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Bar Bulletin

July 25, 2018 • Volume 57, No. 30

Santa Fe River Flows II, by Karen Halbert

www.karenhalbert.com

Inside This Issue

NEW MEXICO Lawyer

Steering ADR Into the Future— Discussions and Updates on Alternative Dispute Resolution

Congratulations to

JAMES M. MADDOX

of Hobbs, New Mexico

— On 48 Years Of Distinguished Practice —

With deep gratitude and best wishes from his colleagues and friends at the firm founded with his brother, Don Maddox, on July 1, 1970 and most recently known as Maddox, Holloman & Moran, P.C.

The attorneys of Maddox, Holloman & Moran, P.C. each have begun new professional and personal ventures, and the firm has closed its practice. It has been our privilege to serve our clients and our community over these many years.

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ADR Committee
11:30, State Bar Center

26
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Noon, The Spence Law Firm, Albuquerque

August

1
Employment and Labor Law Section Board
Noon, State Bar Center

7
Health Law Section Board
9 a.m., teleconference

8
Children's Law Section Board
Noon, Juvenile Justice Center

8
Tax Law Section Board
11 a.m., teleconference

Workshops and Legal Clinics

July

25
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

26
Common Legal Issues for Senior Citizens Workshop Presentation
10–11:15 a.m., Chaves County Joy Center, Roswell, 1-800-876-6657

August

1
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6022

1
Divorce Options Workshop
Civil Legal Clinic 10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

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

About Cover Image and Artist: Karen Halbert, a former computer scientist and college professor of mathematics, transforms the beauty and patterns she sees in the numerical universe into the natural world of her paintings. Halbert spent her childhood in the American West and following in the footsteps of many artists, returned to her roots to capture on canvas the particular quality of the Southwest. It is in Santa Fe that Halbert has found her true home. She can be seen painting plein-air in the fields throughout New Mexico. In her studio, Halbert uses sketches and photographs from her plein-air work to create images full of the emotions she feels while working out-of-doors. She is active in Plein-Air Painters of New Mexico, serving as volunteer website administrator (www.papnm.org). For more of her work, visit www.karenhalbert.com.

Notices

Court News

Second Judicial District Court

Destruction of Tapes

In accordance with 1.17.230.502 NMAC, taped proceedings on domestic matters cases in the range of cases filed in 1972-1990 will be destroyed. To review a comprehensive list of case numbers and party names or attorneys who have cases with proceedings on tape and wish to have duplicates made should verify tape information with the Special Services Division at 505-841-6717 from 8 a.m.-5 p.m. Mon.-Fri. The aforementioned tapes will be destroyed after Sept. 22.

Sixth judicial District Court

Nominating Commission

One application was received in the Judicial Selection Office as of 5 p.m., July 12, for the judicial vacancy in the Sixth Judicial District Court due to resignation of the Honorable Timothy L. Aldrich effective Aug. 10. The Sixth Judicial District Judicial Nominating Commission will meet on July 27, at the Sixth Judicial District Court, Grant Country Courthouse, 201 N. Cooper Street, Silver City, New Mexico 88061 to evaluate the applicant for this position. The commission meeting is open to the public. Those who want to make public comment are requested to be present at the opening of the meeting. The name of the applicant is: **William Perkins**.

State Bar News

Legal Resource for the Elderly Program

Upcoming Legal Workshop

The State Bar of New Mexico's Legal Resources for the Elderly Program (LREP) is offering free legal workshop in Roswell July 26, 10 a.m.-1 p.m., at Chaves County Joy Center. Call LREP at 800-876-6657 for more information.

Professionalism Tip

With respect to the courts and other tribunals:

I will be a vigorous and zealous advocate on behalf of my client, but I will remember that excessive zeal may be detrimental to my client's interests or the proper functioning of our justice system.

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- Aug. 6, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Aug. 13, 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#.
- Aug. 20, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

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

Senior Lawyers Division

Volunteers Needed for Civil Legal Clinic

The Senior Lawyers Division will sponsor the Second Judicial District Court Civil Legal Clinic from 10 a.m.- 1 p.m. on Aug. 1. Volunteers are needed to give brief, free legal advice during the clinic to community members in need. Cases are screened by New Mexico Legal Aid in advance of client consultations and will consist of general civil questions, except for family and immigration law. Attorneys are expected to issue spot and use other attorneys as resources. Contact Bill Burgett at burgettlaw@yahoo.com by July 27 to volunteer. The clinic will take place in the 3rd floor conference room at the Court, located at 400 Lomas NW in Albuquerque.

UNM School of Law

Law Library Hours

Summer 2018 Hours
May 12-Aug. 19

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.

The UNM School of Law Not For Profit Art Gallery

Call for University of New Mexico Connected Artists

The University of New Mexico School of Law Not for Profit Art Gallery invites all artists connected to UNM to submit their New Mexico images for consideration for our 2019 exhibition. The UNM School of Law Not for Profit Art Gallery provides a space for artists affiliated with UNM as faculty, staff, students, alumni and immediate relatives of this group to display and sell their work. For the 2019 exhibition, the Art Committee is looking for approximately 30 images on canvas, print work or photographs. The selected artists will become 2019 Artists in Residence and must provide art throughout the year. Contact Professor Sherri Burr, chair of the Art Committee, 277-5650, burr@law.unm.edu, or Cheryl Burbank, 277-0609, burbank@law.unm.edu

Other Bars

New Mexico Black Lawyers Association

Annual Poolside Brunch

The New Mexico Black Lawyers Association invites members to attend its annual poolside brunch on Aug. 25, 11 a.m.-2 p.m. at 1605 Los Alamos Ave. SW, Albuquerque, N.M. 87104. Join us for food, drinks and fun! Tickets are only $35 and can be purchased on our New Mexico Black Lawyers Association Facebook page or by e-mailing us at nmblacklawyers@gmail.com. Each brunch ticket comes with an entry into our raffle for $500! There will only be 100 tickets sold, so get yours today. We are also accepting sponsorships for this event. If you are interested in sponsoring, please e-mail us at nmblacklawyers@gmail.com.

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.

Nominations for NMDLA Annual Awards

The New Mexico Defense Lawyers Association is now accepting nominations for the 2018 NMDLA Outstanding Civil Defense Lawyer and the 2018 NMDLA Young Lawyer of the Year awards. Nomination forms are available online at www.nmdla.org or by contacting NMDLA at nmdefense@nmdla.org. The deadline for nominations is July 27. The awards will be presented at the NMDLA Annual Meeting Luncheon on Sept. 28, at the Hotel Andaluz, in downtown Albuquerque.

New Mexico Criminal Defense Lawyers Association

Defending Sex Offense Cases: Tips, Trials and Legal Update

This comprehensive seminar will teach attendees how to successfully litigate cases involving sexual assault and related allegations. On the schedule: state and federal law updates on sex offense's, exploitation and human trafficking; dissecting safehouse interviews and sane exams; sex offenders supervision and the first amendment; and trial tips. A special defender wellness presentation will help prepare you for handling trial and these kinds of cases. A membership party will follow. The event will be held Aug. 17, in Las Cruces for 5.5 G, 1.0 E.P., CLE credits. Visit www.nmcdla.org for more info.

Editor's Note:

In response to concerns from readers about the title of the sexual assault CLE seminar by the New Mexico Criminal Defense Lawyers Association published in this issue, we have altered the announcement submitted by NMCDLA with more appropriate language. The State Bar agrees with the concerns of our readers, understanding the sensitivity and seriousness of the issue. We regret that we did not consider the title more carefully during proofreading. We have also advised the NMCDLA of the concerns. We invite readers to contact notices@nmbar.org if they have additional questions or concerns.

Other News

Center for Civic Values

Albuquerque High School Seeks Mock Trial Attorney Coach

The Albuquerque High School is looking for an attorney coach for its Gene Franchini High School Mock Trial Team. Contact Kristen Leeds at mocktrial@civicvalues.org to express interest. To learn more about Mock Trial, visit www.civicvalues.org.

Legal Education

July

26 **Mediating with a Party with a Mental Illness/Disability**
2.0 EP
Live Seminar/ Teleseminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

27 **Bankruptcy Fundamentals for the Non-Bankruptcy Attorney (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Attorney vs. Judicial Discipline (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **Lawyer Ethics and Disputes with Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

August

1 **Charitable Giving Planning in Trusts and Estates, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

2 **Charitable Giving Planning in Trusts and Estates, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

7 **Defending Against IRS Collection Activity, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **Defending Against IRS Collection Activity, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9-11 **2018 Annual Meeting**
12 G, with Possible 7.5 EP
Live Seminar, Hyatt Regency Tamaya Resort and Spa
Center for Legal Education of NMSBF
www.nmbar.org

14 **Joint Ventures Agreements in Business, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Joint Ventures Agreements in Business, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Discover Hidden and Undocumented Google Search Secrets**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Practice Management Skills for Success (2018)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct (2017)**
1.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **Lawyers' Duty of Fairness and Honesty (Fair or Foul: 2016)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Trust and Estate Update: Recent Statutory Changes that are Overlooked and Underutilized**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Selling to Consumers: Sales, Finance, Warranty & Collection Law, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Technology: Time, Task, Document and Email Management**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Selling to Consumers: Sales, Finance, Warranty & Collection Law, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Advanced Google Search for Lawyers**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Construction Contracts: Drafting Issues, Spotting Red Flags and Allocating Risk, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Construction Contracts: Drafting Issues, Spotting Red Flags and Allocating Risk, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **The Exclusive Rights (and Revenue) You Get With Music**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **2017 Real Property Institute**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

29 **Risky Business: Avoiding Discrimination When Completing the Form I-9 or E-Verify Process**
1.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **The Ethical Issues Representing a Band-Using the Beatles**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

September

5 **Choice of Entity for Nonprofits & Obtaining Tax Exempt Status, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Choice of Entity for Nonprofits & Obtaining Tax Exempt Status, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Planning with Single Member, LLCs, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Planning with Single Member, LLCs, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **How to Practice Series: Civil Litigation, Pt II – Taking and Defending Depositions**
4.5 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Income and Fiduciary Tax Issues for Estate Planners, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Income and Fiduciary Tax Issues for Estate Planners, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **2018 Annual Tax Symposium (Full Day)**
6.0 G, 1.0 EP
Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **2018 Annual Tax Symposium - Morning Session: Federal and State Tax Updates**
3.0 G
Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **2018 Annual Tax Symposium - Afternoon Session: Tax Law Special Topics**
3.0 G, 1.0 EP
Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

25 **2018 Sexual Harassment Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **2018 Collaborative Law Symposium: The Basics**
6.0 G, 1.0
Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **2018 Advanced Collaborative Law Symposium**
7.0 G
Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **The California New Rules Review**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

October

19 **2018 Administrative Law Institute (Full Day)**
5.0 G, 1.0 EP
Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

25 **Children's Code: Delinquency Rules, Procedures and the Child's Best Interest**
1.0 G, 1.0 EP
Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

Ask Pat

Committee on Women and the Legal Profession

Dear Pat,

I am a practicing attorney and new mother. I took some time off after the birth of my child but will be returning to work very soon. I would like to continue breastfeeding, but I am a little uncomfortable about pumping at work. I'm not familiar with legislation about pumping in the workplace. Please help.

Sincerely,
Nursing in Albuquerque

Dear Nursing,

You should not feel uncomfortable. The legislature and most of society finds that breastfeeding a baby is an important, natural and nurturing act that should be encouraged in the interests of the health of the mother, health of the child and family values.

New Mexico has allowed breastfeeding in any "public or private location" since 1999, but for breastfeeding women this often meant having to use the office bathroom. Now, New Mexico Statutes § 28-20-2 states that employers must provide a space for using breast pumps which "is clean and private; near the employee's workspace; and not a bathroom." In addition, your office must allow you to have "flexible break times."

Here are a few suggestions when finding a pumping location at work:

1. Find a place where you can close the door. Use an empty office if your own is inappropriate.
2. Optimally, you should be able to lock the door.
3. You should have a large enough space near a sink.
4. Adjust your schedule for the time you need and/or for when the optimal location is available.

Pat suggests that you drop by the office before returning to work to find an acceptable place. If you need assistance, sometimes a fellow coworker/office manager can be helpful and discreet. Employers do not have to provide a refrigerator. If you do not have one or you feel uncomfortable using the lunch area fridge, bring a cooler or a mini fridge for your office. While a closed door by itself means "do not disturb" to many offices, you may find it helpful to put a sign on your door to keep staff from interrupting.

For attorneys, "pumping at work" does not always mean in your own office, as many aspects of our work take us to other locations. To avoid explaining your breaks during a court proceeding, alert the judge's office beforehand, and be sure there is an appropriate room you can use. The judge's staff or the court clerks can be very helpful in finding appropriate accommodations - for example, the Second District Court reserves a room on the fifth floor for nursing or pumping mothers (call court administration at 505-841-7425 to alert them ahead of time the room is needed). Keep in mind that attorneys should be mindful to make similar arrangements for breastfeeding clients.

Attorneys should not only think about the courtroom, but also about mediations at another location. Attorneys should call the location beforehand to alert staff of the need for breaks and for a private place to pump.

Many attorneys are worried about making their hours and still taking enough breaks throughout the day to keep up an adequate supply. Reserve some time at lunch to pump in order to minimize the number of breaks during work hours. You can continue to be productive while pumping as many brands of pumps are now "hands-free," either with use of a band which holds the pump in place, or a pump that fits inside your bra. While there are many types of pumps, in general the more expensive models are quieter.

It will be rare, but you may run into a situation where no accommodation for pumping can be made. While consistency is important for maintaining breast milk supply, remember that an occasional interruption will not hurt, so don't worry if something gets in the way of your normal schedule. Pump earlier, as soon as you are able following the conflict, or both.

Many professional women are able to return to work while enjoying raising their children. Suggestions about nursing and information on required employer accommodations are available by calling La Leche League at 505-886-1223 or the New Mexico Breastfeeding Taskforce at 505-395-6455.

Best of luck to you in balancing the needs of your child and the practice of law.

Sincerely,
Pat

The Rodey Law Firm has achieved top ranking in Chambers USA–America's Leading Lawyers for Business-2018. Rodey received Chambers' highest ranking in the following areas of law: Corporate/Commercial; Labor and Employment; Litigation: General Commercial; and Real Estate. Chambers bases its rankings on technical legal ability, professional conduct, client service, commercial awareness/astuteness, diligence, commitment, and other qualities most valued by the client. Chambers honored these Rodey lawyers with its highest designation of "Leaders in Their Field" based on their experience and expertise:

Mark K. Adams - environment, natural resources and regulated industries; water law
Rick Beitler - litigation: medical malpractice and insurance defense
Perry E. Bendicksen III – corporate/commercial
David P. Buchholtz – corporate/commercial
David W. Bunting – litigation: general commercial
Jeffrey Croasdell – litigation: general commercial
Nelson Franse - litigation: general commercial; medical malpractice and insurance defense
Catherine T. Goldberg - real estate
Scott D. Gordon - labor and employment
Alan Hall - corporate/commercial
Bruce Hall - litigation: general commercial
Justin A. Horwitz - corporate/commercial
Jeffrey L. Lowry – labor and employment
Donald B. Monnheimer - corporate/commercial
Sunny J. Nixon - environment, natural resources and regulated industries: water law
Theresa W. Parrish - labor and employment
Debora E. Ramirez – real estate
John P. Salazar - real estate
Andrew G. Schultz - litigation: general commercial
Tracy Sprouls - corporate/commercial: tax
Thomas L. Stahl - labor and employment
Aaron C. Viets – labor and employment
Charles J. Vigil – labor and employment

Denise M. Chanez, a director with the Rodey Law Firm, has been included in a list of the "Top 100 Influencers in Law. by *Albuquerque Business*. She practices primarily in the areas of long term care and medical malpractice. She is a past president and current board member of the New Mexico Hispanic Bar Association.

The New Mexico Judicial Performance Evaluation Commission has appointed **Nate Gentry,** an Albuquerque attorney who is completing his final term in the New Mexico State Legislature this year, as its newest member. Gentry was first elected to the New Mexico Legislature in 2010, was elected Republican Whip in 2012, Majority Floor Leader in 2014, and Republican Floor Leader in 2016.

Gentry earned his Bachelor of Arts degree from Rhodes College in Memphis, Tennessee, and a Juris Doctor from the University of New Mexico School of Law. He is currently in private practice in Albuquerque.

Saucedo Chavez is proud to announce that **Chris Saucedo** has been appointed to the New Mexico State University Board of Regents. As a lifelong Aggie, being named to the New Mexico State University Board of Regents is a huge honor. Saucedo has strong ties to the New Mexico State University community. All of his family attended the university and have been season ticket holders for years.

Thomas L. Grisham was born on July 25, 1947, in Illinois and died on May 27 in Albuquerque. Grisham lived an amazing life filled with travel and adventure along with love and passion. Grisham began travelling at a young age due to his father being in the military. They moved from Illinois to Washington, D.C. to Colorado. His family finally planted their roots in Albuquerque in the early 1950. Grisham always had a passion for the outdoors. He would often come home with little surprises including a snake wrapped around his waist as a belt. He loved fishing and hiking and he grew up participating in the Boy Scouts of America. He learned many things including survival skills, tying knots and how to carve the most amazing things out of a piece of wood. He received his Eagle Scout Award which he carried through the rest of his life with pride. Later he became a Scoutmaster and received his Wood Badge and also the highest honor The Silver Beaver. Grisham led several young men to the same accomplishments as he once had done himself. Grisham attended Sandia High School through his teenage years. It was there where he found a true love and appreciation for debate. While on the Sandia High School debate team, Grisham won several awards and knew he wanted to pursue a career in law. He was also a thespian and held several offices in extracurricular clubs. Later, in law school, Grisham won first place in the National Client Counseling Competition in Chicago. Grisham attended the University of New Mexico where he graduated *magna cum laude* in 1969. He then attended law school at the University of New Mexico and proudly graduated Order of the Coif in 1973. Grisham worked at the district attorney's office right after graduating law school and then decided to go on an adventure of partnerships with other fellow graduates from the University of New Mexico Law School. He had a very successful career helping others and fighting for justice. In 1969, Grisham married the love of his life, Deborah. They both shared a passion for travel. Grisham and Debby explored the entire world together. They travelled the Nile to see the amazing Egyptian Pyramids, Mexico to see ruins left by the Aztecs, South America to experience Machu Picchu and the Nazca Lines and to the Amazon to experience it's many cultures. They travelled to China to see the Qian Warriors and walk the Great Wall. They rode camels in Morocco, fed obnoxious orangutans in South China, rode elephants in Zimbabwe, rode mules down the edges of the Grand Canyon and parasailed over the blue waters of the Caribbean. They took a ship through the Panama Canal and explored all of Europe together. They got to see the amazing art at the Hermitage Museum in St. Petersburg, Russia, as well as the Del Prado in Madrid. They explored the Picasso museum in Barcelona, Spain ,and marveled at the masterpieces in the Louvre in Paris, France. They travelled to Alaska to whale watch, go dog sledding and land by helicopter on top of a glacier. They stayed in the castles of Ireland and journeyed to the Turkish Baths. Grisham and Debby were able to go to Jordan and experience Petra and swim in the Dead Sea and went scuba diving throughout the Virgin islands and Tahiti. They fancied the Islands of Hawaii which they travelled to so often they lost count. They went on African safaris where Grisham could have moved there and lived out the rest of his days. He loved King's Camp and would jump at the chance to go back. Grisham had a passion for photography and he always had his camera in hand for the perfect photo moment. He loved taking pictures of the wildlife and the wonders of Africa. He also enjoyed capturing the perfect moments with his family and friends. Grisham also loved taking road trips with Debby and their three kids. He enjoyed stopping at every stop on the side of the road while heading to the various National Park Wonders. He travelled to the vastness of the Grand Canyon to the amazing dwellings of Mesa Verde and Bandelier National Park. He took the family to see the geysers of Yellowstone and the amazing falls at Yosemite. He loved to sled down the White Sands of New Mexico and going spelunking at the Carlsbad Caverns. He survived the monsoon of the century in the Painted Deserts of Arizona, a 6.7 earthquake in Costa Rica and a typhoon that hit La Paz, Mexico, in the 1980. Grisham enjoyed collecting interesting souvenirs from around the world. He also enjoyed reading. When he wasn't working, you could often find him reading in his favorite chair or outside enjoying the bird's songs. He wore out his favorite books from reading them so many times. Grisham loved learning about his family's genealogy of which he dedicated the last three decades to. He enjoyed sharing his findings with the entire family. He met extended family members from generations past and loved sharing stories. Grisham is survived by his two sisters Sandra and Debra, as well as a brother Michael along with many nieces and nephews. He is also survived by his wife Deborah Grisham, his daughters, Elizabeth Roybal and Susannah Stark, his son, John Grisham, and five grand-children, Olivia, Cadence, Ethan, Drew and Grant. Grisham's life was full of amazing moments and memories. He will be missed terribly by many people. We pray his adventures have only just begun.

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 July 13, 2018

PUBLISHED OPINIONS

No published opinions

UNPUBLISHED OPINIONS

A-1-CA-35087	State v. P Morales	Affirm	07/09/2018
A-1-CA-36832	J Martinez v. A Burton M.D.	Affirm	07/09/2018
A-1-CA-36954	State v. J Jaramillo	Affirm	07/09/2018
A-1-CA-37013	E Wagner v. E Reyes	Affirm	07/09/2018
A-1-CA-37044	HSBC Bank USA v. J Fontaine	Affirm	07/09/2018
A-1-CA-37062	State v. P Torres	Affirm	07/09/2018
A-1-CA-36821	Pete's Top Quality v. New Mexico Taxation and Revenue	Dismiss	07/10/2018
A-1-CA-36099	State v. M Ortega	Affirm	07/11/2018
A-1-CA-36769	Wells Fargo v. R Semones	Dismiss	07/11/2018
A-1-CA-36956	State v. J Gonzales	Affirm	07/12/2018
A-1-CA-37050	State v. A Garcia	Affirm	07/12/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

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CLERK'S CERTIFICATE OF INDEFINITE SUSPENSION FROM MEMBERSHIP IN THE STATE BAR OF NEW MEXICO

Effective **July 9, 2018**, the following attorney is **INDEFINITELY SUSPENDED** from the State Bar of New Mexico pursuant to Rule 17-206(A)(3) NMRA:
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CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS AND CHANGE OF ADDRESS

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CLERK'S CERTIFICATE OF CORRECTION

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective July 25, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

Please see the summary of proposed rule amendments published in the July 11, 2018, issue of the Bar Bulletin. The actual text of the proposed rule amendments can be viewed on the Supreme Court's website at the address noted below. The comment deadline for those proposed rule amendments is August 1, 2018.

Recently Approved Rule Changes Since Release of 2018 NMRA:

Effective Date

Rules of Civil Procedure for the District Courts

1-003.2	Commencement of action; guardianship and conservatorship information sheet	07/01/2018
1-079	Public inspection and sealing of court records	07/01/2018
1-079.1	Public inspection and sealing of court records; guardianship and conservatorship proceedings	07/01/2018
1-088.1	Peremptory excusal of a district judge; recusal; procedure for exercising	03/01/2018
1-104	Courtroom closure	07/01/2018
1-140	Guardianship and conservatorship proceedings; mandatory use forms	07/01/2018
1-141	Guardianship and conservatorship proceedings; determination of persons entitled to notice of proceedings or access to court records	07/01/2018

Civil Forms

4-992	Guardianship and conservatorship information sheet; petition	07/01/2018
4-993	Order identifying persons entitled to notice and access to court records	07/01/2018
4-994	Order to secure or waive bond	07/01/2018
4-995	Conservator's notice of bonding	07/01/2018
4-995.1	Corporate surety statement	07/01/2018
4-996	Guardian's report	07/01/2018
4-997	Conservator's inventory	07/01/2018
4-998	Conservator's report	07/01/2018

Rules of Criminal Procedure for the District Courts

5-302A	Grand jury proceedings	04/23/2018

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-031
No. S-1-SC-35757 (filed April 23, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
ISAAC MARTINEZ,
Defendant-Appellee,
consolidated with
STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
CARLA CASIAS,
Defendant-Appellee.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
John M. Paternoster, District Judge

HECTOR H. BALDERAS,
Attorney General
MARIS VEIDEMANIS,
Assistant Attorney General
Santa Fe, New Mexico
for Appellant

TODD A. COBERLY
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for Appellees

RYAN J. VILLA
THE LAW OFFICE OF RYAN J. VILLA
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for Amicus Curiae New Mexico
Criminal Defense Lawyers
Association

Opinion

Charles W. Daniels, Justice

{1} In this case we address whether a court may dismiss an indictment because evidence considered by the grand jury had been developed through use of unlawful subpoenas. We confirm almost a century of judicial precedents in New Mexico and hold that, absent statutory authorization, a court may not overturn an otherwise lawful grand jury indictment because of trial inadmissibility or improprieties in the procurement of evidence that was considered by the grand jury.

I. BACKGROUND

{2} Defendants Isaac Martinez and Carla Casias were each indicted on one count of armed robbery and one count of conspiracy to commit armed robbery.

{3} Early in the investigation of the robbery, a police detective enlisted the help of the deputy district attorney in the Eighth Judicial District, who prepared and authorized service of what purported to be judicial subpoenas duces tecum (the subpoenas) to obtain records of calls and text messages of suspects from their cellular telephone providers.

{4} These purported subpoenas represented on their face that they were issued in the name of the Eighth Judicial District Court, although at the time of their preparation and service there was no pending prosecution, court action, or grand jury proceeding. Over signature of the deputy district attorney, some of these purported subpoenas ordered production of "Call Detail Records, and Text Message Detail" for the specified phones, all ordered subscriber information, and all ordered production to the Taos Police Department with the warning, "IF YOU DO NOT COMPLY WITH THIS SUBPOENA, you may be held in contempt of court and punished by fine or imprisonment." These early subpoenas were filed with the district court in a miscellaneous court docket, rather than a criminal or grand jury docket, but they were styled as "State of New Mexico, Plaintiff, vs. John Doe, Defendant."

{5} The detective used information gained from the early subpoenas to obtain search warrants for additional evidence. For example, the original subpoenas revealed the phone numbers Defendants called and texted around the time of the crime as well as text message detail for some subpoenas, but the judicially issued warrants obtained both the content of text messages for the phone of Defendant Casias and records that would help establish geographical location information for the phone of Defendant Martinez at the time of the crime. The district court eventually issued a warrant for the arrest of Defendant Martinez that relied entirely on facts learned through use of the subpoenas.

{6} After this sequence of events and through use of information developed as a result of the subpoenas, a grand jury indicted Defendants for the armed robbery. On the day after the indictment, the district court issued a warrant for the arrest of Defendant Casias, and the State joined Defendants' cases. After two months of pretrial proceedings, Defendants moved to quash the indictment or alternatively to suppress all evidence obtained through the use of the contested subpoenas. The Eighth Judicial District Court granted the motion and quashed the indictment. The court reasoned that the preindictment subpoenas were unlawful and that by presenting the grand jury with evidence obtained through their use the deputy district attorney had tainted the grand jury proceedings.

{7} The State appealed the dismissal to the Court of Appeals, which certified the issue to us for resolution, citing a conflict between (1) our precedents holding that an indictment duly returned into court and regular on its face cannot be challenged with respect to the kind and degree of evidence considered by the grand jury and (2) the broad wording of a recent amendment to our Rules of Criminal Procedure, Rule 5-302A NMRA, providing in pertinent part that "the grand jury proceedings, the indictment, and the lawfulness, competency, and relevancy of the evidence shall be reviewable by the district court."

{8} In its certification, the Court of Appeals noted that application of Rule 5-302A "appears to invite a level of intrusion into the grand jury process that will be altogether new in New Mexico, invite litigation that has historically been limited

to circumstances of evidence insufficiency and prosecutorial bad faith, and bears the capacity to undermine the independence of the grand jury." But the Court of Appeals also expressed concern that reversing the district court would require it to disregard the wording of Rule 5-302A and encroach on the Supreme Court's exclusive authority to exercise superintending control over the rules of procedure in our courts. We accepted certification and set this matter for full briefing and argument.

II. DISCUSSION

A. Jurisdiction and Standard of Review

{9} NMSA 1978, Section 34-5-14(C) (1972), provides jurisdiction in this Court over matters certified to us by the Court of Appeals if "the matter involves: (1) a significant question of law under the constitution of New Mexico or the United States; or (2) an issue of substantial public interest that should be determined by the supreme court."

{10} This case meets both criteria. First, the grand jury is a constitutional institution, *see* N.M. Const. art. II, § 14, and as the following discussion will show, the integrity and independence of the grand jury have been vigorously protected by both the legislative and judicial branches in statutes and case law. Consequently, a question about when grand jury indictments may be overturned is legally significant. Second, because the grand jury represents an important safeguard for individuals against unfounded criminal charges, its independence and functioning are matters of substantial public interest. A significant additional consideration is that conflicts between a statute, this Court's case law interpreting the statute, and this Court's procedural rules call for definitive resolution by this Court.

{11} There being no material facts in dispute, this case presents pure questions of law that we review de novo. *State v. Rowell*, 1995-NMSC-079, ¶ 8, 121 N.M. 111, 908 P.2d 1379.

B. The Use of Subpoenas Issued Without Authority Was Unlawful

{12} At the outset, we recognize that the judicial subpoenas issued unilaterally by the deputy district attorney in the absence of any pending court or grand jury proceeding were unlawful. We have so held in a precedential opinion in the related disciplinary case against both the former deputy district attorney and the District Attorney for the Eighth Judicial District where the subpoenas originated, and there is no need to rearticulate the supporting reasons here. *See In re Chavez*, 2017-NMSC-012, ¶¶ 1-2, 390 P.3d 965.

{13} While noting that the deputy district attorney and district attorney apparently had not acted in bad faith, *id.* ¶ 24, we held in *Chavez* that the purported subpoenas were unlawful because they were issued unilaterally outside the authority of a pending court case or grand jury investigation, *id.* ¶¶ 2, 16, 19, and we formally reprimanded both attorneys, *id.* ¶ 25. As we explicitly held in that published precedential opinion, "it is unlawful for a court or an officer of the court to issue any subpoena in the absence of a pending judicial action." *Id.* ¶ 2.

{14} But *Chavez* dealt solely with attorney discipline and did not address any evidentiary or procedural consequences arising from the unlawful subpoenas. In this case, we must address whether their use was fatal to the validity of a grand jury indictment that was obtained on the basis of the evidence the subpoenas helped to uncover.

C. New Mexico Statutory and Case Law Preclude Judicial Review of the Legality or Admissibility of Evidence Considered by the Grand Jury

{15} Beginning with *State v. Chance*, 1923-NMSC-042, 29 N.M. 34, 221 P. 183, our first precedent on the issue almost a century ago, and despite various amendments of New Mexico grand jury statutes, this Court has consistently honored a strong policy of resisting dismissal of otherwise valid grand jury indictments based on disputes about the source or trial admissibility of the evidence considered by the grand jury. *See, e.g.*, *Buzbee v. Donnelly*, 1981-NMSC-097, ¶ 83, 96 N.M. 692, 634 P.2d 1244 (citing *Chance*, 1923-NMSC-042, ¶ 8).

{16} The first New Mexico statutes relating to the kind of evidence a grand jury should consider were enacted early in our territorial history as part of the Act of February 7, 1854. *See* 1853-54 N.M. Laws, Ch. II, §§ 1-15 at 56, 66-68, 74 (recompiled after statehood as NMSA 1915, §§ 3124-3138 (1854)) (regulating various aspects of the functioning of grand juries). The evidentiary provisions included directions that the grand jurors could receive no other evidence than "[s]uch as is given by witnesses, produced and sworn before them," and "[b]y legal documentary evidence," NMSA 1915, § 3128 (1854), and that "[t]he grand jury can receive none but legal evidence and the best evidence in degree, to the exclusion of hearsay or secondary evidence," NMSA 1915, § 3129 (1854).

{17} In 1923, this Court considered for the first time whether those broad statutory commands authorized a reviewing court to evaluate the sufficiency or legality of evidence that the grand jury had considered in returning an indictment. *See Chance*, 1923-NMSC-042, ¶¶ 2, 8. *Chance* determined that the provisions of NMSA 1915, Section 3129 (1854), provided no such clear statutory authority for judicial oversight of the evidence considered by the grand jury, holding that those provisions were "directory and [were] for the guidance of the grand jury." *Chance*, 1923-NMSC-042, ¶ 8. In a holding that has never been reversed, *Chance* concluded that the grand jury

> is a judicial tribunal with inquisitorial powers, and, unless there is some clear statutory authority to do so, we think the courts are without power to review its action to determine whether or not it had sufficient or insufficient, legal or illegal, competent or incompetent evidence upon which to return an indictment.

Id.

{18} The 1854 version of the grand jury statutes construed in *Chance* remained unaltered for over 115 years until the 1969 addition of "other physical evidence" to the witness testimony and documentary evidence previously approved in the statutes as acceptable evidence for submission to the grand jury, and expansion of the definition of permissible evidence to provide that "[a]ll evidence must be such as would be legally admissible upon trial." NMSA 1953, § 41-5-11(A) (1969 N.M. Laws, ch. 276, § 11).

{19} In several reported decisions, New Mexico appellate courts held that *Chance*'s holding was still controlling law after the 1969 statutory amendments. The fact that "the legislature in amending the laws pertaining to grand juries in 1969 still did not see fit to give the courts authority to review the sufficiency of evidence to support grand jury indictments" was significant. *State v. Paul*, 1971-NMCA-040, ¶ 11, 82 N.M. 619, 485 P.2d 375 (rejecting the contention that *Chance* should be overruled or distinguished), *superseded by rule on other grounds as stated in State v. Elam*, 1974-NMCA-075, ¶ 9, 86 N.M. 595, 526 P.2d 189; *see also State v. Ergenbright*, 1973-NMSC-024, ¶ 4, 84 N.M. 662, 506 P.2d 1209 (citing *Chance* and *Paul* as support

for holding that "[t]here is no provision in New Mexico law for judicial review of the evidence considered by a grand jury").

{20} In *State v. Stevens*, 1979-NMCA-058, 93 N.M. 434, 601 P.2d 67, the district court had dismissed an indictment because a statement of the defendant that had been suppressed as inadmissible trial evidence in an earlier proceeding had subsequently been used as evidence before the reindicting grand jury. *See id.* ¶¶ 1-2. In dismissing the resulting indictment, the district court had relied on the 1969 amendment to the grand jury statutes providing that "[a]ll evidence [before the grand jury] must be such as would be legally admissible upon trial." *Stevens*, 1979-NMCA-058, ¶ 2 (alterations in original) (quoting NMSA 1978, Section 31-6-11 (1979)). The Court of Appeals reversed the dismissal, holding that notwithstanding the new statutory direction regarding legally admissible evidence, *Chance* still precluded any judicial review of the propriety of evidence before the grand jury. *See Stevens*, 1979-NMCA-058, ¶ 4.

{21} This Court endorsed the holdings of *Paul*, *Ergenbright*, and *Stevens* in *State v. Maldonado*, 1979-NMSC-102, ¶¶ 6-7, 93 N.M. 670, 604 P.2d 363. *Maldonado* accepted the defendant's claim that inadmissible evidence presented to a grand jury included fruits of a search and seizure, the defense attorney's statement to a police officer, and the defendant's silence after advice of his *Miranda* rights. *Id.* ¶¶ 4-5. We held that the district court was without authority to dismiss the resulting indictment, agreeing with *Paul* that the Legislature's decision not to textually provide a right of judicial review when promulgating the 1969 amendments to the grand jury statutes confirmed the continued vitality of *Chance*. *See Maldonado*, 1979-NMSC-102, ¶ 7. We also noted that the Legislature had more recently amended the statutes in 1979, but "chose not to give the New Mexico courts the authority to review evidence supporting a grand jury indictment." *Id.*

{22} The 1979 amendment added a new provision that required the prosecutor to submit to the grand jury evidence that "directly negates the guilt" of the defendant. NMSA 1978, § 31-6-11(B) (1979). In *Buzbee*, 1981-NMSC-097, ¶ 83, this Court reviewed the resulting version of the statutes and again held that in the absence of clear statutory authority, "the courts are without power to review the sufficiency, legality or competency of the evidence upon which an indictment is returned."

{23} As *Buzbee* noted in dicta, the 1981 legislative session resulted in more amendments to the grand jury statutes, eliminating the requirement that grand jury evidence must be "legally admissible upon trial" and adding a clause that "'[t]he sufficiency [or] competency of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury.'" *Id.* ¶ 30 (quoting NMSA 1978, Section 31-6-11(B) (1981) and observing that New Mexico law "has gone full circle back to the common law" and is consistent with federal jurisprudence, which bars inquiry into the admissibility of evidence considered by a grand jury). In basing its holding on both principles of grand jury independence and the practical unworkability of postindictment evidence reviews, *Buzbee* relied on a great body of federal law. *See id.* ¶¶ 17-25.

{24} *Buzbee* agreed with federal precedents criticizing a postindictment evidence review that would require a "'preliminary trial to determine the competency and adequacy of the evidence before the grand jury.'" *Id.* ¶ 23 (quoting *Costello v. United States*, 350 U.S. 359, 363 (1956)); *see also United States v. Calandra*, 414 U.S. 338, 349-50 (1974) (holding that federal courts could not preclude a grand jury's consideration of evidence that would be suppressible at trial, observing that "[a] ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws" (internal quotation marks and citation omitted)).

{25} Section 31-6-11(A) was most recently amended in 2003 and now provides:

> Evidence before the grand jury upon which it may find an indictment is that which is lawful, competent and relevant, including the oral testimony of witnesses under oath and any documentary or other physical evidence exhibited to the jurors. The Rules of Evidence shall not apply to a grand jury proceeding. The sufficiency of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury.

Section 31-6-11(A) (2003).

{26} The first case to consider the current version of the statute, as amended in 2003, was *State v. Romero*, 2006-NMCA-105, ¶ 2, 140 N.M. 281, 142 P.3d 362. In *Romero*, the Court of Appeals confirmed the applicability of *Chance*, holding that "(1) the 2003 version of Section 31-6-11(A) is directory and for the guidance of the grand jury, and (2) the Legislature has not authorized judicial review of the evidence presented to a grand jury except for its sufficiency and then only upon a showing of prosecutorial bad faith." *Romero*, 2006-NMCA-105, ¶ 5. *Romero* also observed that because the 2003 amendments added the second sentence of Section 31-6-11(A) providing that the Rules of Evidence shall not apply in a grand jury proceeding and deleted the words "or competency" after "sufficiency" in the final sentence, the Legislature demonstrated its "intent to limit, not to expand judicial review, as compared to the 1981 version . . . ." *Romero*, 2006-NMCA-105, ¶ 7; *see also State v. Gallegos*, 2009-NMSC-017, ¶¶ 9-11, 146 N.M. 88, 206 P.3d 993 (citing *Romero* with approval and rejecting a challenge to a grand jury indictment that was allegedly based on inadmissible hearsay evidence).

{27} The reluctance of the legislative and judicial branches to permit judicial review of the quality or quantity of evidence considered by the grand jury does not mean that we will not step in to prevent prosecutorial abuse of the "structural protections that safeguard the grand jury's ability to perform its constitutional function." *Herrera v. Sanchez*, 2014-NMSC-018, ¶¶ 14, 26-27, 32, 328 P.3d 1176 (ordering dismissal of an indictment because a prosecutor unlawfully prevented the grand jury from hearing a target defendant's answer to questioning by the grand jury and misinstructed the grand jury on the applicable law); *see also De Leon v. Hartley*, 2014-NMSC-005, ¶¶ 16-17, 316 P.3d 896 (ordering dismissal of an indictment because the prosecutor's office unlawfully exercised control over the selection and excusal of grand jurors); *State v. Ulibarri*, 2000-NMSC-007, ¶¶ 1, 3, 128 N.M. 686, 997 P.2d 818 (affirming dismissal of an indictment for failure of prosecution to comply with "mandated constitutional and statutory requirements for instructing the grand jury on the essential elements of the offenses"); *Baird v. State*, 1977-NMSC-067, ¶¶ 2, 4-10, 90 N.M. 667, 568 P.2d 193 (holding that a prosecutor's presence during secret grand jury deliberations is grounds for dismissal

of a resulting indictment); *Davis v. Traub*, 1977-NMSC-049, ¶¶ 10-11, 90 N.M. 498, 565 P.2d 1015 (holding that the presence of an unauthorized person during grand jury proceedings required dismissal of the resulting indictment). But as *Stevens* pointed out in rejecting an argument that structural defect cases like *Baird* and *Davis* retreated from the holding in *Chance*, "[n]one of these decisions involved evidence presented to the grand jury" and therefore "did not modify *State v. Chance*." *Stevens*, 1979-NMCA-058, ¶ 5.

{28} In *Jones v. Murdoch*, 2009-NMSC-002, 145 N.M. 473, 200 P.3d 523, for example, we were faced with a structural integrity problem in fashioning a procedure by which we could help ensure compliance with the mandate of Section 31-6-11(B) that the grand jury be made aware of exculpatory evidence, in light of the fact that the statute "contains no express or implied authorization for judicial review of the evidence to insure that the grand jury considered evidence that disproves or reduces a charge or that makes an indictment unjustified." *Jones*, 2009-NMSC-002, ¶ 19 (internal quotation marks and citation omitted). We created a preindictment dispute resolution system that would not second-guess the grand jury's decision after the fact but instead would, as the Legislature intended, "give the grand jury greater access to pertinent evidence." *Id.* ¶ 25.

{29} The consideration by the grand jury of the evidence in this case involves no structural defect that could have interfered with the grand jury process; like *Stevens* and *Maldonado*, this case relates solely to an argument that unlawful official conduct led to the discovery of inculpatory evidence that was then presented to and considered by the grand jury. It is strikingly similar to the situation in *State v. Eder*, 1985-NMCA-076, ¶¶ 2-3, 103 N.M. 211, 704 P.2d 465, in which a prosecutor without lawful grand jury authorization issued what facially appeared to be grand jury subpoenas seeking financial records relating to the defendants. The prosecutor then procured indictments on the basis of the information gained from the subpoenas. *Id.* The district court not only suppressed the fruits of the subpoenas from admission at trial, it also dismissed the indictments that had been procured with those fruits. *Id.* ¶ 4. The Court of Appeals reversed the dismissal, noting that grand jury indictments should be left undisturbed unless a prosecutor has engaged in "deceitful or malicious overreaching which subverts the grand jury proceedings" and that in cases where "inadmissible evidence is presented to the grand jury, the proper remedy is suppression at trial" and not dismissal of the indictment. *Id.* ¶ 9.

{30} This case also does not involve a challenge to the sufficiency of the evidence as a whole to support the indictment, in which case an inquiry into the good or bad faith of the prosecutor might be called for by Section 31-6-11(A). In that regard, we note that the statute appears to address bad faith in presentation of evidence to the grand jury, such as deceiving the grand jury as to the probative value of the evidence, but not bad faith in the initial acquisition of probative evidence that may be subject to suppression at trial. *Cf. State v. Reese*, 1977-NMCA-112, ¶ 11, 91 N.M. 76, 570 P.2d 614 (holding that an indictment procured by a prosecutor's knowing use of false evidence violated due process). We therefore need not revisit our determination in the related attorney disciplinary action that the evidence in this case does not show that the deputy district attorney and district attorney "exhibited bad faith or an intent to deceive." *Chavez*, 2017-NMSC-012, ¶ 24.

{31} We also reject Defendants' argument that the State based its indictment on false evidence. The claimed falsity was not in the evidence showing the commission of the crime; it was in the alleged misrepresentation that "the genesis of [the officer's] investigation, and the additional evidence he derived therefrom, was predicated on lawfully-obtained evidence." In other words, the grand jury was not misled about Defendants' guilt, whether or not it was implicitly or explicitly misled about the potential suppressibility of the evidence obtained from the subpoenas. Defendants' theory is not only inconsistent with the reasons for guarding against false or perjured testimony in obtaining an indictment, it would negate the entire body of state and federal case law rejecting review of the admissibility of evidence considered by the grand jury. As the above cases emphasize, suppression is a remedy for court determination in pretrial proceedings and is not one the grand jury is either equipped or called upon to decide. *See* Rule 5-212(C) NMRA (providing that motions to suppress shall be filed no less than sixty days prior to trial).

{32} The exhaustive review in this section confirms that neither the New Mexico grand jury statutes nor decades of consistent case law reflect any retreat from the principles or holdings of *Chance* and *Buzbee*. We now address the issue that caused the Court of Appeals to certify this case to us, the possible conflict between that extensive body of law and the language of a recent amendment to our Rules of Criminal Procedure for the District Courts.

D. Rule 5-302A(F) NMRA Must Be Amended to Conform to the Law

{33} In the concluding sentence of our opinion in *Jones*, we noted that although we had described a workable framework for advance notification to the grand jury of potentially exculpatory evidence, "we also request[ed] that our Rules of Criminal Procedure for the District Courts Committee consider whether rule amendments are needed based upon the procedure we have outlined." 2009-NMSC-002, ¶ 43.

{34} Our rules committee in response recommended promulgation of an entirely new Rule, 5-302A, which this Court adopted in Supreme Court Order No. 10-8300-015, effective for target notices filed on or after May 14, 2010. As the official committee commentary reflected, the new rule was intended to deal with resolving disputes related to "a prosecutor's request to be relieved of the duty to alert the grand jury to the target's evidence or defenses." Rule 5-302A cmt. (Comm.). The provision of that new rule that is material to the issues in this case is contained in Rule 5-302A(F)(2), which in part copies language from Section 31-6-11(A) but in part adds language never contained in any New Mexico grand jury statute:

> **Scope of review.** Failure to follow the procedures set forth in this rule shall be reviewable in the district court. The weight of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury, but the grand jury proceedings, the indictment, *and the lawfulness, competency, and relevancy of the evidence shall be reviewable by the district court*.

Rule 5-302A(F)(2) (emphasis added).

{35} Defendants argue that although the highlighted addition "appears to deviate from prior law regarding a district court's ability to review evidence before the grand jury, . . . this Court properly exercised its powers when promulgating Rule 5-302A as it ensures that the prosecutor acting as an aide to the grand jury presents only

that evidence the grand jury may properly consider." There are two flaws in this argument.

{36} First, this Court is not a legislative body. It has no authority to transgress the Legislature's prerogatives through conflicting court rules. And as we have observed in precedent after precedent, the Legislature has not acted to give New Mexico courts the authority to review grand jury proceedings to determine the lawfulness, competency, or relevancy of the evidence considered by the grand jury. While this Court promulgates and adjusts court procedures through rules changes, it would be inappropriate to fashion procedural rules to overturn judicial precedent construing statutes or the common law.

{37} Second, although a broad reading of the concluding language in Rule 5-302A(F)(2) could be argued as authorizing the very kind of postindictment evidentiary review that decades of case law have held to be unprincipled in light of the independence of the grand jury, beyond statutory authorization, and unworkable in practice, to do so was not this Court's intention in adopting the rule proposed by its Rules of Criminal Procedure for District Courts Committee. The focus of the proposed new rule was, as stated in the committee chair's cover letter to this Court, "the committee's proposal for a new grand jury rule and forms based on the Court's recent opinion in *Jones v. Murdoch*." The references in that letter to lawfulness, competency, and relevancy of evidence all relate to resolving disputes in preindictment proceedings regarding whether defense-offered exculpatory evidence meets statutory standards for consideration by the grand jury. Nothing in the letter submitted by the committee reflects that the questioned language was meant to create unprecedented new authority for a postindictment challenge to evidence before the grand jury. The published committee commentary gives no hint that such a drastic rewriting of New Mexico law was intended, focusing only on preindictment resolution of alleged exculpatory evidence that is statutorily required to be made known to the grand jury, as addressed in *Jones*.

{38} As this case demonstrates, the ambiguous wording of Rule 5-302A(F) has spawned confusion and needless litigation. Upon further review, we deem it advisable to delete the clause, "but the grand jury proceedings, the indictment, and the lawfulness, competency, and relevancy of the evidence shall be reviewable by the district court." Rule 5-302A(F)(2). To the extent the questioned language could be read to confirm our holding in *Jones* that the district court may determine the propriety of alleged exculpatory evidence the defense contends should be made known to the grand jury, that topic is covered in Subsection (B)(4) of Rule 5-302A; and to the extent it can be read to overturn existing case law and authorize a postindictment review of the quality or quantity of evidence considered by the grand jury, it would contravene established law. We therefore are entering an order with this opinion withdrawing that language from Rule 5-302A(F), effective immediately.

III. CONCLUSION

{39} We hold that the district court lacked authority to review the admissibility of evidence considered by the grand jury. We reverse the resulting order of dismissal and remand this matter to the district court for further proceedings in accordance with this opinion.

{40} IT IS SO ORDERED.

CHARLES W. DANIELS, Justice

WE CONCUR:

JUDITH K. NAKAMURA, Chief Justice

PETRA JIMENEZ MAES, Justice

BARBARA J. VIGIL, Justice

EDWARD L. CHÁVEZ, Justice, retired, sitting by designation

Certiorari Granted, May 25, 2018, No. S-1-SC-36932, consolidated with No. S-1-SC-36933

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-037

No. A-1-CA-34674 (filed February 14, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
RICHARD SENA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
Stephen K. Quinn, District Judge

HECTOR H. BALDERAS,
Attorney General
Santa Fe, New Mexico
JANE A. BERNSTEIN,
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

BENNETT J. BAUR,
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for Appellant

Opinion

Julie J. Vargas, Judge

{1} A jury convicted Defendant Richard Sena of criminal sexual penetration (CSP), kidnapping, armed robbery, aggravated burglary, and criminal sexual contact (CSC). Defendant was sentenced to a term of forty years and six months. He appeals his conviction, alleging five separate assertions of error. First, Defendant claims the district court erred in failing to grant a mistrial following the State's comments during closing arguments about Defendant's demeanor during the testimony of Victim. Defendant next alleges that the district court failed to properly instruct the jury on the kidnapping charge by omitting the requirement that the State prove that Defendant's restraint of Victim was not incidental to the commission of another crime. Third, Defendant contends that the State failed to present sufficient evidence to support his convictions for first degree CSP and kidnapping. Fourth, Defendant argues his convictions for both aggravated burglary and CSP or CSC violate double jeopardy. Finally, Defendant argues the district court abused its discretion in admitting expert testimony regarding DNA evidence. We conclude that Defendant's convictions for both aggravated burglary and CSP/CSC violate double jeopardy and vacate Defendant's aggravated burglary conviction. Further, because the jury was not properly instructed on kidnapping, we remand to the district court for a new trial on that count. We affirm Defendant's convictions on all other counts.

I. BACKGROUND

{2} Victim, a seventy-three-year-old woman, awoke to an intruder, whom she identified at trial as Defendant, holding his gloved hand over her mouth and pointing a knife at her head. When she attempted to scream, Defendant threatened to kill her if she did not keep quiet. Defendant ordered her to get out of bed and take off her pajamas. Victim obeyed. Defendant asked where he could find Victim's purse, and she directed him to her closet where he retrieved the purse and took Victim's wallet. Victim informed Defendant that she needed to use the restroom, and she was permitted to walk to the restroom with Defendant following close behind. Once there, Defendant masturbated while Victim used the restroom. Defendant then directed Victim—still unclothed—to return to the bedroom and lie face down on the bed. Once Victim did so, Defendant penetrated her with his penis both vaginally and anally while she was lying on the bed. Victim also testified that Defendant fondled her breast and vaginally penetrated her with his fingers.

{3} Defendant left the bedroom after approximately an hour, and Victim made two attempts to get up from the bed. The first was unsuccessful, as Defendant was still in the living room and warned her to get back on the bed. Victim complied, and lay on the bed a while longer before again trying—this time successfully—to get off of the bed. When Victim entered the living room, she discovered her front door was standing open and her two cordless home phones, her wallet, and her rifle were gone. She locked the front door, put on a robe, and used her cell phone to call 911. Defendant never struck Victim, but she testified she felt as though she could not leave while he was in her home.

{4} The police arrived at Victim's home within a few minutes of her 911 call. Once there, the police discovered footprints in the mud outside Victim's window. They followed the footprints leading away from the house, ultimately arriving at another house in town approximately an hour and a half later where they found Defendant hiding in the back yard with socks on but without any shoes. The police found sneakers with tread matching the footprints outside Victim's home and a dark-colored, hooded sweatshirt at the house where Defendant was hiding. In a vehicle parked outside the home, the officers also found leather work gloves matching those described by Victim.

{5} Later that morning, Victim underwent a sexual assault examination, during which the Sexual Assault Nurse Examiner (SANE) found no injuries during an external examination, but did discover that Victim had a half-centimeter "open area" that was "consistent with force." The SANE also collected various swabs from Victim and Defendant. These items were subjected to DNA testing, along with two sheets from Victim's bed and Defendant's boxer shorts.

{6} During closing arguments, the State drew the jury's attention to Defendant's demeanor during Victim's testimony, stating, "did you notice also, ladies and gentlemen, when she testified, that man wouldn't even look at her. He watched every other witness on the stand." At that point, defense counsel objected and moved

for a mistrial, arguing that the State was commenting on Defendant's silence and that there was no evidence in the record regarding what Defendant did or did not do while Victim was testifying. The court overruled Defendant's objection, but stated in open court that "the jury will have to rely on their own memories as to what they observed." The State resumed its closing argument stating, "Did you watch him in the courtroom when she took the stand? He wouldn't even look at her. He looked at every other witness in the eye, but he wouldn't look at her. And why wouldn't he look at her? Because he knew what he'd done. He knew what he did."

II. DISCUSSION

A. The Prosecutor's Closing Argument Comments About Defendant's Demeanor

{7} We review the denial of Defendant's motion for mistrial based on prosecutorial misconduct for an abuse of discretion. *See State v. Fry*, 2006-NMSC-001, ¶ 50, 138 N.M. 700, 126 P.3d 516. An abuse of discretion occurs where the district court acts "in an obviously erroneous, arbitrary, or unwarranted manner." *Id*. (internal quotation
marks and citation omitted). Defendant argues that the prosecutor's action of calling the jury's attention to Defendant's demeanor during Victim's testimony was equivalent to commenting on facts not in evidence. Further, Defendant contends that because he chose not to testify, it was reversible error for the State, during closing argument, to attribute a testimonial value to Defendant's demeanor during Victim's testimony, thereby suggesting Defendant's demeanor was testimonial or somehow relevant to the issue of guilt or innocence. The propriety of a prosecutor's comments on the courtroom demeanor of a defendant who elects not to testify is an issue of first impression in New Mexico.

{8} Although no New Mexico appellate court has addressed this issue, state and federal courts throughout the country have ruled on the propriety of commenting on a non-testifying defendant's courtroom demeanor. A majority of jurisdictions disallow such comments, though their reasons for doing so vary. Some courts reason that such comments are not probative of the issue of guilt or innocence, some equate them to argument of facts not in evidence, some rely on a combination of both those reasons, and some simply characterize them as improper without any additional analysis.

{9} Several states take a broad view when disallowing comment on a non-testifying defendant's demeanor by reasoning that it is not probative of the issue of guilt or innocence. *See Hughes v. State*, 437 A.2d 559, 572 (Del. 1981) (concluding that the prosecution's comments on the defendant's courtroom demeanor were improper, explaining that they are "irrelevant" and "pregnant with potential prejudice"); *Commonwealth v. Young*, 505 N.E.2d 186, 188-90 (Mass. 1987) (distinguishing between permissible general comments on a defendant's courtroom demeanor and improper comments on demeanor that encourage an inference of guilt, stating that "a prosecutor should never argue that an inference of guilt should be drawn from proper conduct"). Other states take a more formalistic evidentiary approach by reasoning that a prosecutor's comments about a non-testifying defendant's demeanor amount to argument of facts not in evidence. *See State v. John B.*, 925 A.2d 1235, 1243 (Conn. App. Ct. 2007) (concluding that the prosecution's reference to the defendant's courtroom demeanor was improperly based on "matters extrinsic to the evidence" where the defendant did not testify and, aside from witness identifications, his presence in the courtroom was not otherwise introduced into evidence); *State v. Smith*, 984 P.2d 1276, 1286 (Haw. Ct. App. 1999) (stating that "[u]nless and until [the defendant's] reaction during the trial was lawfully introduced as evidence, it was not a proper subject for argument to the jury" and concluding that comments on the defendant's reaction violated his right to have his guilt or innocence determined solely on the basis of the evidence presented at trial); *People v. Foss*, 559 N.E.2d 254, 256 (Ill. App. Ct. 1990) (concluding that the prosecutor's invitation during opening statement that the jury consider the defendant's demeanor was improper because the defendant's "demeanor, in any respect other than when he is testifying, does not constitute evidence"). Some states rely on both reasons for disallowing comment on a non-testifying defendant's demeanor. *See Mayberry v. State*, 830 S.W.2d 176, 178 (Tex. App. 1992) ("Because a defendant's nontestimonial demeanor is not evidence, it provides no basis for reasonable deductions from the evidence. Courtroom demeanor is simply irrelevant to the issue of guilt."); *see also People v. Heishman*, 753 P.2d 629, 662-63 (Cal. 1988) (stating that prosecutorial references to a non-testifying defendant's demeanor or behavior in the courtroom are improper because demeanor evidence (1) is relevant only as to the credibility of a witness, (2) infringes on a defendant's right not to testify, and (3) "violates the rule that criminal conduct cannot be inferred from bad character"), *abrogated on other grounds by People v. Diaz*, 345 P.3d 62, 69 (Cal. 2015).

{10} Other states simply characterize comments on the demeanor of a non-testifying defendant as improper without expounding on their reason for doing so. *See Pope v. Wainwright*, 496 So. 2d 798, 802 (Fla. 1986) (acknowledging that "comments on a defendant's demeanor off the witness stand are clearly improper"); *Good v. State*, 723 S.W.2d 734, 738 (Tex. Crim. App. 1986) (en banc) (concluding that a prosecutor's comments regarding a defendant's nontestimonial courtroom demeanor are improper). Further, some federal courts have similarly concluded that a comment on a non-testifying defendant's courtroom demeanor constitutes error—either based on a violation of the defendant's constitutional rights or because it holds no weight in a consideration of guilt or innocence. *See United States v. Mendoza*, 522 F.3d 482, 491 (5th Cir. 2008) (holding that courtroom demeanor of a non-testifying defendant is "an improper subject for comment by a prosecuting attorney" because it is "not in any sense legally relevant to the question of his guilt or innocence" (internal quotation marks and citation omitted)); *United States v. Schuler*, 813 F.2d 978, 981 (9th Cir. 1987) (concluding that "in the absence of a curative instruction from the court, a prosecutor's comment on a defendant's off-the-stand behavior constitutes a violation of the due process clause of the [F]ifth [A]mendment"); *United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984) (concluding that the prosecutor was not free to comment on the defendant's behavior off the witness stand, as "a prosecutor may not seek to obtain a conviction by going beyond the evidence before the jury" and the defendant's behavior off the witness stand was not evidence subject to comment (internal quotation marks and citation omitted)); *United States v. Carroll*, 678 F.2d 1208, 1209-10 (4th Cir. 1982) (concluding that where the prosecution "describes the courtroom behavior of a defendant who has not testified, and then goes on to tell the jury that it may consider that behavior as evidence of guilt," the prosecutor violates the defendant's Fifth

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Steering ADR Into the Future–

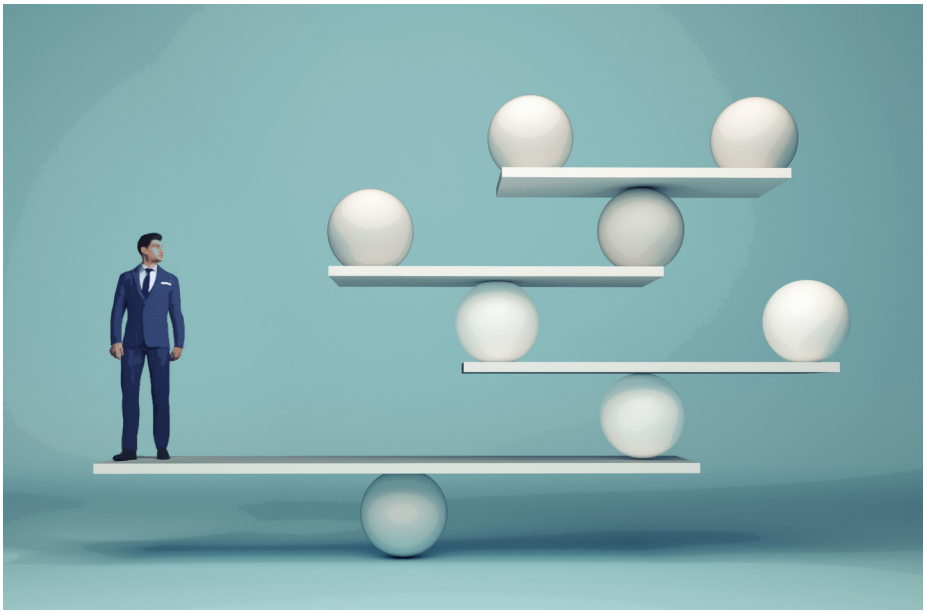
Discussions and Updates on Alternative Dispute Resolution

Alternative Methods of Dispute Resolution Committee

Classical, Advocate, and Organizational:

An Overview of Ombuds from Scandinavian Origins to the Governments, Corporations, and Universities of America

by Jon Lee



In 2017, the American Bar Association House of Delegates unanimously passed the following resolution:

> "RESOLVED that the American Bar Association encourages greater use and development of ombuds programs…as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes."

The term *ombud* (or *ombudsman, ombudsperson)* refers to an individual who offers conflict management resources as an alternative to formal channels, reports misconduct, or investigates allegations of malfeasance. The profession has evolved into three major distinctions: Classical, Advocate, and Organizational.

The Origins and Spread of Ombuds

King Charles XII of Sweden appointed the first ombud in 1713. The role was codified in the Swedish Constitution of 1809 under the term Justitieombudsman, or "the agent of justice" for the common man. The concept of ombuds spread throughout Europe with Finland establishing a similar role in 1919, Denmark in 1954, and Norway in 1963. Canada and the United Kingdom established ombuds in the 1960s, and the United States created its first ombud in 1966.

> "The classical ombud has investigative authority and may issue subpoenas and public reports on investigative findings, and push for systemic change internally and publicly."

The first United States academic institution to create an ombuds program was Eastern Montana College in 1966. Hawaii was the first government to create an office in 1969, and the Nursing Home Ombudsman Project in 1972 was precursor to long-term care ombudsmen established by the Older Americans Act. By the end of the 1970s, an estimated 190 universities employed ombuds, and in 1987 roughly 200 corporations maintained ombuds offices. During the same time, ombuds programs opened in the U.S. Department of Health, Education & Welfare, the Smithsonian Institute, and the U.S. Secret Service.

Formal Definitions

The American Bar Association defines ombuds as those who:

> "…receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve."

The United States Ombudsman Association describes the classical ombud as:

> "…an independent, nonpartisan officer of the legislative branch. This enables the Ombudsman to be independent of the executive agencies under his or her jurisdiction and identifies the Ombudsman's investigative role as an extension of the power of legislative oversight."

The International Ombudsman Association describes an organizational ombud as:

> "…a designated neutral who is appointed or employed by an organization to facilitate the informal resolution of concerns of employees, managers, students, and, sometimes, external clients of the organization."

Classical Ombuds

The primary duty of a classical ombud is to receive complaints from government workers and the general public about the actions of government officials and public employees. The classical ombud has investigative authority and may issue subpoenas and public reports on investigative findings, and push for systemic change internally and publicly.

> "At the conclusion of an investigation, the Ombudsman may make findings and recommendations for corrective action, as appropriate. However,

the Ombudsman has no power to enforce these recommendations or to compel an agency to take any corrective action, and instead, must rely on reasoned persuasion. Therefore, the findings, conclusions, and recommendations the Ombudsman makes must be fair and reasonable, firmly grounded in fact, administratively sound, and in accordance with law."

As an example, the King County Ombuds Office in the state of Washington opened 665 cases and inquiries from residents and county employees between September 1, 2017 and February 28, 2018. Twenty-six of those cases were classified as investigations, and the "allegations that initiated these investigations related to potential improper administrative conduct, as well as violations of the county's ethics and whistleblower codes, including allegations of conflicts of interest, retaliation, and improper governmental action."

Organizational Ombuds

According to the International Ombudsman Association, organizational ombuds "facilitate fair and equitable resolutions of concerns held by members within an organization." They do not advocate for any particular individual, group, or the organization itself, and they function informally as complements to formal processes. Unlike classical and advocate ombuds who have authority to investigate or provide assistance, the organizational ombud provides neutral and impartial services such as one-on-one visits, mediations, group facilitations, training, resource referrals, and trend reporting.

At the University of New Mexico, the Ombuds Services for Staff Program provided 288 one-on-one visits and 15 two-party mediations in 2017 supporting employees of the university with "building communication and collaboration to reduce the human and organizational costs of conflict." The program identified Respect/Treatment, Communication, and Supervisory Effectiveness under the category of Evaluative Relationships as the top three conflict trends reported by visitors that responded to an anonymous feedback survey. When asked what they would have done without Ombuds Services, 28.4 percent of respondents indicated that they would have left UNM and 29 percent would have changed positions within the University.

Advocate Ombuds

Advocate ombuds work on behalf of specific populations designated in their establishing charters. They have authority to represent the interests of the populations they serve, and they provide individual complaint assistance while simultaneously pursuing opportunities to affect systems change. Advocate ombuds have the authority to provide information, advice, and assistance to their constituents and initiate judicial or administrative actions on behalf of individuals.

One example is the United States Long-Term Care Ombuds Program. In 2015, the 53 State ombuds in the program provided information regarding long-term care to 398,057 individuals. The program resolved or partially resolved 74 percent of all complaints to the satisfaction of the complainants and worked to resolve 199,238 complaints initiated by residents, their families, and other concerned individuals. The three most frequent nursing facility complaints handled by ombuds were improper eviction or inadequate discharge/planning, unanswered requests for assistance, and lack of respect for residents/poor staff attitudes.

"Ombuds of all kinds give individuals the opportunity to speak openly and honestly about issues they identify and a place to find resources and assistance when navigating through those issues."

Conclusion: The Benefits of Ombuds Services

Ombuds of all kinds give individuals the opportunity to speak openly and honestly about issues they identify and a place to find resources and assistance when navigating through those issues. They can also provide "upward feedback" by communicating with leadership of organizations and governments regarding risks and trends.

The economic benefits of ombuds come in the form of preventative risk management, expanded productivity, reduced turnover, and preserved management time. The organizational benefits include heightened accountability and increased ethical behaviors. Lastly, the humanistic benefits are expanded fairness, improved and preserved working relationships, reduced incivility, and greater professional satisfaction. ■

Endnotes

[1] See Resolution 103 (2017 Resolution), ABA Resolutions with Reports to the House of Delegates, available at: https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2017_hod_annual_electronic_report_book.authcheckdam.pdf (last accessed May 21, 2018).

[2] Janzen, Fred G. (1971). A Historical Study of the Campus Ombudsman in United States Higher Education (Doctoral Dissertation). Retrieved from https://ttu-ir.tdl.org/ttu-ir/bitstream/handle/2346/15381/31295002233558.pdf (last accessed May 21, 2018).

[3] "The Organizational Ombudsman: Origins, Roles, and Operations: A Legal Guide," Charles L. Howard, ABA Section of Dispute Resolution, 2010. pp. 6-9.

[4] "What is an Organizational Ombudsman," International Ombudsman Association, available at: https://www.ombudsassociation.org/Resources/Frequently-Asked-Questions/What-is-an-Organizational-Ombudsman.aspx (last accessed May 21, 2018).

[5] Semi-Annual Report, King County Ombuds Office, available at https://www.kingcounty.gov/~/media/independent/ombuds/documents/2018/KCOmbudsSemi-AnnualReport-Sept2017-Feb2018.ashx?la=en (last accessed June 30, 2018)

[6] 2017 Annual Report, UNM Ombuds Services for Staff, available at http://ombudsforstaff.unm.edu/common/images/documents/ 2017annualreport.pdf (last accessed June 30, 2018)

[7] See Long-Term Care Ombudsman Program, Administration for Community Living, available at https://www.acl.gov/programs/protecting-rights-and-preventing-abuse/long-term-care-ombudsman-program (last accessed June 30, 2018)

Jon Lee is the ombuds facilitator at the University of New Mexico Ombuds Services. He is board certified by the Certified Organizational Ombudsman Practitioners.

The Next Generation *of* Court Connected Mediation

By Beth Williams

Nationally, courts continue to develop and support court connected mediation programs because mediation programs reduce court caseloads, increase parties' satisfaction, and reduce costs. Typically, programs focus on the benefits of reaching the "win-win" solution by using BATNA focused (Best Alternative to a Negotiated Agreement) compromise. A recent commentator, however, suggests that litigants often do not want self-determination with the aid of a neutral. The "win-win" theory does not fit their end-goal in their dispute. Instead, litigants prefer validation of their perspective. Where ADR professionals see self-determination, litigants believe courts are forcing them to assume responsibility of potentially "bad" decision making. Mayer proposes that ADR professionals reconsider the traditional notion of complete neutrality in mediation and recognize that litigants want someone to take their side. It is considerably odd that litigants really want someone to make the decision for them. If they prevail, their cause has been validated. If they fail, they can simply blame it on the judge or the hearing officer.

Court-connected programs must keep pace with the way litigants communicate and the type of relief they are seeking. In the post-Freudian, texting, tweeting, social media, selfie-taking world, the new generation of litigants communicate only with those "friends" who validate every decision. Parties text, tweet and snapchat rather than engage in face-to-face communication. This matters because as mediators, we ask parties to engage in a process that takes time, emotional energy and meaningful communication skills, most importantly, listening. Moreover, in a majority of our domestic relations cases, the parties have been married or together for five years or less. We are no longer unravelling lengthy, fully comingled couples, but processing short term relationship break-up packets. This is not to say that traditional mediation is valueless. The 13th Judicial District Court's court-connected mediation program routinely sees litigants reach that so-called a-ha moment where parties can style a satisfactory agreement. It does mean that mediators need some different tools in their toolbox.

"In the post-Freudian, texting, tweeting, social media, selfie-taking world, the new generation of litigants communicate only with those "friends" who validate every decision."

Mayer suggests that mediators can no longer remain neutral, but become more-than-neutral to meet parties' needs. California has adopted this approach in their court connected program for domestic relations. The mediator program takes the med-arb approach where if the parties cannot agree, the mediator trades in one hat for that of an arbitrator and decides for them. While this may meet parties' need to have a quick decision made by someone else, this approach flies in the face of New Mexico's basic philosophy about mediation as a vocation.

In adopting another approach, some European countries are using online dispute resolution in domestic relations cases to reflect the increasing use of technology. The Netherlands uses a platform that involves a multi-step process: "…Intake, Negotiation and Review, with optional mediation and arbitration services…" The procedure uses online input by the parties, mediation at various parts in the process and a dialogue phase based on model solutions. It also involves a mandatory legal review. (Einhorn). Such a model incorporates digital interface with the art of mediation for those who are *pro se*.

It is a modern DIY approach to litigation that provides a minimum of physical meeting, online communication along with a divorce wizard, of sorts, that allows the parties to get help only when they need it. Traditionalists will balk at this type of mediation, and it may not be appropriate for every type of case. However, even traditionalists recognize that technology has a place in mediation by virtue of calendaring appointments, emailing drafts, and so on.

Current literature on ODR makes clear that ODR and e-mediation differ. ODR was originally designed to handle commercial, online disputes. Later it became useful for small claims and other commercial disputes. While e-mediation is a *form* of ODR, it is primarily used in instances where the parties know each other well and emotions tend to run high. Aside from a better cultural fit, particularly among millennials, asynchronous e-mediation has the advantage of parties participating as they can. Litigants in rural areas do not have to travel as far. Parties can participate in their own time, gather information and report it later without having to reschedule another mediation session. In addition, ODR literature suggests that mediators have advantages by adding e-mediation to their tool-box as well. Mediators have time to reframe issues. The progress made during mediation is preserved prior to reducing it to writing. In addition, it prevents 'good talkers' from gaining the upper hand or dominant personalities from, in effect, running over the other party in mediation.

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Binding Mediation – An ADR Process Whose Time Has Come

By Peter G. Merrill

Binding mediation is a simple alternative dispute resolution process that allows the parties the opportunity to attempt to settle their dispute first though the use of the standard mediation process with a mediator's guidance. The mediator conducts a standard mediation session with the parties. If the parties reach impasse and can't come to an agreement on how to settle their dispute, the mediator is then charged with rendering a decision on how the dispute will be settled. The mediator does not become an arbitrator**.** The mediator is not governed by the Federal Arbitration Act, state arbitration acts, state arbitration Codes of Civil Procedures, etc. The mediator is free to follow whatever process he/she chooses to be able to render a decision on how the dispute will be settled. The decision is then written as a binding mediation settlement agreement just as a normal mediation settlement agreement would be written if the parties had come to their own agreement on how to settle their dispute.

"Med-Arb", or "Mediation-Arbitration", is often confused with a relative newcomer to the ADR process spectrum—"binding mediation". Insurance companies and plaintiffs' lawyers in search of finality in smaller-damage personal injury cases are turning to binding mediation routinely to avoid the disadvantages of arbitral or court adjudication—namely the substantial delay and costs associated with discovery, trial preparation, trial and possibly appeal. Although arbitration is generally less expensive and should be handled more expeditiously than the litigation process, the arbitration process can become very costly and time consuming especially if one or more of the parties decides to pursue extensive discovery including interrogatories, exchanges of documents, depositions, the issuance of subpoenas and the like.

Prior to commencing the binding mediation session, the parties should have signed a binding mediation agreement or addendum including two very important points: (1) during the mediation process, the mediator, during the private caucus sessions, may be provided with certain personal, private and confidential information by the parties which may be taken into consideration by the mediator in rendering a decision; and (2) if either or both of the parties fails or refuses to sign the binding mediation settlement agreement (written by the mediator), the binding mediation settlement agreement shall be binding on the parties as a result of the parties signing the binding mediation agreement or addendum prior to the binding mediation session. The decision of the Mediator is similar to an arbitration award, in that the parties have pre-agreed that the decision maker will render his/her "final and binding" decision that will not require the written signatures or agreement of the parties.

How many times have you conducted a mediation where the parties were close to an agreement but would not budge any further? With a binding mediation addendum, the parties could elect to have the mediator make the decision for them thus avoiding any further involvement with litigation or arbitration. It would save them the extra costs, time and the rigors and discomfort of proceeding through the litigation or arbitration process. Another advantage is flexibility. Many contracts have graduated dispute resolution mechanisms, and binding mediation can add a layer of options that can save time and money. For example, a graduated resolution process can have a requirement that any dispute under $25,000 shall be settled through binding mediation, any dispute between $25,000 and $250,000 shall be settled through binding arbitration utilizing a single arbitrator, and any dispute over $250,000 shall be settled through binding arbitration utilizing a panel of three arbitrators.

There is no limit on the size of the case that can be settled through binding mediation. For example, i*n Bowers v Raymond J. Lucia,* 12 C.D.O.S 5876, 206 Cal. App. 4th 724 (2012), the ultimate decision from a mediator was $5,000,000 which was affirmed by the California Court of Appeals. It must be remembered that courts follow and enforce contracts. If binding mediation is specified in the contract and both parties were fully aware of and agreed to utilize the process, courts should "enforce the provisions of a contract" including the ADR methodology agreed to and specified by the parties.

Although there are some disadvantages to utilizing binding mediation in place of binding arbitration to settle a dispute, in certain cases; it can be the simplest, least expensive and the most expeditious ADR process that the parties can select to settle a dispute.

Prior to selecting binding mediation, the parties should have a full understanding of the advantages, disadvantages and enforcement differences of binding mediation as opposed to binding arbitration. It is difficult to specify if something is an advantage or a disadvantage as some people may view the same issue differently. Understanding key differences will help the practitioner advise clients on the best choice. Binding mediation is a more unstructured process without specific rules to follow, and some clients would find this advantageous while others would prefer a more structured ADR process such as binding arbitration with its specific rules and procedures.

Binding Mediation is a Simplified ADR Process

Many arbitrations are conducted according to the Federal Arbitration Act and follow its rules and procedures, along with the possible use of state arbitration acts, uniform arbitration acts, rules of civil procedures,

international arbitration treaties, etc. An arbitrator may use a specified set of arbitration rules and procedures that is provided by an arbitration provider such as Construction Resolution Dispute Services, the American Arbitration Association, or the Judicial Arbitration and Mediation Services, etc. In utilizing binding mediation, there are generally few to no specific binding mediation rules and procedures. There is generally no formal discovery (including depositions, subpoenas, etc.), unlike arbitration. With binding mediation, therefore, there should be no need for pre-arbitration conference calls where the arbitrator is required to oversee the establishment and development of a discovery schedule or to handle other discovery disputes. The mediator may use rules and procedures of an ADR provider but generally the mediator may establish the binding mediation process appropriate for each case. Certainly, the parties can establish some rules and procedures with the mediator prior to commencing the binding mediation process, however, in the interest of keeping the process to be simple, expeditious and cost effective, the parties should keep the process as informal as possible.

Binding Mediation is Less Costly

The cost of the binding mediation process is less than that of arbitration, and as a result, the parties' legal costs should be greatly reduced. Preparation time for counsel is generally lower as compared with the costs of preparing for and participating in an arbitration proceeding. In binding mediation, there are generally very few, if any, pre-mediation submissions or exhibits sent to the mediator to review prior to the binding mediation session. It can be a good choice for lesser value disputes, while reserving binding arbitration for greater monetary disputes.

Binding Mediation is Faster

Without a formal discovery process, binding mediation sessions can be promptly scheduled with the agreement of the parties, which can be within days of the dispute developing. In binding mediation, the mediator renders his or her decision at the conclusion of the binding mediation session and writes up the Mediation Settlement Agreement for the parties' signatures. Arbitration awards usually take longer as the arbitrator is allowed up to 30 days from the conclusion of the arbitration process to render the award.

Binding Mediation and Arbitration Enforcement

Should a party to an arbitration fail to comply with the terms of an arbitration award, the opposing party can request an enforcement order from the court. A binding mediation settlement agreement that is the result of the binding mediation process is a contract and is enforceable though a breach of contract action through the courts.

Other Considerations

The mediator usually does not have the same disclosure requirements as an arbitrator. The practitioner should keep in mind that in utilizing binding mediation, the ability to subpoena will likely not exist. Ex parte discussions with the parties are not allowed in the arbitration process; however, it is allowed in binding mediation as the mediator deems it appropriate. It is recommended that only those who are trained in both mediation and arbitration should conduct binding mediations and that mediators have immunity provisions in the Binding Mediation Agreements similar to those in arbitration agreements. If you are serving as the mediator in a binding mediation, rendering a final and binding decision, you should specify in your Binding Mediation contract or addendum that the parties sign prior thereto, that the mediator shall have the same immunity from legal actions as is generally afforded to arbitrators.

Summary

Binding mediation has advantages over the arbitration process; however, it should only be specified in a contract when the parties are fully aware of the advantages and disadvantages of selecting binding mediation over arbitration to settle a dispute. Parties can specify the use of binding mediation for lesser value disputes and binding arbitration for disputes above that specified value. If litigation or arbitration is specified in a contract, after a dispute develops, the parties can mutually agree to switch their dispute resolution process to binding mediation, especially if the parties wish to utilize a less costly, more expeditious and simpler ADR process to settle their dispute. P parties specify arbitration to avoid the more costly and lengthy litigation process. Likewise, parties can specify binding mediation to avoid the more costly and lengthy arbitration process. ■

Endnotes

[1] Cooley, J., *Arbitration Advocacy* (2d Ed. 1997).

Peter G Merrill is the president and CEO of Construction Dispute Resolution Services, LLC. Merrill serves on the Steering Committee of the State Bar of New Mexico Alternative Dispute Resolution Committee and chairs the Arbitration Subcommittee. He also currently serves as the chairman of the American Bar Association Arbitration Rules Subcommittee.

The Next Generation of Court Connected Mediation *continued from page 5*

Both mediators and courts would benefit by allowing mediators to e-file documents that have be electronically signed by the parties. For all the benefits, mediators and courts would need to resolve the issue of assuring the identity of the participant during mediation. Additionally, confidentiality is compromised when information is shared electronically; and of course, textual communication lacks the benefit of non-verbal cues and other context obtained in face-to-face communication. However, some of these issues may be resolved by using a mixed media approach that allows for on-line communication, video or interpersonal communication depending on the parties, their resources and their situation. ■

Endnotes

[1] *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*, Mayer, Bernard S., 2004

[2] See Standards of Practice for mediators

[3] Online Dispute Resolution, "The New Normal" https://www.mediate.com/articles/einhornm4.cfm#bio

[4] Noam Ebner E-mediation

Beth Williams is the director of ADR Programs at the 13th Judicial District Court. She is also a member of the State Bar of New Mexico Alternative Methods of Dispute Resolution Committee.

from an Insurance Coverage Perspective

By Philip Thompson

Alternative Dispute Resolution is a key set of tools in the insurance coverage lawyer's toolkit. This article will explore how ADR can help the coverage lawyer achieve the best, most inexpensive result for the client—which should be every lawyers goal in every case.

ADR refers to the tools available to parties to resolve legal disputes without a judge or jury deciding the factual and legal issues. It usually has the advantage of speed and—its cousin—reduced legal fees. Because the clear majority of legal disputes are resolved using one of the ADR tools, judges prefer that one or more of these tools be used as early as possible in the legal process, preferably before suit is filed. The ADR toolkit includes negotiation, mediation, neutral evaluation, arbitration, mock trials and summary jury trial, or some combination of the above.

Negotiation

Unique to insurance coverage, which primarily involves legal issues, negotiations begin at first contact between counsel and continue throughout the pendency of the dispute, usually over the legal meaning of the language of an insurance policy. The lawyers typically make their arguments in an exchange of letters about the meaning of disputed language with legal citation, which hopefully exposes the strengths and weaknesses of each sides case. To be effective, this exchange should be academic, not adversarial. Like most things in life, it makes no sense to start off fighting if the goal is to resolve the dispute at this early state. Hopefully a meeting of the minds can occur with an agreement or understanding to either resolve or defer the dispute, with the hope it never has to resolve.

Mediation

If negotiation does not resolve the coverage dispute, mediation may be required. This is the most commonly used ADR tool. There are three types of mediation: facilitative, evaluative and transformative. In facilitative mediation the mediator listens and asks questions of the parties about the dispute without judgment. The mediator is a guide in charge of the process; but the parties oversee the outcome. In evaluative mediation a retired judge or experienced lawyer explain the weaknesses in each party's coverage position and usually predict what a judge or jury is likely to decide. In this way, the parties can evaluate the risks of litigation and decide if going forward is worth the expense. Transformative mediation is like facilitative mediation and involves recognition by each party of the other party's needs, interests, values and points of view. In this type of mediation, the parties decide both the process and the outcome.

"The ADR toolkit includes negotiation, mediation, neutral evaluation, arbitration, mock trials and summary jury trial, or some combination of the above."

While all three types of mediation are valuable, and parties and lawyers should understand all three, by far the most commonly used type of mediation in the insurance coverage context is evaluative. By far the most important ingredient in an insurance coverage mediation is the coverage expertise of the mediator. It is critical that the mediator understand and speak the language of coverage and has experience with the type of coverage at issue in the dispute. It is a waste of time and money to mediate unless the mediator has the required expertise. The opposite is true if the right mediator is used. While some areas of the law involve common sense and are susceptible to resolution by an appeal to same, insurance coverage is governed by the policy language and the rules and case law that govern interpretation of that language. The lesson to be learned is to pick a mediator with care.

Neutral Evaluation

In the alternative, the parties can seek an opinion and guidance of an expert neutral on the merits of each party's position. This is usually done in writing, is less time consuming and less expensive than a mediation. It is also usually far less successful because the parties are not forced to appear and exchange thoughts on the disputed coverage issues exposing the flaws in their argument. In an insurance coverage context involving sophisticated parties, however, it can be a valuable tool in the early stages of a dispute to get a sense of what a trial court will do, especially if the legal issues are well developed and discreet.

Arbitration

Arbitration is like a bench trial with the arbitrator acting as the trial judge. Arbitrations can be faster and less cumbersome than a trial because it is more informal, and the rules of evidence are streamlined, and therefore less expensive. Its disadvantages are that usually there are no appeals and the decision is final. If arbitration is used in the coverage context, the selection of the arbitrator, like the selection of the mediator, is the most critical decision the parties will make. The arbitrator should be an expert on the type of insurance policy at issue in the dispute and the coverage issues related to that policy. Using arbitration involving small dollar coverage disputes makes sense. The loss of the right to appeal and loss of an experienced trial judge makes arbitration less attractive in large dollar coverage disputes.

Mock Jury Trial

This involves a neutral jury that produces a verdict that allows a party to evaluate its

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Mandatory Arbitration:

How the Fine Print Deprives Ordinary People of Their Day in Court

By Nicholas Mattison

This issue of the *New Mexico Lawyer* explores the diverse ways that people and businesses voluntarily use alternative dispute resolution to settle controversies without litigation. However useful ADR may be when it is truly voluntary, these methods of resolving disputes, primarily arbitration, are often used in a way that runs contrary to ADR's founding principle of empowering people to choose to work together creatively to resolve conflicts. Increasingly, business interests use mandatory, binding arbitration agreements to deprive people who have little or no bargaining power—and no true choice when it comes to agreeing to ADR—of their day in court.

Everyone reading this article has signed contracts that contain mandatory arbitration agreements. Nursing home admission agreements, credit card agreements, car loans, employment agreements and many other consumer contracts are contracts of adhesion, meaning they are offered on a "take it or leave it" basis in which the consumer has no option to negotiate any of the terms. The businesses that draft these contracts often include in the fine print, in language most non-lawyers would not understand, arbitration "agreements." By agreeing to a contract containing such a provision, the consumer purportedly gives up the right to take disputes to court and instead is obligated to submit all disputes arising under the contract to arbitration.

Arbitration is a private proceeding, held outside of the court system, in which the arbitrator, or panel of arbitrators, has the authority to make a binding ruling on anything from the merits of a dispute to the issue of whether the arbitrator has the authority to arbitrate the dispute in question. Arbitrators often favor the businesses that created and sustain the arbitration industry by continuously referring their disputes to arbitration. There is usually no meaningful right to appeal the decisions of an arbitrator. The proceedings are frequently kept secret altogether because of confidentiality clauses contained in the arbitration agreement. Procedural rules applicable to civil cases in court are truncated or eliminated, evidentiary rules may not apply, and the right to discovery is limited or eliminated.

There is no question that arbitration benefits businesses as a cost-saving tool by shielding the business from being held responsible for wrongdoing. While arbitration has benefits from the perspective of big businesses, these same aspects of arbitration place the consumer at a severe disadvantage. For example, in most cases, a consumer may obtain very little or none of the evidence needed for successful prosecution of a claim without the discovery to which they would be entitled if they litigated the same dispute in court. Unlike in cases that go to court, consumers bound to arbitration usually have no way to combine their resources and knowledge with similarly situated consumers to increase their leverage against the business that harmed them. Moreover, arbitration often involves prohibitive fees that discourage many people from even attempting to seek remedies for their injuries.

Arbitration, except in those cases where it is truly a voluntary proceeding between litigants who prefer it to court proceedings, causes unsuspecting people to give up their constitutional right of access to the courts. Businesses include arbitration agreements in their contracts because they know that avoiding litigation in court reduces the cost of any potential wrongdoing, but in so doing, it eliminates or reduces the business's motivation to do right by the consumer. The result is more defrauded consumers, more senior citizens injured in nursing homes, and more victims of workplace harassment.

Big businesses have also used arbitration agreements to impose a private ban on class action lawsuits. Nearly all arbitration agreements state that disputes can only be decided on an individual basis. This effectively immunizes many wrongdoers, such as banks, from liability for fraud committed against thousands of individuals with smaller claims in which the potential damages are eclipsed by the cost of arbitration. Without a class action, the incentive to hold an offending business accountable for wrongdoing may be eliminated.

Industry groups insist that arbitration agreements benefit consumers. The U.S. Chamber of Commerce, for one, argues that the existence of mandatory arbitration ensures "that consumers can continue settling disputes without incurring staggering court expenses and wading through the overburdened court system." The premise of the Chamber's argument is that

mandatory arbitration increases consumer choice, but the opposite is true. If people have the option of going to court or voluntarily entering into arbitration or any other ADR arrangement once a dispute arises, then consumer choice is maximized. When people unwittingly give up their day in court before a dispute arises, consumer choice is all but nonexistent.

Many of the same businesses that favor mandatory arbitration for consumers actually recognize the drawbacks of mandatory arbitration, as they often strenuously oppose it for themselves. For example, car dealers frequently include arbitration agreements in the fine print of their contracts with consumers, but these same car dealers successfully lobbied Congress to prevent auto manufacturers from forcing them into arbitration unless "after such controversy arises all parties to such controversy consent in writing to use arbitration."

Supporters of mandatory arbitration attempt to sway public opinion by trading in negative stereotypes of lawyers. In an editorial, the Albuquerque Journal claimed that if mandatory arbitration of class actions were banned, "the real beneficiaries would be trial lawyers." This tired attack on the legal profession is both untrue and irrelevant. Class action lawsuits often involve substantial payments or other benefits to class members. In cases involving smaller payments for smaller injuries, the class action lawsuit is a crucial tool to prevent businesses from reaping windfall profits by stealing a little bit from a lot of people.

The United States Supreme Court has facilitated the proliferation of arbitration with its increasingly broad readings of the Federal Arbitration Act. Originally enacted in 1925 and geared toward commercial disputes, the FAA has been reinvented over the past 20 years to keep people out of court. Continuing this pattern, on May 21, 2018, the Supreme Court ruled that employers may require workers to waive their rights to participate in class action lawsuits as a condition of employment. The dissent warned that this "egregiously wrong" decision will result in "the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."

The Consumer Financial Protection Bureau commissioned a study concluding that arbitration agreements unfairly limit justice for consumers. Among other things, the CFPB found that arbitration agreements are highly common in consumer financial products, but that consumers are rarely aware of them. The CFPB concluded that arbitration agreements limited relief for consumers.

Based on its findings, the CFPB issued a rule that would have prevented financial services companies from banning class actions in arbitration agreements. In the fall of 2017, Congress and President Trump prevented the implementation of this rule.

Despite these setbacks, consumers and their advocates we are not powerless to fight mandatory arbitration. The Supreme Court's jurisprudence is based on the FAA, which can be repealed or amended by Congress. Those who believe ADR should be voluntary and empowering should continue to remind politicians that the right to a day in court is a founding principle of America's democracy. ■

Endnotes

[1] https://www.uschamber.com/series/your-corner/protecting-consumers-right-arbitration

[2] 15 U.S.C. §1226(a)(2).

[3] 9 U.S.C. §1 *et seq.*

[4] *Epic Systems Corp. v. Lewis*, No. 16-285 (U.S., filed May 21, 2018).

[5] https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

[6] https://www.federalregister.gov/documents/2017/07/19/2017-14225/arbitration-agreements

[7] https://www.federalregister.gov/documents/2017/11/22/2017-25324/arbitration-agreements

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ADR from an Insurance Coverage Perspective *continued from page 8*

chances of success in a "real" jury trial. In the insurance coverage context, a mock jury trial makes little sense when most of the issues are legal to be decided by a court, not a jury. However, in a high exposure "bad faith" case against an insurer that involves coverage issues it makes sense for the insurer to consider this option.

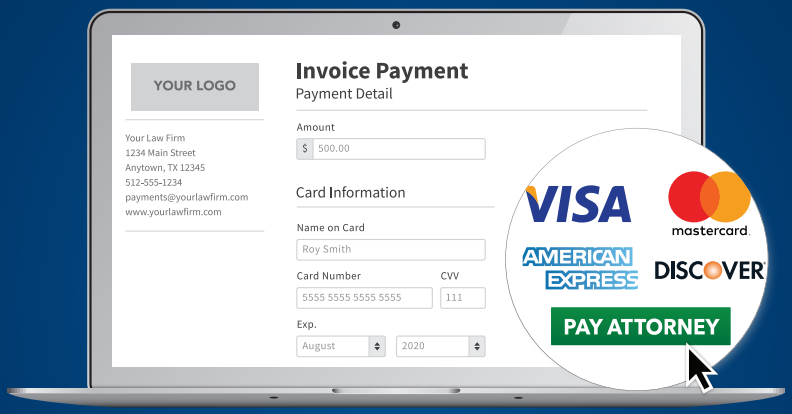
Summary Jury Trial

This is another form of a mock trial with a neutral jury that produces a verdict, but it is ordered by a court rather than being stipulated to by the parties. After hearing the verdict, the court usually requires parties to attempt settling their case before litigating in court. In the insurance coverage context, a summary jury trial makes little sense when most of the issues are legal to be decided by a court.

Conclusion

Because most civil cases are resolved without trial using ADR tools, a thorough understanding of alternative dispute resolution is far more important to practicing civil litigation lawyers and their clients than an understanding of trials. Civil litigators rarely try cases. Coverage lawyers try even fewer because coverage cases usually involve fewer or no questions of fact, and therefore are susceptible to being resolved by motion practice. It is therefore incumbent upon every practicing civil litigator and insurance coverage lawyer to have a thorough understanding of the various ADR tools available and become an expert at using those tools, which saves time and money. ■

Philip H. Thompson has almost 35 years' experience in litigation, insurance coverage, and subrogation matters, including numerous trials, arbitrations, mediations and appeals. He practices with Pegue & Thompson in Santa Fe.



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and Sixth Amendment rights); *United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (rejecting the idea that the defendant's "courtroom behavior off the witness stand is in any sense legally relevant to the question of his guilt or innocence").

{11} A minority of jurisdictions, however, allow the prosecutor to comment on the courtroom demeanor of a non-testifying defendant. *See Shaw v. State*, 207 So. 3d 79, 126-27 (Ala. Crim. App. 2014) (characterizing the prosecution's comments that the defendant "never shed a tear" and "didn't care at all" throughout the presentation of photographic evidence during trial as proper, reasoning that the comments were aimed at the defendant's demeanor, not his failure to testify (internal quotation marks omitted)); *Armstrong v. State*, 233 S.W.3d 627, 638 (Ark. 2006) (finding no reversible error where the prosecution directed the jury to recall the defendant's reaction to photographic evidence, but acknowledging that the prosecution was limited to evidence in the record and that a defendant's face and body are physical evidence); *Smith v. State*, 669 S.E.2d 98, 104 (Ga. 2008) (stating that "it is not improper for the prosecutor to comment in closing argument on a non-testifying defendant's appearance and facial expressions"); *Hunt v. Commonwealth*, 304 S.W.3d 15, 38 (Ky. 2009) ("A prosecutor is entitled to comment on the courtroom demeanor of a defendant."); *State v. Brown*, 358 S.E.2d 1, 15 (N.C. 1987) (finding no error in the prosecution's comments on the defendant's courtroom demeanor because it "calls to the jurors' attention the fact that evidence is not only what they hear on the stand but what they witness in the courtroom"); *see also State v. Lawson*, 595 N.E.2d 902, 911 (Ohio 1992) (applying the rule that a "defendant's face and body are physical evidence" to reach the conclusion that it was "permissible for the prosecution to comment on the accused's physical appearance" (internal quotation marks and citation omitted)).

{12} We agree with the majority of jurisdictions and hold that commenting on the demeanor of a non-testifying defendant is improper, as it is neither probative of innocence or guilt, nor is it evidence that an appellate court can properly review.

{13} In New Mexico, we afford trial judges broad discretion in managing closing argument because they "are in the best position to assess the impact of any questionable comment." *State v. Sosa*, 2009-NMSC-056, ¶ 25, 147 N.M. 351, 223 P.3d 348. The prosecution has similarly wide latitude during closing arguments. *See State v. Smith*, 2001-NMSC-004, ¶ 38, 130 N.M. 117, 19 P.3d 254. A prosecutor's remarks must, however, be based on the evidence or made in response to the defendant's arguments. *Id*.

{14} In this case, the State's comments were not based on the evidence. Nothing in the record suggests Defendant's behavior or demeanor during trial came into evidence. In addition to arguing a fact not in evidence, we further note the prosecutor in this case encouraged the jury to infer guilt from Defendant's courtroom demeanor. Such an inference is particularly troubling where we perceive no impropriety in the demeanor that was the subject of the comments. The prosecutor suggested the jury draw just such an inference in this case by stating, "He wouldn't look at her. And why wouldn't he look at her? Because he knew what he'd done. He knew what he did."

{15} In light of our conclusion that comments on the demeanor of a non-testifying defendant are not probative of innocence or guilt and requirement that a prosecutor's argument be based on the evidence, we hold that prosecutors are prohibited from commenting on a non-testifying defendant's courtroom demeanor where, as here, it is not evidence in the record. We therefore conclude that it was improper for the State to argue that Defendant's alleged failure to make eye contact with Victim during her testimony was evidence of Defendant's guilt.

{16} Having concluded that the State erred, we next examine whether that error warrants reversal. When reviewing statements made during closing arguments for reversible error, we begin by considering three factors. First, we consider whether the comments made during closing argument invade "some distinct constitutional protection" such as a defendant's post-*Miranda* silence or a defendant's exercise of his Fourth Amendment rights in refusing to consent to a warrantless search. *Sosa*, 2009-NMSC-056, ¶¶ 26-28. Second, we evaluate whether the statement made "is isolated and brief, or repeated and pervasive[.]" *Id.* ¶ 26. Generally, "an isolated comment made during closing argument is not sufficient to warrant reversal." *Fry*, 2006-NMSC-001, ¶ 52 (internal quotation marks and citation omitted). Reversal of the trial court verdict is warranted "[o]nly in the most exceptional circumstances." *Sosa*, 2009-NMSC-056, ¶ 25. Instead, the misconduct complained of is reversible error where it is so "pronounced and persistent" that it carries "a probable cumulative effect upon the jury." *Id.* ¶ 30 (internal quotation marks and citations omitted). Third, we consider "whether the statement is invited by the defense." *Id.* ¶ 26. Courts are unlikely to find error "where the defense has opened the door to the prosecutor's comments by its own argument or reference to facts not in evidence." *Id.* ¶ 33 (internal quotation marks and citation omitted).

{17} "[T]he common thread running through the cases finding reversible error is that the prosecutors' comments materially altered the trial or likely confused the jury by distorting the evidence, and thereby deprived the accused of a fair trial." *Id.* ¶ 34. When analyzing whether an error warrants reversal, "context is paramount[,]" and the three factors listed above are only "useful guides." *Id.* Our courts also consider whether the evidence of guilt is overwhelming, whether the improper statement is corrected by counsel or limited by the court, or whether the fact manipulated by the statement is determinative to the outcome of the case. *See id.*

{18} Here, the State's comments did not invade a "distinct constitutional protection." While they may have run afoul of the presumption of innocence, we note that the presumption of innocence is not constitutionally mandated. *See Taylor v. Kentucky*, 436 U.S. 478, 485-86 (1978) (acknowledging that "presumption of innocence"—the concept that Defendant is "entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on . . . other circumstances not adduced as proof at trial,"—is not constitutionally mandated, but is aimed at protecting principles similar to due process (internal quotation marks and citation omitted)); *Sosa*, 2009-NMSC-056, ¶¶ 26-28. The prosecutor's comments in this case were confined to closing argument and were relatively brief. They were not, however, invited by or in response to the defense's argument.

{19} Looking more broadly at the prosecutor's statements in the context of the entire trial, the State presented significant evidence of Defendant's guilt, including Victim's graphic and uncontroverted testimony, evidence that police tracked Defendant's footprints to the home where he was apprehended, and Defendant's own admissions of guilt. During jail phone conversations, Defendant admitted that

he committed the property crimes, though he denied committing the sexual offenses. When police apprehended Defendant on the night of the incident, however, Defendant spontaneously stated, "it doesn't [expletive] matter—none of it does—what you guys are investigating. I will be locked up for the rest of my life," suggesting he was aware that police were investigating something more than a burglary. Regarding the prosecutor's statements specifically, we note that the court clarified, "the jury will have to rely on their own memories as to what they observed," despite having overruled Defendant's objection. Though the court did not directly address the jury, it made the statement in open court with the jury present. In doing so, the court implicitly recognized a potential for prejudice to Defendant that warranted advising the jury that its consideration of Defendant's courtroom demeanor should be limited to its own observations. "The jury is presumed to follow the court's [curative] instructions." *State v. Gonzales*, 1992-NMSC-003, ¶ 35, 113 N.M. 221, 824 P.2d 1023, *overruled on other grounds by State v. Montoya*, 2013-NMSC-020, ¶ 2, 306 P.3d 426; *see State v. Cates*, No. 30,022, dec. ¶ 33 (N.M. Sup. Ct. May 11, 2010) (non-precedential) (applying the general presumption that the jury follows curative instructions specifically). The prosecutor's comments, though improper, were limited by the court and stopped short of commenting on Defendant's silence. Taking into account the significant evidence of Defendant's guilt, the nature and duration of the prosecutor's comments, and the court's statement that the jury's consideration of Defendant's demeanor should be limited to its own observations, we do not see, and Defendant has not pointed to, specifically, how it is that he was deprived of a fair trial in this case. Notwithstanding that the prosecutor's comments on Defendant's courtroom demeanor do not warrant reversal here, we caution against use of such practices in the future, as it is improper and ripe with potential prejudice. We affirm the district court's denial of Defendant's motion for mistrial.

B. Kidnapping Instruction

{20} Defendant next argues that the district court's kidnapping instruction was in error, as it omitted an essential element of the crime when it failed to instruct the jury that any restraint of Victim must have been more than incidental. Defendant failed to object to the instructions given at trial, so we review for fundamental error. *See State v. Romero*, 2013-NMCA-101, ¶ 19, 311 P.3d 1205. To prevail under a fundamental error analysis, a party "must demonstrate the existence of circumstances that shock the conscience or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked." *State v. Cunningham*, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176 (internal quotation marks and citation omitted). Generally, "fundamental error occurs when the trial court fails to instruct the jury on an essential element." *State v. Sutphin*, 2007-NMSC-045, ¶ 16, 142 N.M. 191, 164 P.3d 72. When an essential element is omitted, courts look to "whether there was any evidence or suggestion in the facts, however slight, that could have put the omitted element in issue." *State v. Lopez*, 1996-NMSC-036, ¶ 13, 122 N.M. 63, 920 P.2d 1017 (alteration, internal quotation marks, and citation omitted).

{21} The incident occurred in November 2012. The jury was instructed during Defendant's trial in 2014 that, to find Defendant guilty of kidnapping, the State had to prove beyond a reasonable doubt that Defendant "restrained or confined [Victim] by force or intimidation" and that Defendant "intended to inflict a sexual offense on [Victim.]" This instruction was modeled after the language of the Uniform Jury Instruction (UJI) in place at the time. *See* UJI 14-403 NMRA (1997). In August 2012, this Court decided *State v. Trujillo*, 2012-NMCA-112, ¶ 39, 289 P.3d 238, which held that "the Legislature did not intend to punish as kidnapping restraints that are merely incidental to another crime." The kidnapping UJI was amended in 2015 to follow the holding in *Trujillo*, and while still requiring the state to prove restraint by force or intimidation and intent to inflict a sexual offense on the victim, the instruction also requires the state to prove that the "taking or restraint . . . of [the victim] was not slight, inconsequential, or merely incidental to the commission of another crime[.]" UJI 14-403 NMRA (2015).

{22} Defendant argues that the district court committed fundamental error by improperly instructing the jury regarding intent. The instruction given to the jury required proof that Defendant "intended to inflict" a sexual offense, while the UJI required proof that Defendant "intended to hold" Victim to inflict a sexual offense. Defendant also argues that the district court committed fundamental error by failing to instruct the jury regarding *Trujillo*'s rejection of "incidental restraint" as a basis for kidnapping. We address the latter argument first, and finding it dispositive, decline to address Defendant's intent argument.

{23} In *Trujillo*, this Court looked at whether the Legislature intended to punish the defendant's "momentary restraint of [the v]ictim in the course of a fight as kidnapping[.]" 2012-NMCA-112, ¶ 22. After consulting our state's kidnapping jurisprudence, as well as that of other jurisdictions, this Court adopted a view used in a majority of other jurisdictions, that "kidnapping statutes do not apply to unlawful confinements or movements incidental to the commission of other felonies." *Id.* ¶ 31 (internal quotation marks and citation omitted). Though we did not adopt any particular test to be used in determining whether a restraint is "incidental," we acknowledged that the basic inquiry is "whether the restraint or movement increases the culpability of the defendant over and above his culpability for the other crime." *Id.* ¶ 38 (internal quotation marks and citation omitted). In answering that question, we considered whether the restraint was longer or greater than necessary to commit the other crime, whether the restraint subjected the victim to a substantially greater risk of harm, and whether the restraint increased the length or severity of the attack. *Id.* ¶ 39. Although we ruled as a matter of law that the Legislature did not intend for the defendant's conduct to constitute kidnapping, we also acknowledged that "[a] more complicated factual scenario would present a jury question—submitted under appropriate instructions—as to whether the restraint involved was merely incidental to the other crime." *Id.* ¶ 42.

{24} This is just such a case. It involves a more complicated factual scenario than *Trujillo* that undoubtedly presents a jury question. However, it was not submitted to the jury with appropriate instructions. The instructions submitted to the jury here omitted any and all reference to the potentially incidental nature of the restraint. Our opinion in *Trujillo* qualified a jury's consideration of restraint, confinement, or transportation, as it is used in the UJI, to include only that restraint, which is not merely incidental to the commission of another crime. Indeed, that limitation has been incorporated into the 2015 version of the kidnapping UJI, which limits consideration of restraint to only that which is "not slight, inconsequential, or merely incidental to the commission of another crime[.]" UJI 14-403 (2015).

{25} According to Victim's testimony, she was restrained both before and after the sexual offense occurred: first by threat with a knife, and second by menacing instruction from another room. It is for the jury to determine whether either or both of these restraints were slight, inconsequential, or incidental to the commission of the sexual offense. Indeed, that determination is an essential inquiry under *Trujillo* and its progeny. There can be little doubt that the incidental restraint requirement of *Trujillo* was established well before Defendant's trial. The jury instruction used at trial in 2014, patterned on the 1997 version of UJI 14-403, failed to adequately instruct the jury on restraint as interpreted in *Trujillo*. *See State v. Barber*, 2004-NMSC-019, ¶ 20, 135 N.M. 621, 92 P.3d 633 (acknowledging that "failure to instruct the jury on an essential element . . . ordinarily is fundamental error even when the defendant fails to object or offer a curative instruction"). The omission of incidental restraint from the jury instructions, therefore, constitutes fundamental error, as the jury could have convicted Defendant based upon a deficient understanding of the legal meaning of restraint as an essential element of kidnapping.

C. Sufficiency of the Evidence

{26} Defendant challenges the sufficiency of the evidence supporting his convictions for first degree CSP and kidnapping. "The test to determine the sufficiency of evidence in New Mexico is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (omission, alteration, internal quotation marks, and citation omitted). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks and citation omitted). When determining the sufficiency of the evidence, we view the evidence "in a light most favorable to the verdict," *State v. Garcia*, 2005-NMSC-017, ¶ 12, 138 N.M. 1, 116 P.3d 72, and disregard contrary evidence. *See State v. Salazar*, 1997-NMSC-044, ¶ 44, 123 N.M. 778, 945 P.2d 996. It is for the jury to resolve factual discrepancies arising from conflicting evidence, and the reviewing court cannot "weigh the evidence or substitute its judgment for that of the jury as long as there is sufficient evidence to support the verdict." *State v. Nevarez*, 2010-NMCA-049, ¶ 32, 148 N.M. 820, 242 P.3d 387 (alteration, internal quotation marks, and citation omitted). The question before this Court is whether the district court's decision "is supported by substantial evidence, not whether the court could have reached a different conclusion." *See In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318.

1. First Degree CSP—Mental Anguish

{27} Defendant argues that the evidence presented by the State does not establish that Victim suffered great mental anguish as a result of the incident and that the evidence is therefore insufficient to support his conviction for first degree CSP. CSP in the first degree is that which is perpetrated "by the use of force or coercion that results in great bodily harm or great mental anguish to the victim." NMSA 1978, § 30-9-11(D)(2) (2009). "[G]reat mental anguish" means "psychological or emotional damage marked by extreme change of behavior or severe physical symptoms." UJI 14-980 NMRA; *see* NMSA 1978, § 30-9-10(B) (2005) (defining great mental anguish as "psychological or emotional damage that requires psychiatric or psychological treatment or care, either on an inpatient or outpatient basis, and is characterized by extreme behavioral change or severe physical symptoms"); UJI 14-980 comm. cmt. (interpreting a statute's reference to psychiatric or psychological treatment as "a vehicle to demonstrate the severity of the mental anguish being defined" and explaining that "[i]t was not intended to be an element of the definition that the victim actually received such care").

{28} The evidence presented at trial was that three days after the incident, Victim left New Mexico and moved in with her daughter in Indiana, staying there for eight months because she felt unable to live alone. Nothing in the record suggests she planned to make this move prior to the incident. Victim testified that she experienced "constant flashbacks," but she did not receive medication or counseling as a result of the incident. Victim also testified that as a result of the daily flashbacks, she had trouble concentrating and was unable to drive for a period of time. Seven months after the incident, Victim began living by herself again, but as of the date of trial, she had not returned to her home in Clovis where the incident took place. An officer testified that almost immediately after the incident, Victim behaved as though she was in shock, traumatized, mad, and upset. Victim told the officer that she did not want to be alone, and while the officer was with Victim, she alternated between crying and expressing anger.

{29} Defendant suggests that the evidence of Victim's post-incident symptoms are similar to or less extreme than those discussed in *State v. Barraza*, 1990-NMCA-026, 110 N.M. 45, 791 P.2d 799. *Barraza* is of no assistance to Defendant. In *Barraza*, the defendant was charged with two counts of second degree CSP, which required the state to prove that the defendant's actions caused the victim mental anguish rather than great mental anguish, as required to prove first degree CSP. *Id.* ¶¶ 1, 9. The evidence presented at trial was that the victim experienced mood swings between depression and anger, an emotional inability to re-enroll in school, and elevated drinking habits. *See id.* ¶ 9. She also planned to move to avoid bad memories and embarrassment associated with the alleged rape. *Id.* This Court concluded that these symptoms were sufficient to constitute mental anguish to support a second degree CSP conviction. *Id.* ¶ 11.

{30} Here, Victim's behavioral changes were in many ways more extreme, concrete, and immediate than the victim in *Barraza*. Unlike the victim in *Barraza*, Victim not only planned to move, but effectuated the move almost immediately after the incident. At the time, she was over seventy years of age, uprooted her life, and moved across the country. She went from being self-sufficient enough to live on her own to having to move in with her daughter and being unable to drive. Victim's day-to-day lifestyle changed drastically, and she suffered daily flashbacks and exhibited mood swings immediately after the incident. As Victim's actions and behavior following the incident were more extreme than those set out in *Barraza*, the evidence was sufficient to support a conclusion that Victim suffered great mental anguish as a result of the incident. *See generally Nevarez*, 2010-NMCA-049, ¶ 32 (noting that the reviewing court cannot "weigh the evidence or substitute its judgment for that of the jury" (alteration, internal quotation marks, and citation omitted)).

2. Kidnapping

{31} "[W]here the trial court errs by failing to instruct the jury on an essential element of the crime, retrial following appeal is not barred if the evidence below was sufficient to convict the defendant under the erroneous jury instruction." *State v. Rosaire*, 1996-NMCA-115, ¶ 20, 123 N.M. 250, 939 P.2d 597. Though the

jury instruction given at trial was erroneous because it failed to instruct the jury on an essential element, "we review the sufficiency of the evidence in light of the erroneous jury instruction." *Id.* The jury in this case was instructed that the State had to prove that Defendant "restrained or confined [Victim] by force or intimidation[,]" with the intent to inflict a sexual offense on her. We look at the evidence in the light most favorable to the State to determine whether it was sufficient to prove those elements beyond a reasonable doubt. *See Garcia*, 2005-NMSC-017, ¶ 12.

{32} Defendant argues that the State failed to present sufficient evidence of kidnapping, either because it failed to show Defendant's intent was contemporaneous with restraint or because any restraint or confinement that occurred was incidental to another crime. We addressed Defendant's argument regarding incidental restraint above, and because we review for sufficiency based on the flawed instruction given, which did not include incidental restraint, we do not address it. Regarding intent, however, Defendant asserts that there was no proof that he restrained Victim with the intent to inflict a sexual offense because the "primary evidence of kidnapping" occurred after the sexual offense. Defendant refers to Victim's failed attempt to get off the bed following the sexual offense as the "primary evidence of kidnapping." We are unpersuaded by Defendant's argument, however, because nothing in the record indicates that the jury found Defendant guilty based on this evidence. Indeed, the evidence presented at trial also established that prior to the sexual offense, Defendant threatened Victim with a knife, only allowed her to travel from one room of the house to another while he followed her closely, and ultimately ordered her to return to the bedroom.

{33} Based on our review of the record, we conclude that the evidence regarding the threat, following Victim, and ordering her from one room of the house to another was sufficient to support Defendant's conviction for kidnapping under the flawed instructions given. A jury could reasonably conclude Defendant restricted or confined Victim using intimidation when he threatened her life using a knife. The jury could then infer from Defendant's actions of ordering Victim to take off her pajamas and masturbating while she used the restroom that Defendant restrained Victim while intending to inflict a sexual offense on her. *See State v. Muraida*, 2014-NMCA-060, ¶ 18, 326 P.3d 1113 ("It is well established that the fact finder may infer from circumstantial evidence that the defendant acted with the requisite intent; direct evidence of the defendant's state of mind is not required."). We conclude that the evidence produced at trial was sufficient to support Defendant's kidnapping conviction. Although we reverse Defendant's kidnapping conviction and remand for a new trial based on deficiencies in the jury instructions, we address his sufficiency claim to ensure no double jeopardy concerns are implicated. *See State v. Mascareñas*, 2000-NMSC-017, ¶ 31, 129 N.M. 230, 4 P.3d 1221 (deeming it "prudent" to address a sufficiency claim where reversing for fundamental error in a jury instruction).

D. Double Jeopardy

{34} Defendant argues that his convictions for aggravated burglary and for CSP/CSC cannot stand, as his convictions for all of these offenses result in multiple punishments for the same conduct and therefore violate double jeopardy principles. We review double jeopardy claims de novo. *See State v. Gutierrez*, 2011-NMSC-024, ¶ 49, 150 N.M. 232, 258 P.3d 1024.

{35} The constitution protects against both successive prosecutions and multiple punishments for the same offense. *Swafford v. State*, 1991-NMSC-043, ¶ 6, 112 N.M. 3, 810 P.2d 1223. There are two types of multiple punishment cases: (1) unit of prosecution cases, in which an individual is convicted of multiple violations of the same criminal statute; and (2) double-description cases, in which a single act results in multiple convictions under different statutes. *Id.* ¶¶ 8-9. Defendant's arguments, involving separate statutes, raise only double-description concerns.

{36} Our courts apply a two-step inquiry to double-description claims. *Id.* ¶ 25. First, we analyze the factual question, "whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes[,]" and if so, we consider the legal question, "whether the [L]egislature intended to create separately punishable offenses." *Id.* "If it reasonably can be said that the conduct is unitary, then [we] must move to the second part of the inquiry. Otherwise, if the conduct is separate and distinct, [the] inquiry is at an end." *Id.* ¶ 28.

{37} In this case, the charge of CSP required the State to prove that Defendant caused "the insertion, to any extent, of a finger into the vagina of [Victim], by the use of force, coercion or threats of force or violence, and [D]efendant's acts resulted in . . . great mental anguish." The charge of CSC was based on the touching of Victim's unclothed breast without her consent.

{38} Defendant's conviction for aggravated burglary, on the other hand, required the State to prove, among other things, that: "[D]efendant was armed with a knife; OR [D]efendant became armed with a firearm after entering; OR [D]efendant touched or applied force to [Victim] in a rude or angry manner while entering or leaving, or while inside[.]" As we have noted, the State argues that the battery element of touching or applying force was satisfied by evidence that Defendant placed his hand over Victim's mouth and threatened to kill her. According to the State, that conduct was factually distinguishable from the conduct that gave rise to the CSC/CSP convictions. However, the record does not indicate which of the three alternatives above the jury relied upon in reaching its general verdict finding Defendant guilty on the charge of aggravated burglary.

{39} We begin with whether the conduct here was unitary. In contrast to Defendant's position, the State contends that the conduct required for aggravated burglary in this case is not unitary because in addition to touching Victim during the sexual assaults, Defendant unlawfully touched Victim when he covered her mouth with his hand. The State's argument relies on the assumption that, when the evidence provides alternative facts to support a finding of battery and there is no indication of which facts the jury relied on in reaching its verdict, we may affirm the conviction without violating double jeopardy principles. We disagree with the State.

{40} Our Supreme Court's decision in *State v. Foster*, 1999-NMSC-007, 126 N.M. 646, 974 P.2d 140, *abrogated on other grounds by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683—which neither party cited on appeal—is on point. In *Foster*, the defendant argued that his convictions for aggravated kidnapping and armed robbery violated his constitutional right to be free from double jeopardy because the conduct required for those crimes was subsumed by his first degree felony murder conviction. *Id.* ¶ 26. The defendant and the state relied on different facts to support their theory of each conviction and, on that basis, claimed that the conduct was or was

not unitary. *Id.* ¶¶ 24, 26. According to the state, the conduct was not unitary because the jury instructions provided alternative bases for a conviction notwithstanding that there was "no indication of which alternative the jury relied upon in reaching a general verdict[.]" *Id.* ¶ 26. Thus, the state asserted, there could be no double jeopardy violation. *Id.* Our Supreme Court rejected the state's argument noting that it "must presume that a conviction under a general verdict requires reversal if the jury is instructed on an alternative basis for the conviction that *would* result in double jeopardy, and the record does not disclose whether the jury relied on this legally inadequate alternative." *Id.* ¶ 28 (emphasis added). Using this reasoning, the *Foster* Court reversed defendant's armed robbery conviction based on a double jeopardy violation. *Id.* ¶ 40.

{41} Applying *Foster*, we presume that the jury relied on the third alternative—battery—and the evidence proffered at trial established two instances in which Defendant's conduct could have given rise to a conviction: the act of putting his hand over Victim's mouth, or the touching that resulted from lying on top of Victim in commission of the CSP/CSC. Consistent with *Foster*, we further presume the jury used the touching giving rise to the CSP/CSC conviction as grounds for the battery alternative in Defendant's aggravated burglary conviction. Finally, because there is no evidence of any intervening events, a significant separation in time or physical distance, or a change in Defendant's mental state between the touching giving rise to the battery and the CSP/CSC, we conclude that the conduct was unitary. *See State v. Lucero*, 2015-NMCA-040, ¶ 22, 346 P.3d 1175 (requiring consideration of "whether acts were close in time and space, their similarity, the sequence in which they occurred, whether other events intervened, and the defendant's goals for and mental state during each act" in considering whether conduct is unitary (internal quotation marks and citation omitted)).

{42} Having concluded that this issue involves unitary conduct, we turn our analysis to the question of legislative intent. "Determinations of legislative intent, like double jeopardy, present issues of law that are reviewed de novo, with the ultimate goal of such review to be facilitating and promoting the [L]egislature's accomplishment of its purpose." *State v. Montoya*, 2013-NMSC-020, ¶ 29, 306 P.3d 426 (alterations, internal quotation marks, and citation omitted). When, as here, the statutes themselves do not expressly provide for multiple punishments, we begin by applying the rule of statutory construction from *Blockburger v. United States*, 284 U.S. 299 (1932), to determine whether each provision requires proof of a fact that the other does not. *Swafford*, 1991-NMSC-043, ¶¶ 10, 30. If not, one offense is logically subsumed within the other, and "punishment cannot be had for both." *Id.* ¶ 30.

{43} In *State v. Gutierrez*, our Supreme Court modified the *Blockburger* analysis for double jeopardy claims involving statutes that are "vague and unspecific" or "written with many alternatives[.]" 2011-NMSC-024, ¶¶ 58-59, 150 N.M. 232, 258 P.3d 1024 (emphasis, internal quotation marks, and citation omitted). Accordingly, "the application of *Blockburger* should not be so mechanical that it is enough for two statutes to have different elements." *State v. Swick*, 2012-NMSC-018, ¶ 21, 279 P.3d 747. That is, we no longer apply a strict elements test in the abstract; rather, we look to the state's trial theory to identify the specific criminal cause of action for which the defendant was convicted, filling in the case-specific meaning of generic terms in the statute when necessary. *Gutierrez*, 2011-NMSC-024, ¶¶ 58-59. We do so "independent of the particular facts of the case . . . by examining the charging documents and the jury instructions given in the case." *Swick*, 2012-NMSC-018, ¶ 21

{44} The aggravated burglary statute is broad and contains many alternatives. *See* § 30-16-4. For example, it protects a wide variety of structures, including "any vehicle, watercraft, aircraft, dwelling or other structure movable or immovable." Section 30-16-4. The battery alternative, the focus of our analysis here, is likewise defined in broad terms to include "the unlawful, intentional touching or application of force[,]" done in "a rude, insolent, or angry manner." Section 30-3-4. Both statutes provide numerous ways in which a violation may occur and a conviction be attained. We therefore must look "beyond facial statutory language to the actual legal theory in the particular case by considering such resources as the evidence, the charging documents, and the jury instructions." *Montoya*, 2013-NMSC-020, ¶ 49.

{45} Our review of the record reveals that the State never communicated any theory to the jury nor did it argue any specific facts to support the aggravated burglary charge. Even the charging documents and jury instruction for aggravated burglary contained broad, boilerplate language straight from the statute, providing no insight into the State's theory of the case. *See State v. Montoya*, 2011-NMCA-074, ¶ 43, 150 N.M. 415, 259 P.3d 820 (observing that the state can avoid double jeopardy violations by identifying specific, non-unitary conduct in jury instructions). Because the State failed to provide any legal theory of the crime, and we have found none in the record, we conclude that Defendant's aggravated burglary conviction is subsumed by the CSP/CSC convictions, and Defendant was therefore subjected to two convictions for the same offense in violation of double jeopardy. We must now decide which conviction to vacate.

{46} Defendant asks that we vacate either the CSC or aggravated burglary conviction, but he does not provide any additional explanation, argument or citation to authority as to the basis for his request. The State's analysis of the double jeopardy issue ends with its argument that the underlying conduct was not unitary. We remind the parties that it is their responsibility to fully develop arguments on appeal and lament their failure to do so on this issue.

{47} That Defendant's conviction for one of the offenses must be reversed is clear. *See State v. Olguin*, 1995-NMSC-077, ¶ 2, 120 N.M. 740, 906 P.2d 731 ("[A] general verdict must be reversed if one of the alternative bases of conviction is legally inadequate[.]"). What is not clear, however, is which offense we must vacate. When one of two otherwise valid convictions must be vacated to remedy a double jeopardy violation, we vacate the conviction carrying the shorter sentence. *See Montoya*, 2013-NMSC-020, ¶ 55. Here, the district court imposed a nineteen-year sentence for the CSP conviction, a two-and-one-half-year sentence for the CSC conviction, and a ten-year sentence for aggravated burglary.

{48} Vacating the conviction with the shortest sentence does not remedy the double jeopardy violation in this case. Although the CSC conviction clearly carries the shortest sentence, vacating that conviction continues to allow for two convictions for the same crime resulting in multiple punishments for the same conduct. The jury could have found that Defendant's actions that gave rise to the CSP conviction were the same as those that gave rise to the aggravated burglary conviction, yet both those convictions would remain. When ambiguity in the record leaves two convictions equally likely

to violate double jeopardy when combined with a third, and the rule that we vacate the shortest sentence is rendered impractical due to the potential for a continued violation following remand, we conclude that it is appropriate to vacate the conviction that, though not imposing the shortest sentence, remedies the double jeopardy violations. Accordingly, we vacate Defendant's aggravated burglary conviction.

E. Admission of DNA Evidence

{49} Hours after the incident occurred, Victim underwent a sexual assault examination. The SANE who examined Victim found no injuries when conducting an external examination. The SANE did, however, note that Victim had a half-centimeter "open area" that was "consistent with force." The SANE collected a pubic hair comb, oral swabs, vaginal swabs, cervical swabs, anal swabs, thigh swabs, and a blood sample from Victim. A SANE also collected oral swabs, penal swabs, pubic hair combing, swabbing of facial hair, and a swabbing of lower abdomen hair from Defendant. These items were subjected to DNA testing, along with two sheets from Victim's bed and Defendant's boxer shorts.

{50} No semen was found on any of the items or on any of the swabs taken. There was no human male DNA on Victim's vaginal, cervical, or anal swabs, nor was there any in her pubic hair combing. Human male DNA was detected on one of the thigh swabs, but in insufficient amounts to allow for any further DNA testing. Defendant's expert witness characterized the amount of DNA from this swab as unreliable. Samples taken from underneath Defendant's fingernails contained Victim's DNA. DNA testing eliminated Victim as a contributor to the DNA found on Defendant's boxer shorts. The swabs taken from Defendant's lower abdomen revealed the presence of DNA from two or more individuals, and Victim could not be eliminated as a possible contributor to that DNA mixture. Defendant's expert testified, however, that there was a "degree of inaccuracy" to the abdomen swab results by emphasizing that there was more male DNA on the abdomen swab than total DNA, indicating female DNA was minimal or nonexistent. Both the State's expert and Defendant's expert testified regarding the transfer of DNA and the ways in which someone's DNA could appear on another person.

{51} Defendant argues the district court erred in admitting testimony regarding the DNA results of the thigh swab taken from Victim and the lower abdomen swab taken from Defendant. Defendant argues that the existence of male DNA on the thigh swab was irrelevant because it could not be tied to a particular male and that the information was unhelpful to the jury and prejudicial. Defendant similarly argues that informing the jury that Victim could not be ruled out as a contributor of DNA was unhelpful to the jury but highly prejudicial. Defendant's argument that the DNA evidence was "unhelpful . . . but . . . also highly prejudicial" is akin to a Rule 11-403 NMRA challenge. *See id.* (allowing for the exclusion of evidence where its "probative value is substantially outweighed" by a danger of unfair prejudice, confusing the issues, or misleading the jury).

{52} Admission of expert testimony and scientific evidence is a matter "within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion." *State v. Anderson*, 1994-NMSC-089, ¶ 17, 118 N.M. 284, 881 P.2d 29 (internal quotation marks and citation omitted). An expert witness may testify if doing so "will help the trier of fact to understand the evidence or to determine a fact in issue." Rule 11-702 NMRA. Whether expert testimony will assist the trier of fact is a question of relevance. *Anderson*, 1994-NMSC-089, ¶ 14. Evidence is relevant where it "has any tendency to make a fact more or less probable than it would be without the evidence" and where it "is of consequence in determining the action." Rule 11-401 NMRA. Any doubt about relevance should be resolved in favor of admissibility. *State v. Balderama*, 2004-NMSC-008, ¶ 23, 135 N.M. 329, 88 P.3d 845. A court may exclude relevant evidence if "its probative value is substantially outweighed by a danger of . . . unfair prejudice [or] misleading the jury[.]" Rule 11-403. Defendant's challenge limits our inquiry to whether the evidence was helpful to the jury under Rule 11-702 and whether it was so unfairly prejudicial as to warrant exclusion.

{53} The evidence of the thigh and abdomen swabs is probative because it could assist the jury in choosing between the different theories presented regarding the events of that night. This evidence is unique in that it could be used to support either the State's or Defendant's theory, depending on what testimony the jury found credible or persuasive. If the jury were to find the DNA evidence persuasive, it may find the State's theory that Defendant committed sexual offenses against Victim to be more probable. The absence of quantifiable DNA, however, weighs in favor of Defendant's theory that although he was in the home, he did not commit the sexual offenses. In challenging whether the evidence would be helpful to the jury, Defendant challenges the weight that the evidence should be given. We leave that question to the jury. *See Anderson*, 1994-NMSC-089, ¶ 58 (holding that "questions about the accuracy of [DNA] results goes to the weight of the evidence and is properly left to the jury"). We conclude that the evidence challenged by Defendant—the DNA results of thigh and abdomen swabs—was helpful to the jury in understanding the limits of the DNA found and determining facts at issue. *See* Rule 11-702.

{54} We therefore turn to an assessment of whether the evidence in question was so prejudicial that the district court abused its discretion by failing to exclude it. The State presented the testimony regarding the thigh and abdominal swabs in a very narrow context and with careful limitation. The State's witness explained that the results rendered from the thigh swab were "weak" because of the low quantity of DNA found. She also acknowledged that there was no connection between the thigh swab results and Defendant. In addition, defense counsel vigorously cross-examined the State's expert regarding the statistical likelihood that Victim contributed to the abdomen swab's DNA mixture. Defendant also presented his own expert to attack the conclusion that Victim could not be eliminated as a contributor to the lower abdomen DNA mixture by testifying that a "degree of inaccuracy" existed in the abdomen swab results.

{55} We acknowledge Defendant's argument that DNA evidence has the potential to be particularly persuasive to a jury. *See Anderson*, 1994-NMSC-089, ¶ 63 ("[T]he aura of infallibility surrounding DNA evidence does present the possibility of a decision based on the perceived infallibility of the evidence[.]"). Our Supreme Court has held, however, that the damaging nature of DNA evidence and the associated potential for prejudice does not require exclusion where an adequate factual basis has been laid for the testimony and the defendant has the opportunity to cross-examine the state's expert and present his own rebuttal expert. *See id.* (acknowledging vigorous cross-examination and presentation of rebuttal experts as "the traditional and appropriate means of attacking shaky but admissible evidence" (internal quotation

marks and citation omitted)). Defendant was afforded both those opportunities here and took advantage of them. We conclude that Defendant was not so unfairly prejudiced that the district court was required to exclude the DNA evidence of the thigh and abdomen swabs. As such, the district court did not abuse its discretion.

IV. CONCLUSION

{56} We affirm Defendant's convictions for CSP and CSC, as well as the district court's denial of Defendant's motion for a mistrial. We remand for a new trial on Defendant's conviction for kidnapping because the instructions given to the jury were erroneous, noting that the State presented sufficient evidence to support Defendant's conviction on the charge. We vacate Defendant's conviction for aggravated burglary as violative of the prohibition against double jeopardy.

{57} IT IS SO ORDERED.
JULIE J. VARGAS, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
HENRY M. BOHNHOFF, Judge

Certiorari Granted, May 25, 2018, No. S-1-SC-37034

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-038

No. A-1-CA-35520 (filed April 9, 2018)

GLORIA MENDOZA,
Worker-Appellant,
v.
ISLETA RESORT AND CASINO
and HUDSON INSURANCE,
Employer/Insurer-Appellees,
and
TRIBAL FIRST,
Appellee,
and
STATE OF NEW MEXICO UNINSURED
EMPLOYERS' FUND,
Statutory Third Party.

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION
Leonard J. Padilla, Workers' Compensation Judge

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for Appellees

Opinion

Michael E. Vigil, Judge

{1} Gloria Mendoza (Worker), an employee at Isleta Pueblo Resort and Casino (Isleta Casino), appeals orders of the Workers' Compensation Judge (WCJ) dismissing her workers' compensation complaint and denying her motion to reconsider a prior order to name the proper parties to the case. Worker contends that the WCJ erred in dismissing her complaint on grounds of tribal sovereign immunity based on an express and unequivocal waiver contained in the 2015 Indian Gaming Compact; that even assuming Isleta Casino enjoys sovereign immunity in this case, the defense does not extend to Isleta Casino's non-tribal entity insurer and third-party administrator; and that the WCJ erred in denying Worker's motion to reconsider its order granting leave to file a second amended workers' compensation complaint naming Isleta Casino's insurer and third-party administrator as parties to the case. For the reasons that follow, we reverse and remand for further proceedings.

BACKGROUND

A. The New Mexico Indian Gaming Compacts and Workers' Compensation

{2} In 1988, the United States Congress enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721 (2012)), which provides a statutory basis for Indian tribes to establish gaming enterprises in Indian Country conducted pursuant to state-tribal compacts. *See* 25 U.S.C. § 2702; 25 U.S.C. § 2710(d)(1), *invalidated in part by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

{3} In 1995 and pursuant to IGRA, the Governor of the State of New Mexico, Gary Johnson, unilaterally entered into state-tribal gaming compacts with certain tribes. *See State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 8, 120 N.M. 562, 904 P.2d 11. Concluding that it violated separation of powers under the New Mexico Constitution for Governor Johnson to enter into the state-tribal gaming compacts without legislative approval, our Supreme Court held in *Johnson* that the 1995 Indian Gaming Compacts were without legal effect. *Id.* ¶¶ 46-50.

{4} Based on the decision in *Johnson*, Chapter 190, Section 1 of New Mexico laws of 1997 established the first legally effective state-tribal gaming compact in New Mexico. Section 4(B)(6) of the 1997 Indian Gaming Compact addressed workers' compensation for tribal gaming enterprise employees by stating that:

> [T]he Tribe shall adopt laws . . . providing to all employees of a gaming establishment employment benefits, including, at a minimum, sick leave, life insurance, paid annual leave and medical and dental insurance as well as providing unemployment insurance and workers' compensation insurance through participation in programs offering benefits at least as favorable as those provided by comparable state programs[.]

{5} In 2001 a new and revised Indian Gaming Compact was adopted. S.J. Res. 37, 45th Leg., 1st Sess. (N.M. 2001). The 2001 Indian Gaming Compact included a version of Section 4(B)(6), which was identical to the 1997 Compact.

{6} The Indian Gaming Compact was revised again in 2007. S.J. Res. 21 , 48th Leg., 1st Sess. (N.M. 2007). Under the 2007 Indian Gaming Compact, Section 4(B)(6) was modified to add additional basic rights that tribal gaming enterprise employees must be afforded in the context of workers' compensation and how signatory tribes may elect to participate in the State of New Mexico's workers' compensation program. Section 4(B)(6) of the 2007 Indian Gaming Compact provided that:

> [T]he Tribe shall adopt laws . . . providing to all employees of a gaming establishment employment benefits, including, at a minimum, sick leave, life insurance, paid annual leave and medical and dental insurance as well as providing unemployment insurance and workers' compensation insurance through participation in programs offering benefits at least as favorable as those provided by comparable state programs, *and which programs shall afford the employees due process of law and shall include an effective*

> *means for an employee to appeal an adverse determination by the insurer to an impartial forum, such as (but not limited to) the Tribe's tribal court, which appeal shall be decided in a timely manner and in an administrative or judicial proceeding and as to which no defense of tribal sovereign immunity would be available; and provided that to fulfill this requirement the Tribe may elect to participate in the State's program upon execution of an appropriate agreement with the State*[.]

(Emphasis added.)

{7} In 2015 the current version of the Indian Gaming Compact was adopted. S.J. Res. 19, 52nd Leg., 1st Sess. (N.M. 2015). With revisions emphasized below, the 2015 Indian Gaming Compact re-adopted in its entirety the 2007 amendment to Section 4(B)(6). Section 4(B)(6) of the 2015 Indian Gaming Compact provides:

> [T]he Tribe shall adopt laws *requiring the Tribe, through its Gaming Enterprise or through a third-party entity, to provide to* all employees of the Gaming Enterprise employment benefits, including, at a minimum, sick leave, life insurance, *paid annual leave or paid time off* and medical and dental insurance as well as providing unemployment insurance and workers' compensation insurance through participation in programs offering benefits at least as favorable as those provided by comparable State programs, and which programs shall afford the employees due process of law and shall include an effective means for an employee to appeal an adverse determination by the insurer to an impartial forum, such as (but not limited to) the Tribe's Tribal Court, which appeal shall be decided in a timely manner and in an administrative or judicial proceeding and as to which no defense of tribal sovereign immunity would be available; and provided that to fulfill this requirement the Tribe may elect to participate in the State's program upon execution of an appropriate agreement with the State[.]

(Emphases added.) The Pueblo of Isleta has been a signatory to the 2015 Indian Gaming Compact since July 28, 2015. *See* Indian Gaming, 80 Fed. Reg. 44,992-01 (July 28, 2015).

B. Parties in Interest

{8} Worker, the injured worker and complainant seeking work injury benefits from her employer in this case, is employed by and works as a custodial porter for Isleta Casino. Isleta Casino is a Class III tribal gaming enterprise located in the State of New Mexico that is wholly owned and operated by the Pueblo of Isleta. At the time of Worker's work injury, Isleta Casino maintained workers' compensation insurance issued by Hudson Insurance Company (Hudson), a Delaware corporation. Tribal First, which functioned as the third-party administrator of Isleta Casino's workers' compensation insurance policy at the time of Worker's injury, is a program administered by the California corporation, Alliant Specialty Insurance Services, Inc. Finally, First Nations Compensation Plan, was a company that provided Indian tribes with workers' compensation coverage until 2009. In 2009, First Nations Compensation Plan ceased paying claims after being pulled into bankruptcy proceedings involving a related company whose principals were investigated for operating a "Ponzi scheme" and were convicted on charges of mail fraud.

C. Worker's Work Injury and Claim for Work Injury Benefits

{9} On August 24, 2015, Worker was injured at work while pushing chairs during her midnight shift at Isleta Casino. Worker suffered a torn meniscus in her right knee. Worker filed a notice of accident form with Isleta Casino, was sent to an urgent care clinic by Isleta Casino, and saw a doctor all within twenty-four hours of her accident.

{10} On September 11, 2015, Worker received a letter signed by Erica Brown, an insurance adjuster for Tribal First (the Tribal First adjuster), which stated that Tribal First would be handling her claim for work injury benefits on behalf of Isleta Casino. The letter continued that "[p]er Isleta Resort & Casino work injury program, claims are to be reported within 24 hours." The letter incorrectly asserted, "Since you did not report your claim timely per Isleta Resort & Casino['s] work injury program, your claim is denied." The letter concluded that if Worker disagreed with Tribal First's decision, she was required to submit a written request for appeal with Tribal First no later than thirty days after the date of the letter denying her work injury benefits.

{11} Worker responded by filing a workers' compensation complaint with the Workers' Compensation Administration (WCA), naming Isleta Casino and the Food Industry Self Insurance Fund of New Mexico (FISIF) as parties to the case. Worker then amended her complaint to add as parties Tribal First and the Uninsured Employers Fund of New Mexico (UEF). While the case was pending, a certificate of workers' compensation insurance was filed with the WCA, identifying Hudson as the workers' compensation liability insurance carrier for Isleta Casino at the time of Worker's accident.

{12} A mediation conference was then held, but the parties were not able to resolve the matter. Included in the mediator's observations and recommendations were that the WCA had jurisdiction to adjudicate Worker's case because Isleta Pueblo waived tribal sovereign immunity, pursuant to Section 4(B)(6) of the 2015 Indian Gaming Compact, and that "[t]he behavior of the Tribal First adjuster raises a question of whether there is an enterprise to take tribes' money but pay no claims Such a course of behavior, even if true, is beyond the scope of the WCA. It would not be beyond the scope of appellate courts, were the case to go that far."

{13} Counsel then entered an appearance on behalf of Isleta Casino and Tribal First in the case for the limited purpose of contesting the subject matter jurisdiction of the WCA to adjudicate Worker's claim and filed a Rule 1-012(B)(1) NMRA motion to dismiss on March 2, 2016, asserting tribal sovereign immunity. Attached to the motion were selected pages from an insurance policy produced by First Nations Compensation Plan purported by counsel for Isleta Casino, Hudson, and Tribal First to be the Pueblo's workers' compensation ordinance, and which counsel argued conferred on Isleta Pueblo exclusive jurisdiction over claims made under its workers' compensation insurance policy with Hudson. Subsequent proceedings brought to light that the purported workers' compensation ordinance was not in fact tribal law in force or effect for the Pueblo at the time of Worker's work injury.

{14} The WCJ then entered an order granting an unopposed motion filed by Worker requesting leave to file a second amended complaint adding Hudson as a party and dismissing FISIF. However, without explanation, the order also dismissed Tribal First. Worker moved for reconsideration of the WCJ's order, requesting that Tribal First remain a party in the case.

{15} The WCJ later issued orders, granting the motion to dismiss on grounds of sovereign immunity, relying on *Antonio v. Inn of the Mountain Gods Resort & Casino*,

2010-NMCA-077, 148 N.M. 858, 242 P.3d 425, and summarily denying the motion for reconsideration as moot. As a result, Worker's workers' compensation case was dismissed with prejudice. This appeal followed.

DISCUSSION

{16} Worker raises three issues on appeal: (1) that the WCJ erred in granting Isleta Casino's motion to dismiss for lack of subject matter jurisdiction on grounds of tribal sovereign immunity; (2) that the defense of tribal sovereign immunity does not extend to Isleta Casino's non-tribal workers' compensation insurer, Hudson, or third-party administrator, Tribal First; and (3) that the WCJ erred in denying her motion to reconsider its order granting her leave to file a second amended workers' compensation complaint naming Hudson and Tribal First as parties to the case.

I. The WCJ Erred in Granting Isleta Casino's Motion to Dismiss for Lack of Subject Matter Jurisdiction

{17} Worker first contends that Section 4(B)(6) of the 2015 Indian Gaming Compact contains an express and unequivocal waiver of sovereign immunity. Worker urges us to focus our attention to the language of Section 4(B)(6) added in 2007 and re-adopted in the 2015 Indian Gaming Compact providing that employees of Isleta Pueblo's gaming enterprises "shall [be] afford[ed] . . . an impartial forum, such as (but not limited to) the Tribe's tribal court," and a judicial or administrative proceeding for appeals from adverse workers' compensation determinations in "which no defense of tribal sovereign immunity would be available[.]" (Emphasis omitted.) This language, Worker argues, demonstrates Isleta Pueblo's intent and agreement that either it or its gaming enterprise(s) waive tribal sovereign immunity in cases like hers—which challenge an adverse workers' compensation determination by Isleta Casino's workers' compensation insurer/third-party administrator.

{18} Isleta Casino in turn relies on this Court's opinions in *Antonio*, 2010-NMCA-077; *Martinez v. Cities of Gold Casino*, 2009-NMCA-087, 146 N.M. 735, 215 P.3d 44; and our non-precedential opinion in *Pena v. Inn of the Mountain Gods Resort & Casino*, No. A-1-CA-29799, mem. op. (N.M. Ct. App. Jan. 31, 2011) (non-precedential), to argue that "New Mexico courts have consistently applied the doctrine of tribal sovereign immunity to dismiss workers' compensation claims from the jurisdiction of state courts." Isleta Casino also contends that the language of Section 4(B)(6) of the 2015 Indian Gaming Compact does not constitute an express and unequivocal waiver of sovereign immunity. Rather, Isleta Casino argues that Section 4(B)(6) describes a contractual obligation, enforceable only by the parties to the compact, requiring that Isleta Pueblo shall adopt laws that establish a process for resolving its gaming enterprise employees' workers' compensation claims.

A. Standard of Review

{19} In reviewing an appeal from an order granting or denying a motion to dismiss for lack of jurisdiction based on tribal sovereign immunity, review is de novo. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207, 46 P.3d 668; *see Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, ¶ 4, 136 N.M. 682, 104 P.3d 548.

B. Section 4(B)(6) of the 2015 Indian Gaming Compact Contains an Express and Unequivocal Waiver of Sovereign Immunity

{20} "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Gallegos*, 2002-NMSC-012, ¶ 7 (internal quotation marks and citation omitted). These domestic dependent nations "have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *see Michigan v. Bay Mills Indian Cmty.*, ___ U.S. ___, ___, 134 S. Ct. 2024, 2030 (2014) ("Among the core aspects of sovereignty that [Indian] tribes possess . . . is the common-law immunity from suit[.]" (internal quotation marks and citation omitted)); *Hoffman v. Sandia Resort & Casino*, 2010-NMCA-034, ¶ 6, 148 N.M. 222, 232 P.3d 901 (stating that our Supreme Court has long "recognize[d] tribal sovereign immunity as a legitimate legal doctrine of significant historical pedigree").

{21} But tribal sovereign immunity is not absolute. *See Gallegos*, 2002-NMSC-012, ¶ 7. Article I, Section 8 of the United States Constitution confers on Congress "the ultimate authority over Indian affairs," which includes the ability to "expressly authorize suits against Indian tribes through legislation." *Gallegos*, 2002-NMSC-012, ¶ 7; *see Antonio*, 2010-NMCA-077, ¶ 10 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs, Inc.*, 523 U.S. 751, 756 (1998) for the proposition that "[t]ribal immunity is a matter of federal law and is not subject to diminution by the states" (alteration omitted)). Morever, a tribe is also free to waive its sovereign immunity; however, such a waiver must be "express and unequivocal." *R & R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, ¶ 10, 139 N.M. 85, 128 P.3d 513. "Because a tribe need not waive immunity at all, it is free to prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Id.* (internal quotation marks and citation omitted). Entities under tribal control are also extended sovereign immunity to the same extent as the tribe itself. *Sanchez*, 2005-NMCA-003, ¶ 6.

{22} State-tribal compacts are contracts, subject to the rules of contract interpretation. *See Gallegos*, 2002-NMSC-012, ¶ 30. As a result, a court's duty in interpreting and construing a state-tribal gaming compact is to ascertain the compacting parties' intent, and absent ambiguity, apply the plain meaning of the language employed in the compact. *See id.* We have therefore consistently declined to hold that a tribe waives sovereign immunity by implication. *See Antonio*, 2010-NMCA-077; *Martinez*, 2009-NMCA-087; *Sanchez*, 2005-NMCA-003; *see also Pena*, No. A-1-CA-29799, mem. op. at *1.

{23} In *Sanchez*, an employee of Santa Ana Golf Club, Inc., an entity wholly owned and operated by Santa Ana Pueblo, sued the golf club for wrongful discharge and defamation after being fired upon informing her employer that she had been tested for Hepatitis C—for which she tested negative. 2005-NMCA-003, ¶¶ 1-2. The golf club raised tribal sovereign immunity in a motion to dismiss for lack of subject matter jurisdiction under Rule 1-012(B)(1), which the district court granted. *Sanchez*, 2005-NMCA-003, ¶ 2. On appeal, the employee argued that Santa Ana Pueblo's "voluntary participation in New Mexico's workers' compensation program" served as a waiver of sovereign immunity. *Id.* ¶ 17. Reasoning that the employee's claim relied on a theory of waiver by implication, this Court held that mere "activities such as participation in the state's workers' compensation program" do not establish a clear and unequivocal waiver of tribal sovereign immunity. *See id.* ¶¶ 7, 18.

{24} This Court's holding in *Sanchez* was extended in our decision in *Martinez*, in which an injured employee of the Cities of Gold Casino, an entity wholly owned and operated by Pojoaque Pueblo, was allegedly terminated in retaliation for filing a workers' compensation claim. *Martinez*, 2009-NMCA-087, ¶ 1, 3. In response to the employee's filing of a workers' compensation claim, the casino filed a motion to dismiss, which included the defense of tribal sovereign immunity. *Id.* ¶¶ 10-11. The WCJ denied the casino's motion. *Id.* ¶¶ 15-16. On appeal,

the employee argued that the defense of sovereign immunity was unavailable to the tribe because it had purchased a workers' compensation insurance policy. *Id.* ¶ 27. Following our logic in *Sanchez*, we reversed the WCJ, holding that by merely purchasing workers' compensation insurance, the casino did not "implicitly" waive sovereign immunity requiring it "to surrender to state court jurisdiction." *Martinez*, 2009-NMCA-087, ¶ 27.

{25} *Martinez* also addressed the issue of whether the 2001 Indian Gaming Compact contained a waiver of sovereign immunity. *Id.* ¶ 26. In support of his claim that Section 4(B)(6) of the 2001 Indian Gaming Compact effected a waiver of sovereign immunity in workers' compensation claims, the employee referred to the language requiring tribal gaming enterprise employees be afforded workers' compensation benefits "at least as favorable as those provided by comparable state programs." *Id.* (internal quotation marks omitted). We reasoned that to find a waiver of sovereign immunity from this language would also require this Court to implicitly find that the casino agreed to submit to the jurisdiction of the WCA. *See id.* In support of our conclusion, we pointed out that the compact language cited by the employee did not indicate "where jurisdiction might lie when and if a workers' compensation claim is filed by an employee" of the casino. *Id.* Accordingly, we held that Section 4(B)(6) of the 2001 Indian Gaming Compact did not contain a waiver of tribal sovereign immunity. *See id.*

{26} Similarly, in *Antonio*, an employee of Ski Apache, an entity wholly owned and operated by the Mescalero Apache Tribe, was injured in the course of his employment as a snowmaker. 2010-NMCA-077, ¶ 2. After availing himself of the tribe's workers' compensation program, administered by Tribal First, the employee still believed "that he was entitled to additional compensation" and filed a complaint with the WCA. *Id.* ¶ 3. The WCJ dismissed the employee's complaint for lack of subject matter jurisdiction. *Id.* ¶ 4. On appeal, the employee raised the same argument as the employee in *Martinez*—that Section 4(B)(6) of the 2001 Indian Gaming Compact waived the tribe's sovereign immunity with respect to workers' compensation disputes through its language requiring that the tribe provide its employees with workers' compensation benefits "at least as favorable as those provided by comparable state programs[.]" *Antonio*, 2010-NMCA-077, ¶ 15. Relying on our reasoning in *Sanchez* and *Martinez*, we reaffirmed that Section 4(B)(6) of the 2001 Indian Gaming Compact does not effect a waiver of tribal sovereign immunity. *See Antonio*, 2010-NMCA-077, ¶¶ 15, 17, 20; *see also Pena*, No. A-1-CA-29799, mem. op. ¶ 4 (same).

{27} *Sanchez*, *Martinez*, and *Antonio* do not control. In those cases, the employees all relied upon theories of waiver of tribal sovereign immunity by implication—whether by voluntary participation in WCA proceedings, purchasing workers' compensation insurance, or under Section 4(B)(6) of the 2001 Indian Gaming Compact.

{28} In contrast, here Worker's argument relies on Section 4(B)(6) of the 2015 Indian Gaming Compact, which expressly provides that employees of Isleta Pueblo's gaming enterprises "shall [be] afford[ed] . . . an impartial forum such as (but not limited to) the Tribe's tribal court" and a judicial or administrative proceeding for appeals from adverse workers' compensation determinations in "which no defense of tribal sovereign immunity would be available[.]" Worker asserts this is an express and unequivocal waiver of tribal sovereign immunity. This language materially changed the substance and operation of the compact and it was not in effect in *Martinez* or *Antonio*, which construed Section 4(B)(6) of the 2001 Indian Gaming Compact. Therefore, the question of whether Section 4(B)(6) of the 2015 Indian Gaming Compact contains an express and unequivocal waiver of tribal sovereign immunity is one of first impression. Thus, *Sanchez*, *Martinez*, and *Antonio* do not govern in this case, and we proceed to analyze the 2015 Compact language to determine whether it constitutes an express and unequivocal waiver of tribal sovereign immunity.

{29} There is no issue about whether Section 4(B)(6) of the 2015 Indian Gaming Compact is ambiguous on its face. We therefore proceed to construe the ordinary and usual meaning of the language employed in the 2015 Compact. *See ConocoPhillips Co. v. Lyons*, 2013-NMSC-009, ¶ 23, 299 P.3d 844 (holding that where a contract is unambiguous, "the words of the contract are to be given their ordinary and usual meaning" (alteration, internal quotation marks, and citation omitted)). Section 4(B)(6) of the 2015 Indian Gaming Compact sets forth an express and unequivocal waiver of sovereign immunity. Section 4(B)(6) of the 2015 Compact expressly states that "appeal[s]" from "adverse [workers' compensation] determination[s]" by Isleta Casino's insurer "shall be decided in an administrative or judicial proceeding as to which no defense of tribal sovereign immunity would be available[.]"

{30} Isleta Casino denies that its workers' compensation program does not comply with Section 4(B)(6), and further, assuming Isleta Pueblo has failed to adopt laws as required by the compact, Isleta Casino argues that such a failure can only be remedied by the State of New Mexico, as a party to the contract. The WCJ failed to hear evidence or make any findings of fact on whether Isleta Pueblo has adopted laws requiring it to participate in a workers' compensation program as mandated by Section 4(B)(6). Therefore, notwithstanding that Section 4(B)(6) contains an express waiver of sovereign immunity, we are not able to determine, on the record before us, whether the waiver is operative. Under these circumstances, we would ordinarily remand the case directing the WCJ to hear and consider relevant evidence and make findings of fact on the question of immunity. *See South v. Lujan*, 2014-NMCA-109, ¶ 11, 336 P.3d 1000 (stating that where determination of jurisdiction depends on factual questions that are inadequately developed for appeal, we may remand the case to the district court to make findings of fact and conclusions of law). It is not necessary for us to do so in this case, because even if Isleta Casino has sovereign immunity, Worker has a right to pursue her workers' compensation claim directly against Hudson and its third-party administrator, Tribal First. However, if Worker still wishes to proceed against Isleta Casino in addition to the insurers, then the WCJ should hear evidence and make findings (and allow discovery, if he deems it advisable) on the immunity question.

II. Worker May Pursue Her Workers' Compensation Claim Against Hudson and Tribal First, Notwithstanding Isleta Casino's Entitlement To Tribal Sovereign Immunity

{31} Worker next argues that even if this Court "finds that Employer [Isleta Casino] may defend this workers' compensation claim on the basis of sovereign immunity, . . . [then] such a defense does not extend to non-tribal entities Hudson Insurance and Tribal First." In support of her argument, Worker relies on the 2012 Oklahoma State Supreme Court case *Waltrip v. Osage Million Dollar Elm Casino*, 2012 OK 65, 290 P.3d 741.

{32} Although counsel for Isleta Casino, Hudson, and Tribal First concede that neither Hudson nor Tribal First are tribal entities entitled to claim sovereign immunity, counsel contends that Isleta Pueblo's sovereign immunity effectively extends to the insurers of its tribal gaming enter-

prises. This argument, relies on a statement in *Gallegos*, 2002-NMSC-012, ¶¶ 42-48, that "New Mexico courts have specifically found[, under Rule 1-019 NMRA,] that tribal enterprises are indispensable parties in suits brought against tribal insurers and that independent claims cannot be sustained against a tribal insurer." As a result, Isleta Casino and Hudson assert that adoption of Worker's argument under *Waltrip* "directly conflicts with New Mexico law."

A. *Gallegos* Does Not Apply to This Case

{33} In *Gallegos*, a visitor to the Camel Rock Gaming Center, an entity wholly owned and operated by the Pueblo of Tesuque (Tesuque), was injured when she was knocked down by a garbage container that blew into her because of a sudden gust of wind. 2002-NMSC-012, ¶ 3. At the time of the visitor's injury, the gaming center had an insurance policy in effect with Zurich American Insurance Company. *Id.* The visitor thereafter filed a common law tort action against Tesuque and other defendants seeking damages. *Id.* ¶ 4. The district court dismissed the case on the basis of tribal sovereign immunity. *Id.* The visitor proceeded to file a separate lawsuit against the gaming center's insurer, Zurich and other defendants, alleging, in pertinent part, breach of contract for failing to pay her medical expenses and insurance bad faith. *Id.* ¶ 5. Zurich responded by filing a Rule 1-019 motion to dismiss for failure to join an indispensable party—Tesuque, which enjoyed sovereign immunity. *Gallegos*, 2002-NMSC-012, ¶ 5. On appeal, our Supreme Court affirmed the district court, *id.* ¶ 37, citing federal precedent for the proposition that in actions involving contract disputes, the parties to the contract are indispensable parties. *Id.* ¶ 43.

{34} The Court in *Gallegos* reasoned that the visitor's contract claims "would require that the court interpret the provisions of the insurance contract, as well as determine the duties and responsibilities under the insurance policy" of Tesuque, Zurich, and the visitor "in relation to each other" and "as understood by the contracting parties." *Id.* ¶ 43. "The propriety or impropriety of Zurich's performance under the insurance policy[,]" the Court stated, was of "substantial interest" to Tesuque, which "paid for the insurance protection in question and on whose behalf Zurich acts." *Id.* Accordingly, the Court held that Tesuque was an indispensable party to the visitor's case against Zurich. *Id.* ¶ 47.

{35} *Gallegos* does not apply under the facts and circumstances of this case. In *Gallegos*, the visitor's claim against Zurich was a common law civil action, alleging breach of contract for failing to pay her medical expenses and insurance bad faith. *Id.* ¶ 38.

{36} Here, Worker's case was filed as a statutory workers' compensation claim. From these facts it follows that the procedural issues that warranted dismissal of the visitor's claim against Zurich in *Gallegos* on grounds of failure to join an indispensable party—Tesuque—are not presented in Worker's case. Specifically, in *Gallegos*, the visitor's breach of contract and insurance bad faith claims against Zurich would have required the Court to interpret and determine the duties created under the insurance policy executed between Zurich and the gaming center in relation to the visitor. Therefore, the Court held that based on the principle that in actions involving contract disputes, the parties to the contract at issue are indispensable parties, the gaming center, which the district court determined enjoyed tribal sovereign immunity in relation to the visitor's claim, was an indispensable party without which the visitor's case against Zurich could not go forward.

{37} Here, in contrast, interpretation of the duties created under the workers' compensation insurance policy executed between Isleta Casino and Hudson is not at issue. Rather, to succeed on the merits in her claim for workers' compensation benefits before the WCA, Worker need only establish that at the time of her accident: (1) Isleta Casino had complied with workers' compensation laws regarding obtaining insurance; (2) Worker was performing "service arising out of and in the course of employment"; and (3) her injury was "proximately caused by accident arising out of and in the course of" her employment and was "not intentionally self-inflicted." NMSA 1978, § 52-1-9 (1973). Additionally, workers' compensation law, unlike the common law of contract, generally requires that both a worker's employer and his or her employer's insurer shall be directly and primarily liable to the worker to pay to him or her work injury benefits where the aforementioned elements of a workers' compensation claim are satisfied. *See* NMSA 1978, § 52-1-4(A), (C) (1990). As a result, even assuming Isleta Casino was determined to enjoy tribal sovereign immunity in the context of Worker's workers' compensation claim, Isleta Casino is not an indispensable party without which Worker's claim cannot go forward under *Gallegos*—as both Isleta Casino and Hudson may be directly and primarily liable to her for work injury under workers' compensation law.

{38} Concluding that *Gallegos* does not apply in this case, we proceed to consider Worker's claim that we should adopt the reasoning in the Oklahoma Supreme Court's decision in *Waltrip* and hold that she may pursue her workers' compensation claim against Hudson and Tribal First in the WCA notwithstanding that Isleta Casino may be immune.

B. *Waltrip*'s Rationale Is Persuasive and Worker May Pursue Her Claim for Workers' Compensation Benefits Against Hudson and Tribal First

{39} In *Waltrip*, an employee of the Osage Million Dollar Elm Casino, wholly owned and operated by the Osage Nation, fell on a patch of ice while on the job working as a surveillance supervisor at the casino. 2012 OK 65, ¶¶ 2-3. At the time of the accident, the casino carried an insurance policy issued by Hudson Insurance Company—administered by Tribal First. *Id.* ¶ 2. Although the casino's insurance policy with Hudson contemplated adjudication of workers' compensation claims in Tribal Court, the Osage Nation had not enacted an ordinance governing workers' compensation. *Id.* ¶ 9. The employee proceeded to file a claim in the Oklahoma Workers' Compensation Court, seeking workers' compensation benefits. *Id.* ¶ 4. The Workers' Compensation Court, however, dismissed the employee's claim based on the casino and Hudson's assertion of tribal sovereign immunity as a defense. *Id.* Relying on a section of the Oklahoma Workers' Compensation Act titled "Estoppel from denying employment"[1] and the common law rights in contract of third-party beneficiaries, the court determined that although the casino enjoyed tribal sovereign immunity based on its status as a tribal enterprise, Hudson Insurance—a

[1]Okla. Stat. Ann. tit. 85A, § 117 (West 2014) (providing that "[e]very employer and insurance carrier who schedules any employee as a person employed by the employer for the purpose of paying or collecting insurance premiums on a workers' compensation insurance policy or who pays, receives or collects any premiums upon any insurance policy covering the liability of such employer under the workers' compensation law by reason of or upon the basis of the employment of any such employee shall be estopped to deny that such employee was employed by the employer").

non-tribal Delaware corporation—was not beyond the jurisdiction of the state's Workers' Compensation Court. *Id.* ¶ 19.

{40} The *Waltrip* court's reasoning was as follows. Per the estoppel statute, the employee had been conferred third-party beneficiary status under the insurance policy entered into by the casino and Hudson. *Id.* The purpose of the estoppel statute was to ensure "that an insurer who accepts premiums should not evade liability for benefits due under compensation law" notwithstanding an insured's status as a sovereign entitled to immunity from suit. *Id.* ¶ 7 (internal quotation marks and citation omitted). Hudson "knew or should have known" that the Osage Nation had put no workers' compensation ordinance in place, but still "[willfully] and intentionally collect[ed] premiums from the tribal enterprise[, the casino,] for providing workers' compensation . . . believing that it w[ould] step into the shoes of the Tribe and receive the benefit of the Tribe's sovereign immunity." *Id.* ¶ 12. To permit an insurer to evade any liability because of the status of an employer that it insures would "render the [insurance] policy provisions illusory and inane. Insurer would possess the ability to arbitrarily deny claims and yet evade any judicial review in any tribal, federal, or state court. It would leave no avenue for an injured worker of the tribal enterprise to compel [i]nsurer's performance under the policy in a judicial forum." *Id.* ¶ 15 (emphasis omitted). As a result, without a tribal ordinance governing workers' compensation and establishing the law and a forum for adjudication of employees' workers' compensation claims, the state Workers' Compensation Court could exercise jurisdiction over Hudson and Tribal First. *Id.* ¶ 19.

{41} The circumstances central to the court's decision in *Waltrip* are strikingly similar to those presented in this case. First, like the casino in *Waltrip*, Isleta Casino carried a workers' compensation insurance policy issued by Hudson and administered by Tribal First at the time of Worker's work injury. Like the arrangement between the Osage Nation and Hudson in *Waltrip*, the insurance policy in force between Isleta Casino and Hudson appeared to contemplate adjudication of Isleta Casino employees' workers' compensation claims in some forum. However, at the time that the *Waltrip* employee and Worker were injured, the Osage Nation and apparently Isleta Pueblo had not adopted tribal ordinances governing workers' compensation. Upon the filing of workers' compensation complaints with the New Mexico WCA and Oklahoma Workers' Compensation Court, respectively, both Worker and the *Waltrip* employee's claims were dismissed on grounds of tribal sovereign immunity. And as was the case in *Waltrip*, Hudson and Tribal First knew or should have known that no Isleta Pueblo ordinance governing workers' compensation was in place. Yet Hudson and Tribal First still collected premiums from Isleta Pueblo contending, once again, that it would benefit from the Pueblo's sovereign immunity.

{42} Second, Oklahoma's estoppel from denying employment statute, which is aimed at ensuring "that an insurer who accepts premiums should not evade liability for benefits due under compensation law" notwithstanding an insured's status as a sovereign entitled to immunity from suit, *Waltrip*, 2012 OK 65, ¶ 7 (internal quotation marks and citation omitted), is similar to Section 52-1-4(C). As referenced above, Section 52-1-4(C) requires that both an employer and the employer's workers' compensation insurer assume direct and primary liability to pay employees' "compensation and other workers' compensation benefits" where an employee's injuries are deemed compensable. Section 52-1-4 has also been construed by our Supreme Court as intended to notify a worker that their employer has complied with the insurance requirements of the Workers' Compensation Act, that the employer is subject to the provisions thereof, and that the worker has conclusively accepted the provisions of the Workers' Compensation Act. *See Shope v. Don Coe Constr. Co.*, 1979-NMCA-013, ¶ 9, 92 N.M. 508, 590 P.2d 656.

{43} Finally, New Mexico common law expressly recognizes that workers are third- party beneficiaries of workers' compensation insurance policies. *See Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶¶ 16, 20, 135 N.M. 397, 89 P.3d 69 (reaffirming that workers are "intended beneficiaries" of workers' compensation insurance policies); *Russell v. Protective Ins. Co.*, 1988-NMSC-025, ¶¶ 15-16, 107 N.M. 9, 751 P.2d 693 (recognizing that workers are third-party beneficiaries under workers' compensation insurance policies), *abrogated on other grounds by Cruz v. Liberty Mut. Ins. Co.*, 1995-NMSC-006, ¶¶ 7-10, 119 N.M. 301, 889 P.2d 1223; *Points v. Willis*, 1939-NMSC-041, ¶¶ 47, 50, 44 N.M. 31, 97 P.2d 374 (recognizing that workers and dependents of the worker are third-party beneficiaries of workers' compensation policies).

{44} Based on the foregoing factual and legal similarities, we find *Waltrip* persuasive and adopt its rationale. Applying the *Waltrip* reasoning, we conclude that Worker is a third-party beneficiary to the workers' compensation insurance policy between Isleta Casino and Hudson (evidenced by the December 1, 2015, certificate of workers' compensation insurance filed with the WCA). Specifically, Isleta Casino and Hudson intended for the employees of Isleta Casino, including Worker, to benefit from the rights and protections created under the policy in the event that they are injured on the job. Additionally, the filing of the certificate of workers' compensation insurance with the WCA rendered Hudson to being held directly and primarily liable to pay workers' compensation benefits as Isleta Casino's workers' compensation insurer, pursuant to Section 52-1-4(C). As a result, we likewise conclude, as the Oklahoma Supreme Court concluded in *Waltrip*, that allowing Hudson and Tribal First to deny Worker's claim in this case by hiding behind Isleta Pueblo's sovereign immunity renders the Pueblo's insurance policy illusory and inane and permits Hudson and Tribal First to arbitrarily evade judicial review of its determination in any forum.

{45} Accordingly, we hold that: (1) Hudson and Tribal First, as Isleta Casino's workers' compensation insurer and third-party administrator, are proper parties to Worker's workers' compensation case; and (2) assuming Isleta Casino enjoys tribal sovereign immunity in this case, Worker may pursue her claim for work injury benefits in the WCA against Hudson and Tribal First.

CONCLUSION

{46} For the foregoing reasons, we reverse and remand for further proceedings in Worker's workers' compensation case in the WCA in accordance with this opinion. Additionally, on remand, Worker shall be permitted to amend her complaint to name Tribal First, as Hudson's third-party administrator, as a party to the case.

{47} IT IS SO ORDERED.
MICHAEL E. VIGIL, Judge

WE CONCUR
LINDA M. VANZI, Chief Judge
EMIL J. KIEHNE, Judge

Classified

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Announcement

The United States District Court for the District of New Mexico is seeking an individual with experience in leading a complex, diverse, and innovative organization to serve as the District's Clerk of Court. To be qualified for appointment as Clerk of Court, a candidate must have a minimum of 10 years of progressively responsible administrative experience in public service or business that provides a thorough understanding of organizational, procedural, and human aspects of managing an organization. At least five (5) of the 10 years of experience must have been in a position of substantial managerial responsibility. To view the full announcement, and for application instructions please visit http://www.nmd.uscourts.gov/employment

Position Announcement Research and Writing Attorney - Albuquerque 2018-09

The Federal Public Defender for the District of New Mexico is seeking a full time, experienced Research and Writing Attorney for the main office in Albuquerque. More than one vacancy may be filled from this announcement. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C. § 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Research and Writing Attorney is an attorney position that provides advanced research and writing services to staff attorneys on trial and appellate cases, performs computer assisted legal research, aids in the development of legal strategies, writes briefs, motions, petitions for certiorari, and legal memoranda for review by the Defender and staff attorneys. General duties include examining, analyzing and researching records and issues, performing legal research and preparing legal documents, assisting AFD staff with all aspects of case preparation, training, continuing legal education and supervision of legal interns as appropriate. The Research and Writing Attorney does not ordinarily sign pleadings or make court appearances. Minimum qualifications include graduation from an accredited law school, admission to practice in good standing before the highest court of a state, and a working knowledge of federal criminal law and procedure. Candidates must be able to analyze legal issues from lengthy, complex records, write clearly and concisely, and have strong computer automation skills. Prior appellate writing experience, law review membership or a judicial law clerkship are desirable. This is a full-time position with federal salary and benefits based upon qualifications and experience. Starting pay ranges from a JSP 9-15, $50,769 to $121,690 annually depending on experience. Research and Writing Attorneys may not engage in the private practice of law. All employees are subject to mandatory electronic fund transfer (direct deposit) for payment of net pay. The selected candidate will be subject to a background check as a condition of employment. The Federal Public Defender is an equal opportunity employer. In one PDF document, please submit a statement of interest, detailed resume of experience, and three references to: Stephen P. McCue, Federal Public Defender, FDNM-HR@fd.org. Reference 2018-09 in the subject. Writing samples will be required only from those selected for interview. Applications must be received by August 10, 2018. Positions will remain open until filled and are subject to the availability of funding. No phone calls please. Submissions not following this format will not be considered. Only those selected for interview will be contacted.

Position Announcement Investigator - Albuquerque 2018-08

The Federal Public Defender for the District of New Mexico is seeking a full time, experienced investigator for the main office in Albuquerque. More than one vacancy may be filled from this announcement. This position is a graded position ranging from a JSP 11-14. Federal salary and benefits apply. Position Description: An investigator must be able to perform duties and responsibilities such as: conducting interviews to corroborate reports and facts already contained or presented in records, discovery material or various other formats; locating fact witnesses and experts; conducting open ended interviews with witnesses and other sources of information to explore and develop new facts and information; initiating new areas of investigation after being assigned the case and discussing it with the attorney; gathering records; locating, viewing and retrieving tangible evidence, personal property and other relevant items; photographing crime scenes and evidence; maintaining filing and information reference systems; writing comprehensive descriptive reports of work done; and testifying effectively in federal court proceedings. An investigator must have the ability and willingness to accept responsibility, use initiative, ingenuity and resourcefulness. Knowledge of computer applications is required. Working knowledge of the criminal justice system is required. Regular, out-of-town, overnight travel throughout the State of New Mexico is required. An investigator also must perform all other duties as assigned. Qualifications: Applicants must have a high school degree or equivalent and the requisite experience. Qualified applicants must possess a minimum of six years (three years general plus three years specialized) investigative experience. Education above the high school level in accredited institutions may be substituted for general experience. Spanish proficiency preferred. Applicants may be given a Spanish proficiency test. The selected candidate will be subject to a background check as a condition of employment. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C. ' 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. In one PDF document, please submit a statement of interest and detailed resume of experience, including trial and appellate work, with three references to: Melissa Read, Administrative Officer, FDNM-HR@fd.org. Reference 2018-08 in the subject. Applications must be received by August 10, 2018. Positions will remain open until filled and are subject to the availability of funding. No phone calls please. Submissions not following this format will not be considered. Only those selected for interview will be contacted.

Position Announcement Administrative Assistant to CJA Resource Counsel 2018-11

The Federal Public Defender for the District of New Mexico is seeking a full-time administrative assistant to the CJA Resource Counsel for the District of New Mexico. The CJA Resource Counsel works closely with the Courts, the Federal Public Defender and the Defender Services Office to improve the quality of representation and the efficient management of the CJA Panel. The assistant will work closely with the CJA Resource Counsel in designing and presenting training and assistance to CJA Panel attorneys; assisting CJA Panel attorneys and the Court with the efficient processing of vouchers for reimbursement and authorizations for service providers, travel and other case-related expenses; preparing and assisting in the preparation of various CJA forms, and verifying their compliance with requirements; contacting CJA counsel to determine availability for appointment in criminal cases; monitoring court dockets to determine changes in representation of CJA clients; assisting in the maintenance of lists of service providers to assist CJA counsel; disseminating and receiving information involved in panel management; assisting in the expeditious assignment of counsel in criminal cases; maintaining updated information regarding the CJA Guidelines, federal travel guidelines, local rules of the court for the District of New Mexico; assisting with coordination of travel for panel attorneys and service providers in accordance with federal travel regulations; and other duties as assigned consistent with the mission of the position. Applicants must have a positive work ethic, a reputation for personal and professional integrity and an ability to work well with the CJA Resource Counsel, the Federal Public Defender, the Court and members of the CJA panel. Preferred qualifications of any Applicants for this position include substantial experience with federal criminal practice; and substantial experience with various computer programs, including word processing, spreadsheets, PACER and CM/ECF and billing and timekeeping programs. There is a preference for applicants with a working knowledge of the electronic eVoucher system, either as an administrator or from the perspective of attorney filers. Applicants must have a high school degree or equivalent and the requisite experience. Selected applicants will be subject to a background investigation. Salary commensurate with experience. This position is a graded position with a salary range of JSP 9, 11-12 on the pay table. The Federal Public Defender operates under the authority of the Criminal Justice Act, 18 U.S.C. § 3006A. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. In one PDF document, please submit a statement of interest and detailed resume of experience with three references to: Melissa Read, Administrative Officer, FDNM-HR@fd.org. Reference 2018-11 in the subject line. Applications must be received by August 10, 2018. The position will remain opened until filled and is subject to the availability of funding. No phone calls please. Only those selected for an interview will be contacted.

Position Announcement Assistant Federal Public Defender-Albuquerque 2018-10

The Federal Public Defender for the District of New Mexico is seeking a full time, experienced trial attorney for the main office in Albuquerque. More than one position may be filled from this posting. Federal salary and benefits apply. Applicant must have three years minimum criminal law trial experience, be team-oriented, exhibit strong writing skills as well as a commitment to criminal defense for all individuals, including those who may be facing the death penalty. Spanish fluency preferred. Writing ability, federal court, and immigration law experience will be given preference. Membership in the New Mexico Bar is required within the first year of employment. The private practice of law is prohibited. Selected applicant will be subject to a background investigation. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C. ' 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. In one PDF document, please submit a statement of interest and detailed resume of experience, including trial and appellate work, with three references to: Stephen P. McCue, Federal Public Defender, FDNM-HR@fd.org. Reference 2018-10 in the subject. Writing samples will be required only from those selected for interview. Applications must be received by August 10, 2018. Position will remain open until filled and is subject to the availability of funding. No phone calls please. Submissions not following this format will not be considered. Only those selected for interview will be contacted.

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