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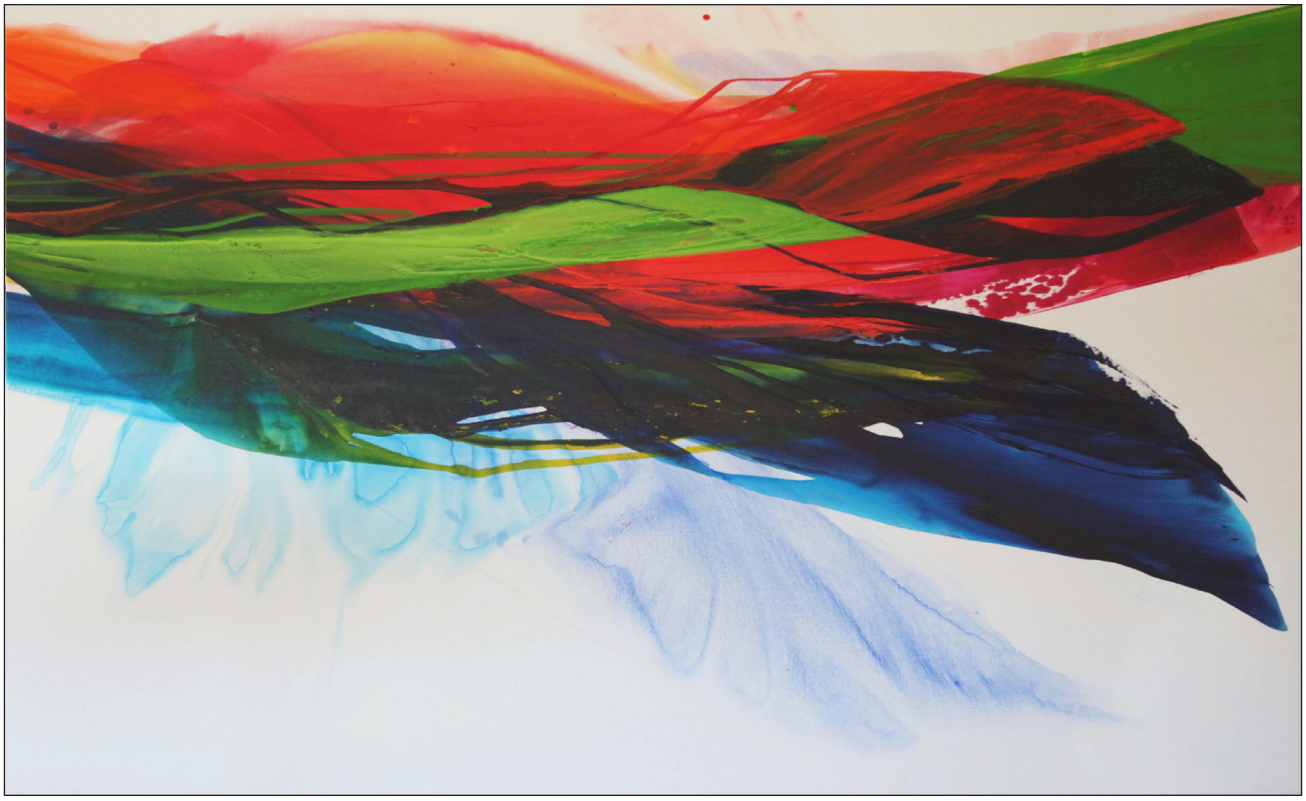

Au Revoir Mon Ami, by Bette Ridgeway (see page 3)

Ridgewaystudio.com

Inside This Issue

CLE Planner

Upcoming programming from the
Center for Legal Education

Modrall Sperling Announces New Attorneys

Lance Hough
Associate

Lance practices in tort, product liability, and class actions at the trial and appellate levels. He represents public and private entities in matters such as environmental remediation, land use, and business disputes.

Chris Killion
Shareholder

Chris' practice involves issuing drilling, division order, and acquisition title opinions for oil and gas clients in New Mexico and Texas, including those with development projects in the Permian and San Juan Basins.

Carl Lisberger
Associate

Carl's practice focuses on real estate and business transactions. He assists renewable energy developers and a variety of public and private entities in real estate and corporate matters.

Moses Winston
Associate

Moses provides counsel on healthcare, tort, and employment matters to business and governmental clients. Prior to joining the firm, he served as General Counsel for the State Personnel Office.

Problem Solving. Game Changing.

Modrall Sperling

Lawyers

www.modrall.com

Albuquerque **Santa Fe**

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About Cover Image and Artist: In her four decade career Bette Ridgeway has exhibited her work globally with more than 80 museums, universities and galleries, including Palais Royale, Paris and Embassy of Madagascar. Multiple prestigious awards include Top 60 Contemporary Masters, Leonardo DaVinci Prize and Oxford University Alumni Prize at Chianciano Art Museum, Tuscany, Italy. Mayo Clinic and Federal Reserve Bank are amongst Ridgeway's permanent public placements, in addition to countless important private collections. Many books and publications have featured her work, among them: *International Contemporary Masters* and *100 Famous Contemporary Artists*. Ridgeway has also penned several books about her art and process. Ridgewaystudio.com

Notices

Court News

New Mexico Supreme Court

New Mexico Commission on Access to Justice Meeting

The next meeting of the Commission is from 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. 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 accesstojustice.nmcourts.gov.

New Mexico Court of Appeals

Announcement of Vacancy

Due to the Nov. 6 elections, one vacancy on the New Mexico Court of Appeals Court will exist as of Jan. 1, 2019, to fill the seat of Judge Michael E. Vigil. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the court. Sergio Pareja, chair of the Appellate 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, or emailed to you by contacting the judicial selection office at 505-277-4700. The deadline for applications has been set for Dec. 18, at 5 p.m. 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 Appellate Court Judicial Nominating Commission will meet on Jan. 11, 2019, to interview applicants for the position at the Supreme Court Building, 237 Don Gaspar Avenue in Santa Fe. 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.

Professionalism Tip

With respect to parties, lawyers, jurors, and witnesses:

I will be courteous, respectful and civil to parties, lawyers, jurors and witnesses. I will maintain control in the courtroom to ensure that all proceedings are conducted in a civil manner.

First Judicial District Court

Notice of Mass Reassignment

Effective Dec. 17, a mass reassignment of all Division IX family court cases previously assigned to Judge Matthew J. Wilson will occur pursuant to NMSC Rule 23-109, the chief judge rule. The cases will be reassigned to the Hon. Maria Sanchez-Gagne, who has been elected to Division II of the First Judicial District, and who will maintain a family court docket. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Dec. 17 to challenge or excuse Judge Maria Sanchez-Gagne pursuant to Rule 1-088.1.

Effective Dec. 17, a mass reassignment of all Division II cases previously assigned to Judge Gregory S. Shaffer will occur pursuant to NMSC Rule 23-109, the chief judge rule. The cases will be reassigned to the Hon. Matthew J. Wilson who will now maintain a Civil Docket in Division IX of the First Judicial District. Parties who have not previously exercised their right to challenge or excuse will have ten days from Dec. 17 to challenge or excuse Judge Matthew J. Wilson pursuant to Rule 1-088.1.

Notice to Family Law Attorneys

The First Judicial District Court will hold open-court sessions to review and approve marital settlement agreements and to enter final decrees during the month of December due to the request by parties and attorneys to finalize pending divorce actions before Jan. 1, 2019. Judge LaMar and Judge Sanchez-Gagne's courts will be open from 8:30-9:30 a.m. to review documents on the following dates: Dec. 20, 21, 24, 26, 27, 28 and 31, 2018. If there is a snow delay, the court will be available from 10:30-11:30 a.m. on the same dates.

Second Judicial District Court

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 through 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.-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.

Notice to Attorneys

Pursuant to the Constitution of the State of N.M., Judge Benjamin Chavez, Division XIX, will be transferring from the Criminal Court to the Civil Court. Effective Jan. 2, 2019, Judge Chavez will be assigned cases previously assigned to Judge Alan Malott, Division XV. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have 10 days from Dec. 26, to excuse Judge Benjamin Chavez.

Retirement Reception for Chief Judge Nan G. Nash

Join the Second Judicial District Court at 2-4 p.m., on Dec. 21, for a retirement reception honoring Chief Judge Nan G. Nash at the Bernalillo County Metropolitan Court, 400 Lomas Blvd. NW. For more information contact Kevin Ybarra at 505-841-7425.

Third Judicial District Court

Mass Reassignment

Effective Dec. 28, a mass reassignment of all Division VIII cases previously assigned to Judge Jeanne H. Quintero will occur pursuant to NMSC Rule 23-109 Judge Grace B. Duran has been elected to fill the vacancy in Division VIII. Parties who have not previously exercised their right to challenge or excuse will have ten days from Dec.28, to challenge or excuse Judge Grace Duran pursuant to Rule 1-088.1.

Destruction of Exhibits

Pursuant to 1.21.2.617 NMAC (New Mexico Administrative Code), the Third Judicial District Court will destroy exhibits filed with the Court in Civil (CV), Domestic (DM), Criminal (CR), and Probate (PB) cases for the years of 1980-2017, 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.26-Dec. 31. Should you have cases with exhibits, verify exhibit information with the Clerk's Office at 523-8200 from 8 a.m.-4 p.m., Mon.-Fri. Plaintiff/Petitioner's exhibits will be released to counsel for the plaintiff(s)/petitioner(s) and defendant/respondent's exhibits will be released to counsel ofrecord for defendants(s)/respondent(s). All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

Tenth Judicial District Court

Destruction of Exhibits

Exhibits in criminal cases for years 2005-2015 may be retrieved on Jan. 25, 2019. For more information contact Tenth Judicial District Court of County of Quay at 575-461-2764.

Bernalillo County Metropolitan Court

Announcement of Vacancy

Due to the Nov. 6 elections, two vacancies on the Bernalillo County Metropolitan Court will exist as of Jan. 1, 2019, to fill the seats of Judge Kenny Montoya and Judge Edward Benavidez. Inquiries regarding the details or assignment of these judicial vacancies 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, or emailed to you by contacting the Judicial Selection Office at 505-277-4700. The deadline for applications has been set for Dec. 13, by 5 p.m. 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 positions at the Metropolitan Courthouse, located at 401 Lomas NE, Albuquerque, New Mexico. 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.

Court Closure Notice

The Bernalillo County Metropolitan Court will be closing its doors briefly from 11 a.m.-1:30 p.m. on Dec. 14, for the court's annual holiday lunch. The outdoor bonding window will remain open for the posting of bonds and to accept any urgent filings.

Retirement Reception for Hon. Sharon D. Walton

Join the Bernalillo County Metropolitan Court on Dec. 18, at 3 p.m. for a retirement reception honoring Judge Sharon D. Walton. The reception will take place in Bernalillo County Metropolitan Court's second floor Jury Assembly Room.

U.S. Courts Library

Library Holiday Open House

The U.S. Courts Library will host a holiday open house on Dec. 13. U.S. Court Library encourages all State and Federal Bar members to stop by between 10 a.m.-5 p.m. to meet the staff, enjoy some cookies and punch, peruse newly relocated and renovated collection and discover how the U.S.Court Library can become part of members legal research team. Members will find the U.S. Court Library on the third floor of the Pete V. Domenici U.S. Courthouse at the northeast corner of Fourth St. and Lomas Blvd. in downtown Albuquerque. The U.S. Court Library usual hours of operation are 8 a.m.-noon, and 1-5 p.m., Mon-Fri. For more information call 505-348-2135.

State Bar News

Center for Legal Education

Business of Law Practice Management Survey

The State Bar and the State Bar Foundation's Center for Legal Education are planning a seminar for the fall of 2019 that will address the business needs of its members engaged in a small firm or solo practice. To help us determine what issues are most important, we have developed a survey geared at members currently practicing in a small firm or solo setting, or thinking about transitioning into a small firm or solo practice. The survey will be open until Dec. 14. Visit https://www.surveymonkey.com/r/9R78PJH to take the survey.

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

- 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#.
- Dec 17. 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#.
- Jan. 7, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group normally meets the first Monday of the month.)

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

Solo and Small Firm Section

Annual Meeting/Social Gathering

The Solo and Small Firm Section will host its annual meeting/social gathering at 4-7 p.m. on Dec 6., at Seasons 52 restuarant located on 6600 Menaul Blvd NE.

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

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.

Other Bars

Alaska Bar Association

CLE by the Sea in Honolulu, Hawaii

Join Alaska Bar Association members along with 16 other bar association members as they attend continuing legal education programs, network at optional excursions, and enjoy the warm weather at a beautiful location. The 2019 CLE by the Sea is scheduled for Feb. 10-15, 2019, at the Prince Waikiki – Honolulu Luxury Hotel. This program is accredited for 12 total CLE credits (4.0 G, 8.0 EP) by New Mexico Minimum Continuing Legal Education. For more information, call 907-272-7469 or email Mary DeSpain, CLE director at mary@alaskabar.org, or visit https://alaskabar.org/cle-mcle/cle-by-the-sea/.

New Mexico Criminal Defense Lawyers Association

Upcoming CLE

Learn the ethics of non-client communications. This CLE is open to civil and criminal defense attorneys. Diego Esquibel and Cori Harbour-Valdez will host a roundtable discussion on sharing information about cases with people who are not clients. This CLE by New Mexico Criminal Defense Lawyers Association yields 2.0 EP professionalism credits perfect for both criminal defense and civil attorneys, on Dec. 14 in Las Cruces. Plus: a special statewide CLE Webinar on Dec. 18, "The Basics of Trust Accounting," will present Rule 17-204 NMRA and how to comply with it. 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.

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.

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.

Legal Education

December

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

7 **Clear and Effective Communications with Clients, Colleagues and Staff**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

7 **Annual Civil Rights Seminar**
5.25 G
Live Seminar, Albuquerque
New Mexico Defense Lawyers Association
www.nmdla.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
Center for Legal Education of NMSBF
www.nmbar.org

11 **Guarantees in Real Estate Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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
gguzman.uwc@gmail.com

14 **Last Chance: Best of the Best Seminar**
3.2 G, 2.0 EP
Live Seminar, Albuquerque, Santa Fe
New Mexico Trial Lawyers Foundation
www.nmtla.org

17 **Trust and Estate Planning for Pets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Practice Management Skills for Success**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **Rights of First Offer, First Refusal in Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **2018 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **Pretrial Practice in Federal Court**
2.5 G, 0.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethical Puzzles: The Wrongful Death Act, Negligent Settlement Claims, and the Search for the Silver Bullets**
3.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Recent Developments in Civil Procedure**
2.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Gain the Edge!® Negotiation Strategies for Lawyers**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Ethics, Satisfied Clients & Successful Representations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Recent Developments in New Mexico Natural Resource Law**
5.2 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Bad Review? Bad Response? Bad Idea! –Ethically Managing Your Online Reputation**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Me Too: Sexism, Bias, and Sexual Misconduct in the Legal Profession**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

26 **What Drug Dealers and Celebrities Teach Lawyers about Professional Responsibility**
3.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **The Fear Factor: How Good Lawyers Get Into Ethical Trouble**
3.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Find it Fast and Free (and Ethically) with Google, Fastcase 7, and Social Media Sites**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **How to Practice Series: Demystifying Civil Litigation Pt 1 (2018)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Fall Elder Law Institute: Navigating Changes to the Adult Guardianship and Conservatorship Statutes and Rules (2018)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Immigration Law: U-Visa Training (2018)**
1.0 G, 0.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Immigration Law: Assisting Human Trafficking Survivors (2018)**
1.0 G, 0.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

28 **Moving Your Practice Into the Cloud-Benefits, Drawbacks and Ethical Issues**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

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

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

Effective November 23, 2018

PUBLISHED OPINIONS

A-1-CA-35785	D Gallegos v. C Vernier	Affirm/Reverse/Remand	11/19/2018
A-1-CA-35562	State v. J Salazar	Affirm	11/20/2018

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A-1-CA-35687	A Rivas v. M Rivas	Affirm/Remand	11/19/2018
A-1-CA-37338	J Torres v. Hudspeth Associates	Affirm	11/19/2018
A-1-CA-37356	State v. D Morgan	Affirm	11/19/2018
A-1-CA-36009	G Martinez v. P Martinez Trust	Affirm	11/20/2018
A-1-CA-36159	State v. D Benson	Affirm	11/20/2018
A-1-CA-37244	CYFD v. Andrew R.	Affirm	11/20/2018
A-1-CA-37249	City of Roswell v. D Warner	Reverse/Remand	11/20/2018
A-1-CA-35349	State v. S Casaus	Affirm/Remand	11/21/2018
A-1-CA-37421	CYFD v. Charlene V	Affirm	11/21/2018

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

Joey D. Moya, Chief Clerk New Mexico Supreme Court
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CLERK'S CERTIFICATE OF ADDRESS AND/OR TELEPHONE CHANGES

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective December 5, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

There are no proposed rule changes open for comment.

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 29, 2018, No. S-1-SC-37184

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-067

No. A-1-CA-35355 (filed August 2, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ERNEST BRYAN BARELA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Marci E. Beyer, District Judge

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for Appellant

Opinion

Michael E. Vigil, Judge

{1} Defendant Ernest Bryan Barela appeals the district court's denial of his motion to proceed pro se, made after years of delay and on the morning trial was set to begin, and raises a claim of ineffective assistance of counsel. We affirm.

I. BACKGROUND

{2} Defendant was charged with residential burglary, unlawful taking of a motor vehicle, stalking, larceny, and escape or attempt to escape from a peace officer on June 21, 2012. Defendant's charges stemmed from an event on May 22, 2012, involving Defendant's ex-girlfriend, E. Ramirez. Defendant and Ms. Ramirez had been involved in a two-year relationship and had a child together in March 2012. However, Ms. Ramirez ended their relationship in early May 2012.

{3} Ms. Ramirez testified during Defendant's trial that, on May 22, 2012, as she went inside her mother's house—a mobile home with an attached garage—and attempted to close the door behind her, Defendant pulled the door from the outside and tried to open it. Defendant asked Ms. Ramirez to open the door so they could talk. Ms. Ramirez told him to leave or she was going to call 911. However, Defendant persisted and said he wanted to see their child. Ms. Ramirez refused to open the door but told Defendant that he could see their child through the glass.

{4} Ms. Ramirez testified that Defendant then pulled a pocket knife and threatened to cut his own throat. Ms. Ramirez still would not open the door and told Defendant that she would call his father to give him a ride home. After Defendant threatened to beat her up, Ms. Ramirez hid inside her mother's garage and called 911. Ms. Ramirez stayed inside the garage and heard Defendant trying to open the door to the garage. Shortly thereafter, Deputy Sheriff Paul Telles arrived at the house but was unable to find anyone else inside. Ms. Ramirez then left the garage and noticed that her purse, wherein she kept her car keys and credit cards, and vehicle were missing.

{5} On June 6, 2012, Deputy Telles went to Defendant's home to serve an arrest warrant on Defendant. While there, Deputy Telles spoke with Defendant's father who informed Deputy Telles that he had no contact with Defendant. After receiving permission from Defendant's father, Deputy Telles searched the home to ensure Defendant was not inside. Deputy Telles found Defendant hiding inside one of the kitchen's cabinets and placed him under arrest.

{6} Following his arraignment on July 2, 2012, Defendant requested a new attorney on three separate occasions. On January 9, 2013, Defendant requested a new attorney one day before trial was scheduled to begin. On March 17, 2014, he requested a new attorney two days before trial was scheduled to begin. On February 13, 2015, Defendant requested a new attorney the day he was scheduled to attend a pre-trial conference in district court. On all three occasions, the district court granted Defendant's request, allowed defense counsel to withdraw, gave Defendant more time to retain new representation, and gave new defense counsel more time to prepare for trial. Defendant's actions caused his case to be delayed for over three years from the date of his arrest. By the third request, the new judge assigned to Defendant's case explicitly told Defendant that he was causing his case to be delayed.

{7} During a hearing on March 2, 2015, Defendant appeared without an attorney and without having applied to the public defender's office, despite the district court's order to do so for a fourth public defender. After the district court informed Defendant that a private attorney with whom he had spoken would not be representing him and that he would need to hire a public defender, Defendant asked, "And I can't represent myself? That's what you're saying?" Defendant agreed to go to the public defender's office despite his desire to have the private attorney represent him. Robert Turner, a contract attorney for the public defender's office, entered his appearance as Defendant's new counsel. The district court scheduled Defendant's trial for August 10, 2015.

{8} During a pre-trial hearing on August 6, 2015, at which Defendant failed to appear, Mr. Turner notified the district court that he needed to briefly interview two officers prior to trial and could do it the morning of trial because he had already prepared based on their reports. Mr. Turner notified the district court in advance that he would have an associate in his office work on the case and that his associate did not need to interview Ms. Ramirez.

{9} On the morning of trial, Mr. Turner's associate, August Rane, appeared with Defendant. Defendant requested to represent himself, stating that he and Mr.

Turner had spoken a great deal already and that Mr. Rane had not spoken with him before the day of trial, had not interviewed the witnesses in the case, and did not know the facts that Mr. Turner knew. However, Mr. Rane informed the district court that he had discussed the case with Mr. Turner, read all of the interviews, prepared the case, and would need only a few minutes to interview one officer. The district court inquired into Defendant's competence and basis for such a request, and informed him of the potential pitfalls of self-representation, the nature of the charges, and possible penalties associated with each offense. The district court then asked Defendant if he was ready to proceed to trial that morning. Defendant responded that he was not ready, at which point the district court denied Defendant's motion for self-representation. The district court stated the untimeliness of Defendant's motion and his lack of preparation as some of the reasons it was denying his motion. The district court then permitted Mr. Rane some time to interview an officer.

{10} The parties proceeded to trial with Mr. Rane representing Defendant. The jury returned a verdict of guilty of stalking and escape or attempted escape from a peace officer, but acquitted him of all other charges.

II. DISCUSSION

{11} Defendant now asks this Court to reverse his convictions and remand for a new trial based on both the district court's denial of his motion for self-representation and his claim of ineffective assistance of counsel.

A. Right to Self-Representation

{12} Defendants have a constitutional right to self-representation. *Faretta v. California*, 422 U.S. 806, 819 (1975); *State v. Garcia*, 2011-NMSC-003, ¶ 24, 149 N.M. 185, 246 P.3d 1057. To proceed pro se, a defendant must (1) "clearly and unequivocally" assert his intention to represent himself, (2) make his assertion in a timely fashion, and (3) "knowingly and intelligently" waive his right to counsel. *Garcia*, 2011-NMSC-003, ¶ 25. However, a defendant may not invoke his right to self-representation "to cause delay or thwart the orderly and fair administration of justice." *Id.* (internal quotation marks and citation omitted). The district court is free to reject a motion for self-representation on any of these independent grounds. *Id.* ¶ 30. We review de novo whether a defendant made a valid knowing, intelligent, and voluntary waiver of his constitutional right to counsel. *State v. Reyes*, 2005-NMCA-080, ¶ 6, 137 N.M. 727, 114 P.3d 407. We review for clear error the factual findings underlying the district court's decision to deny a defendant's motion for self-representation. *United States v. Simpson*, 845 F.3d 1039, 1046 (10th Cir. 2017).

{13} Defendant did not clearly and unequivocally assert his intention to represent himself on March 2, 2015. The requirement that a defendant clearly and unequivocally assert his intent to represent himself is "necessary to protect against an inadvertent waiver of the right to counsel by a defendant's occasional musings on the benefits of self-representation." *United States v. Mackovich*, 209 F.3d 1227, 1236 (10th Cir. 2000) (internal quotation marks and citation omitted). "[W]e indulge in every reasonable presumption against waiver[,]" *Simpson*, 845 F.3d at 1046 (internal quotation marks and citations omitted), and "must ascribe a 'constitutional primacy' to the right to counsel" during "ambiguous situations created by a defendant's vacillation," *Mackovich*, 209 F.3d at 1237 (internal quotation marks and citations omitted). Moreover, the district court is not required to clarify an equivocal request. *See Simpson*, 845 F.3d at 1051 ("[W]e have never required a district court to clarify an equivocal request."); *Duncan v. Schwartz*, 337 F. App'x 587, 593 (7th Cir. 2009) ("*Faretta* does not require a more searching inquiry whenever a defendant makes ambiguous, equivocal statements that could potentially be construed as indicating a desire for self-representation."). Defendant's brief inquiry into his right to represent himself did not amount to a clear, unequivocal assertion of that right, especially given his stated intent of retaining private counsel.

{14} The district court did not err in finding that Defendant's August 10, 2015, motion to represent himself was untimely. When a clear, unequivocal request for self-representation is made in advance of trial, the defendant is "presumptively entitled to the right." *Garcia*, 2011-NMSC-003, ¶ 26. However, that presumption can be overcome where a defendant's motion is used as a tactic to secure delay. *See United States v. Tucker*, 451 F.3d 1176, 1181 (10th Cir. 2006) ("[A] motion for self-representation is timely if it is made before the jury is impaneled, unless it is a tactic to secure delay."); *Avila v. Roe*, 298 F.3d 750, 753 (9th Cir. 2002) ("[A] *Faretta* request is timely if made before jury impanelment, unless it is shown to be a tactic to secure delay." (internal quotation marks and citations omitted)); *Chapman v. United States*, 553 F.2d 886, 887 (5th Cir. 1977) ("We hold that a demand for self-representation must be honored as timely if made before the jury is selected, absent an affirmative showing that it was a tactic to secure delay."). "A court may consider events preceding a motion for self-representation to determine whether the request is made in good faith or merely for delay." *United States v. George*, 56 F.3d 1078, 1084 (9th Cir. 1995).

{15} Here, the record supports the district court's finding that Defendant's motion was untimely. Defendant made repeated requests for a new attorney and was granted several continuances for his trial. Based on Defendant's three prior requests for new counsel, his repeated continuances resulting in a three-year delay, the timing of his pro se motion, and the probable need for a continuance because of his unpreparedness, the district court did not err in its decision to deny Defendant's motion. *See Marshall v. Taylor*, 395 F.3d 1058, 1061-62 (9th Cir. 2005) (holding that a defendant's motion to represent himself was untimely when made the day trial was set to commence, after several continuances of his trial, and with no facts to show that his last-minute request was reasonable); *United States v. Gipson*, 693 F.2d 109, 112 (10th Cir. 1982) (holding that a defendant's request that his attorney be dismissed, made on the morning of his trial, coupled with his previous rejection of four different public defenders without any credible explanation, were suggestive of "a pattern of delaying tactics"), *overruled on other grounds by United States v. Allen*, 895 F.2d 1577, 1580 (10th Cir. 1990); *People v. Windham*, 560 P.2d 1187, 1191 n.5 (Cal. 1977) (in bank) ("We intend only that a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice. For example, a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and requests a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of the request.")

{16} Defendant argues that the New Mexico Constitution grants greater protection for a defendant's right to self-representation. Defendant has not satisfied his burden to seek greater protection under the New Mexico Constitution than is provided under the Sixth Amendment of the United States

Constitution. When a state constitutional right has not already been interpreted more expansively than its federal counterpart, a defendant "must assert in the trial court that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart and provide reasons for interpreting the state provision differently from the federal provision." *State v. Gomez*, 1997-NMSC-006, ¶ 23, 122 N.M. 777, 932 P.2d 1 (emphasis omitted). Defendants do have a right to self-representation under the New Mexico Constitution. *See* N.M. Const. art. II, § 14 ("In all criminal prosecutions, the accused shall have the right to appear and defend himself in person[.]"); *Garcia*, 2011-NMSC-003, ¶ 24. New Mexico's courts have not interpreted this right more expansively than its federal counterpart. Defendant argues on appeal that New Mexico's historical emphasis on self-reliance and independence, as well as the explicit grant of a defendant's right to self-representation, indicate a greater protection under the state constitutional provision. However, the record does not indicate that Defendant argued for greater protections under Article II, Section 14 of the New Mexico Constitution in the district court. We therefore do not address this argument.

B. Ineffective Assistance of Counsel

{17} "Criminal defendants are entitled to reasonably effective assistance of counsel." *State v. Crocco*, 2014-NMSC-016, ¶ 12, 327 P.3d 1068 (internal quotation marks and citation omitted). To establish a prima facie case of ineffective assistance, a defendant must first "show that counsel's performance fell below that of a reasonably competent attorney[.]" *State v. Hester*, 1999-NMSC-020, ¶ 9, 127 N.M. 218, 979 P.2d 729. Second, a defendant must show that counsel's deficient performance prejudiced the defense "such that there was a reasonable probability that the outcome of the trial would have been different." *State v. Hobbs*, 2016-NMCA-006, ¶ 21, 363 P.3d 1259 (internal quotation marks and citation omitted). Our Supreme Court has expressed a preference for bringing ineffective assistance claims through habeas corpus proceedings, rather than on direct appeal. *State v. Schoonmaker*, 2008-NMSC-010, ¶ 31, 143 N.M. 373, 176 P.3d 1105, *overruled on other grounds by State v. Consaul*, 2014-NMSC-030, ¶ 38, 332 P.3d 850. "If facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition, although an appellate court may remand a case for an evidentiary hearing if the defendant makes a prima facie case of ineffective assistance." *State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61. "We review the legal issues involved with claims of ineffective assistance of counsel de novo and defer to the findings of fact of the district court if substantial evidence supports the court's findings." *Hobbs*, 2016-NMCA-006, ¶ 18 (alterations, omissions, internal quotation marks, and citation omitted). Defendant cites four different perceived errors by counsel to support his claim of ineffective assistance. We address each in turn.

{18} Defendant first asks this Court to take judicial notice of its February 16, 2017, order, sanctioning Mr. Turner for not filing an acceptable docketing statement. However, Defendant has failed to show how Mr. Turner's performance on appeal impacted the outcome of his trial.

{19} Defendant next asserts that Mr. Turner was ineffective, and Defendant was therefore prejudiced, in failing to file a motion for self-representation on behalf of Defendant after learning of his intention to proceed pro se. However, we have no basis in the record to conclude that Mr. Turner knew of Defendant's intention to proceed pro se. *See State v. Hall*, 2013-NMSC-001, ¶ 28, 294 P.3d 1235 ("The mere assertions and arguments of counsel are not evidence." (internal quotation marks and citation omitted)); *State v. Jim*, 2014-NMCA-089, ¶ 29, 332 P.3d 870 ("While we are willing to review matters of record for prima facie evidence of ineffective assistance of counsel, we will not afford the same benefit to arguments based on matters outside the trial record." (internal quotation marks and citation omitted)). Defendant has also failed to show that the outcome of the trial would have been different had Mr. Turner filed such a motion on Defendant's behalf, especially in light of the jury's acquittal of three of the five charges. *See McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (recognizing that, when exercised, the right to self-representation "usually increases the likelihood of a trial outcome unfavorable to the defendant"); *State v. Wittgenstein*, 1995-NMCA-010, ¶ 7, 119 N.M. 565, 893 P.2d 461 (noting that the defendant's failure to establish prejudice in her ineffective assistance claim is supported by the jury's acquittal of four of the defendant's seven charges).

{20} Defendant also asserts that Mr. Rane was ineffective in failing to speak with Defendant before the day of trial. Counsel has a duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Mr. Rane was substitute counsel for Mr. Turner from within Mr. Turner's office. As Defendant conceded, Mr. Turner was aware of the facts of his case and Mr. Turner had maintained a good level of communication with Defendant. Absent a showing of prejudice, Defendant cannot rest his claim of ineffective assistance solely on Mr. Rane's entry as a substituted counsel. *Cf. Nettleton v. State*, 320 A.2d 743, 745 (Del. 1974) ("[A] last minute transfer of the case from one Assistant Public Defender to another, without more, is not sufficient ground for a finding of ineffective assistance of counsel. The case was not transferred from one 'law office' to another. Presumably, the file of the case was complete and ready for use by the substituted Assistant."). Furthermore, the record is deficient of information regarding the extent to which Mr. Rane consulted with Defendant. Therefore, we are unable to assess Mr. Rane's effectiveness.

{21} Finally, Defendant asserts that Mr. Rane was ineffective in failing to call witnesses on Defendant's behalf. "Failure to make adequate pretrial investigation and preparation may . . . be grounds for finding ineffective assistance of counsel." *State v. Barnett*, 1998-NMCA-105, ¶ 30, 125 N.M. 739, 965 P.2d 323 (internal quotation marks and citation omitted). Here, again, the record is deficient of evidence that Mr. Rane failed to prepare and investigate in advance of trial, or that there were additional witnesses for Mr. Rane to call. *See State v. Miera*, 2018-NMCA-020, ¶ 34, 413 P.3d 491 ("[A] general claim of failure to investigate is not sufficient to establish a prima facie case if there is no evidence in the record indicating what information would have been discovered." (internal quotation marks and citation omitted)). In fact, Mr. Rane indicated that he had discussed the case with Mr. Turner, read all of the interviews, and prepared the case. Although Mr. Rane still needed to speak with one officer before trial, Mr. Turner indicated at the pre-trial hearing that his interviews of the officers would be brief because he had already prepared based on their reports. Defendant therefore failed to establish a prima facie ineffective assistance of counsel claim.

III. CONCLUSION

{22} The judgment and sentence are affirmed.

{23} IT IS SO ORDERED.
MICHAEL E. VIGIL, Judge
WE CONCUR:

HENRY M. BOHNHOFF, Judge
DANIEL J. GALLEGOS, Judge

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-068

No. A-1-CA-35732 (filed August 14, 2018)

JESSICA CRESPIN,
Plaintiff-Appellant,
v.
SAFECO INSURANCE COMPANY
OF AMERICA,
Defendant-Appellee,
and
TRAVIS BAINBRIDGE and
FABIAN FIERRO,
Defendants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Nan G. Nash, District Judge

TYLER J. ATKINS
SAMUEL H. WALKER
ATKINS & WALKER, P.A.
Albuquerque, New Mexico
for Appellant

SHANNON A. PARDEN
RAY, MCCHRISTIAN & JEANS, P.C.
Albuquerque, New Mexico
for Appellee

Opinion

Henry M. Bohnhoff, Judge

{1} Defendants Fabian Fierro, age 18, and Travis Bainbridge, age 19, picked up Plaintiff Jessica Crespin, age 14, from her school in an uninsured vehicle. They drove to Fierro's mother's house where Fierro had sexual relations with Crespin and Bainbridge sexually assaulted her. Crespin's mother had purchased an automobile liability insurance policy issued by Safeco Insurance Company of America (Safeco) that contained uninsured motorist coverage which extended to Crespin. Crespin brought this action after Safeco denied Crespin's claim for uninsured motorist coverage for the incident. Following Crespin's presentation of her case-in-chief at a bench trial, the district court ruled in favor of Safeco and dismissed Crespin's claim for uninsured motorist coverage. Crespin now appeals. We affirm.

BACKGROUND

{2} The parties do not challenge any of the district court's findings of fact, which we summarize below.

{3} In February 2009, Crespin texted with Fierro and Bainbridge, and they made plans for the men to pick her up from her middle school the following day. Crespin had known Fierro for about three years and previously had sexual relations with him. As of the day of the text exchange, Crespin believed that Bainbridge was her boyfriend, but she had not had sexual relations with him. Bainbridge and Fierro wanted and expected to have sexual relations with Crespin the following day but did not say this in their texts with her.

{4} The following day, Fierro drove an uninsured car owned by Fierro's mother to Crespin's school; Bainbridge was a passenger in the car. Crespin planned on going to the mall with Bainbridge and returning to school before classes let out for the day. Crespin told her teacher that she had to use the restroom; she went outside to meet Fierro and Bainbridge and willingly opened the car door and got in. Fierro and Bainbridge did not tell Crespin that they planned to have sexual relations with her before she got into or while they were riding in the vehicle. Crespin was not physically restrained or otherwise forced to stay in the car, nor was she sexually assaulted or harmed while she was in the car. Bainbridge testified that he would not have picked up Crespin from school that day if he had not had use of a car.

{5} When the three arrived at Fierro's mother's house, Crespin exited the vehicle on her own volition and entered the house with Bainbridge and Fierro. Crespin was introduced to Janet Roybal, Fierro's mother. When Crespin was introduced to Ms. Roybal she was not crying or acting afraid or distressed. Crespin, Fierro, and Bainbridge then went upstairs to talk and listen to music. Prior to going upstairs, Bainbridge and Fierro did not tell Crespin and she otherwise did not know that they intended to have sexual relations with her.

{6} After listening to music for about twenty minutes, Fierro and Crespin went into a different room and had sexual relations. After Fierro had sexual relations with Crespin, he fell asleep, and Crespin went into the room where Bainbridge was. Bainbridge then sexually assaulted Crespin by having sexual relations with her. Neither Fierro nor Bainbridge used physical force or otherwise physically restrained Crespin prior to or while having sexual relations with her. Bainbridge, however, knew that having sexual relations with Crespin was wrong because he knew she was a minor; he had expressed these feelings earlier to Fierro.

{7} Sometime later, Crespin left Fierro's home. She had extra clothes in her backpack, and she dressed in those clothes before she left. She went to the closest Wal-Mart and called her cousin to pick her up. Crespin then reported the sexual acts to her mother and was taken to the emergency room. Fierro initially had placed the clothes that Crespin had left in the attic of his mother's home, but later moved and hid them under the seat of the vehicle in which they had ridden to get to the home.

{8} Fierro and Bainbridge were subsequently arrested and charged with a number of crimes based upon these events. In early 2011, Bainbridge pled guilty to bribery of a witness, tampering with evidence, conspiracy to commit criminal sexual penetration in the second degree, conspiracy to commit tampering with evidence, criminal sexual penetration in the fourth degree, and conspiracy to commit false imprisonment. In late 2011, Fierro pled guilty to bribery of a witness, tampering with evidence, conspiracy to commit criminal sexual penetration in the second degree, conspiracy to commit tampering with evidence, false imprisonment, and conspiracy to commit false imprisonment.

{9} In late 2012, Crespin's attorney notified Safeco that Crespin had been kidnapped

and sexually assaulted in February 2009, and made a demand for uninsured motorist coverage under the policy that Safeco had issued to Crespin's mother. Crespin was an insured under the policy. The uninsured motorist provision in the policy provides in relevant part:

> We will pay damages for which an insured is legally entitled to recover from the owner or operator of an:
>
> 1. Uninsured motor vehicle or underinsured motor vehicle because of bodily injury:
>
> a. sustained by an insured; and
>
> b. caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance, or use of the uninsured motor vehicle or underinsured motor vehicle.

Safeco denied Crespin's claim. Crespin subsequently filed a complaint for personal injury and declaratory judgment against Safeco, Bainbridge, and Fierro.

{10} The district court held a two-day bench trial in May 2016. Following completion of Crespin's presentation of her case-in-chief, Safeco moved pursuant to Rule 1-041(B) NMRA for involuntary dismissal of her claims against it. The court orally ruled that it would grant the motion.

{11} The district court thereafter entered findings of fact and conclusions of law consistent with that ruling. Based on the foregoing facts, the court generally concluded that Crespin had not established the necessary causation required for liability under Safeco's uninsured motorist provision, i.e., Crespin's injuries did not arise out of the use of the uninsured vehicle. First, there was no sufficient causal nexus between the use of the vehicle and the resulting harm. The court emphasized that the vehicle was used only to transport Crespin to Fierro's mother's house: "[Crespin] was not kidnapped by Fierro and Bainbridge or otherwise taken by force to the site of the sexual activity and sexual assault" and thus the vehicle was not an "active accessory" in causing the injury. Second, the events that occurred after Crespin, Fierro, and Bainbridge arrived at Fierro's home broke the causal link that may have existed between the use of the vehicle and the alleged harm. The sexual assault by Bainbridge occurred after the three exited the vehicle and went inside the house and the vehicle was only used to transport Crespin. The court further ruled, however, that Bainbridge committed the intentional tort of sexual assault against Crespin and that Crespin was entitled to a judgment in the amount of $10,000 against him.

{12} The district court entered final judgment in favor of Safeco on Crespin's claims against it but in favor of Crespin, in the amount of $10,000, on her claims against Bainbridge. Crespin now appeals the portion of the judgment concluding that Safeco's policy of insurance does not provide uninsured motorist coverage for the incident at issue.

DISCUSSION

{13} Crespin challenges the district court's causation conclusions. Using the analysis established in *Britt v. Phoenix Indemnity Insurance Co.*, 1995-NMSC-075, 120 N.M. 813, 907 P.2d 994, she argues that her injuries and damages arose out of the use of the uninsured vehicle, and thus were covered by the Safeco policy's uninsured motorist provision, because: (1) there was a sufficient causal nexus between the use of the uninsured vehicle and the sexual assault of Crespin; and (2) no act of independent significance broke the causal link between the use of the uninsured vehicle as part of Fierro's and Bainbridge's plan to sexually assault Crespin and her resulting emotional injuries. These arguments were preserved by Crespin both in her response to Safeco's motion for summary judgment and at trial. *Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717 ("To preserve an issue for review on appeal, it must appear that [the] appellant fairly invoked a ruling of the [district] court on the same grounds argued in the appellate court.").

{14} Rule 1-041(B) provides:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings[.]

In ruling upon the motion the court is not bound to give the plaintiff's evidence its most favorable aspect, but rather should give it such weight as it is entitled to receive. *See Mayer v. Smith*, 2015-NMCA-060, ¶ 8, 350 P.3d 1191. If challenged on appeal, the court's findings will be examined only to the extent necessary to determine whether they are supported by substantial evidence. *Id.* ¶ 9. The district court's legal conclusions will be reviewed de novo. *See Camino Real Mobile Home Park P'ship v. Wolfe*, 1995-NMSC-013, ¶ 14, 119 N.M. 436, 891 P.2d 1190 (indicating that Rule 1-041(B) NMRA dismissals will be reversed if based on an erroneous conclusion of law), *overruled on other grounds by Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc.*, 2013-NMSC-017, ¶ 14, 301 P.3d 387; *Tex. Nat'l. Theatres, Inc. v. City of Albuquerque*, 1982-NMSC-004, ¶ 19, 97 N.M. 282, 639 P.2d 569 (holding that, where legal conclusion is challenged on appeal, "the standard for review is whether the law was correctly applied to the facts, viewing [the facts] in a manner most favorable to the prevailing party"); *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 7, 129 N.M. 698, 12 P.3d 960 (holding that in reviewing a mixed question of law and fact, the appellate court will "review de novo the [district] court's application of the law to the facts in arriving at its legal conclusions").

A. Legal Framework

1. New Mexico Case Law

{15} *Britt* is the seminal New Mexico case that articulates the test "for determining whether intentional conduct and its resulting harm arises out of the use of an uninsured vehicle." 1995-NMSC-075, ¶ 15. In *Britt*, a minor traffic collision resulted in a physical altercation between the passengers of the vehicles. The plaintiff, who was a passenger of the insured vehicle, suffered injuries when a passenger of the uninsured vehicle stabbed him through the vehicle's open window. *Id.* ¶ 2. The plaintiff sought indemnification for his medical bills from the insurance company that had issued a policy covering the vehicle in which he was riding. *Id.* ¶ 3. The uninsured motorist provision of that policy stated, similar to the language of the Safeco policy at issue here, that the insurer "[would] pay damages which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle" for "accidents arising out of the ownership, maintenance or use of the uninsured motor vehicle." *Id.* (alteration, internal quotation marks, and

citation omitted).

{16} The *Britt* Court adopted the three-part causation analysis set forth in *Continental Western Ins. Co. v. Klug*, 415 N.W.2d 876, 878 (Minn. 1987):

> [A] court first considers whether there is a sufficient causal nexus between the use of the uninsured vehicle and the resulting harm. Such a causal nexus requires that the vehicle be an active accessory in causing the injury. If a court finds that there is a sufficient causal nexus, then it should next consider whether an act of independent significance broke the causal link between the use of the vehicle and the harm suffered. Finally, the court must consider whether the use to which the vehicle was put was a normal use of that vehicle. For example, transportation would be a normal use, whereas use of a parked car for a gun rest would not be.

Britt, 1995-NMSC-075, ¶ 15 (internal quotation marks and citations omitted).

{17} Applying this test to the facts of the case, the *Britt* Court determined that while the first and the third elements arguably were satisfied, it was unclear whether the altercation between the plaintiff and the passenger in the other vehicle amounted to an act of independent significance:

> [W]e conclude that there well may have been a sufficient causal link between the use of the uninsured vehicle for transportation and [the plaintiff]'s injuries. What is less clear, however, is whether the attack by the passengers was an act of independent significance sufficient to break this causal link. . . . If, as [the plaintiff] asserted, the unidentified driver intentionally rammed [the vehicle in which the plaintiff was riding] in complicity with the assailants . . . in order to facilitate the attack, then the assailants' actions probably did not constitute an "independent intervening cause" sufficient to cut off the nexus between the driver's actions and [the plaintiff]'s injuries. If, on the other hand, the collision was accidental and the assailants developed the intent to attack [the plaintiff] after the collision, perhaps due to hot tempers resulting from the collision, then their actions broke the causal link between the use of the vehicle and [the plaintiff]'s injury.

Id. ¶ 16.

{18} Several New Mexico and federal court decisions have applied *Britt* and in doing so given meaning to the sufficient causal nexus or "active accessory" prong of the causation test. *Farmers Ins. Co. of Arizona v. Sedillo*, 2000-NMCA-094, ¶ 1, 129 N.M. 674, 11 P.3d 1236, and *Barncastle v. American National Property & Casualty Cos.*, 2000-NMCA-095, ¶ 1, 129 N.M. 672, 11 P.3d 1234, which were decided on the same day, provided this Court "with the opportunity to explain when uninsured motorist coverage is available under circumstances in which the use of the vehicle is somewhat attenuated from the incident." In *Sedillo*, an uninsured driver of a pickup truck sped through a stadium parking lot where a tailgate party was taking place. 2000-NMCA-094, ¶ 2. The truck passed close by the defendant's daughter and then parked some distance away. *Id.* The defendant approached the parked truck and, in response to the threatening demeanor of the two passengers who had gotten out of the vehicle, punched one of them. *Id.* ¶ 3. A fight ensued, and the defendant sustained severe injuries. *Id.* In a declaratory judgment action brought by the insurance company, the defendant claimed coverage under the uninsured motorist provisions of the automobile liability policy that provided coverage for his vehicle. *Id.* ¶ 4. After reviewing the *Britt* test, the *Sedillo* court concluded, without discussion, that the pickup truck was not an "active accessory" in the assault and that the defendant's claim therefore failed for lack of sufficient causal nexus. *Id.* ¶ 9.

{19} In contrast, in *Barncastle*, an assailant pulled up next to the insured victim's stopped car, walked to the victim who was driving, shot the victim through the driver's door window, returned to the assailant's vehicle, and sped away. 2000-NMCA-095, ¶ 2. We concluded that the assailant's uninsured vehicle was an "active accessory" to the assault because "[t]he driver of that vehicle used it to get into a position where [the a]ssailant could get out and shoot [the victim,]" and then escaped from the scene at a high velocity in it, rendering the automobile "an *integral element*" of the shooting. *Id.* ¶ 9 (emphasis added).

{20} *Barncastle* relied on *State Farm Mutual Automobile Insurance Co. v. Blystra*, 86 F.3d 1007, 1010-14 (10th Cir. 1996), which involved a drive-by shooting and applied New Mexico law. In *Blystra*, the insured victim, a pedestrian, was shot by a passenger or the driver of a truck as it drove by the victim. 86 F.3d at 1009. In holding that the truck was an active accessory, the court observed that "[w]hen an automobile is used by an assailant to undertake a drive-by shooting, the automobile is almost by definition an 'active accessory' to the assault. Through the use of an automobile, a drive-by shooter *achieves several advantages* in the commission of his crime that would otherwise be unavailable to him." *Id.* at 1012 (emphasis added).

{21} In *Hartford Insurance Co. of the Midwest v. Estate of Tollardo*, 409 F. Supp. 2d 1301, 1305 (D.N.M. 2005), the court applied the *Britt* causation test to determine whether uninsured motorist coverage extended to the murder of three persons in an insured vehicle that was parked in a gas station parking lot. The genesis of the crime was an argument over drugs and money. *Estate of Tollardo*, 409 F. Supp. 2d at 1302-03. The assailant had driven around in an uninsured truck looking for the victims. *Id.* at 1303. Eventually he gave up and decided to return home. *Id.* On his way home, he saw the victims' vehicle at a gas station; he attempted to turn into the gas station parking lot but "jumped over a curb and slammed into a pole." *Id.* at 1303-04 (internal quotation marks and citation omitted). He got out of the truck, ran across the length of the parking lot, and shot and killed three people inside the vehicle. *Id.* at 1304.

{22} The court concluded that these facts lacked certain features New Mexico courts have relied upon to conclude that a vehicle is an active accessory. *Id.* at 1310-11. First, at the time the assailant spotted the victims in the parking lot, he was not using the truck to search for them; instead, he had given up on the search. *Id.* at 1309. Second, because the assailant had driven his truck into a pole, he could not use the truck to his advantage. *Id.* On the contrary, he could not conceal his identity and weapon and approach the victims without being noticed, and he could not use the truck to commit the shooting. *Id.* at 1309-10. Further, citing Minnesota case law, which it reasoned New Mexico courts would find persuasive given our Supreme Court's reliance in *Britt* on *Klug* and other decisions from that state, the *Estate of Tollardo* court concluded that "mere use of a vehicle for transportation" to or from the scene of a crime does not satisfy the active accessory requirement. *Id.* at 1310. On this basis, the

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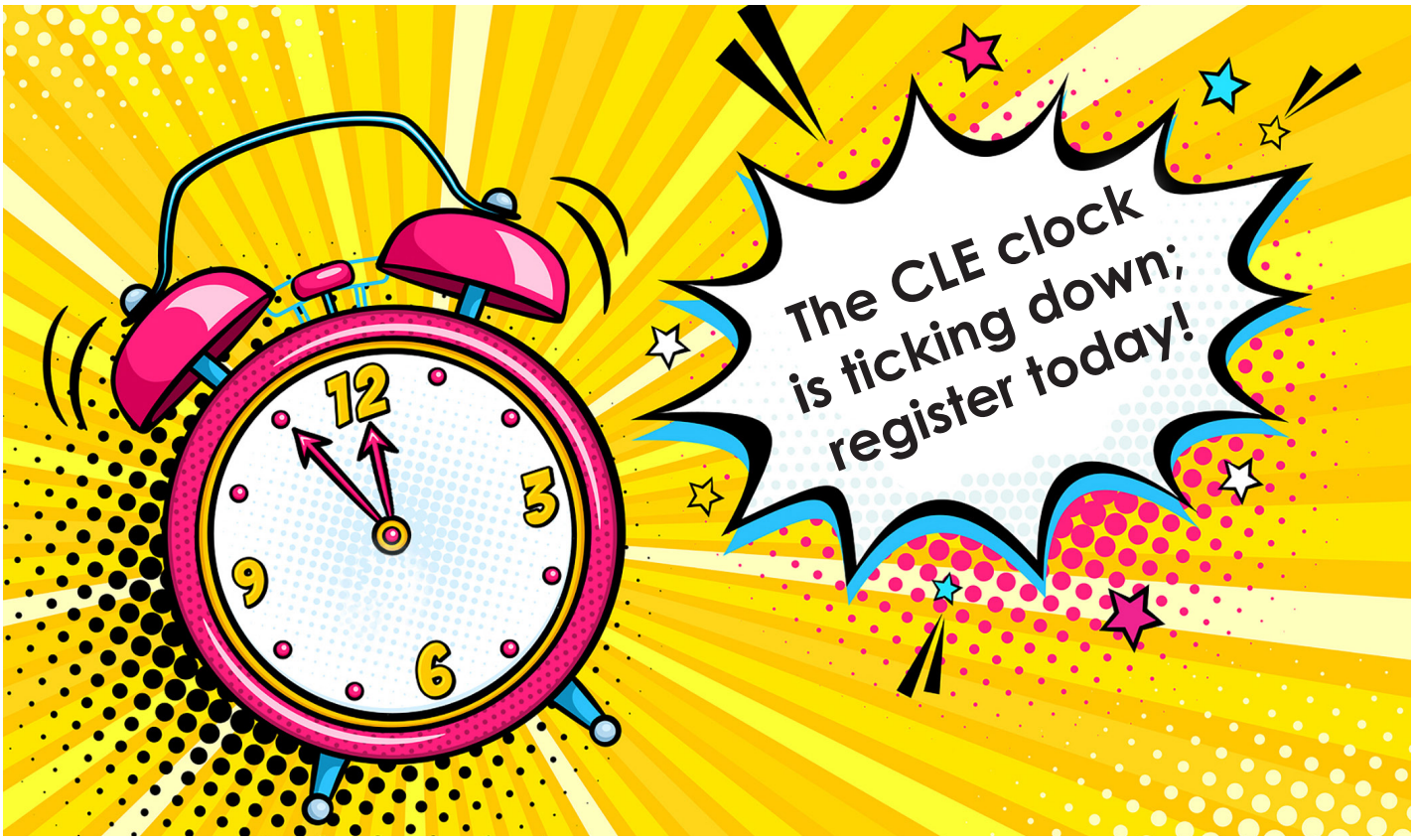

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Believe it or not, but the legal problems faced by some of the most notorious drug dealers actually allow us to understand the requirement to eliminate the barriers to justice for all. Plus, the issue that celebrities face gives us a chance to talk about conflicts, inclusion and substance abuse. Join the CLE Performer, Stuart Teicher, Esq., as he examines the intersection of several aspects of professional responsibility — access to justice, ethics, substance abuse and diversity…all in a way that will keep you engaged!

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1–4:15 p.m.
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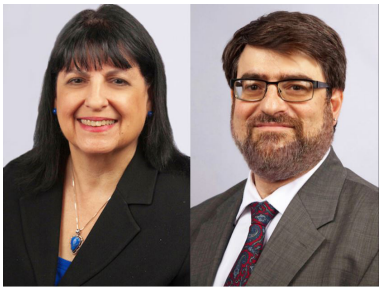

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Live Programs and Webcasts

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2018 Mock Meeting of the Ethics Advisory Committee

Presented by the State Bar of New Mexico Ethics Advisory Committee members

Tuesday, Dec. 18, 2018
1–3 p.m.
2.0 EP
Live at the State Bar Center
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Developments in the World of Legal Ethics
Overview of recent changes to New Mexico's Rules of Professional Conduct as well as a discussion of recent ethics opinions issued by the Ethics Advisory Committee and other entities.

Ethics Advisory Committee Guidelines
Discussion of the guidelines applicable to inquiries submitted to the Ethics Advisory Committee and the opinions issued by the committee

Mock Meeting
An inquiry was sent to the Ethics Advisory Committee seeking advice about an ethical dilemma. What happens next? This portion of the program walks through the process and shows how to deal with a few thorny issues that might come up.

Pretrial Practice in Federal Court

Presented by Hon. Alan Torgerson, Hon. Karen Molzen, Hon. Stephen Vidmar

Tuesday, Dec. 18, 2018
9 a.m.–12:15 p.m.

2.5 G 0.5 EP

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Ethical Puzzles: The Wrongful Death Act, Negligent Settlement Claims and the Search for the Silver Bullets

Presented by Maureen A. Sanders, John M. (Jack) Brant, Gerald G. (Jerry) Dixon, Briggs F. Cheney, and Bruce Evan Thompson

Wednesday, Dec. 19, 2018
9 a.m.–12:15 p.m.

3.0 EP

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This CLE program will cover in detail the wrongful death act and negligent settlement claims from beginning to end.

Civil Procedure Update

Presented by Andrew G. Schultz

Wednesday, Dec. 19, 2018
1–3 p.m.

2.0 G

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$159 Standard/Webcast Fee

Learn about the most recent developments in civil procedure in this must see program!

Recent Developments in New Mexico Natural Resource Law

Friday, Dec. 21, 2018
8:30 a.m.–5 p.m.

5.2 G 1.0 EP

Live at the State Bar Center
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$251 NREEL section members, government and legal services attorneys, Young Lawyers Division and Paralegal Division members
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This full day program will focus on recent developments with both significant public awareness and important public impact on natural resources for New Mexico. The program will include panel discussions with practitioners and professionals who can speak on the following broad topics: land use, water rights and energy development. For each of these areas, the panelists will provide a policy and legal update on their particular subject.

Children's Code: Delinquency Rules, Procedures and the Child's Best Interest

Presented by Kenneth E. Fladager, N.M. Taxation and Revenue Department and Alison B. Pauk, Law Offices of the Public Defender

Friday, Dec. 28, 2018
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1.0 EP

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Monday, Dec. 24, 2018

1.0 EP

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Moving Your Practice to the Cloud- Benefits, Drawbacks and Ethical Issues

Friday, Dec. 28, 2018

1.0 EP

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Network Professionally and Ethically

Saturday, Dec. 29, 2018

1.0 EP

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The Ethics of Delegation

Sunday, Dec. 30, 2018

1.0 EP

Many lawyers have not mastered effective delegation techniques probably because nobody ever taught them the basic skills. They are missing the opportunity to leverage their own talents by delegating projects and tasks to other lawyers, legal professionals and strong support staff. Besides, lawyers are bound by MRPC 5.1 and 5.3 relating to ethical responsibilities in the supervisory context. Workplace outcomes are no doubt adversely affected when delegations go astray. Lawyers and staff at all levels will benefit from the techniques explored in this program.

The Ethics of Social Media Research

Monday, Dec. 31, 2018

1.0 EP

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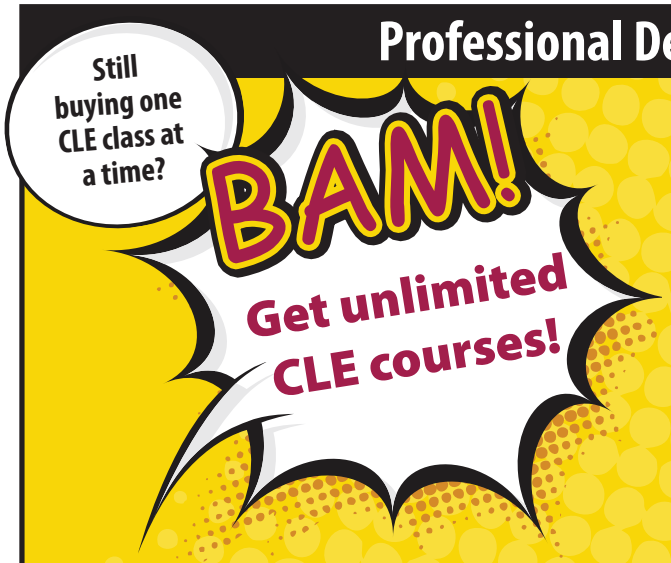

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court ruled that the truck was not an active accessory and thus the victim's injuries did not arise out of the use of the truck. *Id.* at 1312.

2. Uninsured Motorist Coverage for Sexual Assault

{23} Two decisions by California state courts inform our consideration of when sexual assault can arise out of the use of a vehicle as a basis for establishing uninsured motorist coverage.

{24} In *American National Property & Casualty Co. v. Julie R.*, 90 Cal. Rptr. 2d 119, 120 (Cal Ct. App. 1999), the assailant took the victim to dinner in his uninsured car. After they finished dinner and left the restaurant, the assailant pulled the car off the road and parked it against a fence so that the passenger side door could not be opened, and then sexually assaulted the victim. *Id.* at 120-21. She could not open the door because it was locked as well as blocked by the fence and, due to the position and other characteristics of her seat, was otherwise unable to escape the confines of the car. *Id.* at 120-21. The victim subsequently made a claim for uninsured motorist coverage under an automobile insurance policy issued to her father; to be covered, her injury had to "result from the use of the [uninsured] vehicle." *Id.* at 121 (omission, internal quotation marks, and citation omitted). The court construed "result from" to mean the same as "aris[e] out of." *Id.* at 122.

{25} The court reasoned that "[t]here must be a causal connection between the use of the vehicle and the injury." *Id.* at 122. Further, the court determined that the use of the vehicle must be "a predominating cause or a substantial factor in causing the injury[,]" *id.* at 123 (internal quotation marks and citation omitted), a standard similar to the "sufficient causal nexus" test established in *Britt*. The court then identified the three ways in which the vehicle was used in connection with the infliction of the victim's injury: "It was transportation to and from the scene of the assault. It was parked along a chain-link fence, restricting egress from the passenger side of the car. And it served as a confining locale for the rape." *Id.* The court categorically ruled that the first use did not satisfy the predominating cause/substantial factor test:

> Use of a vehicle as transportation to the scene of an injury does not establish a sufficient causal connection between the use and the injury. The mere transportation of a tortfeasor to a site where he commits a tort after departing from the uninsured vehicle does not establish the requisite causal relationship.

Id. at 123 (alteration, internal quotation marks, and citation omitted). The court also found that the other uses of the vehicle were "incidental to" and not a substantial causal factor in the attack and the victim's injuries. *Id.* On this basis, the appellate court affirmed denial of the uninsured motorist claim. *Id.* at 127.

{26} *R.A. Stuchbery & Others Syndicate 1096 v. Redland Insurance Co.*, 66 Cal. Rptr. 3d 80 (Cal. Ct. App. 2007), presents a fact pattern that is analogous to that of the case at bar in that the victim was not subjected to any force or violence until after she left the vehicle and entered a dwelling. *Id.* at 82. The victim, who was sixteen years old at the time, had run away from home. *Id.* In the early hours of January 12, 2000, she was walking around the streets of San Francisco, looking for a shelter for runaways or homeless people. *Id.* She saw the man who turned out to be her assailant standing in front of a shuttle vehicle. *Id.* He said he would take her to a shelter and she entered the shuttle. *Id.* The assailant instead drove to his apartment; he told the victim that the shelters were closed until 6:00 a.m. but that she could sleep in his apartment while he returned to work. *Id.* She agreed, walked up a flight of stairs and went into his apartment, whereupon the assailant sexually assaulted her. *Id.*

{27} The plaintiff, the shuttle owner's general liability insurer, paid significant sums to settle the victim's claims against the owner of the shuttle, then brought suit against the shuttle owner's automobile liability insurer for indemnification. *Id.* at 82-83. The defendant had insured against liability "resulting from the ownership, maintenance or use of a covered [vehicle]." *Id.* at 83 (internal quotation marks omitted). Thus, although the language arose out of a general liability policy, the court construed the same causation terminology that was present in the uninsured motorist provision upon which Crespin grounded her claim. The court reiterated the holding in *Julie R.* that "the mere use of the vehicle as transportation to the scene of the injury did not establish a sufficient causal connection between the use and the injury." *R.A. Stuchbery*, 66 Cal. Rptr. 3d at 84-85 (internal quotation marks and citation omitted). The court then determined that there was no coverage under the defendant's policy: "As in *Julie R.*, the . . . shuttle was merely used to transport the victim to the locale of the rape. Her injury resulted from [the assailant's] conduct and his intent to rape the plaintiff in his apartment, not from the 'use' of the shuttle." *Id.* at 85.

B. The District Court Did Not Err in Ruling That There Was Not a Sufficient Causal Nexus Between the Use of the Uninsured Vehicle and the Sexual Assault of Crespin.

{28} Crespin stresses that Bainbridge admitted in his deposition that he and Fierro would not have picked Crespin up from school had they not had use of a vehicle. She further emphasizes that it was Bainbridge's and Fierro's plan all along to have sexual relations with Crespin. She urges that the use of the uninsured vehicle therefore was an integral element in facilitating the crimes that were committed upon her, and thus the vehicle was an active accessory in inflicting the harm against her. For the following reasons, we disagree.

{29} Fierro's mother's car was not an integral element of the sexual assault. The sexual assault did not occur in the car. On the contrary, Fierro, Bainbridge, and Crespin each had voluntarily exited the car and gone into the house for a considerable amount of time—more than twenty minutes—before the sexual assault had occurred. In contrast to *Britt*, *Blystra*, and *Barncastle*, the vehicle did not provide Bainbridge with any physical or proximal advantage in committing the sexual assault.

{30} Fundamentally, the only nexus between Fierro's mother's vehicle and Bainbridge's sexual assault on Crespin is that the vehicle was the means of transporting Fierro, Bainbridge, and Crespin to Fierro's mother's home, where the assault took place. But as is articulated in *Estate of Tollardo* and the multiple decisions from Minnesota that it found persuasive for purposes of applying *Britt*'s sufficient causal nexus standard, as well as in *Julie R.* and *R.A. Stuchbery*, the mere fact that the vehicle is used to transport the assailant and/or the victim to or from the scene of the intentional tort is not a sufficient connection. On the contrary, the three-part structure of the *Britt* test indicates that, while normal use of the vehicle for transportation purposes is one of the necessary predicates to uninsured motorist coverage, that requirement is separate from and by itself does not also satisfy the active accessory element. We are aware of no court that has reached a contrary con-

clusion. In *Britt*, for example, the vehicle in which the assailant was riding rammed the vehicle in which the victim was riding, and the attack on the victim occurred immediately thereafter. 1995-NMSC-075, ¶ 2. And in *Barncastle* and *Blystra*, the assailants' vehicles were used to approach the victims without being noticed, get into a position where the assailants could shoot the victims, and then escape without being identified or apprehended.

{31} The fact that Fierro and Bainbridge had planned on having sexual relations with Crespin after they transported her to Fierro's mother's house, i.e., they used the vehicle with the intent of committing the sexual assault, does not alter the analysis. The *use* of the vehicle—solely to transport the assailant and the victim to the scene of the tort—remains the same. We acknowledge that in *Britt*, our Supreme Court noted that if the ramming of the vehicle in which the victim was riding was intentional as opposed to accidental, that fact likely would establish that the assailant's subsequent attack on the victim was not an act of independent significance that broke the causal link between the use of the vehicle and the victim's injuries. *Id.* ¶ 16. However, the intent, if present, would be coupled with the use of the uninsured vehicle as a weapon. To our knowledge, no court has concluded that an intentional tort arose out of the operation or use of a vehicle solely because the tortfeasor planned or intended to use the vehicle to travel to the place where he or she would commit the tort. *Cf. Lattanzi v. Travelers Ins. Co.*, 650 N.E.2d 430, 432 (Ohio 1995) ("That the assailant intended to harm [the victim] and that he intended to use her automobile to take her to a place where he could harm her is not disputed, nor is it relevant.").

{32} Similarly, the fact that Bainbridge testified that he and Fierro would not have picked up Crespin at her school had they not had use of a vehicle is not determinative. The test in New Mexico is a "sufficient" causal nexus that makes the vehicle an "*active* accessory" to the tort. *State Farm Insurance Co. v. Bell*, 39 F. Supp. 3d 1352 (D.N.M. 2014), on which Crespin relies, is distinguishable. In *Bell*, a dog that was in the back seat of an uninsured vehicle bit a child who attempted to hug the dog through one of the car windows. *Id.* at 1354. The dog felt threatened because he was in a confined space in the vehicle thus making him territorial over the vehicle. *Id.* at 1358. The fact that the dog was territorial transformed the vehicle from being the mere situs of the injury into a contributing factor to the bite. *Id*. The court held that the vehicle was an active accessory to the bite and reasoned that this was more than simply transporting the dog in the vehicle. *Id.* In contrast to *Bell*, here Crespin left the vehicle a considerable amount of time prior to the assault by Bainbridge; the vehicle did not play a part in the assault, and instead the vehicle was used only to transport Fierro, Bainbridge, and Crespin to the site of the sexual assault. *Bell* does not support the proposition that an uninsured vehicle constitutes an active accessory to the commission of an intentional tort solely because use of the vehicle was necessary to transport the assailant and/or the victim to the location where the tort was committed.[1] *Cf. Lattanzi*, 650 N.E.2d at 432 (rejecting but-for analysis for determining whether rape arose out of use of uninsured vehicle).

CONCLUSION

{33} We hold that, under the facts of this case, the use of Fierro's mother's uninsured vehicle to transport Fierro, Bainbridge, and Crespin to Fierro's mother's house did not make the vehicle an active accessory to Bainbridge's subsequent sexual assault of Crespin. Because it is unnecessary to resolution of the appeal, we do not address the district court's additional determination that acts of independent significance broke the causal link between the use of the vehicle and the harm suffered.

{34} We affirm the district court's judgment in favor of Safeco that its policy of insurance does not provide uninsured motorist coverage for the incident at issue.

{35} IT IS SO ORDERED.

HENRY M. BOHNHOFF, Judge

WE CONCUR:
MICHAEL E. VIGIL, Judge
EMIL J. KIEHNE, Judge

[1]As noted above, after Crespin had left Fierro's mother's house, Fierro hid Crespin's clothes in the vehicle in which Fierro, Bainbridge, and Crespin had traveled from Crespin's school to the house. Crespin has not advanced this fact as support for her contention that the vehicle was an active accessory to the commission of the sexual assault, and thus any such argument would be waived. *See State v. Correa*, 2009-NMSC-051, ¶ 31, 147 N.M. 291, 222 P.3d 1 ("On appeal, issues not briefed are considered abandoned, and we do not raise them on our own."). Moreover, we do not see how the position could be maintained. Fierro's act of hiding Crespin's clothes was not part of the sexual assault crime and tort, but rather presumably the basis for the charge of tampering with evidence, which was not the basis for Crespin's claim of injury

Certiorari Denied, October 26, 2018, No. S-1-SC-37272

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-069

No. A-1-CA-35999 (filed August 22, 2018)

A&W RESTAURANTS, INC.,
Petitioner-Appellant,
v.
TAXATION AND REVENUE
DEPARTMENT OF THE STATE OF
NEW MEXICO,
Respondent-Appellee.

APPEAL FROM THE ADMINISTRATIVE HEARINGS OFFICE
Brian VanDenzen, Chief Hearing Officer

STEVAN DOUGLAS LOONEY
JUSTIN R. SAWYER
ANDREW J. BARANOWSKI
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HECTOR H. BALDERAS,
ATTORNEY GENERAL
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ASSISTANT ATTORNEY GENERAL
TAXATION AND REVENUE DEPARTMENT
Santa Fe, New Mexico
for Appellee

Opinion

Daniel J. Gallegos, Judge

{1} A 2013 audit by the New Mexico Taxation and Revenue Department (the Department) resulted in the assessment of unpaid gross receipts tax against A&W Restaurants, Inc. (A&W), in the amount of $29,349.33. A&W protested the Department's imposition of gross receipts tax on certain trademark-related royalty fees contained within its franchise agreements with New Mexico businesses. The hearing officer granted summary judgment in favor of the Department, and A&W appeals. For the reasons that follow, we affirm.

BACKGROUND

{2} A&W, an out-of-state corporation, entered into a number of franchise agreements with New Mexico businesses. Each of the franchise agreements, among other terms, contained a provision by which A&W granted to franchisees a limited license to use specific trademarks. The authority to utilize the trademarks was limited to use in connection with the operation of an A&W restaurant franchise. In consideration for the grant of the limited trademark license, the franchisees agreed to pay A&W a monthly royalty fee equal to 5 percent of gross sales.

{3} Following an audit in 2013, the Department determined that the royalty fees for the limited trademark license were subject to gross receipts tax as money received "from granting a right to use a franchise employed in New Mexico[.]" NMSA 1978, Section 7-9-3.5(A)(1) (2007). Consequently, the Department assessed gross receipts tax on the royalty fees in the amount of $29,349.33.[1] In response, A&W filed a tax protest with the Department, seeking an abatement of the gross receipts tax.

{4} Pursuant to the Administrative Hearings Office Act, NMSA 1978, §§ 7-1B-1 to -9 (2015), A&W's tax protest went before a hearing officer. During the course of proceedings, A&W and the Department filed cross motions for summary judgment. A&W argued that the royalty fees it received as consideration from the limited trademark licensing provisions are exempt from gross receipts tax as a matter of law because trademarks are not considered "property" under the Gross Receipts and Compensating Tax Act (the Act), NMSA 1978, §§ 7-9-1 to -116 (1966, as amended through 2018). *See* § 7-9-3(J) (defining "property"); § 7-9-3.5(A)(1) (defining "gross receipts"). The Department, in contrast, argued that such royalty fees were taxable as receipts "from granting the right to use a franchise[.]" Section 7-9-3.5(A)(1). After hearing argument from both sides, the hearing officer disagreed with A&W's legal position and awarded summary judgment to the Department. A&W appeals to this Court pursuant to NMSA 1978, Section 7-1-25(A) (2015).

DISCUSSION

{5} This appeal requires us to consider the impact of two 2007 amendments to the Act on the taxability of trademark licensing royalty fees that make up part of a franchise agreement.

I. Standard of Review and Presumption and Burden Applicable to Tax Cases

{6} "Because the facts are not in dispute and the issue presented on appeal is purely legal, our review is de novo." *Fed. Express Corp. v. Abeyta*, 2004-NMCA-011, ¶ 2, 135 N.M. 37, 84 P.3d 85. Likewise, because we must engage in statutory construction, our review of the hearing officer's decision is also de novo. *See Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61 ("The meaning of language used in a statute is a question of law that we review de novo."). "In interpreting statutes, we seek to give effect to the Legislature's intent, and in determining intent we look to the language used and consider the statute's history and background." *Valenzuela v. Snyder*, 2014-NMCA-061, ¶ 16, 326 P.3d 1120 (internal quotation marks and citation omitted). "Tax statutes, like any other statutes, are to be interpreted in accordance with the legislative intent and in a manner that will not render the

[1]The Department assessed gross receipts tax beginning on June 15, 2007, the date the 2007 amendment to Section 7-9-3.5(A)(1) became effective. The audit period at issue in this case went through December 31, 2011.

statutes' application absurd, unreasonable, or unjust." *City of Eunice v. N.M. Taxation & Revenue Dep't*, 2014-NMCA-085, ¶ 8, 331 P.3d 986 (internal quotation marks and citation omitted).

{7} There exists a statutory presumption that all receipts from engaging in business in New Mexico are taxable. Section 7-9-5(A). "The taxpayer claiming that receipts are not taxable bears the burden of proving the assertion." *MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶ 12, 133 N.M. 217, 62 P.3d 308.

II. The Relevant Provisions of the Act

{8} The purpose of gross receipts tax is to provide revenue for public purposes by taxing certain business activities within New Mexico. Section 7-9-2. Prior to 2007, the Legislature categorized these activities in the following ways: "selling property located in New Mexico, . . . leasing or licensing property employed in New Mexico, . . . selling services performed outside New Mexico, [and] . . . performing services in New Mexico." Section 7-9-3.5(A)(1) (2006). "[G]ross receipts" were defined as "the total amount of money or the value of consideration received" from engaging in these business activities. *Id.*

> In 2007, the Legislature amended the definition of gross receipts to the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, *from granting a right to use a franchise* employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico.

Section 7-9-3.5(A)(1) (emphasis added).

{9} Also in 2007, the Legislature amended the definition of "property" from "real property, tangible personal property, licenses, and franchises[,]" Section 7-9-3(J) (2006), to

> real property, tangible personal property, *licenses other than the licenses of* copyrights, *trademarks* or patents and franchises.

Section 7-9-3(J).

III. Gross Receipts Tax Applies to the Trademark Licensing Royalty Fees That Are Part of A&W's Franchise Agreements

{10} After 1991, both franchise agreements and licensing agreements were considered to be, and analyzed as, the sale of property. *See Sonic Indus., Inc. v. State* (*Sonic I*), 2000-NMCA-087, ¶ 12, 129 N.M. 657, 11 P.3d 1219, *rev'd on other grounds by Sonic Indus., Inc. v. State* (*Sonic II*), 2006-NMSC-038, ¶ 1, 140 N.M. 212, 141 P.3d 1266. However, by amending the definition of gross receipts to include the new business activity categories of licensing property employed in New Mexico and granting a franchise employed in New Mexico, Section 7-9-3.5(A)(1), the Legislature has effectively taken licensing agreements and franchise agreements out of the sale of property category. Given this development, and in light of these new categories of gross receipts, the question before us is how to properly analyze the taxability of a limited trademark license provision contained within a franchise agreement.

{11} Unsurprisingly, A&W and the Department have differing views on the analysis to be employed, as well as on the effect that the amendments have on the taxability of the limited trademark license royalties at issue in this case. A&W asserts that gross receipts tax applies to receipts from the licensing of property and that under the new 2007 Section 7-9-3(J) definition, trademark licenses are no longer considered to be property. Based on this definitional exclusion, A&W contends that the royalty fees received as consideration from the trademark licensing provisions are exempt from gross receipts tax. Conversely, the Department maintains that the royalty fees for the limited trademark license are subject to gross receipts tax as money received from granting a right to use a franchise, pursuant to Section 7-9-3.5(A)(1).

{12} In resolving these arguments, the crucial question to be answered is whether the royalty fees flowing from this particular trademark licensing provision should be treated as being received from the grant of a franchise or from the licensing of a trademark. If we were to limit ourselves to A&W's view—that the limited trademark licensing provision is a separately-itemized standalone agreement, although contained within the franchise agreement—it would appear that the answer is clear that the royalties received from the trademark license are excluded from gross receipts under Sections 7-9-3.5(A)(1) and 7-9-3(J). Yet, it is not so simple. We must also, as the Department contends, consider the meaning of the word "franchise." *See Valenzuela*, 2014-NMCA-061, ¶ 16, 326 P.3d 1120 ("[W]e should read the entire statute as a whole so that each provision may be considered in relation to every other part." (internal quotation marks and citation omitted)).

{13} Although we have no statutory definition of franchise in New Mexico, this Court observed in *Sonic I* that "[b]y 1969, when the Legislature extended the Act's definition of property to 'licenses, franchises, patents, trademarks and copyrights,' the use of the term franchise to describe a prepackaged system for doing business appears to have been well established." 2000-NMCA-087, ¶ 24. This Court also set forth the following definition of a franchise:

> In its simplest terms a franchise is a license from the owner of a trademark or trade name permitting another to sell a product or service under that name or mark. More broadly stated, the franchise has evolved into an elaborate agreement under which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchiser and the franchiser undertakes to assist the franchisee through advertising, promotion and other advisory services.

Id. ¶ 23 (internal quotation marks and citation omitted).

{14} We further observed in *Sonic I* that the Department had adopted a regulation defining the word "franchise":

> A franchise is an agreement in which the franchisee agrees to undertake certain business activities or to sell a particular type of product or service in accordance with methods and procedures prescribed by the franchiser, and the franchiser agrees to assist the franchisee through advertising, promotion and other advisory services. The franchise usually conveys to the franchisee a license to use the franchiser's trademark or trade name in the operation of the franchisee's business.

Id. ¶ 25 (emphasis omitted); *see Black's Law Dictionary* 569 (9th ed. 2010) (defining "franchise" as "[t]o grant (to another) the sole right of engaging in a certain business or in a business using a particular trademark in a certain area"). We further held "that for purposes of the Act, a franchise is to be treated as a compound or 'bundled'

form of property, which typically includes a license to use the franchiser's trademark and a commitment by the franchiser to perform various services to assist the franchisee in the operation of the franchised business." *Sonic I*, 2000-NMCA-087, ¶ 28.

{15} We can presume that the Legislature was aware of these longstanding and undisturbed definitions of franchise in 2007 when it amended the definition of gross receipts to include "the total amount of money or the value of other consideration received . . . from granting a right to use a franchise employed in New Mexico[.]" Section 7-9-3.5(A)(1); *see Sonic I*, 2000-NMCA-087, ¶ 25 ("[W]e may infer from the Legislature's inaction in response to this longstanding administrative construction of the term franchise that this definition is consistent with the Legislature's intent.").

{16} Furthermore, we observe that the 2007 gross receipts amendment followed our Supreme Court's 2006 decision in *Sonic II*. *See* 2006-NMSC-038, ¶ 9. The Supreme Court analyzed Sonic's franchising activities under the then-current definition of gross receipts, which only included the money or value received from the sale or lease of property. *Id.* The Supreme Court first determined, in agreement with this Court's opinion in *Sonic I*, that Sonic's franchising activities constituted the sale of property. *Id.* ¶ 13. The Supreme Court went on to hold that when a franchise agreement is executed outside of New Mexico, it is considered to be an out-of-state sale, and thus not considered to fall within the definition of gross receipts. *Id.* ¶ 14. Therefore, the practical effect of *Sonic II* was to render franchise agreements with out-of-state franchisers, such as the agreement in the present case, non-taxable.

{17} Less than a year after the *Sonic II* decision, the Legislature added a new category of business activity resulting in taxable gross receipts: granting a right to use a franchise employed in New Mexico. *See* § 7-9-3.5(A)(1). By this change, the Legislature effectively overruled *Sonic II* and restored the taxability of franchise agreements, even those entered into out-of-state, so long as they are employed in New Mexico. Nothing in the statute as amended indicates to us that the Legislature intended to change the definition of a franchise as adopted by the Department or as laid out by this Court in *Sonic I*, or to use the word franchise in a manner unmoored from these longstanding definitions.

{18} We are therefore not convinced that the trademark licensing provision in this case should be treated as a standalone agreement—separate and apart from the franchise—simply because it is a separate line item in the franchise agreement, as A&W urges. To the contrary, it is especially clear here in the context of a fast-food franchise that the trademark license is the heart of the franchise agreement. Consider the value of an A&W franchise in which the franchisee is not granted a license to use A&W's logos, colors, or menu items. Is such an agreement even a franchise? It certainly would bear little resemblance to a traditional franchise as commonly defined and understood. And in fact, A&W itself agreed during oral argument before this Court that a franchise of this sort would be "not entirely complete" without the trademark. In this light, we conclude that the trademark licensing provision at issue in this case is central to the overall franchise and should be treated as part of the franchise for purposes of gross receipts, regardless of whether it was separately stated and itemized in the franchise agreement.

{19} This is consistent with the Legislature's intent, made manifest through the 2007 amendment to the definition of gross receipts, to subject franchise agreements like the one in *Sonic II* to gross receipts tax. This is also consistent with the 2006 legislative amendment that added the licensing category to the definition of gross receipts. Section 7-9-3.5(A)(1) (2006). Presumably, the addition of this new category will subject certain types of licensing agreements to gross receipts tax. We acknowledge, though, as A&W has forcefully argued, trademark licenses are not considered to be property under the 2007 definition, and are therefore not taxable. This does not mean, however, that the trademark license provision at issue in this case is untaxable. The provision here is notably different from a traditional trademark license, which exists apart from a franchise agreement. *See* Irene Calboli, *The Sunset of "Quality Control" in Modern Trademark Licensing*, 57 Am. U.L. Rev. 341, 348-51 (2007) (explaining that trademark licenses generally take three forms: (1) production outsource agreements, wherein a company that normally produces a product outsources production of that product, under the trademark, to another company; (2) collateral licensing agreements, wherein a company licenses the use of its trademark to another company for use on products collateral to those traditionally produced by the licensing company; and (3) trademark promotional licensing (also known as trademark merchandising), wherein a company licenses its trademark for use on a product wholly unrelated to products originally bearing the licensed mark).

{20} We can see nothing absurd or unreasonable about subjecting trademark licensing provisions contained within a franchise to gross receipts tax, while at the same time exempting standalone trademark licensing agreements, like those described above, from gross receipts tax. *See City of Eunice*, 2014-NMCA-085, ¶ 8; *cf. Michael J. Maloof & Co. v. Bureau of Revenue*, 1969-NMSC-100, ¶ 7, 80 N.M. 485, 458 P.2d 89 ("In the field of taxation, more than in other fields, the [L]egislature possesses the greatest freedom in classification[.]"). This is especially so where we have held that "a franchise is to be treated as a compound or 'bundled' form of property, which typically includes a license to use the franchiser's trademark and a commitment by the franchiser to perform various services to assist the franchisee in the operation of the franchised business." *Sonic I*, 2000-NMCA-087, ¶ 28. Our conclusion—that the Legislature intended to subject a franchise, including the bundled trademark license agreement, to gross receipts tax, while at the same time intending not to tax standalone trademark licensing agreements—harmonizes the various statutory provisions at issue here. *See Luboyeski v. Hill*, 1994-NMSC-032, ¶ 10, 117 N.M. 380, 872 P.2d 353 ("Whenever possible, we must read different legislative actions as harmonious instead of as contradicting one another.").

CONCLUSION

{21} We conclude that the Legislature's 2007 amendment to the definition of gross receipts to add money or the value of other consideration received from the grant of a franchise employed in New Mexico evidenced its intent to subject franchise agreements such as the one at issue in this case to gross receipts tax, and that the taxable gross receipts include the royalties received from a limited trademark license granted as part of the franchise.

{22} Therefore, we affirm.

{23} IT IS SO ORDERED

DANIEL J. GALLEGOS, Judge

WE CONCUR:

EMIL J. KIEHNE, Judge

JENNIFER L. ATTREP, Judge

Certiorari Granted, October 19, 2018, No. S-1-SC-37273

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-070

No. A-1-CA-35927 (filed August 22, 2018)

PROVISIONAL GOVERNMENT OF
SANTA TERESA and MARY GONZALEZ,
Plaintiffs-Petitioners,
v.
DOÑA ANA COUNTY BOARD OF
COUNTY COMMISSIONERS,
Defendant-Respondent,
and
CITY OF SUNLAND PARK,
Intervenor.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Mary Rosner, District Judge

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Opinion

Henry M. Bohnhoff, Judge

{1} In this appeal we are called upon to consider the counterintuitive proposition that, under New Mexico law, residents of territory who wish to incorporate the territory as a new municipality in order to avoid being annexed by an existing neighboring municipality must first petition the existing municipality to annex the territory. The Provisional Government of Santa Teresa (PGST), a New Mexico non-profit corporation consisting of owners of land in the Santa Teresa area in Doña Ana County, New Mexico, seeks to incorporate the area as a municipality, separate from neighboring City of Sunland Park (Sunland Park). PGST contends that, because Sunland Park in 2014 informally expressed an intent to annex Santa Teresa, pursuant to NMSA 1978, Section 3-2-3(B)(3) (1995), PGST could petition the Doña Ana Board of County Commissioners (DABOCC) to incorporate as a separate municipality. DABOCC denied the petition based on its determination that Section 3-2-3(B)(3) required PGST first to submit a formal petition asking Sunland Park to annex the subject territory. PGST appealed that decision to the district court, which agreed with DABOCC. PGST now appeals to this Court. We reverse.

MUNICIPAL ANNEXATION AND INCORPORATION STATUTES

Annexation

{2} NMSA 1978, Sections 3-7-1 to -18 (1965, as amended through 2003), provides three general methods for an existing municipality to annex territory. First, under the arbitration method, an existing municipality can pass a resolution stating its desire to annex the territory and declaring that "the benefits of municipal government are or can be made available within a reasonable time to the territory." Section 3-7-5. An arbitration board is created, with three members representing the municipality, three members representing the territory to be annexed, and one independent member selected by the other six. Section 3-7-6; Section 3-7-9. The board meets, investigates, and decides whether the benefits can be made available and whether annexation should take place. Section 3-7-10. Second, under the commission method, either the existing municipality or a majority of the landowners in the territory to be annexed can submit a petition to the Municipal Boundary Commission (MBC). Section 3-7-11. If the MBC determines that the territory is contiguous and "may be provided with municipal services," it orders the annexation. Section 3-7-15(A)(2). Third, under the petition method, the owners of a majority of the land in the subject territory submit a petition to the municipality, and the municipality either consents to or rejects the petition. Section 3-7-17.

{3} Section 3-7-17.1 establishes special requirements for annexation petitions submitted to existing municipalities with a population of less than 300,000 persons and located in Class A counties, which are counties having an assessed valuation of over $75,000,000 and a population of 100,000 or more persons. NMSA 1978, § 4-44-1(B) (2018). Doña Ana County is a Class A county. If the petition is signed by the owners of a majority of the number of acres in the area proposed for annexation, the petition must be submitted to the board of county commissioners of the county in which the municipality is located for comment by the board. Section 3-7-17.1(B). If the petition is not signed by owners of a majority of the number of acres, under certain circumstances the extraterritorial land use commission, *see* NMSA 1978, Section 3-21-3.2 (2003), also must approve the petition. Section 3-7-17.1(C), (D).

Incorporation

{4} NMSA 1978, Sections 3-2-1 to -9 (1976, as amended through 2018), governs incorporation of new municipalities. Residents of the territory in question may petition the board of county commissioners in which the territory is located to incorporate. Section 3-2-1(A).

The petition must be signed by at least 200 residents of the territory or the owners of at least 60 percent of the land within the territory. *Id*. The petition must include a "municipal services and revenue plan." Section 3-2-1(B). Section 3-2-5 provides that the board will determine if the statutory requirements are met; if they are met, the board conducts an election in which residents of the territory vote on whether to incorporate.

{5} Section 3-2-3 places limits on incorporation within "urbanized territory." "Urbanized territory is that territory within the same county and within five miles of the boundary of any municipality having a population of five thousand or more persons and that territory within the same county and within three miles of a municipality having a population of less than five thousand persons[.]" *Id.* § 3-2-3(A). The parties herein agree that the territory that PGST seeks to incorporate is urbanized territory.

{6} Section 3-2-3(B) provides that:

> No territory within an urbanized territory shall be incorporated as a municipality unless [in addition to satisfying the other requirements of Sections 3-2-1 to -9] the:
> (1) municipality or municipalities causing the urbanized territory approve, by resolution, the incorporation of the territory as a municipality;
> (2) residents of the territory proposed to be incorporated have filed with the municipality a valid petition to annex the territory proposed to be incorporated and the municipality fails, within one hundred twenty days after the filing of the annexation petition, to annex the territory proposed to be incorporated; or
> (3) residents of the territory proposed to be annexed conclusively prove that the municipality is unable to provide municipal services within the territory proposed to be incorporated within the same period of time that the proposed municipality could provide municipal service.

BACKGROUND

1980s-1990s Annexation and Incorporation Efforts

{7} As is recounted in *City of Sunland Park v. Santa Teresa Concerned Citizens Ass'n, Inc.*, 1990-NMSC-050, ¶ 2, 110 N.M. 95, 792 P.2d 1138, in June 1986, Sunland Park expressed an interest in annexing Santa Teresa by sending letters to certain Santa Teresa landowners encouraging them to seek annexation into the municipality. In August of that year, property owners who had formed themselves into the Santa Teresa Concerned Citizens Association, Inc. (Association), petitioned DABOCC to incorporate the area as a separate municipality. *Id.* ¶ 3. Later that month, Sunland Park petitioned the MBC to approve its proposed annexation. *Id*. In October 1986, following hearings, DABOCC ruled that, pursuant to Section 3-2-3(B)(3), the Association had conclusively proven that it could provide municipal services more quickly than Sunland Park. *City of Sunland Park*, 1990-NMSC-050, ¶ 3. Sunland Park appealed to the district court. Although the district court rejected Sunland Park's argument that Section 3-2-3(B)(3) required the Association to seek annexation of the territory by Sunland Park, pursuant to Section 3-2-3(B)(2), before seeking incorporation, it reversed DABOCC's decision on the ground that the Association had not proven conclusively that it could provide municipal services more quickly than Sunland Park. *See id.* ¶ 4.

{8} Our Supreme Court affirmed the district court. *Id.* ¶¶ 13-27. Three aspects of the *Sunland Park* opinion are relevant here. First, the Court articulated the purpose behind the 1965 amendment to Section 3-2-3(B)(3) to require "conclusive proof" of the proposed municipality's ability to provide services sooner than the existing municipality can:

> The policy reasons for this requirement are easy to discern. The [L]egislature has, in effect, declared the public policy of this state to be that the growth of municipalities and of their contiguous and urbanized areas shall take place in a planned and orderly manner. Further, it is the state's policy to discourage splinter communities or a proliferation of neighboring, independent municipal bodies, whose competing needs would divide tax revenues, multiply services, create confusion and factionalism among our citizens, and destroy the harmony that should exist between peoples of diverse backgrounds and socio-economic strata within our state.

City of Sunland Park, 1990-NMSC-050, ¶ 20. Second, the Court determined that the Association in fact had not conclusively proven that its proposed new municipality could provide services sooner than Sunland Park. *Id.* ¶¶ 21-25. Third, the Court declined to address, as unnecessary, the interplay between Sections 3-2-3(B)(2) and (3), i.e., whether the Association had to petition Sunland Park to annex Santa Teresa, pursuant to Section 3-2-3(B)(2), before it could invoke Section 3-2-3(B)(3) and seek DABOCC's permission to incorporate. *City of Sunland Park*, 1990-NMSC-050, ¶ 26. Sunland Park's contemplated annexation of the Santa Teresa territory was never completed.

Recent Annexation and Incorporation Efforts

{9} Beginning in the late summer of 2014, Sunland Park's City Council undertook a series of steps that expressed the municipality's renewed interest in pursuing annexation of the Santa Teresa territory. Following lengthy discussion at its August 19 and September 16, 2014, meetings about annexing the Santa Teresa area, the City Council passed a resolution on October 7, 2014, stating that: "[T]he City of Sunland Park would like to extend a hand to the residents of Santa [Teresa] and open a discussion regarding the possible annexation of the Santa [Teresa], New Mexico, area. . . . [T]he City of Sunland Park and the Santa [Teresa] area can grow and benefit from such annexation as the area can improve their infrastructure and economic development"; on the basis of these considerations, the City Council resolved to authorize the mayor and City Council "to establish dialogue with the Santa [Teresa] residents of the home owners associations of Santa [Teresa] and its residents concerning the possible methods of annexation."

{10} In July 2015, and pursuant to Section 3-2-5, PGST filed a petition with DABOCC to incorporate approximately 4,000 acres as a new municipality. At a meeting on November 24, 2015, DABOCC voted 4-0 to deny the petition (DABOCC Order). The Board interpreted Section 3-2-3(B)(3) to require the residents to first comply with Section 3-2-3(B)(2) and file an annexation petition with Sunland Park: The DABOCC "interprets the use of the term 'residents of the territory proposed to be annexed' to require a petition for annexation be made prior to determining the issues related to the providing of municipal services." Accordingly, DABOCC declined to proceed with the incorporation petition, in particular, to address whether the proposed new munici-

pality could provide services sooner than could Sunland Park.

{11} PGST appealed the DABOCC order to the district court. The district court initially ruled in favor of PGST but then, following a motion for reconsideration filed by Sunland Park, reversed itself. In its September 19, 2016 order, the court acknowledged that "it does not make sense to this Court that the entity (Santa Teresa) which seeks to become its own incorporated municipality must first ask Sunland Park to annex it which the evidence shows is precisely what the citizens of Santa Teresa do not want." Nevertheless, the court ruled that Section 3-2-3(B)(2) "requires, as a condition of incorporation, for Santa Teresa to deliver to the City of Sunland Park, a valid petition for annexation. It has not done so." The district court concluded that, "When the Dona Ana County Board of County Commissioners, dismissed Santa Teresa's motion to become incorporated, it correctly interpreted the law."

DISCUSSION

{12} On appeal, the parties advocate the same construction of Section 3-2-3(B) that they did to DABOCC and the district court. PGST contends that the three subparts of Section 3-2-3(B) are independent, "stand-alone" paths to municipal incorporation, and in particular Section 3-2-3(B)(3) is the path that is available to a group of residents in unincorporated territory who oppose annexation by an adjoining or nearby municipality. PGST further argues that the plain meaning of the phrase "proposed to be annexed" in Section 3-2-3(B)(3) encompasses informal expressions of a municipality's desire or intention to annex the territory. PGST concludes that the Sunland Park City Council's 2014 resolution satisfied this predicate requirement for acting, pursuant to Section 3-2-3(B)(3), and PGST therefore was entitled to submit its incorporation petition to and have it considered by DABOCC.

{13} DABOCC and Sunland Park contend that the phrase "proposed to be annexed" in Section 3-2-3(B)(3) refers to the formal annexation petition described in Section 3-2-3(B)(2). PGST therefore must file a petition with Sunland Park seeking Sunland Park's annexation of PGST's territory, and conclusively prove in the context of that proceeding that it can provide municipal services sooner than can Sunland Park, before PGST can file a petition with DABOCC to incorporate as a new municipality. DABOCC and Sunland Park reason that this construction of Section 3-2-3(B)(3) furthers the underlying legislative purpose, as articulated in *City of Sunland Park,* of discouraging splintering of communities and instead promoting their orderly development.

{14} We note initially that DABOCC and Sunland Park do not dispute that Section 3-2-3(B) creates three approaches to incorporation. Rather, their argument focuses on the meaning of "proposed to be annexed" in Section 3-2-3(B)(3), in particular, whether the proposal to which the phrase refers is the formal annexation petition that is described in Section 3-2-3(B)(2). In other words, Sections 3-2-3(B)(2) and (3) are not stand-alone approaches and instead are interrelated, a position the district court adopted below.

{15} As the issue before this Court is one of statutory construction, the standard of review is de novo. *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 33, 140 N.M. 77, 140 P.3d 498. We consider, in turn, Section 3-2-3(B)(3)'s plain meaning; its construction in harmony with Section 3-2-3(B)(2) as well as other, related statutes; and whether the parties' respective proposed constructions of Section 3-2-3(B)(3) lead to an absurd result.

A. Plain Meaning

{16} Statutes are to be construed in accordance with their plain meaning. *Oldham v. Oldham*, 2011-NMSC-007, ¶ 10, 149 N.M. 215, 247 P.3d 736 ("[A court should] look first to the plain language of the statute, giving the words their ordinary meaning[.]" (internal quotation marks and citation omitted)); *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 44, 121 N.M. 821, 918 P.2d 1321 ("When interpreting statutes, . . . [the Courts'] responsibility is to search for and give effect to the intent of the [L]egislature. . . Our understanding of legislative intent is based primarily on the language of the statute, and we will first consider and apply the plain meaning of such language." (citation omitted)). "We may depart from the plain language only under rare and exceptional circumstances." *State v. Padilla*, 2008-NMSC-006, ¶ 41, 143 N.M. 310,176 P.3d 299 (Chavez, J., dissenting) (internal quotation marks and citation omitted).

{17} The plain meaning of "propose" is not limited to a formal proposal. As defined in *Webster's Third New International Dictionary* 1819 (unabr. 1986), "propose" means "to offer for consideration, discussion, acceptance, or adoption." Thus, in the context of Section 3-2-3(B)(3), "proposed to be annexed" encompasses informal proposals to consider annexation such as 2014 Sunland Park resolution. In the absence of some statutory construction consideration that requires us to do so, we do not read into a statute language—here, "formally proposed to be annexed" or "petitioned to be annexed"—that the Legislature has not included. *Id.*; *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 ("[A] court will not read into a statute or ordinance language which is not there, particularly if it makes sense as written.").

B. Related Statutes

{18} A statute also is to be construed in harmony with other, related statutes. "[W]e analyze a statute's function within a comprehensive legislative scheme. . . . [A statute] must be considered in reference to . . . statutes dealing with the same general subject matter." *In re Grace H.*, 2014-NMSC-034, ¶ 34, 335 P.3d 746 (internal quotation marks and citation omitted). "Whenever possible, . . . we must read different legislative enactments as harmonious instead of as contradicting one another. . . . Statutes which relate to the same class of things are considered to be in pari materia[.]" *State v. Tafoya*, 2010-NMSC-019, ¶ 10, 148 N.M. 391, 237 P.3d 693 (omission, internal quotation marks, and citations omitted). For several reasons, DABOCC's and Sunland Park's construction of Section 3-2-3(B)(3) is not compatible with related statutes.

1. Reconciling Section 3-2-3(B)(3) With Section 3-2-3(B)(2)

{19} We first must reconcile Section 3-2-3(B)(3) with Section 3-2-3(B)(2). As discussed above, Section 3-2-3(B)(2) authorizes incorporation of "urbanized territory" where the proponents of incorporation have filed an annexation petition with the existing municipality and the municipality fails to annex the territory in question within 120 days. Section 3-2-3(B)(3) authorizes such incorporation where the proponents prove that the existing municipality is unable to provide municipal services within "the territory proposed to be annexed" within the same period of time that the proposed municipality would provide the services. If the Legislature intended "proposed to be annexed" in Section 3-2-3(B)(3) to refer to the annexation petition described in Section 3-2-3(B)(2), we would expect it at minimum to use the same term: "petitioned" as opposed to "proposed"; the Legislature would have no reason to use a different term unless it intended a different meaning. Alternatively, the Legislature

would have structured Section 3-2-3(B) to make clear that the annexation petition that is the subject of Section 3-2-3(B)(2) is also the predicate or precondition to proceeding pursuant to Section 3-2-3(B)(3). DABOCC and Sunland Park propose such a construction of Section 3-2-3(B)(3): one that effectively combines Sections 3-2-3(B)(2) and (3) into one subsection with two subparts, both of which require the filing of an annexation petition with the municipality. However, the statute is not written in that manner. As structured and worded by the Legislature, the most logical construction of Section 3-2-3(B) is that advocated by PGST: it provides three stand-alone alternative approaches to incorporation.

{20} In support of its argument that the district court did not err, Sunland Park also invokes the "last antecedent" rule. *See In re Goldsworthy's Estate*, 1941-NMSC-036, ¶ 21, 45 N.M. 406, 115 P.2d 627 ("[R]elative and qualifying words, phrases, and clauses [here, "proposed to be annexed"] are to be applied to the words or phrase immediately preceding, and are not to be construed extending to or including others more remote." (internal quotation marks and citation omitted)). We disagree that the last antecedent rule applies here. First, the reference to a formal annexation petition does not immediately precede the phrase that it supposedly qualifies, "proposed to be annexed." *See* 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:33, at 498-99 (rev'd 7th ed. 2014) ("[A] proviso usually applies to the provision or clause *immediately* preceding it." (Emphasis added.)) Instead, the reference to a formal annexation petition is found in a separate, disjunctive subpart of the statute. Second, the preceding phrase is entirely different: again, DABOCC and Sunland Park provide no basis for inferring that the Legislature intended "proposed" to refer back to "petition," particularly where the Legislature just as easily could have used the phrase "petitioned to be annexed" if that was its intent.

2. Reconciling Section 3-2-3(B)(3) With Other, Related Statutes

{21} We next consider whether the parties' competing constructions of Section 3-2-3(B)(3) are consistent with Sections 3-2-5, 3-7-17, and 3-7-17.1. As stated above, Section 3-2-5 provides for the board of county commissioners of the county within which the subject territory is located to determine if the conditions of Section 3-2-3—including whether, under Section 3-2-3(B)(3), the territory's residents can prove "conclusively" that the new municipality can provide services more quickly than the existing municipality—are met as part of the board's review of an *incorporation* petition and determination to hold an election. This is consistent with PGST's stand-alone construction of Section 3-2-3(B)(3). However, DABOCC's and Sunland Park's construction of Section 3-2-3(B)(3) necessitates that the question be addressed in the context of a Section 3-7-17 or Section 3-7-17.1 *annexation* petition proceeding filed with the municipality. Neither Section 3-7-17 nor Section 3-7-17.1 provides for the municipality to address the Section 3-2-3(B)(3) question, and we perceive no other statutory basis for inferring any legislative intent that, where residents are seeking to incorporate a new municipality as an alternative to annexation by an existing municipality, the existing municipality itself should be the arbiter of whether it can provide municipal services more quickly than the proposed new municipality.[1]

3. Prior jurisdiction and related timing issues

{22} DABOCC attempts to meet this last objection to its construction of Section 3-2-3(B)(3) by suggesting that the municipality will seek the county's input during the course of the annexation proceeding. DABOCC describes the decision-making process (in a scenario in which PGST prevails) thus: "The Incorporators [PGST] petition Sunland Park for annexation, Sunland Park begins the process and when that process is underway, the Incorporators request [DA]BOCC to hold a [Section 3-2-3(B)] hearing, which is held, and the Incorporators prevail on the provision of municipal services issue. . . . [A] favorable [Section 3-2-3(B)] hearing outcome for the Incorporators would trump and displace the Sunland Park annexation process." Not only is such a procedure not authorized by either Section 3-2-5 or Section 3-7-17 (or Section 3-7-17.1), as PGST argues, it is incompatible with the prior jurisdiction doctrine.

{23} The common law prior jurisdiction doctrine provides that "the court first obtaining jurisdiction retains it as against a court of concurrent jurisdiction in which a similar action is subsequently instituted between the same parties seeking similar remedies involving the same subject matter." *In re Doe*, 1982-NMCA-115, ¶ 13, 98 N.M. 442, 649 P.2d 510, *overruled on other grounds by State v. Roper*, 1996-NMCA-073, ¶ 12 n.3, 122 N.M. 126, 921 P.2d 322. New Mexico courts have extended the doctrine to municipal annexation disputes. *Amrep Sw., Inc. v. Town of Bernalillo*, 1991-NMCA-110, ¶ 8, 113 N.M. 19, 821 P.2d 357 (applying doctrine and determining that, because it was filed first in time, annexation petition proceeding filed with MBC had prior jurisdiction over annexation petition proceedings filed with municipalities). Courts in other jurisdictions have extended the doctrine to conflicting municipal annexation and incorporation disputes. *See generally* 2 McQuillin, *The Law of Municipal Corporations* § 7.39.3 (July 2018 Update) ("The general rules governing the acquisition of jurisdiction are usually applied where there are competing incorporation and annexation proceedings. A proceeding for the annexation of territory to a municipal corporation is ineffectual when instituted after the institution of a proceeding for the organization of the territory into a village or city, and while that proceeding is pending and undetermined. Conversely, if annexation proceedings were instituted before municipal organization proceedings, the latter are ineffectual." (footnotes omitted)). The rule is longstanding. *See, e.g.*, *State ex rel. Winn v. City of San Antonio*, 259 S.W.2d 248, 250 (Tex. Civ. App. 1953).

{24} DABOCC's suggested procedure cannot be squared with the aforementioned statutes and the dictates of prior jurisdiction. DABOCC has authority to hold a Section 3-2-3(B)(3) hearing only

[1]Section 3-7-17.1(B) does provide for the municipality to submit the annexation petition to the board of county commissioners *for comment*, but only if the petition is signed by the owners of a majority of the number of acres in the territory proposed for annexation. *See id.* Further, even assuming that this provision could be construed to permit the municipality in that situation to seek the board's input on the Section 3-2-3(B)(3) question, the municipality would be free—inconsistent with the apparent intent of Section 3-2-3(B)(3)—to disregard the board's determination and either annex or decline to annex as the municipality wished

pursuant to Section 3-2-5, i.e., only after a incorporation petition is filed. However, once filed, the Section 3-7-17.1 annexation proceeding would invalidate any incorporation petition. That is, PGST's right to proceed with incorporation following a favorable ruling on the Section 3-2-3(B)(3) question would be "trumped" by Sunland Park's annexation proceeding, not the other way around. Quite simply, if residents of territory who propose to incorporate a new municipality must first file "a valid petition to annex the territory" to an existing municipality, then the residents would lose any control over their fate and instead would subject themselves to the municipality's unfettered ability to accept the petition and annex the territory into the municipality. Absent some expression of legislative intent, not present here, to override the prior jurisdiction doctrine, *see, e.g.*, *City of Greenwood v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 434-36 (Colo. 2000) (en banc), we are not inclined to endorse a construction of Section 3-2-3(B)(3) that requires residents of territory who wish to incorporate as a means of *avoiding* annexation to take steps that expose themselves to the unavoidable possibility if not probability of such a result.

{25} As PGST points out, a related timing problem arises from DABOCC's and Sunland Park's construction of Section 3-2-3(B)(3). If PGST were to file an annexation petition with Sunland Park, Section 3-7-17.1(B) requires Sunland Park to approve or disapprove the petition within sixty days. In contrast, during the incorporation process described in Section 3-2-1 and Section 3-2-5: DABOCC would conduct an initial review of the application within thirty days for compliance with the requirements of Section 3-2-1; assuming such compliance is found, a census would be conducted; the local government division of the New Mexico Department of Finance and Administration would review the municipal services plan (with PGST to respond within three months if the review identified any deficiencies); following completion of those tasks, DABOCC would "determine if the conditions for incorporation of the territory as a municipality have been met as required in Sections 3-2-1 through 3-2-3." Section 3-2-5(D). Only at that point would DABOCC make the determination called for in Section 3-2-3(B)(3). As a practical matter it likely would be impossible for PGST to complete the incorporation process—or even get to the point of obtaining DABOCC's decision whether Sunland Park or the proposed new Santa Teresa municipality can deliver services more quickly—within Section 3-7-17.1(B)'s sixty-day period for Sunland Park to act on the annexation petition. Either Sunland Park would fail to comply with the sixty-day deadline (and arguably Section 3-2-3(B)(2)'s 120-day deadline as well), or it would simply approve PGST's annexation petition and thereby moot the incorporation petition. DABOCC and Sunland Park's construction of Section 3-2-3(B)(3) effectively would nullify any meaningful opportunity for residents of unincorporated territory to utilize Section 3-2-3(B)(3) to avoid unwanted annexation, which opportunity seems to be the basic purpose of the statute.

{26} To summarize, DABOCC and Sunland Park advocate without any statutory basis superimposing on top of annexation proceedings a procedure that is authorized only for incorporation proceedings. This hybrid scheme raises seemingly insurmountable prior jurisdiction and practical timing problems. Particularly given the absence of any language in any of the affected statutes, it is difficult to accept the proposition that the Legislature intended such a scheme.

C. Absurd Construction

{27} Courts will not construe a statute in a manner that leads to an absurd result. *Trujillo v. Romero*, 1971-NMSC-020, ¶ 18, 82 N.M. 301, 481 P.2d 89. This rule is most often invoked when applying the plain or literal meaning of the words of the statute leads to an absurd result, *see Progressive Nw. Ins. Co. v. Weed Warrior Servs.*, 2010-NMSC-050, ¶ 6, 149 N.M. 157, 245 P.3d 1209 ("We do not depart from the plain language of a statute unless we must resolve an ambiguity, correct a mistake or absurdity, or deal with a conflict between different statutory provisions." (internal quotation marks and citation omitted)), but it is equally if not more applicable as a ground for insisting on application of the words' plain meaning to *avoid* an absurdity.

{28} As the district court effectively acknowledged, it is absurd to construe Section 3-2-3(B)(3) to require residents of a territory who oppose annexation by an existing, adjoining municipality to file a petition asking that municipality to annex their territory. Conversely, it is reasonable to construe "proposed to be annexed" to encompass an informal expression by the municipality of its intent to annex the territory. Indeed, such a construction is consistent with the apparent intent of Section 3-2-3(B)(3) to permit residents of adjoining territory who oppose such an announcement of contemplated annexation to respond with a petition for incorporation as an alternative to the anticipated annexation, just as occurred in Doña Ana County in 2014.

D. Legislative Intent

{29} Relying on the language from *City of Sunland Park* quoted above, DABOCC and Sunland Park argue that requiring residents living within five miles of a municipality in an urbanized county "to petition the urbanized municipality for annexation into that municipality, thus affording the municipality the option to annex or not, before resort to a [Section 3-2-3(B)] hearing, fosters the State's public policy."

{30} If a statute is not ambiguous, then it is unnecessary to discern the policy that underlies the statute and instead we construe it by applying the plain meaning of the statute's words. *See Weed Warrior Servs.*, 2010-NMSC-050, ¶ 11. Here, the district court found that Section 3-2-3(B)(3) was not ambiguous, none of the parties contend to the contrary on appeal, and we concur. Therefore, it is not necessary to engage in a public policy analysis. *Cf. Ortiz v. Overland Express*, 2010-NMSC-021, ¶ 18, 148 N.M. 405, 237 P.3d 707 ("When a statute's language is ambiguous or unclear, we look to legislative intent to inform our interpretation of the statute."); *Helen G. v. Mark J.H.*, 2008-NMSC-002, ¶¶ 37-38, 143 N.M. 246, 175 P.3d 914 (noting that ambiguous provisions require the court to ascertain statute's legislative purpose).

E. Summary

{31} An existing municipality has the right to pursue annexation, pursuant to Sections 3-7-1 to -18, independent of any action taken by the residents of the territory in question; if the municipality initiates such action, it will have prior jurisdiction. In addition, Section 3-2-3(B)(1), (2) effectively grant an existing municipality limited first rights of refusal in connection with efforts to incorporate neighboring "urbanized" territory. Section 3-2-3(B)(3) is most reasonably construed to grant a narrow path to incorporation to residents of the territory who oppose annexation by the municipality. While the Legislature has imposed the hurdle of requiring the residents to prove "conclusively" that the proposed new municipality will be able to deliver municipal services more quickly

than could the existing municipality, we do not believe it intended to make the process unreasonable. We hold that Section 3-2-3(B)(3) does not require residents of a territory to first formally petition the existing municipality to annex the territory before they can file a petition to incorporate as a municipality; such residents may file an incorporation petition pursuant to Section 3-2-1 and Section 3-2-5 if the municipality informally proposes to consider or otherwise expresses an interest in annexing the territory, short of actually initiating formal annexation proceedings. We conclude that the aforementioned actions taken by Sunland Park in 2014 amounted to such an informal proposal.

CONCLUSION

{32} We reverse the district court's September 19, 2016 amended final appellate order from an administrative hearing. We remand this action to the district court to reverse DABOCC's decision and instruct DABOCC to address PGST's claim that it can provide municipal services more quickly than Sunland Park, and whether PGST's petition otherwise satisfies the requirements of Sections 3-2-1 to -9.

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

WE CONCUR:
LINDA M. VANZI, Chief Judge
M. MONICA ZAMORA, Judge

Classified

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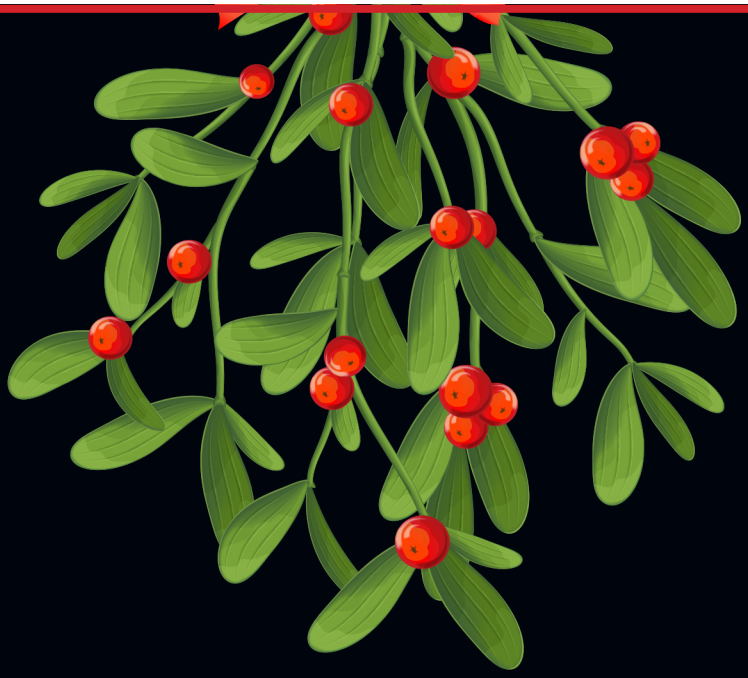

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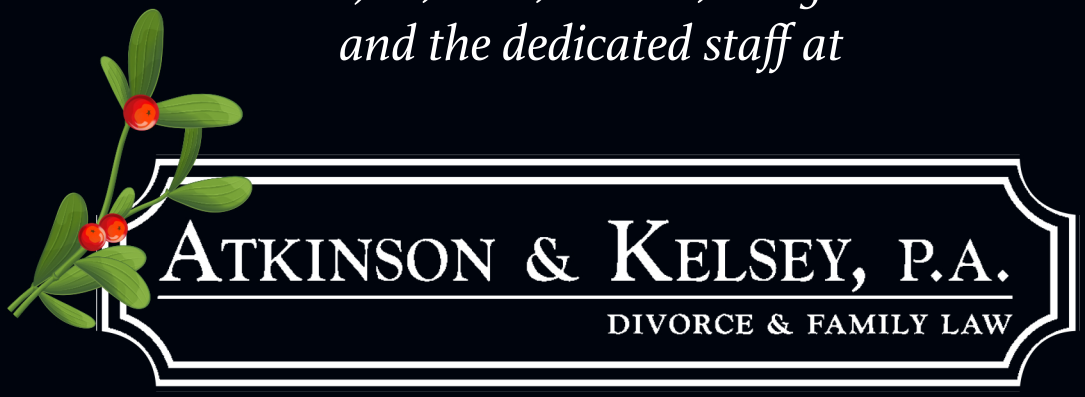

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