

BAR BULLETIN

February 6, 2019 • Volume 58, No. 3



Abandoned Farm House, by Gwen Wilemon (see page 3)

El Zocalo Gallery

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CLE Planner

*Upcoming programming
from the
Center for Legal Education*

MODRALL SPERLING WELCOMES OUR NEW SLATE OF OFFICERS.



Tim Fields
President



Stuart Butzier
Vice President



Earl DeBrine
Secretary-Treasurer

Tim Fields has been elected President of Modrall Sperling. A member of the firm since 1986, he most recently served as Vice President. He has also headed our Litigation Department, where his focus is on complex civil litigation. He has been retained to represent a variety of businesses and individuals, health care providers, and insurance carriers in significant lawsuits and litigation-related matters. *Super Lawyers*® has recognized him since 2013, three times as a Top 25 Super Lawyer in

New Mexico. *Best Lawyers*® has named him Albuquerque Lawyer of the Year in Railroad Law three times in the past eight years. He received his B.S. in Civil Engineering, with honors, from the U. S. Coast Guard Academy and his J.D., *cum laude*, from Georgetown University Law Center.

Stuart Butzier, who joined the firm in 1989, has been elected Vice President. A past member of our Executive Committee, Stuart is the Managing Director of our Santa Fe office, Head of our Natural Resources Department, and Chair of our Mining Practice Group. He has served as a Trustee and Secretary of the Rocky Mountain Mineral Law Foundation. Rated Band 1 by *Chambers USA*, Stuart has been named Lawyer of the Year seven times in four practice areas by *Best Lawyers*®. On two occasions, *Super Lawyers*® named him one of the Top 25 Super Lawyers in New Mexico.

Stuart received his B.A. in English Literature from Grinnell College and his J.D. from University of New Mexico School of Law.

Earl DeBrine continues to serve as the firm's Secretary-Treasurer, a position he has held since 2016. He joined the firm in 1987. Earl is a former Head of our Natural Resources Department and the current Chair of our Oil and Gas Practice Group. *Best Lawyers*® selected him Oil and Gas Law Lawyer of the Year in Albuquerque in 2016 and 2018. He also serves on the Advisory Board of the Institute for Energy Law. He received his B.B.A. in Finance and Accounting from University of New Mexico, where he graduated with distinction. Earl received his J.D. from Georgetown University Law Center, graduating *cum laude*.

PROBLEM SOLVING. GAME CHANGING.



MODRALL SPERLING

L A W Y E R S

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Santa Fe



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Meetings

February

- 7**
Business Law Section
4 p.m., teleconference
- 8**
Indian Law Section
Noon, State Bar Center
- 8**
Prosecutors Section
Noon, teleconference
- 12**
Appellate Practice Law Section
Noon, teleconference
- 12**
Appellate Practice Section
Noon, U.S. Bankruptcy Court
- 13**
Children's Law Section
Noon, Children's Court

Workshops and Legal Clinics

February

- 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
- 8**
Civil Legal Clinic
10 a.m.-1 p.m., Bernalillo County
Metropolitan Court, Albuquerque, 505-
841-9817
- 20**
Family Law Clinic
10 a.m.-1 p.m., Second Judicial District
Court, Albuquerque, 1-877-266-9861
- 27**
Consumer Debt/Bankruptcy Workshop
6-9 p.m., State Bar Center, Albuquerque,
505-797-6094

About Cover Image and Artist: Although Gwen Wilemon had been sketching and drawing her whole life, it wasn't until she became an adult that she began exploring color through acrylics, oils, pastels and watercolor. Since then, Wilemon has studied under several artists including Fred Miller, Bud Edmondson, Clive Tyler, Albert Handel and Lorenzo Chavez among others. Wilemon's work has hung in the Sumner and Dene Gallery in Albuquerque, the Wilder Nightingale Fine Art Gallery in Taos, Purple Sage Galeria in Old Town Albuquerque and El Zocalo in Las Vegas, N.M. as well as other galleries and museums around the state. She has also had the honor of having works included in juried shows of the Plein Air Painters of N.M., Masterworks, Miniatures, the Pastel Society of N.M. Small Works, PSNM National Pastel Show and IAPS Show (International Association of Pastel Societies) and has received awards for watercolor, miniatures and pastels. Wilemon is a member of the Pastel Society of New Mexico, the Plein Air Painters of New Mexico and is a member of the Camino Real 8, a group of artists in central New Mexico. She is currently represented by El Zocalo Gallery in Las Vegas, N.M.

Notices

COURT NEWS

New Mexico Supreme Court Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources, including Westlaw, LexisNexis and HeinOnline. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building Hours: Mon.-Fri. 8 a.m.-5 p.m. Reference & Circulation Hours: Mon.-Fri. 8 a.m.-4:45 p.m. For more information call 505-827-4850, visit <https://lawlibrary.nmcourts.go> or email libref@nmcourts.gov.

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.

Second Judicial District Court Destruction of Exhibits

Pursuant to 1.21.2.617 FRRDS (Records Retention and Disposition Schedules-Exhibits) and 1.17.230.503 NMAC (Domestic Relations Exhibits), the Second Judicial District Court will destroy exhibits filed with the Court, the Domestic (DM/DV) for the years of 1984-2017 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Parties are advised that exhibits may be retrieved through March 15. Should you have cases with exhibits, verify exhibit information with the Special Services Division, at 505-841-6717, from 8 a.m.-5 p.m., Mon.-Fri. Plaintiff's exhibits will be released to counsel for the plaintiff(s) or plaintiffs themselves and defendant's exhibits will be released to counsel of record for defendants(s) or defendants themselves by Order of the Court. All exhibits will be released IN THEIR ENTIRETY. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Notice of Mass Reassignment:

Pursuant to the Constitution of the State of New Mexico, Daniel J. Gallegos Jr. has been appointed to Division XV of the Second Judicial District Court by Gov. Susana

Professionalism Tip

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

I will be considerate of the time constraints and pressures imposed on lawyers by the demands of trial practice.

Martinez. Effective Jan. 3, Judge Daniel J. Gallegos Jr. will be assigned criminal court cases previously assigned to Judge Benjamin Chavez, Division XIX.

Civil Nominating Commission

The Second Judicial District Court Nominating Commission convened on Jan. 24 in Albuquerque and completed its evaluation of the 15 candidates for the one vacancy on the Second Judicial District Court. The Commission recommends the following candidates to Gov. Michelle Lujan Grisham:

Joshua Andrew Allison
Erin Beth O'Connell
Lisa Chavez Ortega
Daniel E. Ramczyk

Criminal Division Nominating Commission

The Second Judicial District Court Criminal Division Nominating Commission convened on Jan. 25 in Albuquerque, and completed its evaluation of the seven candidates for the one vacancy on the Second Judicial District Court Criminal Division. The Commission recommends the following candidates to Gov. Michelle Lujan Grisham:

Bruce Crawford Fox
Jason Robert Greenlee
Daniel E. Ramczyk

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 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 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.

Bernalillo County Metropolitan Court Applicant Announcement

The Bernalillo County Metropolitan Court Nominating Commission convened on Jan. 18 and Jan. 19 in Albuquerque and completed its evaluation of the 29 candidates for the three vacancies on the Bernalillo County Metropolitan Court. The Commission recommends the following candidates to Governor Michelle Lujan Grisham:

Felicia R. Blea-Rivera
Rose Mary Garcia
Jason Matthew Jaramillo
Brittany Maldonado Malott
David Allen Murphy
Rebecca Obenshain O'Gawa
Carlos Francisco Pacheco
Joseph Repito Sanchez
George Bond Yu

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

- Feb. 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 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 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; 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 Professor Richard Wood Raises Broad Cultural Issues

On Feb. 19, UNM Interim Provost and Sociology Professor Richard Wood raises broad cultural issues of particular relevance to judges and lawyers when he presents on "Navigating Conflict and Contention in the Modern University: Gender, Religion, Sexuality, Diversity and Incivility." A superb discussion among attendees is inevitable. The Solo and Small Firm hosts these monthly luncheon programs with an open invitation to all judges and attorneys. The luncheons take place from noon-1 p.m. at the State Bar Center. R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

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 clinic 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.
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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 Hodgin Hall. Please 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.

OTHER BARS

New Mexico Black Lawyers Association

Race and the Law Conference and Asante Awards

The New Mexico Black Lawyers Association and the New Mexico Black History Organizing Committee invites members of the community to attend its Race and the Law Conference and Asante Awards from 8:30 a.m.-5:30 p.m. on Feb. 9 at the State Bar of New Mexico. Speakers include Patricia J. Williams, professor at Columbia Law School and John Bunn, exoneree and head of the non-profit, "A Voice 4 The Unheard." Session topics include the APD consent decree, mandatory minimums, and restorative justice. The program has been approved for up to 3 hours of general CLE credit (\$1 per credit hour to be paid by attorney). The Asante Awards will be presented to Judges Tommy and Angela Jewell during the afternoon reception. This event is free and includes breakfast and lunch. For more information or to register, visit <http://nmblackhistorymonth.com>.

REPORT BY DISCIPLINARY COUNSEL

DISCIPLINARY QUARTERLY REPORT

Reporting Period: October 1, 2018 – December 31, 2018

Final Decisions

Final Decisions of the NM Supreme Court4
Matter of Eric D. Dixon, Esq., (No. S-1-SC-37204). The New Mexico Supreme Court issued an Order on November 9, 2018 indefinitely suspending Respondent from the practice of law for a minimum of nine (9) months for violations of his duties of competence, candor, and meritorious filings, effective thirty (30) days from the date of the Supreme Court Order. The Court ordered other requirements that Respondent must meet before petitioning for reinstatement. The Court also required Respondent to pay costs to the Disciplinary Board.

Matter of James T. Burns, Esq., (No. S-1-SC-36946). The New Mexico Supreme Court issued an Order on November 9, 2018 holding Respondent in Contempt of Court and indefinitely suspending Respondent from the practice of law for a minimum of ninety (90) days for failure to comply with Rule 17-212 NMRA and for failure to respond to the Disciplinary Board. The Court ordered other requirements that Respondent must meet before petitioning for reinstatement. The Court also required Respondent to pay costs to the Disciplinary Board.

Matter of Daniel M. Salazar, Esq., (No. S-1-SC-37306). The New Mexico Supreme Court issued an order on November 9, 2018 indefinitely suspending Respondent from the practice of law for a minimum of one (1) year for failure to file Notice of Appeal in a criminal case and failure to communicate, effective thirty (30) days from the date of the Supreme Court Order. The New Mexico Supreme Court also issued an Order on December 19, 2018 holding Respondent in Contempt of Court and indefinitely suspending Respondent for an additional six (6) months for a period of time no less than eighteen (18) months for failure to comply with the Court's November 9, 2018 Order, specifically, for failure to comply with Rule 17-212 NMRA. The court ordered other requirements that Respondent must meet before petitioning for reinstatement. The Court also required Respondent to pay costs to the Disciplinary Board.

Summary Suspensions

Total number of attorneys summarily suspended.....0

Administrative Suspensions

Total number of attorneys administratively suspended.....0

Disability Inactive Status

Total number of attorneys placed on disability inactive states0

Charges Filed

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to act with reasonable diligence and promptness in representing a client; failing to make reasonable efforts to expedite litigation; knowingly disobeying an obligation under the rules of a tribunal; and by engaging in conduct that is prejudicial to the administration of justice.

Petition for Injunctive Relief Filed

Petitions for injunctive relief filed.....0

Petitions for Reciprocal Discipline Filed

Petitions for reciprocal discipline filed0

Reinstatement from Probation

Petitions for reinstatement filed0

Formal Reprimands

Total number of attorneys formally reprimanded0

Informal Admonitions

Total number of attorneys admonished1

An attorney was informally admonished for failing to provide reasonable consultations with the client about the means by which the client's objectives are to be accomplished in violation of Rule 16-104(A)(2) of the Rules of Professional Conduct.

Letters of Caution

Total number of attorneys cautioned10

Attorneys were cautioned for the following conduct: (1) False statements to the Disciplinary Board; (2) improper means; (3) unauthorized practice of law (2 letters of caution issued); (4) conflict of interest; (5) trust account violations (2 letters of caution issued); (6) safekeeping funds; (7) failure to communicate; and (8) solicitation.

Complaints Received

Allegations.....	No. of Complaints
Trust Account Violations.....	4
Conflict of Interest.....	12
Neglect and/or Incompetence.....	39
Misrepresentation or Fraud.....	16
Relationship with Client or Court.....	20
Fees.....	5
Improper Communications.....	3
Criminal Activity.....	0
Personal Behavior.....	6
Other.....	28
Total number of complaints received.....	133

Legal Education

February

7	2019 Ethics Update, Part 1 1.0 EP Teleseminar Center for Legal Education of NMSBF www.nmbar.org	15	Preview of Animal-Related Legislation: 2019 Regular Session of the New Mexico Legislature 1.0 G Webcast/Live Seminar, Albuquerque Center for Legal Education of NMSBF www.nmbar.org	22	Regional Seminar: Voir Dire 20.0 G Live Seminar, Santa Fe Trial Lawyer College
8	2019 Ethics Update, Part 2 1.0 EP Teleseminar Center for Legal Education of NMSBF www.nmbar.org	20	Drafting Settlement Agreements in Civil Litigation 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org	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
8	How to Practice Civil Litigation, Pt. II – Taking and Defending Depositions 4.5 G, 2.0 EP Webcast/Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org	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	22	Estate Planning for Digital Assests 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org
8	2018 Employment and Labor Law Institute 5.0 G, 1.0 EP 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	22	2019 Americans with Disabilities Act Update 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org
8	Ethics Puzzles: The Wrongful Death Act, Negligent Settlements and the Search for Silver Bullets (2018) 3.0 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	26	Discover Hidden and Undocumented Google Search Secrets 1.0 G Live Webinar Center for Legal Education of NMSBF www.nmbar.org
9	Race and the Law Conference 3.0 G Live Seminar, Albuquerque New Mexico Black Lawyers Association	21	Recent Developments in Civil Procedure (2018) 2.0 G Live Replay, Albuquerque 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
10-15	CLE by the Sea in Honolulu, Hawaii 4.0 G, 8.0 EP Live Seminar Alaska Bar Association alaskabar.org/cle-mcle/cle-by-the-sea/	22	Lawyer Ethics and Texting 1.0 EP Teleseminar Center for Legal Education of NMSBF www.nmbar.org		
12	Drafting Guarantees in Real Estate Transactions 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org				

March

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|--|---|---|
| <p>5 2019 Wage and Hour Update: New Overtime Rules
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>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</p> | <p>27 Immigration Law: U-Visa Training (2018)
1.0 G, 0.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>6 Drafting Special Needs Trusts for Vulnerable Clients
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>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</p> | <p>27 Recent Developments in Civil Procedure (2018)
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>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</p> | <p>21 Advanced Mediation Skills Workshop (2018)
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 2018 Health Law Symposium
5.5 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>20 Trust and Estate Planning for Second Marriages
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>22 Drafting Indemnity Agreements in Business and Commercial Transactions
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 Construction Contracts: Drafting Issues, Spotting Red Flags and Allocating Risk Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>21 Appraisals in Commercial Real Estate Finance and Development
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 A 2018 Administrative Law Institute
5.0 G, 1.0 EP
Webcast/Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>28 Construction Contracts: Drafting Issues, Spotting Red Flags and Allocating Risk Part 2
1.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>21 2018 Probate Institute
6.5 G, 1.0 EP
Webcast/Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 Immigration Law: Assisting Human Trafficking Survivors (2018)
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>28 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| | <p>29 Ethics in Drafting Claims
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | |

April

- | | | |
|--|--|--|
| <p>2 Drafting Sales Agreements: UCC Issues and More
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 Lawyer Ethics and Investigations for and of Clients
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice and More
1.0 EP
Teleseminar
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| <p>11 Due Diligence in Business Transactions
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>23 Mother Nature and Leases: Drafting Issues to Protect Against Storm and Other Damage
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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| <p>18 Beneficiary Designations in Retirement Accounts: Protecting a Lifetime of Savings
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Teleseminar
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| <p>3 The Law of Background Checks: What Clients May/May Not Check
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Center for Legal Education of NMSBF
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Teleseminar
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| <p>7 Incentive Compensation in Businesses, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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Center for Legal Education of NMSBF
www.nmbar.org</p> | |
| <p>8 Incentive Compensation in Businesses, Part 2
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Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location/course type, course provider and registration instructions.



New Inductees to the Roehl Circle of Honor for Trial Lawyers

Ben M. Allen • William K. Stratvert

On Nov. 14, 2018, two new attorneys were inducted into the Roehl Circle of Honor for Trial Lawyers. The Roehl Circle of Honor for Trial Lawyers is named in honor of Joseph E. Roehl (1913–1996), who is widely regarded as one of the best trial lawyers New Mexico ever had. New attorneys are inducted into the circle each year to honor his memory and commitment to the trial lawyer community.



Bill Stratvert, Jerry Roehl and Ben Allen

Congratulations to the new inductees!

For more photos, visit www.nmbar.org/photos.





STATE OF THE JUDICIARY ADDRESS

Jan. 17, 2019

Chief Justice Judith K. Nakamura

Dear Judge,

Today I thought of writing you a letter...In this letter on behalf of myself and family we want to thank you. If you didn't put me in jail and in treatment I don't know where I'd be right now. I wouldn't even be here...I feel like I'm reborn again...I am so happy and proud of myself.

Dear Judge,

I thought you would want to know that my Dad passed away...I was with him when he died. Dad's life would not have been extended to age 92 and I would not have had the joy and privilege of his nearby presence without the guardianship case over which you presided...Thank you for allowing me the opportunity to give him a dignified, respectful and loved end to his life.

Dear Judge,

You asked me on the last time I stood in your courtroom. "Why do you keep coming back . . . it's not a nice place..." I can assure you, I did not keep coming back to jail for the gourmet food or the fine conversation and company...I repeatedly came to jail because I had no choice. I am an alcoholic and an addict...I needed something different. I needed a good program...I am truly grateful for the opportunity to prove to you that treatment helps us addicts...That we are capable of becoming fine people, helpful members of society. I have gone from . . . [an] overall worthless individual to someone I still do not truly know or understand, but I like her.

Honorable Lieutenant Governor, President Pro Tempore Papan, Speaker Egolf, members of the New Mexico House and Senate, Justices, Judges, elected officials and honored guests, these are the voices of actual people who have appeared in our courts. They represent people we all know. They are our mothers, fathers, sisters, brothers, sons, daughters, friends, and neighbors. They are the people who deserve the best court system we can provide and the people we need to remember as we discuss the state of the Judiciary.

So, what is the state of the Judiciary? Let me cut right to the chase. Your Judiciary is certainly busy, with our District, Metropolitan, and Magistrate Court judges handling over 357,000 new cases last year. But we are not just sitting in courtrooms hearing motions and trials. Your courts are innovative, finding solutions to our society's woes by operating drug courts, DWI courts, mental health courts, homeless



courts, and veterans' courts. The result? Defendants are staying engaged in their communities, becoming more productive citizens, and not committing new crimes.

And our civil courts are just as busy with rising caseloads. These courts are continually implementing creative approaches to address the special needs of civil litigants, from running mandatory foreclosure mediation programs to developing procedures to resolve very complex civil matters in a timely manner. And offering programs to ensure that our most vulnerable children are being raised in happier, more stable families.

Your courts are committed to excellence. We are looking forward and planning ahead so that we can continue to meet our constitutional responsibility to uphold and promote the rule of law while ensuring the fair administration of justice in a system accessible to all.

Over the next twenty-seven minutes I will tell you what we are currently doing and planning and how you can help us to create the very best judiciary—the judiciary that our citizens expect and the judiciary our citizens deserve.

Let me begin though by taking a brief look back, especially for those who may be temporarily blinded by the current and very positive economic forecast.

For nearly a decade, our courts were forced to cut expenses, hold positions vacant, and just do without, stretching and straining our resources and employees to such an extent that in January 2017, then-Chief Justice Daniels advised in his State of the Judiciary address that the judicial system was on “life support and its organs were shutting down.” That statement was accurate.

We did not have enough money to pay jurors or even pay our rent. Staff vacancies were soaring leaving critical positions unfilled. Nearly every magistrate court in this state closed early because we lacked the manpower to keep the doors open. Our district courts were not immune either with many reducing their hours as well. It took a great deal of hard work and innovative thinking to not furlough or lay off our employees.

Two years later, I am pleased—and relieved (in fact, incredibly relieved)—to report that our courts are beginning to breathe on their own. All courts are now open during regular business hours. We received additional funding from you, renegotiated and reduced our magistrate court leases, and are now able to pay our rent.

Our new statewide jury management system is up and running. We told you when you helped us fund this system that it would help us operate more efficiently. In fact, it has! The savings it has helped the Judiciary achieve guarantees that for the first time in eight years we can timely pay jurors. We will not be seeking loans or supplemental funding. And most importantly we will not be directing our courts to stop holding jury trials!

We asked and you funded our employee workforce investment plan. Because we have improved pay we are now able to attract, hire, and retain employees. Vacancy rates in our magistrate courts have declined by about ten percent. And, we are no longer routinely losing our employees to places like Target and Walmart that, in some communities, paid better than the courts. While there is still work to be done, especially for our appellate courts, we are on the path to recovery; and on behalf of the entire New Mexico Judiciary, thank you.

Are our courts thriving? Not yet. But we are no longer operating in a continual state of crisis. This small bit of breathing room has given court leaders an opportunity to pause, reflect, and consider the future of our judicial branch.

We began by studying the needs of court users, reviewing survey results as well as anecdotal reports from litigants, legislators, business groups, court staff, and judges. Here is what we’ve learned.

- First, the public finds courts and the legal system confusing, complicated, difficult to navigate, and lacking in technological innovation.
- Second, many New Mexicans are concerned about the role of politics in selecting judges.

- Third, the need to do more for litigants who live in rural areas and for those who are self-represented is undeniable.
- Fourth, litigants continue to be impacted by delays. It is not surprising that some people report they would actually prefer to lose a case quickly, rather than have it drag on, even if they would have eventually won.

With this information in mind, all chief judges, court executive officers, and representatives from magistrate and municipal courts, and with the assistance of the National Center for State Courts, met last Spring to propose solutions to these challenges. We emerged with a single initiative, Advancing Judicial Excellence.

This initiative, which will provide the framework for the Judiciary’s strategic planning and budgets for the next three years is rooted in two simple questions. *Are we doing our best work? And how can we do better?*

We have begun to answer these questions by identifying specific projects, proposals, and recommendations I look forward to telling you about today. Some projects we have begun on our own. Others require legislative action but not necessarily money. And yes, some require money.

Let me begin with our efforts to address the first question: *Are we doing our best work?* To answer this question we have to focus on two things: personnel and operations. Let me start with personnel—specifically judges.

If your only source of information about the Judiciary came from news reports, you might think that our judges only handle criminal cases and routinely and nonchalantly release dangerous people into the community. Of course this is not true!

I promise you, there is not a single judge, not one, who intends to release a dangerous person into the community. We are all New Mexicans, and we too want to live in safe communities.

While criminal cases dominate the news, the reality is that seventy-four percent of the cases filed in our district courts last year were civil cases—including family and probate matters, adoptions, guardianships, business and real estate disputes, employment matters, insurance issues, claims alleging personal injury and wrongful death, and violations of civil rights.

The work of a judge, whether in civil or criminal court, is more difficult than many realize. The letters I began with this morning are examples of the challenging and difficult problems our judges grapple with each and every day. And please, don’t take my word for it. Visit your local court, the doors are open. There you will find that nearly everyone who appears before us has something to lose: a marriage and children, money and property, and in many cases their liberty. They are scared, and they are often angry. Each day judges face seemingly hopeless situations; and we strive to treat each person fairly with dignity

and respect, to apply and uphold the law, and to inspire hope where we can.

I would like to take a moment to recognize and thank the men and women in this room who have risen to this challenge and who have worked day in and day out to serve the Judiciary's mission. Would all justices and judges, from all courts, sitting or retired, please stand. Thank you for your commitment, your dedication, and your service.

And, I also want to acknowledge our hard-working and dedicated court staff without whom our judges could not do their jobs. Would all court employees who are here today please stand. Thank you for your service.

As we move forward, we must continue to focus on recruiting well qualified judges with the commitment to do this demanding and challenging work.

I read recently that the Governor has had a difficult time attracting the most qualified people to some of her cabinet positions. We feel her pain.

We too are finding it more and more difficult to attract qualified applicants for judgeships. In 2017 we averaged **six** applicants per judicial vacancy. In 2018 that number plummeted to just over two applicants per vacancy. And in one district, we had to post the judicial vacancy at least three times before anyone even applied.

It is increasingly difficult to recruit attorneys with civil experience. Recently, only fifteen percent of all judicial applicants had experience in something other than government service. Why do we have this problem? A State Bar survey of New Mexico lawyers provides one answer. It is simple and you have heard it before: pay.

Lawyers with experience in the private sector, including law firms, say that judicial salaries keep them from applying to be judges. This is hardly surprising, given that the average partner in a New Mexico law firm is paid fifty-one percent more than a New Mexico Supreme Court Justice.

We appreciate the Legislature's recognition of this problem, and we support your Judicial Compensation Commission's recommendation to increase judicial pay. Keep in mind though, that the Commission's recommendation still leaves district court judges making about eight percent less than the average New Mexico lawyer and about forty percent less than the average solo practitioner.

While a pay increase moves us in the right direction, low pay is not the only problem. Another problem is that very few attorneys are willing to give up their practice for what could be a short tenure on the bench. Let me give you an example. If a vacancy occurs in an election year, the attorney must close his or her practice, learn a new job, do the job, and must begin campaigning immediately to win a partisan election in

a matter of months. For some of you that may sound like fun, but for attorneys, leaving one job to potentially lose another is not appealing. I will not even get into the challenge of hiring employees who could also lose their jobs if the judge is not elected.

Your Courts, Corrections, and Justice Committee has endorsed a constitutional amendment that will start to address this problem. The amendment will allow a new judge to serve at least one year before being required to run in a partisan election. We know that this will encourage more attorneys to apply for judgeships; we have already seen an increase in applicants to fill current vacancies when elections are two years away. As importantly, the amendment will also create greater stability and reduce delay for litigants, whose cases will not have to be reassigned to a new judge. We ask that you support this amendment.

A pay increase and the amendment are only partial solutions to the challenge of attracting well-qualified judicial candidates. There is *more* that must be done. We must find comprehensive solutions that will remove the role of politics in the selection and election of New Mexico's judges, and we look forward to working with you to find those solutions.

Doing our best work requires that judges are trained from day one. Everyone needs training when they take on a new job and judges are no exception. Asking a judge to take the bench, as we do, without any training on how to be a judge is like asking the outfielder to replace the umpire during the seventh game of the world series. There is no doubt the outfielder has been watching the game, but the view from behind the plate is much different than the view from the outfield.

While new judges need training before they take the bench, all judges need ongoing education. We all need to reinforce our skills and stay current with changes in the substantive law, procedural rules, and the best practices in case-flow management. Many other states provide year-round, robust, in- person and web-based training for judges and staff. We must do the same.

Why don't we do this? It comes down to money.

The Judicial Education Center is based at the University of New Mexico, and funding for training comes from fees on traffic citations. These fees have declined by thirty-one percent in the past eight fiscal years. As a result, training continues to be reduced if not outright eliminated for some. Our judges are primarily trained at one annual conference, and the majority of our employees receive no training. The money is simply not there to do what we should.

To build and maintain a qualified and competent judiciary capable of fulfilling its mission, we must expand and modernize judicial education in New Mexico. We are requesting \$650,000 for judicial education just to return us to our 2012 funding level. What will we do with this money? What other states

have done: we will expand online course offerings and provide regular ongoing training for judges and staff locally, regionally and statewide.

The importance of education for judges and staff cannot be overstated, and I ask that you support this request.

Let me turn now to our court operations.

The task of building the best judiciary requires a clear understanding of the work being done. Identifying the problem is critical to implementing the right solution. If your car won't start you need to know what the problem is. Is it the battery, the starter, or an empty gas tank?

We have initiated several important studies of our judicial system that will help us identify potential problems. First, we have contracted with the National Center for State Courts to conduct a new workload study of the district, metropolitan, and magistrate courts. What we hope to learn is how we might streamline processes, improve efficiencies, reduce delay, and identify where additional judges and staff are needed.

Next, we have also obtained a grant from the State Justice Institute to fund a first-ever evaluation of appellate court processes. And finally, our courts will continue to evaluate internal processes and procedures, aided by nationally recognized performance measures.

These studies are important. They will help us improve how we do business, and they will tell us what resources we may need to request from you. So, stay tuned.

In the meantime, there are three areas where we can begin to make immediate improvements. That gets us to our second question: *How can we do better?*

- We can simplify and streamline our organizational structure and improve case management;
- We can expand our use of technology to improve efficiency, increase services, and reduce delay; and
- We can improve the public's access to—and information about—the courts.

Let's begin with those areas that require your support.

First, we have two proposals aimed at simplifying the Judiciary's organizational structure. Both of these proposals have been endorsed by your Courts, Corrections, and Justice Committee.

New Mexico has 311 judges and justices in 197 court locations. We have seven different types of courts: a Supreme Court, a Court of Appeals, district courts, metropolitan courts, magistrate courts, probate courts, and municipal courts. Some of these courts are operated and paid for by the state, others by counties, and still others by municipalities. The vast majority of states have fewer court types than New Mexico.

Multiple court types, like those we have in New Mexico, many with overlapping jurisdiction, are inefficient, create delay, add to scheduling difficulties, and are downright confusing for litigants.

Some of our smaller communities have as many as four different types of courts. Let's look at Clayton. I had the pleasure of visiting Clayton last year. Clayton's population hovers around 2,800 citizens. Yet they have a district court, a magistrate court, a municipal court, and a probate court. All are located less than a mile from each other. The magistrate, municipal, and probate courts have a combined total of less than 1800 cases, enough for one judge. Whether or not the City of Clayton or Union County wants or needs that many courts is not the issue; they have to have them. Why does any community have to have all of these courts? Because our law requires it.

Probate courts are constitutionally required in New Mexico, leaving us as one of only thirteen remaining states operating these separate courts statewide. And once you have 1,500 citizens in your city, you must have a municipal court even if your magistrate court is capable of handling the caseload.

More courts lead to more problems. For example, inconsistent rulings, judge shopping, duplication of services, and the inefficient use of city and county resources that might be better spent on other community needs.

And, it is a public safety issue. The more courts there are, the more places police officers and sheriff's deputies have to be. Multiple courts with overlapping jurisdiction create scheduling conflicts for courts. It takes officers off the street and creates delay when a case must be postponed because an officer is testifying elsewhere. This simply doesn't make sense.

So, how do we fix this? Let's take some small steps in the right direction. We have two, no cost, good government proposals this session.

Currently, cities with populations under 1,500 may have their municipal cases heard in magistrate court. Senate bill 173 gives local municipalities with populations over 1,500 this same option.

Similarly, Senate Joint Resolution 8 gives county governments the option of transferring jurisdiction over probate matters to the local magistrate or district court.

Under both proposals, the transfer would occur only upon the request of the municipality or county government and with the approval of our Supreme Court. Requiring the Supreme Court to approve the transfer will ensure that the local magistrate or district courts can handle the cases with current resources.

The transfer also will not occur until the expiration of a sitting judge's term, so no judge will lose his or her position. And, both of these proposals will allow local governments to determine

how best to allocate their resources without any additional cost to the state.

It is hard to imagine why anyone would oppose this legislation. It does not require anything, but only creates options. Why wouldn't a community want the option to create a more efficient and less confusing court system? Let's begin to build a better system with these good-government proposals which are good for our citizens.

We also have three technology-based funding requests that need your support.

First, to improve transparency, we are seeking \$1.8 million in one-time funding to make more than eighty million pages of court documents accessible to the public without a trip to the courthouse. Right now, the law prohibits us from providing documents online without removing personal identifying information. Individuals who want these records must request them by mail or in person. The requested funding will allow us to purchase the technology needed to redact this prohibited information and provide easy, online access to these documents.

Next, we are seeking \$450,000 in one-time funding to expand a pilot program known as online dispute resolution or ODR. ODR is a convenient, cost effective, and efficient way to resolve cases quickly through an automated negotiation process.

It has been successfully used for more than twenty years by companies like eBay and PayPal. Although it is a new concept in the judicial context, early results from other courts are very positive. A neighboring jurisdiction reports that more than sixty percent of the cases participating in ODR resolved within about four days, without the intervention of the judge. This is exciting. ODR resolves cases quickly, and frees up judges to focus on more complex civil cases and on their criminal dockets.

Beginning in February we will pilot ODR in debt and money-due cases in three judicial districts. With this additional funding we will expand the pilot to additional judicial districts.

Finally, we are seeking \$550,000 in recurring funds to expand the use of a remotely administered early-assessment program. In short, this program helps courts decide who can be safely released into the community pending trial. Only nonviolent offenders are eligible for this program. The offender appears from jail by video, and court personnel housed at a central location elsewhere administer an evidence-based screening tool. The program has successfully operated in the Bernalillo County Metropolitan Court for decades. And recently, we obtained a federal grant and expanded the program to five additional counties. It is now time to take the program statewide.

That completes the money requests. If you were to fund all of our general fund requests, including our base budgets, the Judiciary's percentage of the entire state budget will be a minuscule 2.55%, down from our equally minuscule 2.68%.

I have to say, I feel like I have just finished an episode on "Shark Tank." You don't have to start shouting out your offers. Just vote yes.

Let me wrap up by reporting on several projects that do not require funding or significant legislation but do demonstrate your Judicial Branch's commitment to advancing judicial excellence.

The Supreme Court has joined a national effort to improve court efficiencies by consolidating courts' administrative functions. We are doing the same by combining the administrations of magistrate and district courts within a judicial district.

Historically, the Administrative Office of the Courts (AOC) has centrally managed New Mexico's forty-seven magistrate court locations, including its 67 judges and 277 employees, from its offices in Santa Fe. The AOC remains the only AOC in the country charged with managing the day-to-day functions of courts. As you can imagine, it has been difficult to respond quickly and manage local needs from a distance.

Consolidating the administrative functions of our magistrate and district courts has several benefits.

- All district and magistrate court clerks will be comparably paid and cross-trained, allowing us to move staff to where we have shortages, thereby keeping courts open.
- Eliminating duplicative functions frees up staff and resources to provide new services to the public, including self-help centers.
- We can coordinate and share other resources like jury pools. And,
- Our AOC can focus on what other AOCs in the country do: operate statewide programs, provide our courts administrative support, and ensure we are adhering to best national practices.

Consolidation began last fall with a pilot program in the 12th Judicial District (Otero and Lincoln counties) and has recently expanded to the 6th Judicial District. By the end of the fiscal year all districts will have completed this successful transition.

Next, we are using technology to make navigating the court system simpler for all involved. In addition to working to expand the use of e-filing from civil cases to criminal cases, we have rolled out a program which allows parties to complete divorce and custody forms from their home computers. We launched this program called, "Guide and File," last October. Parties—most of whom are self-represented—are guided through a series of questions to complete court-approved forms. It is like Turbo Tax for divorce cases. Although, the forms must then be printed and filed at the courthouse, you

can imagine that being able to complete the paperwork at home reduces the stress of an inherently difficult situation.

We are also working to find ways to improve access to and understanding of court processes. We know that many litigants simply do not have the money to pay for a lawyer or lack legal services in their community. To address this issue, the Supreme Court, working with the New Mexico State Bar, is exploring the use of a different type of legal professional in New Mexico. Currently recognized in some states, these professionals are often referred to as Limited License Legal Technicians (LLLT). They are specially qualified and certified paralegals authorized to provide greater legal assistance in specific areas of the law.

Lastly, we really are moving into the twenty-first century. Like courts across the country we are working to use video, text, and social media: to inform the public about court dates and important events and educate on court processes and procedures.

Lieutenant Governor Morales, President Pro Tempore Papen, Mr. Speaker, and honorable members of the New Mexico Legislature, your Judicial Branch is innovative, forward-

thinking, hard-working, and committed. But together we can do better. It takes courage to take the long view, to plan and build something that may not be completed during your term or, in some cases, during your lifetime. But our citizens deserve no less than the best judicial branch we can offer. We take pride in our work and will continue to do our best to uphold the rule of law and provide fair, timely and equal access to justice for all.

Let me end this morning with the voice of a young woman who reminds us all why supporting and building a better Judiciary matters.

Dear Judge, . . .

I am a miracle. I woke up in the bottom of a dark hole and clawed my way to the top again...Please, if nothing else, remember me. The next time someone with a drug or alcohol problem stands before you too thin, scared, hopeless and angry, please think of me and who I have become because you let me get help . . . there is a tiny glint of hope in that addict's eyes. Please give it a chance to grow.

Thank you.

Opinions

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

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
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Effective January 18, 2019

PUBLISHED OPINIONS

No opinions published

UNPUBLISHED OPINIONS

A-1-CA-36368	State v. R Quintana	Affirm	01/14/2019
A-1-CA-36763	State v. Brandon G-P.	Affirm	01/14/2019
A-1-CA-37488	State v. J Johnson	Affirm	01/14/2019
A-1-CA-37110	CYFD v. Bobby W.	Affirm	01/15/2019
A-1-CA-37264	State v. R Pipkin	Affirm	01/15/2019
A-1-CA-37316	State v. R. Anderson	Dismiss	01/15/2019
A-1-CA-37400	State v. L. Ortega-Rojas	Dismiss	01/15/2019
A-1-CA-37430	State v. R Johnson	Affirm	01/15/2019
A-1-CA-35964	State v. R Begay	Affirm/Remand	01/16/2019
A-1-CA-37222	State v. V McGee	Affirm	01/16/2019
A-1-CA-36091	State v. J Kennedy Jr.	Affirm	01/17/2019
A-1-CA-37409	State v. A Gutierrez	Affirm	01/17/2019

Effective January 25, 2019

PUBLISHED OPINIONS

A-1-CA-35414	State v. J Simpson	Affirm	01/22/2019
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UNPUBLISHED OPINIONS

A-1-CA-37432	HSBC v. J Marquez	Affirm/Dismiss	01/22/2019
A-1-CA-37597	State v. J Lacy	Dismiss	01/22/2019
A-1-CA-37670	State v. C Bustamante	Affirm	01/22/2019
A-1-CA-35898	2727 San Pedro v. Bern County Assessor	Reverse/Remand	01/23/2019
A-1-CA-34618	J Pruitt v. J Guinn	Affirm	01/24/2019

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

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective February 6, 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
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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

12-201	Appeal as of right; when taken	12/31/2018
12-318	Briefs	12/31/2018
12-505	Certiorari from the Court of Appeals regarding district court review of administrative decisions	12/31/2018
12-601	Direct appeals from administrative decisions where the right to appeal is provided by statute	12/31/2018

Uniform Jury Instructions – Civil

Chapter 8	Introduction	12/31/2018
13-807	Acceptance; definition	12/31/2018
13-808	Acceptance; terms of the offer	12/31/2018
13-809	Withdrawn	12/31/2018
13-812	Acceptance; performance as acceptance; notification of the offeror; partial performance	12/31/2018
13-817	Modification of contract; definition	12/31/2018
13-824	Breach of contract; repudiation of contractual obligation	12/31/2018
13-826	Custom in the trade	12/31/2018
13-827	Course of dealing	12/31/2018
13-828	Course of performance	12/31/2018
13-831	Reasonable time	12/31/2018
13-832	Good faith and fair dealing	12/31/2018
13-840	Impossibility or impracticability of performance	12/31/2018
13-843	Contracts; measure of damages; general instruction	12/31/2018
13-843A	Special or consequential damages	12/31/2018
13-844	Withdrawn	12/31/2018
13-845	Withdrawn	12/31/2018
13-846	Withdrawn	12/31/2018
13-847	Withdrawn	12/31/2018
13-848	Withdrawn	12/31/2018
13-849	Withdrawn	12/31/2018
13-860	Mitigation of damages	12/31/2018

Uniform Jury Instructions – Criminal

14-141	General criminal intent	12/31/2018
14-210	Second-degree murder; voluntary manslaughter lesser included offense; essential elements	12/31/2018
14-211	Second-degree murder; voluntary manslaughter not lesser included offense; essential elements	12/31/2018
14-301	Assault; attempted battery; essential elements	12/31/2018
14-606	Abandonment of a child resulting in great bodily harm or death	12/31/2018
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Feb. 6, 2019



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Preview of Animal-Related Legislation: 2019 Regular Session of the New Mexico Legislature



Friday, Feb. 15, 2019

Noon–1 p.m.

1.0 G

Live at the State Bar Center

Also available via Live Webcast!

No charge for attendees not seeking CLE credits.

\$30 Animal Law Section members, government and legal services attorneys, Young Lawyers Division and Paralegal Division members

\$55 Standard/Webcast Fee

This presentation will highlight the bills introduced during this 60-day session addressing issues related to animals and to animal law in New Mexico. This is a “bring your lunch/brown bag” event. Water, sodas, and coffee will be provided.

Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204



Friday, Feb. 22, 2019

3:30–4:30 p.m.

1.0 EP

Live at the State Bar Center

Also available via Live Webcast!

\$55 Standard Fee

\$65 Webcast Fee

Effective Dec. 31, 2016, the New Mexico Supreme Court adopted modifications to Rule 17-204 NMRA which requires that an attorney must take a trust accounting class at least once every three years, or within the first year of being licensed in New Mexico. This program fulfills the requirement of Rule 17-204 NMRA, and is one of the New Mexico Disciplinary Board’s ongoing programs designed to educate attorneys on proper practices and procedures. Currently, the State Bar of New Mexico Center for Legal Education is the only approved course provider. Please see below for upcoming opportunities to attend the required ethics course. For more information, lawyers should carefully read Rule 17-204 NMRA. The first compliance deadline for licensed attorneys is Dec. 31, 2019.

Save
the
Date

for the

**34th Annual
Bankruptcy
Year in Review**

on Friday,
March 1!

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

\$241 Early bird fee (Registration must be received by Feb. 15)

\$265 Government and legal services attorneys, Young Lawyers Division and Paralegal Division members

\$295 Standard/Webcast Fee



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- Experience an interactive format using case studies and speaker role plays
- Learn about the start to finish training in the “flow of the case”
- Receive example forms and checklists in electronic format to use in practice
- Have training in core practice skills and how to avoid common pitfalls

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Feb. 8

How to Practice Civil Litigation, Pt. II – Taking and Defending Depositions (2018)

4.5 G 2.0 EP

9 a.m.–4:35 p.m.

\$295 Standard Fee

Also available via Live Webcast

2018 Employment and Labor Law Institute

5.0 G 1.0 EP

9 a.m.–4:05 p.m.

\$278 Standard Fee

Ethics Puzzles: The Wrongful Death Act, Negligent Settlements and the Search for Silver Bullets (2018)

3.0 EP

1–4 p.m.

\$159 Standard Fee

Feb. 21

How to Practice Series: Probate and Non-Probate Transfers (2018)

4.0 G 2.0 EP

9 a.m.–4:05 p.m.

\$295 Standard Fee

Also available via Live Webcast

How to Practice Series: Demystifying Civil Litigation, Pt. III—Dispositive Motion Practice and Mediations (2018)

4.5 G 2.0 EP

9 a.m.–4:15 p.m.

\$295 Standard Fee

2018 Mock Meeting of the Ethics Advisory Committee

2.0 EP

9–11 a.m.

\$109 Standard Fee

Recent Developments in Civil Procedure (2018)

2.0 G

1–3 p.m.

\$109 Standard Fee

Teleseminars

Earn live CLE credit from your work or personal phone!



Earn CLE credit by attending a teleseminar from your work or mobile phone. Great for learning your relevant practice information that fits with your schedule.

2019 Ethics Update, Part 1

Thursday, Feb. 7, 2019

1.0 EP

2019 Ethics Update, Part 2

Friday, Feb. 8, 2019

1.0 EP

Drafting Guarantees in Real Estate Transactions

Tuesday, Feb. 12, 2019

1.0 G

Drafting Settlement Agreements in Civil Litigation

Wednesday, Feb. 20, 2019

1.0 G

Lawyer Ethics and Texting

Friday, Feb. 22, 2019

1.0 EP

Estate Planning for Digital Assets

Monday, Feb. 25, 2019

1.0 G

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Program Cost _____ IMIS Code _____ (internal use only)

Payment

☐ Check or P.O. # _____ (Payable to *Center for Legal Education*)

☐ VISA ☐ MC ☐ American Express ☐ Discover *Payment by credit and debit card will incur a 3% service charge.

Name on card if different from above: _____

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Note: Programs subject to change without notice.

14-923 Criminal sexual contact of a minor in the fourth degree; victim unconscious, asleep, physically or mentally helpless; essential elements	12/31/2018	14-5022 Impeachment of defendant; wrongs; acts or conviction of a crime	12/31/2018
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LR1-405 Safe exchange and supervised visitation program 09/01/2018

Local Rules for the Second Judicial District Court

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LR2-309 Electronic filing authorized 01/14/2019

LR2-401 Court clinic mediation program and other services for child-related disputes 09/01/2018

LR2-403 Safe exchange and supervised visitation 09/01/2018

LR2-Form 709 Court clinic referral order 09/01/2018

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LR3-401 Domestic relations mediation and safe exchange and supervised visitation programs 09/01/2018

Local Rules for the Fourth Judicial District Court

LR4-401 Safe exchange and supervised visitation, and domestic relations mediation 09/01/2018

Local Rules for the Fifth Judicial District Court

LR5-401 Safe exchange and supervised visitation; domestic relations mediation 09/01/2018

Local Rules for the Sixth Judicial District Court

LR6-213 Electronic filing authorized 09/01/2019

LR6-401 Safe exchange and supervised visitation, and domestic relations mediation 09/01/2018

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Local Rules for the Eighth Judicial District Court

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

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LR9-405 Domestic relations mediation 09/01/2018

Local Rules for the Eleventh Judicial District Court

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

Local Rules for the Twelfth Judicial District Court

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LR12-201 Electronic filing authorized 09/01/2019

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LR13-208 Electronic filing authorized 09/01/2019

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

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

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at <http://nmsupremecourt.nmcourts.gov>. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at <http://www.nmcompcomm.us>.

Rules/Orders

From the New Mexico Supreme Court

<http://www.nmcompcomm.us/>

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

IN THE MATTER OF JOHANNA COX, ESQ.

DISCIPLINARY NO. 2017-03-4336

AN ATTORNEY LICENSED TO PRACTICE LAW BEFORE THE COURTS OF THE STATE OF NEW MEXICO

FORMAL REPRIMAND

You are being issued this Formal Reprimand pursuant to a *Consent Agreement* accepted by the Disciplinary Board in your disciplinary case.

You represented a client in a personal injury case. At the time of settlement, there was an outstanding medical bill due a provider. Your client negotiated the amount due directly with the provider for a total amount due of \$3,750. Your disbursement sheet indicated you withheld \$500.00 to pay this provider. Your client contacted you to advise you the amount actually due was \$3,750. Your client agreed to pay the provider \$3,250 directly, with the understanding that you would pay the remaining \$500.00 to the provider from the funds you withheld. After a period of time, both the provider and your client claimed that you had failed to remit the \$500.00 to the provider. You responded to those complaints by stating it was your understanding that the provider had been paid in full. It was only after disciplinary counsel advised you that you still owed the \$500.00 that you paid the provider. A proper reconciliation of your trust account would have revealed this to you.

In a separate case, a client paid \$2,500 in advance to represent her. You subsequently took a different position and advised her you could no longer represent her. Although you eventually refunded the client the balance of her retainer fee, your IOLTA records do not indicate that you placed the fee into trust, and you could not confirm whether you in fact had placed the funds in trust.

Your conduct in both of these matters violated Rule 16-115 and 16-804 NMRA. Because you were cooperative throughout the disciplinary process and have agreed to attend the trust accounting CLE offered by the office of disciplinary counsel and have your trust account audited it is hoped that this formal reprimand is sufficient to impress upon you the importance of maintaining meticulous trust account records.

You are hereby formally reprimanded for these acts of misconduct pursuant to Rule 17-206(A)(5) of the Rules Governing Discipline. The formal reprimand will be filed with the Supreme Court in accordance with 17-206(D), and will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. In addition, in accordance with Rule 17-206(D), the entire text of this formal reprimand will be published in the State Bar of New Mexico Bar Bulletin.

Dated January 18, 2019

The Disciplinary Board of the New Mexico Supreme Court

By

Hon. Cynthia Fry (Ret.)
Board Chair

From the New Mexico Supreme Court

Opinion Number: 2019-NMSC-001
No. S-1-SC-36428 (filed S November 1, 2018)

STATE OF NEW MEXICO,
Plaintiff-Respondent,
v.
KELSON LEWIS,
Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Christina P. Argyres, District Judge

BENNETT J. BAUR,
Chief Public Defender
B. DOUGLAS WOOD, III,
Assistant Appellate Defender
Santa Fe, New Mexico
for Petitioner

HECTOR H. BALDERAS,
Attorney General
MARKO DAVID HANANEL,
Assistant Attorney General
Santa Fe, New Mexico
for Respondent

Opinion

Barbara J. Vigil, Justice

{1} In this appeal we address two issues which arise when a jury is asked to render a verdict on a count that includes both greater and lesser offenses and it deadlocks in its deliberations on the greater offense. First, we clarify what is required of the district court under Rule 5-611(D) NMRA in polling the jury to determine on which offense the jury has deadlocked. We hold that a district court satisfies the requirements under Rule 5-611(D) when it has established a clear record as to which offense the jury is deadlocked. Strict compliance with the provisions of Rule 5-611(D) is not necessary to fulfill its purpose. Second, we recognize an ambiguity in our existing jury instructions regarding the order in which a jury must deliberate on counts which include both greater and lesser included offenses. To resolve this ambiguity and provide guidance to courts and litigants forthwith we adopt an approach to jury instructions that enables the jury to consider both the greater and lesser offenses under a count in any order it deems appropriate provided it return a verdict of not guilty on the greater offense before the court may accept a verdict on the lesser included offense.

I. BACKGROUND

{2} The State prosecuted Defendant, Kelson Lewis, under a five-count indictment. The only count at issue in this appeal is Count 1, under which Defendant was

charged with criminal sexual contact of a minor (CSCM) contrary to NMSA 1978, Section 30-9-13 (2003). At the close of the State’s case at trial, the district court granted the State’s motion to amend the CSCM charge from second to third degree and granted Defendant’s motion to include battery as a lesser included offense under Count 1.

{3} The jury was therefore instructed that there were three possible verdicts for Count 1: guilty of CSCM, guilty of battery, or not guilty on the entire count. The jury was not provided with a verdict form for a not guilty verdict on CSCM specifically. The district court also instructed the jury, “If you should have a reasonable doubt as to whether Defendant committed the crime of [CSCM], you must proceed to determine whether he committed the included offense of battery.” See UJI 14-6002 NMRA.

{4} On the third day of deliberations, the jury sent a note to the district court asking, “If we cannot come to a unanimous decision for Count 1, do we move on to discuss/decide on the lesser charge for Count 1[?]” After consulting with defense counsel and the State and receiving their consensus, the district court responded by sending a note to the jury stating, “If you have a reasonable doubt as to the guilt on Count 1, only then do you move to consideration of the included offense of battery.”

{5} Thirty minutes later, the jury sent a second note asking, “On the count of criminal sexual contact we are unable to

reach unanimous decision of guilty or not guilty. Should we move on to a lesser charge of battery?” Again with the agreement of both defense counsel and the State, the district court responded with a note stating, “No. Have you reached a unanimous verdict on the other counts?” {6} Roughly thirty-five minutes later, the jury sent a note stating that it had completed its deliberations on the other counts. The district court then confirmed with the jury that it had completed its deliberations as to Count 1.

{7} After calling the jury into court, the district court had the following exchange with the jury foreperson:

THE COURT: I’m also understanding none of the forms are signed as to Count 1. And based on the note you all sent, it’s my understanding that there’s no possibility for juror agreement on Count 1; is that correct?

THE JUROR: That is correct, Your Honor.

THE COURT: And I’m seeing heads shaking in the jury box that there’s not -- you’re unable to reach unanimous verdict. Is that correct[?]

THE JUROR: That’s correct.

The district court stated it would declare a mistrial as to Count 1. The district court issued an order finding manifest necessity to declare a mistrial as to CSCM on the basis that the jury was unable to reach unanimous agreement as to that offense. Defendant filed a motion to bar retrial on the greater offense of CSCM on double jeopardy grounds. Defendant asserted that the jury was not polled regarding Count 1 and therefore there was not a clear record as to whether the jury was deadlocked on CSCM or battery. The district court denied Defendant’s motion, finding that its procedure was proper under Rule 5-611(D) because it polled the jury through the notes exchanged during deliberations and “reaffirmed in open court” that “the jury could not reach a unanimous decision as to Count 1.”

{8} Defendant appealed the district court’s order to the Court of Appeals, claiming that the district court failed to properly poll the jury on Count 1 and therefore retrial on the greater charge of CSCM would subject him to double jeopardy in violation of the Fifth Amendment to the United States Constitution and Article II, Section 15 of the New Mexico Constitution. *State v. Lewis*, 2017-NMCA-056, ¶ 2, 399

P.3d 954. The Court of Appeals rendered an opinion affirming the district court's order. *Id.* ¶ 17. Defendant filed a petition for writ of certiorari with this Court asking us to review the Court of Appeals' opinion, which we granted pursuant to Rule 12-502 NMRA. In addition to the issue raised by the Defendant regarding whether the district court adequately polled the jury as to Count 1, we asked the parties to address the issue of whether the district court erred by instructing the jury that it could not consider the lesser included offense of battery if it was deadlocked on the greater offense of CSCM. See *State v. Jade G.*, 2007-NMSC-010, ¶ 24, 141 N.M. 284, 154 P.3d 659 (acknowledging "that as a general rule, propositions of law not raised in the trial court cannot be considered sua sponte by the appellate court" but that we have done so for "questions of a general public nature affecting the interest of the state at large" (internal quotation marks and citations omitted)).

II. DISCUSSION

{9} We proceed to address two issues which lie at the core of the jury's inability to agree on a verdict of guilty or not guilty on the greater charge of CSCM. First, we address whether retrial of Defendant on the greater charge of CSCM would violate constitutional protections against double jeopardy—being tried twice for the same crime—where the district court did not strictly comply with the formal requirements of Rule 5-611(D) but clearly established on the record that the jury was deadlocked on CSCM. We then turn to the second issue regarding how a district court must instruct a jury on the manner and order in which it is to deliberate on a count with lesser included offenses. In addressing this second issue, we acknowledge an ambiguity in our existing jury instructions and address the problem by providing guidance to courts and litigants alike.

A. The District Court Did Not Abuse Its Discretion By Declaring a Mistrial on All Offenses Under Count 1 Where it Had Established a Clear Record That the Jury Was Deadlocked on the Greater Charge of CSCM

{10} "A double jeopardy challenge is a constitutional question of law which we review de novo." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747. Central to that question in this case is whether the

district court erred by determining that the jury was deadlocked on the charge of CSCM based on the notes sent during deliberations and its exchange with the jury foreperson after deliberations. We review a district court's determination that the jury was deadlocked on a particular charge under a count with greater and lesser included offenses for an abuse of discretion. See *State v. Phillips*, 2017-NMSC-019, ¶¶ 1, 14, 396 P.3d 153; *State v. Wardlow*, 1981-NMSC-029, ¶¶ 12-13, 95 N.M. 585, 624 P.2d 527. "A trial court abuses its discretion when its decision is contrary to logic and reason." *Roselli v. Rio Cmty. Serv. Station, Inc.*, 1990-NMSC-018, ¶ 11, 109 N.M. 509, 787 P.2d 428.

{11} The constitutional protection against double jeopardy prevents retrial of a crime after a jury has rendered a verdict of either guilty or not guilty as to that offense; on the other hand, a defendant may be retried if the jury is deadlocked or hung on that offense. *State v. Collier*, 2013-NMSC-015, ¶¶ 11, 14, 301 P.3d 370; *Phillips*, 2017-NMSC-019, ¶ 1. Because the protection against double jeopardy prevents a retrial of a crime where the jury has rendered a verdict, when a jury indicates that it is deadlocked on a count with lesser included offenses the district court must poll the jury in order to clearly establish on the record the precise offense on which the jury was deadlocked. *Phillips*, 2017-NMSC-019, ¶ 1.

Importantly, the judge must confirm that the jury did not unanimously agree that the defendant was not guilty of one or more of the included offenses because the constitutional protection against double jeopardy precludes the State from prosecuting the defendant for such offense(s) since the jury's unanimous agreement on a verdict of not guilty constitutes an acquittal.

Id. In such a count with greater and lesser included offenses, it can be difficult to determine on which offense the jury is deadlocked and which offenses, if any, it has unanimously agreed to acquit. The manner for making this determination is set forth in Rule 5-611(D) as follows:

If the jury has been instructed on one or more lesser included offenses, and the jury cannot unanimously agree upon any of

the offenses submitted, the court shall poll the jury by inquiring as to each degree of the offense upon which the jury has been instructed beginning with the highest degree and, in descending order, inquiring as to each lesser degree until the court has determined at what level of the offense the jury has disagreed. If upon a poll of the jury it is determined that the jury has unanimously voted not guilty as to any degree of an offense, a verdict of not guilty shall be entered for that degree and for each greater degree of the offense.

{12} Defendant argues that because the district court did not "formally poll" the jury and instead only questioned the foreperson as to whether the jury was deadlocked on "Count 1," the district court failed to strictly comply with the polling requirement of Rule 5-611(D) and thereby abused its discretion in determining that the jury was deadlocked on the highest offense of CSCM. We disagree with this contention. We conclude that the district court satisfied the purpose of Rule 5-611(D) by establishing a clear record that the jury was deadlocked on CSCM and therefore did not abuse its discretion by declaring a mistrial and allowing a retrial of the offense of CSCM. As aptly stated by the Court of Appeals in its review of the issue, to hold that the district court abused its discretion in this case by failing to strictly comply with the formal requirements of Rule 5-611(D) would "exalt form over substance" where the purpose of the rule has been satisfied. *Lewis*, 2017-NMCA-056, ¶ 16.

{13} We have recognized that the language of Rule 5-611(D) is mandatory, concluding that when a jury is deadlocked on a count with lesser included offenses the district court "must poll the jurors, beginning with the greatest offense, to determine whether they unanimously found the defendant not guilty of any individual offense within the count." *Phillips*, 2017-NMSC-019, ¶ 6. We acknowledge, as the Court of Appeals has, that this polling requirement was drafted based significantly on our holding in *State v. Castrillo*, 1977-NMSC-059, ¶¶ 5, 14, 90 N.M. 608, 566 P.2d 1146.¹ See *State v. Garcia*, 2005-NMCA-042, ¶ 26, 137 N.M. 315, 110 P.3d 531 ("It is apparent that Rule 5-611(D) was likely drafted, for the most part, based on

¹"Although in *Wardlow* this Court stated that *Castrillo* was overruled to the extent that it was inconsistent with *Wardlow*, we now clarify that we perceive no inconsistency between those cases." *Phillips*, 2017-NMSC-019, ¶ 17 n.1 (citation omitted)

the committee's reading of *Castrillo*.”).

{14} In *Castrillo*, we held that there is no manifest necessity to declare a mistrial on the greater offenses and the defendant may only be retried on the least included offense where “the record is not clear as to which of the included offenses the jury was considering at the time of its discharge.” 1977-NMSC-059, ¶ 14. The defendant in *Castrillo* was tried for first-degree murder with the lesser included offenses of second-degree murder and voluntary manslaughter. *Id.* ¶ 1. After deliberations, the foreperson announced that the jury was deadlocked and the district court declared a mistrial. *Id.* ¶¶ 1, 14. The district court asked for the numerical division of the jury and the foreperson indicated that nine jurors were for acquittal and three were for “some degree of conviction,” but the court did not otherwise inquire as to which charge the jury was deadlocked. *Id.* ¶ 14. The defendant was retried, convicted of second-degree murder, and appealed on double jeopardy grounds. *Id.* ¶ 1. We concluded that the “record [was] silent upon which, if any, of the specific included offenses the jury had agreed and upon which the jury had reached an impasse” and held that any doubt must be resolved “in favor of the liberty of the citizen.” *Id.* ¶ 14. Because the record was not clear as to whether the jurors disagreed on first- or second-degree murder, “no necessity [was] manifest to declare a mistrial as to those offenses and thus jeopardy [had] attached.” *Id.* However, the defendant could be retried on the least included offense, manslaughter, because the jury would not have announced it was deadlocked had it reached a unanimous decision on that offense. *Id.* ¶¶ 14-15.

{15} Since *Castrillo*, when deciding whether a district court erred in finding manifest necessity to declare a mistrial on counts containing lesser included offenses, we unequivocally consider whether a clear record was established by the district court when determining on which offense the jury was deadlocked. In *Wardlow*, the foreperson stated that the jury was deadlocked on the greater charge but was unanimous against the lesser charge. 1981-NMSC-029, ¶ 4. Upon questioning by the district court, the foreperson explained that the jury did not believe the lesser charge to be appropriate but had not executed the not guilty form for that lesser charge. *Id.* ¶¶ 4, 12. We concluded in *Wardlow* that because the record was clear that the jury was deadlocked on the

greater charge and did not have the intent to acquit on the lesser, the district court did not abuse its discretion by declaring a mistrial as to both offenses. *Id.* ¶¶ 5, 12-13.

{16} More recently in *Phillips*, when the jury indicated that it was deadlocked, the district court polled the jury and received conflicting and ambiguous responses from the jurors as to whether they were deadlocked on the greatest charge in the count. 2017-NMSC-019, ¶¶ 11, 14. The district court then denied the defendant's request that the court clarify the ambiguity in the jurors' responses and declared a mistrial as to all the charges under the count. *Id.* ¶ 12. On appeal, we concluded that, by failing to clarify the ambiguous responses to the jury poll, the district court failed to create “a clear record indicating the crimes on which the jurors had failed to reach a unanimous verdict” and therefore “it was an abuse of discretion for the court to conclude that the jury was hung and that there was manifest necessity justifying a mistrial on all of the crimes in [the count].” *Id.* ¶¶ 15-16.

{17} In accordance with this precedent, the purpose of the polling requirement of Rule 5-611(D) is for the district court to create a clear record as to “which, if any, of the specific included offenses the jury had agreed and upon which the jury had reached an impasse.” *Castrillo*, 1977-NMSC-059, ¶ 14. In the instant case, the district court's exchange with the jury foreperson “was designed to elicit this information” and satisfied the purpose of Rule 5-611(D). *Wardlow*, 1981-NMSC-029, ¶¶ 9, 12-13 (concluding that the district court's questioning of the foreperson clearly established that the jury was deadlocked on the greater offense).

{18} During deliberations in the present case, the jury sent two notes indicating that it was deadlocked on the CSCM charge. The first stated that it was unable to reach unanimity on “Count 1” and asked the district court if it should proceed to consideration of “the lesser charge for Count 1.” The second note expressly stated that the jury was unable to reach unanimous agreement “[o]n the count of criminal sexual contact” and again asked the district court if it should proceed to the “lesser charge of battery.” Then, after the jury indicated that it was finished deliberating on the count, the jury foreperson confirmed in open court that there was no possibility for unanimous agreement on Count 1. These exchanges render the record clear—the jury was deadlocked on the greater charge

of CSCM.

{19} Defendant contends that the level of offense on which the jury was ultimately deadlocked is unclear because the jury continued to deliberate for approximately thirty-five minutes after sending the notes and therefore the notes do not reflect the jury's final position. We agree with Defendant that a note sent during deliberations “merely provides a snapshot of the jury's thinking partway through deliberations and does not give a definitive answer as to its final disposition of each crime within [the count].” *Phillips*, 2017-NMSC-019, ¶ 18. For this reason, we held in *Phillips* that a note sent the day before the conclusion of deliberations stating that the jury was deadlocked on a specific charge did not establish a clear record as to which offense the jury was deadlocked at the time of its discharge. *Id.* ¶¶ 7, 18. Consistent with our holding in *Phillips*, the notes in this case do not in and of themselves establish a clear record of the jury's position at the time of its discharge. *See id.* ¶ 18 (“Indeed, the jury's note would not be sufficient even if it had been sent to the court on the same afternoon as the jury poll because once the court conducted the jury poll, the results of that poll were the ultimate expression of the jury's verdict at the time of its discharge.”). However, unlike the notes in *Phillips*, the notes here were sent close in time to the conclusion of jury deliberations and thus provide meaningful context to the foreperson's confirmation shortly thereafter that there was “no possibility for juror agreement on Count 1.” We recognize, as did the Court of Appeals, that the notes “consistently refer to CSCM as ‘Count 1’ and battery as the ‘lesser charge’ or ‘included offense.’” *Lewis*, 2017-NMCA-056, ¶ 10. In this context, the foreperson's confirmation that the jury was unable to reach unanimous agreement on “Count 1” was plainly in reference to the greater charge of CSCM.

{20} Therefore, unlike in *Phillips* and *Castrillo*, the district court's discourse with the foreperson in open court, along with the substance and timing of the notes, established a clear record “as to which of the included offenses the jury was considering at the time of its discharge.” *Phillips*, 2017-NMSC-019, ¶ 18 (quoting *Castrillo*, 1977-NMSC-059, ¶ 14). Because the district court clearly established on the record that the jury was deadlocked on CSCM, the purpose of Rule 5-611(D) was satisfied. We therefore hold that it was not an abuse of discretion for the district court

to conclude that the jury was deadlocked on the crime of CSCM and that there was manifest necessity justifying a mistrial on all counts. *Phillips*, 2017-NMSC-019, ¶ 16. We affirm the district court's denial of Defendant's motion to bar retrial of the greater offense of CSCM.

B. A Jury Should Be Instructed That It May Deliberate on the Greater and Lesser Offenses Under a Count in Any Order It Sees Fit, but Must Return a Not Guilty Verdict on the Greater Offense Before the Court May Accept Any Verdict on the Lesser Offense

{21} We next turn to the issue of how a district court must instruct a jury regarding its deliberations on counts with lesser included offenses, recognizing that UJIs 14-6002 and 14-6012 NMRA are ambiguous and inconsistent with other uniform jury instructions regarding whether a jury may proceed to consideration of a lesser offense if deadlocked on the greater offense. Because issues regarding this ambiguity and inconsistency are likely to arise and impact criminal defendants in the future, we address this issue *sua sponte* as a "question[] of a general public nature affecting the interest of the state at large." *See State v. Consaul*, 2014-NMSC-030, ¶¶ 27-28, 332 P.3d 850 (quoting *Jade G.*, 2007-NMSC-010, ¶ 24) (raising *sua sponte* the issue of whether the intent requirements in the UJIs for child abuse were consistent with legislative intent, in part because of the issue's potential to "impact[] people and events all across our state, and the fundamental rights of criminal defendants in particular"); *cf. State v. Parish*, 1994-NMSC-073, ¶¶ 4, 15-20, 118 N.M. 39, 878 P.2d 988 (concluding that UJIs which were capable of more than one interpretation when considered in the context of the instructions as a whole were ambiguous and their use constituted reversible error).²

{22} Before commencing its deliberations, the jury was instructed on two occasions by the district court that it should proceed to consideration of the lesser offense of battery if it had reasonable doubt as to Defendant's guilt of the greater

offense of CSCM. First, consistent with UJI 14-6012, the district court gave the following instructions regarding Count 1:

[I]n this case as to the charge of criminal sexual contact of a minor contained in Count 1 there are three possible verdicts.

One, guilty of criminal sexual contact of a minor child under the age of 13; or, two, guilty of the battery; or, three, not guilty. You must consider each of these crimes. You should be sure that you fully understand the elements of each crime before you deliberate further. You will then consider whether the defendant is guilty of the crime of criminal sexual contact of a minor. If you find him guilty of that crime, then that is the only form of verdict which is to be signed.

If you have a reasonable doubt as to his guilt of that crime, you would go on [to the] crime of battery. If you find him guilty of that crime, that is the only form of verdict which should be signed. But if you have a reasonable doubt as to his guilt of the crime of battery, then you should find him not guilty and sign only the not guilty form.

You may not find the defendant guilty of more than one of the foregoing crimes. If you have reasonable doubt as to whether the defendant committed any one of the crimes, you must determine that he's not guilty of that crime. If you find him not guilty of all of these crimes in Count 1, you must return a verdict of not guilty as to this count.

Second, consistent with UJI 14-6002, the district court gave the following instruction between the elements of CSCM and battery: "If you should have a reasonable doubt as to whether the defendant committed the crime of criminal sexual contact of a minor, you must proceed to determine whether he committed the included of-

fense of battery."

{23} Having received these instructions, the jury was nevertheless uncertain whether it was permitted to proceed to consideration of the lesser offense of battery when it was unable to agree on whether Defendant was guilty of the greater offense of CSCM and asked the court how to proceed. The district court considered the instruction modeled on UJI 14-6012, requiring the jury to proceed to consideration of the lesser offense if it had "reasonable doubt" as to Defendant's guilt on the greater offense, and understood "reasonable doubt" to mean the finding of Defendant not guilty of the greater offense. Given this understanding, the district court instructed the jury not to proceed to consideration of the lesser offense of battery if it was deadlocked on the greater offense of CSCM.

{24} Neither UJI 14-6002 nor 14-6012 directly address in their text or committee commentary whether a jury may proceed to consideration of a lesser offense if it is unable to agree on the greater offense. Both instructions simply state that the jury must proceed to consideration of the lesser offense if it has "reasonable doubt" of the defendant's guilt of the greater offense. UJI 14-6002; UJI 14-6012. Some courts in sister states have interpreted similar language to require the jury to unanimously find the defendant not guilty on the greater offense before proceeding to the lesser, while other courts have concluded that similar instructions allow juries to proceed to consider the lesser offense if unable to agree on the greater offense. *See Hawes v. State*, 2014 WY 127, ¶¶ 16-18, 335 P.3d 1073, 1078 (Wyo. 2014) (understanding a similar instruction to only allow the jury to consider the lesser offense if it found the defendant not guilty of the greater offense); *but see State v. Thomas*, 40 Ohio St. 3d 213, 533 N.E.2d 286, 292-93 (1988) (concluding that similar instructions did not require the jury to unanimously acquit the defendant of the greater offense before considering the lesser offense, but also concluding that such instructions were "rather ambiguous" and should instead

²The issue of whether the district court in this case erred by instructing the jury that it could not proceed to consideration of the lesser offense of battery if deadlocked on the greater offense of CSCM is moot as to Defendant. Defendant did not object to this instruction and it would therefore be reviewed for fundamental error, the remedy for which is a new trial. *State v. Cunningham*, 2000-NMSC-009, ¶¶ 8, 10, 128 N.M. 711, 998 P.2d 176. We have concluded that Defendant may be retried on all offenses under Count 1 without violating double jeopardy. Therefore, granting a new trial would not provide Defendant with any actual relief and the issue is moot. *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008. For this reason, we will not address whether the district court's instructions in this case constituted fundamental error but will instead address the ambiguity and inconsistency in our UJIs as a matter of public importance.

expressly instruct the jury that it may consider the lesser offense if unable to agree on the greater offense).

{25} Here, the district court's understanding of UJI 14-6012 was a reasonable interpretation. Because UJI 14-6012 states both that the jury must acquit the defendant of an offense if it has "reasonable doubt" that the defendant committed that offense and that the jury should proceed to consideration of the lesser offense if it has "reasonable doubt" of defendant's guilt on the greater offense, it was reasonable to interpret the instruction to allow the jury to proceed to the lesser offense only if it finds the defendant not guilty of the greater offense. However, when discussing earlier versions of these UJIs we have stated that a jury must proceed to consider the lesser offense if it unanimously acquits the defendant or is unable to reach unanimity on the greater offense. *Castrillo*, 1977-NMSC-059, ¶ 6 (discussing NMSA 1953, UJI 50.01, 50.12 (1975) (Vol. 6, 2d Repl., Part 1, 1975 Pocket Supp.)). Additionally, our current jury instruction for consideration of counts with various degrees of homicide expressly states that a jury should proceed to consider the lesser offense if, after reasonable deliberation, it is unable to agree that the defendant is guilty of the greater offense. UJI 14-250 NMRA; see also *State v. Vigil*, 1990-NMSC-066, ¶¶ 15-16, 110 N.M. 254, 794 P.2d 728 (concluding that, in a homicide case, the district court's instructions that a "verdict must be unanimous" did not lead "jurors to believe that they had to be unanimously in favor of acquittal on the first-degree murder charge before they could move on to consider lesser charges," contrary to UJI 14-250). Similar to the homicide instructions, the instruction for consideration of child abuse resulting in the death of a child under twelve, UJI 14-625 NMRA, allows the jury to proceed to consider the lesser offense if it is unable to agree on the greater offense.

{26} For these reasons, we conclude that UJIs 14-6002 and 14-6012 are susceptible to more than one reasonable interpretation. On one hand, the language of UJIs 14-6002 and 14-6012 supports the interpretation of the district court in the instant case—that the jury must acquit on the greater offense before considering the lesser included offense. On the other hand, our prior jurisprudence and the language of UJIs 14-250 and 14-625 support a different, yet equally rational, interpretation—that the jury may proceed to consider a

lesser included offense if, after reasonable efforts, it is unable to agree on the greater offense.

{27} Despite our previous acceptance of jury instructions which allow juries to proceed to consider lesser offenses if they are unable to agree on the greater offense, we have never conducted an in depth analysis of the legal and policy rationales for and against such instructions. See, e.g., *Castrillo*, 1977-NMSC-059, ¶ 6; *Phillips*, 2017-NMSC-019, ¶ 4. We have simply acknowledged that such instructions are consistent with a policy of refraining from interference with jury deliberations. *State v. Chamberlain*, 1991-NMSC-094, ¶¶ 33-34, 112 N.M. 723, 819 P.2d 673 ("The court is not permitted to interfere with the jury's discretion to deliberate. . . . [T]he approach taken by a jury in reaching a decision should not be called into question. We agree with the policy that discourages, and in most instances prohibits, any inquiry or intrusion into the jury room." (internal quotation marks and citations omitted)).

{28} Therefore, the disparate, yet equally rational, interpretations of UJIs 14-6002 and 14-6012 compel us to consider the "wide divergence of opinion on the issue of the order and manner in which a trial court instructs a jury to consider an indicted offense together with any appropriate lesser-included offenses." *State v. Davis*, 266 S.W.3d 896, 905 (Tenn. 2008) (internal quotation marks and citation omitted). We do so in order to provide clarity and, perhaps more importantly, consistency in the instructions to juries regardless of the type of offense or offenses at issue in any given trial.

1. Types of transitional instructions

{29} There are at least four types of "transitional instruction" used by various jurisdictions. *Id.*; see generally Jay M. Zitter, *When Should Jury's Deliberation Proceed from Charged Offense to Lesser-Included Offense*, 26 A.L.R. 5th 603 (1995) (collecting and discussing cases considering how a jury should be instructed on how and when to proceed to consideration of lesser included offenses). First, several jurisdictions have concluded that "acquit first" instructions, which do not allow the jury to consider the lesser offense unless it has determined that the defendant is not guilty of the greater offense, are proper or permissible. See, e.g., *United States v. Moccia*, 681 F.2d 61, 64 (1st Cir. 1982); *Lindsey v. State*, 456 So. 2d 383, 387 (Ala. Crim. App. 1983), *aff'd*, *Ex Parte Lindsey*, 456 So. 2d 393 (Ala. 1984); *State v. Sawyer*, 227

Conn. 566, 630 A.2d 1064, 1071-75 (1993); *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596, 600-01 (1993); *Fulgham v. State*, 46 So. 3d 315, 329-30 (Miss. 2010); *State v. Taylor*, 141 N.H. 89, 677 A.2d 1093, 1097-98 (1996); *People v. Boettcher*, 69 N.Y.2d 174, 505 N.E.2d 594, 598 (1987); *State v. Daulton*, 518 N.W.2d 719, 720-23 (N.D. 1994); *State v. Turnidge*, 359 Or. 364, 374 P.3d 853, 930-32 (2016); *Commonwealth v. Hart*, 388 Pa.Super. 484, 565 A.2d 1212, 1216-20 (1989); *Davis*, 266 S.W.3d at 907-08; *Hawes*, 2014 WY 127, ¶¶ 16-18.

{30} Second, two jurisdictions have adopted a "modified acquit first" instruction, allowing a jury to deliberate in the order it sees fit but requiring that it acquit the defendant of the greater offense before returning a verdict on the lesser offense. See *Dresnek v. State*, 697 P.2d 1059, 1060-64 (Alaska Ct. App. 1985), *aff'd*, 718 P.2d 156 (Alaska 1986); *People v. Kurtzman*, 46 Cal. 3d 322, 250 Cal. Rptr. 244, 758 P.2d 572, 576-80 (1988) (in bank). These instructions "distinguish between the jury's right to deliberate about the elements of a lesser-included offense before deciding the greater offense and the preclusion on returning a verdict on the lesser-included offense without deciding the greater offense." *Dresnek*, 697 P.2d at 1064.

{31} Third, several jurisdictions have adopted "unable to agree" or "reasonable effort" instructions, which allow the jury to consider a lesser offense if it is unable to agree on the greater offense after reasonable deliberation. See, e.g., *State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441, 442-44 (1996) (in banc); *People v. Richardson*, 184 P.3d 755, 764 n.7 (Colo. 2008) (en banc); *Morris v. State*, 303 Ga. 192, 811 S.E.2d 321, 327 (2018); *State v. Ferreira*, 8 Haw. App. 1, 791 P.2d 407, 408-09 (1990), *cert. denied*, 71 Haw. 668, 833 P.2d 901 (1990); *State v. Parker*, 301 Kan. 556, 344 P.3d 363, 368 (2015); *Commonwealth v. Figueroa*, 468 Mass. 204, 9 N.E.3d 812, 827-31 (2014); *People v. Handley*, 415 Mich. 356, 329 N.W.2d 710, 712 (1982) (per curiam); *Tisius v. State*, 183 S.W.3d 207, 216-17 (Mo. 2006) (en banc); *Green v. State*, 119 Nev. 542, 80 P.3d 93, 95-97 (2003) (per curiam); *State v. Mays*, 158 N.C. App. 563, 582 S.E.2d 360, 367-68 (2003), *cert. denied*, 357 N.C. 510, 588 S.E.2d 379 (2003); *Thomas*, 533 N.E.2d at 291-93; *Graham v. State*, 2001 OK CR 18, ¶¶ 4-7, 27 P.3d 1026, 1027-28; *Barrios v. State*, 283 S.W.3d 348, 353 (Tex. Crim. App. 2009); *State v. Gardner*, 789 P.2d 273, 283-84 (Utah 1989); *State v. Wright*, 154 Vt. 512, 581 A.2d 720, 723-24

(1989); *State v. Labanowski*, 117 Wash. 2d 405, 816 P.2d 26, 35-36 (1991) (en banc); *State v. Truax*, 151 Wis. 2d 354, 444 N.W.2d 432, 436-37 (Ct. App. 1989), *cert. denied*, 446 N.W.2d 286 (1989).

{32} Finally, a few jurisdictions use the “optional approach,” which allows the defendant to choose between an acquit first or an unable to agree instruction. *See, e.g.,* Mont. Code Ann. § 46-16-607(3) (2017); *Jones v. United States*, 620 A.2d 249, 252 (D.C. Cir. 1993); *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984); *Catches v. United States*, 582 F.2d 453, 459 (8th Cir. 1978); *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978). The courts of several states have rejected this approach on the grounds that the choice of transitional instruction “should be based on legislative and judicial policy, not each defendant’s or each trial court’s discretion.” *Ferreira*, 791 P.2d at 409; *accord Labanowski*, 816 P.2d at 35; *Daulton*, 518 N.W.2d at 722; *Sawyer*, 630 A.2d at 1071; *Green*, 80 P.3d at 96. We agree that the choice of transitional instruction should not be left to the discretion of the defendant and district court in each case, and accordingly reject Defendant’s request that we adopt the optional approach. We therefore turn to consider the various arguments for and against acquit first, unable to agree, and modified acquit first instructions.

2. We adopt the modified acquit first approach

{33} Courts adopting acquit first instructions have generally considered these instructions to promote the jury’s duty to carefully deliberate on the greater charge and reduce the chances of the jury compromising on the lesser offense. *See, e.g.,* *Sawyer*, 630 A.2d at 1073 (“Anything less [than an acquit first instruction] dilutes the right of the state and the defendant to have the jury give its undivided attention and most serious deliberations to the offense with which the defendant is charged and flies in the face of the unanimity requirement[.]”); *Boettcher*, 505 N.E.2d at 597 (“[I]t is the duty of the jury not to reach compromise verdicts based on sympathy for the defendant or to appease holdouts, but to render a just verdict by applying the facts it finds to the law it is charged.”); *Daulton*, 518 N.W.2d at 722 (“The primary difficulty with the unable to agree instruction is it dilutes the requirement of unanimity and encourages the jury to bypass the charged offense on its way to a compromise verdict[.]”); *Davis*,

266 S.W.3d at 907-08 (concluding that an acquit first instruction promotes structured and thorough deliberations, assures reliable verdicts, and “reduces the risk of a compromise verdict”).

{34} On the other hand, several courts consider unable to agree instructions to reduce the risk of a hung jury, mistrial, and subsequent retrial by allowing juries the freedom “to better gauge the fit between the state’s proof and the offenses being considered.” *LeBlanc*, 924 P.2d at 442-43; *see also Green*, 80 P.3d at 96 (“Use of the ‘unable to agree’ instruction reduces the risk of compromise verdicts by enabling the finders of fact to better gauge the fit between the evidence adduced at trial and the offenses being considered. The instruction also reduces the risk of hung juries and the significant costs involved with retrial.”); *Thomas*, 533 N.E.2d at 292 (“We reject the ‘acquittal first’ instruction . . . because such an instruction encroaches on the province of the jury to decide questions of fact and to arrive at a verdict based on all the evidence before it and all the various offenses on which it has been properly instructed.”); *Labanowski*, 816 P.2d at 34 (concluding that an “unable to agree” instruction “allows the jury to correlate more closely the criminal acts with the particular criminal conviction” and “promotes the efficient use of judicial resources” by reducing the likelihood of mistrials).

{35} For these reasons, the United States Court of Appeals for the Second Circuit, in an often cited case, concluded that both acquit first and unable to agree instructions have advantages and disadvantages for both the state and the defendant:

[An acquit first instruction] has the merit, from the Government’s standpoint, of tending to avoid the danger that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser one. From the defendant’s standpoint, it may prevent any conviction at all; a jury unable either to convict or acquit on the greater charge will not be able to reach a lesser charge on which it might have been able to agree. But it entails disadvantages to both sides as well: By insisting on unanimity with respect to acquittal on the greater charge before the jury can move to the lesser, it may prevent

the Government from obtaining a conviction on the lesser charge that would otherwise have been forthcoming and thus require the expense of a retrial. It also presents dangers to the defendant. If the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge.

An instruction permitting the jury to move on to the lesser offense if after all reasonable efforts it is unable to reach a verdict on the greater likewise has advantages and disadvantages to both sides the mirror images of those associated with [acquit first instructions]. It facilitates the Government’s chances of getting a conviction for something, although at the risk of not getting the one that it prefers. And it relieves the defendant of being convicted on the greater charge just because the jury wishes to avoid a mistrial, but at the risk of a conviction on the lesser charge which might not have occurred if the jury, by being unable to agree to acquit on the greater, had never been able to reach the lesser.

Tsanis, 572 F.2d at 346 (footnote omitted).

{36} Upon review of these considerations, we recognize that the unable to agree approach adopted by several jurisdictions and approved by UJIs 14-250 and 14-625 has the practical benefit of reducing the likelihood of jury deadlock, mistrial, and the significant cost of retrial. *See Labanowski*, 816 P.2d at 34. However, we are concerned that under an unable to agree instruction the jury may convict a defendant of a lesser offense without unanimously acquitting him or her of the greater offense, thereby barring retrial of an offense on which the defendant has not actually been found not guilty. *See Castrillo*, 1977-NMSC-059, ¶ 6 (“Either an acquittal or a conviction of a lesser included offense bars further prosecution for the greater offense.”). This outcome deprives the State of a final resolution on the greater offense before barring retrial of that offense. *See Boettcher*, 505 N.E.2d

at 597 (concluding that “unable to agree” instructions “have a deleterious effect” on the state because they may prevent retrial of an offense on which the jury did not find the defendant not guilty); *see also Dresnek*, 697 P.2d at 1063-64 (expressing concern that under the optional approach a jury may feel required to return a verdict on the lesser offense even if it was deadlocked on the greater offense).

{37} Due to these concerns, we are persuaded that the modified acquit first approach of Alaska and California is the most sound approach. First, because under modified acquit first instructions the jury may deliberate as it sees fit, this approach is consistent with our stated policy of not interfering with jury deliberations. *See Chamberlain*, 1991-NMSC-094, ¶ 34. Second, by requiring the jury to return a verdict of not guilty on the greater offense before returning a verdict on the lesser offense, this approach does not deprive the State of a final resolution on the greater offense. For these reasons, we agree with the Supreme Court of California that this approach is “adequate to protect both the defendant’s interest in not improperly restricting the jury’s deliberations and the [state’s] interest in requiring the jury to grapple with the prospect of [the] defendant’s guilt of the greatest offense charged.” *Kurtzman*, 758 P.2d at 580.

{38} For the aforementioned reasons, we adopt modified acquit first instructions for

all counts with lesser included offenses and refer this issue to our Criminal Uniform Jury Instructions Committee to revise our jury instructions to conform with our holding. These instructions should make clear that the jury has the discretion to choose the manner and order in which it deliberates on the offenses in the count but that it must return a unanimous verdict of not guilty on the greater offense before the court may accept a verdict on the lesser offense. *See* CALJIC 17.10. We further recommend that the committee consider adopting partial verdict forms, allowing the jury to indicate that it unanimously finds the defendant not guilty on a greater offense even if deadlocked on a lesser offense, as consistent with the modified acquit first approach, *see* CALJIC 8.75, 17.10, 17.12, and the requirement under *Castrillo* that the district court create a clear record as to which offenses the jury has agreed and which it has deadlocked. *See Castrillo*, 1977-NMSC-059, ¶¶ 5, 14 (“Henceforth, when a jury announces its inability to reach a verdict in cases involving included offenses, the trial court will be required to submit verdict forms to the jury to determine if it has unanimously voted for acquittal on any of the included offenses. The jury may then be polled with regard to any verdict thus returned.”).

III. CONCLUSION

{39} Because the district court’s questioning of the foreperson, in the context of the

notes sent by the jury during deliberations, established a clear record that the jury was deadlocked on the charge of CSCM at the time of its discharge, we conclude that the district court did not abuse its discretion in finding manifest necessity to declare a mistrial on both charges under Count 1. Accordingly, we affirm the district court’s denial of Defendant’s motion to bar retrial on the greater offense of CSCM.

{40} Furthermore, to address the ambiguity and inconsistency in our current uniform jury instructions, we adopt a consistent approach to the consideration of counts with lesser included offenses. Henceforth, juries shall be instructed that they have discretion to choose the order in which they deliberate on the offenses within a count but that they may not return a verdict on a lesser included offense unless they unanimously find the defendant not guilty on the greater offense.

{41} IT IS SO ORDERED.
BARBARA J. VIGIL, Justice

WE CONCUR:
PETRA JIMENEZ MAES, Justice
CHARLES W. DANIELS, Justice
GARY L. CLINGMAN, Justice



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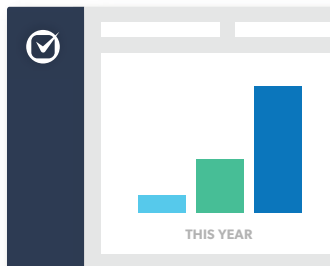


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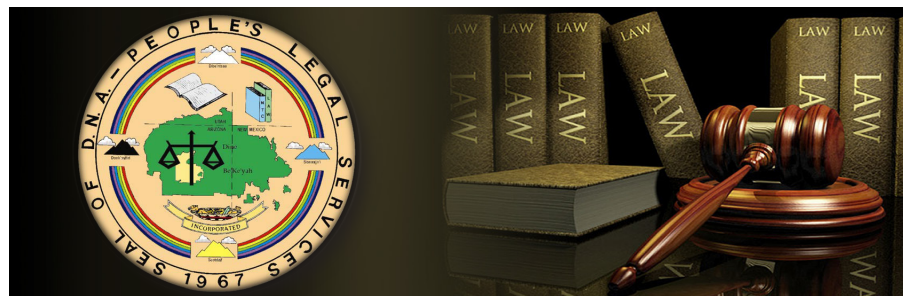
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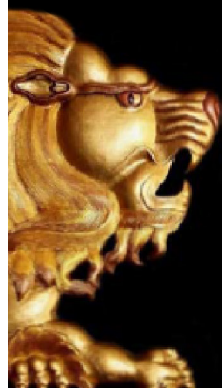
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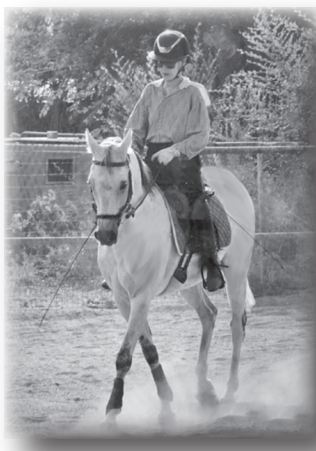


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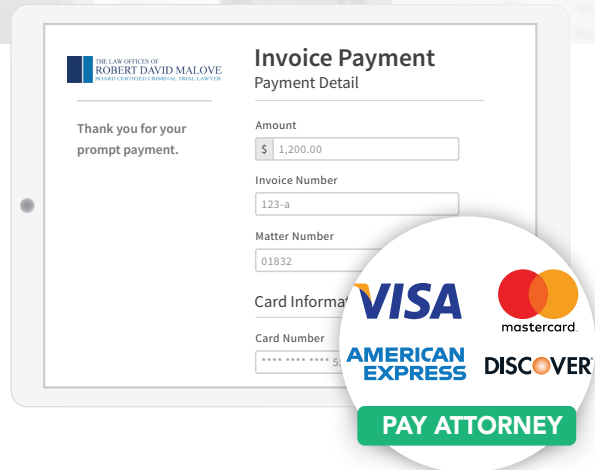
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