Official Publication of the State Bar of New Mexico

BAR BULLETIN

February 20, 2019 • Volume 58, No. 4

Pink Rose by Julia McFall (see page 3) www.trulyjuliedesigns.com

Inside This Issue

NEW MEXICO Lawyer

Bankruptcy Law Section

CLE programming from the Center for Legal Education

34th Annual Bankruptcy Year in Review Seminar

Friday, March 1, 2019
8:30 a.m. –5 p.m.
6.0 G 1.0 EP
Live at the State Bar Center
Also available via Live Webcast!

$99 Non-members and those not seeking CLE credit
$278 Co-sponsoring section members, government and legal services attorneys, Young Lawyers Division and Paralegal Division members
$309 Standard/Webcast fee

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

Tuesday, March 26, 2019
9:30 a.m. –12:15 p.m.
1.5 G 1.0 EP
Live at the State Bar Center
Also available via Live Webcast!

$39 Non-members and those not seeking CLE credit
$121 Children's Law Section members, government and legal services attorneys, Paralegal Division members and Young Lawyers Division members
$135 Standard/Webcast Fee

How to Practice Series

Divorce Law in New Mexico

Friday, March 15, 2019
8:45 a.m.-4:30 p.m.
4.5 G 2.0 EP
Live at the State Bar Center
Also available via Live Webcast!

$99 Audit/Non-member not seeking CLE credit
$265 Government and legal services attorneys, Young Lawyers Division and Paralegal Division members
$295 Standard/Webcast Fee

Making Your Case with a Better Memory

Friday, March 29, 2019
8:30 a.m. –4 p.m.
6.0 G
Live at the State Bar Center
Also available via Live Webcast!

$99 Audit/Non-member not seeking CLE credit
$228 Early bird fee (Registration must be received by Feb. 28)
$251 Government and legal services attorneys, Young Lawyers Division and Paralegal Division members
$279 Standard/Webcast Fee

Would you like to have more time, less stress, better concentration and no trouble remembering names and faces?

Join nationally recognized memory training consultant Paul Mellor for a session that will improve the way your mind retains facts. Learn techniques to improve your memory and learn how to apply these techniques to your everyday practice. Mellor's objective is to show you how a trained memory can increase your efficiency and productivity in all aspects of law. He will shred the myth that memory cannot be enhanced and help you lay a foundation for total recall.

Registration and payment for the programs must be received prior to the program date. A $20 late fee will be incurred when registering the day of the program. This fee does not apply to live webcast attendance.

New Mexico State Bar Foundation
Center for Legal Education

LinkedIn
505-797-6020 • www.nmbar.org/cle
5121 Masthead NE • PO Box 92860, Albuquerque, NM 87199

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

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Trial Practice Law Section
Noon, State Bar Center

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February

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21
Common Legal Issues for Senior Citizens Workshop Presentation
10–1 p.m., Bosque farms Community Center, Bosque Farms, 1-800-876-6657

27
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

March

5
Common Legal Issues for Senior Citizens Workshop Presentation
10–1 p.m., Cibola Senior Citizens Center, Bosque Farms, 1-800-876-6657

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

6
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

About Cover Image and Artist: Julia McFall was admitted into the State Bar of New Mexico in October 2013 and was the inaugural law clerk of Justice Barbara J. Vigil of the New Mexico Supreme Court. She also clerked for Judge Michael Vigil of the New Mexico Court of Appeals and is currently an associate attorney at the civil litigation law firm of Atkinson, Baker & Rodriguez, PC. McFall enjoys painting acrylic on canvas and drawing charcoal portraits. View more of her work at www.trulyjuliedesigns.com.

Notices

Court News

Judicial Standards Commission

Amendments Procedural Rules

The State of New Mexico Judicial Standards Commission has amended its procedural rules for all matters filed on or after March 1. To view or download a copy of the amended rules, visit www.nmjsc.org under the Resources > Governing Provisions of Law tab.

Sixth Judicial District Court

Notice of Right to Excuse Judge

As of Dec. 29, 2018, the Hon. Thomas F. Stewart is now the District Judge for Division I of the Sixth Judicial District Court. Grant County: 50 percent of all pending and reopened cases previously assigned to Hon. William J. Perkins, former District Judge for Division I, and 50 percent of Division III cases, shall be reassigned to the Hon. Thomas F. Stewart. Hidalgo County: All pending and reopened cases previously assigned to the Hon. William J. Perkins, former District Judge for Division I, shall be reassigned equally to Division III (currently vacant) and the Hon. Jarod K. Hofacket, District Judge for Division IV. Luna County: One hundred percent of all pending and reopened cases previously assigned to William J. Perkins, former District Judge for Division I, shall be reassigned to the Hon. Thomas F. Stewart. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days to excuse Judge Stewart.

Nominating Commission Candidate Announcement

The Sixth Judicial District Court Nominating Commission convened on Tuesday, Jan. 29 in Silver City and completed its evaluation of the four candidates for the one vacancy on the Sixth Judicial District Court. The Commission recommends the following candidates to Gov. Michelle Lujan Grisham:

James B. Foy
William J. Perkins

Professionalism Tip

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

Within practical time limits, I will allow lawyers to present proper arguments and to make a complete and accurate record.

EighthJudicial District Court

Announcement of Vacancy

One vacancy will exist in the Eighth Judicial District Court due to the retirement of the Hon. Sarah Backus effective, Feb. 28. This judicial vacancy will be in Raton. Inquiries regarding specific details for the judicial vacancy should be direct ed to the chief judge or the Administrator of the Court. Dean Sergio Pareja of the UNM School of Law, designated by the New Mexico Constitution to chair the District Court Nominating Committee, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications, as well as information related to qualifications for the position, may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php, or by contacting Beverly Akin at akin@law.unm.edu or 505-277-4700. The deadline for applications has been set for March 11, 5 p.m. Applications received after that date 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 Judicial Nominating Committee will meet at 9 a.m. on March 26 at the Eighth Judicial Court Colfax County, located at 1413 South Second, Raton, to evaluate the applicants for this position. The Committee meeting is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

Eleventh Judicial District Court

Notice of Mass Reassignment

Under the authority of Rule 23-109 NMRA, the Chief Judge of the Eleventh Judicial District Court has directed a mass reassignment of cases in San Juan County effective Feb. 20 as follows:

1. All cases of every type pending in Division 4 (currently vacant) are reassigned to Division 6.
2. Cases pending in Division 6 are reassigned as follows:
   a. Domestic cases are reassigned to Division 1, with the exception of two cases.
   b. All other civil cases are reassigned to Division 4, with the exception of ten cases.
3. Probate cases pending in Division 1 are reassigned to Division 4, with the exception of eight cases.

Division 1 is relocated to the District courthouse in Farmington at 851 Andrea Drive. Division 6 is relocated to the District courthouse in Aztec at 103 So. Oliver Dr. A list of the cases referred to herein that have been excepted from this mass reassignment is available on the court's website at https://eleventhdistrictcourt.nmcourts.gov. Parties who have not yet exercised a peremptory excusal in a case being reassigned in this mass reassignment will have up to ten business days after March 6 to excuse the judge in the newly assigned division.

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

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

Mitchell R. Elfers has been appointed Clerk of the U.S. District Court for the District of New Mexico, effective Feb. 4 and will continue in that capacity until otherwise ordered by the Court. In this capacity, Mitchell R. Elfers will perform all duties and will assume the responsibilities of the Clerk of Court.

State Bar News

Call for CLE Proposals

The New Mexico State Bar Foundation Center for Legal Education invites all State Bar members; sections, divisions and committees; and voluntary bar members to submit proposals for CLE programs that could be presented at the State Bar Annual Meeting or at other times during the year. We are looking for hot topics in your areas of law. This year's annual meeting will be held Aug. 1-3 at Hotel Albuquerque in Old Town, Albuquerque. Breakout sessions will be one hour in length and 12 spots are available. Complete and submit this form https://form.jotform.com/90175355209154 with a hot topic program in your area of law by close of business March 29.

ADR Committee

ADR Superpower Skills Workshop

The ADR Committee invites State Bar members to a skills workshop for those who are new as well as for those who are experienced with the practice of ADR. It is an opportunity to identify and develop the core skills for success in facilitating communication, collaboration and constructive conflict management. Attendees will work in small groups, with a coach, to experience the profound and positive impact of skillful listening and acknowledgement. Join JoEllen Ransom, Jon Lee and Anne Lightsey from UNM Ombuds for Staff from noon-1 p.m. on April 25 at the State Bar Center for this free workshop. R.S.V.P. to Breanna Henley at bhenley@nmbar.org. Attendees are welcome to join the ADR Committee meeting from 11:30 a.m.-noon in advance of the presentation.

Minimum Continuing Legal Education

2018 Credit Completion Extension

If you missed the 2018 deadline to complete your MCLE requirements, don't worry you still have time! For $100, the deadline for 2018 MCLE compliance is extended until March 31. As a reminder, these credits must be LIVE credits. No need to contact MCLE, you will receive an invoice in the mail.

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- March 4, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (The group normally meets the first Monday of the month.)
- March. 11, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- March 18, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

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

Monitor Training

The NMJLAP will be hosting a monitor training for those interested in volunteering as a monitor or already serving as a monitor; Monitors are crucial in the NMJLAP Monitoring Program success as they are attorneys and judges who have lived experiences with recovery and mental health conditions. They have the desire to assist and support a peer who is going through a similar struggle. The second monitor training will take place at the State Bar Center on 11 a.m.-12 p.m., April 6, For more information or to signup, contact Erica Candelaria at ecandelaria@nmbar.org or 505-797-6093.

Committee Meeting

The NMJLAP will be having its second quarter Committee meeting at 10-11 a.m., on April 6, at the State Bar Center. All JLAP Committee members are encouraged to attend. For those that cannot be there in person, a teleconference will be provided. Coffee and a continental breakfast will be provided. R.S.V.P. with Erica Candelaria at ecandelaria@nmbar.org or 505-797-6093 no later than April 2. For questions, contact Pam Moore at 505-797-6003 or pmoore@nmbar.org.

Solo and Small Firm Section

Legislative Session Overview with Senator Daniel Ivey-Soto

The Solo and Small Firm Section always has a prominent state legislator review the recent most Roundhouse session during the March Speaker Series presentation and alternates each year's guest between the two parties. 2019 is Democrats' turn, so Senator Daniel Ivey-Soto will present an overview of all that happened (and didn't happen) from noon-1 p.m. on March 19 at the State Bar Center. The Section hosts these monthly luncheon programs with an open invitation to all judges and attorneys. R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

SSF Roundtable in Albuquerque

The Solo and Small Firm Section invites Albuquerque area members to connect with other local attorneys to discuss their practice and learn from peers on practice management topics from technology to succession planning. Guests do not need to be a Section member to attend. Please join the section at 8:30 a.m., March 4, at the State Bar Center. R.S.V.P. and send questions to Deian McBryde at deian@mcbrydelaw.com or 505-465-9086.

Young Lawyers Division

Volunteers Needed for Veterans Civil Legal Clinic

The YLD seeks volunteers to staff the Veterans Civil Legal Clinic from 8:30-10:30 a.m. on March 11 at the N.M. Veteran's Memorial located at 1100 Louisiana Blvd SE in Albuquerque. Volunteers should arrive at 8 a.m. for orientation and complimentary breakfast. The clinics offers veterans a broad range of veteran-specific and non-veteran specific legal services, including family law, consumer rights, worker's comp, bankruptcy, driver's license restoration, landlord/tenant, labor/employment and immigration. To volunteer, visit https://form.jotform.com/71766385703969.

UNM School of Law

Law Library Hours
Spring 2019

Jan. 14-May 11

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.

Exceptions

March 10-17: During Spring Break the library will be open to the public from 8 a.m.-6 p.m.

Reference

Monday–Friday	9 a.m.–6 p.m.

UNM School of Law Women's Law Caucus

2019 Justice Mary Walters Awards Dinner

The UNM School of Law Women's Law Caucus will host the 2019 Justice Mary Walters Awards Dinner at 6:30 p.m., on March 29 at UNM Student Union Building, ballroom C. R.S.V.P. at goto.unm.edu/walters by March 22. For more information contact Ariana Montez, president of the Women's Law Caucus, at Montezar@law.unm.edu.

Resolution of Indigenous Historical Grievances in New Zealand Recent Developments

The UNM School of Law Natural Resources and Environmental Law Program and the Utton Center in cooperation with the Natural Resources, Energy and Environment Section of the State Bar of New Mexico and co-sponsor the UNM Law and Indigenous Peoples Program will host a CLE Lecture: "Resolution of Indigenous Historical Grievances in New Zealand—Recent Developments" by The Hon. Christopher Finlayson, MP and former Attorney General, New Zealand. The Hon. Christopher Finlayson will speak on New Zealand's efforts to resolve historical grievances with its indigenous people, the Maori. The resolution of these grievances has on occasion required some radical rethinking of the status quo, and he has achieved highly creative and innovative settlements. Feb. 25, at 5–6:30 p.m., Room 2401, UNM School of Law, 1117 Stanford NE, Albuquerque. The CLE has been approved for 1.0 G, MCLE credit. There is no fee, and no registration is required. Free parking is available in Lot L of the School of Law. For more information, call Laura at 505-277-3253.

Tribal Law Journal 20th Anniversary Symposium

The Tribal Law Journal presents "20th Anniversary Symposium" entitled "Tribal Justice: Honoring Indigenous Dispute Resolution" with speakers Rep. Deb Haaland (Laguna) and Hon. Robert Yazzie (Navajo). The symposium will include a screening of the award winning documentary: Tribal Justice. Film panelists include Hon. Abby Abinanti (Yurok Tribe), Hon. Claudette White (Quechan Tribe) and local indigenous dispute resolution peacemakers. The program is at 11:30 a.m. (lunch at noon), on March 29 at the UNM School of Law. The program has been approved for 3.0 general and 1.0 ethics/professionalism credits by MCLE. For more information, email chavezis@law.unm.edu.

Legal Education

February

21 **How to Practice Series: Probate and Non-Probate Transfers (2018)**
4.0 G, 2.0 EP
Webcast/Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **How to Practice Series: Demystifying Civil Litigation, Pt. III – Dispositive Motion Practice and Mediations (2018)**
4.5 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **2018 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Recent Developments in Civil Procedure (2018)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Lawyer Ethics and Texting**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Regional Seminar: Voir Dire**
20.0 G
Live Seminar, Santa Fe
Trial Lawyer College

22 **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

22 **Estate Planning for Digital Assests**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **2019 Americans with Disabilities Act Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

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

March

1 **34th Annual Bankruptcy Year in Review Seminar**
6.0 G, 1.0 EP
Webcast/Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **2019 Wage and Hour Update: New Overtime Rules**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Drafting Special Needs Trusts for Vulnerable Clients**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **How to Practice Series: Divorce Law in New Mexico**
4.5 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Trust and Estate Planning for Second Marriages**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Appraisals in Commercial Real Estate Finance and Development**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **2018 Probate Institute**
6.5 G, 1.0 EP
Webcast/Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Immigration Law and General Civil Practice: Representing Clients in and Age of Increased Enforcement (2018)**
5.5 G, 1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **A Practical Approach to Indian Law: Legal Writing, 2018 Update and the Ethics of Practicing Law (2018)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
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 February 1, 2019

PUBLISHED OPINIONS

No opinions published

UNPUBLISHED OPINIONS

A-1-CA-34521	State v. R Chester	Affirm/Remand	01/28/2019
A-1-CA-35699	A Arguedas v. G Seawright	Affirm	01/28/2019
A-1-CA-36986	State v. M Chacon	Affirm	01/28/2019
A-1-CA-37173	City of Rio Rancho v. A Johnson	Affirm	01/28/2019
A-1-CA-34978	State v. J Bice	Affirm	01/29/2019
A-1-CA-35242	State v. D Dominguez	Affirm	01/30/2019
A-1-CA-35014	State v. B Beard	Affirm/Remand	01/31/2019
A-1-CA-37197	R Mendez v. McDonalds	Affirm	01/31/2019
A-1-CA-37657	State v. B Lerman	Affirm	01/31/2019

Effective February 8, 2019

PUBLISHED OPINIONS

A-1-CA-35643	T Giddings v. SRT-Mountain	Vacate/Remand	02/04/2019
A-1-CA-36368	State v. R Quintana	Affirm	02/05/2019

UNPUBLISHED OPINIONS

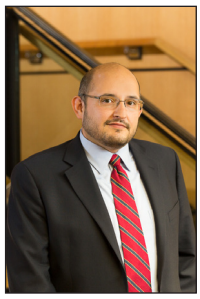
A-1-CA-34997	D Herbison v. M Schwaner	Affirm	02/04/2019
A-1-CA-35840	AFSCME v. City of Las Vegas	Reverse/Remand	02/04/2019
A-1-CA-35852	C Mulqueen v. Radiology Assoc.	Affirm	02/04/2019
A-1-CA-36601	I Zamora v. N Serna	Affirm	02/04/2019
A-1-CA-37494	El Castillo v. G Martinez	Affirm	02/04/2019
A-1-CA-37556	State v. D Carter	Affirm	02/04/2019
A-1-CA-35127	State v. J Owens	Affirm	02/05/2019
A-1-CA-37534	G Corse v. M Bailey	Affirm	02/05/2019
A-1-CA-35486	NM Bank v. D Lucas	Affirm	02/06/2019
A-1-CA-37010	State v. B Parker	Affirm	02/06/2019
A-1-CA-37125	US Bank v. A Deardorff	Affirm	02/06/2019
A-1-CA-35306	State v. T Mcbride	Affirm	02/07/2019
A-1-CA-35931	J Tunis v. Country Club Estates	Reverse/Remand	02/07/2019
A-1-CA-37358	State v. B Ryan	Affirm	02/07/2019
A-1-CA-37555	State v. G Hernandez	Affirm	02/07/2019

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

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

The Bernalillo County Metropolitan Court Judges being sworn-in (after their November retention victories) by District Court Chief Judge Stan Whitaker.

Bernalillo County Metropolitan Court **Chief Judge Sandra Engel** announced that four judges will be taking on additional duties in 2019. **Judge Courtney B. Weaks** will take on the newly-created role of presiding Specialty Courts judge, where she will be responsible for overseeing the court's 11 Specialty Court programs. **Judge Christine E. Rodriguez** will take over as presiding Judge of the DWI Recovery Court, **Judge Henry A. Alaniz** will serve as Presiding Judge of the Community Veterans Court, and **Judge Maria I. Dominguez** will preside over the Outreach Court.



Luis G. Carrasco was elected to the Board of Directors of the Rodey Law Firm on Jan. 23. Carrasco practices in Rodey's Santa Fe office. He is a member of the Business Department where his practice focuses in the areas of public finance, real estate, administrative law and government relations and other transactional matters. Prior to joining Rodey, Carrasco served as an Assistant Attorney General in the New Mexico Attorney General's Office.

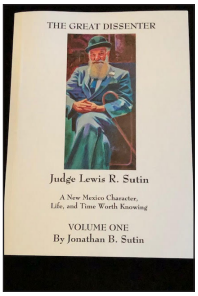
Jenica L. Jacobi was elected to the Board of Directors of the Rodey Law Firm on Jan. 23. Jacobi practices in Rodey's Albuquerque office. She is a member of the business department where her practice focuses on real estate, land use and local government law. Prior to joining Rodey, Jacobi was a managing assistant city attorney for the City of Albuquerque, overseeing general counsel and transactional work for the City.

Miller Stratvert P.A. is pleased to announce their newest Shareholder/Director, **Max A. Jones**. Miller Stratvert P.A. congratulates Jones for the manner in which he has distinguished himself as a lawyer and member of our community. Jones will continue to represent clients in civil litigation in the areas of medical malpractice, workers' compensation, personal injury, employment law and contract disputes. He has a bachelor's and law degree from the University of New Mexico. Jones joined the firm in 2013.

Juan M. Marquez, Jr. was elected to the Board of Directors of the Rodey Law Firm on Jan. 23. Marquez practices in Rodey's Albuquerque office. He is a member of the Litigation Department where his practice focuses on professional liability, with an emphasis on medical malpractice defense. He also practices in the areas of railroad litigation, product liability defense, tort and wrongful death defense and general liability defense.

Denisha Pierre, a participating attorney in the State Bar of New Mexico's legal incubator program, Entrepreneurs in Community Lawyering, has been invited to join a Testing Task Force established by the National Conference of Bar Examiners. The Task Force is charged with undertaking a three-year study to ensure that the Uniform Bar Examination tests fairly and without bias the knowledge, skills, and abilities required for competent entry-level lawyers in the 21st century. The study will be facilitated by an independent research consultant, American Institutes for Research (AIR), and will lay the foundation for a future-focused practice analysis survey, which will be distributed nationwide in 2019. The ECL program is proud to have her as one of its participating solo practitioners.

Michael L. Stout has been selected by his peers for inclusion in the 25th edition of *The Best Lawyers in America* for his work in criminal defense: general practice and criminal defense: white collar. This is his 29th year of recognition. He practices in Las Cruces, serves on the New Mexico Public Defender Commission and is on the faculty of the National Criminal Defense College.



Judge Jonathan Sutin (Ct. App. 1999-2017) has written and published (Amazon.com) a significant, thorough biography of his father, Judge Lewis R. Sutin (Ct. App. 1971-82), a New Mexico personality, entitled *The Great Dissenter*. Anna Box, Sutin's paralegal for 28 years, and now Court of Appeals manager, provided invaluable technical and publication assistance. Lewis Sutin and Justice Irwin Moise founded the Sutin Law Firm in 1946. The accompanying portrait of Judge Lewis Sutin, painted in 1982 by Santa Fe artist Jamie Chase, hangs in the lobby of La Fonda.

Modrall Sperling is pleased to announce the firm's recently elected officers. **Tim Fields** has been elected President. A member of the firm since 1986, he most recently served as Vice President. He has also headed the firm's Litigation Department, where his focus is on complex civil litigation.

Stuart Butzier, who joined the firm in 1989, has been elected Vice President. A past member of Modrall Sperling's Executive Committee, Stuart is the Managing Director of the firm's Santa Fe office, Head of its Natural Resources Department, and Chair of its Mining Practice Group.

Earl DeBrine continues to serve as Modrall Sperling's Secretary-Treasurer, a position he has held since 2016. He joined the firm in 1987, and is a former Head of the firm's Natural Resources Department and the current Chair of its Oil and Gas Practice Group.

Modrall Sperling is pleased to welcome **Daniel Alsup** as a newly elected member of the firm's executive committee, and announce that **Alex Walker** has been elected to a second term. The Executive Committee is a group of seven shareholders, charged with overseeing and directing the firm's activities and goals.

Daniel Alsup is a member of the firm's Public Finance group, where he regularly advises clients regarding a wide variety of public finance transactions and matters.

Alex Walker has an active civil litigation practice representing business clients in both state and federal courts.

In Memoriam

Lea Anne Zukowski, JD, LPCC, and beloved mother, sister and friend, passed away on Aug. 5, 2018, at the age of 43 years. Zukowski was born on May 16, 1975, in Albuquerque. A lifelong native of Albuquerque, Zukowski attended Sandia High School and the University of New Mexico, where she earned a Bachelor of Arts in English and Psychology and a Master of Arts in Counseling, and the UNM School of Law. She had a 14-year career at Sequoyah Adolescent Treatment Center where she worked as milieu director for over six years. When her career ended at Sequoyah, Zukowski sought a career in law to continue fighting for the rights of children and people with disabilities working at Disability Rights New Mexico. While Zukowski's legacy will continue through her work, Zukowski's memory will be cherished by the people whose lives she touched. She was first and foremost a devoted mother to her daughter, Kaitlin Jane, and will be lovingly remembered by her daughter, Katie; brother, Michael; sister-in-law, Lynese Zukowski; sister, Mary Zukowski; brother-in-law, Edward Dlugokecki; and sister, Susan Adrian, as well as many nieces and nephews.

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective February 20, 2019

Pending Proposed Rule Changes Open for Comment:

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

1-004.1 Guardianship and conservatorship proceedings; process 01/14/2019

1-047 Jurors 12/31/2018

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 01/14/2019

1-141 Guardianship and conservatorship proceedings; determination of persons entitled to notice of proceedings or access to court records 07/01/2018

1-142 Guardianship and conservatorship proceedings; proof of certification of professional guardians and conservators 07/01/2019

Rules of Procedure for the Probate Courts

1B-101 Scope of rules; probate court jurisdiction; title; citation form 12/31/2018

1B-102 Probate definitions 12/31/2018

1B-201 Commencement of a probate proceeding 12/31/2018

1B-202 Probate court pleadings; identification of party and lawyer 12/31/2018

1B-203 Notice of minors or persons under legal disability 12/31/2018

1B-204 Use of approved probate forms 12/31/2018

1B-205 Unsworn affirmations under penalty of perjury 12/31/2018

1B-301 Probate court forms; short title; limited purpose of forms; cautions regarding use of forms 12/31/2018

1B-302 General instructions for probate forms 12/31/2018

1B-303 General instructions for probates (no will) 12/31/2018

1B-304 Explanation of forms and how to complete; specific steps (no will) 12/31/2018

1B-305 General instructions for probates (will) 12/31/2018

1B-306 Explanation of forms and how to complete; specific steps (will) 12/31/2018

1B-401 Notice; filing required 12/31/2018

1B-501 Inventories and accountings 12/31/2018

1B-601 Closing probate; verified statement 12/31/2018

1B-602 Compensation 12/31/2018

1B-701 Transfer from probate court to district court 12/31/2018

Rules of Civil Procedure for the Magistrate Courts

2-102 Conduct of court proceedings 12/31/2018

2-114 Courtroom closure 12/31/2018

2-202 Summons 12/31/2018

2-603 Jurors 12/31/2018

Rules of Civil Procedure for the Metropolitan Courts

3-102 Conduct of court proceedings 12/31/2018

3-603 Jurors 12/31/2018

Civil Forms

4-602D Juror questionnaire privacy and destruction certification 12/31/2018

4-950 Tribal court order for initial involuntary commitment of an adult for mental health evaluation and treatment not to exceed 30 days 12/31/2018

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

Probate Court Forms

4B-101 Opening and closing a probate court case (flow chart) 12/31/2018

4B-201 Affidavit of poverty and indigency 12/31/2018
4B-202 Order allowing free process 12/31/2018
4B-301 Application for informal appointment of personal representative (no will) 12/31/2018
4B-302 Application for informal probate of will and for informal appointment of personal representative (will) 12/31/2018
4B-303 Order of informal appointment of personal representative (no will) 12/31/2018
4B-304 Order of informal probate of will and appointment of personal representative 12/31/2018
4B-305 Acceptance of appointment as personal representative (no will) (will) 12/31/2018
4B-306 Letters of administration (no will) 12/31/2018
4B-307 Letters testamentary (will) 12/31/2018
4B-401 Notice of informal appointment of personal representative 12/31/2018
4B-402 Proof of notice 12/31/2018
4B-501 Notice to creditors by publication and notice to creditors by written notice (mailing or other delivery) 12/31/2018
4B-503 Withdrawn 12/31/2018
4B-504 Withdrawn 12/31/2018
4B-601 Inventory 12/31/2018
4B-602 Accounting 12/31/2018
4B-701 Verified closing statement of the personal representative 12/31/2018
4B-702 Verified small estate closing statement of the personal representative 12/31/2018
4B-801 Proof of authority 12/31/2018
4B-802 Certificate acknowledging receipt of documents related to proof of authority 12/31/2018
4B-901 Application for informal appointment of special administrator 12/31/2018
4B-902 Order appointing special administrator 12/31/2018
4B-903 Acceptance for appointment of special administrator 12/31/2018
4B-904 Letters of special administration 12/31/2018
4B-1001 Order transferring case from probate court to district court 12/31/2018

Rules of Criminal Procedure for the District Courts

5-103.2 Electronic service and filing of pleadings and other papers 01/14/2019
5-123 Public inspection and sealing of court records 02/01/2019
5-301 Arrest without warrant; probable cause determination; first appearance 02/01/2019
5-302A Grand jury proceedings 04/23/2018
5-403 Revocation or modification of release orders 02/01/2019
5-409 Pretrial detention 02/01/2019
5-602 Insanity; lack of capacity 02/01/2019
5-602.1 Competency 02/01/2019
5-602.2 Proceedings after a finding of incompetency 02/01/2019
5-602.3 Incompetency due to mental retardation 02/01/2019
5-606 Jurors 12/31/2018

Rules of Criminal Procedure for the Magistrate Courts

6-102 Conduct of court proceedings 12/31/2018
6-116 Courtroom closure 12/31/2018
6-203 Arrests without a warrant; probable cause determination 02/01/2019
6-302 Pleas allowed 02/01/2019
6-403 Revocation or modification of release orders 02/01/2019
6-501 Arraignment; first appearance 02/01/2019
6-507 Insanity; transfer to district court 02/01/2019
6-507.1 Competency; transfer to district court 02/01/2019
6-605 Jurors 12/31/2018

Rules of Criminal Procedure for the Metropolitan Courts

7-102 Conduct of court proceedings 12/31/2018
7-203 Probable cause determination 02/01/2019
7-302 Pleas allowed 02/01/2019
7-403 Revocation or modification of release orders 02/01/2019
7-501 Arraignment; first appearance 02/01/2019
7-507 Insanity; transfer to district court 02/01/2019
7-507.1 Competency 02/01/2019
7-605 Jurors 12/31/2018

Rules of Procedure for the Municipal Courts

8-202 Probable cause determination 02/01/2019
8-302 Pleas allowed 02/01/2019
8-403 Revocation or modification of release orders 02/01/2019
8-501 Arraignment; first appearance 02/01/2019
8-507 Insanity; transfer to district court 02/01/2019
8-507.1 Competency; transfer to district court 02/01/2019

Criminal Forms

9-404 Transfer order; insanity defense 02/01/2019
9-404A Order on motion for competency evaluation; transfer 02/01/2019
9-513D Juror questionnaire privacy and destruction certification 12/31/2018
9-514 Order on motion for a competency evaluation 02/01/2019
9-514A Defendant information sheet 02/01/2019

Children's Court Rules and Forms

10-103 Service of process 12/31/2018
10-166 Public inspection and sealing of court records 12/31/2018
10-261 Probation 12/31/2018
10-324 Conduct of hearings 12/31/2018
10-515 Notice of pendency of action by publication 12/31/2018
10-605 Tribal court order for involuntary placement for treatment or habilitation of a child not to exceed 60 days 12/31/2018
10-719 Probation order and agreement 12/31/2018

Rules of Appellate Procedure

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From the New Mexico Supreme Court

Opinion Number: 2019-NMSC-002
No. S-1-SC-35491 (filed S November 29, 2018)

DAVID R. LUKENS, JR.,
Petitioner,
v.
GERMAN FRANCO, Warden,
Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Cristina Jaramillo, District Judge

JENNIFER J. WERNERSBACH
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for Respondent

Opinion

Gary L. Clingman, Justice

{1} In this appeal of the district court's denial of habeas corpus, Petitioner David Lukens, Jr. claims ineffective assistance of appellate counsel in his direct appeal and requests a new appeal or reversal of his conviction. We consider (1) whether prejudice due to deficient performance of Petitioner's attorney should be presumed or whether Petitioner must prove that actual prejudice occurred on direct appeal and, (2) if there was prejudice, whether the remedy should be a new appeal. Although the performance of Petitioner's appellate counsel on direct appeal (Appellate Counsel) was clearly deficient in certain instances, we hold that prejudice may not be presumed because the performance of Appellate Counsel did not deprive Petitioner of his constitutional right to a direct appeal of his conviction. We further hold that Petitioner has failed to establish actual prejudice in his direct appeal. Because Petitioner did not establish prejudice, we do not reach the question of remedy. We affirm the district court's denial of the petition for a writ of habeas corpus.

{2} We pause to address deficient briefing that is too often submitted to this Court and to other courts throughout New Mexico. We observe a degree of irony in this case because the very briefs in this habeas appeal alleging deficient performance were neither examples of good structure nor models of clarity. Although we have determined that Petitioner did not suffer a constitutional deprivation due to ineffective assistance of counsel, we are concerned about performance issues in general and about the performance of Appellate Counsel in this case in particular. No appellate court or district court should ever hesitate to return briefing or order rebriefing with a short deadline when briefing is unclear or lacks citations or is otherwise unprofessional. "[A]n order to rebrief provides a reasonable means for imposing a minimal level of quality control on the appellate briefing process." Douglas E. Cressler, *Mandated Rebriefing: A Judicial Mechanism for Enforcing Quality Control in Criminal Appeals*, 44-JUL Res Gestae 20, 20.

{3} The New Mexico Rules of Appellate Procedure authorize our appellate courts to impose appropriate sanctions.

> For any failure to comply with these rules or any order of the court, the appellate court may, on motion by appellant or appellee or on its own initiative, take such action as it deems appropriate in addition to that set out [herein], including but not limited to citation of counsel or a party for contempt, refusal to consider the offending party's contentions, assessment of fines, costs or attorney fees or, in extreme cases, dismissal or affirmance.

Rule 12-312(D) NMRA.

{4} The New Mexico "Rules of Professional Conduct . . . presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure [and] laws defining specific obligations of lawyers" where "[f]ailure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process." Rule 16-Preamble—Scope NMRA.

{5} This Court has stated,

> We remind counsel that we are not required to do their research, and that this Court will not review issues raised in appellate briefs that are unsupported by cited authority. When a criminal conviction is being challenged, counsel should properly present this court with the issues, arguments, and proper authority. Mere reference in a conclusory statement will not suffice and is in violation of our rules of appellate procedure.

State v. Clifford, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254 (citations omitted).

{6} We are not alone in our concern. A law review article authored by the Administrator of the Indiana Supreme Court discusses that court's experience with deficient briefing in criminal appeals. *Cressler*, *supra*, at 20 & n.a1. The article describes the briefing in a case, similar to the case before us, where the Indiana Supreme Court required appointment of new counsel for a criminal appellant:

> Throughout the argument section of the appellant's brief, factual assertions were made without reference to the record. Contentions of legal error were made without cogent analysis and without sufficient explanation of how the alleged errors were preserved for appellate review. The Court also found the arguments of counsel to be unreasonably difficult to follow. Grammatical errors littered the brief. The Court ultimately concluded that, taken as a whole, the brief was inadequate.

Id. at 21 & ns.19-20 (citing *Perez v. State*, Cause No. 12S00-9910-CR-633, *appeal to the Indiana Supreme Court pending as of the publication of this July 2000 law review*) (reporting that in April 2000 the *Perez* Court struck the appellate brief and

remanded the cause for appointment of new counsel and rebriefing); *see also Perez v. State*, 748 N.E. 2d 853 (Ind. 2001) (reviewing the convictions on direct appeal). {7} Courts are not required to try and make sense of work product so flawed that its meaning cannot be discerned. We remind our courts and the New Mexico bar that the New Mexico Rules of Appellate Procedure and Rules of Professional Conduct empower courts to sanction lawyers, including by return of briefs and reassignment of counsel for "failure to comply with an obligation or prohibition imposed by a rule."

I. BACKGROUND

{8} Petitioner is the father of a child who was born prematurely and injured during his first months of life (Child). On December 5, 2005, a hospital alerted law enforcement when x-rays revealed multiple fractures throughout Child's body. A grand jury indicted Petitioner for intentional child abuse resulting in great bodily harm in violation of NMSA 1978, Section 30-6-1 (2005). After a two-week trial, the jury convicted Petitioner of first-degree negligent child abuse by endangerment, resulting in great bodily harm. The district court sentenced Petitioner to eighteen years in prison but reduced his sentence to twelve years upon finding mitigating circumstances. Petitioner filed a notice of appeal.

{9} Appellate Counsel Trace Rabern filed a docketing statement with the New Mexico Court of Appeals but failed to ensure timely filing of the record proper with the Court of Appeals. The Court of Appeals allowed the late filing of the record proper and eventually affirmed the conviction. *State v. Lukens*, A-1-CA-30819, mem. op. ¶ 22 (July 1, 2013) (nonprecedential). Throughout its opinion, the Court of Appeals noted that Appellate Counsel failed to develop arguments, failed to cite the record, failed to cite authorities, and did not provide a basis for relief. *Id.* ¶¶ 6, 9, 10, 14, 17, 19-21. Due to these failures, the Court of Appeals did not directly address some issues that Appellate Counsel raised. *See id.* ¶¶ 6, 9, 14, 17, 19-21.

{10} After losing on direct appeal, Appellate Counsel filed an untimely petition for writ of certiorari in this Court and moved for consideration of the petition as timely. We denied the motion. Appellate Counsel failed to communicate with Petitioner regarding the status of his appeal, and consequently Petitioner did not learn that he was to be remanded to prison until the day before his sentence was to begin.

{11} Petitioner then filed a pro se petition for a writ of habeas corpus under Rule 5-802 NMRA (2009). The district court summarily dismissed the petition. After consultation between the district attorney's office and the public defender's office, the district court reinstated the petition and appointed new counsel (Habeas Counsel) for Petitioner.

{12} Habeas Counsel filed an amended petition for writ of habeas corpus on behalf of Petitioner, primarily alleging ineffective assistance of appellate counsel. Habeas Counsel informed the district court that Appellate Counsel had been indefinitely suspended from the practice of law. The district court denied the amended petition, finding that Petitioner "failed to demonstrate adequate prejudice to demonstrate the results would have been different but for the errors of his appellate counsel." Petitioner now seeks this Court's review of the district court's denial of habeas corpus.

{13} We granted certiorari under Rule 12-501 NMRA (2014) and ordered the parties to brief Petitioner's ineffective assistance of counsel issues, particularly (1) "whether the standard for ineffective assistance of counsel always requires prejudice" and (2) "if there was ineffective assistance of counsel, whether the case should be remanded to the New Mexico Court of Appeals for a new appeal."

II. DISCUSSION

{14} Petitioner alleges that the assistance of Appellate Counsel was so deficient that prejudice should be presumed and that we should grant him a new appeal. Alternatively, Petitioner argues that he suffered actual prejudice and that had it not been for such deficient appellate representation, his conviction would have been reversed and should be reversed now. The State argues that prejudice should not be presumed and that Petitioner did not suffer actual prejudice.

{15} We review findings of fact concerning habeas petitions to determine whether substantial evidence supports the district court's findings. *Duncan v. Kerby*, 1993-NMSC-011, ¶ 7, 115 N.M. 344, 851 P.2d 466. Substantial evidence "is evidence that a reasonable mind would regard as adequate to support a conclusion." *Fitzhugh v. N.M. Dep't of Labor, Emp't Sec. Div.*, 1996-NMSC-044, ¶ 24, 122 N.M. 173, 922 P.2d 555. We review questions of law or questions of mixed fact and law, including the assessment of effective assistance of counsel, de novo. *Duncan*, 1993-NMSC-011, ¶ 7; *see also Strickland v. Washington*, 466 U.S. 668, 698 (1984) ("[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.").

A. Right to Effective Assistance of Appellate Counsel in New Mexico

{16} New Mexico recognizes "that both the Federal Constitution and Article II, Section 14 of the New Mexico Constitution provide a right to the assistance of counsel both at trial and on appeal." *State v. Vigil*, 2014-NMCA-096, ¶ 11, 336 P.3d 380. Criminal defendants in New Mexico are entitled to the effective assistance of appellate counsel. *Id.* ¶ 13 ("[W]here a right to counsel has been guaranteed, that right includes a guarantee that counsel be effective.").

{17} The two-pronged ineffectiveness standard of *Strickland*, 466 U.S. at 687, *see* 697-98, requires a defendant to show both that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." To show deficiency the defendant must demonstrate that "defense counsel did not exercise the skill of a reasonably competent attorney." *Duncan*, 1993-NMSC-011, ¶ 10 (citing *Strickland*, 466 U.S. at 687). Defense counsel's performance is deficient if the "'representation fell below an objective standard of reasonableness'" under prevailing professional norms. *Lytle v. Jordan*, 2001-NMSC-016, ¶ 26, 130 N.M. 198, 22 P.3d 666 (quoting *Strickland*, 466 U.S. at 688). The defendant must also show prejudice to the defense resulting from counsel's deficient performance. *Id.* ¶ 25. To show actual prejudice, there must have been "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome [of the proceeding]." *Id.* It is the defendant's burden to show both incompetence and prejudice. *State v. Grogan*, 2007-NMSC-039, ¶ 11, 142 N.M. 107, 163 P.3d 494.

{18} A "'defendant must [also] overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Lytle*, 2001-NMSC-016, ¶ 26 (quoting *Strickland*, 466 U.S. at 689). Appellate court "'scrutiny of counsel's performance must be highly deferential.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). Every effort should be made "'to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Id.* (quoting *Strickland*, 466 U.S. at 689).

{19} A court may "'dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice'" to avoid the deficient performance analysis if this simplifies disposition. *State v. Plouse*, 2003-NMCA-048, ¶ 13, 133 N.M. 495, 64 P.3d 522 (quoting *Smith v. Robbins*, 528 U.S. 259, 286 n.14 (2000)), *abrogated on other grounds by State v. Garza*, 2009-NMSC-038, ¶ 48, 146 N.M. 499, 212 P.3d 387; *see also Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both [the deficiency and prejudice] components of the inquiry if the defendant makes an insufficient showing on one."). "[T]he proper standard for evaluating [a] claim that *appellate* counsel was ineffective . . . is that enunciated in *Strickland*." *Smith*, 528 U.S. at 285 (emphasis added).

B. Petitioner's Ineffective Assistance of Appellate Counsel Claims

{20} Petitioner advances alternative arguments to establish ineffective assistance of appellate counsel: (1) prejudice should be presumed because Appellate Counsel's performance was so deficient that Petitioner is entitled to a new appeal or (2) Petitioner suffered actual prejudice on his direct appeal because his conviction would have been reversed had Appellate Counsel not performed so deficiently.

{21} Petitioner points to numerous specific errors and omissions of Appellate Counsel to support his ineffective assistance of appellate counsel (IAAC) claim. Appellate Counsel's brief in chief on direct appeal lacked record citations required by our Rules of Appellate Procedure. *See* Rule 12-213(A) NMRA (2010, recompiled 2017). Petitioner argues that Appellate Counsel failed to develop "almost all of the seven issues raised on appeal . . . and failed in some instances to communicate to the [Court of Appeals] in full sentences or completed thoughts." Petitioner observes that Appellate Counsel "failed to argue fundamental error on the issues raised on appeal that were not preserved by trial counsel." Petitioner notes that Appellate Counsel failed to submit a reply brief to the Court of Appeals in response to the State's answer brief which specifically noted the shortcomings of Petitioner's brief in chief. Appellate Counsel failed to submit a timely petition for a writ of certiorari in this Court. Petitioner also claims that he was not advised to seek new counsel when Appellate Counsel took leave from her law practice to seek medical treatment and that Appellate Counsel neglected to inform Petitioner of the status of his appeal. The State concedes that Appellate Counsel's performance was "quite lacking." Without further analysis, we presume deficient performance based on this agreement of the parties.

1. Appellate Counsel's errors did not deprive Petitioner of his constitutional right to one appeal and therefore do not justify presumed prejudice in this case

{22} Petitioner argues that because Appellate Counsel "was ineffective and deprived him of an appeal on the merits of his case," he is entitled to a new appeal. Petitioner asserts that Appellate Counsel's "omissions in the brief in chief constitutionally prejudiced [Petitioner]." We examine the question whether presumed prejudice should apply in Petitioner's circumstances.

{23} Prejudice should be presumed in circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658 (1984); *see, e.g.*, *Grogan*, 2007-NMSC-039, ¶ 12. Three examples of deficient performance that could warrant a presumption of prejudice: are (1) denial of representation by counsel, (2) failure of defense counsel to subject the state's case to meaningful adversarial testing, and (3) denial of effective cross-examination of state witnesses. *Grogan*, 2007-NMSC- 039, ¶ 12 (citing *Cronic*, 466 U.S. at 659).

{24} No New Mexico court has presumed prejudice based on the argument advanced by Petitioner. Petitioner asserts that he was deprived of his right to appeal because Appellate Counsel's errors resulted in the inability of the Court of Appeals to consider the merits of his claims. In support of this argument, Petitioner cites *Commonwealth v. Fink*, 2011 PA Super 141, 24 A.3d 426. The reasoning in *Fink* is helpful in evaluating Petitioner's claim, but we reach a different conclusion than Petitioner reaches.

{25} In *Fink*, a defendant appealed his conviction, challenging the trial court's denial of his motion to suppress the statement he gave to police. *Id.* at 429. The appellate court concluded that the appellate brief was "insufficient" and affirmed the conviction. *Id.* Subsequently on postconviction appeal, the same appellate court reinstated the defendant's right to direct appeal, holding that "only those omissions of counsel on appeal that completely foreclose appellate review offer a basis for a presumption of prejudice on a [subsequent ineffective assistance of counsel] claim." *Id.* at 429, 432, 434. *Fink* supports the proposition that prejudice should be presumed only when the defendant was completely deprived of a merits review at the appellate level. *Id.* at 432.

{26} In this case, Appellate Counsel's numerous errors did not deprive Petitioner of his right to a merits review by the Court of Appeals. Appellate Counsel filed a forty-eight page brief in the Court of Appeals. Although the Court of Appeals admonished Appellate Counsel for the brief's shortcomings, it still considered the merits of arguments made therein. *See generally Lukens*, A-1-CA-30819, mem. op. For example, despite Appellate Counsel's failure to cite the record proper, the Court of Appeals thoroughly addressed an issue raised by Petitioner pertaining to an audio recording made by Child's mother that was admitted into evidence at trial. *See id.* ¶¶ 18-19. After a multiparagraph merits analysis, the Court of Appeals described Petitioner's argument as "particularly unpersuasive in light of his cross-examination of [Child's] mother and his production of an expert witness to discredit the value of the tape recordings." *Id.* ¶ 19.

{27} In its order denying Petitioner a writ of habeas corpus, the district court also concluded that the Court of Appeals had adequately addressed Petitioner's concerns on appeal, stating that

> it is not as though Petitioner was fully denied a meaningful review of his issues on appeal. Despite the Court of Appeals' issues with the quality of Petitioner's arguments and record citations on appeal, Petitioner was given the benefit of the doubt regarding his factual allegations and the [C]ourt [of Appeals] addressed the merits of several of his claims.

{28} In analyzing an IAAC petitioner's assertion that deficient briefing caused the loss of the petitioner's appeal of right and that prejudice should therefore be presumed, the determinative issue is whether the appellate court failed to conduct a merits review or, in other words, whether "[c]ounsel's constitutional error . . . caused a total failure in the relevant proceeding." *Fink*, 24 A.3d at 432 (internal quotation marks and citation omitted). Petitioner's direct appeal was not a total or even a substantial failure. Petitioner's right to direct appeal was not violated. Deficient briefing does not necessarily equate to ineffective-

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Bankruptcy Law

Bankruptcy Law Section

A DOOMSDAY PREPPER'S GUIDE
to the Treatment of Commercial Leases in a Tenant's Bankruptcy

By Shay Elizabeth Meagle

Dozens of bankruptcy filings by giant retailers over the past several years have been dubbed the "Retail Apocalypse" by one financial research site.[1] New Mexico commercial landlords have been greatly affected. A tenant's bankruptcy filing has always been an issue facing commercial landlords, but in today's financial climate, it is becoming more frequent. The process can be daunting to landlords and also to attorneys who do not regularly practice in Bankruptcy Court, especially as these national retailers file bankruptcy cases in districts across the country. If any of your clients own or manage commercial rental property, you have or will soon be approached with a tenant's notice of bankruptcy. Special rules govern leases and executory contracts in a bankruptcy case. For purposes of this article, I am going to focus narrowly on commercial real estate leases that had not expired before the tenant filed the bankruptcy case (the "Petition Date"). This article is also limited to Chapter 11 bankruptcy cases, as it is the most likely chapter in which these issues will arise.

It is tempting for a landlord to simply ignore or accept that a tenant has filed bankruptcy, and ignore the flurry of notices that will be sent regarding the case. It is important to encourage your clients not to do this. First, the landlord cannot proceed as if nothing has changed, because once a bankruptcy is filed, the landlord is prohibited from taking certain actions. Second, the landlord can miss important deadlines and the opportunity to protect its rights and ability to collect amounts due for rent owed both before and after the Petition Date. You should advise any commercial landlord clients that in the event they receive notice of a tenant's bankruptcy filing, they should seek competent advice from an attorney quickly.

The Petition Date

You and your client should be mindful of the date the bankruptcy was filed—the Petition Date. Application of many of the rules and statutes concerning commercial leases in bankruptcy will hinge on whether something occurred before the Petition Date or on/after that date.

The Automatic Stay

Most of you know about the automatic stay that kicks in upon the filing of a bankruptcy. 11 U.S.C. § 362 (2018) lists the types of actions the automatic stay prohibits. A landlord cannot simply evict a tenant for breach of lease while the tenant is in bankruptcy. A landlord also cannot contact the tenant seeking rent that was due before the Petition Date. If the tenant is in default after the Petition Date, the landlord may be able to obtain an order granting the landlord "relief" from the automatic stay, allowing the landlord to proceed with eviction, or the landlord may have other options. However, before taking any action, the landlord should seek competent legal advice. Violation of the automatic stay when the landlord knows of the filing of the bankruptcy can lead to serious consequences for the landlord, whether or not the landlord received formal notice of the bankruptcy.

Assumption and Rejection of Lease

11 U.S.C. § 365 (2018) provides that the trustee (or a debtor-in-possession—i.e., a "DIP"—in a Chapter 11 case) may assume or reject a lease upon motion and a hearing. A commercial real property lease must be assumed within 120 days of the order for relief (which is usually the Petition Date) or by the date a plan is confirmed, or it will automatically be deemed rejected and the tenant must immediately surrender the property. The court can extend it (prior to the 120-day deadline) up to an additional 90 days upon motion by the landlord or trustee/DIP and a hearing.

Assumption and Assignment

11 U.S.C. § 365(b) requires that in order to assume a lease, all defaults (including any prepetition defaults) must be cured and the trustee/DIP must provide the landlord with adequate assurance of future performance. The tenant or trustee cannot unilaterally change the terms of the lease then assume it; the lease cannot be changed unless the landlord agrees.

11 U.S.C. § 365(f) permits the tenant to assign an assumed commercial lease. This allows a tenant to sell its business, binding various landlords to rent to the successor/

purchaser under the same lease terms. There are some situations under which assignments are not permitted, but those rarely apply to a commercial lease.

When a tenant moves to assume a lease, it will usually assert a proposed "cure amount," which is the amount of total rent the tenant believes must be paid to bring the rent current. The landlord should make sure this amount is accurate, as once an order is entered, it will be difficult, if not impossible, to obtain additional pre-assumption rent payments.

Rejection

If the commercial lease is rejected, the tenant is required to surrender the leased premises to the landlord by a certain date (depending on the manner of rejection). If the tenant has continued operating its business out of the leased premises until then, the landlord likely will have a valid administrative priority expense claim against the bankruptcy estate under 11 U.S.C. § 503 (2018) for the amount of any unpaid rent that came due between the Petition Date and the effective date of the rejection. A court order must be entered, upon application and hearing, before the landlord's claim is approved and paid. However, pursuing such a claim is frequently worthwhile, as the landlord's priority dictates that it be paid before most other claims and are on the same level as the tenant's attorneys.

Any rent owed prior to the Petition Date is usually a nonpriority unsecured claim, and would be included in a proof of claim form filed in the case that sets forth the amount and basis of the claim and to which supporting documents are attached. There is usually a deadline, a "Claims Bar Date," by which that claim must be filed.

Rejection of the commercial lease will create a breach of the lease that did not exist on the Petition Date. However, pursuant to 11 U.S.C. § 502(g) (2018), damages arising from the breach of the lease are to be treated as a prepetition claim. Therefore, the landlord should include in a proof of claim, after rejection of its commercial lease, damages for loss of future rent and any other amounts which could be included as damages under state law. However, the amount a landlord can claim for future rent has been limited by 11 U.S.C. § 502(b)(6). There is usually a separate deadline set for filing these claims. There will usually be different deadline to file or amend claims based on lease rejection damages if the Claims Bar Date has already expired.

Security Deposits

Landlords frequently assume that they can go ahead and apply security deposits to rents due before the Petition Date or to past due rents at the time of rejection of a lease and surrender of the premises. However, this is not permitted under the Bankruptcy Code, and instead must be negotiated or ordered by the court. Rejection orders frequently state whether the landlords may or may not apply any deposits held. Indeed, it is important to remember that any amounts held by landlords as deposits of a tenant who files a bankruptcy case is property of the bankruptcy estate.

It is tempting for a landlord to simply ignore or accept that a tenant has filed bankruptcy, and ignore the flurry of notices that will be sent regarding the case.

Preferential Transfers

Your commercial landlord clients also should be mindful that they can be sued by the DIP/trustee or another entity under a plan to recover that is called a "preferential transfer" under 11 U.S.C. § 547 (2018). A landlord or its counsel, early in a tenant's bankruptcy case, should review the landlord's records to determine if there is a risk of such a suit. The deadline to file this kind of action does not expire until 2 years after what is usually the Petition Date, and frequently, more than a year passes before any such action is filed. 11 U.S.C. § 547, along with other Bankruptcy Code sections, allow a trustee/DIP to recover from creditors any amounts the tenant paid to them within 90 days before the Petition Date on account of an antecedent debt. Therefore, landlords need to determine whether, in the 90 days before the Petition Date, the tenant paid a chunk to the landlord to catch up on past due rent. This does not include funds paid by the tenant for current rent. It is prudent to determine any potential risk early so that efforts can be made to resolve any such issues through negotiation of any administrative priority claims, etc. However, in a case where the lease is assumed, there is no risk of a preference action.

Other Considerations & Conclusion

There are, of course, other issues affecting landlords when their commercial tenants file a Chapter 11 bankruptcy that cannot be covered in this limited article. But the considerations discussed above provide an overview of some of the main issues facing commercial landlords in the domain of tenant bankruptcies. Although provisions prohibiting bankruptcy that terminates the lease upon bankruptcy or prohibits assignment will be unenforceable if a tenant files, there are other lease provisions that can be helpful in the event of a tenant's later bankruptcy filing, such as specific landlord's lien language, defining "rent" broadly in a lease (defining it to include monthly base rent, CAM, utilities, etc.), requiring personal guarantees by individuals, obtaining and perfecting a security interest in other property of the tenant at the time of execution/renewal of the lease, limitation of the tenant's use of the premises, and provisions permitting termination by the landlord upon short notice in the event of default. Remember that commercial leases are more flexible as to terms than residential, as they are not subject to consumer protection legislation.

Chapter 11 bankruptcy cases present a swath of complex and technical issues arising under the Bankruptcy Code. However, in the midst of the retail apocalypse, commercial landlords need not fall victim to the misfortunes of their tenants. Early and competent legal advice is the best way for your clients to handle the bankruptcy of their commercial tenants. ■

Endnotes

[1] *Here's a List of 57 Bankruptcies in the Retail Apocalypse and Why They Failed*, CB Insights (Oct. 17, 2018), https://www.cbinsights.com/research/retail-apocalypse-timeline-infographic/.

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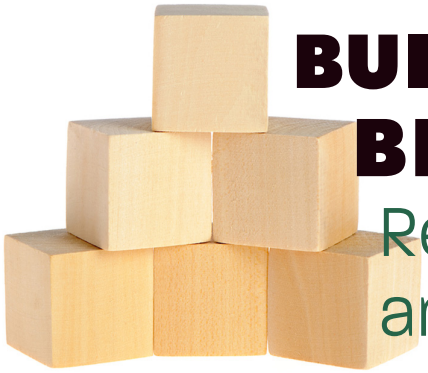

BUILDING BLOCKS: Receiverships and Bankruptcy

By Daniel A. White

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Receivership as a system for collecting rents began to mature as early as the reign of Elizabeth I (1558-1603) and was adopted by early colonial American courts as an equitable remedy. This ancient system has been undergoing a modern renaissance in much of America, and is sometimes seen as a more efficient alternative to bankruptcy in certain instances. This article will address what happens when these competing insolvency regimes collide. The typical case occurs when a receiver has been appointed in state court over a portion of a debtor's property, but the debtor then files a bankruptcy petition.[2]

The Default Position: Turnover and Accounting by Receiver

Under 11 U.S.C. § 543(a), a "custodian with knowledge" of a bankruptcy case cannot use, disburse, or otherwise administer the property he or she holds, other than "as is necessary to preserve such property." Under 11 U.S.C. § 101(11)(A), the term "custodian" includes any "receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title." As a result, a receiver who is aware of a bankruptcy proceeding is required to take no action other than preserve what he or she holds. Section 543(b) covers what comes next. It requires a receiver to take two actions.

First, the receiver must "deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product offspring, rents or profits of such property that is in such custodian's possession, custody or control on the date that such custodian acquires knowledge of the commencement of the case." Therefore, a receiver with knowledge of a bankruptcy proceeding cannot administer property of the receivership estate and is under an affirmative duty to surrender it.

Second, the receiver must file an accounting of the assets which came into his or her possession at any time. The statute does not specify what form such an accounting must take or any deadline for filing the accounting. Federal Rules of Banking Procedure 6002(a) provides a few more details, adding that the accounting must be "prompt," and that in addition to being filed, it must also be transmitted to the United States trustee. Rule 6002(b) provides that after the report has been filed and transmitted, the court shall "determine the propriety of the administration, including the reasonableness of all disbursements." The advisory committee notes explain that this examination "may be initiated on the motion of, or the filing of an objection to the custodian's account by, the trustee or any other party in interest." Case law is scant on what constitutes an adequate, promptly-filed report.

Judicial review of the receiver's report cuts both ways. Under 11 U.S.C. § 543(c)(2), a bankruptcy court shall, after notice and a hearing "provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian." These expenses are allowable administrative expenses under §

503(b)(3)(E). Accountants and attorneys employed by receivers have corresponding administrative claims under § 503(b)(4). However, under § 543(c)(3), a receiver may be surcharged, if the receiver took possession more than 120 days before the petition, for "any improper or excessive disbursement" unless the disbursement was "made in accordance with applicable law" or been approved pre-petition, after notice and hearing, by a court of competent jurisdiction. As one court has noted "it would be impossible to perform the tasks of determining reasonable compensation if a bankruptcy judge could not review the quality of a receiver's performance."[3] However, state law will ultimately control whether or not a receiver can be surcharged even if the reviewing bankruptcy court identifies an "improper or excessive disbursement."[4] This result follows from the statutory language excepting from surcharge "disbursement[s]…made in accordance with applicable law."

Excuse me! Excusing Compliance With § 543

Under § 543(d), a receiver may be excused from compliance with § 543 after notice and hearing. The test for excusal is a best interest of creditors test: A receiver may be excused from compliance if "interests of creditors and, if the debtor is not insolvent, of equity security holders, would be better served by permitted a custodian to continue in possession, custody or control of such property." While § 543(d) is often described in terms of excusing turnover by the receiver, it excuses the receiver from turnover, accounting, and judicial review of their administration by the bankruptcy court under § 543(c), including surcharge under § 543(c)(3).

In determining whether to excuse a receiver's compliance under § 543(d)(1), courts often consider the following factors:

(1) "The likelihood of reorganization, and whether the funds held by the receiver are required for reorganization;

This ancient system has been undergoing a modern renaissance in much of America, and is sometimes seen as a more efficient alternative to bankruptcy in certain instances.

(2) Whether the debtor mismanaged the property;
(3) Whether the turnover would injure the creditors;
(4) Whether the debtor would use the property for the creditors' benefit;
(5) Whether there are avoidance issues raised with respect to property retained by a receiver, because a receiver does not possess avoiding powers for the benefit of the estate; and
(6) The fact that the automatic stay has deactivated the state court [r]eceiver [a]ction."[5]

The sixth element, effect of the automatic stay, may be addressed by requesting modification or relief from the automatic stay simultaneously with the request to excuse compliance with § 543(a)-(c). Savvy practitioners may head off potential stay issues at the outset by including a stay relief request with their motion under § 543(d).

As an additional note, since § 543(d) is silent on approval of fees for an excused receiver and his or her professionals, cautious receivers and professionals may wish to include language in their excusal pleadings that they not be required to submit their fees to the bankruptcy court for approval under §§ 503(b)(3)(E) and (4).

"The party requesting turnover must show by a preponderance of the evidence that the best interests of the creditors are served by permitting a custodian to retain control of the estate."[6] Since § 543(d)(1) says "may" rather than "shall," excusal of a receiver from his or her obligations under § 543(a)-(c) is discretionary, even if the movant establishes all of the required elements.

Maybe Later? Picacho Hills: Abstention Until Liquidation

Even if a receiver's obligations under § 543(a)-(c) have been excused, the assets which they administer are still property of the estate. Likewise, even after a

receiver has been excused from complying with his or her turnover and accounting obligations, the bankruptcy case does not stop automatically. By default, the two cases proceed simultaneously. As a result, to the extent there is any ambiguity about whether property is part of a receivership estate or not, it may behoove the receiver or the appointing creditor to file a motion for determination with the bankruptcy court, to clarify who has control over the property.

However, in certain cases, creditors may prefer that the cases not proceed simultaneously, even after having the receiver excused from turnover and accounting. Under § 305(a), a bankruptcy court may "dismiss a case under this title or may suspend all proceedings in a case under this title, at any time if (1) the interests of creditors and the debtor would be better served by such dismissal or suspension…" However, as noted in *Picacho Hills,* "Abstention or suspension under § 305(a)(1) is an unusual remedy… there is no agreement on what 'interests of creditors and the debtor' should be considered" and that "Case law on abstention through suspension (rather than dismissal) is sparse." In that case, the Bankruptcy Court for the District of New Mexico began its analysis with a seven-factor test developed by the Bankruptcy Court for the District of Massachusetts. The seven factors were:

(1) Economy and efficiency of administration;
(2) Whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court;
(3) Whether federal proceedings are necessary to reach a just and equitable solution;
(4) Whether there is an alternative means of achieving an equitable distribution of assets;
(5) Whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case;
(6) Whether a non-federal insolvency has proceeded so far in those proceedings that it would costly and time consuming to start afresh with the federal bankruptcy process; and
(7) The purpose for which bankruptcy jurisdiction is sought.

Picacho Hills is instructive. In that case, the debtor filed a chapter 11 petition shortly before a hearing on the receiver's motion to sell the debtor's assets and set aside two questionable transfers. In considering abstention under § 305(a)(1), the court determined that given the pending sale motions in state court, economy and efficiency of administration, that federal proceedings were not necessary, and that the sixth factor, the progress in the state-court receivership, weighed in favor of abstention. The court also determined that the fifth factor, an-out-of-court workout, weighed in favor of abstention to permit the receiver to proceed, because the parties had previously agreed to allow the receiver to sell the debtor's assets. On the third and seventh factors, however, results were mixed. The court determined that "on balance" it was "a better place to liquidate and distribute Debtor's assets, post-sale" but that "[p]re-sale, the Receive Action is a perfectly acceptable alternative forum. On the seventh factor, the purpose for which bankruptcy jurisdiction was sought, the Court found the debtor's attempts to use the bankruptcy filing to take control of the sale process objectionable and in no one's best interests, but that the debtor's request to use bankruptcy law and procedure for the liquidation of its assets "reasonable, and consistent with the Settlement Agreement."

To these seven factors, the court added two more:

(8) Whether § 305(a)(1) relief has the substantial support of creditors; and
(9) Whether § 305(a)(1) relief is appropriate to allow a state to enforce police powers.

In *Picacho Hills,* abstention had the support of creditors and the eighth factor was not in question. The ninth factor also supported abstention because the receiver had been appointed by the New Mexico Public Regulation Commission and New Mexico Environmental Department. The court therefore reasoned that allowing the receiver to continue and pursue the proposed sale was consistent with the state's police powers.

Based on its nine-factor analysis and having already excused the receiver's obligations to the estate under § 543(d)(1), the court granted abstention. However, that abstention was not permanent. The court found that "allow[ing] Debtor to complete the liquidation of assets in this case would not deprive [creditors] of any bargained-for benefits, and would allow Debtor to exercise its right to use the federal bankruptcy process." The court's compromise ruling allowed the receiver to continue in place, and finish liquidating the debtor's assets, but allowed the debtor to use the bankruptcy process to distribute them according to the statutory priority scheme.

Conclusion

The intersection between bankruptcy and receivership is an area where specialized and uncommonly-used code-sections may come into play. Case law is still developing, and the number of receivership-related bankruptcy cases is likely to increase as the remedy of receivership continues to become more popular.

Excusal of turnover and accounting by a receiver under § 543(d)(1) and abstention under § 305(a)(1) are powerful remedies available when a bankruptcy case is filed during a receivership. However, given that these remedies are used infrequently outside of the receivership-bankruptcy intersection, practitioners should carefully review the relevant code sections, review developing case law, and consider what other relief, including stay relief and other determinations, that it may be appropriate to request at the outset of a case. ■

Endnotes

[1] Daniel A. White, "Please Excuse Me: Receiverships and Bankruptcy," XXXVII ABI Journal 11, 36-37, 54-55, November 2018, available at abi.org/abi-journal.

[2] Assignments for the benefit of creditors, although similar to receiverships, are not covered by this article.

[3] *In re Sundance Corporation*, 149 B.R. 641, 650 (Bankr.E.D.Wa. 1993).

[4] *In re 29 Brooklyn Avenue, LLC*, 535 B.R. 36, 42-43 (Bankr.E.D.N.Y. 2015).

[5] *In re Picacho Hills Utility Co., Inc.,* 2013 WL 1788298 at * 7 (Bankr. D.N.M. 2013).

[6] *Id.* (citing *In re Franklin*, 476 B.R. 545 at 551 (Bankr.N.D.Ill. 2012)).

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The DEVIL is in the DETAILS and in the DISCHARGE – *creditors beware!*

By Ron Holmes

New Mexico is one of only a handful of states and territories in the United States that follow community property law.[1] The most basic tenet of community property is a presumption of fifty-fifty split in ownership of property and debt in marriage. Under Section 40-3-12(A), all property "acquired during marriage by either husband or wife, or both, is presumed to be community property." Exceptions include property one spouse acquired prior to the marriage, by gift, or by inheritance. This distinction, between community property and so-called separate property, is an important consideration when practitioners are consulting with potential bankruptcy clients.

When a petition is filed in a joint bankruptcy case, all community property of both spouses is disclosed to the court and subject to the liquidation powers of the trustee. If only one spouse files, that spouse's property interests must be disclosed, including community and separate property. The non-filing spouse's separate property, however, is neither property of the estate nor subject to the disclosure requirements of the filing spouse. Therefore, if one spouse has already inherited or is expected to inherit separate property, then it may be strategic to leave that spouse out of the filing.

The presumption of community acquisition of property applies equally to the allocation of debt. Debts incurred during the marriage are presumptively community debts.[2] A separate debt is, among other things, one incurred by a spouse before the marriage or after entry of a divorce decree, one "contracted by a spouse during marriage which is identified by a spouse to the creditor in writing at the time of its creation as ... separate debt," or a debt determined to be separate debt by a court having jurisdiction.[3]

A bankruptcy discharge of debt is a release of the personal liability for a pre-petition debt. More accurately, a discharge is a bankruptcy court-ordered injunction against the collection of a pre-petition debt. The discharge injunction also protects property "acquired after the commencement of the case, on account of any allowable community claim."[4]

The potential pitfall for creditors occurs when the non-filing spouse receives the benefit of a practical discharge from the debtor's discharge. "Community discharge" protects community property from claims even against the non-filing spouse.[5] This includes post-petition wages of the non-filing spouse, although it does not prevent creditors from attempting to collect separate property of the non-filing spouse. This means the community property injunction forever protects the entire community from pre-petition claims not excepted from discharge. If the non-filing spouse's debt is from fraud or other non-dischargeable wrongs, then the non-filing spouse can be protected by the "practical discharge" because the community

property protections afforded under the discharge injunction protect the non-filing spouse's interest in community property.

Not so long ago, many New Mexicans fell victim to a notorious Ponzi scheme associated with the Doug Vaughn and Vaughn Company Realtors bankruptcies. The Bankruptcy court denied Doug Vaughn's petition for a discharge. Mr. Vaughn was single when he filed his case. The end result could have been drastically different had Mr. Vaughn been married at the time of his filing and his spouse filed an individual bankruptcy case instead. Enter the hypothetical Mrs. Vaughn. What if the hypothetical Mrs. Vaughn filed a bankruptcy without Doug joining the case? She would naturally give the necessary disclosures to the court, relating to property belonging to the debtor and outstanding debt. The hypothetical Mrs. Vaughn would disclose all creditors, including those victims in the Ponzi scheme since presumptively those creditors would count as community debt. She would also disclose all property interest including community property owned by herself and Mr. Vaughn. If she had no knowledge of the Ponzi scheme, then she would likely receive her own discharge.

All of the Ponzi scheme creditors would be put on notice of the Mrs. Vaughn's petition for a bankruptcy discharge. The creditors would have to know the law in order to protect their claims from the injunction favoring the community property following discharge. Time is critical. If creditors failed to timely file an adversary action against Mr. Vaughn in Mrs. Vaughn's case, then Mr. Vaughn's interest in their community property would forever receive protections under the practical discharge discussed above. Mr. Vaughn's wages, for example, could not be garnished by the victims of the Ponzi scheme following Mrs. Vaughn's discharge.

Mr. Vaughn would not receive his own discharge, so his creditors would not be left without any remedy at all, but their remedy would be severely limited. The creditors would be restricted to seek redress only against his sole and separate property (i.e. not community property). A victim creditor must pay particular attention to the bankruptcy filings of the wrongdoer's spouse so as to not fall victim a second time to the non-filing spouse's wrongdoing.

A famous quote regarding the community discharge goes like this: "the Devil himself could effectively receive a discharge in bankruptcy if he were married to Snow White."[6] Retired New Mexico Bankruptcy Judge Stewart Rose clarified that position when he added "if [the Devil] does not treat [Snow White] better than his creditors, she will, by divorcing him, deny his discharge."[7] ■

Endnotes

[1] Other community property states include Arizona, California, Idaho, Louisiana, Nevada, Puerto Rico, Texas, Washington and Wisconsin.

[2] *See* NMSA 1978, Section 40-3-9(B)

[3] *See* NMSA 1978, Section 40-3-9(A)

[4] *See* 11 U.S.C. §524(a)(3)

[5] 11 U.S.C. 524(a)(3)

[6] Alan Pedlar, *Community Property and the Bankruptcy Act of 1978*, 11 S. Mary's L.J 349, 382 (1979).

[7] *Gonzales v. Costanza (In re Constanza)*, 151 B.R. 588, 590 (Bankr.D.N.M. 1993)

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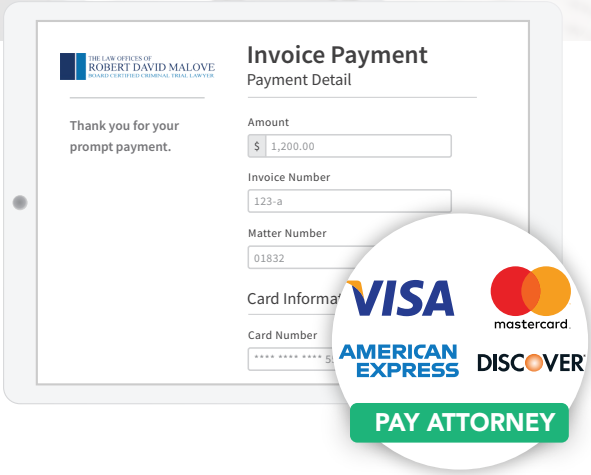

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ness. Because Appellate Counsel's failures narrowed the scope of Petitioner's appeal without denying a merits review, those failures do not offer a basis for a presumption of prejudice on a subsequent IAAC claim. *Id.* Accordingly, under the facts presented here, we conclude that Petitioner must prove how Appellate Counsel's deficient performance caused actual prejudice.

2. Petitioner has not shown actual prejudice from Appellate Counsel's deficient performance

{29} Petitioner argues it is likely that, but for the errors of Appellate Counsel, the Court of Appeals would have reversed Petitioner's conviction. The State counters that even if Appellate Counsel had performed competently, Petitioner's conviction would not have been reversed on appeal and that Petitioner therefore did not suffer prejudice.

{30} The weight of evidence of prejudice is decided on a case-by-case basis. *See State v. Favela*, 2015-NMSC-005, ¶ 18, 343 P.3d 178. Petitioner maintains that but for Appellate Counsel's deficiencies, the result of his appeal would have been different for two reasons. Petitioner claims that he was convicted under an "improper" jury instruction and that Appellate Counsel prejudiced his appeal by raising this issue in a manner that precluded review by the Court of Appeals. Petitioner also claims the evidence at trial was insufficient to support a conviction for child abuse based on an endangerment theory. He insists that if Appellate Counsel had "fully argued these issues to the Court of Appeals and/or filed a timely petition for certiorari in this Court, it is reasonably probable that [Petitioner]'s sole conviction . . . would have been reversed and re-trial prohibited." We disagree with Petitioner and determine that Appellate Counsel's errors did not amount to actual prejudice in violation of Petitioner's constitutional right to an appeal.

a. Appellate Counsel's failure to adequately raise a jury instruction issue did not prejudice Petitioner's appeal

{31} Petitioner maintains that his conviction was "based on a subsequently discredited theory of criminally negligent child abuse," that the corresponding jury instruction used at his trial was erroneous, and that Appellate Counsel "was so ineffectual that the Court of Appeals refused to address the claim." According to Petitioner, Appellate Counsel attempted to argue that the jury instruction used erroneously applied the civil negligence standard of "knew or should have known" to the foreseeability of risk to Child but was ineffective in presenting this argument to the Court of Appeals. Petitioner asserts that the "appeal certainly would have turned out differently" but for Appellate Counsel's errors.

{32} Appellate Counsel's appellate brief acknowledged that the jury instruction error was not preserved at trial but failed to argue that the Court of Appeals could consider the issue under the fundamental error exception. *See* Rule 12-216(B) NMRA (1993). The Court of Appeals responded to the jury instruction issue and concluded, "[W]e find no error and will not address these claims further." *Lukens*, A-1-CA-30819, mem. op. ¶ 20. Petitioner concludes that he would have prevailed if Appellate Counsel had fully articulated this issue to the Court of Appeals. We disagree. Appellate Counsel's failure to raise fundamental error did not prejudice Petitioner's appeal because the jury instruction was not erroneous.

{33} We again look to *Strickland* to assess the validity of Petitioner's claim of prejudice. We do not need to assess whether Appellate Counsel adequately raised the jury instruction issue nor whether the brief's shortcomings concerning this issue amounted to deficient performance. As previously discussed, we "dispose of [this] ineffectiveness claim on the ground of lack of sufficient prejudice" and avoid analysis of deficient performance altogether. *Plouse*, 2003-NMCA-048, ¶ 13. Under the second prong of the *Strickland* test, we review Petitioner's claim of prejudice.

{34} A petitioner suffers prejudice when there is a reasonable probability that, had it not been for a deficient performance by appellate counsel, the petitioner would have prevailed on direct appeal. *Smith*, 528 U.S. at 285. Applied to this case, Petitioner must show that the use of the challenged jury instruction was fundamental error that would have required reversal if Appellate Counsel had properly raised the issue on direct appeal. Petitioner fails to meet his burden.

{35} At Petitioner's trial, jury instruction 5 tracked the negligent child abuse instruction, UJI 14-602 NMRA (2000, withdrawn April 3, 2015), and specified the elements of reckless disregard, stating in pertinent part,

> To find that David Lukens, Jr. acted with reckless disregard, you must find that David Lukens, Jr. *knew or should have known* the defendant's conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of [Child].

(Emphasis added.) Appellate Counsel's brief in chief specifically asserted that UJI 14-602 was erroneous because the instruction included certain language that this Court had questioned in prior cases. *See, e.g.*, *State v. Schoonmaker*, 2008-NMSC-010, ¶ 45, 143 N.M. 373, 176 P.3d 1105 ("UJI 14-602 on negligent child abuse appears to be somewhat inconsistent by using a 'should have known' standard and then later requiring that the defendant have 'disregarded [the] risk and . . . [been] wholly indifferent to the consequences.'" (alterations and omission in original)), *abrogated in part by State v. Consaul*, 2014-NMSC-030, ¶¶ 37-38, 332 P.3d 850 (acknowledging confusion between criminally negligent and reckless child abuse and requiring only recklessness, the conscious disregard of risk, for UJI 14-602).

{36} Petitioner argues that the language of the instruction was subsequently changed. The thrust of Petitioner's argument is that later changes to the instruction demonstrate that errors were present in the prior version. To the contrary, this Court has never found UJI 14-602 to be legally insufficient. *See State v. Lucero*, 2017-NMSC-008, ¶ 32, 389 P.3d 1039 (reinforcing the presumption that the district court's reliance on UJI 14-602 was conclusive of the jury having been properly instructed). This Court has also recognized the presumption that a uniform jury instruction correctly states the law. *State v. Johnson*, 2001-NMSC-001, ¶ 15, 130 N.M. 6, 15 P.3d 1233. We disagree with Petitioner's assertion that the trial court's use of the jury instruction was erroneous. Even if Appellate Counsel raised fundamental error regarding the jury instruction, the Court of Appeals would have concluded that the instruction was proper. Petitioner's conviction would not have been reversed. Because the jury instruction was proper, no prejudice resulted when Appellate Counsel failed to raise fundamental error.

{37} Petitioner's discussion of the alleged jury instruction error relies heavily on *Consaul*, 2014-NMSC-030, a case decided one full year after the Court of Appeals mandate in Petitioner's appeal. *Consaul* cannot support error in this case because *Consaul* was not the law at the time of Petitioner's direct appeal. Under *Strickland*, we must evaluate Appellate Counsel's conduct from Appellate Counsel's perspective at the time and without "'the distorting effects of hindsight.'" *Lytle*, 2001-NMSC-016, ¶ 26 (quoting *Strickland*, 466 U.S. at 689). An attorney's assessment of the merits of an issue depends on the law at

the time. *People v. Weninger*, 686 N.E.2d 24, 27-28 (Ill. App. Ct. 1997) ("Representation based on the law prevailing at the time of trial is adequate, and [*trial*] counsel is not incompetent for failing to accurately predict that existing law will change." (emphasis added)). The same principles apply for claims of inadequate representation by appellate counsel on direct appeal. *People v. Barnard*, 470 N.E.2d 1005, 1012 (Ill. 1984) ("We have tested the performance of [the] defendant's counsel, both at trial and on appeal, by the standards adopted by the Supreme Court in *Strickland*.."). Appellate Counsel for Petitioner could not claim error based on case law that did not exist.

{38} Even if *Consaul* was available at the time of Petitioner's appeal, the facts in *Consaul* are distinguishable from Petitioner's case. In *Consaul*, this Court reversed a conviction for negligent child abuse causing great bodily harm, holding that the jury should have received separate jury instructions on intentional child abuse and negligent child abuse. *Consaul*, 2014-NMSC-030, ¶¶ 23, 26. In Petitioner's case, all charges of intentional child abuse were abandoned, and the jury only considered negligent child abuse. *Consaul* could not affect the outcome of Petitioner's appeal.

{39} Finally, the new version of the jury instruction reflecting the change referred to by Petitioner did not become effective until April 3, 2015, nearly five years after Petitioner's September 2010 sentencing and nearly two years after the August 2013 mandate in Petitioner's direct appeal. *See* UJI 14-615 NMRA. By order of this Court, the new instruction, UJI 14-615, applies to "cases filed or pending on or after April 3, 2015," and has no application in Petitioner's case.

{40} Because Petitioner bases his argument on a future jury instruction and future case law, we cannot agree that Appellate Counsel's failure to raise fundamental error in the trial court's use of an allegedly erroneous jury instruction caused Petitioner prejudice. Our review of the record indicates that Appellate Counsel argued for reversal of Petitioner's conviction based on the law as it existed at the time of Petitioner's direct appeal. Appellate Counsel did not cause Petitioner prejudice for failing to predict the ruling of *Consaul* or subsequent changes in jury instructions.

b. Appellate Counsel's failure to challenge the sufficiency of the evidence did not constitute deficient performance, nor did it prejudice Petitioner

{41} Petitioner's final argument is that the State did not present sufficient evidence to support a theory of child abuse by endangerment. Petitioner claims that by failing to challenge sufficiency of the evidence, Appellate Counsel performed deficiently and Appellate Counsel's performance prejudiced Petitioner. Petitioner states that "the appellate courts would have ruled in [his] favor had [A]ppellate [C]ounsel not utterly failed to brief this issue in the Court of Appeals" or failed to apply for certiorari in this Court. The State argues against such a finding of prejudice because "no error occurred in the trial below" where "more than sufficient evidence" supported child abuse by endangerment.

{42} We review a jury's verdict to determine "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. The evidence "is viewed in the light most favorable to the guilty verdict." *State v. Ramirez*, 2018-NMSC-003, ¶ 6, 409 P.3d 902 (internal quotation marks and citation omitted). This Court will not substitute its judgment for that of the jury so long as a rational jury could have found the essential facts required for a conviction beyond a reasonable doubt. *Id.*

{43} "Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be . . . placed in a situation that may endanger the child's life or health." Section 30-6-1(D)(1) (2005). Jury instruction 5 stated,

> 1. David Lukens, Jr. caused [Child] to be placed in a situation which endangered the life or health of [Child];
> 2. [David Lukens, Jr.] acted with reckless disregard . . . ;
> 3. David Lukens, Jr.'s actions or failure to act resulted in great bodily harm to [Child], to wit: rib fracture;
> 4. [Child] was under the age of 18;
> 5. This happened in New Mexico on or between the 11th day of September, 2005 and the 5th day of December, 2005.

We conclude from the following discussion that the State introduced sufficient evidence at trial for a rational jury to find each of the essential elements to prove Petitioner guilty of child abuse by endangerment beyond a reasonable doubt.

{44} Child's mother testified about Child's fragility when he was born. When asked if the hospital sent Child home with any particular warning about Child being fragile, she responded, "They constantly spoke to us about how fragile babies can be. They didn't specifically say, 'Be very, very careful,' or anything like that, but you would think anybody would know that babies are fragile." She also testified that Petitioner "was particularly rough" with Child a "couple of times," stating that "he held him kind of roughly like you would—you know when a baby cries, and you would gently, you know, shake them and say, 'Come on now. Stop crying.' He was very rough when he did that, and I did mention it to him."

{45} When asked about the significance of the location of Child's rib fractures, one of the State's medical experts testified, "It's significant in that in my radiology literature, that in the setting of squeezing of the chest, fractures tend to occur along the side and along the back, as in [Child]." The expert added that rib fractures are not common because "[t]he ribs in children are very elastic." "They bend before they actually break, . . . and so we don't see rib fractures, commonly, at all." When the State asked another medical expert whether Child's rib fractures could be a result of "normal handling," the expert answered, "Not unless you have an underlying bone problem, which, in my opinion, [Child] did not have."

{46} Evidence introduced at trial included the video recording of the investigating detective's interview with Petitioner. During the interview Petitioner stated, "I did get mad at [Child] . . . ; I did squeeze him." The jury watched the recording of the interview and heard Petitioner say, "I really, really, really got mad" at Child. Petitioner also said that he "may have used excessive force." And while being interviewed by the detective, Petitioner also stated, "I'm digging a grave here."

{47} When confronted with the statements he gave to police, Petitioner explained that he was mad at himself, not mad at Child. "'Contrary evidence . . . does not provide a basis for reversal because the jury is free to reject [a d]efendant's version of the facts.'" *State v. Galindo*, 2018-NMSC-021, ¶ 12, 415 P.3d 494 (quoting *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829). Because the factfinder determines credibility, the jury was free to disbelieve Petitioner. *See State v. Smith*, 2001-NMSC-004, ¶ 16, 130 N.M. 117, 19 P.3d 254.

{48} The trial court found that endangerment could be based either on Petitioner's handling of Child while angry or on the

injuries themselves or on Petitioner's failing to alert medical authorities. Based on Petitioner's statements to the detective or on the testimony at trial, a rational jury could have found the essential facts required to convict Petitioner of endangerment of Child beyond a reasonable doubt. We hold that Appellate Counsel's failure to argue insufficient evidence of endangerment did not constitute deficient performance and did not prejudice Petitioner because the State's evidence was sufficient to prove endangerment.

c. We reject Petitioner's specific claims concerning Appellate Counsel's failure to challenge insufficient evidence of endangerment

{49} Petitioner makes the following three assertions concerning specific claims of unchallenged insufficiency of the State's evidence that he endangered Child: (1) evidence of endangerment may not rely on actual injuries, (2) evidence of endangerment is evidence of the forseeability of substantial risk of injury, and (3) Petitioner's failure to get medical attention for Child is not evidence of endangerment.

{50} Petitioner relies on four recent cases, decided one to four years after the Court of Appeals mandate that affirmed his conviction, to support his specific claims of unchallenged insufficient evidence that he endangered Child. *See Lucero*, 2017-NMSC-008; *State v. Nichols*, 2016-NMSC-001, 363 P.3d 1187; *Consaul*, 2014-NMSC-030; *State v. Garcia*, 2014-NMCA-006, 315 P.3d 331. Appellate Counsel did not have the benefit of the cases Petitioner cites. As we have discussed, Petitioner errs in making IAAC claims reliant on case law that was unavailable to Appellate Counsel at the time of the appeal. Nevertheless we address Petitioner's three assertions concerning unchallenged insufficiency.

{51} Petitioner contends that child abuse by endangerment must be established "without reliance on any resulting injuries." This Court has stated, "Whether a defendant's conduct creates a substantial and foreseeable risk of harm is what determines whether the child was endangered." *State v. Chavez*, 2009-NMSC-035, ¶ 2, 146 N.M. 434, 211 P.3d 891. Endangerment does require evidence of the risk of harm, but that does not exclude evidence of actual harm—such as the medical experts' testimony at trial concerning Child's actual injuries—as irrelevant. Actual harm may provide circumstantial evidence of the risk, as it did here. We maintain that other testimony at trial established that Petitioner's conduct was sufficient evidence of the foreseeable risk of harm to Child.

{52} In arguing that child abuse by endangerment must be foreseeable, Petitioner implies that a reasonable person could not have foreseen that Petitioner's act of squeezing Child with excessive force would result in harm to Child. Petitioner asserts that there was no evidence that Petitioner's handling of Child while angry and sleepless created a substantial and foreseeable risk of harm to Child and that his "own act of squeezing [Child] could not have formed the basis of his child endangerment conviction." But the jury heard the testimony of Child's mother and Petitioner's own explanation of how he might have injured Child by using "excessive force." Juries may "'use their common sense to look through testimony and draw inferences from all the surrounding circumstances.'" *State v. Phillips*, 2000-NMCA-028, ¶ 14, 128 N.M. 777, 999 P.2d 421 (citation omitted). The fragility of infants is common knowledge, and the risk of harm is substantial and foreseeable if infants are handled improperly. A rational jury could conclude that handling an infant with excessive force creates a substantial and foreseeable risk of harm. In this light, the evidence was sufficient for a jury to find Petitioner guilty of endangerment of Child.

{53} Petitioner claims the State did not establish that failing to get medical attention for Child amounted to endangerment. But the State presented evidence at trial of three distinct theories of endangerment, and the trial court agreed in finding that endangerment could be based either on Petitioner's handling of Child while angry, on the injuries themselves, or on failing to alert medical authorities. The trial court stated, "the State has made out a prima facie case upon which a reasonable juror could find that child abuse occurred and the defendant was the one that may have committed the act, causing injury, and depriving Child of needed medical attention or care at that time." Regardless of whether the State established how the failure to seek medical attention endangered Child, the jury had two other theories of endangerment it could consider. Accordingly, even if the State did not establish the connection between medical care and endangerment, Petitioner's argument fails to establish insufficient evidence of endangerment.

d. Appellate counsel discretion determines which arguments to advance

{54} We recognize Appellate Counsel's failure to make a sufficiency of the evidence argument, theoretically, as a tactical decision based upon strength of the evidence presented at trial and the resultant weakness of the sufficiency argument on appeal. Appellate Counsel had discretion to argue the most meritorious issues on appeal. An insufficient evidence argument is not "so plainly meritorious that it would have been unreasonable to winnow it out" of the appellate brief. *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003). Counsel has discretion to choose which nonfrivolous arguments to advance on appeal. *Welch v. Workman*, 639 F.3d 980, 1012-1013 (10th Cir. 2011). Appellate attorneys are wise to focus on the strongest issue rather than raise every viable issue.

> "[The] weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy . . . . [E]very weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court. For these reasons, a lawyer who throws in every arguable point—'just in case'—is likely to serve her client less effectively than one who concentrates solely on the strong arguments."

LaFevers v. Gibson, 182 F.3d 705, 722 (10th Cir. 1999) (alterations and omission in original) (quoting *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir.1989)). Contrary to Petitioner's arguments, Appellate Counsel's failure to discuss the sufficiency of the evidence was not deficient and did not prejudice Petitioner.

III. CONCLUSION

{55} Petitioner complains he suffered from ineffective assistance of appellate counsel and was deprived of the constitutional right to appeal his conviction. We conclude otherwise. Petitioner was afforded his appeal of right, the district court had substantial evidence to support its findings, and Appellate Counsel's shortcomings did not prejudice Petitioner in this case. Petitioner is not entitled to a new appeal. Petitioner is not entitled to a reversal of his conviction.

{56} For the foregoing reasons, we affirm the district court's denial of the petition for writ of habeas corpus.

{57} IT IS SO ORDERED.
GARY L. CLINGMAN, Justice

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

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-001

No. A-1-CA-34496 (filed September 4, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JEANNE ROEPER,
a/k/a JEANNA ROEPER,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Jane Shuler Gray, District Judge

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for Appellant

Opinion

Julie J. Vargas, Judge

I. INTRODUCTION

{1} Defendant appeals her criminal conviction for failure to enforce compulsory school attendance resulting from her fifteen-year-old son's habitual truancy. We conclude that the Compulsory School Attendance Law (the Act), NMSA 1978, §§ 22-12-1 to -10 (1967, as amended through 2017) requires that the juvenile probation office conduct an investigation into whether Defendant's child was "a neglected child or a child in a family in need of services" pursuant to Section 22-12-7(C) and, taking the information discovered in that investigation into consideration, make a determination and finding that the truancy may have been caused by Defendant before prosecuting Defendant. As the evidence presented was insufficient to show that the required investigation was conducted, we reverse.

II. BACKGROUND

{2} Defendant is the mother of three children, including fifteen-year-old J.M. (Son). Son had a history of behavioral problems and had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Defendant also cares for her younger son, who is deaf and suffers from autism and Down syndrome. Along with her own three children, Defendant also cares for her grandchild.

{3} In the winter of 2012, following a stay in hospice, Defendant's husband died. Defendant suffers from bipolar disorder and depression, and eight or nine months after her husband's death, in the fall of 2013, Defendant suffered a mental breakdown and checked herself into a hospital for approximately three weeks.

{4} While Defendant was hospitalized, Son's grandmother enrolled him at Eddy Alternative School in mid-August 2013. Son began school at Eddy Alternative School as an eighth grader after having been held back from high school for one year. Son's attendance at the school was "sporadic," and he quickly accumulated an impermissible number of absences. The school attempted, without success, to contact Defendant regarding Son's absences on several occasions. On September 19, 2013, the school mailed Defendant notice that Son had four unexcused absences, following up with another letter the next day, notifying of Son's fifth unexcused absence. Both letters requested that Defendant contact the school within one week to schedule a meeting with the school's principal. On October 14, 2013, the school sent Defendant written notice that Son had accumulated ten and a half unexcused absences and requested that Defendant contact the principal of the school within forty-eight hours. The letter further advised that the case was "being referred to the [j]uvenile [p]robation & [p]arole [o]ffice for investigation and potential prosecution."

{5} The school forwarded its file on Son to Danial Schwertner, Chief Juvenile Probation Officer (Schwertner). Schwertner reviewed the file and decided solely from that review that Defendant may have caused Son's habitual truancy. The State filed a complaint in magistrate court, charging Defendant with one count of failure to enforce compulsory school attendance, contrary to Section 22-12-7. At trial, Defendant testified that Son was sometimes violent toward her and that she was afraid of him. As evidence of Son's violent behavior, Defendant introduced evidence that between April 2013 and December 2013 emergency services received at least five 911 calls reporting disturbances involving Son at the family home.

{6} The magistrate court found Defendant guilty. Defendant appealed to the district court, where she received a trial de novo. The district court upheld the magistrate court's judgment.

III. DISCUSSION

The Act

{7} The Act imposes a responsibility upon parents of school-aged persons to insure school attendance. Section 22-12-2(C) Included among the provisions of the Act is a statutorily-created protocol for addressing habitual truancy and a parent's failure to satisfy his or her obligation to insure a child's school attendance. *See* § 22-12-7. A habitually truant student is a student with ten or more unexcused absences. Section 22-12-9(A)(1).

{8} To initiate enforcement against the parent of a habitual truant, Section 22-12-7(B) requires that the local school board or its authorized representative "give written notice of the habitual truancy by mail to or by personal service on the parent." If the student continues to accumulate unexcused absences after notice is provided, the student "shall be reported to the probation services office . . . *for an investigation as to whether the student shall be considered to be a neglected child or a child in a family in need of services*." Section 22-12-7(C) (emphasis added). "If, *after review by the juvenile probation office. . . a determination and finding is made* that the habitual

truancy by the student may have been caused by the parent of the student," the matter will be referred "to the district attorney's office or any law enforcement agency having jurisdiction for appropriate investigation and filing of charges." Section 22-12-7(D) (emphasis added). A parent who, "after receiving written notice" and "after the matter has been reviewed [by the juvenile probation office] in accordance with Subsection D[,]" knowingly allows the student to violate the Act commits a petty misdemeanor. Section 22-12-7(E).

{9} While Section 22-12-7(E) explicitly establishes the written notice and the juvenile probation officer's review as prerequisites to prosecution, it makes no reference to the investigation called for in Section 22-12-7(C). Defendant contends that, notwithstanding the omission of any reference to an investigation from Section 22-12-7(E), the statute also requires the investigation as a prerequisite to prosecution. Defendant argues that the State did not satisfy its burden because it failed to provide substantial evidence that the probation services office properly investigated whether Son was "a child in a family in need of services" before making a "determination and finding . . . that the habitual truancy by the student may have been caused by the parent" and referring the matter to the district attorney's office. Section 22-12-7(C), (D). In response to Defendant's argument, the State claims that the statute does not specify any mandatory steps to be taken in an investigation and the probation officer's review of Son's file in this case was sufficient to satisfy the statutory requirement.

Investigation Required by Section 22-12-7(C)

{10} We first consider the language of the statute to determine the nature and scope of the investigation required by Section 22-12-7(C). When considering the meaning of a statute, we note that issues of statutory interpretation are subject to a de novo review. *State v. Tafoya*, 2012-NMSC-030, ¶ 11, 285 P.3d 604. When interpreting a statute, we seek to fulfill the Legislature's intent, taking into consideration the fact that the primary indicator of that intent is the language it used in creating the statute. *State v. Erwin*, 2016-NMCA-032, ¶ 5, 367 P.3d 905. When the statute contains terms that are "clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *State v. Rivera*, 2004-NMSC-001, ¶ 10, 134 N.M. 768, 82 P.3d 939 (internal quotation marks and citation omitted). In addition, statutory subsections "must be considered in reference to the statute as a whole[,]" *id.* ¶ 13 (internal quotation marks and citation omitted), and "must be construed so that no part of the statute is rendered surplusage or superfluous." *State v. Javier M.*, 2001-NMSC-030, ¶ 32, 131 N.M. 1, 33 P.3d 1 (internal quotation marks and citation omitted); *see State v. Jackson*, 2010-NMSC-032, ¶ 28, 148 N.M. 452, 237 P.3d 754 (characterizing this rule as fundamental, and stating it should be applied to every "word, clause, sentence provision[,] or part" of a statute (internal quotation marks and citation omitted)), *overruled on other grounds by State v. Radosevich*, 2018-NMSC-028, ¶¶ 2, 34, 419 P.3d 176.

Nature and Scope of an Investigation Under Section 22-12-7(C)

{11} The parties do not dispute that the plain language of the statute clearly requires the juvenile probation office to conduct an investigation into whether a habitually truant student is "a neglected child or a child in a family in need of services" if the student continues to accrue unexcused absences after written notice is given to the student's parent. Section 22-12-7(C). The State, however, argues that nothing in the statute defines the investigation called for in Section 22-12-7(C), or mandates the type of investigation that it must conduct. Because the statute does not define the nature and scope of the investigation, the State contends that the investigation conducted by the juvenile probation office regarding Son was sufficient.

{12} While we agree that the statute contains no explicit language setting out the scope and nature of the investigation the juvenile probation office must conduct, the mandate of the statute requires that the juvenile probation office conduct an investigation sufficient to determine whether the student is a "neglected child or a child in a family in need of services." The Children's Code specifically defines a "family in need of family services," in relevant part, as "a family whose child's behavior endangers the child's health, safety, education or well-being[.]" NMSA 1978, Section 32A-3A-2 (A)(1) (2005). "[F]amily services" are "services that address specific needs of the child or family." Section 32A-3A-2(B). The Legislature unequivocally incorporates the requirements of the Children's Code into the Act, making the child subject to the provisions of the Children's Code if, after investigation, the child is found to be "a neglected child or a child in a family in need of services." Section 22-12-7(C). Included among the provisions of the Children's Code is the Family Services Act, NMSA 1978, §§ 32A-3A-1 to -11, (1993, as amended through 2016), which "recognize[s] that many instances of a child's behavior are symptomatic of a family in need of family services" and "provide[s] prevention, diversion and intervention services" for children or families. Section 32A-3A-1(B); *see* NMSA 1978, § 32A-3B-1(B)(2) (2005) (expressing legislative purpose of the Family in Need of Court-Ordered Services Act "to recognize that many instances of truancy . . . by a child are symptomatic of a family in need of services"); *see also* NMSA 1978, § 32A-3B-2(A) (2009) (defining "family in need of court-ordered services" as one that has exhausted available family services and requires court intervention where "child, subject to compulsory school attendance, is absent from school without an authorized excuse more than ten days during a school year"). By structuring the Act to incorporate the provisions of the Children's Code, the Legislature intended that the probation office conduct an investigation sufficient to determine whether the student is endangering his own health, safety, education, or well-being. *See* § 32A-3A-2(A)(1) (defining a "family in need of family services").

{13} Our interpretation is bolstered by the legislative history of the Act. *See State v. Lopez,* 2009-NMCA-112, ¶ 5, 147 N.M. 279, 219 P.3d 1288. Considering the history and background of the Act, we note that prior versions of Section 22-12-7 were more punitive than the current version; parents could be convicted before courts or the juvenile probation office sought out the cause of and remedy for a student's habitual truancy. Over the years, Section 22-12-7 transitioned from assigning automatic penalties for violating attendance policies to requiring investigation into the circumstances causing those violations. Overall, the changes made to Section 22-12-7 show the Legislature's recognition of both the importance of school attendance, and of the possibility that poor attendance may be indicative of other problems with the student or in the home. Section 22-12-7 balances the Legislature's intent to hold parents accountable for their student's poor attendance while still recognizing and accounting for the difficulties families may face beyond the school or classroom.

{14} The 1986 version of Section 22-12-7 allowed an adjudication and assignment of penalties to precede any investigation into the circumstances of the family or the student. It required that notice of the student's absences be given to the parent, much like the current version, but mandated that continued absences following delivery of written notices be reported to magistrate or metropolitan court. If the court found that the parent knowingly allowed the continued absences, he or she was subject to a penalty under the statute. If absences continued after the court imposed a penalty, the matter was reported to the children's court, and the statute required that the student be considered "a neglected child or a child in need of supervision" under the Children's Code. Section 22-12-7(B) (1986). The 1986 version made no provision for investigation into the circumstances causing the absences, instead making it mandatory that courts find a child to be neglected or in need of supervision upon accrual of any additional absences.

{15} The following year, the Legislature restructured Section 22-12-7 to resemble the current statute we use today by requiring an investigation into the need for children's court services upon additional absences following notice of habitual truancy, and prior to an adjudication under the statute. It also removed the provision that made an adjudication under the Children's Code the automatic result of additional absences. *See* § 22-12-7(C) (1987). Under this later version, and as with the current version, the Legislature required the student's accumulating excess absences to be reported to the local probation services office "for an investigation as to whether the student shall be considered to be a neglected child or a child in need of supervision" under the Children's Code. *Id.* The juvenile probation office or local children's court judge then would make a determination of whether "the nonattendance by the student may have been caused by the parent," in which case the matter was referred to an appropriate law enforcement agency "for appropriate investigation and filing of charges." Section 22-12-7(D) (1987). In 2004, the Legislature shifted the responsibility for investigating the student's circumstances from the children's court and probation offices to the probation offices alone, but left in place the other requirements, including notice, an investigation into the need for children's court services, and a finding that the parent may have caused the absences, contained in the current version. *See* § 22-12-7(C),(D) (2004).

{16} The changes between the 1986 and 1987 versions of Section 22-12-7 are clearly indicative of a shift in the legislative intent from a punitive focus to one intended to assess and address the causes underlying a student's habitual truancy before a parent is charged with a violation of the statute. By shifting from a post-adjudication investigation to a pre-adjudication investigation, the Legislature explicitly recognized that continuous school absences may be a symptom of deeper issues in the child's family or personal life requiring family services to remedy those issues. The restructuring of the statute to allow for a more meaningful evaluation of whether the family is in need of services *prior* to the filing of criminal charges and a possible conviction further evidences the Legislature's intent that an investigation serve as a prerequisite to prosecution under Section 22-12-7.

{17} While we decline to define what specifically must be done to comply with the statutory mandate, unless the student's file itself demonstrates that a child is neglected or a child in a family in need of services, simply reviewing the file is not sufficient. Instead, we expect that in most instances, an investigation will include, at the very least, interviews with the student's teachers to determine whether they have any information about the student's family life that would assist the juvenile probation office in making its determination. We further anticipate that the juvenile probation office would attempt to speak with the student and student's parent, guardian, or other caretaker, seeking similar information. Absent such interviews, we find it difficult to see how the juvenile probation office could properly determine whether the student was "a neglected child or a child in a family in need of services." Section 22-12-7(C).

Schwertner's Investigation

{18} We now consider whether there was sufficient evidence in the record that the juvenile probation office conducted a proper investigation as to whether Son was "a neglected child or a child in a family in need of services." A challenge to the sufficiency of the evidence requires consideration of "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314; *see State v. Dowling*, 2011-NMSC-016, ¶ 20, 150 N.M. 110, 257 P.3d 930 ("[T]he Court must scrutinize the evidence and review the jury's fact-finding function to ensure that a rational jury could have found the facts required for each element of the conviction beyond a reasonable doubt."). That evidence is to be viewed in the light most favorable to the State, and we "indulge all reasonable inferences in support of the verdict[] and disregard all evidence and inferences to the contrary." *State v. Cobrera*, 2013-NMSC-012, ¶ 7, 300 P.3d 729 (internal quotation marks and citation omitted). The question is whether the district court's "decision is supported by substantial evidence, not whether the [district] court could have reached a different conclusion." *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and citation omitted).

{19} Schwertner testified that when evaluating whether a child is neglected or in a family in need of services, he reviews the student's file, reading the documents therein to see if the school had reported seeing any signs of abuse or neglect. Files typically include letters, attendance records, a cover sheet with student's personal information, behavioral records, notes documenting any contact with the student's family, and occasionally, teacher's notes regarding the student's behavior. Schwertner testified that he never contacts parents when determining whether a child is part of a family in need of services, and instead relies on a review of the information in the file. He explained that no further efforts are necessary because his role involved only a review of the information regarding attendance that the school collected, and it was "not a situation where [he is] involved in the proof of it."

{20} Son's file included a cover letter, attendance record, disciplinary report, and copies of the letters sent to Defendant regarding Son's absences. Our record on appeal contains nothing detailing the information set out in the disciplinary report, and we are therefore unable to consider that information. Schwertner testified that he "reviewed" Son's file and concluded that Son "did not meet the criteria for any abuse and neglect," that there was no evidence of abuse, and that he did not feel that Defendant's family was

a family in need of services. Schwertner also testified that his department acted under an assumption that when a student is "under ninth grade, parents have a lot more control and authority over the child than they do once [the student] get[s] up into the high school." Son was fifteen at the time in question—at least one year older than an average eighth grader. Although Schwertner testified that he considered Son's grade level in making his determination regarding abuse and family services, he also claimed that the determination was "pretty much" based on the age of the student. Additionally, there is evidence Schwertner knew Son through prior referrals to probation not related to this case. There is not, however, any evidence regarding Schwertner's involvement with those referrals or the extent of his knowledge of the circumstances of those referrals. There is also no evidence that Schwertner considered or used his knowledge of Son's referrals in assessing whether Son was part of a family in need of services. Ultimately, Schwertner believed reviewing Son's file for signs that the family was in need of services was sufficient to determine whether Defendant may have been the cause of Son's absences.

{21} Schwertner's testimony about his investigation is of little assistance to the State. Initially, we note that had the Legislature intended that the investigation be limited to the review of the student's file, there would be no need to involve the juvenile probation office. School officials are in just as good a position to conduct such a review as the juvenile probation office. The Legislature's referral of the investigation to the juvenile probation office indicates its intent to require more than a cursory file review before determining whether the student is a "neglected child or a child in a family in need of services." *See* § 22-12-7(C). Furthermore, Schwertner's testimony at trial is more akin to an assessment of the merits of the adjudication of Son as a habitual truant rather than an investigation of whether Son's family circumstances merited referral to the children's court. His testimony contains vague references to the materials in the file that he "reviewed," but does not indicate, with any specificity, what information he gathered from his review. Schwertner did not divulge what was in Son's disciplinary report, and gave no explanation as to why the information contained in the report satisfied him that Son was not "a neglected child or child in a family in need of services." Section 22-12-7(C). Schwertner's "review" did not include any interviews with Defendant, Son, Son's grandmother, other members of Son's family, Son's teachers, or anyone else who interacted with Son on a regular basis who might be able to provide information about whether Son was "a child in a family in need of services." *See id.* Indeed, it is unclear from the record whether, in making his assessment, Schwertner was aware that Son's father had recently died, that his mother had been hospitalized, that in addition to Son, Defendant cared for a special needs child, or that numerous calls were made to 911 to report disturbances involving Son at the family home. Instead of seeking to verify or supplement any of the information contained in the file, Schwertner simply sought to confirm that Son had more than the permitted number of unexcused absences and that Defendant had been notified of those absences. The evidence presented regarding Schwertner's efforts in this case was nothing more than a superficial review of Son's file. While a review of the student's file is absolutely contemplated by the language of the statute, Section 22-12-7(C) requires more. Schwertner's actions were insufficient to allow him to determine whether Son was "a child in a family in need of services" and did not constitute an "investigation" as required by Section 22-12-7(C).

Investigation as a Prerequisite to Prosecution Under Section 22-12-7(E)

{22} Having determined the nature and scope of an investigation required by Section 22-12-7(C) and concluded that Schwertner's investigation did not satisfy the statutory requirements, we now consider whether a proper investigation is a prerequisite to a prosecution under Section 22-12-7(E). While at first blush, the Legislature's omission of any reference to the investigation from Section 22-12-7(E) would seem to allow a prosecution of a parent without an investigation, the plain language, structure, and legislative history of the Act make clear that the investigation is intended to be an integral part of the juvenile probation office's determination as to whether the habitual truancy may have been caused by the student's parent. *See* § 22-12-7(C), (E). Section 22-12-7(D) of the statute provides that, "[i]f, *after review by the juvenile probation office* . . . a determination and finding is made that the habitual truancy by the student may have been caused by the parent of the student, then the matter will be referred . . . to the district attorney's office or any law enforcement agency." Section 22-12-7(D). Notwithstanding that the statute requires the juvenile probation office to conduct a review, it fails to define what exactly the juvenile probation office is to review in making its "determination and finding" regarding the cause of the student's truancy. Again, while we will not adopt specific requirements of what must be reviewed by the juvenile probation office before making any determination or finding regarding the cause of student's truancy, we expect that any such review will include information collected in the statutorily mandated investigation into the student's status as a "neglected child or a child in a family in need of services" required by Section 22-12-7(C), as well as any other information available to the juvenile probation office. Indeed, to interpret Section 22-12-7(E)'s omission of any reference to an investigation in a way that renders an investigation unnecessary for prosecution under Section 22-12-7 would render the investigation language of Section 22-12-7(C) superfluous. *See Javier M.*, 2001-NMSC-030, ¶ 32. Finally, we expect that the information gathered during that investigation will bear significantly on the juvenile probation office's determination and finding, as we anticipate it will provide the juvenile probation officer with at least a basic understanding of the student's home life and parent engagement.

{23} Because Section 22-12-7(C) requires an investigation into whether a student is "a neglected child or a child in a family in need of services," the juvenile probation office must review the information learned from the investigation as part of its determination and finding as to whether the student's habitual truancy may have been caused by the parent. No such investigation took place in this instance. We hold that the State failed to satisfy the statutory prerequisite to prosecuting Defendant for a violation of the Act, requiring the reversal of Defendant's conviction.

Sufficiency of the Evidence

{24} We look next to Defendant's assertion that there was insufficient evidence to support her convictions. *See State v. Mascarenas*, 2000-NMSC-017, ¶ 31, 129 N.M. 230, 4 P.3d 1221 (addressing a sufficiency argument in an effort to ensure no double jeopardy violation). When reviewing for sufficiency, "we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Holt*, 2016-

NMSC-011, ¶ 20, 368 P.3d 409 (internal quotation marks and citation omitted). The question then becomes "whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted).

{25} As noted previously, the information gathered during the investigation should provide the juvenile probation officer with some understanding of parental engagement. Here, however, Schwertner's investigation was so deficient that it contributed nothing to an assessment of Defendant's parental engagement, and provided no information to assist the district court in determining whether Defendant "knowingly allowed" Son's truancy to continue. *See* § 22-12-7(E) (providing that a parent who, after receiving requisite notice and after investigation has occurred, "knowingly allows the student to continue" his pattern of habitual truancy is guilty of a petty misdemeanor). As such, the evidence proffered to support Defendant's conviction on that element is limited, consisting mostly of Defendant's testimony regarding her efforts to make Son attend school.

{26} The evidence is sufficient to demonstrate Defendant knew Son had missed school—she admitted to having received letters informing her of his absences. Evidence of that knowledge alone, however, is insufficient to support Defendant's conviction here because the language of the statute requires not only that the parent knew of, but also allowed, the student's continued school absences. Thus, a conviction under Section 22-12-7(E) contains an implicit requirement that the parent either acted or failed to act in a way that authorized or ignored the child's continued absences. The evidence demonstrates Defendant attempted to get Son to attend school by waking him up, making breakfast, and arranging for his transportation to school, but that Defendant was afraid of Son, and when Defendant tried to get Son to go to school, Son became violent. This evidence was not sufficient to support a conclusion that Defendant allowed Son's absences, either by condoning his behavior or by an apathetic failure to act.

III. CONCLUSION

{27} We reverse the judgment of the district court and remand the matter to the district court to vacate the conviction.

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

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

WILCOX & MYERS, P.C.

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Annual Estate Planning Update 2019

Thursday May 16, 2019
7:45 a.m. – 4:00 p.m.

New Mexico State Bar Center
5121 Masthead, N.E.
Albuquerque, New Mexico 87109

To Register: Mail a check for $75 to the Independent Community Foundation, Inc. We will not accept registrations by phone or email. You will receive either a thumb drive or notebook of seminar materials. Please specify your preference when you register, or you will receive a thumb drive.

Seating is limited, so you must register to attend.

Professional Credit Pending: CLE, CE, CFP, CPA and Insurance (including Ethics)

Note: CE Credits for CFPs may only be available for attendees who are present the entire day, per the CFP regulations.

Agenda

Sign-in		7:45 – 8:15 a.m.
Introductory Comments		8:15 – 8:30 a.m.
Federal and State Estate and Gift Tax Update 2019	Vickie R. Wilcox, J.D., LL.M.	8:30 – 9:30 a.m.
Ask the Expert: Everything Advisors Need to Know About Retirement Plans + Q & A	Danielle R. Panter, J.D., LL.M.	9:30 – 10:30 a.m.
Break		10:30 – 10:45 a.m.
Continued from 2017: What Fiduciaries, Estate Planners, and Other Advisors Should Know About Oil and Gas Interests	Stephen D. Ingram, J.D. Scott S. Morgan, J.D. Sealy Cavin, Jr., J.D., LL.M.	10:45 – 11:45 a.m.
Lunch: Pizza, Drinks, and Networking in the Charity Exhibit Hall		11:45 – 12:45 p.m.
State of the State from the Judiciary's Perspective	Judge Linda M. Vanzi, J.D.	12:45 – 1:45 p.m.
Robin Williams vs. Prince: Ensuring your Clients' Intellectual Property Wishes are Honored	Jeffrey D. Myers, M.S., J.D.	1:45 – 2:45 p.m.
Break		2:45 – 3:00 p.m.
Ethical Issues When Representing Families and Closely Owned Businesses: Identifying and Managing Conflicts	William D. Slease, J.D.	3:00 – 4:00 p.m.

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To RSVP, please mail your $75 registration fee and your contact information to the address on the left. Please specify if you prefer a thumb drive or notebook of seminar materials.

Classified

Positions

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Caruso Law Offices, an ABQ plaintiff personal injury/wrongful death law firm has an immediate opening for associate with 2+ yrs. litigation experience. Must have excellent communication, organizational, and client services skills. Good pay, benefits and profit sharing. Send confidential response to Mark Caruso, 4302 Carlisle NE, ABQ NM 87107.

Law Clerk At-Will position in Chief Justice's Chamber
The NM Supreme Court is recruiting for a full-time, Law Clerk At-Will position in Chief Justice's chambers. Position is located in Santa Fe, New Mexico. SUMMARY OF POSITION: Under general supervision, work with Chief Justice on assigned cases, perform legal research, analysis, writing and editing. Salary: $45,500-$71,095. To apply, go to: https://supremecourt.nmcourts.gov/employment-opportunities.aspx

Assistant District Attorney
The Fifth Judicial District Attorney's office has immediate positions open to a new or experienced attorney's. Salary will be based upon the New Mexico District Attorney's Salary Schedule with starting salary range of an Assistant Trial Attorney to a Senior Trial Attorney ($58,000 to $79,679). Please send resume to Dianna Luce, District Attorney, 301 N. Dalmont Street, Hobbs, NM 88240-8335 or e-mail to 5thDA@da.state.nm.us.

Law Clerk
The NM Supreme Court is recruiting for a full-time, Law Clerk At-Will position in Santa Fe, New Mexico. SUMMARY OF POSITION: Under general supervision, work with justices on assigned cases, perform legal research, analysis, writing and editing. Salary: $45,500-$71,095. To apply, please go to: https://www.nmcourts.gov/jobs.aspx

Civil Legal Attorney (Contract)
POSITION: Civil Legal Attorney (Contract); PROGRAM: Peacekeepers, Espanola NM; STATUS: Contract/ Part Time; RATE OF PAY: DOE; EDUCATION: Juris Doctorate; EXPERIENCE: Ten years' experience in family law. PREFERRED CERTIFICATES: none. Practice civil and family law with an emphasis on domestic violence orders of protection within the Eight Northern Pueblos. Submit applications to: Desiree Hall/HR Specialist; Desiree@enipc.org; 505-753-6998 (Fax); Or call 505-747-1593 ext. 110 for information

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SUPREME COURT OF NEW MEXICO- The Supreme Court is accepting applications for attorney-associate and attorney-senior positions within the Court's office of legal counsel. The target annual salary for these at-will positions ranges from $73,133 to $98,759, depending on position, qualifications, and experience. These positions support the Supreme Court's adjudicative and rulemaking functions and may include supervisory duties. For a detailed description of the job qualifications, duties, and application requirements, please visit the Employment Opportunities webpage on the New Mexico Supreme Court website at https://supremecourt.nmcourts.gov/employment-opportunities.aspx

Associate Attorney
Scott & Kienzle, P.A. is hiring an Associate Attorney (0 to 10 years experience). Associate Attorney will practice in the areas of insurance defense, subrogation, collections, creditor bankruptcy, and Indian law. Associate Attorney needed to undertake significant responsibility: opening a file, pretrial, trial, and appeal. Lateral hires welcome. Please email a letter of interest, salary range, and résumé if interested to paul@kienzlelaw.com.

Trial Attorney
Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney's Office, which includes Curry and Roosevelt counties. Employment will be based in either Curry County (Clovis) or Roosevelt County (Portales). Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Email resume, cover letter, and references to: Steve North, snorth@da.state.nm.us.

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Second Judicial District Court Contract Attorney Residential Mortgage Foreclosure Settlement Facilitation Project

The Second Judicial District Court is accepting applications for Contract Attorneys for the Residential Mortgage Foreclosure Settlement Facilitation Project ("RMFSF"). RMFSF will operate under the direction of the Chief Judge and the Presiding Civil Judge. Attorney will conduct settlement facilitation conferences in residential foreclosures pending before the court between lenders and borrowers. Attorney is independent and impartial and shall be governed by the Rules of Professional Conduct, Mediation Procedures Act, NMSA 1978, § 44-7B-1 to 44-7B-6, and Mediation Ethics and Standards of Practice. Attorney will be responsible for memorializing settlement agreements and meeting with the designated supervising judge to receive case assignments and discuss RMFSF progress. Attorney agrees to twenty hours of work per week, which is anticipated to be a minimum of eleven settlement conferences per month, subject to adjustment for complex case assignments, maintain records for payment and reporting and statistical purposes as defined by the Court. Attorney will coordinate with assigned Court staff who provide administrative support to RMFSF. Qualifications: Must be a graduate of an ABA accredited law school; possess and maintain a license to practice law in the State of New Mexico; must have experience in settlement facilitation. Experience with residential mortgage foreclosure matters and loss mitigation is a plus. Compensation will be at a rate of $50.00 per hour, inclusive of gross receipts tax. Send letter of interest, resume, proof of education and writing sample to the Second Judicial District Court, Court Administration, P.O. Box 488 (400 Lomas Blvd. NW), Albuquerque, NM, 87102. Letters of interest without required material will be rejected. Letters must be received by court administration no later than 5:00 P.M. Friday, March 08, 2019. More information about the contract can be found on the SJDC's website: http:/www/2nddistrictcourtnm.com.

Deputy City Attorney

The City of Carlsbad is accepting applications for the position of Deputy City Attorney. In addition to an excellent benefit package, starting annual base pay will be $102,374.42 with an increase to $105,445.65 on July 1, 2019. Deadline for application is March 15, 2019. For additional information go to www.cityofcarlsbadnm.com. EOE M/F/V/D

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Attorney II New Mexico Corrections Department

The NMCD is hiring for the position of Attorney II (Lawyer-O). This position will be based in Santa Fe. Primary responsibilities will consist of responding to Inspections of Public Records Act (IPRA) requests. The position may perform other responsibilities such as review Office of Professional Standards (OPS) reports and proposed disciplinary actions, defend the NMCD in disciplinary appeals and arbitrations and other legal issues. Some limited interaction with inmates. Applicants must have JD degree from accredited law school; 3 years experience in the practice of law; and must be licensed as an attorney by the Supreme Court of New Mexico or qualified to apply for limited practice license, which requires graduation from an accredited school of law, licensure (in good standing) in another state and sitting for the next eligible State Bar exam. Pay band 75 - $39,686-$69,035 per year. Applicants must apply with State Personnel Office at www.spo.state.nm.us, position # 16374.

City of Albuquerque – Contract Attorney

The City of Albuquerque, through the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board"), is seeking a qualified attorney to contract with to provide legal representation and general legal services to the Air Board. This position is an independent contractor, and is not an employee of the City of Albuquerque. Applicant must be admitted to the practice of law by the New Mexico Supreme Court and be an active member of the Bar in good standing. A successful candidate will have strong communication skills, knowledge of board governance and Robert's Rules of Order, and knowledge of environmental rules and regulations including the Clean Air Act. Prior experience with, or advising, boards and commissions is preferred. Please submit a resume to the attention of "Air Board General Counsel Application"; c/o Angela Aragon; Executive Assistant; P.O. Box 2248, Albuquerque, NM 87103 or amaragon@cabq.gov. Application deadline is March 6, 2019.

City of Albuquerque – Contract Hearing Officer

The City of Albuquerque, through the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board"), is seeking a qualified attorney to contract with to serve as a contract hearing officer for the Air Board. This position is an independent contractor, and is not an employee of the City of Albuquerque. Applicant must be admitted to the practice of law by the New Mexico Supreme Court and be an active member of the Bar in good standing. A successful candidate will have strong communication skills, and knowledge of environmental rules and regulations including the Clean Air Act. Prior government hearing officer experience is preferred. Please submit a resume to the attention of "Air Board Hearing Officer Application"; c/o Angela Aragon; Executive Assistant; P.O. Box 2248, Albuquerque, NM 87103 or amaragon@cabq.gov. Application deadline is March 6, 2019.

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City of Santa Fe

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Entry-level attorney position available in Las Vegas, New Mexico.

Excellent opportunity to gain valuable experience in the courtroom with a great team of attorneys. Requirements include J.D. and current license to practice law in New Mexico. Please forward your letter of interest and resumé to Richard D. Flores, District Attorney, c/o Mary Lou Umbarger, District Office Manager, P.O. Box 2025, Las Vegas, New Mexico 87701 - or via e-mail: mumbarger@da.state.nm.us Competitive Salary!

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Attorney's Office, Div II

The McKinley County District Attorney's Office, Gallup, New Mexico is seeking resumes to fill current vacancies. The DUI Task Force is seeking a Senior Trial Attorney and an Assistant Trial Attorney position. Both these positions must be New Mexico and Navajo Nation Licensed. The DUI Task Force is a multi-agency taskforce established to prosecute DUI cases in courts of the State of New Mexico and on the Navajo Nation. The District Attorney is also seeking resumes for an Assistant Trial Attorney and Senior Trial Attorney. Former position is ideal for persons who recently took the NM bar exam. Senior Trial Attorney position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence. Admission to the New Mexico State Bar preferred, but will consider applicants who are eligible to be admitted by reciprocity. The McKinley County District Attorney's Office provides regular courtroom practice and a supportive and collegial work environment. Enjoy the spectacular outdoors in the adventure capital of New Mexico. Salaries are negotiable based on experience. Submit letter of interest, resume and references to Paula Pakkala, District Attorney, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter and resume to PPakkala@da.state.nm.us by 5:00 p.m. March 30, 2019.

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Associate attorney wanted for fast paced, well established, litigation defense firm downtown. Great opportunity to grow and share your talent. Salary DOE, great benefits incl. health, dental & life ins. and 401K match. Inquiries kept confidential. Please e-mail your resume to kayserk@civerolo.com, or mail to Civerolo, Gralow & Hill, PA, PO Box 887, Albuquerque NM 87103.

Assistant Attorney General

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Attorney 1-3 years of experience

Giddens & Gatton Law, P.C., a dynamic and growing law firm in Albuquerque, NM, has an immediate opening for an attorney with 1-3 years of experience to join its bankruptcy, commercial litigation, and real estate practice. The successful candidate will be talented and ambitious with excellent academic performance. Attorney to interact with clients and provide advice, legal research, writing, drafting pleadings and briefs, and prepare for court and or make supervised court appearances. Must thrive in a team environment and believe that client service is the most important mission of an attorney. Must be willing to work a full-time schedule. Skills and abilities: Excellent oral and written interpersonal & communication skills; Strong analytical, logical reasoning and research skills; Strong organizational and time management skills; Strong customer service and personal service orientation; Strong knowledge of the law and legal precedence; Ability to use Westlaw, MS Office and other computer programs. TO APPLY: Please email cover letter, resume, law school transcript & writing sample to Denise DeBlassie-Gallegos, at giddens@giddenslaw.com. DO NOT CONTACT OUR OFFICE DIRECTLY BY PHONE; EMAIL ONLY.

Position Announcement Associate Judge (Lay) Mescalero Apache Tribal Court

SUMMARY: The Associate Judge is responsible for fairly and impartially hearing and deciding judicial matters within the jurisdiction of the Mescalero Apache Tribal Court. A full position description is available upon request. MINIMUM QUALIFICATIONS: Applicant must: Have one-quarter (1/4) or more Indian blood and be a member of a federally recognized Indian tribe (including Eskimo, Aleut and other Alaska Natives); Be between thirty-five (35) and seventy (70) years old; Have no felony convictions or misdemeanor convictions within the past year; and At least three (3) years' experience as a tribal court judge or other relevant experience. SALARY & CLOSING DATE: Salary is negotiable and is dependent upon qualifications and budgetary concerns. This position is open until filled. Submit resume with copy of certificate of Indian blood to Carol Woods, Director of Human Resources, Mescalero Apache Tribe via: 1) first class mail to P.O. Box 227, Mescalero, NM 88340; 2) facsimile to (575) 464-9292; or 3) email to cwoods@mescaleroapachetribe.com.

Position Announcement Associate Judge (Licensed) Mescalero Apache Tribal Court

SUMMARY: The Associate Judge is responsible for fairly and impartially hearing and deciding judicial matters within the jurisdiction of the Mescalero Apache Tribal Court. A full position description is available upon request. MINIMUM QUALIFICATIONS: Applicant must: Have one-quarter (1/4) or more Indian blood and be a member of a federally recognized Indian tribe (including Eskimo, Aleut and other Alaska Natives); Be between thirty-five (35) and seventy (70) years old; Have no felony convictions or misdemeanor convictions within the past year; Hold a law degree from an ABA accredited law school; and be licensed and in good standing in the bar of any state. SALARY & CLOSING DATE: Salary is negotiable and is dependent upon qualifications and budgetary concerns. This position is open until filled. Submit resume with copy of certificate of Indian blood to Carol Woods, Director of Human Resources, Mescalero Apache Tribe via: 1) first class mail to P.O. Box 227, Mescalero, NM 88340; 2) facsimile to (575) 464-9292; or 3) email to cwoods@mescaleroapachetribe.com.

Attorney position available

The Southwest Women's Law Center is seeking an attorney with 3+ years of experience who is passionate about advancing economic security and social justice issues for women and girls in New Mexico. An attorney who has experience with Reproductive Justice issues is preferred. The mission of the SWLC is to create the opportunity for women to realize their full economic and personal potential by: eliminating gender bias, discrimination and harassment; lifting women and their families out of poverty; and ensuring that all women have full control over their reproductive lives through access to comprehensive reproductive health services and information. Please submit your resume and a letter of interest to tmassey@swwomenslaw.org. The position will remain open until filled. Salary range is $50,000-65,000 DOE. For more information on SWLC, please visit www.swwomenslaw.org.

Full-Time Paralegal

The City of Albuquerque Legal Department is seeking a full-time paralegal to assist its Employment and Labor Law Litigation Division with its civil and administrative casework. This position involves the performance of a variety of paralegal duties, including, but not limited to, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings, and setting up and maintaining a calendar with deadlines. Excellent organization skills and the ability to multitask are necessary. Competitive pay and benefits available on first day of employment. Please apply at https://www.governmentjobs.com/careers/cabq. Position posting closes March 12, 2019.

Legal Assistant

Hatcher Law Group, PA seeks a legal assistant with two-plus years of legal experience for our downtown Santa Fe office. We are looking for a motivated individual who is well organized, detail oriented and a team player. Proficiency in Word, Microsoft 365, Odyssey and CM/ECF filing and Adobe Pro helpful. We are a small law firm, and are looking for a person who is versatile and can perform many tasks, including scheduling depositions, appointments and travel, calendaring, filing, transcribing dictation, and general office duties. Hatcher Law Group defends individuals, state and local governments and institutional clients in the areas of insurance defense, coverage, workers compensation, employment and civil rights. We offer a great work environment and competitive salary and benefits. Send your cover letter and resume via email to juliez@hatcherlawgroupnm.com

Experienced Litigation Secretary

The law firm of Gallagher & Kennedy is seeking an experienced litigation secretary to join their Santa Fe office, assisting two to three attorneys with tax litigation, complex civil litigation and regulatory matters. Candidate must have 5+ years of experience and have strong written and verbal communication skills. Submit resumes to: patti.marshall@gknet.com.

Part-Time Legal Assistant

Experienced part-time Legal Assistant needed for Medical Malpractice law firm. Please send resumes to: legalresumeNM@gmail.com

Legal Assistant

Small defense firm in search of a self-motivated legal assistant. Applicants must be proficient in using all Microsoft applications including Word, Excel and Exchange. Experience in general civil litigation is preferred but not required. Priority will be given to applicants with excellent proven computer skills. Competitive pay and benefits. Please fax resumes to (505) 842-5713, attention Hiring Division.

Full-Time Legal Administrator

The City of Albuquerque Legal Department is seeking a full-time Legal Administrator to manage and oversee the activities and operations for fiscal, contract, and front desk management; coordinate assigned activities with other divisions and outside agencies; provide highly responsible and complex administrative support to the City Attorney. Excellent organization skills and the ability to multitask are necessary. Competitive pay and benefits available on first day of employment. Please apply at https://www.governmentjobs.com/careers/cabq. Position posting closes March 12, 2019.

Immigration Legal Assistant
Noble & Vrapi is hiring an Immigration Legal Assistant at our Albuquerque office. To apply, visit http://www.noblelawfirm.com/job-posting-business-immigration-legal-assistant

Paralegal
Personal Injury firm in Santa Fe seeking paralegal with 2-5 years experience. Please submit resume to andras@szantholaw.com

Legal Assistant
Legal Assistant for litigation defense downtown law firm. Looking for someone with 3+ years experience, knowledge of e-filing in State and Federal courts, strong organizational skills, cooperative attitude, and attention to detail. Full time, salary DOE, great benefits incl. health, dental & life ins. and 401K match. Please e-mail resume to kayserk@civerolo.com, or mail to Civerolo, Gralow & Hill, PA, PO Box 887, Albuquerque NM 87103.

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

Nob Hill Offices for Rent
Established law firm has up to five office spaces available in the heart of Nob Hill. Option packages available for any number of the five offices and paralegal spaces. Cost will be dependent on what package is requested. Offices include optional front desk reception, lobby, conference room, established phone/internet/fax/scanner infrastructure, private outdoor patio, kitchenette, two file rooms/paralegal spaces, 8+ secure parking spaces in private, gated lot and personalized signage. Great for small firm with paralegals or a solo practitioner. Non-legal businesses welcome to inquire as well. Please call 505-924-2121.

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Official Publication of the State Bar of New Mexico

BAR BULLETIN

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Submission deadlines are also on Wednesdays, two weeks prior to publishing by 4 p.m. Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.

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