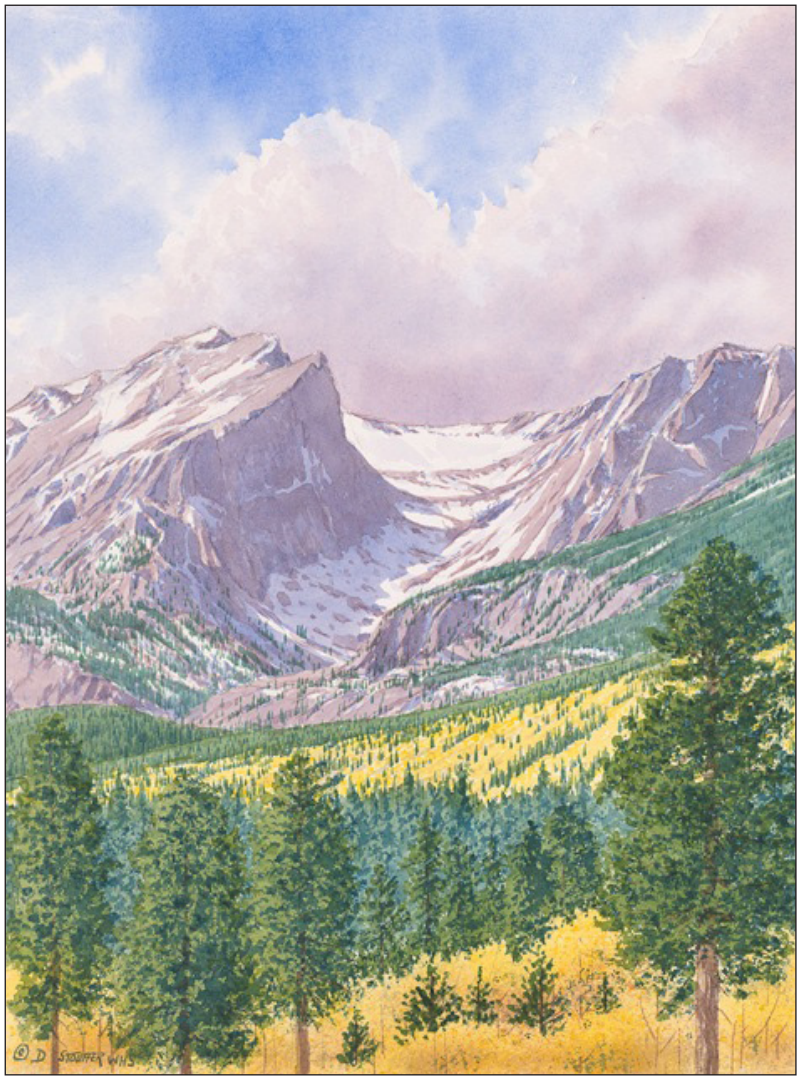
Official Publication of the State Bar of New Mexico

Bar Bulletin

November 14, 2018 • Volume 57, No. 46



Hallott Peak, by Dan Stouffer (see page 3) Weems Gallary

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The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

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About Cover Image and Artist: Dan Stouffer was born in Ohio and attended Ohio State University. His work has been shown in museums and corporate collections throughout the country. He has won over 60 awards and is listed in the *Who's Who in American Art*. His work has appeared in many publications. He is also a member of three national signature honor societies and in 2010, the albuquerque art business association designated him a local treasure. He is currently represented by The Weems Gallary.

Notices

Court News

Judicial Standards Commission Releases Annual Report

This year marks the State of New Mexico Judicial Standards Commission's 50th anniversary of service to the citizens, bench, bar and other users of our courts, ensuring that integrity, impartiality and independence of our courts are preserved and promoted. The commission recently published its fiscal year 2018 Annual Report and it may be viewed on the commission's website at www.nmjsc.org/resources/ annual-report/.

New Mexico Supreme Court New Mexico Commission on Access to Justice

Meeting

The next meeting of the Commission is rom noon-4 p.m., on Dec. 14, 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. We will be engaged in a strategic planning process at this meeting and would like to strongly encourage interested members of the public and bar to attend. More information about the Commission is available at www.accestojustice.nmcourts.gov.

Second Judicial District Court

Notice to Attorneys and Public

Effective Nov. 1, the Second Judicial District Court clerk's office will no longer accept cash bills larger than $20. The Second Judicial District Court will continue to accept cashier checks and money orders. The Second Judicial District Court does not accept personal checks, credit cards or debit cards at this time.

Destruction of Exhibits

Pursuant to 1.21.2.617 FRRDS (Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy exhibits filed with the court, the Civil for the years of 1997-2017 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Parties are advised that exhibits may be retrieved beginning Nov. 14-Dec. 7. Should you have cases with exhibits, please verify exhibit information with the Special Services Division, at 841-6717, from 8 a.m.-5 p.m., Mon.- through Fri. Plaintiff's exhibits will be released to counsel for the plaintiff(s) or plaintiffs themselves and defendant's exhibits will be released to counsel of record for defendants(s) or defendants themselves by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by order of the Court.

Judicial Notice of Retirement

The Second Judicial District Court announces the retirement of the Hon. Judge Nan Nash effective Jan. 1, 2019. A Judicial Nominating Commission will be convened in Albuquerque, at the Second Judicial District Courthouse in January 2019 to interview applicants for these vacancies. Further information on the application process can be found on the Judicial Selection website (http://lawschool.unm.edu/judsel/index.php), updates regarding the vacancy and the news release.

Fourth Judicial District Court

Mass Reassignment

On Oct. 4, pursuant to the authority of Article VI, Sections 35 and 36 of the Constitution of the State of New Mexico, Chief Justice Nakamura appointed Flora Gallegos to fill the vacant position in Division III of the Fourth Judicial District Court. Effective Oct. 26, all cases previously assigned to Division III shall be assigned to Judge Flora Gallegos. Pursuant to Rules 1-088.1, 5-106, and 10-162 NMRA, parties who have not yet exercised a peremptory excusal will have 10 business days from Nov. 21, to excuse Judge Flora Gallegos.

Bernalillo County Metropolitan Court

Announcement of Vacancy

A vacancy on the Bernalillo County Metropolitan Court will exist as of Jan. 1, 2019, due to the retirement of the Hon. Judge Sharon Walton, effective Dec. 31. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the court. Sergio Pareja, chair of the Bernalillo County Metropolitan Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php. The deadline for applications has been set for 5 p.m., Dec. 13. Applications received after that time will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Bernalillo County Metropolitan Court Nominating Commission will meet beginning at 9 a.m. on Jan. 18, 2019, to interview applicants for the position at the Metropolitan Courthouse, located at 401 Lomas NE, Albuquerque. The Commission meeting is open to the public, and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

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

Court Closure

The U.S. District Court for the District of New Mexico will be closed Nov. 22-23, for the Thanksgiving holiday. Court will resume on Nov. 26. After-hours access to CM/ECF will remain available as regularly scheduled. Stay current with the U.S. District Court for the District of New Mexico by visiting the court's website at: www.nmd.uscourts.gov.

Professionalism Tip

With respect to the public and to other persons involved in the legal system:

I will respect and protect the image of the legal profession, and will be respectful of the content of my advertisements or other public communications.

State Bar News

2019 Budget Disclosure

Deadline to Challenge Expenditures

The State Bar of New Mexico Board of Bar Commissioners has completed its budgeting process and finalized the 2019 budget disclosure, pursuant to the State Bar Bylaws, Article VII, Section 7.2, Budget Procedures. The budget disclosure is available in its entirety on the State Bar website at www.nmbar.org on the financial information page under the "About Us" tab. The deadline for submitting a budget

challenge is on or before noon, Nov. 30, and the form is provided on the last page of the disclosure document. The BBC will consider any challenges received by the deadline at its Dec. 13, 2018, meeting.

Board of Editors

Seeking Applications for Open Positions

The Board of Editors of the State Bar of New Mexico will have open positions beginning Jan. 1, 2019. Both lawyer and non-lawyer positions are open. The Board of Editors meets at least four times a year (in person and by teleconference), reviewing articles submitted to the *Bar Bulletin* and the quarterly *New Mexico Lawyer*. This volunteer board reviews submissions for suitability, edits for legal content and works with authors as needed to develop topics or address other concerns. The Board's primary responsibility is for the *New Mexico Lawyer*, which is generally written by members of a State Bar committee, section or division about a specific area of the law. The State Bar president, with the approval of the Board of Bar Commissioners, appoints members of the Board of Editors, often on the recommendation of the current Board. Those interested in being considered for a two-year term should send a letter of interest and résumé to Evann Kleinschmidt at ekleinschmidt@nmbar.org. Apply by Nov. 30.

Board of Bar Commissioners

Client Protection Fund Commission

The Board of Bar Commissioners will make two appointments to the Client Protection Fund Commission for three-year terms. Active status attorneys in New Mexico who would like to serve on the Commission should send a letter of interest and brief résumé by Nov. 26 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

New Mexico Access to Justice Commission

The Board of Bar Commissioners will make one appointment to the N.M. Access to Justice Commission for a three-year term. The Commission is dedicated to expanding and improving civil legal assistance by increasing pro bono and other support to indigent people in New Mexico. Active status attorneys in New Mexico who would like to serve on the Commission should send a letter of interest and brief resume by Nov. 26 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Cannabis Law Section

Board of Directors Meeting Open to Membership

On Aug. 9, the Board of Bar Commissioners approved a membership petition to form a State Bar of New Mexico Cannabis Law Section. The Section's Board of Directors will meet from noon-1 p.m., Nov. 30, at the State Bar Center and the general State Bar membership is invited to attend, share ideas and enroll in the Section. R.S.V.P. to Breanna Henley bhenley@nmbar.org. Visit www.nmbar.org/sections to join the Section.

Committee on Women and the Legal Profession

Professional Clothing Closet

Does your closet need cleaning? The Committee on Women sponsors a professional clothing closet, which provides professional attire to State Bar members, law students, paralegals and clients free of charge. The Committee graciously accepts gently used, dry cleaned and dark colored professional attire. All clothing should be court room and interview appropriate. Visit www.nmbar.org/CommitteeOnWomen > Initiatives > Professional Clothing Closet for donation locations and for information about visiting the closet.

Minimum Continuing Legal Education

Compliance Deadline Approaching

Dec. 31, is the last day to complete 2018 Minimum Continuing Legal Education requirements. Jan. 31, 2019, is the last day to submit 2018 credits without penalty. For a list of upcoming MCLE approved courses, visit www.nmbar.org/MCLE. Contact MCLE with questions at 505-821-1980 or mcle@nmbar.org.

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- Nov. 19, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- Dec. 3, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group normally meets the first Monday of the month.)
- Dec. 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#.

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

Natural Resources, Energy and Environmental Law Section

Nominations Open for 2018 Lawyer of the Year Award

The NREEL Section will recognize an NREEL Lawyer of the Year during its annual meeting of membership, which will be held in conjunction with the Section's CLE on Dec. 21. The award will recognize an attorney who, within his or her practice and location, is the model of a New Mexico natural resources, energy or environmental lawyer. More detailed criteria and nomination instructions are available at www.nmbar.org/NREEL. Nominations are due by Nov. 16 to Breanna Henley, bhenley@nmbar.org.

Solo and Small Firm Section

Fall Speaker Features Robert Huelskamp

Robert Huelskamp will share his insights from almost 40 years working with nuclear weaponry, non-proliferation and counter terrorism in "Russia, Iran and North Korea: What Could Possibly Go Wrong?" from noon-1 p.m. on Nov. 20 at the State Bar Center in Albuquerque. The presentation is open to all State Bar members and lunch will be provided free by the section to those who R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Young Lawyers Division

Free Legal Advice for Veterans

The YLD and co-sponsors New Mexico Legal Aid and El Paso Health Care System are asking attorneys to help a veteran and donate time from 9 a.m.-1 p.m. on Nov. 30, at VFW POST 6917, 5845 Bataan Memorial. Las Cruces. This event is asking for attorneys who have familiarity in any of the following areas of law: family (divorce, custody/visitation, child support), consumer rights, bankruptcy, landlord/tenant, foreclosure, employment, We welcome any attorney from anywhere in the state and especially those who are practicing in Dona Ana, Luna and Otero counties. Contact Gina McCue at 915-504-5446, Gina.McCue@va.gov, Mick Gutierrez by texting him at 575-386-2171, mickgutierrez@gmail.com, or Dan Rosales at 575-524-6370, DRosales@da.state.nm.us.

UNM School of Law

Law Library

Fall 2018 Hours

Mon., Aug. 20– Sat., Dec. 15

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.
Saturday & Sunday	No reference

The UNM School of Law Natural Resources and Environmental Law Program and the Utton Center

Colorado's Experience Using State Regulations to Cut Air Pollution from the Oil and Gas Sector

The UNM School of Law Natural Resources and Environmental Law Program and the Utton Center in cooperation with the Natural Resources, Energy and Environment Section of the State Bar will host: A CLE Lecture and Panel Discussion "Colorado's Experience Using State Regulations to Cut Air Pollution from the Oil and Gas Sector" at 1:30–3:45 p.m., Nov 16, at Auditorium of UNM Continuing Ed (North Building), 1634 University Blvd. NE, Albuquerque. The CLE has been approved for 2.0 G, MCLE credit. There is no fee and no registration required. Free parking is available at UNM Continuing Ed parking lot behind the building at 1634 University Blvd. NE, Albuquerque. For more information, call Laura at 505-277-3253.

UNM Law 3L Welcome to the Law Alumni Association Happy Hour

Join UNM Law to welcome their newest members to the UNM Law Alumni/ae Association and to celebrate the holiday season from 5-7 p.m. on Nov. 30, at the UNM School of Law. Register at goto.unm.edu/happy-hour or call 505-277-1457 for more information.

Justice Mary Walters 2019 Honoree Nomination

Each year, the Women's Law Caucus chooses an outstanding woman in the New Mexico legal community to honor in the name of former Justice Mary Walters, the first woman appointed to the New Mexico Supreme Court. The Women's Law Caucus will be accepting nominations until Dec. 15. The nomination form can be found at https://drive.google.com/file/d/19kiBUImYt9AGnjJAHgFBw0gPtQaNKVo/view?usp=sharing. Email the form to the Law Caucus at UNMWomensLawCaucus@Gmail.com.

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

Other Bars

New Mexico Black Lawyers Association

Cyber Security, Social Media and Cell Phones: How to Use Technology in Business and Practice

The New Mexico Black Lawyers Association invites members of the legal community to attend its annual CLE, "Cyber Security, Social Media and Cell Phones: How to Use Technology in Business and Practice." (5.0 G, 1.0 EP pending) from 8 a.m.-4:30 p.m. on Nov. 16, at the State Bar of New Mexico, 5121 Masthead NE, Albuquerque. Registration is $199 and the deadline to request a refund is Nov. 9. For more information, or to register online, visit www.newmexicoblacklawyersassociation.org.

How Are We Doing?

It is the goal of the *Bar Bulletin* and the State Bar of New Mexico staff to provide a relevant and useful publication for our members to read. You may direct feedback and suggestions at any time to notices@nmbar.org or Bar Bulletin, PO Box 92860, Albuquerque, NM 87199-2860.

New Mexico Criminal Defense Lawyers Association
Two Upcoming CLEs

The New Mexico Criminal Defense Lawyers Association is hosting two end-of-year CLEs. "End of Year Ethics—Winning the War of Words: Effectively Communicating About Your Case" will be held Dec. 7 in Albuquerque, and "Common Ethics Issues in Multi-Defendant Cases and Sentencing" will be held Dec. 14, in Las Cruces. Also on the schedule, learn how unexamined assumptions about Spanish translation affect criminal justice, as well as the havoc poor sleeping patterns can wreak on cognition. Both CLEs include 2.0 Ethics credits. Civil Attorneys are welcome. Visit www.nmcdla.org to register today.

New Mexico Defense Lawyers Association
Presents its Annual Civil Rights Seminar

Join the New Mexico Defense Lawyers Association for its annual Civil Rights Seminar on Dec. 7, at the Jewish Community Center of Greater Albuquerque. This seminar is designed for the intermediate and advanced civil rights/government liability practitioner, including claims adjusters and state, county and municipal attorneys. Visit www.nmdla.org to register and for more information.

New Mexico Women's Bar Association
Nominations for New Mexico Women's Bar Association Board of Directors

The New Mexico Women's Bar Association board of directors has openings on its board for two terms beginning January 2019. Elections for board members will be held on Nov. 16. The Board invites interested members to apply by sending a short letter of interest and a resume to nmwba1990@gmail.com. Board members are expected to attend an overnight retreat Jan. 26-27, 2019, to attend bi-monthly meetings, in person or by phone, to actively participate on one or more committees, and to support events sponsored by the Women's Bar Association. The New Mexico Women's Bar does not discriminate on the basis of sex or gender and encourages all licensed attorneys to become members and apply to be on the board. For more information about the Women's Bar Association, or to become a member, visit www.nmwba.org.

Other News
Gene Franchini High School Mock Trial Competition
Judges Needed for the Qualifier Rounds

The Gene Franchini New Mexico High School Mock Trial Competition needs judges for the qualifier rounds. The qualifier competition will be held Feb. 8-9, 2019. It will be hosted by the Bernalillo County Metropolitan Court. Mock trial is an innovative, hands-on experience in the law for high school students of all ages and abilities. Sign up at http://www.civicvalues.org/index.php by Jan. 20, 2019. If you have any questions, contact Kristen at the Center for Civic Values at 764-9417 or Kristen@civicvalues.org.

STATE BAR of NEW MEXICO

Board of Bar Commissioners Election 2018

Voting in the 2018 election for the State Bar of New Mexico Board of Bar Commissioners will begin Nov. 9 and close at noon on Nov. 30. Four candidates submitted nomination petitions for the three open positions in the **First Bar Commissioner District (Bernalillo County)**, so there will be an election in that district. To view the biographies of the candidates running, view the 11-7-18 *Bar Bulletin.*

With regard to the remaining positions, one nomination petition was submitted for the open position in the **Second Bar Commissioner District (Cibola, McKinley, San Juan and Valencia counties)** from Joseph F. Sawyer, so he will be elected by acclamation; one nomination petition was submitted for the open position in the **Third Bar Commissioner District (Los Alamos, Rio Arriba, Sandoval and Santa Fe counties)** from Constance G. Tatham, so she will be elected by acclamation; and no nomination petitions were submitted for the open position in the **Sixth Bar Commissioner District**, so the Board will appoint someone from that district to fill the vacancy at their February meeting.

A link to the electronic ballot and instructions will be emailed on Nov. 9 to all active members in the First Bar Commissioner District using email addresses on file with the State Bar. Active status members who reside outside the State of New Mexico shall vote in the district where the State Bar office is located. To provide an email address if one is not currently on file or to request a mailed ballot, contact Pam Zimmer at pzimmer@nmbar.org.**The election will close at noon on Nov. 30, at which time the election results will be certified.**

Second Annual Golf Classic Tournament

Oct. 15 • Tanoan Country Club

Thank you to everyone who came out and played in the Bar Foundation's Second Annual Golf Classic Tournament. We appreciate your participation and continued support! This year's tournament hosted 88 players made up of State bar members, sponsors and members of the community. Proceeds raised from the tournament will support the great work and efforts of the State Bar Foundation. The Foundation is the charitable arm of the State Bar of New Mexico and provides legal services to our community including free workshops and legal clinics and referral services.

Judge Alan Torgerson's team took first place

We have a winner!

Tom Briones won EnvisionIT's TV drawing!

Thanks to all of this year's teams for braving the cold and supporting the Bar Foundation!

Congratulations to Maxann Shwartz and Mike Wagner for winning the longest drive. Congratulations to Tony Medrano for winning closest to the pin and coming away with two tickets to The Waste Management PGA Tournament sponsored by Konica Minolta Business Solutions.

The Golf Classic would not be possible without our generous sponsors. View them all at **www.nmbar.org/golfclassic**. For information about next year's Golf Classic, contact Stephanie Wagner at 505-797-6007 or swagner@nmbar.org.

MCLE Compliance Deadline Approaching

- Dec. 31, 2018, is the last day to **COMPLETE** your 2018 Minimum Continuing Legal Education credits.
Jan. 31, 2019, is the last day to **SUBMIT** your 2018 credits to MCLE without penalty.

For a list of upcoming MCLE approved courses or to check your transcript, please visit our website at **www.nmbar.org/MCLE.**

Please contact us with questions at 505-821-1980 or mcle@nmbar.org.

STATE BAR of NEW MEXICO
MINIMUM CONTINUING LEGAL EDUCATION

Legal Education

November

15 **2018 Probate Institute**
6.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Ethical Issues and Implications on Lawyers' Use of LinkedIn**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Ethics of Beginning and Ending Client Relationships**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

26 **Secured Transactions Practice: Security Agreements to Foreclosures, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Secured Transactions Practice: Security Agreements to Foreclosures, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **2018 Family Law Institute: Hot Topics in Family Law Day 1**
5.0 G, 1.5 EP
Webcast/Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **29th Annual Appellate Practice Institute (2018)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Zen Under Fire: Mindfulness for the Busy Trial Lawyer (2018 Annual Meeting)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Add a Little Fiction to Your Legal Writing (2017)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

28 **Ethics and Dishonest Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **2018 Family Law Institute: Hot Topics in Family Law Day 2**
6.0 G
Webcast/Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **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

29 **2018 Animal Law Institute: Updates, Causes of Action, and Litigation**
6.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Law Practice Potpourri for Lawyers and Paralegals**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

December

5 **Business Divorce, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **2018 Real Property Institute**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Business Divorce, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Attorney Orientation and the Ethics of Pro Bono**
2.0 EP
Live Seminar, Albuquerque
New Mexico Legal Aid
505-814-6719

6 **Intellectual Property in Tech Transfer, Estate and Business Opportunities**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **Immigration Law and General Civil Practice: Representing Clients in an Age of Increased Enforcement**
5.5 G, 1.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **End of Year Ethics—Winning the War of Words: Effectively Communicating About Your Case**
4.0 G, 2.0 EP
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

7 **2018 Ethics and Social Media Update**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **A Practical Approach to Indian Law: Legal Writing, 2018 Update and the Ethics of Practicing Indian Law**
2.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Cutting Edge Ethics Threat: The Dangers with Frictionless Computing**
1.0 EP
Live Webinar
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11 **Guarantees in Real Estate Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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11 **2018 Ethicspalooza (Full Day)**
6.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Employee v. Independent Contractor: Tax and Employment Law Considerations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Advanced Mediation Skills Workshop**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Criminal Rules Hot Topics**
2.5 G, 0.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **Drafting Client Letters in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **How to Practice Series: Demystifying Civil Litigation, Pt. III – Dispositive Motion Practice and Mediations**
4.5 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **Ethics and Virtual Law Offices**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Trial Know-How! Presentation and Expertise**
5.2 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **Common Ethics Issues in Multi-Defendant Cases and Sentencing**
1.2 G, 2.2 EP
Live Seminar, Las Cruces
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

14 **The 6thAnnual Wage Theft in New Mexico: Common injustice, practice opportunity**
3.0 G, 1.0 EP
Live Seminar, Albuquerque
The United Workers' Center of New Mexico, N.M. Hispanic Bar Association, and the N.M. Center on Law & Poverty
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Opinions

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

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
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Effective November 2, 2018

PUBLISHED OPINIONS

None posted

UNPUBLISHED OPINIONS

A-1-CA-36489	Protest of L Casias	Affirm	10/29/2018
A-1-CA-36819	State v. E Rocha	Affirm	10/29/2018
A-1-CA-37037	State v. C Goins	Affirm	10/29/2018
A-1-CA-34056	State v. J Chavez Jr	Affirm	10/30/2018
A-1-CA-36682	State v. S Gonzales	Affirm	10/30/2018
A-1-CA-36899	State v. W Smith III	Affirm	10/30/2018
A-1-CA-37153	Windchime Condominium v. J Gehre	Affirm	10/30/2018
A-1-CA-36631	CYFD v. Chesa S.	Affirm	10/31/2018
A-1-CA-34548	State v. J Garcia	Affirm	11/01/2018
A-1-CA-34636	Southwest Lending v. ReCorp-NM	Affirm/Reverse/Remand	11/01/2018

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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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective October 31, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

Please see the special summary of proposed rule amendments published in the October 24, 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 Nov. 29, 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
4-999	Notice of hearing and rights	10/15/2018
Rules of Criminal Procedure for the District Courts		
5-302A	Grand jury proceedings	04/23/2018
Local Rules for the First Judicial District Court		
LR1-404	Family court services and other services for child-related disputes	09/01/2018
LR1-405	Safe exchange and supervised visitation program	09/01/2018
Local Rules for the Second Judicial District Court		
LR2-401	Court clinic mediation program and other services for child-related disputes	09/01/2018
LR2-403	Safe exchange and supervised visitation	09/01/2018
LR2-Form 709	Court clinic referral order	09/01/2018
Local Rules for the Third Judicial District Court		
LR3-401	Domestic relations mediation and safe exchange and supervised visitation programs	09/01/2018
Local Rules for the Fourth Judicial District Court		
LR4-401	Safe exchange and supervised visitation, and domestic relations mediation	09/01/2018
Local Rules for the Fifth Judicial District Court		
LR5-401	Safe exchange and supervised visitation; domestic relations mediation	09/01/2018
Local Rules for the Sixth Judicial District Court		
LR6-401	Safe exchange and supervised visitation, and domestic relations mediation	09/01/2018
LR6-404	Withdrawn	09/01/2018
Local Rules for the Seventh Judicial District Court		
LR7-401	Domestic relations; mediation	09/01/2018

Local Rules for the Eighth Judicial District Court

LR8-401 Safe exchange and supervised visitation; domestic relations mediation 09/01/2018

Local Rules for the Ninth Judicial District Court

LR9-405 Domestic relations mediation 09/01/2018

Local Rules for the Eleventh Judicial District Court

LR11-402 Domestic relations mediation; safe exchange and supervised visitation 09/01/2018

Local Rules for the Twelfth Judicial District Court

LR12-401 Domestic relations mediation 09/01/2018

Local Rules for the Thirteenth Judicial District Court

LR13-124 Fees non-refundable 09/01/2018

LR13-401 Domestic relations alternative dispute resolution (ADR); advisory consultation 09/01/2018

LR13-402 Domestic Relations Mediation Act; safe exchange and supervised visitation 09/01/2018

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.

Certiorari Denied, August 9, 2018, No. S-1-SC-37126

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-063

No. A-1-CA-35149 (filed June 7, 2018)

THE COUNSELING CENTER, INC.,
Respondent-Appellant,
v.
NEW MEXICO HUMAN SERVICES DEPARTMENT,
Petitioner-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Francis J. Mathew, District Judge

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for Petitioner

Opinion

Julie J. Vargas, Judge

{1} The New Mexico Human Services Department (HSD) appeals the district court's reversal of an administrative decision requiring The Counseling Center, Inc. (TCC), a behavioral health care provider, to reimburse HSD for claimed overpayments. HSD makes two arguments on appeal. First, HSD argues that the district court erred when it overturned the administrative law judge's conclusion that TCC failed to satisfy its burden of proof because it did not audit one hundred percent of the claims at issue. Second, HSD contends that the district court erroneously concluded that the administrative law judge's decision requiring TCC to return fees mistakenly paid with Medicaid funds to HSD is not supported by substantial evidence. Because the administrative law judge did not properly apply the regulations governing the recovery of overpayments, we affirm the district court's decision regarding TCC's burden of proof, though for reasons other than those stated by the district court. Further, because substantial evidence supports the administrative law judge's finding that TCC was erroneously paid with Medicaid funds and federal law requires that a provider who receives an overpayment of such funds must return them, we reverse the district court on that issue. The case must be remanded to the administrative law judge for further proceedings in accordance with our decision.

BACKGROUND

{2} In 1977 the Legislature created the Human Services Department, organized in six different divisions, including the medical assistance division (MAD). *See* NMSA 1978, § 9-8-2 (1977); NMSA 1978, § 9-8-4(A)(3) (2007). The Human Services Department Act requires HSD to contract for behavioral health treatment and support services for New Mexicans. *See* NMSA 1978, § 9-8-7.1(A) (2007). In 2009 OptumHealth New Mexico, Inc. (OptumHealth), a managed care organization, was awarded the statewide contract to manage and oversee the administration of these behavioral health services. *See* 8.311.2.11(C) NMAC; NMSA 1978, § 9-7-6.4(A), (B)(5) (2008) (creating a "collaborative," comprised of secretaries from various commissions and departments and chaired by the secretary of HSD, and authorizing the collaborative to "contract for operation of one or more behavioral health entities to ensure availability of services throughout the state"). OptumHealth, in turn, contracted with statewide behavioral health care providers to provide behavioral health services, with providers agreeing to provide services at a mutually-agreed upon amount, or at a reimbursement rate defined by the Medicaid rate for services rendered. *See* 8.311.2.11(C) NMAC.

{3} TCC, a behavioral health care provider in Alamogordo, New Mexico was among the providers to contract with OptumHealth. As part of its contract with OptumHealth, TCC provided behavioral health services for the state's Medicaid clients, as well as for clients of the Children, Youth and Families Department (CYFD) and HSD's Behavioral Health Services Division (BHSD).

{4} Between July 1, 2009 and January 2011, OptumHealth struggled to implement its new billing system to manage the administration of behavioral health services in New Mexico. During that time period, TCC received thirty-one reimbursement fee schedules from OptumHealth. The reimbursement fee schedules TCC received from OptumHealth listed the services TCC was allowed to provide and the reimbursement rate for those services. The fee schedules were sometimes backdated and contained several mistakes, including missing service codes, missing modifiers, incorrect rates and incorrect units, requiring that they be revised and reissued on numerous occasions.

{5} In November 2012 OptumHealth asked to meet with HSD leadership to present information regarding suspicious activities of several health care providers referred to as the Rio Grande providers, including TCC. OptumHealth's presentation suggested aberrant billing patterns in the billings of the Rio Grande providers. After hearing OptumHealth's presentation, HSD hired Public Consulting Group (PCG) to audit the Rio Grande providers.

{6} On June 21, 2013, HSD leadership met with PCG and received its report. When PCG presented its report to HSD, it had not yet had the opportunity to follow up with providers to request additional documentation. Instead, PCG was advised to do no further work, as HSD had decided to refer TCC and fourteen other providers to the Medicaid Fraud Control Unit (MFCU) of the Attorney General's Office for further

investigation. At the time it was directed to stop work, PCG had identified twenty-six claims out of a 150 claim sample group that failed in a random sample audit of TCC claims (PCG audit). That number was later reduced to nine when the Attorney General requested and received additional documentation from TCC.

{7} When the audit of TCC was referred to the Attorney General's Office, TCC was advised by HSD that all payments on state contracts, whether for Medicaid or non-Medicaid services, were immediately suspended.

{8} The Attorney General's Office conducted its investigation and issued its report on January 10, 2014. The Attorney General's investigation reviewed the PCG audit, the OptumHealth audit and a referral that came into its office regarding TCC. The Attorney General reported that the nine failed claims out of 150 randomly sampled claims from the PCG audit resulted in overcharges totaling $5,264.24. The Attorney General was able to resolve the concerns raised in the OptumHealth audit as part of its investigation, and did not identify any inappropriate charges resulting from that audit.

{9} Finally, the Attorney General investigated the allegations set out in an anonymous letter sent to its office in 2012, alleging that TCC employees had been ordered to bill more time than was actually spent with clients, including Medicaid clients, to destroy progress notes and assessments and treatment plans, and to sign progress notes even though they had seen Medicaid clients for less than one hour. The Attorney General's Office was unable to substantiate the claims set out in the anonymous letter by talking to current and former employees; however, one former manager advised that TCC had been doing basic mental health assessments of clients and billing them as enhanced assessments. Investigators from the Attorney General's Office met with the entire TCC staff and TCC attorneys in August 2013. The investigators reported that "[a]ll of the staff believe that they are appropriately preparing assessments and were surprised to learn that the assessments reviewed by our office did not qualify as enhanced." TCC staff denied ever hearing any discussions about billing for enhanced assessments while only performing basic assessments.

{10} Prior to meeting with TCC, the Attorney General's Office performed an audit of a random sample of thirty clients for whom TCC had submitted bills for behavioral health services identified with an H0031 billing code between January 2010 and March 20, 2013 (Attorney General's audit). The H0031 billing code is used to bill for several different types of behavioral health services to several different government agencies, with billing to an agency defined by whether a modifier is used or not. The H0031 billing code with no modifier indicated a billing to the BHSD. An H0031 billing code containing an HA modifier indicated an assessment of a minor billed to CYFD or BHSD. Finally, claims submitted with the H0031 U8 code and modifier denoted billing for services provided to adult Medicaid clients under the psychosocial rehabilitation umbrella of services.

{11} At the conclusion of the Attorney General's investigation, on February 20, 2014, HSD requested that TCC remit $343,000.49 to satisfy overpayments, including extrapolated overpayments calculated from the results of the Attorney General's audit and the PCG audit. TCC timely filed a request for fair hearing pursuant to 8.352.3.9 NMAC. An administrative law judge (ALJ) held a four-day hearing to address the validity of the methodology employed in extrapolating the overpayments made to TCC, whether TCC improperly billed certain claims using the incorrect modifier, and whether TCC was paid out of Medicaid funds for those claims.

{12} At the hearing, TCC challenged the failure of each of the nine claims found to have failed by the PCG audit. TCC also challenged the failure of the claims that were the subject of the Attorney General's audit. The evidence showed that TCC submitted thirty-nine claims related to thirty different clients using the H0031 billing code, both with and without modifiers, with some clients receiving multiple assessments. At the hearing, the parties stipulated that four of the claims submitted did not meet the criteria to be billed as H0031 U8 claims. Of the remaining claims, TCC presented evidence to the ALJ that nine of those claims should not have failed because TCC had not billed them to Medicaid, though they were erroneously paid with Medicaid funds. TCC also challenged the remaining failed claims in the Attorney General's audit, presenting evidence as to why each claim properly fell within the scope of the H0031 U8 billing code used when the claim was submitted.

{13} At the conclusion of the hearing, HSD requested that the ALJ direct TCC to return overpayments totaling $379,135.26, representing the extrapolated overpayments from the PCG audit and the Attorney General's audit, including claims properly billed by TCC, but erroneously paid from Medicaid funds.

{14} After hearing the evidence and arguments of the parties, the ALJ made findings of fact. Among the findings made by the ALJ were findings that:

> 1. There were 706 claims submitted to and paid by OptumHealth to TCC under code H0031 with the modifier of U8 for the time period that is at issue. A random sample of 30 claims, all of which had been determined to have failed, was applied to this universe of 706 claims using a ratio-based analysis for extrapolation. This resulted in an overpayment claim of $285,468.91. . . .
>
> 2. The Attorney General's office reviewed the audit results from the Public Consulting Group (PCG) regarding the 150 claims that had been randomly sampled by PCG. The Attorney General's office determined that nine claims failed. When the nine claims were extrapolated by PCG, that resulted in an overpayment claim of $62,837.00. . . .
>
> 18. OptumHealth would use incorrect funding sources with respect to payment for TCC's billings, which thereafter would require corrections to be made. . . .

{15} Using its findings, the ALJ reached the following four conclusions:

1. Attorney General's Audit of H0031 (U8) Claims and Extrapolated Results

{16} The ALJ concluded that the $285,468.91 in overpayments claimed by HSD resulting from the Attorney General's audit constituted prima facie evidence of the overpayment. To rebut this prima facie showing, the ALJ concluded, TCC was therefore "required to take certain steps, as the 'burden of proof of compliance' shifted to it" under 8.351.2.13(A) NMAC. Though the ALJ acknowledged that "TCC did put forward a certain amount of credible evidence in opposition, it failed to provide . . . the requisite '[one-hundred] percent audit of the universe of provider records' in support of its position." As a result, the ALJ found HSD was entitled to recover these monies.

2. PCG Audit and Extrapolated Results

{17} Next, the ALJ applied the same rationale to the extrapolated overpayment resulting from the nine failed claims set out in the PCG audit, concluding that because TCC did not rebut HSD's prima facie case with a one-hundred percent audit of the more than 78,000 claims, HSD was entitled to recover its extrapolated overpayment in the amount of $62,837.00.

3. H0031 Claims (No Modifier) Paid With Medicaid Funds

{18} The ALJ concluded that "the evidence establishes that TCC did not bill [H0031 (no modifier)] claims to Medicaid" but that "the evidence establishes that TCC was credited with an amount of $25,210.77 in Medicaid funds, in connection with there having been numerous problems associated with the payor's (OptumHealth) interactions with TCC and its processing of TCC's claims." In reaching this conclusion and finding in favor of HSD on the issue, the ALJ "afforded substantial weight" to the testimony of Robert Stevens.

4. H0031 (HA) Claims Paid With Medicaid Funds

{19} Finally, the ALJ applied the same logic to HSD's H0031 (HA) claims as it applied to the H0031 claims without a modifier, finding that TCC had been credited with the $5,618.58 in billings under code H0031 (HA). As such, the ALJ concluded that HSD should prevail on that portion of its claim.

{20} In light of these four conclusions, the ALJ determined that "the weight of the evidence goes in favor of HSD" and recommended that the MAD director of HSD "uphold the overpayment in the total amount of $379,135.26." HSD adopted the ALJ's recommendations, and TCC appealed the issue to the district court pursuant to Rule 1-074 NMRA.

{21} The district court determined that the ALJ's conclusions regarding the extrapolated Attorney General audit claims and the extrapolated PCG audit claims were not decided in accordance with the law. The district court then determined that conclusions regarding the Medicaid payments of the H0031 (no modifier) claims and H0031 (HA) claims were "not supported by substantial evidence[,]" focusing on the limitations of and weaknesses in the testimony of HSD's employee Robert Stevens. As a result, the district court reversed the HSD decision adopting the ALJ's recommendation. It remanded the ALJ's conclusions regarding the extrapolated Attorney General audit and PCG audit claims for further proceedings, instructing the agency to apply the preponderance of the evidence burden stated in 8.352.3.12(D) NMAC. The district court also ordered that "[a]ny monies withheld with respect to [H0031 (no modifier) claims and H0031 (HA) claims] shall be paid to [TCC.]" HSD filed a petition for writ of certiorari seeking review of the decision, which we granted.

STANDARD OF REVIEW

{22} We review HSD's decision to determine whether it acted fraudulently, arbitrarily or capriciously, whether its decision was not supported by substantial evidence, or whether it failed to act in accordance with law. *See* NMSA § 39-3-1.1(D) (1999); *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. "A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Rio Grande Chapter of the Sierra Club*, 2003-NMSC-005, ¶ 17. In reviewing agency decisions, we remain mindful that "in resolving ambiguities in the statute or regulations which an agency is charged with administering, the Court generally will defer to the agency's interpretation if it implicates agency expertise." *Atlixco Coal. v. Maggiore*, 1998-NMCA-134, ¶ 30, 125 N.M. 786, 965 P.2d 370. However, in considering whether HSD's actions were in accordance with the law, we note that interpretation of a statute or regulation is a matter of law that this Court reviews de novo; and, we are not bound by HSD's or the district court's interpretation of the relevant statutes and regulations. *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶ 11, 141 N.M. 41, 150 P.3d 991 (citing *Rio Grande Chapter of the Sierra Club*, 2003-NMSC-005, ¶ 17).

DISCUSSION

{23} HSD's arguments on appeal can be distilled to two issues. First, HSD contends that the district court erred when it overturned the ALJ's conclusions that TCC failed to satisfy its burden of proof when it did not provide a one-hundred percent audit of the universe of provider records to challenge the Attorney General's audit and PCG audit. Second, HSD argues that the district court erred when it held that HSD's decision requiring TCC to return payments erroneously paid with Medicaid funds was not supported by substantial evidence.

A. One-Hundred Percent Audit Requirement

{24} To determine whether the ALJ applied the proper burdens of proof to the parties at the fair hearing, we first consider the regulatory scheme applicable to HSD-funded medical assistance programs, including the burdens of the parties in proceedings to recover overpayments and the circumstances under which a one-hundred percent audit of the claims universe is required. Next, we consider whether the ALJ properly applied the regulations. Finding he did not, we affirm the district court, though on grounds different than those stated in its decision. *See Lynn Hawkins v. McDonald's*, 2014-NMCA-048, ¶ 23, 323 P.3d 932 ("Under the right for any reason doctrine, we may affirm the district court's order on grounds not relied upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below." (internal quotation marks and citation omitted)); *State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692, 181 P.3d 684 (stating that we may affirm the district court on grounds not relied upon if those grounds do not require us to look beyond the factual allegations raised and considered below).

HSD Regulations

{25} Overpayments are defined as "amounts paid to a MAD provider or other entity in excess of the MAD allowable amount" and include "payment for any claim for which the provider or other entity was not entitled to payment because an applicable MAD NMAC rule and its requirements were not followed." 8.351.2.13 NMAC. In furtherance of recovering overpayments, HSD has promulgated regulations that include procedures for auditing a provider's records to determine whether the provider has been overpaid for its services. *See* 8.351.2.13(A) NMAC (setting out audit procedures for recovery of overpayments). First, the overpayment regulations note that "[t]he audit findings generated through the audit procedure shall constitute prima facie evidence in all MAD proceedings of the number and amount of requests for payment as submitted by the provider[.]" 8.351.2.13(A)(1) NMAC. Because of the voluminous number of claims submitted by providers, the regulations permit MAD to employ statistical sampling and extrapolation techniques to derive the total overpayment a provider may have received. The regulation governing the recovery of overpayments provides:

> MAD's procedures for auditing a provider or other entity may include the use of random sampling and extrapolation. When this procedure is used, all sampling will be performed using generally accepted statistical methods and will yield statistically significant results at a confidence level of at least 90 percent. Findings of the sample will be extrapolated to the universe for the audit period.

8.351.2.13(A)(2) NMAC.

{26} The provider has the burden of proof of any noncompliance with statistical sampling techniques in the event of any disagreement with MAD's audit findings arising from an audit utilizing sampling and extrapolation methodology. *See* 8.351.2.13(A)(3) NMAC.

{27} The provider or other entity may present evidence to show that the sample was invalid; however, the evidence supporting such invalidity must include a one-hundred percent audit of the universe of provider records used by MAD in the drawing of its sample. 8.351.2.13(A)(3) NMAC. Any one-hundred percent audit must:

> (a) be arranged and paid for by the provider or other entity;
> (b) be conducted by a certified public accountant;
> (c) demonstrate that a statistically significantly higher number of claims and records not reviewed in MAD sample were in compliance with MAD NMAC rules, and
> (d) be submitted to MAD with all supporting documentation.

8.351.2.13(A)(3) NMAC.

{28} A provider may request an administrative hearing if it disagrees with a decision of MAD with respect to recovery of overpayments resulting from incorrect billing, lack of documentation to support the medical necessity of a service, claims that the service was provided, or the imposition of a sanction or other remedy. *See* 8.352.3.10(C)(1)(c) NMAC. At the administrative hearing, "MAD has the burden of proving the basis to support its proposed action by a preponderance of the evidence." 8.352.3.12(D) NMAC.

Extrapolated Overpayment Claims

{29} At the hearing before the ALJ, TCC challenged both the statistical sampling techniques used by HSD, as well as HSD's claims that several of TCC's claims failed to satisfy the criteria for the payment sought. On appeal to the district court, however, TCC's appeal was limited to the issues related to its failed claims. During the fair hearing, TCC challenged the failure of all but four of the claims used in the Attorney General's audit and PCG audit to extrapolate the alleged overpayment. HSD admits that it has the burden to show that the cases randomly selected for audit failed when it employs statistical sampling and extrapolation techniques to determine an overpayment. Once HSD has shown that the case failed, HSD contends, then the burden shifts to the provider to show that the claim actually did not fail. If the provider shows the claim should not have failed, then the extrapolated overpayment is adjusted to reflect the fact that fewer claims failed than were initially noted. HSD concedes that, even after it has established that the claims failed, it still has the burden to mathematically prove the extrapolation and overpayment amount. Upon proof of the extrapolation and overpayment amount, the burden shifts to the provider, who is then obligated to produce evidence. HSD explains that, only if a provider disagrees with the math—the manner in which the extrapolation was calculated and not just the findings of failed claims—must the provider conduct a one-hundred percent audit of the claims universe. While we agree with HSD's interpretation of the burdens of the parties under the regulations, we do not agree that this is how those burdens were applied by the ALJ to this case.

{30} At oral argument, HSD contended that the ALJ found that all of the claims challenged by TCC at the fair hearing failed, pointing to the ALJ's findings 1 and 2 as support for its argument. Therefore, HSD asserted, those claims were properly included in its extrapolation. We do not interpret the ALJ's findings to support HSD's position. Rather than making a finding that MAD had properly determined that the claims failed, we interpret the ALJ's findings as merely reporting the conclusions reached by MAD and the Attorney General's office, rather than making a determination that he agreed with those conclusions. Referring to the Attorney General's audit, finding number 1 reports on "[a] random sample of 30 claims, all of which *had been determined to have failed*," while finding no. 2 states that upon review of the PCG audit, "[t]he *Attorney General's office determined* that nine claims failed." (Emphases added.) Nowhere in his findings does the ALJ indicate that he agreed with the Attorney General's office or MFCU, or that he had otherwise determined that the claims failed. Instead, the ALJ's findings and conclusions indicate that he merely reported the outcomes of the audits as determined by MFCU and the Attorney General's office, note that "TCC did put forward a certain amount of credible evidence[,]" but then fail to consider any of that evidence or reach any of his own conclusions regarding the validity of those alleged failed claims because TCC had not performed a one-hundred percent audit of the universe of provider records. The district court correctly found that the ALJ improperly shifted the burden of proof to TCC, as TCC was not required to provide a one-hundred percent audit of the universe of providers before the ALJ could properly consider whether the claims used to extrapolate TCC's alleged overpayment actually failed.

{31} As part of our review of the district court's decision, we note that the district court concluded that "[t]o require TCC to engage and complete a one-hundred percent audit for the purpose of pursuing its rights at a hearing is unreasonable, especially considering the reasonable time necessary . . . to meet the audit requirements of 8.351.2.13 [NMAC] and in light of 8.352.3.12(A) [NMAC], which does not mention such a requirement." To the extent that this issue may arise on remand, we take the opportunity to address it now. While we agree that TCC was not required to perform a one-hundred percent audit of the universe under the circumstances of this appeal, we disagree with the district court's broad conclusion that the regulation requiring a one-hundred percent audit is unreasonable.

A One-Hundred Percent Audit is Reasonable

{32} "Rules and regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes that they implement." *Earthworks' Oil & Gas Accountability Project v. N.M. Oil Conservation Comm'n*, 2016-NMCA-055, ¶ 11, 374 P.3d 710 (internal quotation marks and citation omitted). Because its rule-making function involves the exercise of discretion, we defer to the agency when reviewing its rule-making decisions. *See id.* We will not substitute our judgment for that of the agency where there is no showing of an abuse of discretion. *See Wilcox v. N.M. Bd. of Acupuncture & Oriental Med.*, 2012-NMCA-106, ¶ 7, 288 P.3d 902. To

successfully challenge the validity of a rule adopted by an administrative agency, the party challenging the rule has the "burden of showing that the rule is arbitrary or capricious by demonstrating that the rule's requirements are not reasonably related to the legislative purpose." *Earthworks' Oil & Gas Accountability Project*, 2016-NMCA-055, ¶ 11 (alteration, internal quotation marks, and citation omitted).

{33} As set out above, the requirement for a one-hundred percent audit becomes relevant only if a provider claims that the sample used to calculate the overpayment was invalid. *See* 8.351.2.13(A)(3) NMAC. It does not apply to circumstances where the issue is whether a particular claim was properly passed or failed during the course of the audit or whether the mathematical calculation of the extrapolated overpayment was accurate. Instead, should a provider wish to challenge the methodology used to choose the sample size of the audit or to randomly select the claims for audit, the regulation requires that, rather than merely choose a different sample size, or select a different set of claims for audit, the provider must audit the entire universe of claims at issue. *See id. But see Chaves Cty. Home Health Serv., Inc. v. Sullivan*, 931 F.2d 914, 921 (D.C. Cir. 1991) (holding that under federal law, a provider may challenge accuracy of an extrapolation by separately presenting evidence of a different random sample from the universe of claims or establish the validity of all or a sufficient number of claims to demonstrate that the extrapolation is factually impossible of correctness); N.C. Gen. Stat. Ann. § 108C-5(n)(2) (West 2014) (stating that a provider may challenge error rate of extrapolated audit results by *either* conducting a one-hundred percent file review *or* conducting a second audit upon a sample chosen by the [d]epartment); 42 C.F.R. § 402.109(c) (2012) (providing that once the agency "has made a prima facie case, the burden is on the respondent to produce evidence reasonably calculated to rebut the findings of the statistical sampling study").

{34} Initially, we note that the ALJ does not appear to have made any findings or conclusions regarding the validity of the audit samples used to extrapolate the overpayment claimed by HSD based on the Attorney General's audit and the PCG audit. While our courts have not previously addressed the propriety of the requirement that a party challenging the validity of an audit sample show that the sample was invalid by auditing one hundred percent of the universe of provider records, the parties point us to the Seventh Circuit's decision in *Illinois Physicians Union v. Miller*, 675 F.2d 151 (7th Cir. 1982). The *Illinois Physicians Union* court considered "whether the state, in attempting to preserve its welfare monies, may place the burden on the physician to demonstrate that the [d]epartment's calculations are inaccurate." *Id.* at 154. Finding "nothing improper with the [d]epartment's requirement that the physician, not the [d]epartment, conduct the one[-]hundred percent audit[,]" *id.* at 158, the court held that it was not arbitrary or capricious to require providers who are benefitting from publicly funded welfare programs to bear the burden of conducting a one-hundred percent audit, "particularly when the state has already borne the cost of the initial audit and the evidence to rebut that initial determination is uniquely within the [provider's] control." *Id.*

{35} In this instance, we cannot conclude that the requirement that a provider who challenges the validity of a sample conduct a one-hundred percent audit of the claims universe is not reasonably related to the legislative purpose. *See Earthworks' Oil & Gas Accountability Project,* 2016-NMCA-055, ¶ 11 (stating that to invalidate an administrative rule, the party challenging the rule has the burden of showing that the rule's requirements are not reasonably related to the legislative purpose). States that elect to participate in the Medicaid program are entitled to receive federal funds so long as they "comply with requirements imposed by the [Social Security] Act and by the Secretary of Health and Human Services." *Atkins v. Rivera*, 477 U.S. 154, 157 (1986). The one-hundred percent audit requirement is reasonably related to HSD's compliance responsibilities, including its responsibility to recover overpayments made to Medicaid providers, and is therefore not arbitrary or capricious or an abuse of the agency's discretion. As such, should the validity of the sample be an issue on remand, the rule is not unreasonable or invalid.

HSD's Obligation and Burden of Proof

{36} Finally, notwithstanding the regulation's requirement that evidence of the invalidity of MAD's sample must include a one-hundred percent audit of the universe, a provider's failure to perform such an audit does not relieve HSD of its obligation to prove the basis to support its claim for overpayment by a preponderance of the evidence at the fair hearing, including proof that its sample was valid. *See* 8.352.3.12 NMAC. In this case, the ALJ concluded that the calculated overpayment resulting from the sampling and extrapolation of the Attorney General's audit and the PCG audit constitute "[p]rima facie evidence. . . of the number and amount of requests for payment as submitted by the provider or other entity." 8.351.2.13(A)(1) NMAC. We note that the ALJ appears to conflate the amount of the overpayment calculated as a result of the Attorney General's and PCG's audits with the "number [of requests] and amount of requests for payment as submitted by the provider[.]" *See id.* Regulation 8.351.2.13(A)(1) NMAC states nothing more than the fact that the information set out in the audit findings constitutes prima facie evidence of the "requests for payment as submitted by the provider," and makes no reference to or assumptions about the validity of those claims or any determination of overpayment by HSD. While the ALJ appears to have decided that the audit findings were prima facie evidence of the overpayment, shifting the "burden of proof of compliance" to TCC, the regulations do not support this conclusion. Not only must HSD prove by a preponderance of the evidence at the fair hearing that the identified claims failed, but also that its mathematical calculations of the overpayment were properly calculated and the methodology it used to choose the sample was valid. Should a provider challenge the validity of the sample, but fail to perform a one-hundred percent audit of the claims universe, HSD is not relieved of its obligation to prove its validity by a preponderance of the evidence. It simply has the opportunity to do so with little resistance from the provider—with regard to the methodology used to choose the sample. Should the ALJ determine that HSD's methodology in choosing its sample was unreliable, notwithstanding the provider's failure to perform a one-hundred percent audit, the ALJ could properly find that HSD failed to satisfy its burden by proving by the greater weight of the evidence that its sample is valid. *See Campbell v. Campbell*, 1957-NMSC-001, ¶ 24, 62 N.M. 330, 310 P.2d 266 (stating that "[p]reponderance of the evidence simply means the greater weight of the evidence").

{37} Because we affirm the district court's decision regarding the burden of proof, the district court shall remand this case back to the ALJ to make findings, applying the preponderance of the evidence standard,

related to the failed claims challenged by TCC, related to any necessary adjustments to the total overpayment amount claimed by HSD based on its extrapolation, and related to the validity of the sample sizes used in the Attorney General's audit and the PCG audit.

B. Payment of Claims From Medicaid Funds

{38} Finally, we address HSD's claims that the district court erred when it concluded that the ALJ's decision requiring TCC to return fees mistakenly paid with Medicaid funds to HSD is not supported by substantial evidence. The ALJ concluded that TCC was credited with Medicaid funds in the amount of $25,210.77 for H0031 (no modifier) claims and $5,618.58 for H0031 HA claims, notwithstanding that "TCC did not bill these claims to Medicaid." Finding the testimony of HSD's witness, Robert Stevens, to be lacking, the district court held that the ALJ's conclusion that TCC was credited with Medicaid funds was not supported by substantial evidence. We disagree.

{39} On appeal, we review the whole record in the light most favorable to the ALJ's decision to determine whether substantial evidence supports that decision. *See Duke City Lumber Co. v. N.M. Envtl. Improvement Bd.*, 1984-NMSC-042, ¶¶ 13-14, 101 N.M. 291, 681 P.2d 717. "To conclude that an administrative decision is supported by substantial evidence in the whole record, the court must be satisfied that the evidence demonstrates the reasonableness of the decision. No part of the evidence may be exclusively relied upon if it would be unreasonable to do so. The reviewing court needs to find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." *Nat'l Council on Comp. Ins. v. N.M. Corp. Comm'n*, 1988-NMSC-036, ¶ 8, 107 N.M. 278, 756 P.2d 558.

{40} The ALJ concluded that TCC did not bill H0031 (no modifier) and H0031 HA claims to Medicaid, but that TCC was nonetheless paid with Medicaid funds for some of those claims as a result of numerous problems associated with the manner in which OptumHealth processed the claims. Of note is the fact that, while the district court found a lack of substantial evidence to support the ALJ's finding that TCC was erroneously paid from Medicaid funds, on appeal, TCC concedes that though TCC properly submitted its claims, OptumHealth, without TCC's knowledge, "frequently paid these claims using Medicaid funds." The ALJ's finding and TCC's admission about the source of payment for H0031 (no modifier) and H0031 HA claims are supported by substantial evidence in the administrative record. Robert Stevens, the bureau chief of the Program Policy and Integrity Bureau of MAD, testified that he oversees the claims processing system for the State. Mr. Stevens testified about records produced from MAD's data warehouse showing claims submitted by OptumHealth. Included among those records were records showing TCC H0031 (no modifier) and H0031 HA claims paid by OptumHealth. MAD, he explained, receives an "encounter claim" from OptumHealth, with OptumHealth retaining the information it received from the provider. OptumHealth adds information to the encounter claim, such as the amount OptumHealth paid on the claim, as well as the date it paid the claim to the provider before submitting it to MAD. Mr. Stevens testified that the records maintained by MAD for the H0031 (no modifier) and H0031 HA claims showed that payment was erroneously paid to OptumHealth from Medicaid funds. Based on Mr. Stevens' testimony, the ALJ concluded that TCC was paid with Medicaid funds for services that were not eligible for payment by Medicaid.

{41} "[W]e will not reweigh the evidence nor substitute our judgment for that of the fact[-]finder." *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. "To conclude that substantial evidence exists to support an administrative decision we need only find that there is credible evidence for a reasonable mind to accept as adequate the result reached by the agency." *Id.* We conclude that substantial evidence exists to support the ALJ's finding that the H0031 (no modifier) and H0031HA claims at issue were paid with Medicaid funds.

{42} TCC argues that the district court properly concluded that it was not required to reimburse HSD for these payments because, as the ALJ found, TCC did not bill those claims to Medicaid. Instead, TCC claims HSD must address any issues related to erroneous payments to OptumHealth. HSD does not contend that TCC was not entitled to payment for the H0031 (no modifier) and H0031 HA claims, arguing only that it was not entitled to payment from Medicaid funds.

{43} In considering TCC's argument, we note that federal law governing Medicaid payments requires that one who receives an overpayment shall "report and return the overpayment to the Secretary, the State, an intermediary, a carrier, or a contractor, as appropriate[.]" 42 U.S.C. §1320a-7k(d)(1)(A) (2012). Notwithstanding that TCC properly billed the H0031 (no modifier) and H0031 HA claims, federal law requires that overpayments of Medicaid funds must be returned. As none of the claims at issue were entitled to be paid from Medicaid funds, they must be returned to the State. We reverse the district court on this issue.

CONCLUSION

{44} The decision of the district court is reversed as to the H0031 (no modifier) and H0031 HA claims erroneously paid from Medicaid funds. The district court is affirmed on the remaining issues on appeal, and the district court is instructed to remand this matter to the ALJ to make findings, applying the preponderance of the evidence standard related to the failed claims challenged by TCC, related to any necessary adjustments to the total overpayment amount claimed by HSD based on its extrapolation, and related to the validity of the sample sizes used in the Attorney General's and the PCG audits.

{45} IT IS SO ORDERED.

JULIE J. VARGAS, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

STEPHEN G. FRENCH, Judge

Certiorari Granted, October 15, 2018, No. S-1-SC-37201

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-064

No. A-1-CA-35930 (filed July 30, 2018)

GANDYDANCER, LLC,
Plaintiff-Appellee,
v.
ROCK HOUSE CGM, LLC,
and KARL G. PERGOLA,
Defendants-Appellants.

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

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Opinion

Julie J. Vargas, Judge

{1} In this interlocutory appeal, we consider whether the language in NMSA 1978, Section 57-12-10(B) (2005) of New Mexico Unfair Practices Act (UPA) allowing "[a]ny person who suffers any loss . . . as a result of any . . . act or practice declared unlawful by the [UPA to] bring an action[,]" creates a private right of action for businesses seeking to bring suit against competitors for unfair competition practices. Taking into consideration both the plain language of the statute and the UPA's remedial purpose as a consumer protection statute, we hold that a business may sue a competitor under the UPA only if the conduct alleged involves consumer protection concerns or trade practices addressed to the market generally. Because Plaintiff's claims against its business competitor do address such concerns, we affirm.

BACKGROUND

{2} Plaintiff Gandydancer, LLC and Defendant Rock House CGM, LLC are both construction companies providing railroad contracting services to BNSF Railway Company (BNSF). In the spring of 2015, Plaintiff submitted a complaint to the New Mexico Construction Industries Division (CID), alleging Defendant had performed unlicensed construction work in violation of the Construction Industries Licensing Act (CILA), NMSA 1978, §§ 60-13-1 to -59 (1967, as amended through 2013). Following an investigation, Defendant entered into a stipulated settlement agreement with CID agreeing to pay administrative penalties. A week before the stipulated settlement agreement was approved by CID's supervisory commission, Plaintiff sued Defendant in district court raising several claims, including a UPA claim. Plaintiff's complaint alleged that Defendant operated its business without satisfying the mandatory licensing requirements, induced Plaintiff's former employees to divulge confidential trade secrets, and used those trade secrets to convince BNSF to hire Defendant instead of Plaintiff without disclosing to BNSF that it was unlicensed.

{3} Defendant filed a motion to dismiss, asserting Plaintiff had no standing to bring the UPA claim and failed to state any claims upon which relief could be granted. Following a hearing, the district court denied Defendant's motion to dismiss Plaintiff's UPA claim and certified the question of "whether the [UPA] affords private-party standing to business competitors who are both sellers of services, or only to buyers of goods and services" to this Court for interlocutory review. Defendant then filed an application for interlocutory appeal, which this Court granted pursuant to Rule 12-203 NMRA and NMSA 1978, Section 39-3-4(B) (1999).

DISCUSSION

{4} Defendant raises three issues on appeal. First, Defendant contends that our prior decisions and the legislative intent of the UPA to protect consumers limits its grant of standing to "a person who purchased goods or services[,]" notwithstanding the broad language of Section 57-12-10(B) allowing "[a]ny person who suffers any loss of money or property" to bring a claim. Next, Defendant claims Plaintiff has failed to state a viable UPA claim, requiring dismissal with prejudice of its complaint. Finally, Defendant argues that to allow Plaintiff to bring a UPA claim against a competitor for failing to obtain a license would result in an improper usurpation of the government's regulatory authority. We are not persuaded by Defendant's arguments and affirm the district court.

A. Standard of Review

{5} A business competitor's standing to bring a private right of action under the provisions of the UPA is an issue of first impression in New Mexico. *See First Nat'l Bancorp Inc. v. Alley*, 76 F. Supp. 3d 1261, 1263 (D.N.M. 2014) (acknowledging no New Mexico court had directly decided the issue of competitor standing under the UPA); *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1174 (D.N.M. 2013) (acknowledging undecided nature of competitor standing). Statutory interpretation, as well as a party's standing to litigate a particular issue are both questions of law we review de novo. *Town of Silver City v. Scartaccini*, 2006-NMCA-009, ¶ 11, 138 N.M. 813, 126 P.3d 1177.

B. Plaintiff's Standing to Bring a Claim

{6} Defendant effectively makes two arguments as to why Plaintiff cannot bring a claim under the plain language of the UPA. First, Defendant argues that the provision in Section 57-10-12(B) allowing "[a]ny person who suffers any loss" to bring a claim is tempered by the legislative intent of the UPA and our prior case law limiting standing to buyers of goods and services.

Second, Defendant contends that, while the UPA precludes "unfair or deceptive trade practice[s,]" it makes no mention of unfair competition practices.

1. Rules Governing Statutory Construction

{7} When interpreting a statute, a court's primary goal is to facilitate and promote the Legislature's purpose. *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 17, 148 N.M. 426, 237 P.3d 728. In discerning that purpose, "we look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Flores v. Herrera*, 2016-NMSC-033, ¶ 8, 384 P.3d 1070 (internal quotation marks and citation omitted). While the plain meaning rule provides that "statutes are to be given effect as written and, where they are free from ambiguity, there is no room for construction[,]" this rule must be applied with caution, as "a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning." *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶¶ 2, 23, 117 N.M. 346, 871 P.2d 1352. Consequently, courts will reject the literal language of the statute if doing so is necessary to "conform to the obvious intent of the [L]egislature, or to prevent its being absurd." *Id.* ¶ 3; *see also Baker v. Hedstrom*, 2013-NMSC-043, ¶ 15, 309 P.3d 1047 (indicating that the statute must be interpreted in the context of the statute as a whole with an eye toward its purposes and consequences). Finally, we note that "a statute with a remedial purpose must be liberally construed to implement its purpose, and any exception will be strictly construed." *N.M. Dep't. of Labor v. A.C. Elec., Inc.*, 1998-NMCA-141, ¶ 13, 125 N.M. 779, 965 P.2d 363; *see Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 27, 125 N.M. 401, 962 P.2d 1236 (recognizing that when "resolving statutory ambiguities, courts will favor a general provision over an exception. This is especially true when a statute promotes the public welfare" (citation omitted)).

2. The UPA

{8} The UPA makes it unlawful to employ "[u]nfair or deceptive trade practices . . . in the conduct of any trade or commerce." Section 57-12-3; *see also* NMSA 1978, § 57-12-2(C) (2009) (defining "trade" or "commerce" to include "the advertising, offering for sale or distribution of any services and any property and any other article, commodity or thing of value, including any trade or commerce *directly or indirectly affecting the people of this state*" (emphasis added)). An "unfair or deceptive trade practice" is a "false or misleading oral or written statement . . . or other representation of any kind knowingly made in connection with the sale . . . of goods or services . . . in the regular course of the person's trade or commerce that may, tends to or does deceive or mislead any person" and includes, among other things, "causing confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services" and "failing to state a material fact if doing so deceives or tends to deceive[.]" Section 57-12-2(D)(2), (14). "*Any person* who suffers any loss of money or property . . . as a result of any employment by another person of a method, act or practice declared unlawful by the [UPA] may bring an action to recover actual damages." Section 57-12-10(B) (emphasis added). The Legislature has expansively defined a "person" as it is used in the UPA to include, "natural persons, corporations, trusts, partnerships, associations, cooperative associations, clubs, companies, firms, joint ventures, or syndicates[.]" Section 57-12-2(A).

a. "Any Person"

{9} Defendant contends that, while the language of the UPA allowing "any person who suffers any loss" appears to confer standing on Plaintiff, the legislative intent that the UPA serve as a mechanism to protect consumers excludes Plaintiff from the class of persons entitled to bring a claim under the Act. Plaintiff, by contrast, urges us to look exclusively to the plain language of the Act. We agree with Defendant that, notwithstanding that the plain language of the UPA appears to confer standing to Plaintiff and other similarly situated business competitors, we must consider whether our literal interpretation of the statute is contrary to its obvious intent or renders it absurd. *See Helman*, 1994-NMSC-023, ¶ 2. For this, we look to the public policy behind the UPA. *See First Baptist Church of Roswell v. Yates Petroleum Corp.*, 2015-NMSC-004, ¶ 12, 345 P.3d 310 ("Every statute is a manifestation of some public policy.").

{10} The UPA represents New Mexico's public policy favoring the resolution of consumer claims and prevention of consumer harm. *See Fiser v. Dell Comput. Corp.*, 2008-NMSC-046, ¶¶ 9, 10, 144 N.M. 464, 188 P.3d 1215 (recognizing that UPA represents "[t]he fundamental New Mexico policy of providing consumers a mechanism for dispute resolution"). Its fundamental purpose is to protect consumers from unscrupulous business practices regardless of whether those consumers are directly or indirectly affected. *See* § 57-12-2(C). "[T]he UPA is designed to provide a remedy against misleading identification and false or deceptive advertising." *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 22, 142 N.M. 437, 166 P.3d 1091. In furtherance of its purpose, the Legislature authorized an award of attorney fees for the successful prosecution of UPA claims, as it "furthers the public policies of encouraging individuals to pursue their UPA claims[,] . . . reimburs[es] plaintiffs and their counsel for enforcing the UPA[,]" and accomplishes the goal of "encouraging plaintiffs to pursue justice[,]" even where the recoverable amount of damages is small. *Aguilera v. Palm Harbor Homes, Inc.*, 2004-NMCA-120, ¶ 10, 136 N.M. 422, 99 P.3d 672.

{11} Because "the UPA constitutes remedial legislation, we interpret the provisions of [the] Act liberally to facilitate and accomplish its purposes and intent." *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 30, 147 N.M. 583, 227 P.3d 73 (internal quotation marks and citation omitted); *see Maese v. Garrett*, 2014-NMCA-072, ¶ 18, 329 P.3d 713 (acknowledging liberal interpretation of UPA provisions in this Court's prior decisions); *State ex rel. Stratton v. Gurley Motor Co.*, 1987-NMCA-063, ¶ 27, 105 N.M. 803, 737 P.2d 1180 (favoring liberal construction to accomplish legislative intent). The UPA's position in New Mexico as a consumer protection statute entitles it to the broadest possible application, and "[i]t is the task of the courts to ensure that the [UPA] lends the protection of its broad application to innocent consumers." *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 48, 329 P.3d 658 (internal quotation marks and citation omitted).

{12} Taking into consideration the plain language of the statute and its remedial consumer protection purpose, we reject both parties' proposed interpretations of Section 57-12-10(B), as neither accomplishes the goals of the statute. Defendant's interpretation is overly-narrow in limiting standing to buyers of goods and services, while Plaintiff's overly-broad interpretation confers standing on business competitors regardless of whether the violation was related to trade or commerce "directly or indirectly affecting the people of the

state[.]" Section 57-12-2(C). Defendant's interpretation ignores the plain language of the UPA, while Plaintiff ignores its legislative intent. To satisfy both the plain language of the Act, allowing "any person" to bring a claim, as well as the legislative intent to protect the people of the state from being directly or indirectly affected by unscrupulous business practices, we conclude that a business competitor may sue under the UPA provided that the conduct alleged involves trade practices that either implicate consumer protection concerns or are addressed to the market generally.

{13} Our holding is also consistent with our decision in *Lohman* in which we considered the plaintiff's UPA claim against a seatbelt manufacturer for its deceptive representations to a distributor to facilitate car sales to consumers at large. 2007-NMCA-100, ¶ 25. Notwithstanding the attenuated relationship between the manufacturer and consumers, we concluded that "the language of the UPA is capable of encompassing a broad array of commercial relationships, and nothing expressly limits its scope to communications directed at the plaintiff or at the public." *Id.* "[T]he definition of unfair or deceptive trade practice[,]" we noted, "makes no mention of transactions between a claimant and a defendant." *Id.* ¶ 30 (internal quotation marks and citations omitted). Furthermore, it does not "require a misrepresentation *in the course of* a sale between [the] plaintiff and [the] defendant[.]" *Id.* Instead, "it merely requires that a misrepresentation be made *in connection with the sale* . . . of goods generally." *Id.* (internal quotation marks and citations omitted). The term "in connection with" is "designed to encompass a broad array of commercial relationships" that "[do] not suggest that a direct representation, by the defendant to the plaintiff, is a prerequisite." *Id.* ¶ 21. "[B]oth the plain language of the act and the underlying policies suggest that a commercial transaction between a claimant and a defendant need not be alleged in order to sustain a UPA claim."*Id.* ¶ 33. Indeed, the remedial purpose of the legislation as a consumer protection measure is consistent with this broadest possible application. *Id.* ¶ 21.

{14} Relying primarily on our decisions in *Santa Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A., Inc.* (hereinafter, *SFCS*), 2005-NMCA-051, ¶¶ 17-18, 137 N.M. 524, 113 P.3d 347 and *Hicks v. Eller*, 2012-NMCA-061, ¶ 20, 280 P.3d 304, Defendant argues that our law is clear that only buyers and not business competitors have standing to bring claims under the UPA. *SFCS* and *Hicks*, however, are factually distinguishable because they addressed standing in the limited context of disputes between buyers and sellers and did not require us to consider the role of business competitors in the context of the UPA and its policy of preventing "[u]nfair or deceptive trade practices . . . in the conduct of any trade or commerce[.]" Section 57-12-3.

{15} In *SFCS* we were asked to determine whether a company who supplied custom shutters and installation services to Home Depot could bring a claim under the UPA against Home Depot when Home Depot failed to market and sell the shutters as promised. 2005-NMCA-051, ¶¶ 3-7. Noting that the Legislature treats buyers and sellers differently under the provisions of the UPA, we held, that, "[c]onsistent with its purpose as consumer protection legislation, the UPA gives standing only to buyers of goods or services." Id. ¶¶ 14, 17 (citation omitted).

{16} Similarly, in *Hicks*, the seller of certain pieces of art brought a UPA claim against an art appraiser who purchased several paintings from the seller after the seller declined to retain the appraisers services to value the art. *Hicks*, 2012-NMCA-061, ¶¶ 4-9, 20. Emphasizing the UPA's purpose as a consumer protection statute, we stated that the UPA requires that "somewhere along the purchasing chain, the claimant did purchase an item that was at some point sold by the defendant[,]" and concluded that the seller of the art had no standing to bring a UPA claim against the appraiser who acted as a buyer of goods in the transaction. *Hicks*, 2012-NMCA-061, ¶ 20.

{17} Taking into consideration the plain language and legislative intent of the statute and our holding in *Lohman*, however, we conclude that the statements from *SFCS* and *Hicks* limiting standing to buyers of goods and services merely disqualifies the seller, as between a buyer and seller, from bringing suit rather than precludes "any person" whose claim raises consumer protection concerns or trade practices addressed to the market generally. Because neither case addressed business competitor standing under the UPA, neither case controls our analysis here.

{18} Further, courts in other jurisdictions have also used legislative intent paired with statutory interpretation principles, including the liberal construction of remedial statutes, to interpret statutory language authorizing "any person" to bring a state consumer protection claim. *See Eder Bros., Inc. v. Wine Merchs. of Conn., Inc.*, 880 A.2d 138, 149 (Conn. 2005) (holding that a business had standing to sue competitor in unfair practices suit, reasoning that the statute was remedial in character and must be liberally construed to provide protection to both businesses and consumers); *see also S. Serv. Corp. v. Excel Bldg. Servs., Inc.*, 617 F. Supp. 2d 1097, 1099-1100 (D.Nev. 2007) (construing Nevada law granting standing to "any person who is a victim" of consumer fraud and concluding business had standing to sue competitor for consumer fraud). Interpreting a consumer protection statute with language similar to the UPA's grant of standing to "any person" who suffers damages, the Illinois Court of Appeals held, "where the dispute involves two businesses who are not consumers, the proper test is . . . whether the alleged conduct involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns" and noted that the statute was aimed at redressing the injuries suffered when businesses deceive customers. *Downers Grove Volkswagen, Inc. v. Wigglesworth Imps., Inc.*, 546 N.E.2d 33, 40-41 (Ill. App. Ct. 1989).

{19} Similarly, in *John Labatt Ltd. v. Molson Breweries*, (Mem and Order) 853 F. Supp. 965, (E.D. Mich. 1994), the court considered whether a business competitor had standing to sue under the Michigan Consumer Protection Act, (MCPA) §§19.418(1) to -.418(22) (recompiled at Mich. Comp. Laws § 445.901 to -.922), which provided that "a *person* may bring an action." 853 F.Supp. at 967; *see* Mich. Comp. Laws Ann. § 445.911(A) (2018) (emphasis added); Mich. Comp. Laws Ann. § 445.902(d) (2018) (defining a "[p]erson" as "a natural person, corporation, limited liability company, trust, partnership, incorporated or unincorporated association, or other legal entity"). In holding that a business competitor was entitled to bring a claim, the *Labatt* Court concluded, "Allowing a competitor to bring suit under a statute designed ultimately to protect the interests of consumers is not a novel approach to enforcement[.]" *Labatt*, 853 F. Supp at 970. "[T]he intent of protecting consumers is well served by allowing suit to be brought by non-consumers who have a significant stake in the events." *Id.* "If competitor suits are not allowed,

[consumer protection statutes are] unlikely to be enforced except in those instances when the Attorney General chooses to pursue an action." *Id.*

{20} Because Plaintiff's claims offend neither the plain language nor the legislative intent of the UPA, we hold that a business competitor is among the persons allowed to bring an action pursuant to Section 57-12-10(B) if the conduct alleged involves consumer protection concerns or trade practices addressed to the market generally.

b. Unfair Competition Claims

{21} Defendant next contends that Plaintiff's claim fails because the UPA makes no mention of unfair competition practices. Plaintiff alleges in its complaint that Defendant's unfair competition practices consist of its knowingly making false and misleading statements when it sold its services to BNSF by failing to disclose that it lacked licenses required under CILA to perform the work that was the subject of the BNSF contracts, that Defendant was awarded BNSF contracts as a result of its intentional omissions regarding licensure, and that Plaintiff sustained business losses as a result of Defendant's conduct. Because trade practices prohibited by the UPA include representations that "fail[] to state a material fact if doing so deceives or tends to deceive[,]" Section 57-12-2(D)(14), we conclude that despite Section 57-12-2(D)'s silence regarding unfair competition practices, the language of the UPA defining unfair and deceptive trade practices is broad enough to encompass the wrongful conduct of which Plaintiff complains. *See Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶ 14, 356 P.3d 531 ("[T]he UPA imposes an affirmative duty to disclose material facts reasonably necessary to prevent any statements from being misleading." (internal quotation marks and citation omitted)). Indeed, while our Supreme Court has never decided the propriety of an unfair competition claim under the UPA, it has previously contemplated that such a claim might be brought under the Act. In *Page & Wirtz Const. Co. v. Solomon*, 1990-NMSC-063, ¶ 22, 110 N.M. 206, 794 P.2d 349, our Supreme Court opined in dicta that a competitor might be a proper party to bring suit for damages under the UPA:

> For example, relief under [Section 57-12-10(A) allowing "any person to obtain injunctive relief] might be had by one commercial enterprise from the deceptive advertising campaign of another. A competitor might complain that their company could suffer loss of market share and profits because the public might be deceived. . . . In contrast, recovery of damages [under Section 57-12-10(B)] . . . might be suffered either by a consumer of goods or services, *or the commercial competitor of an enterprise engaged in deceptive trade practices*.

Solomon, 1990-NMSC-063, ¶¶ 21-22 (emphasis added) (citations omitted).

{22} While not binding, we find it difficult to ignore our Supreme Court's acknowledgment that recovery of damages might be had by a business whose competitor engaged in deceptive trade practices. Taking this language into consideration along with our mandate to interpret the UPA broadly, we conclude that, notwithstanding the UPA's failure to mention unfair competition practices, the misrepresentations of which Plaintiff complains are among those contemplated by the UPA.

3. Plaintiff's Claim

{23} In light of our conclusion that a business competitor is among the class of persons entitled to bring a claim under Section 57-12-10(B) of the UPA, we now consider whether the conduct alleged in Plaintiff's complaint involves trade practices that either implicate consumer protection concerns or are addressed to the market generally. In addition to its allegations related to Defendant's failure to disclose to BNSF that it was not properly licensed, Plaintiff's complaint alleges that "[c]onstruction contracting services, including in particular railroad construction and repair, [are] inherently dangerous both for those who perform such services and the general public."

{24} New Mexico statutes, as well as the case law interpreting those statutes, make it clear that New Mexico recognizes a strong public policy against unlicensed contractors. *See Little v. Jacobs*, 2014-NMCA-105, ¶ 12, 336 P.3d 398 (acknowledging that the statute indicates "the [L]egislature casts a harsh eye on contracting without a license" and that caselaw "highlight[s] the [L]egislature's complete intolerance of unlicensed contractors" (internal quotation marks and citation omitted)); *Gamboa v. Urena*, 2004-NMCA-053, ¶ 14, 135 N.M. 515, 90 P.3d 534. CILA is reflective of this policy, as its purpose is to create "*a healthy, ordered market* in which *consumers may contract with competent, reliable construction contractors*[,]" to avoid "*exploitation of the public* by incompetent and unscrupulous contractors who are unable or unwilling to obtain a license[,]" as well as to prevent unlicensed contractors from profiting at the expense of the public. *Mascarenas v. Jaramillo*, 1991-NMSC-014, ¶ 14, 111 N.M. 410, 806 P.2d 59 (emphasis added); *see also* Section 60-13-1.1 (1989) ("The purpose fo the [CILA] is to promote the general welfare of the people of New Mexico by providing for the protection of life and property[.]"). The licensure requirements of CILA clearly implicate consumer protection concerns and trade practices addressed to the market generally such that a defendant who knowingly misrepresents its licensure in connection with the sale of goods and services is subject to claims from a competitor who is able to show that it suffered a loss of money or property as a result of the misrepresentation. Given the policy considerations associated with licensure under CILA and with unlicensed contractors in general, the conduct alleged in Plaintiff's complaint involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns. We conclude that Plaintiff's complaint is therefore sufficient to entitle it to standing under the UPA.

C. CILA Enforcement

{25} Defendant next argues that a violation of CILA and its potential for sanctions and monetary penalties preclude recovery under the UPA for the same violations. Consequently, Defendant contends, a UPA claim undermines CILA and threatens its application and enforcement. *See* Section 60-13-9(G) (2013) (authorizing CID to investigate, enforce, and institute legal action to accomplish the provisions set forth in CILA). Defendant argues that Plaintiff's UPA claim effectively usurps enforcement powers that were already statutorily assigned to CID under CILA, and to the attorney general under the UPA. *See* § 57-12-15 (1967).

{26} Initially, we note that Defendant has failed to point us to any authority that supports its argument that CILA regulatory enforcement is the only recourse available where a contractor performs unlicensed work. *See Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104 ("We will not search the record for facts, arguments, and rulings in order to support generalized arguments."). Further, to allow CILA enforcement to infringe upon claims under the UPA is contrary to New Mexico

policy favoring the resolution of consumer claims. *See Fiser*, 2008-NMSC-046, ¶¶ 9-10 (recognizing that UPA represents "[t]he fundamental New Mexico policy of providing consumers a mechanism for dispute resolution"). Absent authority providing for CILA's displacement of the provisions of the UPA, we will not interfere with the authority of either statute.

D. Motion to Dismiss

{**27**} Finally, Defendant seeks dismissal with prejudice of Plaintiff's UPA claim based on a failure to plead facts sufficient to meet all the required elements. Defendant did not, however, request such relief or present this issue in its application for interlocutory appeal. Defendant therefore has not satisfied the requirements of Rule 12-203, and although we recognize that our scope of review may extend beyond the question presented for interlocutory review, we decline to do so here. *See In re Begay*, 1988-NMCA-081, ¶ 20, 107 N.M. 810, 765 P.2d 1178 (declining to reach the issue where such a ruling "could only be hypothetical or speculative"). As an order denying a motion to dismiss alone is generally not appealable and does not tend to dispose of the merits of the action, we see little wisdom in proceeding to consider the merits of the order with regard to Plaintiff's UPA claim. *Cf. Pub. Serv. Co. of N.M. v. Wolf*, 1967-NMSC-170, ¶ 5, 78 N.M. 221, 430 P.2d 379 (acknowledging that the denial of motion to dismiss is not appealable because it is not a final judgment).

CONCLUSION

{**28**} We affirm the district court's denial of Defendant's motion to dismiss Plaintiff's UPA claim.

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

JULIE J. VARGAS, Judge

WE CONCUR:

J. MILES HANISEE, Judge

STEPHEN G. FRENCH, Judge

Certiorari Denied, October 11, 2018, No. S-1-SC-37232

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-065

No. A-1-CA-34545 (filed August 6, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
EUGENE CHACON,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Sheri A. Raphaelson, District Judge

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Opinion

Michael E. Vigil, Judge

{1} This case involves the constitutionality of a second strip search of Defendant Eugene Chacon in which correctional officials at the Santa Fe County Adult Detention Facility (SFCADF) discovered heroin on Defendant's person. We are required, as a matter of first impression, to determine the appropriate standard required to perform a second strip search of an inmate who has had no contact with anyone outside of the jail. We hold that such a search requires reasonable suspicion and that the strip search of Defendant was supported by reasonable suspicion. We therefore affirm.

I. BACKGROUND

{2} On the evening of June 5, 2013, Defendant was booked into SFCADF on charges that included trafficking a controlled substance. It is the facility's policy to perform a "visual examination of an individual's naked body for weapons, drugs or other contraband[,]" which we herein refer to as a "strip search," on all individuals arrested for certain charges, including drug trafficking charges. Pursuant to the policy, Defendant was strip searched during the booking process. Two officers took Defendant into the restroom where Defendant was required to remove his clothing one item at a time, lean over, and cough. During this search, the officers found a blue rubber glove, but the record does not indicate where the officers found the glove. Defendant was then taken to a booking intake cell, where he was kept until the next day.

{3} The following morning, June 6, 2013, Defendant was sent to an "orientation pod" called the Alpha 300 Pod, where he was to be kept until classified to an appropriate housing unit according to his status (i.e., threat level). The Alpha 300 Pod is a two-tiered unit with a large common room on the bottom floor. One wall of the pod has two floors of cells, with six cells on each floor. The odd numbered cells (301 through 311) are situated on the bottom floor, while the even numbered cells (302 through 312) are on the top floor. The cells all have doors with a narrow window running vertically in the middle of the door.

{4} On the morning of June 7, 2013, Lieutenant Charlie Valdez, a shift commander at SFCADF, received an anonymous tip that several inmates in the Alpha 300 Pod had drug paraphernalia. Between 7:12 a.m. and 8:48 a.m., several inmates in the Alpha 300 Pod were moving from their cells to the common area and to other inmates' cells, including 301, 303, 305, 307, and 311, where they would remain for a brief period of time. They would then briefly return to their own cells before repeating this process. On several occasions, an inmate from cell 301—the cell in which Defendant and another inmate were held—appeared to go inside cells 303 and 307, stay inside for a while, return to his room, and go back into one of those rooms. Officer Joseph Cross, the floor officer, noticed this activity and deemed it unusual and suspicious.

{5} The inmates' behavior combined with the anonymous tip prompted the correctional officers to enter the pod and direct the inmates to line up against a wall in the common area. Officer Cross entered cell 303 and discovered its two occupants, neither of whom were Defendant, to be in possession of drugs. Major Nelson Abeyta, the chief of security, noticed Officer Cross escorting inmates and entered the Alpha 300 Pod to assist him. Officer Cross informed Major Abeyta of what had just happened, and identified to Major Abeyta the inmates who were engaging in the unusual and suspicious behavior were in the area of cell 303 and should therefore be strip searched.

{6} Defendant was one of the inmates Officer Cross identified. Major Abeyta took Defendant into a mop closet for privacy and directed him to remove his clothes, lift his arms and tongue, lean over, hold his testicles, squat, spread his buttocks, and cough. When Defendant squatted and coughed, Major Abeyta spotted a string from Defendant's anal cavity. Major Abeyta told Defendant to either "give up" what he had or be sent to a dry cell (i.e., a cell with either no plumbing fixtures or plumbing fixtures that can be turned off. Defendant was compliant and pulled a "black tar[-]like rock" wrapped in plastic from his anal cavity and gave it to Major Abeyta. Testing confirmed that the plastic contained heroin.

{7} Charged with possession of a controlled substance (heroin), Defendant filed a motion to suppress the heroin seized from his body, asserting that the search violated the Fourth Amendment of the United States Constitution and Article II, Section 4 of the New Mexico Constitution. Following an evidentiary hearing in which the foregoing facts were presented, the district court denied Defendant's motion. The district court ruled that reasonable suspicion was the standard under which

the constitutionality of the search was to be measured and concluded that the evidence demonstrated that the search was supported by reasonable suspicion. Following a jury trial, Defendant was found guilty and appeals.

II. DISCUSSION

{8} Defendant does not contend that the first strip search was unconstitutional. *See Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 322-23 (2012) (upholding the constitutionality of a jail's policy requiring a strip search of every arrestee upon his/her admission to the jail).

{9} Defendant does, however, argue that the second strip search of his person was unconstitutional under the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. This argument requires us to first determine the standard for deciding the constitutional reasonableness of the strip search of a pretrial detainee who was strip searched upon booking, has remained in the sealed correctional facility environment without any contact external to the correctional facility, and is then subjected to a second strip search. This is a question of first impression in New Mexico.

A. The Constitutional Standard

{10} The Fourth Amendment guarantees the right to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. One of the most weighty considerations in determining constitutional reasonableness in the correctional facility context is internal security. *See Hudson v. Palmer*, 468 U.S. 517, 524 (1984) (concluding that, while correctional facilities are not beyond the reach of the Constitution, "imprisonment carries with it the circumscription or loss of many significant rights" made "necessary, as a practical matter, to accommodate a myriad of institutional needs and objectives of prison facilities, chief among which is internal security" (internal quotation marks and citations omitted)). However, incarcerated individuals do not forfeit all constitutional protections by reason of their confinement. *Turner v. Safley*, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."). Courts therefore recognize that prisoners have a limited Fourth Amendment right to bodily privacy. *See Bell v. Wolfish*, 441 U.S. 520, 558 (1979) (addressing visual body cavity searches of inmates and assuming "inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility"); *Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992) ("[W]e have little doubt that society is prepared to recognize as reasonable the retention of a limited right of bodily privacy even in the prison context.").

{11} Thus, while courts are necessarily deferential to correctional facility administrators in policies and practices they adopt that, in their judgment, are necessary "to preserve internal order and discipline and to maintain institutional security[,]" *Bell*, 441 U.S. at 547, courts remain responsible for protecting the constitutional rights of prisoners. *See Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974) (stating that federal courts will discharge their duty to protect constitutional rights when prison regulations or practices offend fundamental constitutional guarantees), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989).

{12} We therefore require, consistent with the Fourth Amendment, that searches and seizures of prisoners be reasonable under all the facts and circumstances in which they are performed. In making this determination, we engage in a "balance between the public and private interests at stake." *State v. Williams*, 2011-NMSC-026, ¶ 20, 149 N.M. 729, 255 P.3d 307.

{13} The public interests at stake are the necessity for maintaining the institutional security and preserving internal order and discipline of the correctional facility. *Bell*, 441 U.S. at 547. This necessarily includes detecting and deterring the possession of contraband such as drugs and weapons within the correctional facility. *Florence*, 566 U.S. at 328. That public interest justifies policies providing for strip searches at points of entry into detention facilities without any quantum of suspicion. *See id.* at 330 (holding that strip searches can be conducted on all new inmates upon admission to the detention facility); *Bell*, 441 U.S. at 558, 560 (holding that strip searches can be conducted on an inmate after every contact visit with someone from outside the facility); *Powell v. Barrett*, 541 F.3d 1298, 1300, 1314 (11th Cir. 2008) (interpreting the Supreme Court's decision in *Bell* to permit a strip search without reasonable suspicion when conducted during "the point-of-entry booking process before [the inmates] were placed into the general jail population"). The policies allowing the strip searches in these points-of-entry cases are justified on the basis that they are needed to prevent contraband from *entering* the correctional facilities. *See Florence*, 566 U.S. at 333-35 (explaining the purpose of the facility's policy was to prevent persons from introducing prohibited items into the facility); *Bell*, 441 U.S. at 559 (recognizing the facility's need to deter inmates from smuggling money, drugs, weapons, and other contraband into the facility by concealing them in the inmates' body cavities).

{14} While the need for a detention facility to deter and detect the introduction of contraband is at its peak at points of entry, that institutional need diminishes when a strip search takes place outside a point of entry. *See Arruda v. Fair*, 710 F.2d 886, 890 (1st Cir. 1983) (Maletz, J., concurring in part and dissenting in part). Searches within the correctional facility to discover the circulation of contraband, while certainly important, are not accompanied by the same circumstances that facilitate the smuggling of contraband into a facility. A correctional facility's institutional justification to conduct a second strip search is further reduced when it takes place shortly after a prior strip search and no contraband was discovered. *See, e.g.*, *N.G. v. Connecticut*, 382 F.3d 225, 234 (2nd Cir. 2004) (holding that a second strip search of a juvenile inmate to search for a missing pencil was unreasonable because the inmate had already been strip searched upon her initial admission to the facility); *Hodges v. Stanley*, 712 F.2d 34, 35-36 (2d Cir. 1983) (per curiam) (holding that a strip search of an inmate under continuous escort—conducted shortly after a prior strip search—was unnecessary and unconstitutional because there was no possibility that the inmate could have obtained and concealed contraband in the interim); *Green v. Martin*, 224 F. Supp. 3d 154, 164 (D. Conn. 2016) ("[W]hen two strip searches are conducted close in time and the inmate had no opportunity to obtain contraband after the first search, then the second strip search may be unreasonable and unconstitutional because the inmate lacked an opportunity to obtain contraband in the time in between the searches."); *Jean-Laurent v. Wilkerson*, 438 F. Supp. 2d 318, 321, 323 (S.D.N.Y. 2006) (holding that a second strip search of an inmate—conducted after the inmate was previously strip searched, handcuffed, and escorted to another location—was unreasonable).

{15} The foregoing public interests must be balanced against the private interests at stake. As we have already noted, inmates have a Fourth Amendment right to the

privacy of their bodies. Undoubtedly, and without question, strip searches invade and violate that privacy interest. Our own Supreme Court has declared that no matter how professionally and courteously a strip search is conducted, it is embarrassing, humiliating, and offensive to personal dignity. *State v. Garcia*, 1993-NMCA-105, ¶ 5, 116 N.M. 87, 860 P.2d 217. Regardless of whether a strip search is conducted at a point of entry or inside the secured area of a detention facility, they both invade an inmate's personal bodily privacy to an equal extent.

{16} In balancing the competing interests at stake, we agree with the district court that the appropriate standard for determining the constitutional reasonableness of the second strip search of Defendant is reasonable suspicion. At one extreme, courts may require probable cause as the appropriate standard. *See Commonwealth v. Thomas*, 708 N.E.2d 669, 673 (Mass. 1999) ("[W]e conclude that probable cause is the appropriate standard to apply to strip and visual body cavity searches."). However, our view is that, given the exigencies inherent in a detention facility's environment, such a threshold tilts the balance too far in favor of the privacy interest and is therefore "an unrealistically high standard of proof" for correctional officials to satisfy. *Arruda*, 710 F.2d at 890 (Maletz, J., concurring in part and dissenting in part). At the other extreme, requiring no quantum of suspicion gives correctional officials unlimited, unreviewable discretion to conduct inherently degrading body cavity searches of all inmates. This standard fails to take into account the privacy interests at stake. We agree that the middle ground, reasonable suspicion "is flexible enough to afford the full measure of [F]ourth [A]mendment protection without posing an insuperable barrier to the exercise of all search and seizure powers." *Williams*, 2011-NMSC-026, ¶ 13 (internal quotation marks and citation omitted). Such a standard reasonably accommodates correctional officials' security concerns as well as the privacy right of an inmate who has had no contact outside the jail and has already been subjected to a strip search.

{17} In balancing the public interests and private interests at stake, we hold that the second strip search of Defendant must be supported by a reasonable suspicion that Defendant had contraband on or in his body cavity. Defendant was subject to a full strip search upon being booked into the SFCADF, and no drugs or other contraband was found. Defendant was then placed in a booking cell where he remained until he was placed in an orientation pod with other inmates awaiting their housing classification. The institutional need to conduct a strip search was diminished at this point. Less than forty-eight hours later, and without having had any contact with anyone outside the orientation pod, Defendant was subjected to a second strip search. Requiring the SFCADF officers to have a reasonable suspicion that Defendant had contraband on or in his body cavity strikes a proper balance between Defendant's Fourth Amendment right to his body privacy, and the need of the SFCADF officers to maintain institutional security and preserve the internal order and discipline of the facility. We now turn to whether the second strip search of Defendant was supported by reasonable suspicion.

B. Reasonable Suspicion Analysis

{18} Reasonable suspicion exists "when the officer becomes aware of specific articulable facts that, judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." *State v. Martinez*, 2018-NMSC-007, ¶ 10, 410 P.3d 186 (internal quotation marks and citation omitted). "Unsupported intuition and inarticulate hunches are not sufficient." *State v. Garcia*, 2009-NMSC-046, ¶ 43, 147 N.M. 134, 217 P.3d 1032 (internal quotation marks and citation omitted). In determining whether there is reasonable suspicion for a search, we assess the totality of the circumstances instead of looking at each individual factor in a vacuum on its own. *State v. Neal*, 2007-NMSC-043, ¶ 28, 142 N.M. 176, 164 P.3d 57.

{19} Our review of the district court's ruling on the motion to suppress presents a mixed question of fact and law. *Martinez*, 2018-NMSC-007, ¶ 8. First, in our review of the facts, "we defer to the district court's findings of fact if substantial evidence exists to support those findings and view the facts in the manner most favorable to the prevailing party." *Id.* ¶ 12 (internal quotation marks and citation omitted). In this regard, when the evidence is conflicting, we indulge in all reasonable presumptions in favor of the district court's ruling, disregarding all evidence and inferences to the contrary, and when evidence is uncontradicted, we presume the district court believed the uncontradicted evidence, unless it indicates to the contrary on the record. *State v. Jason L.*, 2000-NMSC-018, ¶¶ 10-11, 129 N.M. 119, 2 P.3d 856. Secondly, we review the district court's application of the law to those facts de novo to determine whether the search or seizure was constitutionally reasonable. *Martinez*, 2018-NMSC-007, ¶ 8.

{20} We conclude that under our standard of review, the evidence supports the district court's conclusion that the second strip search of Defendant was supported by reasonable suspicion. Defendant was booked into SFCADF on charges of trafficking a controlled substance and strip searched. Defendant was then held in a booking intake cell until the next morning, when he was transferred to the orientation pod. That morning, the shift commander received an anonymous tip that inmates in the orientation pod where Defendant was housed had drugs. The floor officer in the orientation pod also observed the inmates engaging in what was described as unusual and suspicious behavior and congregating, and it was decided to search one of the cells in which inmates were seen entering and leaving. That search resulted in the discovery that its occupants were in possession of drugs, which corroborated the anonymous tip. These facts and inferences viewed in the light most favorable to the district court's ruling establish a constitutionally sufficient reasonable suspicion to support the second strip search of Defendant. *See Hudson*, 468 U.S. at 526 (holding that the Fourth Amendment does not apply to the search of a prisoner's cell); *Wood v. Clemons*, 89 F.3d 922, 929 (1st Cir. 1996) ("Although an anonymous tip, standing alone, may typically fail to create reasonable suspicion, an anonymous tip that is corroborated in some measure by actual facts or by other sources may be enough.").

{21} Defendant's remaining arguments were either not preserved or were undeveloped, and we decline to address them.

III. CONCLUSION

{22} The order of the district court denying Defendant's motion to suppress is affirmed.

MICHAEL E. VIGIL, Judge

WE CONCUR:
M. MONICA ZAMORA, Judge
J. MILES HANISEE, Judge

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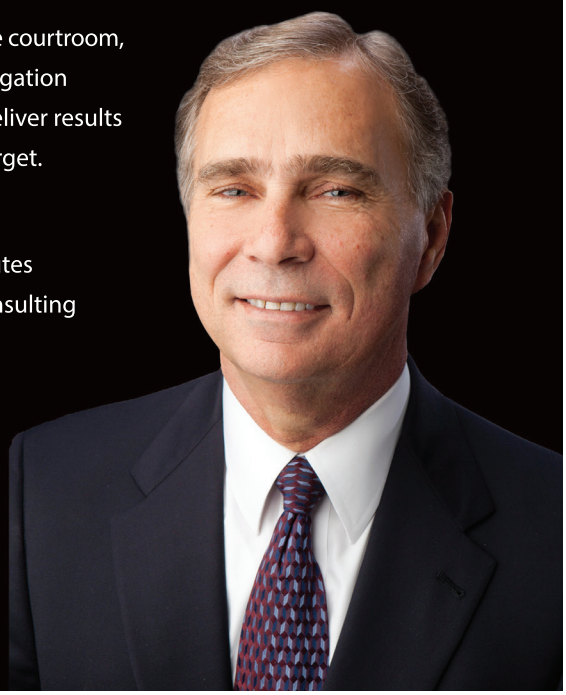

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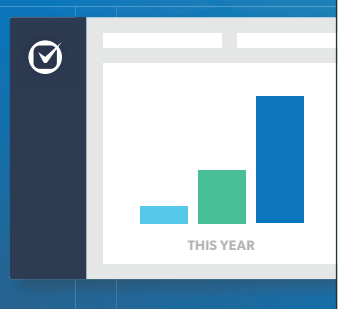

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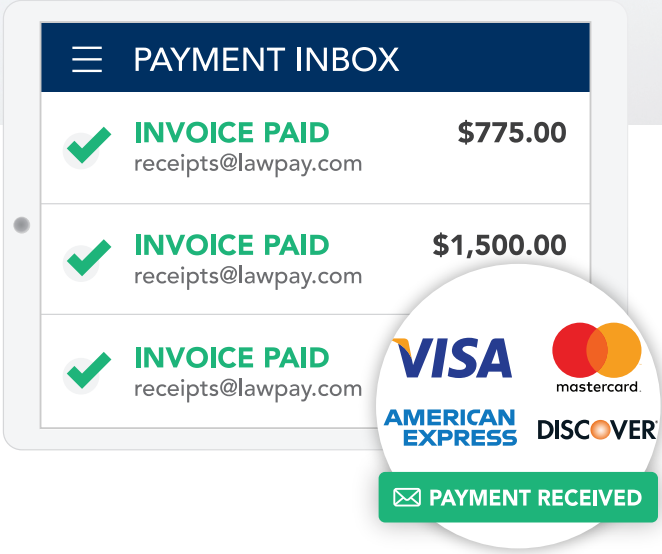

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