

BAR BULLETIN

August 22, 2018 • Volume 57, No. 34



View to Niagara Falls, by Dean G. Loumbas

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-STATE BAR OF NEW MEXICO-

2018

ANNUAL MEETING

Thank you!

On behalf of President Wesley O. Pool and the entire Board of Bar Commissioners, the State Bar of New Mexico would like to thank all attendees for a fantastic 2018 Annual Meeting!

We would also like to thank all of our sponsors, exhibitors, silent auction donors and CLE speakers for helping us put together one of our best events yet.

See you next year!

Aug. 1-3, 2019
Hotel Albuquerque at Old Town
and Hotel Chaco





Officers, Board of Bar Commissioners

Wesley O. Pool, President
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 Ernestina R. Cruz, Secretary Treasurer
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Meetings

August

- 22**
NREEL Section Board
 Noon, teleconference
- 24**
Immigration Law Section Board
 Noon, teleconference
- 28**
Intellectual Property Law Section Board
 Noon, Lewis Roca Rothgerber Christie LLP
- 30**
Trial Practice Law Section Board
 Noon, The Spence Law Firm

September

- 4**
Health Law Section Board
 9 a.m., teleconference
- 5**
Employment and Labor Law Section Board
 Noon, State Bar Center

Workshops and Legal Clinics

September

- 4**
Common Legal Issues for Senior Citizens Workshop Presentation
 10-11:15 a.m., Alamo Senior Center, Alamogordo, 1-800-876-6657
- 5**
Common Legal Issues for Senior Citizens Workshop Presentation
 10-11:15 a.m., Deming Senior Center, Deming, 1-800-876-6657
- 5**
Divorce Options Workshop
 6-8 p.m., State Bar Center, Albuquerque, 505-797-6022
- 5**
Civil Legal Clinic
 10 a.m.-1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861
- 6**
Common Legal Issues for Senior Citizens Workshop Presentation
 10-11:15 a.m., Munson Senior Center, Las Cruces, 1-800-876-6657

About Cover Image and Artist: Dean Loumbas is a speech-language pathologist residing and working in San Francisco. His paintings have been accepted and shown in regional, national and international juried exhibitions as well as in juried museum shows. Loumbas' paintings have been published as cover art for the *Journal of Pediatric and Adolescent Medicine*, the *Journal of Academic Medicine* and the *Journal of Speech-Language Pathology*. His current work redefines the solid form by presenting geometric shapes in close relationships which create horizons and abstract 'landscapes' that takes the viewer on multiple journeys through numerous visual and spatial transformations. For more information and additional work, email dlou33@cs.com.

Notices

COURT NEWS

New Mexico Supreme Court Supreme Court Law Library Hours and Information

The Supreme Court Law Library is open to anyone in the legal community or public at large seeking legal information. The Library has a comprehensive legal research collection of print and online resources, and a staff of professional librarians is available to assist. Search the online catalog at <https://n10045.eos-intl.net/N10045/OPAC/Index.aspx>. Call 505-827-4850, Click <https://lawlibrary.nmcourts.gov> or email libref@nmcourts.gov for more information. Visit the Law Library at the Supreme Court Building, 237 Don Gaspar, Santa Fe, NM 87501. The Library is open Monday-Friday, 8 a.m.-5 p.m. Reference and circulation is open Monday-Friday 8 a.m.-4:45 p.m.

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 1971-1999 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 505-841-6717 from 8 a.m.-5 p.m. Mon.-Fri. The aforementioned tapes will be destroyed after Oct. 13.

Twelfth Judicial District Court Announcements

The Twelfth Judicial District Court would like to extend an invitation to anyone who would like to electronically receive Court announcements and newsletters. To be added to the email distribution list, submit request to aladref@nmcourts.gov.

Bernalillo County Metropolitan Court Court Closure Notice

Bernalillo County Metropolitan Court will be closed from 11 a.m.-5 p.m. on Aug. 24 for the Court's annual employee conference. Misdemeanor Custody Arraignments will commence at 8:30 a.m. and will be immediately followed by Felony First Appearances. Traffic Arraignments and

Professionalism Tip

With respect to the courts and other tribunals:

I will voluntarily exchange information and work on a plan for discovery as early as possible.

Preliminary Hearings will not be held that day. The outside Bonding Window will be open from 11 a.m.-5 p.m. for the filing of emergency motions and for posting bonds. The conference is sponsored by the New Mexico Judicial Education Center and paid for by fees collected by state courts.

STATE BAR NEWS Appellate Practice Section Court of Appeals Candidate Forum

The Appellate Practice Section will host a Candidate Forum for the eight candidates running for the New Mexico Court of Appeals this November. Save the date for 4-6 p.m., Oct. 18, at the State Bar Center in Albuquerque.

Committee on Women and the Legal Profession Aaron Wolf Honored with Justice Pamela B. Minzner Outstanding Advocacy for Women Award

Join the Committee on Women and the Legal Profession for the presentation of the 2017 Justice Pamela B. Minzner Outstanding Advocacy for Women Award to Aaron Wolf for his work providing legal assistance to women who are under-represented or under served and for his egalitarian approach towards working with women colleagues. The award reception will be held from 5:30-7:30 p.m., Aug. 30, at the Albuquerque Country Club. Hors d'oeuvres will be provided and a cash bar will be available. R.S.V.P.s are appreciated. Contact Committee Co-chair Quiana Salazar-King at salazar-king@law.unm.edu.

New Mexico Judges and Lawyers Assistance Program Attorney Support Groups

- Sept. 10, 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#.

- Sept 17, 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#.
- Oct. 1, 5:30 p.m.
First United Methodist Church, 4th and Lead SW, Albuquerque (The group normally meets the first Monday of the month but will skip September due to the Labor Day holiday.)

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

UNM SCHOOL OF LAW Law Library Summer 2018 Hours

Building and Circulation

Monday-Thursday	8 a.m.-8 p.m.
Friday	8 a.m.-6 p.m.
Saturday	10 a.m.-6 p.m.
Sunday	noon-6 p.m.

Reference

Monday-Friday	9 a.m.-6 p.m.
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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 NMBLA for food, drinks and fun! Tickets are only \$35 and can be purchased on the New Mexico Black Lawyers Association Facebook page or by emailing nmblacklawyers@gmail.com. Each brunch ticket comes with an entry into our raffle for \$500. There will only be 100 tickets sold, act fast. NMBLA also accepting sponsorships for this event. For information about sponsorships, email nmblacklawyers@gmail.com.

OTHER NEWS Workers' Compensation Administration Judicial Reappointment

The director of the Workers' Compensation Administration, Darin A. Childers, is considering the reappointment of Judge Reginald "Reg" Woodard to a five-year term pursuant to NMSA 1978, Section 52-5-2 (2004). Judge Woodard's term expires on Nov. 24. Anyone who wants to submit written comments concerning Judge Woodard's performance may do so until 5 p.m. on Aug. 31. All written comments submitted per this notice shall remain confidential. Comments may be addressed to WCA Director Darin A. Childers, PO Box 27198, Albuquerque, New Mexico 87125-7198 or faxed to 505-841-6813.

New Mexico Commission on Access to Justice

The next meeting of the Commission On Access to Justice is at Noon-4 p.m. on Sept. 7, at the State Bar of New Mexico. Commission goals include expanding resources for civil legal assistance to New Mexicans living in poverty, increasing public awareness, and encouraging and supporting pro bono work by attorneys. Interested parties from the private bar and the public are welcome to attend. More information about the Commission is available at www.accesstojustice.nmcourts.gov.

Environmental Law Institute 27th Annual Eastern Boot Camp on Environmental Law

Join ELI for a stimulating three-day immersion in environmental law at Eastern Boot Camp. Designed for both new and seasoned professionals, this intensive course explores the substance and practice of environmental law. The faculty members are highly respected practitioners who bring environmental law, practice, and emerging issues to life through concrete examples, cases and practice concerns in this three-day intensive course for ELI members. The Boot Camp is a great deal, offering up to 20 hours of CLE credit for \$1,100 or less, with special discounts



CORRECTIONS TO THE 2018-2019 BENCH AND BAR DIRECTORY

ACTIVE MEMBERS

Bishop, Larry K.575-964-2261
1601 N Turner St #209 88240-4309
PO Box 494
Hobbs NM 88241-0494
Bishoplaw123@outlook.com

Hayes, Michal M.505-469-4140
NM Aging and Long-Term Services Department
PO Box 27118
Santa Fe NM 87502-0118
F 505-476-4750
michal.hayes@state.nm.us

FOURTH JUDICIAL DISTRICT COURT

GUADALUPE, MORA AND SAN MIGUEL COUNTIES

Division I
Chief Judge Gerald E. Baca
505-425-7131 F 505-425-6307

Division III
Judge Matthew J. Sandoval
505-425-9352 F 505-425-9457

Court Executive Officer
Robert Duran
505-425-7281 x11 F 505-454-8611

TENTH JUDICIAL DISTRICT COURT

QUAY, HARDING AND DeBACA COUNTIES

QUAY COUNTY (#1010)
300 S 3rd Street
PO Box 1067
Tucumcari NM 88401
575-461-2764
F 575-461-4498
tucddiv1proposedtxt@nmcourts.gov

FEDERAL COURTS

United States Bankruptcy Court District of New Mexico www.nmb.uscourts.gov/

Pete V. Domenici U.S. Courthouse
333 Lomas Boulevard NW, Suite 360
Albuquerque, NM 87102

Chief Judge Robert H. Jacobvitz
505-600-4650

Judge David T. Thuma
505-600-4640

Court Clerk
Lana Merewether
505-415-7999 or 1-866-291-6805

Note: Information for members is current as of April 16, 2018. Visit www.nmbar.org/FindAnAttorney for the most up-to-date information. To submit a correction, contact Pam Zimmer, pzimmer@nmbar.org.

provided to government, academic, public interest employees and students. Designed originally for attorneys, the course is highly useful for environmental professionals such as consultants, environmental managers, policy and advocacy experts, paralegals and technicians seeking deeper knowledge of environmental law. The registration deadline is Oct. 19. Visit <https://www.eli.org/boot-camp/eastern-bootcamp-environmental-law> for more details.

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 August 10, 2018

PUBLISHED OPINIONS

A-1-CA-34545	State v. E Chacon	Affirm	08/06/2018
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UNPUBLISHED OPINIONS

A-1-CA-35570	D Welch v. J Welch	Affirm	08/06/2018
A-1-CA-35579	State v. S Curiel	Affirm/Reverse/Remand	08/06/2018
A-1-CA-36771	State v. D Saenz	Affirm	08/06/2018
A-1-CA-35487	I Campbell v. J Lieb	Affirm	08/07/2018
A-1-CA-35755	PNC v. S Valdez	Affirm/Remand	08/07/2018
A-1-CA-35298	Living Cross v. Valencia Co	Dismiss	08/08/2018
A-1-CA-36867	State v. H Hudson	Affirm	08/08/2018
A-1-CA-34973	State v. F Lajeunesse	Affirm/Reverse/Remand	08/09/2018
A-1-CA-35478	D Morales-Murill v. Las Cruces	Affirm	08/09/2018
A-1-CA-35558	State v. D Rodriguez	Reverse	08/09/2018

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

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



STATE OF NEW MEXICO EXECUTIVE OFFICE SANTA FE, NEW MEXICO

Proclamation

WHEREAS, PARALEGALS PROVIDE A VITAL LINK BETWEEN LAWYERS AND THE CLIENTS THEY REPRESENT; AND

WHEREAS, PARALEGALS MAKE INVALUABLE CONTRIBUTIONS THROUGH THE DRAFTING AND ANALYSIS OF LEGAL DOCUMENTS, CASE PLANNING, RESEARCH, CLIENT INTERVIEWS, AND THE DEVELOPMENT OF LEGAL PLEADINGS; AND

WHEREAS, DUE TO THE RAPIDLY EVOLVING NATURE OF OUR LEGAL SYSTEM, THE RESPONSIBILITIES OF NEW MEXICO'S PARALEGALS ARE CONSTANTLY GROWING AND EXPANDING, INCLUDING PROVIDING PRO-BONO SERVICES TO THE UNDERSERVED; AND

WHEREAS, THE PARALEGAL DIVISION OF THE STATE BAR OF NEW MEXICO, WHICH WAS CREATED IN 1995, REPRESENTS THE PARALEGAL PROFESSION AND WORKS TOWARD ENHANCING PROFESSIONAL DEVELOPMENT; AND

WHEREAS, THE GOALS OF THE PARALEGAL DIVISION INCLUDE PROVIDING EFFICIENT ADMINISTRATION TO ACCOMMODATE GROWTH, AND DEVELOPMENT OF PARALEGALS THROUGH EDUCATION; AND

WHEREAS, THE PARALEGAL DIVISION SUPPORTS THE DELIVERY OF LEGAL SERVICES IN AN ECONOMIC AND EFFICIENT MANNER;

NOW, THEREFORE, I, SUSANA MARTINEZ, GOVERNOR OF THE STATE OF NEW MEXICO, DO HEREBY PROCLAIM AUGUST 26TH, 2018, AS

“PARALEGAL DAY”

THROUGHOUT THE STATE OF NEW MEXICO.

SIGNED AT THE EXECUTIVE OFFICE
THIS 31ST DAY OF JULY, 2018.

ATTEST:

Maggie Toulouse Oliver

WITNESS MY HAND AND THE GREAT
SEAL OF THE STATE OF NEW MEXICO.

MAGGIE TOULOUSE OLIVER
SECRETARY OF STATE

Susana Martinez
SUSANA MARTINEZ
GOVERNOR



August

- | | | |
|--|--|--|
| <p>23-24 11th Annual Legal Service Providers Conference: Poverty and the Law
10.0 G, 2.0 EP
Live Seminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>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</p> | <p>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</p> |
| <p>24 Advanced Google Search for Lawyers
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 The Exclusive Rights (and Revenue) You Get With Music
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>31 The Ethical Issues Representing a Band-Using the Beatles
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>24 Women's Leadership Summit
5.0 G
Live Seminar, Albuquerque
New Mexico Society of CPAs
505-246-1699</p> | <p>29 2017 Real Property Institute
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | |
| <p>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</p> | <p>29 New Mexico Liquor Law for 2017 and Beyond
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | |

September

- | | | |
|---|--|--|
| <p>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</p> | <p>6 Attorney Orientation and the Ethics of Pro Bono
2.0 EP
Live Seminar, Albuquerque
New Mexico Legal Aid
505-814-6719</p> | <p>7 2018 Family Law Institute: Hot Topics in Family Law (Friday)
5.0 G, 1.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>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</p> | <p>6 Microsoft Word's Styles: A Guide for Lawyers
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>7-8 2018 Family Law Institute: Hot Topics in Family Law (Both Days)
11.0 G, 1.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |

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|--|--|---|
| <p>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</p> | <p>11 Ethics Issues of Moving Your Practice Into the Cloud
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 Military Retired Pay Primer
2.0 G, 1.0 EP
Live Seminar, Albuquerque
FAMlaw LLC
www.famlawseminars.com</p> |
| <p>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</p> | <p>12 Planning with Single Member, LLCs, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 The Lifecycle of a Trial, from a Technology Perspective (2017)
4.3 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>6 Attorney Orientation and the Ethics of Pro Bono
2.0 EP
Live Seminar, Albuquerque
New Mexico Legal Aid
505-814-6719</p> | <p>12 Boundary Issues and Easement Law
5.0 G, 1.0 EP
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com</p> | <p>20 2017 ECL Solo and Small Business Bootcamp Parts I and II (2017)
3.4 G, 2.7 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>6 Microsoft Word's Styles: A Guide for Lawyers
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>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</p> | <p>20 Bankruptcy Law: The New Chapter 13 Plan (2017)
3.1 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>7 2018 Family Law Institute: Hot Topics in Family Law (Friday)
5.0 G, 1.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>14 29th Annual Appellate Practice Institute (Full Day)
5.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>21 2018 Annual Tax Symposium (Full Day)
6.0 G, 1.0 EP
Webcast/Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>7-8 2018 Family Law Institute: Hot Topics in Family Law (Both Days)
11.0 G, 1.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 How to Comply with Disciplinary Board Rule 17-204: Basics of Trust Accounting
1.0 EP
Webcast/Live Seminar, Albuquerque
New Mexico Legal Aid
505-814-6719</p> | <p>21 2018 Annual Tax Symposium - Morning Session: Federal and State Tax Updates
3.0 G
Webcast/Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>8 2018 Family Law Institute: Hot Topics in Family (Law Saturday)
6.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 Income and Fiduciary Tax Issues for Estate Planners, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>21 2018 Annual Tax Symposium - Afternoon Session: Tax Law Special Topics
3.0 G, 1.0 EP
Webcast/Live Seminar</p> |
| <p>11 Planning with Single Member, LLCs, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 Income and Fiduciary Tax Issues for Estate Planners, Part 2
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | |

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

IN MEMORIAM

As of April 22, 2018:
Patricia Ann Bradley
1212 Pennsylvania Street, NE
Albuquerque, NM 87110

CLERK'S CERTIFICATE OF ADMISSION

On July 31, 2018:
Spencer S. Chaffin
BC Counselors at Law, PLLC
1701 West NW Hwy.,
1st Floor
Grapevine, TX 76051
972-584-9668
972-584-1599 (fax)
schaffin@bccounselorsatlaw.com

On August 7, 2018:
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Wilkinson Barker Knauer,
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303-626-2351 (fax)
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832-500-3172 (fax)
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@herringlawfirm.com

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Southlake, TX 76092
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malik2law@yahoo.com

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Arizona State Board of
Nursing
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On August 7:
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214-987-2545 (fax)
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On August 7, 2018:
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25331 IH 10 W.,
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San Antonio, TX 78257
210-222-1200
210-579-9000 (fax)
simpsonlawnm@gmail.com

CLERK'S CERTIFICATE OF NAME CHANGE

As of August 3, 2018:
Geraldine Garduno
F/K/A **Geraldine Gonzales**
N.M. Public Regulation
Commission
PO Box 1269
1120 Paseo de Peralta (87501)
Santa Fe, NM 87504
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505-827-4155 (fax)
geraldine.garduno
@state.nm.us

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F/K/A **Jessica Sweeney**
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sweeney01115@gmail.com

As of July 31, 2018:
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Nance, Pato & Stout, LLC
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Socorro, NM 87801
575-838-0911
866-808-1165 (fax)
kathy@npplawfirm.com

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective July 31, 2018:
Julianna Koob
PO Box 26952
Albuquerque, NM 87125
505-920-6002
juliannakoob@gmail.com

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective July 26, 2018:
Lily C. Richardson
1984 E. Cornell Drive
Tucson, AZ 85283
602-350-7160
lrichardson@lclawoffice.com

Effective July 27, 2018:
Paul Phillip Strange
2594 Lower Lando Lane
Park City, UT 84098
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Dated July 9, 2018:
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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective August 22, 2018

PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:				
		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
Comment Deadline				
<i>Please see the summary of proposed rule amendments published in the August 8, 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 September 7, 2018.</i>				
RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2018 NMRA:				
		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
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
Rules of Civil Procedure for the District Courts				Effective Date
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

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 Court of Appeals

Opinion Number: 2018-NMCA-045

No. A-1-CA-35545 (filed May 15, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
WILBUR M. STEJSKAL,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY

Fred T. Van Soelen, District Judge

HECTOR H. BALDERAS,
Attorney General
Santa Fe, New Mexico
LAURIE BLEVINS,
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

ROBERT E. TANGORA
ROBERT E. TANGORA, LLC
Santa Fe, New Mexico
for Appellant

Opinion

Henry M. Bohnhoff, Judge

{1} Defendant Wilbur M. Stejskal (Defendant) appeals an amended judgment and sentence entered two years after the entry of his original judgment and sentence. By changing the word “concurrent” to the word “consecutive,” the amended judgment has the practical effect of increasing Defendant’s term of incarceration from nine years to ten years. On appeal, Defendant asserts that, pursuant to Rule 5-801 NMRA and *State v. Torres*, 2012-NMCA-026, 272 P.3d 689, the district court lacked jurisdiction to amend or modify the original sentence. The State, on the other hand, argues that the amended judgment in this case did not involve a “modification of sentence” for purposes of Rule 5-801 and *Torres*; instead, the amended judgment merely corrected a clerical mistake as permitted by Rule 5-113(B) NMRA. We conclude that Rule 5-113 authorized the district court to enter the amended judgment and therefore affirm.

BACKGROUND

{2} Defendant’s convictions are based upon a plea agreement. Pursuant to the terms of that agreement, Defendant pled

no contest to two separate crimes, one of which would result in a nine-year sentence and the other of which would result in a three-year sentence with two years unconditionally suspended. The agreement recited that the sentences for both convictions would “run consecutively for a total of ten (10) years in the [d]epartment of [c]orrections.”

{3} At a plea hearing, the district court reviewed the terms of the plea agreement with Defendant on the record and accepted Defendant’s plea. At various points during that hearing, the parties and court each acknowledged that the plea agreement called for a ten-year period of incarceration. At a subsequent sentencing hearing, the district court pronounced sentence, explaining that:

pursuant to the plea agreement on count one, you are hereby sentenced to nine years in the department of corrections [and on] count two, three years in the department of corrections with two years unconditionally suspended, running consecutively for a total of ten years in the department of corrections, [and] running concurrently with any time that you are currently facing on probation or parole.

{4} Thus, based upon the record below, the parties and their counsel understood that the plea agreement called for consecutive sentences that would result in ten years of incarceration and also that Defendant was, in fact, being sentenced to a ten-year term of incarceration. Nonetheless, the written judgment and sentence that was then entered recited that the sentences for the two crimes would run concurrently, with the result that Defendant effectively was sentenced to nine years of incarceration.

{5} Two years later, while reviewing Defendant’s file, the district court noticed that the written judgment provided for the sentences to run concurrently instead of consecutively. The court scheduled a presentment hearing *sua sponte*. At that hearing, the court proposed to enter an amended judgment to correct the error. Counsel for Defendant argued that the district court was without jurisdiction to do so, relying upon Rule 5-801(A) and *Torres*. The court, however, found that it had authority under Rule 5-113 to correct the error in the judgment, and accordingly, entered the amended judgment as proposed.

DISCUSSION

{6} Rule 5-801 was amended in 2014 by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014. The version in effect on March 28, 2013, when the case at bar was filed, provided in pertinent part as follows:

A. Correction of sentence. The court may correct an illegal sentence at any time pursuant to Rule 5-802 NMRA and may correct a sentence imposed in an illegal manner within the time provided by this rule for the reduction of sentence.

B. Modification of sentence. A motion to reduce a sentence may be filed within ninety (90) days after the sentence is imposed[.]

Rule 5-802 addresses the procedure to be followed for petitioning for a writ of habeas corpus to determine *inter alia* that a “sentence [is] illegal or in excess of the maximum authorized by law or is otherwise subject to collateral attack.” Rule 5-113(B) provides that, “[c]lerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.”

{7} Defendant contends that “under [Rule 5-801(B)], the district court cannot modify

a sentence after ninety (90) days. . . . Any modification beyond the proscribed time period is outside the district court's jurisdiction." Citing *Torres*, Defendant urges that the district court therefore lacked jurisdiction to amend his sentence two years after its original entry. Defendant further argues that changing the two sentences to run consecutively as opposed to concurrently was not a clerical error that could be corrected pursuant to Rule 5-113.

{8} Defendant's trial counsel preserved the error by contesting the district court's authority to amend the sentence during the presentment hearing. We review a district court's application of Supreme Court rules of procedure de novo. *State v. Miller*, 2008-NMCA-048, ¶ 11, 143 N.M. 777, 182 P.3d 158.

A. Rule 5-801

{9} The version of Rule 5-801 in effect in 2013 permitted the district court to correct an illegal sentence at any time through a habeas corpus proceeding and correct a sentence imposed in an illegal manner within 90 days after the sentence is imposed. As the district court noted in its letter ruling, Rule 5-801(A) was not applicable to Defendant's original sentence, because it was "not illegal in any way." The State does not contend to the contrary. Rather, the State defends the amended sentence on the grounds that the district court properly had authority under Rule 5-113(B) to correct a clerical error in the judgment.¹

{10} *Torres* does not affect the applicability of Rule 5-113 to the amendment of Defendant's sentence. In that case, this Court addressed the jurisdiction of district courts to amend judgments pursuant to Rule 5-801. *Torres*, 2012-NMCA-026, ¶ 11. The defendant had been sentenced as a habitual offender for the crime of escape from prison in a manner that allowed his newly imposed sentences to run concurrently with his preexisting sentences. *Id.* ¶ 3. As a result, the sentences imposed ran afoul of NMSA 1978, Section 31-18-17(C) (amended 2003) and NMSA 1978, Section 31-18-21(A) (1977). *Torres*, 2012-NMCA-026, ¶¶ 9-10; See also *State v. Davis*, 2003-NMSC-022, ¶ 15, 134 N.M. 172, 74 P.3d 1064 (holding that sentences imposed for crimes committed while an inmate must run consecutive to all combined existing sentences); *State v.*

Mayberry, 1982-NMCA-061, ¶¶ 17-18, 97 N.M. 760, 643 P.2d 629 (holding that habitual offender enhancements cannot be served concurrently with their underlying basic sentences). Eighteen years later, as part of an audit conducted by the Department of Corrections, the illegality of *Torres*' sentences was discovered and the district court ultimately granted the state's motion filed under Rule 5-801 to amend the judgment to extend the term of incarceration by eight years. *Torres*, 2012-NMCA-026, ¶¶ 1, 5. On appeal, this Court reversed. After examining the history of Rule 5-801, we concluded that a district court's jurisdiction under the pre-2014 version of Rule 5-801(A) to correct an illegal sentence was strictly limited to habeas corpus proceedings. *Torres*, 2012-NMCA-026, ¶ 27. Thus, the State could seek modification of a sentence pursuant to Rule 5-801 only to correct one imposed in an illegal manner and only within the 90-day period following original entry.

B. Rule 5-113

{11} As stated above, Rule 5-113(B) authorizes a district court at any time to correct "[c]lerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission[.]" In *State v. Ross*, 1983-NMCA-065, ¶¶ 16-18, 100 N.M. 48, 665 P.2d 310, this Court characterized as a clerical error, and subject to correction under Rule 5-113(B), a citation in a judgment to the statute that defines the crime of burglary of a dwelling house as opposed to the statute that defines the crime of breaking and entering. In *Ross*, it was clear from the record not only that the defendant had been convicted of breaking and entering but that the district court had intended to sentence him for that crime. However, we have not considered whether the erroneous imposition of sentences to run consecutively versus concurrently in a judgment can qualify as a clerical error or otherwise fall within the parameters of Rule 5-113(B).

{12} When interpreting a court rule, a court looks to the same rules of construction as if it were interpreting a statute. Our function is to fulfill the intent of the rule. In doing so, we will "give effect to the plain meaning of the rule if its language is clear and unambiguous." *State v. Montoya*, 2011-NMCA-009, ¶ 8, 149 N.M. 242, 247

P.3d 1127 (alteration, internal quotation marks, and citation omitted); see also *Del-fino v. Griffio*, 2011-NMSC-015, ¶ 12, 150 N.M. 97, 257 P.3d 917 (recognizing that in determining the Legislature's intent, the appellate courts will look first to the plain language of the statute and give its words their ordinary meaning).

{13} *Webster's Third New International Dictionary* 421 (unabr. ed. 1986) defines "clerical error" as "an error made in copying or writing." Similarly, *Black's Law Dictionary* 489 (9th ed. 2010) defines "clerical error" as "[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." Here, it is clear from the plea agreement as well as the colloquy at the plea hearing and the original sentencing hearing that the district court and the parties understood and intended that Defendant would be sentenced to two consecutive sentences that would run for a total of ten years. We assume the insertion of the word "concurrent" as opposed to "consecutive" in the written sentence and judgment was made by the district judge's clerical assistant during the course of preparing the latter document. In any event, it was an error in copying or writing, i.e., a clerical error.

{14} The similarly worded Federal Rule of Criminal Procedure 36 has been given a consistent construction. Rule 36 provides: "After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." Fed. R. Crim. P. 36. Within the meaning of Rule 36, a clerical error "must not be one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature." *United States v. Guevremont*, 829 F.2d 423, 426 (3d Cir. 1987) (internal quotation marks & citation omitted). "Because a defendant has a constitutional right to be present when he is sentenced, if there is a variance between the oral pronouncement of sentence and the written judgment of conviction, the oral sentence generally controls." *United States v. DeMartino*, 112 F.3d 75, 78 (2d Cir. 1997) (citation omitted). Thus, while Rule 36 does not authorize a court to modify the

¹The version of Rule 5-801(B) in effect in 2013 permitted the district court only to reduce a sentence and, therefore, that provision also has no application to the amendment of sentence.

written judgment to effectuate an intention that the court did not express in its oral sentence, *DeMartino*, 112 F.3d at 79, the court may amend a sentence to accurately provide, in accordance with its original intention and oral pronouncement of sentence, that multiple sentences will run consecutively as opposed to concurrently. See, e.g., *United States v. Becker*, 36 F.3d 708, 710 (7th Cir. 1994); *United States v. McAfee*, 832 F.2d 944, 946 (5th Cir. 1987), *superseded by statute on other grounds as stated in United States v. Walls*, 163 F.3d 146, 147 n.1 (2d Cir. 1998); *Kennedy v. Reid*, 249 F.2d 492, 492 (D.C. Cir. 1957).

C. Defendant's Remaining Argument

{15} Citing *State v. Diaz*, 1983-NMSC-090, ¶ 4, 100 N.M. 524, 673 P.2d 501, Defendant also contends that the district court lacked authority to amend the sentence because he had an "expectation of finality" in the original sentence and the district court amended it after he had served two years of it. *Diaz* does not help

Defendant's cause. While it holds that an oral ruling, including an oral pronouncement of sentence, is not a final judgment and can be changed at any time before entry of final judgment, *id.* ¶ 6, it does not address at all, much less hold, that a clerical error in a final judgment cannot be corrected pursuant to Rule 5-113(B). Further, to the extent Defendant implicitly is raising a double jeopardy challenge, it, too, is unsupported. Double jeopardy rights are not compromised where the defendant has no reasonable expectation of finality in his or her sentence. *March v. State*, 1989-NMSC-065, ¶ 5, 109 N.M. 110, 782 P.2d 82.; See *State v. Cheadle*, 1987-NMSC-100, ¶ 12, 106 N.M. 391, 744 P.2d 166.

CONCLUSION

{16} The record in this case establishes that the Defendant entered his plea of no contest pursuant to an agreement by which he would receive two consecutive sentences resulting in a total of ten years

of incarceration. The parties and court all understood that agreement and accurately recited its sentencing terms at various points in the proceedings. The district court's pronouncement of sentence in open court was consistent with both written agreement and the parties' unanimously expressed understanding. We therefore conclude that the written judgment and sentence imposing concurrent sentences resulting in a total of nine years of incarceration was the product of clerical error, which the district court could correct pursuant to Rule 5-113(B). Accordingly, the district court's amended judgment and sentence imposing consecutive sentences is affirmed.

{17} **IT IS SO ORDERED.**
HENRY M. BOHNHOFF, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
STEPHEN G. FRENCH, Judge

Certiorari Denied, July 11, 2018, No. S-1-SC-37104

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-046

No. A-1-CA-36351 (filed June 4, 2018)

ANITA REINA,
Plaintiff-Appellee,

v.

LIN TELEVISION CORPORATION,
d/b/a KRQE and LARRY BARKER,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Denise Barela Shepherd, District Judge

STEPHEN F. LAWLESS
STEPHEN F. LAWLESS, P.A.
Albuquerque, New Mexico
for Appellee

MARTIN R. ESQUIVEL
ESQUIVEL & HOWINGTON, LLC
Albuquerque, New Mexico
for Appellants

Opinion

Stephen G. French, Judge

{1} This interlocutory appeal requires us to determine whether a hearing officer employed by the City of Albuquerque (the City) is a public official and therefore required to prove that Defendants acted with actual malice in broadcasting an allegedly defamatory story about her. We conclude that Plaintiff is a public official and reverse the order of the district court finding that she is a private figure plaintiff.

BACKGROUND

Factual Background

{2} Plaintiff worked exclusively as an administrative hearing officer for the Office of Administrative Hearings for the City for over one year. She then sought and acquired a second job, an action that required prior written approval from the City's human resources department per the City personnel code. Plaintiff began serving as a tribal judge for the San Felipe tribal court before receiving written approval from the City's human resources department, though by then her immediate supervisor in the Office of Administrative Hearings approved her request in a form titled "Request for Permission to Engage in Employment Outside the City of Albuquerque."

{3} Eventually, Defendant Larry Barker, an investigative reporter for KRQE News 13, began researching Plaintiff's employment arrangements with the City and the San Felipe tribal court. Barker reviewed memos that Plaintiff submitted to the City and various leave slips tracking her schedule with the tribal court and her absences from the City, and he interviewed Plaintiff's supervisor at the City, along with the chief administrative officer of the City. As a consequence of Barker's investigation, the City began its own formal investigation, for which it retained Robert Caswell Investigations. That investigation found that Plaintiff was employed with the City Monday through Friday, from 8:00 a.m. to 5:00 p.m., for a total of forty hours per week and that she possibly defrauded the City by working at times as a tribal judge at the Pueblo of San Felipe during those hours. The investigation findings also noted that Plaintiff used her City-issued computer to correspond with the San Felipe Pueblo, that she admitted working longer than her scheduled hours at San Felipe, and that she claimed to have "made up" the time with the City, but she lacked documentation showing as much.

{4} Plaintiff did not contest the findings of the investigator, and she voluntarily resigned her employment with the City. Two days after her resignation, KRQE News

13 broadcasted a report about Plaintiff, in which Plaintiff was purportedly referred to as "The Cheating Judge" in reference to her work as a tribal judge during employment hours with the City. This and other statements in the report regarding her performance of her work as a hearing officer form the basis of Plaintiff's defamation claim.

Procedural Background

{5} Plaintiff sued Defendants for defamation. Defendants moved for summary judgment, claiming (1) Plaintiff was a public official; (2) the matter reported was true; and (3) Plaintiff could not meet her burden of proof, which required her to establish that Defendants acted with actual malice. The district court concluded that Plaintiff was not a public official as a matter of law, but stated that it lacked guidance in our caselaw for the determination. After further discovery, Defendants asked that the district court certify its order determining that Plaintiff was not a public official for interlocutory review. The district court did so, and upon Defendant's application, we granted interlocutory review and assigned the matter to the general calendar. Defendants argue that the district court erred in determining that Plaintiff is not a public official.

DISCUSSION

{6} If Plaintiff—a hearing officer with the City—is a public official, then in order to prevail in a defamation cause of action, she must meet the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). "Whether a plaintiff is a public official is a question of law that we review de novo." *Young v. Wilham*, 2017-NMCA-087, ¶ 10, 406 P.3d 988, cert. denied, ___-NMCERT-___, (S-1-SC-36497, Aug. 3, 2017); *Marchiondo v. Brown*, 1982-NMSC-076, ¶ 24, 98 N.M. 394, 649 P.2d 462.

{7} "Ascertaining the status of [a] plaintiff is necessary since it dictates the standard of proof applicable in the law suit [sic]." *Coronado Credit Union v. KOAT Television, Inc.*, 1982-NMCA-176, ¶ 33, 99 N.M. 233, 656 P.2d 896. Public official and public figure plaintiffs must prove that the defendant acted with actual malice in publishing a defamatory statement, *Sullivan*, 376 U.S. at 279-80, but a private figure plaintiff need only prove that the defendant acted negligently. *Newberry v. Allied Stores, Inc.*, 1989-NMSC-024, ¶ 21, 108 N.M. 424, 773 P.2d 1231. The heavier burden on public official and public figure plaintiffs reflects "a profound national commitment to the

principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Sullivan*, 376 U.S. at 270. Specifically, public official and public figure plaintiffs must prove that the defendant acted in reckless disregard of the truth and with knowledge of falsity. *Newberry*, 1989-NMSC-024, ¶ 17; see *Furgason v. Clausen*, 1989-NMCA-084, ¶ 26, 109 N.M. 331, 785 P.2d 242 (“[W]here a plaintiff in a defamation action is either a public official or a public figure, or where an allegedly defamatory statement involved a matter of public concern, it is incumbent upon the plaintiff to prove that the defendant acted with actual malice[.]” (internal quotation marks and citation omitted)).

{8} In *Furgason*, we acknowledged that the terms “public figures” and “public officials” have not been defined, but we have adopted tests for determining whether a person is to be considered one. 1989-NMCA-084, ¶ 29 (internal quotation marks omitted). The first category of plaintiffs that must prove actual malice has been generally stated to include those who, “by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures.” *Id.* (internal quotation marks and citation omitted). There are two types of public figures, “those who occupy positions of such persuasive power and influence that they are deemed public figures for all purposes, and limited public figures, consisting of those who have thrust themselves to the forefront of particular public controversy in order to influence the resolution of the issues involved.” *Id.* (alteration omitted).

{9} Regarding the latter category, the test for whether a given plaintiff is a public official turns on the degree of the person’s responsibility for and control over government affairs. *Id.* ¶ 35. “It is clear that the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” *Id.* (omission, internal quotation marks, and citation omitted). Public officials occupy positions in government that have “such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it,” one that is beyond the public’s

general interest in the qualifications and performance of all government employees. *Id.* (internal quotation marks and citation omitted). The public has a special interest in persons “who are in a position significantly to influence the resolution of . . . [public] issues.” *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

{10} The district court noted that Plaintiff’s position as a hearing officer “is distinguishable from positions that clearly are classified as a ‘public official,’ such as an elected city commissioner or a district court judge[.]” the positions held by the plaintiffs in two federal cases, *Sullivan*, 376 U.S. 254, and *Garrison v. State of Louisiana*, 379 U.S. 64 (1964). While that may be true, it does not eliminate the possibility that a hearing officer—hired to resolve disputes in matters of public concern in proceedings that are at the very least quasi-judicial—is also a public official. To determine whether this is the case, we apply the test for public official status articulated in *Rosenblatt* and adopted in *Furgason*, which we repeat in full below:

It is clear that the “public official” designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the [actual] malice standards apply.

Furgason, 1989-NMCA-084, ¶ 35 (omissions omitted) (quoting *Rosenblatt*, 383 U.S. at 85-86). Based on the application of this test, we reverse the order of the district court determining that Plaintiff was not a public official.

{11} On appeal, Defendants argue that only one New Mexico case squarely addresses the public official status of Plaintiff, citing *Ammerman v. Hubbard Broadcasting, Inc.*, 1977-NMCA-127, 91 N.M. 250, 572 P.2d 1258, and that the plaintiff in that case was employed by the police department, unlike the situation in this case. *Id.* ¶ 1. Defendants then argue that the quasi-judicial character of Plaintiff’s position as a hearing officer and the work

performed by a hearing officer qualify Plaintiff as a public official.

{12} We describe with some detail the work that Plaintiff performed as a hearing officer and agree with Defendants: Plaintiff is a public official for purposes of her defamation suit because she possessed substantial responsibility for and control over governmental affairs.

{13} Plaintiff was an employee of the City. She was appointed as an administrative hearing officer under Chapter 2, Article 7 of the City’s ordinance in June 2009. Albuquerque, N.M., City Ordinance ch. 3, art. VII, § 2-7-8-5(B) (2009, amended 2012) At the time of her hiring, Section 2-7-8-5(B) of the ordinance stated that hearing officers are to “be appointed by the Presiding Judge of the Civil Division of the Second Judicial [District] Court.” Plaintiff’s interview for the hearing officer position took place before three district court judges.

{14} The creation of the position that Plaintiff occupied sheds further light on its public nature. Section 2-7-8-2 provides context, explaining that the City established the Independent Office of Hearings, a division of the City that independently conducts the hearings that the City requires, because the use of city employees as hearing officers “has created a perception that the independence of hearing officers has been or can be compromised.” Section 2-7-8-2(D). “To ensure confidence in the hearing officer process it has become necessary to create an Independent Office of Hearings to protect employees acting as hearing officers from actual or perceived influence from the city’s administration.” Section 2-7-8-2(E).

{15} The role that a hearing officer plays in the administration of city ordinances and the adjudication of disputes over city ordinances, which are governmental affairs, carries with it such weight and responsibility that the city council undertook, by its creation of the Independent Office of Hearings, specific measures to ensure “that any city hearing officer act[s] in a fair and impartial manner” and is “perceived as acting in a fair and impartial manner.” Section 2-7-8-2(C). The parties present during a hearing are members of the public, and it is the public’s perception of hearing officers that led the city council to establish the Independent Office of Hearings. We find the establishment of the Independent Office of Hearings indicative of the public’s special interest in the qualifications and performance

of hearing officers, one that exceeds the interest it has in the qualifications and performance of any government employee given the City's heightened sensitivity to public perception. See *Furgason*, 1989-NMCA-084, ¶ 35 (explaining that public officials occupy positions in government that have "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it," one that is beyond the public's general interest "in the qualifications and performance of all government employees" (internal quotation marks and citation omitted)).

{16} Plaintiff's performance in her role as a hearing officer was extensive in both the scope of her authority and in the subject matter to which her authority extended. For example, hearing officers are required to determine whether the City could prove by a preponderance of the evidence that a member of the public violated a city ordinance. They also occasionally rule on the constitutionality of city ordinances. They preside over hearings and swear in witnesses as needed. Hearing officers are responsible for conducting all of the City's hearings concerning its ordinances, which include land use, zoning, liquor licenses, and personnel hearings. Moreover, determinations of a hearing officer are subject to judicial review, and like most any court ruling, can be appealed by the non-prevailing party.

{17} Functionally, Plaintiff was the decision making authority in semi-formal, quasi-judicial proceedings that involved the application of law, including city ordinances, to the conduct of members of the public. And the subject matter of the

ordinances varied. Plaintiff said that she handled vehicle seizure issues and carport zoning issues, and she was also asked "to do work on proposal language on [a] new ordinance," and "to do work on two seizure provisions and asked to do some firearms cases[.]" Plaintiff said that she initially presided over hearings addressing the use of red light cameras, but later she accepted more work, including zoning hearings, when her red light docket slowed. She handled as many as 35-60 zoning hearings in one day, which dealt with "proposed brick walls, special variance exceptions, [and] parking space variances, etc." She described the zoning hearings as "a completely different type of hearing." All of her decisions had to be written. Once each case closed, she made a decision based on the zoning codes and prepared written findings and conditions of approval. Plaintiff also said that up to sixty members of the public attended some of these hearings. The number of hearings, the breadth of the subject matter of the hearings, and the attendance of and participation by the public in these hearings bolsters the importance of Plaintiff's position such that the public has an interest in her qualifications and performance of the work, and evinces Plaintiff's responsibility for and control over the conduct of governmental affairs.

{18} Finally, we briefly address Plaintiff's arguments that (1) hearing officers cannot be considered public officials because they are unelected, and (2) one of our statutes defines "'public official' as 'a person elected to an office in an election covered by the Campaign Reporting Act[.]'" NMSA 1978, § 1-19-26(P) (2015) Running for office, hiring a campaign manager, or

"putting yourself in the public eye to let people know what you think[]" are not conditions of public official status in the context of defamation lawsuits. Whether the government employee plaintiff was a politician or subject to election may suffice to conclude that the plaintiff is a public official, but it is not necessary to reach that conclusion. The test for public official status hinges on whether the defamation plaintiff has "substantial responsibility for or control over the conduct of governmental affairs." *Furgason*, 1989-NMCA-084, ¶ 35 (internal quotation marks and citation omitted). Such authority at times exists in the absence of elections and politics. Additionally, we do not look to state statutes to inform our understanding of who constitutes a public official. See *Rosenblatt*, 383 U.S. at 84 (rejecting the suggestion that the determination of public official status should be answered by reference to state law standards because states "have developed definitions of 'public official' for local administrative purposes, not the purposes of a national constitutional protection").

CONCLUSION

{19} We reverse the order of the district court concluding that Plaintiff is a private figure and hold that she is a public official, and we remand for further proceedings consistent with this opinion.

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

STEPHEN G. FRENCH, Judge

WE CONCUR:

J. MILES HANISEE, Judge

EMIL J. KIEHNE, Judge



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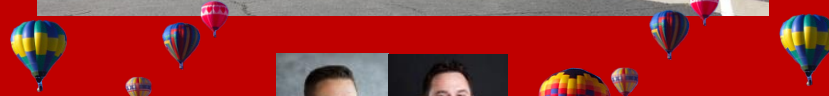


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