30-2-1(A).

{14} This Court has noted that first-degree murder "is reserved for the most heinous and reprehensible of killings, and therefore deserving of the most serious punishment under this state's law." *State v. Tafoya*, 2012-NMSC-030, ¶ 38, 285 P.3d 604 (internal quotation marks and citations omitted). Similarly, we upheld NMSA 1978, Section 31-21-10(A) (Repl. Pamp. 1987), which prevented capital felons from receiving meritorious sentence deductions before their thirty-year life terms have elapsed, even though noncapital convicts may receive the deductions within thirty years. *Martinez v. State*, 1989-NMSC-026, ¶ 2, 108 N.M. 382, 772 P.2d 1305 ("There is a rational and natural basis for confining capital felons to the penitentiary for at least thirty years, and depriving them of meritorious deductions, while at the same time granting noncapital felons the right to seek earlier parole on the basis of meritorious deductions.").

{15} Other courts have upheld sentencing schemes that do not guarantee a right to present mitigating evidence to those convicted of first-degree murder. *State v. Ulm*, 326 N.W.2d 159, 163 (Minn. 1982) (upholding a legislative distinction between first-degree murder and lesser offenses as "constitutionally permissible"). The New Mexico Legislature has taken a similar stance in enacting Sections 31-18-14 and 31-18-15.1, which establish distinct sentencing schemes for first-degree murder and less serious crimes. It is the Legislature's prerogative to make these policy decisions. *See Santillanes*, 1993-NMSC-012, ¶ 41; *see also Ewing*, 538 U.S. at 25 (explaining that state legislatures have the authority to make policy choices related to sentencing).

{16} If the Legislature intended for first-degree murderers to have the opportunity to present mitigating circumstances at sentencing, it could have included affirmative language granting this right. Section 31-18-15.1(A)(1), the controlling sentencing statute for lesser offenders, mandates that

> [t]he court shall hold a sentencing hearing to determine if mitigating or aggravating circumstances exist and take whatever evidence or statements it deems will aid it in reaching a decision to alter a basic sentence. The judge may alter the basic sentence . . . upon . . . a finding by the judge

> of any mitigating circumstances surrounding the offense or concerning the offender.

See State v. Tomlinson, 1982-NMCA-025, ¶¶ 11-12, 98 N.M. 337, 648 P.2d 795 (holding that the use of the word "shall" in Section 31-18-15.1, the statute governing noncapital felonies and directing district courts to hold sentencing hearings, was intended to make a sentencing hearing mandatory to allow parties to provide mitigation evidence). Section 31-18-14 includes no such language. The difference in language relating to the sentencing hearing in this case reveals a clear intent to create different sentencing procedures for different categories of offense. *See State v. Wyrostek*, 1994-NMSC-042, ¶ 17, 117 N.M. 514, 873 P.2d 260 ("We do not read language into the Act that is not there.").

{17} The repeal of the death penalty does not give us reason to conclude otherwise. *Cf. Oliver*, 2014-NMSC-003, ¶¶ 30-31 (examining the history of marriage laws for any indication of the purposes of those laws). Until 2009, the Legislature was obliged to provide death-eligible offenders with an opportunity to present mitigating evidence at sentencing. *See Hitchcock*, 481 U.S. at 399. However, in 2009, the Legislature repealed the death penalty and the statute mandating a sentencing hearing for a death penalty-eligible case. H.B. 285, 49th Leg., 1st Sess. (N.M. 2009); NMSA 1978, § 31-18-14.1 (2001, repealed 2009). The imposition of distinct sentencing schemes for first-degree murder and lesser offenses reflects an intent that those convicted of first-degree murder be treated differently from less serious offenders, regardless of the maximum possible penalty. This is a lawful exercise of the legislative authority to distinguish between different levels of offense and establish corresponding sentencing schemes. Because the classes are not similarly situated for these purposes, we do not reach the second step of the equal protection analysis.

D. Request for Remand to Present Evidence of Mitigating Circumstances

{18} We decline Defendant's request to remand this matter to the district court for an evidentiary hearing on mitigating circumstances to preserve such evidence for consideration at parole after Defendant serves the minimum of a thirty-year life sentence. NMSA 1978, Section 31-21-10(A)(2)(b) (2009) provides, "[a]n inmate . . . sentenced to life imprisonment becomes eligible for a parole hearing after the inmate has served thirty years of the sentence. *Before ordering the parole* of an inmate sentenced to life imprisonment, the board shall . . . consider all pertinent information concerning the inmate, including . . . mitigating . . . circumstances." (Emphasis added). The plain language of the statute guarantees that the parole board consider mitigating circumstances before ordering parole. Nothing in the plain language of the statute mandates the district court to take and consider this evidence at the initial time of sentencing and we decline Defendant's request that we order the district court to do so in this case.

IV. CONCLUSION

{19} For the foregoing reasons, we conclude that defendants convicted of first-degree murder and those convicted of lesser offenses are not similarly situated, and consequently that Section 31-18-14 does not violate Defendant's constitutional right to equal protection.

{20} IT IS SO ORDERED.
BARBARA J. VIGIL, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-016
No. S-1-SC-36225 (filed February 15, 2018)

ENDURO OPERATING LLC,
Plaintiff-Respondent,
v.
ECHO PRODUCTION, INC.; TALUS, INC.; TWIN MONTANA, INC.; CIMARRON RIVER INVESTMENTS, LLC; CMW INTERESTS, INC.; D2 RESOURCES, LLC; ELGER EXPLORATION INC.; PLAINS PRODUCTION, INC.; SOLIS ENERGY LLC; THE ALLAR COMPANY; KEN SELIGMAN; and W. GLEN STREET, JR.,
Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
Lisa B. Riley, District Judge

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Opinion

Edward L. Chávez, Justice

{1} Echo and Enduro are two of several parties to a joint operating agreement[1] (JOA). Under the JOA, Echo, as a party wishing to undertake a new drilling project, had to provide notice of the proposed project to the other parties to the JOA, who then had thirty days to decide whether to opt in or out of the project. By opting in, a party agrees to share in the cost and risk of the project. If a party opts out of the project—as Enduro did in this case—then the party is deemed "non-consenting," and is exempt from any of the cost or risk associated with the new project, but cannot share in any of the profits from the new project until the consenting parties have recovered four-hundred percent of the labor and equipment costs invested in the new project. For the consenting parties to recover the nonconsenting parties' forfeited share of profits, the consenting parties must "within ninety (90) days after the expiration of the notice period of thirty (30) days . . . actually commence the proposed operation and complete it with due diligence." Together, the JOA's provisions provide the consenting parties with 120 days after proposing the project to "actually commence" the operation, which in this case is the drilling of an oil well. If the consenting parties do not commence the proposed operation within 120 days, but one or more of them "still desires to conduct said operation," then the parties wishing to proceed with the operation must repropose the operation to the nonconsenting parties "as if no prior proposal had been made."

{2} The question before us is what activities are adequate as a matter of law to satisfy the contractual requirement that a consenting party actually commence the drilling operation. The Court of Appeals in *Johnson v. Yates Petroleum Corp.*, 1999-NMCA-066, ¶ 11, 127 N.M. 355, 981 P.2d 288, held that "any activities in preparation for, or incidental to, drilling a well are sufficient" even if "only the most modest preparations for drilling have been made." (internal quotation marks omitted) (citing Howard R. Williams & Charles J. Meyers, 3 *Oil and Gas Law* § 618.1 at 320-21 (1998)). In *Johnson*, the Court of Appeals found the following combination of activities adequate as a matter of law to satisfy the actual commencement requirement: (1) staking and surveying the location, (2) filing for and receiving a permit to drill a well, (3) entering into an agreement with a contractor to have the location of the well prepared for drilling, and (4) beginning the clearing of brush and the leveling of the area. *Id.* at ¶ 7.

{3} In its opinion below, the Court of Appeals concluded that the language in *Johnson* indicating that "any" preparatory activities would be sufficient was too permissive. *See Enduro Operating LLC v. Echo Prod., Inc.*, 2017-NMCA-018, ¶¶ 25, 29, 388 P.3d 990. The Court of Appeals was persuaded that Echo's lack of on-site activity at the proposed well site, other than surveying and staking, and lack of a permit to commence drilling was evidence as a matter of law

[1]The substance of the parties' JOA was adopted, with slight modification, from a model form published by the American Association of Petroleum Landmen (A.A.L.P.L.) Form 610-1982.

that Echo had not actually commenced drilling operations. *Id*. ¶¶ 22, 29. The Court of Appeals reversed the district court's grant of summary judgment in favor of Echo and remanded for an entry of summary judgment in favor of Enduro. *Id*. ¶ 31. We reverse the Court of Appeals and hold that the failure to obtain an approved drilling permit within the relevant commencement period is not dispositive. A party may prove that it has actually commenced drilling operations with evidence that it committed resources, whether on-site or off-site, that demonstrate its present good-faith intent to diligently carry on drilling activities until completion.

I. DISCUSSION

A. Commencement of Operations

1. A party has commenced operations if it engages in actions that demonstrate a present good-faith intent to diligently carry on drilling activities until completion

{4} When resolving a dispute over the meaning of terms in a contract, our goal is to "ascertain the intentions of the contracting parties with respect to the challenged terms at the time they executed the contract." *Strata Prod. Co. v. Mercury Expl. Co.*, 1996-NMSC-016, ¶ 29, 121 N.M. 622, 916 P.2d 822. "[I]f the parties attached different meanings to [disputed] language, the court's task is the more complex one of applying a standard of reasonableness to determine which party's intention is to be carried out at the expense of the other's." Allan E. Farnsworth, *Farnsworth on Contracts* 285 (3rd ed. 2004). To determine the reasonable construction of contract terms, "[w]ords and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight." Restatement (Second) of Contracts § 202 (1981).

{5} Cases interpreting the meaning of commencement clauses in the context of oil and gas lease agreements provide insight into how we should construe the commencement clause in the parties' JOA. Only a Texas court has interpreted the meaning of the commencement provision in the model-form JOA used by the parties in this case, and the Texas court also relied on several lease agreement cases to determine the meaning of "actually commence" under the model-form JOA. *See Valence Operating Co. v. Anadarko Petroleum Corp.*, 303 S.W.3d 435, 438-41 (Tex. App. 2010).

{6} In the context of lease agreements, the majority rule is that a party has commenced where "modest preparations for drilling have been made" so long as the preparations are "part of a good-faith effort to obtain production." *See* 3 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law*, § 618.1 at 319, 321 (2016). Although actual drilling would obviously suffice as evidence of "actual commencement," actual drilling is not required. *See* Eugene Kuntz, *A Treatise on the Law of Oil and Gas*, § 32.3(b) at 75 & n.4 (1989) (collecting cases supporting the proposition that "it is generally held that acts which are preparatory to drilling are sufficient to constitute the commencement of a well and that it is not essential that the lessee be in the process of making a hole").

{7} Preparatory activity at the well site is also sufficient to prove that a drilling operation has actually commenced. As one treatise explained:

> Where the lessee has the ability to drill the well to completion and the lessor can make no showing the lessee lacks a present intent to diligently carry on drilling activities until completion, very little in the way of physical activities must be performed on the site to support a conclusion that the lessee has commenced operations . . . . A minimum of physical activities seems to include the staking of the well site plus some acts on the land itself such as leveling the site and digging slush pits.

Owen L. Anderson, et al., *Hemingway Oil and Gas Law and Taxation*, § 6.7 at 293 (4th ed. 2004). *See also, e.g.*, *Duffield v. Russell*, 1899 WL 1336, at *2 (Ohio Cir. Ct. May 1899), *aff'd*, 63 N.E. 1127 (1902) (holding that a party demonstrated commencement where on the last day of the commencement period it staked the well and cut a "portion of the timber" to be used for the drilling rig); *Petersen v. Robinson Oil & Gas Co.*, 356 S.W.2d 217, 219-20 (Tex. Civ. App. 1962) (holding that a party demonstrated commencement where it staked the well and, on the last day of the commencement period, moved a maintainer onto land and spent two hours leveling the well location). In each of these cases, the commitment of resources at the drilling site was sufficient evidence to prove the operator had actually commenced drilling operations because the evidence proved the operator's present good-faith intent to diligently carry on drilling activities until completion. Other cases have found a combination of on-site and off-site activity was adequate to prove that an operator has commenced drilling activities. *See Kaszar v. Meridian Oil & Gas Enters., Inc.*, 499 N.E.2d 3, 4-5 (Ohio Ct. App. 1985) (holding that a party demonstrated commencement where it staked the well, cleared the well site, and filed paperwork with the Securities and Exchange Commission); *Jones v. Moore*, 338 P.2d 872, 874-75 (Okla. 1959) (holding that a party demonstrated commencement where on the last day of the commencing period it staked the well, dug a slush pit, and signed equipment contracts).

{8} The question we must still answer is whether the off-site commitment of resources can ever be adequate evidence of the parties' present good-faith intent to diligently carry on drilling activities until completion where the only on-site activity was the surveying and staking of the well. In its opinion, the Court of Appeals relied heavily on the *Valence* case to discount the evidentiary value of off-site activities. *See Enduro*, 2017-NMCA-018, ¶ 26. The *Valence* court held that when "there is doubt or controversy as to the intent of the party claiming to have commenced operations for drilling by performing preparatory acts, the question is one of mixed law and fact and should be submitted to the jury." 303 S.W.3d at 441. More importantly, the *Valence* court held that the following "'backroom preparations' . . . with no on-site activity except a preliminary staking of wells" were not sufficient, as a matter of law, to prove the party had actually commenced drilling operations: (1) preparing an authorization for expenditures, (2) receiving a topographic map of the well locations, (3) staking locations, (4) photographing the well sites, (5) obtaining a preliminary list of instruments regarding title, (6) holding several meetings to discuss locations and how to build on the locations, (7) preparing detailed cost and facility estimates for all wells, (8) preparing preliminary run sheets, and (9) obtaining drilling permits for all four wells. *Id*. at 440. Instead, it was for the jury to determine whether these activities "showed a bona fide intent to commence actual work on the proposed operation before the deadline and proceed with diligence to the completion of the wells." *Id*. at 441.

{9} Importantly, in *Valence*, the operator had not signed drilling contracts, built access roads, restaked the well locations, secured title opinions, and had not actually

begun drilling, before the deadline for actually commencing the drilling operation. *Id.* at 440. Although the *Valence* court made it clear that "[a]ctual drilling is not necessary in order to comply with an obligation to commence operations for drilling," *id.*, we do not know if the *Valence* court would have held that proof of one or more of the latter activities was sufficient as a matter of law to prove commencement.

{10} Building access roads and/or restaking well locations involves the commitment of resources. And, as one commentator explained, the focus of a commencement clause is on whether a party has taken actions that amount to an "irrevocable commitment to conduct operations, to completion, on the lease land. The best evidence of this, absent actual drilling of the premises, is an enforceable contract with a third party to drill a well on the leased land." Martin & Kramer, *supra*, § 618.1 at 318-19 n.10.2 (quoting 1 D. Pierce, *Kansas Oil and Gas Handbook* 9.34 (1991)). We agree that an enforceable drilling contract that commits an operator's resources is sufficient evidence, as a matter of law, to establish that the operator actually commenced drilling operations, even in the absence of on-site activities.

{11} We also conclude that a drilling permit is not essential for an operator to prove that it actually commenced drilling operations. The Court of Appeals overemphasized the importance of obtaining an approved drilling permit within the commencement deadline. The Court relied on a provision in the New Mexico Administrative Code (NMAC) stating that the purpose of the drilling permit rules was to "require an operator to obtain a permit *prior to commencing* drilling" and concluded that it would be condoning unpermitted drilling by deciding that a party could commence operations without a permit. *Enduro*, 2017-NMCA-018, ¶ 22 (quoting 19.15.14.6 NMAC) (internal quotation marks omitted). One jurisdiction has held that commencement cannot occur without a permit. *See Goble v. Goff*, 42 N.W.2d 845, 846-47 (Mich. 1950). However, the Texas Court of Appeals, in a later case dealing with language similar to the language in New Mexico's permit regulations, declined to follow *Goble* and concluded that the absence of a permit would not preclude a determination that a party commenced operations. *Gray v. Helmerich & Payne, Inc.*, 834 S.W.2d 579, 582 (Tex. App. 1992). The court's reasoning in *Gray* is persuasive.

{12} In *Gray,* the court held that the language in the Texas Administrative Code should not control the meaning of the language in the party's contract because the code and the contract were drafted to serve different purposes. *Id.* The court explained that an oil and gas lease is a private agreement between two parties that is designed to allocate property rights between the lessor and lessee. *See id.* By contrast, the *Gray* court concluded that the Texas Administrative Code provision, which states that "[o]perations of *drilling* . . . shall not be commenced until the *permit* has been granted," was designed to carry into effect the state's conservation laws. *Gray*, 834 S.W.2d at 579, 582 (omission original) (quoting 16 Tex. Admin. Code § 3.5(c)).

{13} The difference in purpose between the NMAC provisions and the JOA provisions convinces us that the intended meaning underlying the phrase "actually commence the proposed operations" in the JOA is different from the phrase "commencing drilling" in the NMAC. The NMAC requires a party to file a "[r]eport of commencement of drilling operations" within ten days following "commencement" and the report "shall indicate the hour and the date the operator spudded[2] the well." 19.15.7.14(C) NMAC. The majority of cases that have looked at commencement clauses in private contracts have found that actual spudding is not required. *See, e.g.*, Kuntz, *supra*, § 32.3(b) at 75 & n.4 (1989). Hence, the language in the JOA was not only designed to serve a different purpose than the language in 19.15.14.6 NMAC but was also likely used with a different intended meaning.

{14} Several courts have upheld findings of commencement when the party had not obtained a drilling permit within the primary term. *See Henry v. Chesapeake Appalachia, L.L.C.*, 739 F.3d 909, 912-13 (6th Cir. 2014); *Cason v. Chesapeake Operating, Inc.*, 47,084 pp. 10-11 (La. App. 2 Cir. 4/11/12), 92 So.3d 436, 442-43; *Gray*, 834 S.W.2d at 582. We also note that even if Echo's drilling permit was approved prior to the deadline, it would have said little about its concurrent good-faith intent to diligently carry on drilling activities until completion because the permit was valid for two years and did not require the spudding of a well within any particular time period.

{15} Without a clear indication in the JOA that the parties intended to require a permit before a party can demonstrate commencement, the language in the NMAC should not control the meaning of the JOA. Here, as in *Gray*, we conclude that the JOA and the NMAC serve different purposes. The JOA that the parties used was adopted from a model form "commonly used in the oil and gas industry in New Mexico and other producing states to set forth the arrangement between interest owners as to exploration and development of jointly owned interests." *Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶ 2, 123 N.M. 526, 943 P.2d 560 (discussing A.A.P.L. Form 610–1977). Its purpose is to allocate rights and responsibilities between the individual parties, whereas the purpose of NMAC permitting requirements is to carry out the commission's duty to promulgate rules relating to "the conservation of oil and gas and the prevention of waste of potash as a result of oil or gas operations in this state." NMSA 1978, § 70-2-6(A) (1979). Accordingly, we disagree with the Court of Appeals and hold that when an operator has applied for but has not obtained an approved drilling permit within the commencement period, the operator is not precluded from relying on other activities to demonstrate that it actually commenced drilling operations.

{16} In summary, unless the parties include language in their contract indicating otherwise, to prove that an operator has actually commenced drilling operations: (1) actual drilling is conclusive proof, but is not necessary, (2) obtaining a permit is not essential, (3) activities such as leveling the well location, digging a slush pit, or other good-faith commitment of resources at the drilling site will suffice as evidence of the parties' present intent to diligently carry on drilling activities until completion, and (4) the off-site commitment of resources, such as entering into an enforceable drilling contract requiring the diligent completion of the well, will also suffice as evidence that the operator actually commenced drilling operations. With these principles in mind we turn next to consider the summary judgment motions in this case.

2. Decisions to grant summary judgment motions are reviewed de novo

{17} Almost four years after Echo sent notice of its proposed well operation Enduro filed a complaint against Echo and

[2]Spudding in is defined as "[t]he first boring of the hole in the drilling of an oil well." 8 Martin & Kramer, *supra*, at 996 (2017).

the other defendants for breach of contract, conversion, violation of the Oil and Gas Proceeds Payment Act under NMSA 1978, Sections 70-10-1 to 6 (1985), and declaratory relief. The parties filed a series of cross-motions for summary judgment, three of which addressed whether Echo had commenced operations under the terms of the JOA. On January 14, 2015, the district court held a consolidated hearing on all of the motions for summary judgment. The court granted Echo's motion for summary judgment and issued a final judgment in Echo's favor on February 3, 2015. The court then awarded attorneys' fees against Enduro consistent with NMSA 1978, Section 70-10-6 (1991). Enduro appealed both the order granting summary judgment on the issue of commencement and the order awarding attorneys' fees.

{18} Summary judgment on whether Echo had actually commenced drilling operations would only be appropriate if "there are no genuine issues of material fact" and either Echo or Enduro is "entitled to judgment as a matter of law." *See Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 6, 310 P.3d 611 (quoting *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582) (internal quotation marks omitted). We review the grant of a summary judgment de novo, viewing "the facts in a light most favorable to the party opposing summary judgment and draw[ing] all reasonable inferences in support of a trial on the merits" because summary judgment is a "drastic remedy." *Id.* ¶ 6 (internal quotation marks and citation omitted).

3. An issue of material fact pertinent to whether Echo timely commenced drilling operations must be resolved by the factfinder

{19} On December 1, 2010, Echo sent Enduro's predecessor in interest, Conoco Phillips, notice that Echo was proposing a plan to drill a new well (6H Well). On December 28, Conoco "elected to not participate in the drilling of the" 6H Well. On December 29, 2010, Enduro executed an agreement to purchase Conoco's interests in the property covered by the JOA. Echo's 120-day period to commence operations ended on April 2, 2011.

{20} Echo submitted evidence that it had engaged in the following activities prior to April 2, 2011, as proof that it actually commenced drilling operations. On November 30, 2010, it surveyed and marked the well site, the center line for the access road, and "other points." Prior to November 30, 2010, it contacted a petroleum engineer, Joe Janica, to assist with securing a drilling permit from the New Mexico Oil Conservation Division (OCD). Janica arranged for activities required to obtain the permit: surveying and marking the 6H Well site, designing a closed loop waste-removal system for the well, and preparing the drilling permit application. Echo also began consulting with John Thoma, a geologist with expertise in horizontal wells. And Echo contacted a fracking contractor who, in January 2011, "committed" to providing fracking services for the 6H Well sometime between May 15 and June 15, 2011. On or around March 24, 2011, Echo entered into a contract with JW Drilling to provide drilling services for the 6H Well and agreed to a $70,000 liquidated damages clause in favor of the contractor. The contract provided that JW Drilling would be available to drill the 6H Well on May 20, 2011, or as soon as it finished work on another well in Lea County, New Mexico. Finally, on March 31, 2011, Echo submitted its drilling permit application to OCD.

{21} No party disputes what occurred after April 2, 2011. Echo did not repropose the project to Enduro. Instead, Echo moved forward with the project. OCD approved Echo's application for a permit on April 13, 2011. The 6H Well site was prepared for drilling between May 6 and May 14, 2011. JW Drilling commenced drilling the well on May 25 and completed drilling by June 10, 2011. The well was prepared for fracking and fracked between June 16 and July 7, 2011. Finally, the well began pumping on or about August 5, 2011.

{22} The Court of Appeals acknowledged that Echo "designed a closed loop system, and obtained a drilling procedure, spud program, and casing program . . . communicated with . . . a geologist[] regarding the design and engineering of a lateral for Well 6H . . . , [and] entered into a drilling contract" all before the end of the 120-day period. *Enduro*, 2017-NMCA-018, ¶ 16. But the Court wrote that it would be a "mistake" to allow "'any' preparations to count as commencement" and thus held that Echo's actions could not be "characterized as 'commencement'. . . as a matter of law." *Id.* ¶ 29.

{23} Echo argues that off-site activities relating to the planning and organizing of a drilling project should be considered when determining whether a party has commenced operations. Specifically, it contends that the recent changes in industry practices, brought on by the advent of lateral drilling and hydraulic fracturing, have made the planning and organizing of oil wells more complicated and that, as a result, the nonphysical activities involved in well drilling should be given more weight when determining if a party has commenced operations.

{24} Enduro, on the other hand, asserts that planning, meetings, and other "back-room" activities cannot substitute for meaningful on-site activity demonstrating commencement. During oral argument Enduro also argued that on-site physical acts are superior to off-site activities because "under the JOA, [Enduro] is completely dispossessed of any right to any record of the operation," and therefore Enduro "can't verify" the off-site activities in which Echo engaged. We are not persuaded by this argument. To the extent Enduro's argument is that on-site activities are superior because it could have traveled to the well site and observed the activities, we note that the only provision in the JOA stating anything about denying the nonconsenting parties access to business records would also deny the nonconsenting party any "right *to observe such operation* . . . until such time as the Nonconsenting party's share of the cost of such operation and the non-consent penalty applicable thereto has been recovered by the Consenting parties as provided for herein." (emphasis added).

{25} No provision appears in the plain language of the JOA indicating that only on-site physical activities should be considered when determining whether a party has commenced operations. If anything, the JOA can be read as indicating the importance of off-site activities in demonstrating commencement. For instance, the JOA includes a provision allowing an operator to unilaterally extend the commencement period if the extension is "necessary to obtain permits from government authorities, surface rights (including rights of way) or appropriate drilling equipment, or to complete title examination."[3] Obtaining permits, surface rights, and completing title examination are all off-site organizational and planning activities.

{26} Echo produced verifiable documentary evidence that it surveyed and staked the well site, entered into a contract for

[3]The provision was not available to Echo in this case because it only applied in situations where all parties to the JOA had consented to the proposed operation.

drilling services, prepared and submitted a drilling permit, and consulted with its geologist regarding the design of the 6H Well. It provided testimonial evidence that it obtained a commitment for fracking services.[4] Of these acts, the most probative evidence that Echo committed resources demonstrating its intent to diligently carry on drilling activities until completion was its entry into a drilling contract. Without the drilling contract, the factfinder would have to weigh Echo's other off-site activities when deciding whether Echo actually commenced drilling operations. If it is undisputed that Echo entered into a binding drilling contract before April 2, 2011, we would conclude as a matter of law that Echo actually commenced drilling operations.

{27} However, Enduro contends that there is a genuine issue of material fact as to whether Echo timely accepted JW Drilling's bid proposal because the signature from Echo's agent is not dated. The bid proposal was required to be accepted within ten days of when JW Drilling signed the proposal. JW Drilling signed the proposal on March 14, 2011. Arguably because the acceptance date is unknown the proposal might have been accepted after the April 2, 2011, deadline for commencing drilling operations, and even if it was signed before the April 2, 2011, deadline, the contract may not have been enforceable. Echo admits that its contract signature was not dated, but asserts that because the terms of the proposal required acceptance within ten days of being received, Echo must have accepted the proposal on or before March 24, 2011. The drilling contractor indicated that he did not have "any doubt" that the drilling contract was effective in mid-March of 2011, but also admitted that it was "possible but unlikely" that Echo responded outside the ten-day deadline because the drilling company might have allowed parties to accept after the ten-day deadline in the past. Additionally, Echo's corporate representative could not confirm the date on which he signed the contract proposal on behalf of Echo. Yet, it remains undisputed that JW Drilling drilled the well in accordance with the proposal signed by both parties.

{28} Whether Echo and JW Drilling entered into a binding contract before the April 2, 2011, deadline is a genuine issue of material fact that remains in this case. Summary judgment should not be granted if there is a genuine issue of material fact in dispute. *Cebolleta Land Grant, ex rel. Bd. of Trustees of Cebolleta Land Grant v. Romero*, 1982-NMSC-043, ¶ 3, 98 N.M. 1, 644 P.2d 515. Accordingly, the district court and Court of Appeals erred in granting summary judgment.

B. The Court of Appeals Award of Attorneys' Fees was Premature

{29} The Court of Appeals should not have issued an order granting attorneys' fees and costs to Enduro while a writ of certiorari on the merits of its decision was pending in this Court. Echo correctly points to NMSA 1978, Section 34-5-14(B) (1972), which states that "upon filing of the application [for a writ of certiorari], the judgment and mandate of the court of appeals shall be stayed pending final action of the supreme court." The statute's language indicates that the mere filing of a writ of certiorari automatically stays both the "judgment and mandate" of the Court of Appeals. Rule 12-403 NMRA states that costs and fees are only awarded to the "prevailing party." Whether Enduro was a prevailing party on appeal would depend on the "judgment and mandate" of the Court of Appeals. But the Court's "judgment and mandate" were suspended on December 16, 2016, when Echo petitioned this Court for a writ of certiorari. Therefore, there was no underlying basis on which the Court of Appeals could award costs and fees on January 10, 2017, when Echo's writ of certiorari was still pending in this Court.

II. CONCLUSION

{30} We reverse the Court of Appeals' award of summary judgment in favor of Enduro and its award of appellate costs and attorneys' fees to Enduro. We also reverse the district court's grant of summary judgment to Echo and remand for proceedings consistent with this opinion.

{31} IT IS SO ORDERED.
EDWARD L. CHÁVEZ, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
PETRA JIMENEZ MAES, Justice
CHARLES W. DANIELS, Justice
BARBARA J. VIGIL, Justice

[4]Enduro objected to the admissibility of the testimonial evidence because it came from affidavits in which the affiants recalled out of court conversations in which the contractor "commit[ted]" to providing services between May 15 and June 15, 2011. The statement should have been admissible for the nonhearsay purpose of showing how the delay in availability of a fracking crew influenced Echo's coordination and planning for the 6H Well. *See State v. Reyes*, 2002-NMSC-024, ¶ 29, 132 N.M. 576, 52 P.3d 948 ("[I]f an out-of-court statement is offered in evidence merely for the purpose of establishing what was said at the time, and not for the truth of the matter, the testimony is not hearsay."), *abrogated on other grounds by Allen v. LeMaster*, 2012-NMSC-001, ¶ 29, 267 P.3d 806.

Certiorari Denied, March 9, 2018, No. S-1-SC-36905

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-023

No. A-1-CA-36015 (filedNovember 15, 2017)

NEW MEXICO LAW GROUP, P.C.,
Plaintiff-Appellee,
v.
PAUL K. BYERS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Clay Campbell, District Judge

ROBERT N. SINGER
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for Appellee

PAUL K. BYERS
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Pro Se Appellant

Opinion

J. Miles Hanisee, Judge

{1} Defendant Paul Byers appeals an order denying his request to vacate an adverse summary judgment. This Court issued a calendar notice proposing to affirm, and Defendant has filed a memorandum in opposition to that disposition. Having duly considered that memorandum, we are unpersuaded and now affirm.

{2} The sole question raised by this appeal is whether the district court properly denied Defendant's motion to vacate the previously entered order of summary judgment. *See James v. Brumlop*, 1980-NMCA-043, ¶ 9, 94 N.M. 291, 609 P.2d 1247 (noting that an appeal from the denial of a motion for relief from judgment "cannot review the propriety of the judgment sought to be reopened"). The denial of a motion to vacate a judgment is reviewed for abuse of discretion. *See L.D. Miller Constr., Inc. v. Kirschenbaum*, 2017-NMCA-030, ¶ 16, 392 P.3d 194. In this case, the discretionary question before the district court was whether Defendant's motion to vacate established grounds to relieve Defendant from the previously-entered final judgment.

{3} On the merits, Defendant's motion to vacate asserted his constitutional right to a trial by jury and argued that the right to a jury cannot be overcome by procedural rules allowing for the entry of a summary judgment. The right to a jury in civil trials is protected at the federal level by the Seventh Amendment to the United States Constitution, and in this state by Article II, Section 12 of the Constitution of the State of New Mexico. Despite the threshold constitutional guarantees, the grant of a motion for summary judgment does not, by itself, violate the right to a trial by jury. This is because neither the Seventh Amendment nor New Mexico's Constitution creates an absolute right to a jury trial in *all* civil cases, but instead merely preserved the existing common law right to have the facts of a case "tried by a jury." U.S. Const. amend. VII; *see* N.M. Const. art. II § 12 (securing "[t]he right of trial by jury as it has heretofore existed").

{4} Although the question presented has not been directly answered in New Mexico, federal precedents long ago established that rules governing and permitting entry of summary judgment do not violate the right to have a jury decide a case; instead, summary judgment "prescribes the means of making an issue." *Fid. & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 320 (1902). In other words, the summary judgment process differentiates issues, and sometimes cases, that may be resolved as matters of law from those to which a constitutional right to a jury exists. Thus, if "[t]he issue [is] made as prescribed, the right of trial by jury accrues." *Id.*

{5} Further, in civil actions seeking only equitable remedies, as opposed to legal remedies, there is no right to a trial by jury because there was no such historical right in courts of equity. *Evans Fin. Corp. v. Strasser*, 1983-NMSC-053, ¶ 5, 99 N.M. 788, 664 P.2d 986. Thus, where legal and equitable claims are asserted in the same action, our courts have been careful to preserve the right to a jury on the legal claims, despite the fact that the equitable claims will be tried to the court without a jury. This distinction has forced courts to carefully examine what events at trial require the use of a jury. In *Blea v. Fields*, 2005-NMSC-029, ¶ 33, 138 N.M. 348, 120 P.3d 430, for instance, our Supreme Court held that the district court risked depriving a party "of her right to a jury trial on a disputed issue of fact underlying her legal claim[,]" by resolving a fact question relevant to both the legal and equitable issues in the case without employing a jury. *Id.* Thus, "[i]f there are disputed facts material to the disposition of both equitable and legal claims, the court's discretion to hear the equitable issues first must be narrowly exercised to preserve a jury trial on the disputed facts relevant to the legal issues." *Id.* ¶ 37.

{6} Applying these basic principles to the present case, Defendant, like all litigants, was entitled to have a jury resolve any "disputed facts relevant to the legal issues" in this case. *Id.* Consistent with this, Rule 1-056 NMRA, limits the entry of summary judgment only to circumstances where there is no dispute regarding the material facts of a case. *See Rekart v. Safeway Stores, Inc.*, 1970-NMCA-020, ¶ 1, 81 N.M. 491, 468 P.2d 892 (explaining that "[s]ummary judgment is not proper where there is the slightest issue as to a material fact"). As a result, Rule 1-056 cannot intrude upon the province of a jury, because it is the presence of disputed questions of fact that triggers the need for a jury's work.

{7} The rule specifically requires that the moving party list, in numbered paragraphs, every material fact of the case "as to which the moving party contends no genuine issue exists." Rule 1-056(D)(2). And, in order to defeat the motion, a responding party only needs to establish, by affidavit or otherwise, the existence of a dispute about any of those material facts. *See* Rule 1-056(D)(2), (E). Thus, in the process of ruling upon a motion for summary judgment, the district court is not called upon to invade "the province of

the jury by deciding disputed facts." *Blea*, 2005-NMSC-029, ¶ 1; *see In re Kelly's Estate*, 1983-NMCA-018, ¶ 10, 99 N.M. 482, 660 P.2d 124 (noting that where there is any conflict "as to a material fact, summary judgment is improper and the question is for the jury").

{8} In this case, Plaintiff's motion for summary judgment appears to have complied with Rule 1-056. The undisputed facts accompanying that motion asserted that Defendant agreed to pay Plaintiff for legal services; Plaintiff provided such services, including representation in two criminal cases; and Defendant had not fully paid Plaintiff's bill for those services, leaving an outstanding balance of $19,078.60. Defendant's response to the motion did not dispute any of those facts. Although Defendant's memorandum in opposition to our proposed disposition suggests that a review of the transcript below would uncover some unspecified factual dispute, he still does not dispute that he agreed to pay Plaintiff for services that were provided, and that he has not fully paid for those services. Ultimately, the only question before the district court when it ruled upon Plaintiff's motion for summary judgment was whether Plaintiff was entitled to judgment on the basis of those undisputed facts and, more importantly, there were no questions of fact for a jury to decide. *See Durham v. Sw. Developers Joint Venture*, 2000-NMCA-010, ¶ 45, 128 N.M. 648, 996 P.2d 911 ("In ruling upon a motion for summary judgment, it is not necessary for the court to adopt findings of fact and conclusions of law because the basic premise underlying an award of summary judgment is the absence of any genuine issue of material fact.").

{9} Because the district court was not called upon to decide any question of fact in granting summary judgment, no jury trial was necessary in this case and no right to such trial was violated by the granting of a summary judgment. As a result, the district court's denial of Defendant's motion to vacate that summary judgment was proper. We, therefore, affirm the district court's order of September 20, 2016, denying Defendant's motion to vacate the previously entered summary judgment in this case.

{10} IT IS SO ORDERED.
J. MILES HANISEE, Judge

WE CONCUR:
M. MONICA ZAMORA, Judge
STEPHEN G. FRENCH, Judge

Albuquerque Law-La-Palooza

Help us address the needs of low-income New Mexicans!

The Second Judicial District Pro Bono Committee is hosting Law-La-Palooza, a free legal fair, on Thursday, May 31 2018 from 3-6 PM at the Westside Community Center (1250 Isleta Blvd. SW, Albuquerque, NM 87105)

The legal fair will be first come, first served
Spanish language interpreters will be available

We are looking for attorneys who practice in the following areas to give consults:

Divorce	Creditor/Debtor	Powers of Attorney
Custody	Child Support	Public Benefits
Landlord/Tenant	Kinship/Guardianship	Unemployment
Bankruptcy	Wills & Probate	Personal Injury
Contracts	Immigration	Problems with the IRS
SSI/SSDI	Visitation	Name Change

If you would like to volunteer, please register at: https://bit.ly/2HXbujl
For questions, please contact Aja Brooks at (505) 814-5033
or by e-mail at ajab@nmlegalaid.org

Classified

Positions

Trial Attorney
The Third Judicial District Attorney's Office in Las Cruces is looking for: Trial Attorney. Requirements: Licensed attorney in New Mexico, plus a minimum of two (2) years as a practicing attorney, or one (1) year as a prosecuting attorney. Salary Range: $54,122-$67,652. Salary will be based upon experience and the District Attorney's Personnel and Compensation Plan. Submit Resume to Whitney Safranek, Human Resources Administrator at wsafranek@da.state.nm.us. Further description of this position is listed on our website http://donaanacountyda.com/.

PT/FT Attorney
PT/FT attorney for expanding law firm in Santa Fe. Email resume to xc87505@gmail.com. All inquiries are maintained as confidential.

Eleventh Judicial District Attorney's Office, Div II
The McKinley County District Attorney's Office is currently seeking immediate resumes for two (2) Assistant Trial Attorneys and one (1) Senior Trial Attorney. Former position is ideal for persons who recently took the NM bar exam and persons who are in good standing with another state bar. Senior Trial Attorney position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence. Persons who are in good standing with another state bar or those with New Mexico criminal law experience in excess of 5 years are welcome to apply. The McKinley County District Attorney's Office provides regular courtroom practice and a supportive and collegial work environment. Enjoy the spectacular outdoors in the adventure capital of New Mexico. Salaries are negotiable based on experience. Submit letter of interest and resume to Paula Pakkala, District Attorney, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter and resume to PPakkala@da.state.nm.us by 5:00 p.m. June 1, 2018.

Attorney
The Zuni Pueblo is seeking a part-time prosecutor with three years or more trial experience and qualifications sufficient to be admitted to practice before the Zuni Tribal Court in Zuni, New Mexico. Email letter of interest and resume to dfc@catchlaw.com.

Senior Trial Attorney
Senior Trial Attorney wanted for immediate employment with the Seventh Judicial District Attorney's Office, which includes Catron, Sierra, Socorro and Torrance counties. Employment will be based primarily in Torrance County (Estancia). Must be admitted to the New Mexico State Bar and be willing to relocate within 6 months of hire. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Seventh District Attorney's Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park Street, Socorro, New Mexico 87801.

Staff Attorney

New Mexico Center on Law and Poverty (www.nmpovertylaw.org) seeks full-time staff attorney for our Public Benefits Team to provide legal representation, policy advocacy, and community education to address hunger and secure fundamental fairness in the administration of the public safety net for low-income New Mexicans. Required: Law degree and license; minimum two years as an attorney; excellent research, writing, and legal advocacy skills; 'no-stone-unturned' thoroughness and persistence; leadership; ability to be articulate and forceful in the face of powerful opposition; commitment to economic and racial justice. Preferred: knowledge and experience in advocacy, lobbying, legislative and government administrative processes; experience working with diverse community groups and other allies; familiarity with poverty law; Spanish fluency. Varied, challenging, rewarding work. Good non-profit salary. Excellent benefits. Balanced work schedule. Apply in confidence by emailing a resume and a cover letter describing your commitment to social justice and to the mission of the NM Center on Law and Poverty to veronica@nmpovertylaw.org. Please put your name in the subject line. EEOE. People with disabilities, people of color, and people who have grown up in low-income communities are especially encouraged to apply.

Entry-Level Attorney Position

We have an entry-level attorney position available in Las Vegas, New Mexico. Excellent opportunity to gain valuable experience in the courtroom and with a great team of attorneys. Requirements include J.D. and current license to practice law in New Mexico. Please forward your letter of interest and Resumé to Richard D. Flores, District Attorney, c/o Mary Lou Umbarger, District Office Manager, P.O. Box 2025, Las Vegas, New Mexico 87701; or via e-mail: mumbarger@da.state.nm.us Salary will be based on experience, and in compliance with the District Attorney's Personnel and Compensation Plan.

13th Judicial District Attorney
Senior Trial Attorney, Trial Attorney, Assistant Trial Attorney
Cibola, Sandoval, Valencia Counties

Senior Trial Attorney - Requires substantial knowledge and experience in criminal prosecution, as well as the ability to handle a full-time complex felony caseload. Trial Attorney - Requires misdemeanor and felony caseload experience. Assistant Trial Attorney - May entail misdemeanor, juvenile and possible felony cases. Salary is commensurate with experience. Contact Krissy Saavedra KSaavedra@da.state.nm.us or 505-771-7411 for application.

Senior Assistant City Attorney/ Prosecutor, Assistant City Attorney

City of Las Cruces – Senior Assistant City Attorney/Prosecutor; Assistant City Attorney/ Prosecutor. Closing date: Open until filled. Senior Assistant City Attorney salary range: $67,381.64 – $101,072.46 annually. Assistant City Attorney salary range: $58,102.98 - $72,628.73 annually. This posting is for a Municipal Court Prosecutor. Fulltime regular, exempt position. Applicants for this Prosecutor position may also be considered for a position that performs a variety of legal duties to support the City Attorney's office which may include legal assessments and recommendations; factual and legal analysis to determine whether legal issues should be prosecuted or defended based on the facts of law and evidence; preparation and presentation of legal documents, analyses, and City code revisions, and other legal measures. Minimum requirements: Juris Doctor Degree plus one (1) year of experience in criminal prosecution. A combination of education, experience, and training may be applied in accordance with City of Las Cruces policy. Member of the New Mexico State Bar Association, licensed to practice law in the state of New Mexico; active with all New Mexico Bar annual requirements. Valid driver's license may be required or preferred. Visit website http://agency.governmentjobs.com//lascruces/default.cfm for further information, job posting, requirements and online application process.

Mid-level Associate Attorney

Mid-level Associate Attorney – civil litigation department of AV Rated firm. Licensed and in good standing in New Mexico with three plus years of experience in litigation (civil litigation preferred). Experience in handling pretrial discovery, motion practice, depositions, trial preparation, and trial. Civil defense focus; knowledge of insurance law also an asset. We are looking for a candidate with strong writing skills, attention to detail and sound judgment, who is motivated and able to assist and support busy litigation team in large and complex litigation cases and trial. The right candidate will have an increasing opportunity and desire for greater responsibility with the ability to work as part of a team reporting to senior partners. Please submit resume, writing sample and transcripts to palvarez@rmjfirm.com.

Experienced Attorney

Chappell Law Firm seeks an experienced attorney to work in its commercial litigation and transactional practice. Compensation will be considered based upon experience and other factors. Please submit resumes and other requirements to Gwenn Beaver at gwennb@chappellfirm.com. All submissions will be kept confidential.

Attorney Associate, Unclassified, Full-time, Santa Fe, NM

Perm# 10102423-23100; Opening Date: 04/26/2018 – Close Date: 05/23/2018; Job Pay Range LL: $28.128 - $43.95 per hour; Target Pay Range/Rate: $28.128 - $35.16 per hour; The First Judicial District Court is recruiting for a Full-time, Unclassified "at will" Attorney Associate position in Santa Fe, New Mexico. QUALIFICATIONS; Education: Must be a graduate of a law school meeting the standards of accreditation of the American Bar Association; possess and maintain a license to practice law in the State of New Mexico. Education Substitution: None. Experience: Three (3) years of experience in the practice of applicable law, or as a law clerk. Experience Substitution: None. Other: Completion of a post offer background check may be required. Knowledge: Thorough knowledge of United States and New Mexico constitutions, federal law, New Mexico case law, statutes, rules, policies and procedures; Code of Judicial Conduct; Rules of Professional Conduct; court jurisdiction and operations; manual and computerized legal research; principles of legal analysis and writing, legal proofreading and editing, standard English usage and grammar; and computer software applications (e.g., legal research, word processing, databases, court case management system, e-mail and internet). TO APPLY: A NM Judicial Branch Employment Application or a Resume and Resume Supplemental Form along with a copy of proof of education must be received by mail or hand delivered by 5:00 p.m. Wednesday, May 23, 2018. A legal writing sample must be submitted with the application/resume. First Judicial District Court; Human Resource Office; 225 Montezuma Ave.; P.O. Box 2268; Santa Fe, NM 87504. Please visit the NM Judiciary web-site to view a complete job announcement at: https://nmcourts.gov under careers or call 505-455-8196.

Senior Trial Attorney

Senior Trial Attorney wanted for immediate employment with the Seventh Judicial District Attorney's Office, which includes Catron, Sierra, Socorro and Torrance counties. Employment will be based primarily in Sierra County (Truth or Consequences). Must be admitted to the New Mexico State Bar and be willing to relocate within 6 months of hire. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Seventh District Attorney's Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park Street, Socorro, New Mexico 87801.

Special Assistant US Attorney

CITY OF LAS CRUCES invites applications for the position of Special Assistant US Attorney; SALARY: $55,000.00 - $84,000.00 / Annually; OPENING DATE: 05/16/18; CLOSING DATE: 05/30/18 11:59 PM; NATURE OF WORK: Fulltime, contract position designed to support the national drug control strategy. The primary goal of the New Mexico High Intensity Drug Trafficking Area (HIDTA) strategy is to identify, target, disrupt, and dismantle major drug organizations through a cooperative multi-agency process. The attorney will help task forces develop cases which will significantly impact domestic and international drug organizations operating in the New Mexico HIDTA region, and will prosecute those cases in Federal Court. Work is performed in a standard office environment. Light physical demands; mostly deskwork. Frequent to constant use of a personal computer. Duty station will be in the United States Attorney's Office in Las Cruces, New Mexico. Position involves competing demands, performing multiple tasks, working to deadlines, occasional work beyond normal business hours, and occasional travel within and outside New Mexico. Regular attendance is an essential function of this job to ensure continuity of services. Position is subject to drug testing in accordance with applicable State and Federal regulations and City of Las Cruces policies. DUTIES AND RESPONSIBILITIES: Directs and conducts investigations, working with agents and other witnesses. Considers novel legal theories and investigative techniques, using viable investigative tools; Makes charging decisions and proposes dispositions. Considers potential bases for criminal liability and civil and criminal asset forfeiture; considers applicable statutes. When requested, clearly and concisely documents or explains foundation for charges and basis for pleas; Works with agents and other witness to prepare for trials and other significant court proceedings, while considering novel legal theories. Handles investigations, charging decisions, plea negotiations, trials, sentencings, and appeals. Identifies and addresses significant issues. Communicates pertinent information to and consults with agencies, victims, and others; Researches and applies constitutional, statutory, regulatory, and other sources of authority and applies law to facts to craft persuasive arguments. Responds to defense correspondence and motions; Writes pleadings and other legal documentation based on case requirements; Prepares for and presents oral advocacy for cases for hearings, opening statements, direct- and cross-examinations, summations, rebuttals, sentencings, and appeals. MINIMUM QUALIFICATIONS: Juris Doctor Degree AND one year experience as a law clerk or practicing attorney. A combination of education, experience, and training may be applied in accordance with City of Las Cruces policy. Applicant must be a United States Citizen or national. Initial employment is conditioned upon a satisfactory pre-employment background adjudication. This includes fingerprint, credit, and tax checks. Position is subject to drug testing in accordance with applicable State and Federal regulations and City of Las Cruces policies. In addition, continued employment is subject to a favorable adjudication of a background investigation. If applicant is a male applicant born after December 31, 1959, he must certify that he has registered with the Selective Service System, or is exempt from having to do so under the Selective Service Law. Licenses/Certification(s): Must be an active member of a state bar association and licensed to practice law in at least one state. Must be in good standing with the applicable bar association and be eligible to be licensed to practice law in the Federal District Court in the District of New Mexico and the Tenth Circuit Court of Appeals. Valid driver's license may be required or preferred. If applicable, position requires an acceptable driving record in accordance with City of Las Cruces policy. KNOWLEDGE, SKILLS, AND ABILITIES: Knowledge of: Federal and State criminal statutes, rules, case law; hearings and trial court processes and protocols; legal research methods, techniques, sources, databases and other research tools; legal case management procedures and techniques; principles and protocols for the evidentiary gathering of information, documents, financial records and other data that may be used in court and legal hearings. Ability to: Analyze, appraise and organize facts, evidence and precedents and to present such materials in a clear and logical form, both verbally and in writing; present oral and written information in a clear and concise manner; effectively present cases in court; establish and maintain effective working relationships with law enforcement agents, public officials, outside agencies, and other participants in the justice process. The ideal candidate will possess outstanding litigation skills, legal writing and research skills, courtroom skills, and a demonstrated commitment to professionalism and public service. Skills in: Researching and identifying precedents in statutory and case law; negotiating agreements; litigating cases in legal hearings and trials in a courtroom setting; reviewing and assessing legal issues and documents; effectively assessing, interpreting and applying criminal laws to information, evidence and other data compiled; utilizing and evaluating electronic legal research and on-line systems; assessing and prioritizing multiple tasks, projects and demands; interpreting technical instructions and analyzing complex variables. APPLICATIONS MAY BE OBTAINED AND FILED ONLINE AT: http://www.las-cruces.org. It is policy to provide reasonable accommodations for qualified persons with disabilities who are employees or applicants for employment. If you need assistance or accommodation to interview and/or test because of a disability, please contact the Human Resources Department at 575-528-3100 / Voice or 575-528-3169/TTY.

Assistant City Attorney Positions

The City of Albuquerque Legal Department is hiring multiple Assistant City Attorney positions in the areas of real estate and land use, governmental affairs, immigration and civil rights, general commercial transaction issues, and civil litigation. The department's, team of attorneys provide legal advice and guidance to City departments and boards, as well as represent the City and City Council on complex matters before administrative tribunals and in New Mexico State and Federal courts. Attention to detail and strong writing skills are essential. Five (5)+ years' experience is preferred, must be admitted to the practice of law in New Mexico, and be an active member of the Bar in good standing. Salary will be based upon experience. Please submit resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or amaragon@cabq.gov.

Attorney

U.S. Eagle Federal Credit Union is looking for an Attorney to practice broadly in the areas of bankruptcy, lending, collections, repossession/foreclosures and real estate law; prior experience practicing in the aforementioned areas of law is strongly preferred. The Attorney will prepare legal documents and advise on compliance and other legal issues related to the financial institution. For additional information or immediate consideration, email resume or contact nreagin@useagle.org

Prosecutor

If you're looking for a six-figure salary, working countless hours behind a desk, keeping track of your life in 6-mintue increments, and not seeing the inside of a courtroom for the first five years of your legal career, this job isn't for you. But if you're looking for a career that will give you a sense of purpose, a job where you will truly make a difference in your community, where you seek truth and justice, try cases, and hold criminal offenders responsible for their actions, then come join our team. The Twelfth Judicial District Attorney's Office has vacancies for a prosecutor in Lincoln and Otero Counties. We try more jury trials per capita than every other judicial district in the State. As an Assistant District Attorney in the 12th, you'll learn from some the best prosecutors in the State of New Mexico, and you'll get actual courtroom experience starting day one. Email your resume and a cover letter to John Sugg at 12thDA@da.state.nm.us or mail to 12th Judicial District Attorney's Office, 1000 New York Ave, Room 101, Alamogordo, NM 88310.

NMLA Managing Attorney Position Available in Albuquerque

New Mexico Legal Aid is seeking a Managing Attorney for our main office in Albuquerque. The position will help lead NMLA's advocacy efforts throughout central New Mexico. The Managing Attorney will supervise and mentor attorneys, paralegals and other staff and volunteers; handle administrative duties; and handle cases as sole counsel or co-counsel for low-income individuals and families in a wide variety of poverty law areas including family law, housing, public benefits, and consumer issues. The Managing Attorney will be active in local bar and community activities. The work will include participating in community education and outreach to eligible clients; and recruitment of and collaboration with pro bono attorneys. The NMLA office in Albuquerque handles a wide range of creative, challenging and complex work. We are looking for highly motivated candidates who are passionate and strongly committed to helping NMLA better serve our client communities, including development of effective team strategies to handle complex advocacy and extended representation cases. Requirements: Minimum five years as a licensed attorney; prior experience in administrative and supervisory roles preferred. Must be willing to travel. Must be able to effectively use computer technology and remote communications systems, including shared on-line workspaces and web meeting and videoconferencing software, to effectively supervise and co-counsel with staff located in multiple offices. Candidates also must possess excellent written and oral communication skills, the ability to manage multiple tasks, manage a caseload and build collaborative relationships within the staff and the community. Proficiency in Spanish is a plus. Send a current resume, three references, and a letter of interest explaining what you would like to accomplish if you are selected for this position to: jobs@nmlegalaid.org. Salary: DOE, NMLA is an EEO Employer. Application Deadline: May 21st, 2018.

Multiple Attorney Positions 1st Judicial District Attorney

The First Judicial District Attorney's Office has multiple felony and entry level magistrate court attorney positions. Salary is based on experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to: "DA Employment," PO Box 2041, Santa Fe, NM 87504, or via e-mail to 1stDA@da.state.nm.us.

Domestic Relations Hearing Officer (PT At-Will) Family Court

The Second Judicial District Court is accepting applications for a part-time At-Will Domestic Relations Hearing Officer in Family Court. This position is under the supervision of the Presiding Family Court Judge. Applicant will be assigned caseloads to include domestic violence, domestic relations, and child support matters consistent with Rule 1-053.2. Qualifications: J.D. from an accredited law school, New Mexico licensed attorney in good standing, minimum of (5) years of experience in the practice of law with at least 20% of practice having been in family law or domestic relations matters, ability to establish effective working relationships with judges, the legal community, and staff; and to communicate complex rules clearly and concisely, respond with tact and courtesy both orally and in writing, extensive knowledge of New Mexico and federal case law, constitution and statutes; court rules, policies and procedures; manual and computer legal research and analysis, a work record of dependability and reliability, attention to detail, accuracy, confidentiality, and effective organizational skills and the ability to pass a background check. SALARY: $45.530 hourly, plus benefits. Send application or resume supplemental form with proof of education to the Second Judicial District Court, Human Resource Office, P.O. Box 488 (400 Lomas Blvd. NW), Albuquerque, NM 87102. Applications without copies of information requested on the employment application will be rejected. Application and resume supplemental form may be obtained on the Judicial Branch web page at www.nmcourts.gov. Resumes will not be accepted in lieu of application. CLOSES: May 25, 2018 at 5:00 p.m. EOE

Court Of Appeals Staff Attorney

THE NEW MEXICO COURT OF APPEALS is seeking applications for a full-time Associate Staff Attorney position. The position will be located in Albuquerque. Regardless of experience, the beginning salary is limited to $66,000, plus generous fringe benefits. New Mexico Bar admission as well as three years of practice or post-law-school judicial clerkship experience is required. The position entails management of a heavy caseload of appeals covering all areas of law considered by the Court. Extensive legal research and writing is required; the work atmosphere is congenial yet intellectually demanding. Interested applicants should submit a completed New Mexico Judicial Branch Application for Employment, along with a letter of interest, resume, law school transcript, and short writing sample of no more than 5 pages to Paul Fyfe, Chief Staff Attorney, P.O. Box 2008, Santa Fe, New Mexico 87504, no later than 4:00 p.m. on Friday, May 25, 2018. The materials may also be submitted by email to coapgf@nmcourts.gov. To obtain the application please call 827-4875 or visit www.nmcourts.com and click on "Job Opportunities." The New Mexico Judicial Branch is an equal opportunity employer.

City Attorney

The City of Santa Fe seeks a full-time City Attorney to perform managerial and professional duties as required to carry out the efficient litigation of civil or criminal cases and the ongoing legal process of city government. Serves as the lead city legal advisor in all civil and criminal matters. Must possess a licensed to practice law in New Mexico. Annual salary range is $78,988 - $134,948 depending on experience, plus excellent benefits. Submit City of Santa Fe Application by one of the following methods: Fill out application at Human Resources Department, City Hall, 200 Lincoln Avenue, Santa Fe, NM; mail application/resume to P.O. Box 909, Santa Fe, New Mexico 87504-0909; or fax application to (505) 955-6810. Applications may be downloaded from our website: www.santafenm.gov; or apply online at www.santafenm.gov.

Assistant City Attorney

The City of Rio Rancho seeks an Assistant City Attorney to assist in representing the City in legal proceedings before city, state, federal courts and agencies, including criminal misdemeanor prosecution. This position requires a JD from an accredited, ABA approved college or university law school. Three years' related law experience required. See complete job description/apply at: https://rrnm.gov/196/Employment EOE

Paralegal

Well established Santa Fe personal injury law firm is in search of a highly qualified paralegal. The ideal candidate should have at least 3 years litigation experience, preferably in civil law, be friendly, highly motivated, well organized, detail oriented, proficient with computers and possess excellent verbal and written skills. Exceptional individuals with top level skills should apply. We offer an excellent retirement plan completely funded by the firm at 15% of total wages, 100% paid health insurance, paid vacation, and sick leave. Top level salary. Please submit your cover letter and resume to santafelaw56@gmail.com

Legal Assistant/Paralegal

Sole practitioner personal injury law firm in Albuquerque seeks an experienced full-time Legal Assistant/Paralegal (5+ years). The ideal candidate should be highly motivated, well organized, detail oriented, and can work independently. Bilingual (Spanish) preferred, but not required. All responses are strictly confidential. Salary DOE plus benefits. Please submit your letter of interest, resume, references, and salary requirements to: LegalAssistantNM@gmail.com

P/T Legal Assistant
P/T Legal Assistant needed for busy 2 attorney ABQ civil/family firm (Heights). Must be professional, reliable self-starter. Phones, efiling, basic drafting in Word and timekeeping REQUIRED. Send resume and inquiries to abqlaw5218@gmail.com

Paralegal/Legal Asst./ Legal Secretary
Staff Counsel for Fred Loya Ins., is looking to fill several positions for its new location- candidates must have personal injury experience. 3+ yrs. Preferred, bilingual, Microsoft Word, Medical Benefits. Previous employment references and background check will be done when conditional offer of employment is extended. The resumes can be sent to the following email: zalaniz@fredloya.com

Paralegal
Team, Talent, Truth, Tenacity, Triumph. These are our values. (Please read below concerning how to apply.) Mission: To work together with the attorneys as a team to provide clients with intelligent, compassionate and determined advocacy, with the goal of maximizing compensation for the harms caused by wrongful actions of others. To give clients and files the attention and organization needed to help bring resolution as effectively and quickly as possible. To make sure that, at the end of the case, the client is satisfied and knows Parnall Law has stood up for, fought for, and given voice and value to his or her harm. Success: Litigation experience (on plaintiff's side) preferred. Organized. Detail-oriented. Meticulous but not to the point of distraction. Independent / self-directed. Able to work on multiple projects. Proactive. Take initiative and ownership. Courage to be imperfect, and have humility. Willing / unafraid to collaborate. Willing to tackle the most unpleasant tasks first. Willing to help where needed. Willing to ask for help. Acknowledging what you don't know. Eager to learn. Integrate 5 values of our team: Teamwork; Tenacity; Truth; Talent; Triumph. Compelled to do outstanding work. Know your cases. Work ethic; producing Monday – Friday, 8 to 5. Barriers to success: Lack of fulfillment in role. Treating this as "just a job." Not enjoying people. Lack of empathy. Thin skinned to constructive criticism. Not admitting what you don't know. Guessing instead of asking. Inability to prioritize and multitask. Falling and staying behind. Not being time-effective. Unwillingness to adapt and train. Waiting to be told what to do. Overly reliant on instruction. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at www.HurtCallBert.com/jobs. Emailed applications will not be considered.

Positions Wanted

Legal Asst/Paralegal Seeks Immediate FT Employment
Desire to work in Personal Injury area of law. Strong Work Ethic. Integrity. Albq./RR area only. Over 5 yrs exp. E-file in State & Fed Courts. Calendaring skills. Med Rec. Rqsts & Organization. Please contact 'legalassistantforhire2017@gmail.com ' for resume/references.

Experienced Paralegal Seeks Employment In Santa Fe
Highly experienced (20+ years) and recommended paralegal wishes part-time or contract employment in Santa Fe only. For resume and references, please e-mail 'santafeparalegal@aol.com'.

Seeking 'Of Counsel' Arrangement
Senior lawyer seeking 'of counsel' arrangement: Highly skilled or credentialed in environmental law, civil rights defense, oil & gas and medical. Requires light paralegal assistance; use of conference room; does not need office space. Will continue working on current limited client base; share increased workload. Submit letters of interest to POB 92860, ABQ, NM 87199-2860, Attn: Box A

Office Space

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.

620 Roma N.W.
The building is located a few blocks from Federal, State and Metropolitan courts. Monthly rent of $550.00 includes utilities (except phones), fax, copiers, internet access, front desk receptionist, and janitorial service. You'll have access to the law library, four conference rooms, a waiting area, off street parking. Several office spaces are available. Call 243-3751 for an appointment.

Available To Rent
Available to rent out 1 furnished office, attached small conference room, and secretarial bay in spacious professional building just west of downtown. Phone and internet service included. Access to large volume copier/scanner and use of larger conference room. Walking distance to courts and downtown. $750/mo. Contact Grace at 505-435-9908 if interested.

Nob Hill Office Building
Historic remodeled home one block off Central. 1,200 sf with 500 sf partial basement. Two private offices, large staff area, waiting room, full kitchen, 3/4 bath, alarm system. Tree-shaded yard, 6-space parking lot. $1,400 per month with one-year lease. See Craigslist ad for photos. https://albuquerque.craigslist.org/off/d/ne-unm-area-professional/6535481516.htmlCall or email Beth Mason at 505-379-3220, bethmason56@gmail.com

Professional Law Offices
Professional law offices for lease adjacent to Santa Fe district court at 311 Montezuma Avenue. $4400/mo for 2505 SF + utilities. 505-629-0825 LNMREB#18556

820 Second Street NW
820 Second Street NW, offices for rent, one to two blocks from courthouses, all amenities including copier, fax, telephone system, conference room, high-speed internet, phone service, receptionist, call Ramona at 243-7170.

Law Office Los Lunas
Law Office space for rent in Los Lunas. Utilities plus copier, internet, landline phone service, telephone receptionist, reception area, and conference room. $700 per month. Contact Dana 865-0688.

Downtown Office For Sale/Lease
Three (3) Blocks from the courthouse in revitalizing downtown near Mountain Road. Great visibility and exposure on 5th Street. Excellent office space boasting off street parking. Surrounded by law offices the property is a natural fit for the legal or other service professionals. Approximately 1230 square feet with two offices/bedrooms, one full bath, full kitchen, refinished hardwood floors, reception/living area with fireplace and conference/dining area. Property features CFA, 150sf basement and a single detached garage. Run your practice from here! Sale price is $265,000. Lease option and owner financing offered. Contact Joe Olmi @ 505-620-8864.

Official Publication of the State Bar of New Mexico
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

-State Bar of New Mexico-

2018 Annual Meeting

Hyatt Regency
TAMAYA RESORT
Santa Ana Pueblo

Aug. 9-11

Registration is now open!

Visit **www.nmbar.org/AnnualMeeting** to reserve your spot today.

Reserve your hotel room today!
Rates start at $179/night at the
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State Bar of New Mexico

The $26 resort fee has been waived for State Bar of New Mexico Annual Meeting attendees.