

BAR BULLETIN

March 6, 2019 • Volume 58, No. 5



Chama Down the River by Martha Mans (see page 3)

Owen Contemporary

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—SPECIAL INSERT—
YLD in Brief



CLE programming from the Center for Legal Education

How to Practice Series

Divorce Law in New Mexico

Friday, March 15, 2019

8:45 a.m.–4:30 p.m.

4.5 G 2.0 EP

Live at the State Bar Center

Also available via Live Webcast!



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

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

Tuesday, March 26, 2019

9:30 a.m.–12:15 p.m.

1.5 G 1.0 EP

Live at the State Bar Center

Also available via Live Webcast!

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

Abuse and Neglect Case in Children's Court

Tuesday, March 26, 2019

1–4:15 p.m.

3.0 G

Live at the State Bar Center

Also available via Live Webcast!

\$39 Audit/Non-member not seeking CLE credit
\$143 Government and legal services attorneys; Young Lawyers Division and Paralegal Division members
\$159 Standard Fee/Webcast Fee

This program will cover the Abuse and Neglect Case in Children's Court from the perspective of the Court, the Respondent's Attorney and the Guardian ad Litem. We will discuss what an Abuse and Neglect case is, and how the parents and the child move through the process.

Making Your Case with a Better Memory

Friday, March 29, 2019

8:30 a.m.–4 p.m.

6.0 G

Live at the State Bar Center

Also available via Live Webcast!

\$99 Audit/Non-member not seeking CLE credit
\$251 Government and legal services attorneys, Young Lawyers Division and Paralegal Division members
\$279 Standard/Webcast Fee

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

Join nationally recognized memory training consultant Paul Mellor for a session that will improve the way your mind retains facts. Learn techniques to improve your memory and learn how to apply these techniques to your everyday practice.

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



505-797-6020 • www.nmbar.org/cle

5121 Masthead NE • PO Box 92860, Albuquerque, NM 87199



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Meetings

March

- 6**
Employment and Labor Law Section Board
Noon, teleconference
- 8**
Prosecutors Section Board
Noon, teleconference
- 12**
Appellate Practice Section Board
Noon, teleconference
- 13**
Tax Section Board
11 a.m., teleconference
- 13**
Animal Law Section Board
Noon, State Bar Center
- 13**
Children's Law Section
Noon, Children's Court
- 14**
Elder Law Section Board
Noon, State Bar Center

Workshops and Legal Clinics

March

- 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
- 12**
**Common Legal Issues for Senior Citizens
Workshop Presentation**
10–11:15 a.m., Ft. Sumner Senior Center, Ft.
Sumner, 1-800-876-6657, 505-797-6005
- 19**
**Common Legal Issues for Senior Citizens
Workshop Presentation**
10–11:15 a.m., Village of Ruidoso Senior
Center, Ruidoso, 1-800-876-6657, 505-797-
6005

About Cover Image and Artist: Born in Pittsburgh, PA, Martha Mans received her degree in art and art education at Carlow University. She continued her art studies at the Maryland Institute College of Art and the University of Southern California. Upon moving to Colorado she became a master instructor for a branch of the Art Students League in Colorado Springs and also began privately teaching art classes in her studio.

Notices

COURT NEWS

Second Judicial District Court Mass Case Reassignments Notice to Attorneys

Three hundred cases from Division IV, Hon. Beatrice Brickhouse; 100 cases from Division XVI, Hon. Carl Butkus; 100 cases from Division XII, Hon. Clay Campbell; and 100 cases from Division XXIII, Hon. C. Shannon Bacon, will be reassigned to the Hon. Erin Beth O'Connell, Division XVII (formerly the division of Hon. Nan Nash, Ret.) effective March 18. For a complete listing of the 600 cases transferred to Division XVII, go to the Second Judicial District Court's website under Division XVII. Applicants will be afforded an opportunity to exercise a peremptory challenge of the newly appointed judicial officer in accordance with the local and Supreme Court rules of civil procedure that apply to district courts. All cases previously assigned to Hon. Nan G. Nash will be assigned to Hon. Erin Beth O'Connell effective March 18.

Eighth Judicial District Court Announcement of Vacancy

One vacancy will exist in the Eighth Judicial District Court due to the retirement of the Hon. Sarah Backus effective, Feb. 28. This judicial vacancy will be in Raton. Inquiries regarding specific details for the judicial vacancy should be directed to the chief judge or the administrator of the Court. Dean Sergio Pareja of the UNM School of Law, designated by the New Mexico Constitution to chair the District Court Nominating Committee, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications, as well as information related to qualifications for the position, may be obtained from the Judicial Selection website: <http://lawschool.unm.edu/judsel/application.php>, or by contacting Beverly Akin at akin@law.unm.edu or 505-277-4700. The deadline for applications has been set for March 11, at 5 p.m. Applications received after that date will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Committee will meet at 9 a.m. on March 26 at the Eighth Judicial Court Colfax County, located at 1413 South

Professionalism Tip

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

I will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

Second, Raton, to evaluate the applicants for this position. The Committee meeting is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

Notice of Mass Case Reassignment

Due to the retirement of Judge Sarah C. Backus, Division II a mass reassignment of all Taos County Division II cases will be assigned to Judge Emilio J. Chavez, Division I effective March 1. Colfax and Union County cases in Division II will remain in Division II. All Union and Colfax County cases assigned to Judge Emilio J. Chavez, Division I will be reassigned to Division II (vacant). Taos County cases in Division I will remain in Division I. Upon appointment of a judge to Division II all Division II cases will then be reassigned to the appointed judge. The assignments are pursuant to NMSC Rule 23-103. Parties who have not previously exercised their right to challenge or excuse will have ten days from March 27 to challenge or excuse Judge Emilio J. Chavez pursuant to NMRA 1-088.1.

Eleventh Judicial District Court

Notice of Mass Reassignment

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

1. All cases of every type pending in Division 4 (currently vacant) are reassigned to Division 6.
2. Cases pending in Division 6 are reassigned as follows:
 - a. Domestic cases are reassigned to Division 1, with the exception of two cases.
 - b. All other civil cases are reassigned to Division 4, with the exception of ten cases.
3. Probate cases pending in Division 1 are reassigned to Division 4, with the exception of eight cases. Division 1 is relocated to the District courthouse in Farmington at 851 Andrea Drive. Division 6 is relo-

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

Bernalillo County Metropolitan Court Mass Reassignment of Cases

Mass Reassignment of cases will occur pursuant to Rule 23-109 NMRA, and as a consequence of the recent appointments by the Gov. Effective Feb. 21, Judge Felicia Blea-Rivera, appointed to Division XV, was assigned criminal court cases previously assigned to Judge Kenny C. Montoya. Pursuant to Rule 7-106 NMRA, parties who have not yet exercised the right to excuse a judge will have 10 days from Feb. 21 to file a notice of excusal. Effective Feb. 25, Judge Brittany Maldonado Malott, appointed to Division X, was assigned criminal court cases previously assigned to Judge Edward L. Benavidez; and Judge David A. Murphy, appointed to Division XVI, will be assigned criminal court cases previously assigned to Judge Sharon D. Walton. Pursuant to Rule 7-106 NMRA, parties who have not yet exercised the right to excuse a Judge will have 10 days from Feb. 25 to file a notice of excusal.

STATE BAR NEWS 2019 State Bar of New Mexico Annual Awards Call for Nominations

Nominations are being accepted for the 2019 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2018 or 2019. The awards will be presented during the 2019 Annual Meeting, Aug. 1-3 at Hotel Albuquerque at Old Town. View the award descriptions, previous recipients and nomination instructions at www.nmbar.org.

org/AnnualMeeting. The deadline for nominations is May 1. For more information, contact Kris Becker at 505-797-6038.

Board of Bar Commissioners Commissioner Vacancy First Bar Commissioner District (Bernalillo County)

A vacancy exists in the First Bar Commissioner District, representing Bernalillo County. The appointment will be made prior to the May 17 Board of Bar Commissioners meeting to fill the vacancy until the next regular election of Commissioners, and the term will run through Dec. 31, 2019. Active status members with a principal place of practice located in the First Bar Commissioner District are eligible to apply. The remainder of the 2019 Board meetings are scheduled for May 17, Aug. 1 (Hotel Albuquerque, in conjunction with the State Bar of New Mexico Annual Meeting), Oct. 25, and Dec. 11 (Santa Fe). Members interested in serving on the Board should submit a letter of interest and resume to Kris Becker, at kbecker@nmbar.org or fax to 505-828-3765, by April 15.

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

New Phone Number

The Minimum Continuing Legal Education program has a new phone number. Members can contact MCLE at 505-797-6054, mcle@nmbar.org or www.nmbar.org/MCLE.

New Mexico State Bar Foundation

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.

Public Law Section

Accepting Award Nominations

The Public Law Section is accepting nominations for the Public Lawyer of the Year Award, which will be presented at the state capitol at 4 p.m. on May 3. Visit www.nmbar.org/publiclaw to view previous recipients and award criteria. Nominations are due no later than 5 p.m. on April 5. Send nominations to Geraldine Garduno at Geraldine.Garduno@state.nm.us. The selection committee will consider all nominated candidates and may nominate candidates on its own.

New Mexico Access to Justice Fund Grant Commission Request for Proposals

The State Bar of New Mexico Access to Justice Fund Grant Commission is pleased to announce that the 2019-20 grant process opened on Feb. 19 at 11 a.m. Applications are due no later than April 19, at noon. The Grant Commission shall be responsible for reviewing the applications and awarding grants to civil legal service organizations consistent with the current State Plan for the Provision of Civil Legal Services to Low Income New Mexicans. For more information on the application process, visit www.nmbar.org/atjfundgrant.

ATJ Fund Grant Commission Vacancy

One vacancy exists on the State Bar of New Mexico ATJ Fund Grant Commission. The term for the position is for the remainder of 2019 along with two optional three-year terms. The ATJ Fund Grant Commission will solicit and review grant applications and award grants to civil legal services organizations consistent with the State Plan for the provision of civil legal services to low income New Mexicans. active status attorneys in New Mexico, not affiliated with a civil legal service organization which would be eligible for grant funding from the ATJ Fund, who are interested in serving on the Commission should send a letter of interest and brief resume by March 18 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

New Mexico Judges and Lawyers Assistance Program Attorney Support Groups

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

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

Monitor Training

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

Committee Meeting

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

Solo and Small Firm Section Legislative Session Overview with Senator Daniel Ivey-Soto

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

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 12 at the N.M. Veteran's Memorial located at 1100 Louisiana Blvd SE in Albuquerque. Volunteers should arrive at 8 a.m. for orientation and complimentary breakfast. The clinics offers veterans a broad range of veteran-specific and non-veteran

specific legal services, including family law, consumer rights, worker's comp, bankruptcy, driver's license restoration, landlord/tenant, labor/employment and immigration. To volunteer, visit <https://form.jotform.com/71766385703969>.

Home Safe Home Volunteer Recruitment Pro Bono Fair

The YLD invites New Mexico attorneys who want to learn more about doing domestic violence pro bono work to a Home Safe Home Volunteer Recruitment Pro Bono Fair on Saturday, March 16 from 10 a.m.-noon at the State Bar Center in Albuquerque. Attendees will have the opportunity to talk to community organizations that are working to assist domestic violence survivors and learn more about how you can help. Representatives from DNA People's Legal Services, S.A.F.E. House, Pegasus Legal Services for Children and the Transgender Resource Center of New Mexico are confirmed to attend, with more to come. Contact 2019 YLD Chair Sonia Russo with questions and to R.S.V.P. at soniarusso09@gmail.com.

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 UNM Student Union Building, ballroom C. R.S.V.P. at goto.unm.edu/walters by March 22. For more information contact Ariana Montez, president of the Women's Law Caucus, at Montezar@law.unm.edu.

Tribal Law Journal 20th Anniversary Symposium

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

OTHER BARS Albuquerque Bar Association Monthly luncheon

Join the Albuquerque Bar Association for its monthly luncheon at 11:45 a.m.-1 p.m., March 12 at the Embassy Suites 1000 Woodward Pl NE, Albuquerque. The guest speaker this month is UNM President Garnett S. Stokes. The cost is \$30 for members and \$35 for non-members. There is a \$5 walk-up fee. Register for lunch by 5 p.m., March 8 and note that we are returning to Embassy Suites for 2019. To register contact the Albuquerque Bar Association's interim executive director Deborah Chavez at dchavez@vancechavez.com or 505-842-6626.

Hispanic National Bar Association 2019 Corporate Counsel Conference

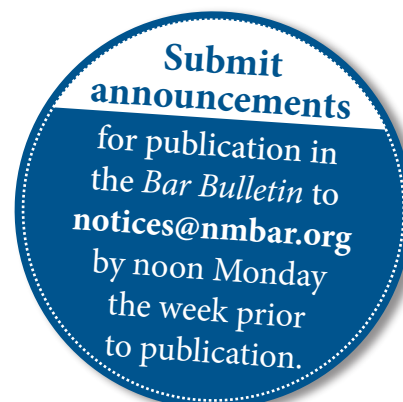
Join the Hispanic National Bar at its 10th Annual Corporate Counsel Conference and 24th Annual Uvaldo Herrera Moot Court Competition at the Albuquerque Convention Center on March 20-23. This signature event provides a unique setting for Corporate America and the HNBA to connect, offering opportunities for outside counsel to meet representatives from numerous Fortune 500 Companies. This year's Conference will give hundreds of attorneys, judges, and law students a valuable and enjoyable three-day program featuring continuing legal education panels on cutting edge topics led by experts from across the country, a variety of workshops, and one of a kind networking opportunities.

**New Mexico Criminal Defense
Lawyers Association
Capturing the Best Defense for
Clients with Mental Health Issues:
Advanced Strategies in Litigation**

On March 29 NMCDLA will present "Capturing the Best Defense for Clients with Mental Health Issues: Advanced Strategies in Litigation". Persons accused of crime face incredible difficulty in our justice system, doubly so when such persons are already struggling with mental illness. Learn how to deconstruct the prejudicial psychiatric language wielded by the prosecution; familiarize yourself with the good and bad changes to the new competency rules; understand differences between psychoses and how they relate to intent; advocate better for those with developing brains (children/young adults); and develop your client's history for use in raising insanity defenses. Visit www.nmcdla.org to register.

**Using Law Enforcement
Techniques as a Sword and Shield**

On March 29 NMCDLA will present "Using Law Enforcement Techniques as a Sword and Shield". If you've never had the opportunity to pick the brain of a New Mexico law enforcement instructor, now's your chance! Retired officer Craig Martin, of Martin's Consulting, will share the techniques taught for investigations, from interviews to evidence collection to report writing. He'll be joined by experienced trial attorney Mark Earnest and others. We'll conclude the CLE with an hour for any questions you may have for our presenters. Visit www.nmcdla.org to register.



***You are cordially invited to attend
an Investiture Ceremony
for***

The Honorable Michael E. Vigil
Associate Justice of the Supreme Court of New Mexico

The Honorable C. Shannon Bacon
Associate Justice of the Supreme Court of New Mexico

The Honorable David K. Thomson
Associate Justice of the Supreme Court of New Mexico

The Honorable Zachary A. Ives
Judge of the New Mexico Court of Appeals

Friday, March 22, 2019, at 4:00 p.m

***Albuquerque Convention Center
San Miguel/Mesilla/Pecos Ballrooms
401 Second Street NW
Albuquerque, New Mexico***

Reception to Immediately Follow the Ceremony

Legal Education

March

- | | | |
|---|--|---|
| <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>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 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>26 Children's Code: Delinquency Rules, Procedures and the Child's Best Interest
1.5 G, 1.0 EP
Webcast/Live Replay, Albuquerque
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>26 Abuse and Neglect Case in Children's Court
3.0 G
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 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 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>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: Assisting Human Trafficking Survivors (2018)
2.0 G
Live Replay, Albuquerque
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> |
| <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 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>29 Making Your Case with a Better Memory
6.0 G
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 Recent Developments in Civil Procedure (2018)
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 Tribal Law Journal 20th Anniversary Symposium
3.0 G, 1.0 EP
Live Seminar, Albuquerque
The UNM School of Law
chavezis@law.unm.edu</p> |

29 Capturing the Best Defense for Clients with Mental Health Issues: Advanced Strategies in Litigation
6.0 G
Live Seminar, Albuquerque
New Mexico Criminal Defense
Lawyers Association
www.nmcdla.org

29 Using Law Enforcement Techniques as a Sword and Shield
6.0 G
Live Seminar, Albuquerque
New Mexico Criminal Defense
Lawyers Association
www.nmcdla.org

April

2 Drafting Sales Agreements: UCC Issues and More
1.0 G
Teleseminar
Center for Legal Education of
NMSBF
www.nmbar.org

11 Due Diligence in Business Transactions
1.0 G
Teleseminar
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17 Speaking to Win: The Art of Effective Speaking for Lawyers (2018)
5.0 G, 1.0 EP
Webcast/Live Replay,
Albuquerque
Center for Legal Education of
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17 29th Annual Appellate Practice Institute (2018)
5.5 G, 1.0 EP
Live Replay, Albuquerque
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17 Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics (2017)
3.0 EP
Live Replay, Albuquerque
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17 Criminal Rules Hot Topics (2018)
2.5 G, 0.5 EP
Live Replay, Albuquerque
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18 How to Practice Series: Estate Planning
5.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
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18 Beneficiary Designations in Retirement Accounts: Protecting a Lifetime of Savings
1.0 G
Teleseminar
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19 Lawyer Ethics and Investigations for and of Clients
1.0 G
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23 Mother Nature and Leases: Drafting Issues to Protect Against Storm and Other Damage
1.0 G
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26 Undue Influence and Duress in Estate Planning
1.0 G
Teleseminar
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26 Veterans disability Law Bootcamp
5.7 G
Live Seminar, Albuquerque
Vet Defender

26 Surviving White Collar Cases – Prosecution and Defense Perspectives
5.5 G, 1.5 EP
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26 Surviving White Collar Cases – Prosecution and Defense Perspectives
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29 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
Webcast/Live Seminar, Albuquerque
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29 Add a Little Fiction to Your Legal Writing (2017)
2.0 G
Webcast/Live Replay, Albuquerque
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|---|---|--|
| <p>29 Ethics Puzzles: The Wrongful Death Act, Negligent Settlements and the Search for Silver Bullets (2018)
3.0 EP
Webcast/Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 2018 Family Law Institute: Hot Topics in Family Law Day 2
6.0 G
Live Replay, Albuquerque
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www.nmbar.org</p> | <p>30 Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice and More
1.0 EP
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| <p>29 Litigation and Argument Writing in the Smartphone Age (2017)
5.0 G, 1.0 EP
Live Replay, Albuquerque
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May

- | | | |
|--|--|--|
| <p>3 The Law of Background Checks: What Clients May/May Not Check
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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1.0 G
Teleseminar
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1.0 G
Teleseminar
Center for Legal Education of NMSBF
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| <p>7 Incentive Compensation in Businesses, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 Ethics of Shared Law Offices, Working Remotely and Virtual Offices
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
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| <p>8 Incentive Compensation in Businesses, Part 2
1.0 G
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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.

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 February 15, 2019

PUBLISHED OPINIONS

A-1-CA-34919	Texasfile v. Bd of Co Comm Lea	Affirm	02/12/2019
A-1-CA-35497	State v. S Wright	Reverse/Remand	02/14/2019

UNPUBLISHED OPINIONS

A-1-CA-35441	Animal Protection v. New Mexico Game Commission		
		Dismiss	02/11/2019
A-1-CA-35598	State v. D Brown	Affirm/Vacate/Remand	02/11/2019
A-1-CA-37108	State v. C Martinez	Affirm	02/11/2019
A-1-CA-37278	County of Quay v. L Stone	Affirm	02/11/2019
A-1-CA-37415	City of Alamogordo v. W Pollard	Reverse	02/11/2019
A-1-CA-37526	State v. S Garibay	Affirm	02/11/2019
A-1-CA-37530	CYFD v. Jason S. Sr.	Affirm	02/11/2019
A-1-CA-36016	State v. T Vallejos	Affirm	02/12/2019
A-1-CA-37391	Northern New Mexicans v. Pojoaque Valley	Affirm	02/12/2019
A-1-CA-35977	P Benavidez v. Red Sky Plating	Reverse/Remand	02/14/2019
A-1-CA-36202	A Hauff v. City of Alb	Affirm	02/14/2019
A-1-CA-37328	Federal National v. S. Chavez	Affirm	02/14/2019
A-1-CA-37424	State v. E Martinez	Affirm	02/14/2019
A-1-CA-37489	State v. D Lauynh	Affirm	02/14/2019

Effective February 22, 2019

PUBLISHED OPINIONS

A-1-CA-34796	State v. J Smith	Affirm	02/18/2019
A-1-CA-36331	Communication Workers v. PELRB	Reverse/Remand	02/21/2019

UNPUBLISHED OPINIONS

A-1-CA-37108	State v. C Martinez	Affirm	02/18/2019
A-1-CA-36896	State v. M Gomez	Affirm/Reverse	02/19/2019
A-1-CA-37056	Deutsche Bank v. B Pino	Affirm	02/19/2019
A-1-CA-37589	State v. C Warren	Affirm	02/19/2019
A-1-CA-37298	State v. J Montoya	Affirm	02/20/2019
A-1-CA-34538	State v. J Myers	Affirm	02/21/2019
A-1-CA-35196	State v. D Gonzales	Affirm/Remand	02/21/2019
A-1-CA-35270	J Vinyard v. Pizza Hut	Affirm	02/21/2019
A-1-CA-35413	State v. J Sanchez	Affirm	02/21/2019
A-1-CA-36027	City of SF v. One 2003 Gray	Remand	02/21/2019
A-1-CA-36028	City of SF v. One 2007 Maroon	Remand	02/21/2019
A-1-CA-36775	City of Santa Fe v. One (1) 2007 White Chevrolet	Remand	02/21/2019

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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

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

NOTICE OF PUBLICATION FOR COMMENT

MARCH 4, 2019

PROPOSED AMENDMENTS TO SUPREME COURT RULES OF

PRACTICE AND PROCEDURE

In accordance with the Supreme Court's annual rulemaking process under Rule 23106.1 NMRA, which includes an annual publication of proposed rule amendments for public comment every spring, the following Supreme Court Committees are proposing to recommend for the Supreme Court's consideration proposed amendments to the rules of practice and procedure summarized below. If you would like to view and comment on the proposed amendments summarized below

before they are submitted to the Court for final consideration, you may do so by submitting your comment electronically through the Supreme Court's website at <http://supremecourt.nmcourts.gov/openforcomment.aspx>, by email to nmsupremecourtclerk@nmcourts.gov, by fax to 5058274837, or by mail to

Joey D. Moya, Clerk

New Mexico Supreme Court

P O Box 848

Santa Fe, New Mexico 875040848

Your comments must be received by the Clerk on or before April 3, 2019, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing

Ad hoc Committee on Rules for Mental Health Proceedings

Proposal 2019-001 - Treatment guardian's petition for enforcement order

[New Form 4-934 NMRA]

The Ad hoc Committee on Rules for Mental Health Proceedings proposes to adopt new Form 4-934 NMRA, a model petition for use by a treatment guardian when seeking an enforcement order under NMSA 1978, Section 43-1-15(G).

Ad hoc Guardianship and Conservatorship Rules and Forms Committee

Proposal 2019-002 - Filing of reports

[New Rule 1-143 NMRA]

The Ad hoc Guardianship and Conservatorship Rules and Forms Committee proposes to adopt new Rule 1-143 NMRA to govern the filing, distribution, and review of reports in guardianship and conservatorship proceedings. The proposed new rule establishes deadlines for filing reports by the qualified health care professional, visitor, and guardian *ad litem* and requires the petitioner to provide copies to the persons entitled to access the reports under Rule 1-079.1(B)(4) and (C)(4) NMRA. The proposed rule also requires the guardian *ad litem* to review the reports with the alleged incapacitated person before the hearing on the petition to appoint a guardian or conservator.

Children's Court Rules Committee

Proposal 2019-003 - Mandatory joinder of delinquent acts in delinquency proceedings

[Rule 10-212 NMRA]

The Children's Court Rules Committee proposes to amend Rule 10-212 NMRA to make joinder of delinquent acts mandatory in delinquency proceedings in children's court. The amendments would align Rule 10-212 with Rule 5-203 NMRA, which requires joinder of offenses in criminal proceedings.

Proposal 2019-004 - Advisement of rights in proceedings subject to ICWA

[Rule 10-314 NMRA; and New Form 10-517 NMRA]

The Children's Court Rules Committee proposes to amend Rule 10-314 NMRA and to adopt new Form 10-517 NMRA to require the children's court, in appropriate cases, to advise a respondent in an abuse and neglect proceeding of his or her rights under the Indian Child Welfare Act (ICWA). Proposed amended Rule 10-314 was published for comment in March of 2018 and is being re-published with minor revisions. Proposed new Form 10-517, published for comment here for the first time, provides a checklist for the children's court to ensure compliance with the requirements of Rule 10-314.

Committee for Improvement of Jury Service in New Mexico

Proposal 2019-005 - Juror questionnaires [Forms 4-602C and 9-513C NMRA]

The Committee for Improvement of Jury Service in New Mexico proposes identical amendments to Forms 4-602C and 9-513C NMRA — the juror questionnaires used in civil and criminal proceedings. The committee proposes to eliminate several questions and revise others to reduce the length of the questionnaire and improve its clarity. All comments received will be submitted to the Committee for Improvement of Jury Service in New Mexico, the Rules of Civil Procedure Committee, and the Rules of Criminal Procedure Committee for further review before a final recommendation is submitted to the Court later this year.

Rules of Civil Procedure Committee

Proposal 2019-006 - Notice of completion of briefing [Rule 1-007.1 NMRA]

The Rules of Civil Procedure Committee proposes to amend Rule 1-007.1 NMRA to clarify who may file a notice of completion of briefing. The proposed amended rule would permit the movant or any party to notify the district court of “the expiration of all response times” under Rule 1-007.1(H) and thereby alert the judge that the motion is ready for decision.

Proposal 2019-007 - Default judgment; required filing of original negotiable instrument [Rule 1-055 NMRA]

The Rules of Civil Procedure Committee proposes to amend the commentary to Rule 1-055 NMRA to clarify the scope of the requirement to file the original negotiable instrument in default judgment proceedings. The proposed amended commentary explains that the requirement applies in cases involving a negotiable instrument that is not part of a consumer debt claim under Rule 1-009(J) NMRA.

Proposal 2019-008 - Issuance of mandate to magistrate or metropolitan court [Rules 1-072 and 1-073 NMRA; and New Form 4-711 NMRA]

The Rules of Civil Procedure Committee proposes to amend Rules 1-072 and 1-073 NMRA and to adopt new Form 4-711 NMRA to promote compliance with the requirement to issue a mandate to the magistrate or metropolitan court following an appeal. The proposed amended rules establish a consistent thirty (30)-day deadline for issuance of the district court’s mandate following an appeal. The proposed new form provides a standard form of mandate for use by the district court.

Rules of Criminal Procedure Committee

Proposal 2019-009 - Preference for summons [Rule 5-208 NMRA]

The Rules of Criminal Procedure Committee proposes to amend Rule 5-208 NMRA to incorporate language from the rules governing the courts of limited jurisdiction, expressing a preference for the use of a summons rather than an arrest warrant when practicable. See Rule 6-204 NMRA; Rule 7-204 NMRA; Rule 8-203 NMRA.

Proposal 2019-010 - Motions to reconsider [Rules 5-601, 6-304, 7-304, and 8-304 NMRA]

The Rules of Criminal Procedure Committee proposes to amend Rules 5-601, 6-304, 7-304, and 8-304 NMRA to address the lack of rules governing motions to reconsider in the district, magistrate, metropolitan, and municipal courts. The proposed amended rules affirmatively provide for motions to reconsider and indicate when such motions will toll the time to initiate an appeal, consistent with Rule 12-201 NMRA.

Proposal 2019-011 - Life without the possibility of release or parole procedures [New Rule 5-705 NMRA]

The Rules of Criminal Procedure Committee proposes to adopt new Rule 5-705 NMRA to address the lack of procedural rules for cases in which the State seeks life imprisonment without the possibility of release or parole. The proposed rule provides for heightened procedural protections comparable to those afforded to defendants in death penalty cases.

UJI – Civil Committee

Proposal 2019-012 - Loss of consortium claims; wrongful death claims [UJI 13-1810A and 13-1830 NMRA; and New UJI 13-1810B and 13-2223 NMRA]

The UJI – Civil Committee proposes to amend UJI 13-1810A and 13-1830 NMRA and to adopt new UJI 13-1810B and 13-2223 NMRA to provide additional guidance and clarity for loss of consortium and wrongful death claims. The proposed revised and new instructions are offered in response to the Court’s request in *Estate of Saenz v. Ranack Constructors, Inc.*, 2018-NMSC-032, ¶ 41, 420 P.3d 576, to “consider whether amendments to the current version of UJI 13-1830 are warranted to ensure that jurors understand how to allocate damages between the personal representative for the wrongful death estate and the individual claimants, if any. . . . [And] to consider whether a new special verdict form should be adopted for use in wrongful death cases.”

UJI – Criminal Committee

Proposal 2019-013 - Removing “Evidence has been presented that . . .”

[UJI 14-252, 14-5007, 14-5009, and 14-5010 NMRA]

The UJI – Criminal Committee proposes to amend UJI 14-252, 14-5007, 14-5009, and 14-5010 NMRA to remove the introductory phrase, “Evidence has been presented that . . .”, which the committee determined to be an improper comment on evidence. In addition, the proposed revisions to UJI 14-252 update the instruction and commentary to better capture the requisite factual considerations relevant to the causal chain when the negligence of a third party is at issue. Proposed UJI 14-5007, 14-5009, and 14-5010 were similarly modified and have been rephrased to maintain their substance.

Proposal 2019-014 - Instructions relating to sexual exploitation of children

[New UJI 14-631, 14-632, 14-633, 14-634, and 14-6019C NMRA]

The UJI – Criminal Committee proposes to adopt new UJI 14-631, 14-632, 14-633, 14-634, and 14-6019C NMRA to implement the sexual exploitation of children statute, NMSA 1978, Section 30-6A-3 (2016).

Proposal 2019-015 - Restructuring battery on a peace officer instruction and correcting a citation

[UJI 14-2211 NMRA]

The UJI – Criminal Committee proposes to amend UJI 14-2211 NMRA to correct a citation in Use Note 2. Additionally, the committee proposes to amend the instruction to move the discussion in Use Note 2 to the commentary. Finally, the committee proposes to update the structure of the instruction to better correspond to other battery instructions.

Proposal 2019-016 - Updating tampering with evidence instructions in light of State v. Radosevich

[UJI 14-2241 and 14-6019 NMRA]

The UJI – Criminal Committee proposes to amend UJI 14-2241 and 14-6019 NMRA to provide additional guidance and clarity following *State v. Radosevich*, 2018-NMSC-028, 419 P.3d 176. The committee proposes to amend the commentary to UJI 14-2241 to explain the Sixth Amendment implications of the tampering with evidence statute’s penalty scheme in light of *Radosevich*. Proposed amendments to UJI 14-6019 similarly update the instruction, commentary, and use notes to be consistent with *Radosevich*.

Proposal 2019-017 - Consideration of mental capacity in determining voluntariness of a confession or admission

[UJI 14-5040 NMRA]

The UJI – Criminal Committee proposes to amend UJI 14-5040 NMRA to reflect New Mexico law, indicating that a defendant’s diminished capacity may be considered in determining whether a statement was made voluntarily. Additionally, the committee proposes to remove the phrase, “Evidence has been admitted . . .”, which the committee determined to be an improper comment on evidence.

Proposal 2019-018 - Updating instructions relating to intoxication defenses

[UJI 14-5106, 14-5110, and 14-5111 NMRA; and Withdrawn UJI 14-5105 NMRA]

The UJI – Criminal Committee proposes to withdraw UJI 14-5105 NMRA and to amend 14-5106, 14-5110, and 14-5111 NMRA to more accurately reflect New Mexico law concerning intoxication defenses. The committee proposes to amend the committee commentary for UJI 14-5110 and 14-5111 to note the withdrawal of UJI 14-5105 and include the guidance currently contained in that instruction. The proposed amendment to 14-5106 would update Use Note 1 to better align with the components of an insanity defense, as defined in UJI 14-5101 NMRA.

Proposal 2019-019 - Duty to retreat; first aggressor; removing “Evidence has been presented that . . .”

[UJI 14-5170, 14-5171, 14-5172, 14-5173, and 14-5174 NMRA]

The UJI – Criminal Committee proposes to amend UJI 14-5170, 14-5171, 14-5172, and 14-5174 NMRA to remove the phrase, “Evidence has been presented that . . .”, which the committee determined to be an improper comment on evidence. Additionally, the committee proposes to amend UJI 14-5171 to include a use note requiring instructions relating to the duty to retreat and the first aggressor rule under certain circumstances.

Proposal 2019-020 - Clarifying first aggressor instructions

[UJI 14-5191 NMRA; and New UJI 14-5191A NMRA]

Rule-Making Activity <http://nmsupremecourt.nmcourts.gov>

The UJI – Criminal Committee proposes to amend UJI 14-5191 NMRA and to adopt new UJI 14-5191A NMRA to clarify and improve the first aggressor instructions. The committee proposes to amend 14-5191 to provide clearer instructions for describing when a defendant may be considered the first aggressor. Proposed UJI 14-5191A instructs on the exceptions to the first aggressor rule.

The proposed rule amendments summarized above

Can be viewed in their entirety at the

New Mexico Supreme Court website

[Http://supremecourt.Nmcourts.Gov/openforcomment.aspx](http://supremecourt.Nmcourts.Gov/openforcomment.aspx)

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

From the New Mexico Supreme Court

Opinion Number: 2019-NMSC-003

No. S-1-SC-34974 (filed December 13, 2018)

CATHY MOSES AND PAUL F.
WEINBAUM,
PlaintiffsPetitioners,

v.

CHRISTOPHER RUSZKOWSKI,
Secretary of Education, New Mexico
Public Education Department,
DefendantRespondent,

and

ALBUQUERQUE ACADEMY, et al.,
Defendants/IntervenorsRespondents.

ORIGINAL PROCEEDING ON CERTIORARI

Sarah M. Singleton, District Judge

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GRAESER & MCQUEEN, LLC
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Opinion

Barbara J. Vigil, Justice

{1} In this opinion we reconsider the constitutionality of New Mexico’s textbook loan program. In *Moses v. Skandera* (*Moses II*), this Court considered whether using public funds to lend textbooks to private school students violated Article XII, Section 3 of the New Mexico Constitution, which precludes the use of public funds “for the support of any sectarian,

denominational or private school, college or university.” 2015-NMSC-036, 367 P.3d 838, *vacated sub nom.*, *N.M. Ass’n of Non-public Sch. v. Moses*, 137 S. Ct. 2325 (2017) (mem.). This Court held “that the plain meaning and history of Article XII, Section 3 forbids the provision of books for use by students attending private schools, whether such schools are secular or sectarian.” *Moses II*, 2015-NMSC-036, ¶ 2. The United States Supreme Court subsequently vacated this Court’s judgment and remanded the case for further consideration in light of *Trinity Lutheran*

Church of Columbia, Inc. v. Comer, 582 U.S. ___, 137 S. Ct. 2012 (2017). *N.M. Ass’n of Non-public Sch.*, 137 S. Ct. 2325.

{2} On remand, we conclude that this Court’s previous interpretation of Article XII, Section 3 raises concerns under the Free Exercise Clause of the First Amendment to the United States Constitution. To avoid constitutional concerns, we hold that the textbook loan program, which provides a generally available public benefit to students, does not result in the use of public funds in support of private schools as prohibited by Article XII, Section 3. We also hold that the textbook loan program is consistent with Article IV, Section 31 of the New Mexico Constitution, which addresses appropriations for educational purposes, and Article IX, Section 14 of the New Mexico Constitution, which limits “any donation to or in aid of any person, association or public or private corporation.”

I. BACKGROUND

{3} Cathy Moses and Paul F. Weinbaum (Petitioners) initiated this case by filing a complaint for declaratory judgment against Hanna Skandera, the Secretary of the New Mexico Public Education Department (Department).¹ Petitioners sought a declaration that the Instructional Material Law (IML), NMSA 1978, §§ 22-15-1 to -14 (1967, as amended through 2011), violates several provisions of the New Mexico Constitution because the IML provides for the distribution of public funds to private schools.

{4} The IML establishes an instructional material fund that is administered by the Department. See § 22-15-5(A). The Department uses the fund to purchase textbooks that are loaned free of charge to public and private school students enrolled in first through twelfth grades and in early childhood education programs. See §§ 22-15-5(B), 22-15-7(A); see also § 22-15-2(C) (defining “instructional material,” which is referred to collectively in this opinion as “textbooks”). Although schools play a role in the implementation of the IML, they do so as agents for the benefit of their students. See §§ 22-15-7(B), 22-15-8(B). The Department allocates the money in the instructional material fund to schools based on the number of students enrolled. See § 22-15-9(A). The schools select textbooks from a “multiple list” approved by the Department. See §§ 22-15-2(D), 22-15-8(B). The IML permits

¹ Christopher Ruszkowski, the current Secretary of Education, has been substituted for Hanna Skandera on remand

schools to use a portion of their allocated funds for the purchase of instructional materials, classroom materials, and “items that are not on the multiple list; provided that no funds shall be expended [by a private school] for religious, sectarian or nonsecular materials.” Section 22-15-9(C). The Department distributes the textbooks to the schools, *see* § 22-15-7(B), and the schools disseminate the textbooks to their students, *see* § 22-15-7(C). Schools are responsible for the safekeeping of the textbooks, *id.*, and may hold a student or parent “responsible for the loss, damage or destruction of” a textbook that is “in the possession of the student.” Section 22-15-10(B).

{5} Petitioners moved for summary judgment in the district court. At a summary judgment hearing, the district court indicated that it intended to grant the motion based on *Zellers v. Huff*, 1951-NMSC-072, 55 N.M. 501, 236 P.2d 949 (addressing issues concerning public funding of parochial schools and Catholic influence in public schools). But before the district court entered summary judgment, Intervenor, the Albuquerque Academy, the New Mexico Association of Non-public Schools, Rehoboth Christian School, St. Francis School, Hope Christian School, Sunset Mesa School, and Anica and Maya Benia moved to intervene. The district court granted the motion to intervene and ordered the parties to submit additional briefing on whether *Zellers* precluded the use of IML funds to purchase textbooks for distribution to private schools. At a second summary judgment hearing, the district court concluded that *Zellers* did not constitute binding or persuasive authority, denied Petitioners’ motion for summary judgment, and granted summary judgment in favor of the Department. The Court of Appeals affirmed. *Moses v. Skandera* (*Moses I*), 2015-NMCA-036, ¶ 2, 346 P.3d 396, *rev’d*, 2015-NMSC-036, ¶¶ 12, 41.

{6} Petitioners sought review by this Court, raising five issues:

- (1) whether this Court’s decision in *Zellers* constituted dicta; (2) whether the IML violates Article XII, Section 3 of the New Mexico Constitution; (3) whether the IML violates Article IV, Section 31 of the New Mexico Constitution; (4) whether the IML violates Article IX, Section 14 of the New Mexico Constitution; and (5)

whether the IML violates Article II, Section 11 of the New Mexico Constitution.

Moses II, 2015-NMSC-036, ¶ 11. This Court held that loaning textbooks to private school students violated Article XII, Section 3 and declined to reach the remaining issues. *Moses II*, 2015-NMSC-036, ¶ 12.

{7} The New Mexico Association of Non-public Schools filed a petition for a writ of certiorari in the United States Supreme Court. The day after the Supreme Court issued its opinion in *Trinity Lutheran*, 137 S. Ct. 2012, the Supreme Court granted review of this Court’s opinion in *Moses II*, vacated this Court’s judgment, and remanded the case to this Court for further consideration in light of *Trinity Lutheran*. *See N.M. Ass’n of Non-public Sch.*, 137 S. Ct. 2325. In accordance with the Supreme Court’s directive, in this opinion we take a fresh look at the constitutionality of the textbook loan program under the New Mexico Constitution.

II. DISCUSSION

{8} On remand, Petitioners argue that loaning textbooks to private school students under the IML violates three provisions of the New Mexico Constitution: (1) Article XII, Section 3, which prohibits the use of public funds “for the support of any sectarian, denominational or private school, college or university”; (2) Article IV, Section 31, which precludes an appropriation for “educational . . . purposes to any person, corporation, association, institution or community, not under the absolute control of the state”; and (3) Article IX, Section 14, which limits “any donation to or in aid of any person, association or public or private corporation.”

{9} The Department and Intervenor argue that Article XII, Section 3, as interpreted by the Court in *Moses II*, violates the Free Exercise Clause of the First Amendment to the United States Constitution and the equal protection guarantees of the federal and state constitutions. They ask this Court to interpret Article XII, Section 3 in a manner that permits the state to loan textbooks to private school students under the IML and assert that such an interpretation would be consistent with the United States Constitution.

A. Standard of Review

{10} This Court applies a *de novo* standard of review to a constitutional challenge to a statute. *Bounds v. State ex rel. D’Antonio*, 2013NMSC037, ¶ 11, 306 P.3d 457. In doing so, we presume that

the statute is valid and will uphold it “unless we are satisfied beyond all reasonable doubt that the Legislature went outside the bounds fixed by the Constitution in enacting the challenged legislation.” *Id.* (internal quotation marks and citation omitted). “We will not question the wisdom, policy, or justness of a statute, and the burden of establishing that the statute is invalid rests on the party challenging the constitutionality of the statute.” *Id.* (internal quotation marks and citation omitted).

B. Loaning Textbooks to Private School Students Under the IML Does Not Constitute Support of Private Schools as Prohibited by Article XII, Section 3

1. This Court’s previous interpretation of Article XII, Section 3 in *Moses II*

{11} This Court based its decision in *Moses II*, 2015-NMSC-036, on Article XII, Section 3 of the New Mexico Constitution, which provides that

[t]he schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

To determine whether loaning textbooks to private school students constituted support of private schools in violation of Article XII, Section 3, this Court considered the historical circumstances that led to the provision’s adoption, including the nationwide controversy over public education. *See Moses II*, 2015-NMSC-036, ¶¶ 19-23.

{12} “During the early nineteenth century, public education was provided in public schools known as common schools.” *Moses II*, 2015-NMSC-036, ¶ 19 (internal quotation marks and citation omitted). These common schools were heavily influenced by non-denominational Protestantism. *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol’y 551, 559-60 (2003) (describing the “overt fusion of Protestant faith with public education”); Joseph P. Viteritti, *Blaine’s Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub.

Pol’y 657, 666 (1998) (noting that the common schools promoted “the teachings of mainstream Protestantism”). The Protestant-run common schools were “‘designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority.’” *Moses II*, 2015-NMSC-036, ¶ 19 (quoting Viteritti, *supra*, at 668). “State statutes at the time authorized Bible readings in public schools and state judges generally refused to recognize the Bible as a sectarian book.” *Id.*

{13} “By the middle of the nineteenth century,” an “influx of Catholic immigrants created a demand for Catholic education, and consequently Catholics and other minority religionists challenged the Protestant influence in the common schools.” *Id.* ¶ 20. Protestants responded by “calling for legislation prohibiting sectarian control over public schools and the diversion of public funds to religious institutions.” Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 43 (1992). President Ulysses S. Grant entered the debate by vowing to “[e]ncourage free schools, and resolve that *not one dollar be appropriated to support any sectarian schools.*” *Moses II*, 2015-NMSC-036, ¶ 21 (alteration in original) (emphasis added) (quoting Viteritti, *supra*, at 670). At that time, “[i]t was an open secret that ‘sectarian’ was code for ‘Catholic.’” *Id.* (internal quotation marks and citation omitted).

{14} In 1875, Congressman James G. Blaine proposed the following amendment to the federal constitution:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, [nor] any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Green, *supra*, at 38 n.2 (quoting 4 Cong. Rec. 5453 (1876)). This proposed amendment to the federal constitution failed to pass, but similar provisions were soon incorporated into state law. *Moses II*, 2015-NMSC-036, ¶ 23. “By 1876, fourteen [s]tates had enacted legislation prohibiting the use of public funds for religious

schools; by 1890, twenty-nine [s]tates had incorporated such provisions into their constitutions.” Viteritti, *supra*, at 673.

{15} Although many states voluntarily chose to adopt state constitutional provisions based on the failed Blaine amendment, Congress forced New Mexico and other territories seeking admission to the union to adopt Blaine provisions as a condition of statehood. See DeForrest, *supra*, at 573-74; Viteritti, *supra*, at 673. Congress passed the Enabling Act for New Mexico in 1910. See Enabling Act for New Mexico of June 20, 1910, ch. 310, 36 Stat. 557. The Enabling Act required New Mexico to establish and maintain “a system of public schools . . . free from sectarian control,” *id.* § 2, and granted New Mexico “over thirteen million acres of federal land . . . to be held in trust for the benefit of various public schools and other institutions.” *State of N.M. ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 5, 149 N.M. 330, 248 P.3d 878. The Enabling Act further mandated

[t]hat the schools, colleges, and universities provided for in this Act shall forever remain under the exclusive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

Enabling Act § 8. “The Enabling Act required that the people of New Mexico incorporate its mandates into the state constitution, and it specified that those mandates could not be modified without the consent of Congress and a ratifying vote of our citizens.” *Lyons*, 2011-NMSC-004, ¶ 4; see also N.M. Const. art. XXI, § 9 (consenting to Enabling Act provisions); N.M. Const. art. XXI, § 10 (making Enabling Act provisions “irrevocable without the consent of the United States and the people of this state”).

{16} The drafters of the New Mexico Constitution modeled Article XII, Section 3 on Section 8 of the Enabling Act but made two significant changes to the language drafted by Congress. First, Article XII, Section 3 restricts “the use of proceeds from *any* lands granted to New Mexico by Congress, not only those granted in the Enabling Act.” *Moses II*, 2015-NMSC-036, ¶ 27. And second, Article XII, Section 3 restricts “the use of any funds appropriated, levied, or collected for educational purposes for the support of not only sectarian

schools, but also the *much broader category of private schools.*” *Moses II*, 2015-NMSC-036, ¶ 27 (emphasis added). “Through these changes, the Constitutional Convention decided to provide for additional restrictions on public funding of education beyond the restrictions required by Section 8 of the Enabling Act.” *Moses II*, 2015-NMSC-036, ¶ 27. “The members of the Constitutional Convention chose to play it safe—by broadening the provision to reach all private schools, they avoided drawing a line between secular and sectarian education.” *Id.*

{17} In *Moses II*, this Court considered two interpretations of Article XII, Section 3: a permissive interpretation that would allow the state to lend textbooks to private school students under the IML, and a restrictive interpretation that would preclude such lending. *Moses II*, 2015-NMSC-036, ¶¶ 30-38. Our Court of Appeals had taken the permissive approach, construing the limitations in Article XII, Section 3 as coextensive with the limitations set forth in the Establishment Clause of the First Amendment to the United States Constitution. See *Moses I*, 2015-NMCA-036, ¶ 34. The Court of Appeals explained that the Establishment Clause, which prohibits Congress from making any law “respecting an establishment of religion,” U.S. Const. amend. I, does not bar a state from creating a textbook loan program that provides secular instructional material for the benefit of students and their parents, “regardless of the school of their attendance.” See *Moses I*, 2015-NMCA-036, ¶¶ 34-38. The Court of Appeals concluded that although the IML may provide incidental or indirect benefits to private schools, the IML does not violate Article XII, Section 3 because students and their parents “are the direct recipients of the program’s financial support.” *Moses I*, 2015-NMCA-036, ¶¶ 39-40.

{18} On certiorari, this Court observed that Article XII, Section 3 “stands as a constitutional protection separate from the Establishment Clause” because it prohibits the use of public funds for all private schools, not just religious schools. *Moses II*, 2015-NMSC-036, ¶¶ 17-18. This Court concluded that “Article XII, Section 3 must be interpreted consistent with cases analyzing similar Blaine amendments under state constitutions.” *Moses II*, 2015-NMSC-036, ¶ 32. State courts considering the constitutionality of similar textbook loan programs have reached different results.

{19} Some jurisdictions have concluded that the Blaine provisions in their state

constitutions permit a textbook loan program despite incidental or collateral benefits to religious schools. *See, e.g., Borden v. La. State Bd. of Educ.*, 123 So. 655, 660-61 (La. 1929); *Chance v. Miss. State Textbook Rating & Purchasing Bd.*, 200 So. 706, 713 (Miss. 1941) (in banc); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 228 N.E.2d 791, 793-94 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968). These jurisdictions have emphasized that textbook loan programs are intended to benefit the student, not the school, and that such programs advance the state's legitimate public welfare concern in promoting education. *See Borden*, 123 So. at 660-61 (concluding that school children and the state, but not the schools, were the beneficiaries of the program); *Chance*, 200 So. at 713 (concluding that lending secular textbooks to "individual pupils" did not provide "a direct or indirect aid to the respective schools which they attend" and that any benefit to the school was only incidental); *Allen*, 228 N.E.2d at 794 (explaining that the textbook program was intended to "bestow a public benefit upon all school children" and that "any benefit accruing to" religious schools was merely "a collateral effect" that "cannot be properly classified as the giving of aid directly or indirectly").

{20} Other states have chosen a more restrictive approach, interpreting the Blaine provisions in their state constitutions to preclude the provision of any aid or benefit to private religious schools. *See, e.g., Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 964 (Cal. 1981); *Spears v. Honda*, 449 P.2d 130, 135-36 (Haw. 1968); *Bloom v. Sch. Comm. of Springfield*, 379 N.E.2d 578, 581-82 (Mass. 1978); *Paster v. Tussey*, 512 S.W.2d 97, 104-05 (Mo. 1974) (en banc); *Gaffney v. State Dep't of Educ.*, 220 N.W.2d 550, 554 (Neb. 1974); *Dickman v. Sch. Dist. No. 62C, Or. City, of Clackamas Cty*, 366 P.2d 533, 541-42 (Or. 1961) (en banc); *In re Certification of a Question of Law from the U.S. Dist. Court, Dist. of S.D., S. Div.*, 372 N.W.2d 113, 116, 118 (S.D. 1985). These courts have reasoned that textbook loan programs help religious schools fulfill their religious mission. *See Cal. Teachers Ass'n*, 632 P.2d at 962-63 ("[I]t is an undeniable fact that books are a critical element in enabling the school to carry out its essential mission to teach the students."); *Dickman*, 366 P.2d at 544 (noting that textbooks are an "integral part of the educational process" and that the teaching of religious precepts is an inseparable part of that process).

{21} Faced with two competing interpretations of Article XII, Section 3, this Court concluded that the more restrictive approach honored the intent behind the failed Blaine amendment and the mandate set forth in the Enabling Act to ensure that no public funds are used to support sectarian schools. *See Moses II*, 2015-NMSC-036, ¶¶ 21, 27, 32. In reaching that conclusion, this Court did not attach any significance to the inclusion of private schools in Article XII, Section 3; the restrictive approach flowed from the intent underlying the Blaine amendment and the Enabling Act and applied equally to sectarian and private schools. This Court thus held "that the plain meaning and history of Article XII, Section 3 forbids the provision of books for use by students attending private schools, whether such schools are secular or sectarian." *Moses II*, 2015-NMSC-036, ¶ 2.

2. Evolving First Amendment Law and *Trinity Lutheran*

{22} The religion clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. On remand we must consider whether this Court's interpretation of Article XII, Section 3 in *Moses II* conflicts with the First Amendment principles enunciated by the United States Supreme Court in *Trinity Lutheran*, 137 S. Ct. 2012.

{23} The Supreme Court described the relationship between the religion clauses in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947). *Everson* involved a New Jersey program that reimbursed parents for school bus fares incurred by both public and private school students, including students who attended religious schools. *Id.* at 3. The Court opined that "New Jersey cannot consistently with the [Establishment Clause] contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." *Id.* at 16. "On the other hand, [the Free Exercise Clause] commands that New Jersey cannot hamper its citizens in the free exercise of their own religion." *Id.* Given these competing concerns, the Court was "careful, in protecting the citizens of New Jersey against state-established churches, to be sure that [it did] not inadvertently prohibit New Jersey from extending its general [s]tate law benefits to all its citizens without regard to their religious belief." *Id.* The Court concluded that the Establishment

Clause did not prohibit New Jersey from providing bus fares to religious school students "as a part of a general program." *Id.* at 17. The Court explained that the state must remain "neutral in its relations with groups of religious believers and non-believers" when providing "general government services," such as "police and fire protection, connections for sewage disposal, public highways and sidewalks." *Id.* at 17-18.

{24} Since *Everson*, the Supreme Court has issued multiple opinions analyzing whether the Establishment Clause permits the government to provide benefits or aid to religious schools or their students. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 644-45, 652, 663 (2002) (upholding a publicly financed school voucher program that was neutral with respect to religion and provided aid to families who exercised an independent choice regarding whether to enroll in public or private school); *Mitchell v. Helms*, 530 U.S. 793, 801, 829, 835 (2000) (plurality opinion) (upholding a program that loaned secular educational materials to public and private schools on the basis of neutral, secular criteria); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3, 13-14 (1993) (permitting a local school district to provide a publicly employed interpreter for a deaf student who attended parochial school); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 238, 243 (1968) (upholding a New York law under which secular textbooks were loaned to public and private school students).

{25} While there have been many opinions addressing whether the Establishment Clause *permits* a state to provide aid or benefits to a religious school or its students, the Supreme Court has only recently begun to consider the circumstances under which the Free Exercise Clause *requires* a state to do so. In *Locke v. Davey*, the Court analyzed a Washington scholarship program that prohibited recipients from using scholarship money to pursue "a degree in devotional theology." 540 U.S. 712, 715 (2004). The Court concluded that the Establishment Clause permitted Washington to give scholarship money to theology students because "the link between government funds and religious training [was] broken by the independent and private choice of recipients." *Id.* at 719. But the Court held that Washington could nonetheless exclude theology students from the scholarship program under the Washington Constitution without violating the Free Exercise

Clause. *Id.* at 725. The Court explained Washington's restrictions on scholarship recipients fell into the "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause requires. *Id.* at 718-19 (internal quotation marks and citation omitted). In other words, although Washington could give scholarship money to recipients pursuing a degree in theology without violating the Establishment Clause, it did not have to do so. Washington's interest against "funding religious instruction" to "prepare students for the ministry" provided a valid basis for excluding theology students from the scholarship program and did not violate their rights under the Free Exercise Clause. *Id.* at 719; *see also id.* at 725 ("If any room exists between the two Religion Clauses, it must be here.").

{26} In *Trinity Lutheran*, the Supreme Court considered whether the Free Exercise Clause required Missouri to include religious schools in a program that provided grants to schools and other entities to resurface playgrounds with recycled tire rubber. 137 S. Ct. at 2017. The preschool at Trinity Lutheran Church applied for a grant, but the state deemed the preschool categorically ineligible to receive a grant based on restrictions set forth in article I, section 7 of the Missouri Constitution. *Trinity Lutheran*, 137 S. Ct. at 2017-18. Article I, section 7 provides

[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Trinity Lutheran Church sued, arguing that Missouri's policy of denying grants based on the religious identity of the applicant violated the Free Exercise Clause. *Trinity Lutheran*, 137 S. Ct. at 2018. The federal district court ruled in favor of the state, reasoning that the case was controlled by *Locke* and that the Free Exercise Clause did "not prohibit withholding an affirmative benefit on account of religion." *Trinity Lutheran*, 137 S. Ct. at 2018. The Eighth Circuit Court of Appeals affirmed, concluding that the Free Exercise Clause did not compel Missouri "to disregard the antiestablishment principle" embodied in

its state constitution. *Id.* at 2018-19.

{27} The Supreme Court reversed, holding that Missouri's policy of excluding religious entities from the grant program violated the Free Exercise Clause. *Id.* at 2024. The Court confirmed that a state's denial of "a generally available benefit solely on account of religious identity" violates the Free Exercise Clause unless "justified . . . by a state interest of the highest order." *Id.* at 2019 (internal quotation marks and citation omitted). The Court concluded that Missouri's policy implicated the Free Exercise Clause because it "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 2021. The Court also determined that Missouri's interest in "skating as far as possible from religious establishment concerns" was insufficient to justify its discriminatory policy. *Id.* at 2024. The Court did not analyze the constitutionality of the Missouri policy under the Establishment Clause because the parties stipulated that Missouri could provide playground resurfacing grants to religious preschools without violating the Establishment Clause. *Id.* at 2019. *But see id.* at 2028 (Sotomayor, J. dissenting) (opining that the Establishment Clause precluded Missouri from giving a grant to the church for playground resurfacing because the church uses its facilities "to practice and spread its religious views"). We discuss the holding and implications of *Trinity Lutheran* later in this opinion.

3. Reconsideration of *Moses II* in light of *Trinity Lutheran*

{28} Petitioners argue that *Trinity Lutheran* does not require reversal of this Court's holding in *Moses II* because Article XII, Section 3 treats all private schools alike, whether religious or secular, and does not discriminate "solely on account of religious identity." *See Trinity Lutheran*, 137 S. Ct. at 2019. The Department and Intervenors argue that despite its facial neutrality, Article XII, Section 3, as interpreted by this Court in *Moses II*, violates the Free Exercise Clause because Article XII, Section 3 was adopted as a result of animus toward Catholics. The Department and Intervenors also assert that the decisions from other states on which this Court relied in *Moses II*, 2015-NMSC-036, ¶¶ 32-38, are suspect following *Trinity Lutheran*.

{29} In *Trinity Lutheran*, the Supreme Court changed the landscape of First Amendment law. Under *Trinity Lutheran*, if a state permits private schools to partici-

pate in a generally available public benefit program, the state must provide the benefit to religious schools on equal terms. *See* 137 S. Ct. at 2022 ("The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant."). *Trinity Lutheran* was the first Supreme Court opinion to hold that the Free Exercise Clause required a state to provide public funds directly to a religious institution. *See* 137 S. Ct. at 2027 (Sotomayor, J., dissenting) ("The Court today profoundly changes [the] relationship [between church and state] by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church."). The Supreme Court also emphasized that a state's interest in maintaining church-state separation does not justify the withholding of generally available public benefits based on the religious status of the recipient. *Id.* at 2024. {30} Like the grant program at issue in *Trinity Lutheran*, the textbook loan program under the IML is a generally available public benefit program. *See Moses II*, 2015NMSC036, ¶ 28 (acknowledging "that the provision of school books for children attending both public and private schools constitutes 'a public service'"). And this Court in *Moses II*, like Missouri in *Trinity Lutheran*, limited the availability of the program based on restrictions in our state constitution on the expenditure of public funds.

{31} But there is a critical difference between Article XII, Section 3 of the New Mexico Constitution and article I, section 7 of the Missouri Constitution. Specifically, Article XII, Section 3 of the New Mexico Constitution does not make a distinction based solely on religious status, whereas article I, section 7 of the Missouri Constitution does. *Compare* N.M. Const. art. XII, § 3 (providing that no "funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university"), *with* Mo. Const. art. I, § 7 (providing "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion").

{32} Article XII, Section 3, as interpreted in *Moses II*, 2015-NMSC-036, enunciates a facially neutral policy of prohibiting the expenditure of public funds to support private schools, both religious and secular. Article XII, Section 3 does not

disqualify religious individuals or entities from receiving public benefits based solely on their religious status. Instead, it creates a distinction between public schools and private schools. The First Amendment requires government neutrality toward religious viewpoints; it does not require the state to treat public schools and private schools alike.

{33} Although Article XII, Section 3 is facially neutral toward religion, the Free Exercise Clause may still be implicated if its adoption was motivated by religious animus. In *Trinity Lutheran*, the Supreme Court recognized a distinction between laws that “single out the religious for disfavored treatment” and laws that are “neutral and generally applicable without regard to religion.” 137 S. Ct. at 2020. “[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). But “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.” *Id.* at 533. “Facial neutrality is not determinative.” *Id.* at 534. The Free Exercise Clause “forbids subtle departures from neutrality and covert suppression of particular religious beliefs.” *Id.* (internal quotation marks and citations omitted).

{34} Evolving First Amendment jurisprudence suggests that courts should consider the historical and social context underlying a challenged government action to determine whether the action was neutral or motivated by hostility toward religion. “Factors relevant to the assessment of governmental neutrality include the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (internal quotation marks and citation omitted); see *id.* at 1729-31 (citing hostile comments from members of the Colorado Civil Rights Commission and the commission’s inconsistent treatment of religious discrimination and sexual-orientation discrimination to conclude that the commission’s treatment of a cake shop owner “violated the [s]tate’s duty under the First Amendment not to base laws or

regulations on hostility to a religion or religious viewpoint”); *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (considering extrinsic evidence of anti-Muslim animus when determining the constitutionality of a presidential proclamation).

{35} In *Moses II*, this Court acknowledged that the federal Blaine amendment originated in anti-Catholic prejudice and that Congress, through the Enabling Act, forced New Mexico to adopt a Blaine provision as a condition of statehood. *Moses II*, 2015-NMSC-036, ¶¶ 19-24. The United States Supreme Court likewise has recognized that the federal Blaine amendment was a product of anti-Catholic animus. See *Mitchell*, 530 U.S. at 828 (“Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that ‘sectarian’ was code for ‘Catholic.’”); see also *Zelman*, 536 U.S. at 720-21 (Breyer, J., dissenting) (explaining that “the Protestant position . . . was that public schools must be nonsectarian (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support sectarian schools (which in practical terms meant Catholic)” (internal quotation marks and citation omitted)). This history casts constitutional doubt on the motive underlying Article XII, Section 3. We therefore consider whether the history or circumstances in New Mexico that led to the adoption of Article XII, Section 3 cured the provision’s anti-Catholic origins.

4. History of public and sectarian schools in New Mexico

{36} New Mexico has a unique history and culture, and the public school debate within New Mexico took a different course than the debate at the national level. Formal schooling commenced in New Mexico with the arrival of the first Franciscan missionaries over four hundred years ago. See Kathleen Holscher, *Religious Lessons: Catholic Sisters and the Captured Schools Crisis in New Mexico* 28 & 206 n.13 (2012). “Under both Spanish and Mexican rule, the Roman Catholic Church . . . handled all education with little interference from secular forces.” Robert W. Larson, *New Mexico’s Quest for Statehood: 1846-1912* 101 (1968). During that time period, “New Mexico’s remote location, its rugged landscape, and its struggling economy made a centralized system of schools no more than a far-off hope.” Holscher, *supra*, at 28.

{37} In 1848, Mexico ceded present-day New Mexico to the United States, and in

1850, New Mexico became a territory. See Treaty of Peace, Friendship, Limits, and Settlement With the Republic of Mexico (Treaty of Guadalupe Hidalgo), 9 Stat. 922 (1848); *Torrez v. Bd. of Cty. Comm’rs, Socorro Cty.*, 1901NMSC002, ¶ 3, 10 N.M. 670, 65 P. 181. When New Mexico became a territory, the overwhelming majority of its population consisted of native-born New Mexicans. See Holscher, *supra*, at 31 (“In 1850, ninety-five percent of New Mexico’s population was native born, either Hispano or Native American.”). Catholic Church leaders established new parochial schools during the early territorial days, and the Church maintained control over education in New Mexico into the 1870s. See Dianna Everett, *The Public School Debate in New Mexico: 1850-1891*, 26 Arizona and the West 107, 108-09 (1984) (describing the work of “the first bishop of the Diocese of Santa Fe, John B. Lamy,” and “Father Donato Maria Gasparri, Superior of the Society of Jesus in New Mexico”). Both New Mexico’s public schools and its parochial schools employed members of the Catholic clergy as teachers and used textbooks published by a Catholic printing press. See Howard R. Lamar, *The Far Southwest 1846-1912: A Territorial History* 144-45 (rev. ed. 2000); see also Holscher, *supra*, at 38 (explaining that “schools taught by Catholic religious” were some of the first to receive public funding and that a Jesuit printing press “supplied textbooks to many of the territory’s tax-supported schools”). New Mexico remained “overwhelmingly Spanish-American in culture . . . and Roman Catholic in religion” throughout the territorial period. See Lamar, *supra*, at 3.

{38} Although native New Mexicans remained a majority, the number of Anglo-American Protestants in New Mexico increased significantly between 1850 and 1910. See Holscher, *supra*, at 31. “Anglo-American transplants to New Mexico introduced a series of proposals for public education.” Holscher, *supra*, at 26. These proposals met resistance because they “relied on the familiarly Protestant objection to sectarianism” and sought “to eliminate Catholic influence.” *Id.* at 38, 40; see also Lamar, *supra*, at 144-45, 162-64 (describing opposition to public school proposals by Catholic Church leaders and Spanish-American members of the legislature); Charles E. Smith, *The New Mexico State Constitution* 13 (2011) (“[T]he Catholic Church had enjoyed the position of primacy in education for three

centuries, and Catholic leaders were suspicious of public schools.”). “Between 1850 and 1891, New Mexico’s government failed at multiple attempts to inaugurate a system of tax-supported schools.” Holscher, *supra*, at 37. The ongoing debate over public education evidenced “mounting hostility between public education advocates and the Archdiocese of Santa Fe,” Holscher, *supra*, at 38, and was one of the most pressing problems facing the territorial legislature, see Larson, *supra*, at 65.

{39} Perceived problems with New Mexico’s educational system and widespread illiteracy also posed obstacles to New Mexico becoming a state. See David V. Holtby, *Forty-Seventh Star: New Mexico’s Struggle for Statehood* 54-55 (2012); Holscher, *supra*, at 38-39; Lamar, *supra*, at 162; Larson, *supra*, at 65, 124-25. Concerns about New Mexico’s educational system were exacerbated by “strong prejudice toward [its] Spanish-speaking, Roman Catholic people.” See Larson, *supra*, at 303-04; see also *State ex rel. League of Women Voters of N.M. v. Advisory Comm. to the N.M. Compilation Comm’n*, 2017NMSC025, ¶¶ 29, 32, 401 P.3d 734 (concluding that “decades of hostility toward New Mexico’s Spanishspeaking population” delayed New Mexico’s admission to the union); Larson, *supra*, at 124-25 (explaining that the “Catholicism of native New Mexicans was used in a particularly insidious way” and that the Catholic Church was implicated “in the high percentage of illiteracy”). “Anglo-Protestant apprehension about Catholic influence motivated official scrutiny of the Church’s role in schooling as soon as New Mexico became part of the United States.” Holscher, *supra*, at 37; see also Lamar, *supra*, at 144 (explaining that officials viewed New Mexico’s schools with disfavor because classes were “Catholic in orientation” and taught in Spanish). “[B]y the last quarter of the century everyone understood that the territory’s prospects for joining the Union depended upon the condition of its educational system. Above all, statehood would require schools free from Catholic influence.” Holscher, *supra*, at 38.

{40} In 1891, the territorial legislature passed “an act establishing common schools in the territory of New Mexico and creating the office of superintendent of public instruction.” 1891 N.M. Laws, ch. 25. The 1891 act was “intended to establish a comprehensive and harmonious system of public schools throughout the territory.” *Water Supply Co. of Albuquerque v.*

City of Albuquerque, 1898NMSC023, ¶ 9, 9 N.M. 441, 54 P. 969. The 1891 act made school attendance compulsory and served as a precursor to the IML by authorizing free textbooks for a child whose “parent or guardian [was] not able by reason of poverty to buy books.” 1891 N.M. Laws, ch. 25, § 42. In 1903, the 1891 act was amended to clarify that the textbooks were only loaned to the children and that ownership remained with the school districts. See 1903 N.M. Laws, ch. 39, § 2.

{41} When Congress passed the Enabling Act for New Mexico in 1910, New Mexico’s centralized public school system had been in place for almost two decades. “New Mexico held a constitutional convention that same fall in Santa Fe, and nearly a third of the convention’s one hundred elected delegates were native Spanish-speakers.” *State ex rel. League of Women Voters of N.M.*, 2017NMSC025, ¶ 32. The delegates drafted an array of constitutional provisions related to education. Consistent with the 1891 act, the New Mexico Constitution requires the state to establish and maintain a “uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state.” N.M. Const. art. XII, § 1. The Constitution also includes explicit protections for the educational rights of New Mexico’s Spanish-speaking citizens. *State ex rel. League of Women Voters of N.M.*, 2017NMSC025, ¶ 26; see N.M. Const. art. XII, § 8 (“The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanishspeaking pupils and students in the public schools and educational institutions of the state, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students.”); N.M. Const. art. XII, § 10 (“Children of Spanish descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the state, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the state, and the legislature shall provide penalties for the violation of this section.”). The provisions protecting the educational rights of Spanish speakers were safeguarded with a heightened amendment require-

ment and cannot be changed without at least threefourths of the popular vote in a statewide election. *State ex rel. League of Women Voters of N.M.*, 2017NMSC025, ¶¶ 25-26.

{42} The constitutional delegation that incorporated explicit protections for Spanish-speaking students into the New Mexico Constitution also drafted Article XII, Section 3, which extended the Enabling Act’s restrictions on public funding for “sectarian [and] nondenominational school[s]” to also include “private schools.” We cannot ascertain what motivated the delegates to draft Article XII, Section 3. See *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (noting the difficulty of “determining the actual motivations of the various legislators” that make up a constitutional delegation); see also Smith, *supra*, at 17 (noting that no verbatim record was made of the constitutional convention). But under the circumstances, it appears that the drafters of Article XII, Section 3 intended to create a provision that would be acceptable to New Mexico voters while fulfilling the mandate set forth in the New Mexico Enabling Act. See Dorothy I. Cline, *New Mexico’s 1910 Constitution: A 19th Century Product* 26-27, 45 n.31, 46 (1985) (explaining that despite a deep political divide between Republicans and Democrats, the constitutional delegates “agreed it was essential to guarantee the civil, religious and political rights” of native New Mexicans). In the absence of sufficient proof that New Mexico adopted Article XII, Section 3 for a discriminatory purpose, we decline to impute an impermissible motive to the constitutional delegation and New Mexico voters, who approved the Constitution “by an overall majority of three to one.” See Cline, *supra*, at 52.

5. We adopt a construction of Article XII, Section 3 that avoids free exercise concerns

{43} Even though it appears that the people of New Mexico intended for Article XII, Section 3 to be a religiously neutral provision, the history of the federal Blaine amendment and the New Mexico Enabling Act lead us to conclude that anti-Catholic sentiment tainted its adoption. New Mexico was caught up in the nationwide movement to eliminate Catholic influence from the school system, and Congress forced New Mexico to eliminate public funding for sectarian schools as a condition of statehood. In *Moses II*, this Court looked to the history of the federal Blaine amendment and the Enabling Act to conclude

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Message from the YLD Chair

When I first moved back to Albuquerque after law school, attending events sponsored by the State Bar of New Mexico Young Lawyers Division was a crucial part of how I built my network here. Like me, I'm sure many of you have had to figure out how to succeed in your workplace, how to obtain the substantive knowledge you need to be an excellent attorney in your field, and pondered career and job changes.

As the 2019 Chair of the YLD, my top priority is providing programs and resources that support you. Whether through networking, professional development, or public service, if you want to get involved, we have an opportunity for you.

We have a lot to offer you in 2019. This year, we'll offer more #fit2practice events that are designed to strengthen your mental, emotional, and physical health. Some of these events will be for CLE credit! We will also host receptions for the spring and fall swearing-in ceremonies, and I hope you'll join me in warmly welcoming the newest members of our profession.

You are a member of the YLD if you're 35 years old or younger, or if you've been practicing for five years or less, whichever period of time is longer. We offer you numerous ways to engage in fellowship through public service. I know that time is a valuable resource for all of us, but I hope you'll agree with me that public service is always worth your time. You can be part of something bigger than yourself and know that you've helped provide access to legal services for someone who needed it. As lawyers, we are uniquely trained to provide a crucial service to the community, and the YLD provides many opportunities to serve through programs like the Veterans Legal Clinic, Homeless Legal Clinics, Wills for Heroes, Constitution Day Week, and Law Day Call In. In addition, as part of the American Bar Association Young Lawyers Division's National Week of Service, we will host a Home Safe Home Pro Bono Fair on March 16 that will connect you with community organizations that need volunteer attorneys to help fight domestic violence.

If you have an idea for a program we can offer, or if you want more information on how you can be involved, reach out and let me know! Email me at soniarusso09@gmail.com, or call me at (505) 269-0369. The YLD is here for you, and I'm excited to hear about new ways that we can support you. Please also follow @NewMexicoYLD on Facebook, Instagram, and Twitter for program information and updates from us! I look forward to a great year of building friendships and serving our community.

Sincerely,

Sonia R. Russo

Sonia R. Russo

Meet the Board



Sonia Raichur Russo
Chair
Director-at-Large, Position 4

Sonia Raichur Russo is a law clerk for New Mexico Court of Appeals Judge J. Miles Hanisee. She previously clerked for U.S. Magistrate Judge Gregory Fouratt in the District of New Mexico and New Mexico Court of Appeals Judge Henry Bohnhoff. She also serves as the American Bar Association Young Lawyers Division's Public Service Director and is on the Federal Bar Association Young Lawyers Division's Board of Directors. Prior to clerking, Sonia prosecuted violent felonies, including homicides and domestic violence, at the Second Judicial District Attorney's Office in Albuquerque, NM. Sonia started her career as a litigation associate at Modrall Sperling, also in Albuquerque.

Sonia earned her Bachelor of Arts degree in Political Science from Brown University and her law degree from Boston College Law School. At her law school commencement ceremony, Sonia was awarded the Susan Grant Demarais Award for Excellence in Clinical Work for her work as a student attorney in the BC Law Prosecution Clinic. Her interests include going on adventures with her adopted shelter dog, Milo, travel, performing and visual arts, and tennis.



Allison H. Block-Chavez
Chair-elect
Director-at-Large, Position 1

Allison Block-Chavez is an attorney at Aldridge, Hammar, Wexler & Bradley, PA, in Albuquerque, where her law practice focuses on fiduciary services, adult guardianships and conservatorships, estate planning, and probate matters, real estate, and creditors' rights. Allison graduated from the University of New Mexico School of Law and served as the judicial law clerk for Chief Judge Michael E. Vigil of the New Mexico Court of Appeals. In addition to serving on the board for the Young Lawyers Division, she also serves on the board for the Elder Law Section of the State Bar of New Mexico. She is New Mexico's young lawyer delegate to the ABA House of Delegates.



Shasta N. Inman
Vice Chair
Director-at-Large, Position 2

Shasta N. Inman is in solo practice, working primarily in Children's Law & Adult Guardianship. She earned her law degree and a Master of Arts in Gender & Women's Studies from the University of Arizona, James E. Rogers College of Law. She currently serves on the Children's Law Section Board as Secretary and is a prior YLD Liaison to the Elder Law Section. Shasta is also an American Bar Association Young Lawyers Division Scholar for 2018-2019. In her spare time, she enjoys playing video and board games, and hanging out with her rabbit, Peanut Bunny.



Evan Cochnar
Director-at-Large, Position 3

Evan Cochnar serves as Director-at-Large Position 3, and previously served on the YLD board as Region 1 Director. He is a graduate of the University of New Mexico and Syracuse University College of Law. He currently works as a criminal prosecutor at the Second Judicial District Attorney's Office in Albuquerque, having previously worked at the City of Albuquerque, and at the 11th Judicial District Attorney's Office in Farmington, New Mexico. He has also worked at the United States Attorney's Office for the District of New Mexico, and in the United States Senate for former Senator Jeff Bingaman. In his free time, Evan enjoys running, traveling, and getting into adventures.

Meet the Board



Billy J. Jimenez

Director-at-Large, Position 5

Billy Jimenez serves as Director-At-Large, Position 5. He is an associate attorney at the ADAMS+CROW LAW FIRM, practicing in the areas of civil litigation, administrative law, and environmental law. Billy has been on the YLD Board since 2015, first serving as the ABA YLD District Representative for New Mexico and Arizona. He has co-chaired the Wills For Heroes and UNM School of Law Mentorship Programs, and serves as YLD's representative for the NMHBA/UNM Law Camp and the Annual ABA YLD Mountain States Regional Summit.



Mariah McKay

Region 1 Director
Eleventh Judicial District

Mariah McKay is currently an Assistant District Attorney for the Eleventh Judicial District Attorney's Office, Division One, in Farmington, New Mexico. Before coming to the District Attorney's Office, Mariah was a Staff Attorney for DNA-People's Legal Services, as well as the Victims of Crime Act (VOCA) project manager. Mariah attended law school at American University Washington College of Law, in Washington, DC. In Farmington, Mariah is an active member of the San Juan County Sexual Assault/ Domestic Violence Community Coordinated Response Team and the San Juan County Bar Association. As a native of Wyoming, Mariah is happy to be back in the west, and appreciates the opportunity to serve San Juan County, and the Young Lawyers of New Mexico.



Breanna Contreras

Region 2 Director
First, Fourth, Eighth and 10th
judicial districts

Breanna Contreras is an intellectual property attorney with Bardacke Allison LLP in Santa Fe, New Mexico. She was born and raised in Albuquerque, New Mexico and received her undergraduate degree from University of New Mexico before attending Notre Dame Law School where she served as Vice President of the Hispanic Law Students Association. Breanna represents a variety of clients in brand strategy, trademark and copyright registration and licensing, and enforcement of intellectual property rights. Among the clients Breanna is proud to represent are her hometown hero UFC fighter Holly Holm and Fresquez Productions in matters ranging from UFC contracts to sponsorship and endorsement deals. Most recently, Breanna was named a 2018 Rising Star by Super Lawyers, an accolade reserved to only the top 2.5% of attorneys in the Southwest.

Breanna is actively involved in her community, and serves on a number of boards, including for the Catholic Foundation of the Archdiocese of Santa Fe and the Intellectual Property Law Section of the State Bar of New Mexico. She has served as an adjunct faculty member for the Santa Fe Community College where she taught Legal and Business Issues in the Arts, and regularly gives Continuing Legal Education conferences on contemporary intellectual property law issues. Before law school, Breanna worked as a bilingual legal assistant at Catholic Charities of Central New Mexico, where she served immigrant victims of domestic violence in pursuing non-immigrant legal status.



Alex E. Reynolds

Region 3 Director
Fifth and Ninth judicial districts

Alex E. Reynolds is a Texas native who works as an associate at the law firm Sanders, Bruin, Coll & Worley, P.A. His practice areas include personal injury, general civil litigation, and medical malpractice. He earned his bachelor's degree from Texas Tech University and subsequently earned an MBA from the University of Texas at Tyler. After earning his MBA, Alex returned to Texas Tech to earn his J.D. concurrently with a Master of Science in Personal Financial Planning. While at Tech, Alex served as president of the local Federalist Society chapter and remains a supportive member. Outside of work, Alex is an avid racquetball player and enjoys reading a variety of subjects.

Meet the Board



Jessica Streeter

Region 4 Director
Third, Sixth and Twelfth judicial
districts and Sierra County

Jessica Streeter practices family law at Streeter & Martinez-Salopek, LLC. Previously, Streeter worked as a Special Assistant Attorney General for the Human Services Department and as a trial attorney at the Law Offices of the Public Defender. Streeter was a member of the Roswell juvenile drug court team, has been a CLE presenter on jurisdictional issues in family law, and serves on the board of a non-profit organization. A Las Cruces native, Streeter earned her B.A. from NMSU and her J.D. from the UNM School of Law. While in law school, Streeter was awarded the ABA/BNA Award recognizing Excellence in Health Law. She was an editor of the National Resources Journal, a tutor of Legal Writing and Research, and served as Mentorship Chair and Co-President of the Mexican American Law Student Association. In her spare time, Streeter enjoys traveling and spending time with family and friends.



Darin Kyle McDougall

Region 5 Director
Second and Thirteenth judicial
districts and Catron, Socorro and
Torrance counties

Darin Kyle McDougall graduated from the University of New Mexico School of Law in 2015. Upon graduating, he chose to serve the community through his work at the Law Offices of the Public Defender. Currently he is an Associate Attorney at the Law Offices of Lynda Latta specializing in family law and criminal defense.

Darin has served as the Region 5 Director on the New Mexico Young Lawyers Division board since January 2017. He is a member of various State Bar sections and is involved in volunteer legal clinics. Darin co-chairs several YLD programs that do outreach to law students such as the Mock Interview, Law Student Mentorship, and Speed Networking programs. Darin also works on the Constitution Day project and a student essay contest. Darin is on an ongoing mission to remind the attorneys of New Mexico that our noble profession can be fun and fulfilling through volunteerism and professional courtesy.



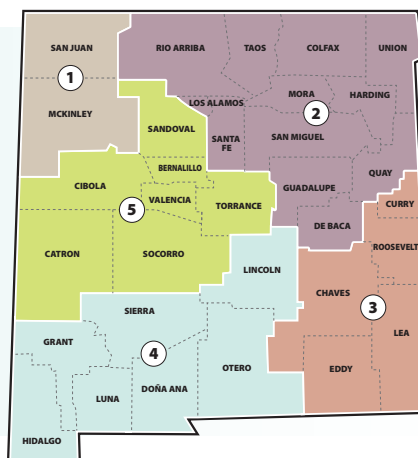
Sean M. FitzPatrick

Immediate Past Chair

Sean FitzPatrick is a graduate of UNM School of Law and currently practices plaintiff's civil litigation focusing on personal injury in Albuquerque, NM at FitzPatrick Law, LLC. FitzPatrick prosecuted a variety of felony and misdemeanor cases after law school at the 11th Judicial District Attorney's office. FitzPatrick continues to serve in many of the YLD programs as either a member or as co-chair of the program including Wills for Heroes, Veterans Legal Clinic, and the UNM School of Law Mentorship Program.

Young Lawyers Division Region Map

- Region 1 11th Judicial District
- Region 2 First, Fourth, Eighth and 10th judicial districts
- Region 3 Fifth and Ninth judicial districts
- Region 4 Third, Sixth and 12th judicial districts and Sierra County
- Region 5 Second and 13th judicial districts and Catron, Socorro and Torrance counties



that Article XII, Section 3 was intended to preclude any whisper of support for *private* schools. *Moses II*, 2015-NMSC-036, ¶¶ 19-24, 32. After *Trinity Lutheran* and the cases interpreting the Free Exercise Clause that have followed, we must reconsider our conclusion through a different lens, one that focuses on discriminatory intent.

{44} Prior to *Trinity Lutheran*, this Court's interpretation of Article XII, Section 3 in *Moses II* fell into the "play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause requires. See *Locke*, 540 U.S. at 719 (noting that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause"). In other words, in *Moses II* we concluded that New Mexico's interest in restricting public funding for *private* schools was a lawful basis for restricting funding for *religious* schools. Following *Moses II*, the Supreme Court emphasized that the Free Exercise Clause is implicated by a law that "single[s] out the religious for disfavored treatment." *Trinity Lutheran*, 137 S. Ct. at 2020. The Supreme Court has since underscored the state's constitutional duty to avert religious discrimination. See *Masterpiece Cakeshop*, 138 S. Ct. at 1731 ("The Constitution commits government itself to religious tolerance, and upon even *slight suspicion* that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."). Thus, we conclude that this Court's previous interpretation of Article XII, Section 3 in *Moses II* raises concerns under the Free Exercise Clause.

{45} When interpreting the New Mexico Constitution, we avoid a construction that raises concerns under the federal constitution. See *State v. Radosevich*, 2018NMSC028, ¶ 8, 419 P.3d 176 (recognizing "the well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions" (internal quotation marks and citation omitted)); *State ex rel. State Highway Comm'n v. City of Aztec*, 1967NMSC046, ¶ 9, 77 N.M. 524, 424 P.2d 801 ("[P]rinciples governing the construction of statutes apply also to the interpretation of constitutions[.]"). When a state constitutional provision "is susceptible to two constructions, one supporting it and the other rendering it void," this Court "should adopt the construction which upholds its constitutionality." See *N.M. State*

Bd. of Educ. v. Bd. of Educ. of Alamogordo Pub. Sch. Dist. No. 1, 1981NMSC031, ¶ 26, 95 N.M. 588, 624 P.2d 530.

{46} To avoid constitutional concerns, we adopt a construction of Article XII, Section 3 that does not implicate the Free Exercise Clause under *Trinity Lutheran*. We have previously held that Article XII, Section 3 serves the dual purposes of ensuring that the state maintains control over the public education system and that the public schools do not become religious schools. *Prince v. Bd. of Educ. of Cent. Consol. Indep. Sch. Dist. No. 22*, 1975NMSC068, ¶ 20, 88 N.M. 548, 543 P.2d 1176. The IML neither divests the state of control over the public schools nor affects the non-religious character of the public schools. Like the 1891 act establishing New Mexico's public school system, the IML grants students access to appropriate textbooks regardless of their parents' financial resources, which helps students fulfill their duty to attend school. See N.M. Const. art. XII, § 5 (making school attendance compulsory); NMSA 1978, § 22-12-2(A) (2015) (same). The textbook loan program furthers New Mexico's legitimate public interest in promoting education and eliminating illiteracy. See NMSA 1978, § 22-1-1.2(E) (2015) (setting forth the Legislature's finding that "improving children's reading and writing abilities and literacy throughout their years in school must remain a priority of the state"). We conclude that the IML provides a public benefit to students and a resulting benefit to the state. Any benefit to private schools is purely incidental and does not constitute "support" within the meaning of Article XII, Section 3. We hold that loaning secular textbooks to private school students under the IML does not violate Article XII, Section 3.

C. The IML Does Not Result in Any Appropriation to a Person or Entity Not Under the Absolute Control of the State as Prohibited by Article IV, Section 31

{47} Petitioners argue that lending textbooks to private school students under the IML violates Article IV, Section 31, which provides in relevant part, "No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state." The Department and Intervenors argue that the IML does not implicate Article IV, Section 31. We agree with the Department and Intervenors.

{48} Article IV, Section 31 imposes limits on the Legislature's authority to appropriate money. Under the IML, appropriations are made only to the Department. See § 22-15-5(A). The Department is an executive agency established by the New Mexico Constitution and is under the absolute control of the state. See N.M. Const. art. XII, § 6(A); see also NMSA 1978, § 22-2-1(B) (2004) (setting forth the general powers of the Department). The IML does not result in an appropriation to any person or entity not under the absolute control of the state. The fact that students derive a benefit from the IML does not implicate Article IV, Section 31. Compare *State ex rel. Interstate Stream Comm'n v. Reynolds*, 1963-NMSC-023, ¶¶ 16-17, 71 N.M. 389, 378 P.2d 622 (holding that although certain communities and nonprofit organizations would benefit from appropriations to the State Engineer, the appropriations did not implicate Article IV, Section 31 because the State Engineer retained absolute control over their expenditure), with *Harrington v. Atteberry*, 1915-NMSC-058, ¶¶ 66-67, 21 N.M. 50, 153 P. 1041 (Hanna, J., concurring in result) (majority of three-justice panel concluding that appropriation of funds to the fair association violated Article IV, Section 31 because the funds did not remain under the control of the state). We hold that the IML does not result in any appropriation to a person or entity not under the absolute control of the state as prohibited by Article IV, Section 31.

D. Loaning Textbooks to Students Under the IML Does Not Constitute a Donation to Any Person or Entity as Prohibited by Article IX, Section 14

{49} Petitioners argue that lending textbooks to private school students under the IML violates the anti-donation clause of Article IX, Section 14, which provides, "Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation." Petitioners do not contend that the IML results in the lending or pledging of government credit. Thus, the IML implicates the anti-donation clause only if a textbook loan constitutes a "donation" within the meaning of Article IX, Section 14. The Department and Intervenors argue that the IML does not violate Article IX, Section 14 because a textbook loan is not a donation. We agree with the Department and Intervenors.

{50} This Court has defined donation, for purposes of Article IX, Section 14, as “a gift, an allocation or appropriation of something of value, without consideration.” *Vill. of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 36, 62 N.M. 18, 303 P.2d 920 (per curiam) (internal quotation marks omitted). Article IX, Section 14 permits “incidental aid or resultant benefit to a private corporation or other named recipients” unless the aid or benefit “by reason of its nature and the circumstances surrounding it, take on character as a donation in substance and effect.” *Vill. of Deming*, 1956-NMSC-111, ¶¶ 34, 37. This Court has found violations of the anti-donation clause in circumstances involving an outright gift of public money to a private individual or entity. *See, e.g., Chronis v. State ex rel. Rodriguez*, 1983NMSC081, ¶¶ 24, 30, 100 N.M. 342, 670 P.2d 953 (holding that a law granting liquor licensees a credit against gross receipts taxes owed to state constituted an unconstitutional subsidy to the liquor industry); *State ex rel. Mechem v. Hannah*, 1957NMSC065, ¶¶ 18, 40, 63 N.M. 110, 314 P.2d 714 (holding unconstitutional a law granting “an outright gift” of public funds to ranchers and farmers to purchase livestock feed in times of drought); *Hutcheson v. Atherton*, 1940NMSC001, ¶¶ 24, 35, 44 N.M. 144, 99 P.2d 462 (holding unconstitutional the appropriation of bond money to finance auditoriums for use by private corporations because the aid was “direct and substantial”).

{51} In this case, the textbook loan program does not involve any donation or gift to students or private schools. The Department merely loans textbooks to students for use while attending school. *See* §§ 22-15-7, 22-15-10(B). The Department retains ownership and control over the textbooks and the fund used to purchase them. *See* §§ 22-15-4(B), 22-15-5(A), 22-15-10(E). We hold that loaning textbooks to students under the IML does not involve a donation to any person or entity as prohibited by Article IX, Section 14.

E. Equal Protection Clauses of the State and Federal Constitutions

{52} The Department and Intervenors argue that excluding private school students from participation in the textbook loan program violates the equal protection guarantees of the state and federal constitutions. *See* U.S. Const. amend. XIV,

§ 1; N.M. Const. art. II, § 18. We decline to address these arguments because we conclude that private school students may participate in the textbook loan program. *See Trinity Lutheran*, 137 S. Ct. at 2024 n.5 (deciding the case on free exercise grounds and declining to reach the equal protection claim raised by the church).

III. CONCLUSION

{53} We hold that the textbook loan program established by the IML does not violate Article IV, Section 31; Article IX, Section 14; or Article XII, Section 3 of the New Mexico Constitution. We reinstate the provisions of the IML that allow private school students to participate in the textbook loan program.

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

BARBARA J. VIGIL, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Justice

CHARLES W. DANIELS, Justice

JUDITH K. NAKAMURA, Chief Justice, dissenting

GARY L. CLINGMAN, Justice, joining in dissent

NAKAMURA, Chief Justice (dissenting).

{55} *Moses II* correctly concluded that the provision of school books under the IML to students who attend *private schools*—whether secular or religious—violates the plain language of Article XII, Section 3. *Moses II*, 2015-NMSC-036, ¶ 2. Understanding what *Trinity Lutheran* does and does not do makes clear that this Court should not abandon this conclusion.

{56} *Trinity Lutheran* holds that, “[i]f a state awards grants, on religiously neutral criteria, to create safer playground surfaces, it cannot exclude an otherwise eligible playground simply because it is owned by a church. Such discrimination against religion violates the Free Exercise Clause, and awarding the grant would not violate the Establishment Clause.” Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 Harv. L. Rev. 133, 133 (2017); *see Trinity Lutheran*, 137 S. Ct. at 2024. At the heart of the *Trinity Lutheran* Court’s holding is the following thought: “If the state neutrally supports playground surfaces for reli-

gious and secular daycares alike, and for religious daycares of different faiths, it is supporting daycares, or just playgrounds, but not religion. Equal funding gives the religious daycares no advantage; funding only secular daycares would put religious daycares at a disadvantage.” Laycock, *supra*, at 147. This thought is not a departure from settled First Amendment principles.

{57} The conclusion in *Trinity Lutheran* that Missouri cannot disqualify an applicant for a public benefit “solely because of its religious character,” 137 S. Ct. at 2024, advances the “core principles of the Religion Clauses: that government should not penalize any person because of his religion, and that government should be neutral with respect to the people’s religious choices and commitments.” Laycock, *supra*, at 148. *But see Trinity Lutheran*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting) (“The Court today profoundly changes th[e] relationship [between church and state] by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country’s longstanding commitment to a separation of church and state beneficial to both.”). This is an adequate summary of what *Trinity Lutheran* does. We need to understand with equal certainty what *Trinity Lutheran* does not do.

{58} Footnote three of Chief Justice Robert’s opinion for the Court² points out that *Trinity Lutheran* “involves *express discrimination* based on religious identity” and clarifies that *Trinity Lutheran* does not “address religious uses of funding or *other forms of discrimination*.” 137 S. Ct. at 2024 n.3 (emphasis added). In other words, “[f]ootnote three carefully limits the reach of the opinion” and “reserve[s]” the very issue before this Court on remand: whether a very different form of alleged discrimination than that considered in *Trinity Lutheran* is also an unconstitutional abridgment of religious liberty. Laycock, *supra*, at 134-35.

{59} The “discrimination” we are faced with here, on remand, is “public-private, not religious-secular.” *Id.* at 167. This difference is critical. Because of this difference, “motive” becomes essential. *Id.* at 167-68. The question remand to this Court prompts is this: was Article XII, Section 3 “adopted because of a desire to prohibit

² Footnote three was joined by four justices (including the Chief Justice), but has unquestionable significance for future cases (like this one) given how the other Justices proposed to resolve *Trinity Lutheran*. Laycock, *supra*, at 135-36.

funding for Catholic education?” Laycock, *supra*, at 167. “If [Article XII, Section 3] was motivated by anti-Catholicism, it should be unconstitutional.” Laycock, *supra*, at 168. This is because, “[w]here sufficient evidence of motive is available, *Trinity Lutheran* should extend to cases of antireligious discrimination shrouded in facially neutral provisions.” Laycock, *supra*, at 169. Careful attention must be paid to the instances of the word “should” in the two preceding sentences.

{60} *Trinity Lutheran* does not resolve the question presented on remand. Laycock, *supra*, at 134. We can only make educated guesses about how the United States Supreme Court will resolve the issues reserved, and we will only know whether those guesses are correct when the Supreme Court takes up the “next round of cases.” *Id.* at 169. While we eagerly await future guidance, we must nevertheless answer the question before us: whether there is sufficient evidence that the motivations for the enactment of Article XII, Section 3 were discriminatory. I cannot conclude sufficient evidence exists.

{61} “In determining if the object of a law is a neutral one under the Free Exercise Clause, we can . . . find guidance in . . . equal protection cases.” *Lukumi*, 508 U.S. at 540. In the equal protection context, a litigant claiming that a facially neutral provision is unconstitutional because it emanates from discriminatory motives is required to establish that the provision did in fact arise from discriminatory motives. *See Hunter*, 471 U.S. at 227-28; *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (“Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State.”). Only after making such a showing must the proponent of the provision’s constitutionality attempt to rebut the claim. *Hunter*, 471 U.S. at 227-28.

{62} “Proving the motivation behind official action is often a problematic undertaking.” *Id.* at 228. This is particularly true when the official action under review is the drafting of a constitutional provision that occurred a century ago. *See id.* The problem is only further compounded when the provision under scrutiny is neutral and constitutional on its face. *Id.*

{63} The history the majority recounts suggests that a straight line of anti-Catholic bigotry runs from the motivations underlying the Blaine Amendment to Article XII, Section 3. *Maj. Op.* ¶¶ 12-17, 43.

This history, first explicated in *Moses II*, purports to establish that anti-Catholic animus prompted the Blaine Amendment, which was in turn incorporated into the Enabling Act (most directly) at Section 8, which was in turn the basis for Article XII, Section 3. *Maj. Op.* ¶¶ 12-17, 43. *Moses II* was too quick to conclude that the root of this series of events was, in fact, anti-Catholic bigotry.

{64} “Those who characterize the Blaine Amendment as a singular exercise in Catholic bigotry . . . give short shrift to the historical record and the dynamics of the times.” Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295, 296 (2008).

The Blaine Amendment had as much to do with the partisan climate of the postReconstruction era and related concerns about federal power over education as it did with Catholic animus. Included in the mix was a sincere effort to make public education available for children of all faiths and races, while respecting Jeffersonian notions of churchstate separation.

Id. (internal quotation marks and citation omitted). Any attempt at a summary of the many social forces at play in the lead-up to the creation of the Blaine Amendment is beyond the scope of this dissent. *See generally id.* It suffices to state that there is reason to doubt the first link in the chain of inferences that must be accepted to conclude that Article XII, Section 3 was motivated by anti-Catholic animus (i.e., that anti-Catholic animus was the sole force behind the Blaine Amendment). The next link—that between the Blaine Amendment and the Enabling Act—is equally susceptible to attack.

{65} The suggestion that the motives underlying the Blaine Amendment (whatever they were) were shared by the drafters of the Enabling Act is problematic. The enabling act

which authorized the statehood of Arizona and New Mexico contained the proviso that both nascent states must have constitutional language forbidding public funding to sectarian schools. Opponents of the Blaine Amendment claim that the same antiCatholic animus behind the federal Blaine Amendment motivated this mandate to new states in the enabling acts. How-

ever, a recent study by historians prepared in an amicus brief to *Locke v. Davey* found that no evidence of antiCatholic bigotry lay behind a similar enabling act for Washington State that same year, and the Supreme Court noted in a footnote that the history of the federal Blaine Amendment was not relevant to consideration of Washington’s similar provision.

Jill Goldenziel, *Blaine’s Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 Denv. U. L. Rev. 57, 79-80 (2005) (footnotes omitted). The “legal and religious historians and law scholars who” authored the amicus brief in *Locke* point out that “[m]any state constitutions . . . contain nofunding provisions [like Article XII, Section 3] that have nothing to do with antiCatholicism or nativist sentiment.” Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners Gary Locke, et al., *Locke v. Davey*, 540 U.S. 712 (2004) (No. 021315), 2003 WL 21697729 at 1, 4. They further note that “[t]he nofunding principle, as applied to educational matters, arose independently of and prior to the rise of Catholic parochial schooling and the organized nativist movement of the midnineteenth century.” *Id.* at 2.

{66} These authorities are offered not as indisputably correct and definitive; rather, they merely illuminate the complexity of the historical questions before us: What, precisely were the motives behind the Blaine Amendment? How, exactly, did those motives influence the drafters of the Enabling Act? And how, specifically, did these events influence the drafters of Article XII, Section 3? It is because the answers to these difficult questions are uncertain at best and because we must “eschew guesswork” that other interpretive tools must be prioritized. *Hunter*, 471 U.S. at 228, (internal quotation marks and citation omitted).

{67} As *Moses II* observes, the drafters of our state constitution made a significant drafting decision when writing Article XII, Section 3. *Moses II*, 2015-NMSC-036, ¶ 27. Unlike Section 8 of the Enabling Act which “precludes the use of public funds for the support of sectarian or denominational schools[,]” Article XII, Section 3 restricts the use of public funds for “the much broader category of *private schools*.” *Moses II*, 2015-NMSC-036, ¶ 27 (emphasis added). *Moses II* correctly notes that this drafting choice is self-evidently significant: “The

members of the Constitutional Convention chose to play it safe—by broadening [Article XII, Section 3] to reach all private schools, they avoided drawing a line between secular and sectarian education.” *Id.* ¶ 27. In other words, the drafters of Article XII, Section 3 took affirmative measures to decouple the provision from the problematic language in the Enabling Act. Our understanding of the drafter’s motives must incorporate these measures, which strongly suggest that their motives were not discriminatory but the opposite. The majority seems in agreement with this point.

{68} The majority ultimately concludes that they cannot “impute an impermissible motive to the constitutional delegation[,]” *Maj. Op.* ¶ 42, and doubt that it is possible to “ascertain what motivated the delegates to draft Article XII, Section 3.” *Maj. Op.* ¶ 42. They do accept, however, that “the constitutional delegates agreed it was essential to guarantee the civil, religious, and political rights of the native New Mexicans[,]” who were largely Catholic. *See Maj. Op.* ¶¶ 37, 42. It is difficult to see how the majority’s conclusions and concessions do not end the inquiry in this case and dictate the outcome.

{69} “Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 277 (1979). It “implies more than intent as volition or intent as awareness of consequences.” *Id.* “It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.” *Id.* (internal quotation marks omitted).

{70} Respondents have not established that Article XII, Section 3 was the product of impermissible, discriminatory motives, and the majority appears to recognize this. All that has been established is that Article XII, Section 3 is guilty by association. *See Maj. Op.* ¶ 43 (“Even though it appears that the people of New Mexico intended for Article XII, Section 3 to be a religiously neutral provision, the history of the federal Blaine amendment and the New Mexico Enabling Act lead us to conclude that anti-Catholic sentiment *tainted its adoption*.” (emphasis added)). But this is insufficient and does not amount to discriminatory intent or purpose as the United States Supreme Court has defined this concept.

{71} Moreover, the claim of guilt by association here is doubtful as the history associated with the Blaine Amendment

and Enabling Act are unclear at best. We are left wondering: With what, exactly, is Article XII, Section 3 guilty of associating? More critically, “[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.” *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (internal quotation marks and citation omitted). The drafters of our constitution took affirmative measures to avoid becoming ensnared by the nativist discrimination—to whatever extent it existed—in the Blaine Amendment and Enabling Act. We should not ignore these efforts and condemn the drafters to be forever and inescapably associated with a viewpoint the majority acknowledges the drafters of Article XII, Section 3 did not embrace.

{72} *Moses II*’s conclusion that the plain language of Article XII, Section 3 prohibits the state from loaning textbooks to children enrolled in private schools does not run afoul of the principles articulated in *Trinity Lutheran*. There is insufficient evidence Article XII, Section 3 stems from discriminatory motives. Respondent and Intervenor’s renewed free-exercise claims fail. The majority disagrees and embraces a construction of Article XII, Section 3 that is inconsistent with the provision’s plain language and permits the state to loan secular textbooks to private school students, including religious students. *See Maj. Op.* ¶ 46. They do so to “avoid constitutional concerns,” but these are concerns that do not exist. *Id.*

{73} Because the conclusions in *Moses II* survive *Trinity Lutheran* and because the IML violates Article XII, Section 3, there is no need to address whether the IML also violates Article IV, Section 31 or Article IX, Section 14 of our state constitution. *See Baca v. N.M. Dep’t of Pub. Safety*, 2002-NMSC-017, ¶ 12, 132 N.M. 282, 47 P.3d 441 (noting that courts exercise judicial restraint by deciding cases on the narrowest possible grounds and avoid reaching unnecessary constitutional issues).

{74} The majority does not address Respondent and Intervenor’s arguments that interpreting Article XII, Section 3 to preclude the provision of books to private schools gives rise to a violation of our state constitution’s equal protection clause. The majority need not do so given their resolution of this matter. *See Maj. Op.* ¶ 52. Because I resolve this case differently, I address these claims.

{75} The argument presented is that providing books to public school students but not to private school students treats two

classes of similarly-situated students differently. Public school students will receive books, private school students will not. This disparate treatment is a violation of equal protection, or so it is argued.

{76} “The New Mexico Constitution provides that no person shall be denied equal protection of the laws.” *Wagner v. AGW Consultants*, 2005NMSC016, ¶ 21, 137 N.M. 734, 114 P.3d 1050 (citing N.M. Const. art. II, § 18). “Like its federal equivalent, this is essentially a mandate that similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment.” *Id.* “What level of scrutiny we use depends on the nature and importance of the individual interests asserted and the classifications created by the statute.” *Id.* ¶ 12. “Rational basis review applies to general social and economic legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class.” *Breen v. Carlsbad Mun. Sch.*, 2005NMSC028, ¶ 11, 138 N.M. 331, 120 P.3d 413. “Under rational basis review, the challenger must demonstrate that the legislation is not rationally related to a legitimate government purpose.” *Rodriguez v. Brand W. Dairy*, 2016NMSC029, ¶ 23, 378 P.3d 13. It is conceded that rational basis review applies to the equal-protection argument presented.

{77} The decision by the drafters of our state constitution that state largesse be directed to the public schools alone, and not to private schools, is rationally supported by the legitimate principle that doing so ensures that the public schools of our state are maximally financed, a circumstance necessary to ensure that “[a] uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.” N.M. Const. art. XII, § 1. “It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause.” *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

{78} *Trinity Lutheran* does not require us to abandon the conclusion reached in *Moses II* that Article XII, Section 3 precludes the provision of school books to private schools under the IML. The state-constitution, equal-protection claims advanced by Respondent fails.

{79} Accordingly, I respectfully dissent.
JUDITH K. NAKAMURA, Chief Justice

I CONCUR:
GARY L. CLINGMAN, Justice

From the New Mexico Supreme Court

Opinion Number: 2019-NMSC-004
No. S-1-SC-35887 (filed December 13, 2018)

STATE OF NEW MEXICO
Plaintiff-Appellee,
v.
DAVID CANDELARIA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Jacqueline Flores, District Judge

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Opinion

Barbara J. Vigil, Justice

{1} This case stems from the tragic death of an innocent eight-year-old child as a result of a violent confrontation between two groups of men. Consequently, a jury convicted David Candelaria (Defendant) of first-degree depraved mind murder, two counts of shooting at or from a motor vehicle, and three counts of aggravated assault. One count of shooting at or from a motor vehicle was later vacated on double jeopardy grounds. The district court sentenced Defendant to life in prison plus nine years. Defendant now appeals his convictions for depraved mind murder and aggravated assault and asks this Court to vacate the convictions or order a new trial. For the reasons set forth below, we affirm Defendant's convictions and deny the relief requested.

I. BACKGROUND

{2} On the morning of May 31, 2013, Defendant and his son, David Candelaria, Jr. (David Jr.), went to the home of Richard Turrieta, Sr. (Richard Sr.) on the west side of Albuquerque. Defendant and Richard Sr. had been close friends since high school. Sometime later that afternoon, the group—Defendant, David Jr., Richard Sr., and Richard Turrieta, Jr. (Richard Jr.)—left Richard Sr.'s house and drove to Nine Mile Hill, west of Albuquerque, to take Defen-

dant's truck "four-wheeling." Defendant's truck got stuck in the sand and could not be freed, so the group started walking back to town. A nearby resident gave them a ride to Coors Boulevard and Bridge Boulevard, where the group began walking east of Coors toward the Alamosa Community Center (community center). Richard Sr. testified that as the group was walking north to Gonzales Road, a vehicle, later determined to be driven by Rudy Chavez Montoya (Rudy), which was also traveling north towards Gonzales Road, pulled close to the curb and stopped a few feet away from Defendant's group. According to Richard Sr., Richard Sr. asked Rudy for a ride and Rudy cursed at him, made a quick u-turn, and tried to run the group down as the group was walking on Airport Drive, the road that goes into the community center. Rudy, on the other hand, testified that he was headed toward the community center on Airport Drive to pick up some friends when he encountered the group "blocking the road." He explained that the group was walking in the middle of the road, away from the community center. He said the group approached him and asked him for a ride, and Rudy responded that he could not give the group a ride because he was picking up friends and his vehicle was full. Rudy testified that Defendant's group was "mad" when Rudy refused to pick them up. David Jr. testified that Rudy spoke to the group saying, "You guys look familiar," to which Richard Jr. replied,

"Don't act hard." Witness testimony differed as to the actual words exchanged by the parties and whether Rudy attempted to run over Defendant's group during this first encounter. According to Richard Sr., approximately twenty minutes passed before his group encountered Rudy again. {3} Rudy proceeded to the community center where he picked up his friend, Troy Fontanelle (Troy), Troy's younger brother Logan Fontanelle (Logan), and Troy's eight-year-old daughter, Sunni Reza (Sunni). Rudy sat in the driver's seat, Logan in the front passenger seat, Troy in the back seat behind Logan, and Sunni in the back middle seat beside Troy. Logan testified that Rudy told them about the incident with Defendant's group after Rudy picked up Logan and the others. Rudy and his passengers then headed north on Airport Drive toward Gonzales Road to pick up Rudy's daughter at his sister's house at 60th Street and Gonzales Road. Rudy testified that when he turned right onto Gonzales Road, Defendant's group jumped into the road, causing Rudy to stop his vehicle. Logan testified that Defendant's group was about a half a block away, but was walking toward them. Richard Sr. testified that the driver stopped on Gonzales Road; and according to Richard Jr., the vehicle was about eighty to one hundred yards away from Defendant's group. Logan testified that he was seated in the front passenger seat of Rudy's vehicle and could hear Defendant's group yelling at them. He testified that he got out of Rudy's vehicle and said, "Why are you guys trying to jump my friend?" Rudy told the police that Logan had also asked Defendant's group if the group wanted to fight. Rudy testified that after Logan got out of the vehicle someone in Defendant's group started shooting. Logan testified that he heard gunshots and then saw one bullet hit the ground in front of him when he was standing outside Rudy's vehicle. He said he then jumped in the vehicle and at that point the next shot came through the windshield. This was the shot that hit Sunni. Rudy testified that he tried to run over Defendant's group with his vehicle after the group started shooting, but the group ran into an alley. He said that during the shooting he turned the vehicle around to avoid the bullets, headed towards Coors Boulevard, and realized that Sunni had been shot. Rudy drove Sunni to a nearby fire station for assistance and the fire department then took Sunni to the hospital. Sunni died of a gunshot wound to the forehead.

{4} David Jr. testified that a person got out of Rudy's vehicle on the passenger side and he thought someone in the vehicle "possibly" had "a handgun or a rifle," but they were a "hundred yards out" and he "couldn't get a clear description of what it was." When police asked David Jr. who fired the shots, however, he said, "I'm pretty sure it was our party." In a statement to police, Defendant said that a person jumped out from what appeared to be the front passenger side of Rudy's vehicle with a machine gun. Defendant also told police that the person was pointing a rifle straight at him. Richard Sr. testified that it seemed like the driver, as well as a passenger, exited Rudy's vehicle but stayed behind the doors, and when they got out of the vehicle he and Richard Jr. fled the scene. Richard Sr. indicated that he was too far from the vehicle to be able to see if anyone in Rudy's vehicle had a weapon. Rudy and Logan testified that no one in Rudy's vehicle had a weapon or a firearm.

{5} David Jr. testified that Defendant had a handgun on him that day that had been retrieved from Defendant's truck at Nine Mile Hill when Defendant's group left the truck to walk back into town. It is unclear from the testimony who retrieved the gun from Defendant's truck. David Jr. testified that during this second encounter with Rudy's vehicle, Defendant fired the gun twice in the air and twice at the vehicle. In his statement to police, Defendant admitted firing the gun twice in the air and twice at the vehicle. David Jr. testified that he and Defendant then ran. David Jr. further testified that when Defendant dropped the gun, David Jr. picked it up and tried to hide it under a building. Officers testified to finding the gun under a portable school building. David Jr. later pled guilty to possession of a gun on school grounds and tampering with evidence.

{6} The State introduced two witness statements given to police that indicated that one of the occupants in Rudy's vehicle may have had a pistol and that one of the occupants was possibly shooting from the vehicle. An officer testified that police used those statements to obtain search warrants for locations where Rudy was believed to have gone after the incident. Officers found a rifle in Rudy's parents' home, but Rudy's parents testified that it did not work and Rudy's mother said their children did not even know about it.

{7} Detectives found five shell casings in the road that matched the cartridges in Defendant's gun that was hidden under

the school building. No other shell casings were found at the scene and no firearms or rifles were found in Rudy's vehicle.

II. DISCUSSION

A. Depraved Mind Murder in New Mexico

{8} We begin our examination of Defendant's convictions with an explanation of depraved mind murder in New Mexico. In New Mexico, depraved mind murder is classified as a first-degree offense. See NMSA 1978, § 30-2-1(A)(3) (1994). As such, depraved mind murder is a capital felony, which carries a maximum penalty of life in prison. See NMSA 1978, § 31-20A-2 (2009). Depraved mind murder is defined as "the killing of one human being by another without lawful justification or excuse . . . by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life." Section 30-2-1(A)(3).

{9} Our courts, receiving little guidance from our Legislature, have struggled to distinguish first-degree depraved mind murder from second-degree murder. Although the parties do not address the fine distinction between depraved mind murder and second-degree murder in their briefing, we take this opportunity to define the distinction between the two types of murder in an effort to assist parties and lower courts in the future. Second-degree murder, which carries a basic penalty of fifteen years in prison, is defined as follows:

Unless [the person] is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree if in performing the acts which cause the death [the person] knows that such acts create a strong probability of death or great bodily harm to that individual or another.

Section 30-2-1(B). See NMSA 1978, § 31-18-15(A)(4) (2016). The knowledge requirement of depraved mind murder—knowledge that an act is "greatly dangerous to the lives of others, indicating a depraved mind regardless of human life," as distinguished from the knowledge requirement of second-degree murder—knowledge that an act "create[s] a strong probability of death or great bodily harm to [an] individual or another [person]," "has vexed New Mexico courts since 1980, when New Mexico's current statutory definitions of

the mens reas for murder in the first- and second-degree were enacted." Section 30-2-1(A)(3); Section 30-2-1(B); *State v. Suazo*, 2017-NMSC-011, ¶ 18, 390 P.3d 674; see UJI 14-203 NMRA; UJI 14-210 NMRA. Recently, in *Suazo*, this Court clarified that first-degree depraved mind murder and second-degree murder share the same subjective knowledge requirement—that a defendant *know* "the probable consequences" of the defendant's act, as opposed to *should have known* of the probable consequences. 2017-NMSC-011, ¶ 16. These requirements being equal, we turn to the defining characteristic of depraved mind murder—that the defendant acted with a depraved mind—to better understand the difference between the two crimes. See *State v. Reed*, 2005-NMSC-031, ¶ 21, 138 N.M. 365, 120 P.3d 447.

{10} Prior to 2009, our depraved mind murder jury instruction provided the following:

The defendant is charged with first degree murder by an act greatly dangerous to the lives of others indicating a depraved mind without regard for human life. For you to find the defendant guilty [as charged in Count _____][], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (describe act of defendant);
2. The defendant's act caused[] the death of _____ (name of victim);
3. The act of the defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life;
4. The defendant knew that his act was greatly dangerous to the lives of others;
5. This happened in New Mexico on or about the _____ day of _____, _____.

UJI 14-203 NMRA (2008). To assist jurors in understanding what constitutes a depraved mind, our jury instruction was amended in 2009 to add the following explanation:

A person acts with a depraved mind by intentionally engaging in outrageously reckless conduct with a depraved kind of wantonness or total indifference for the value of human life.

Mere negligence or recklessness is not enough. In addition, the defendant must have a corrupt, perverted, or malicious state of mind, such as when a person acts with ill will, hatred, spite, or evil intent. Whether a person acted with a depraved mind may be inferred from all the facts and circumstances of the case.

UJI 14-203 NMRA (2009). No further modifications of the language of the instruction have been made. As may be gleaned from the amended instruction, this Court has established four primary indicators of a depraved mind that aid in distinguishing first-degree depraved mind murder from second-degree murder. The four indicators of a depraved mind are as follows: (1) “more than one person [was] endangered by the defendant’s act,” (2) the defendant’s act was “intentional” and “extremely reckless,” (3) the defendant had “subjective knowledge that his act was greatly dangerous to the lives of others,” and (4) the defendant’s act “encompass[ed] an intensified malice or evil intent.” *State v. Dowling*, 2011-NMSC-016, ¶ 11, 150 N.M. 110, 257 P.3d 930 (internal quotation marks and citations omitted). We explain each of these indicators, below.

{11} First, depraved mind murder is “limited to acts that are dangerous to more than one person,” such as “shooting into a crowd” or “placing a bomb in a public place.” *Reed*, 2005-NMSC-031, ¶ 22 (citations omitted). Other types of conduct evidencing a high degree of risk include “starting a fire at the front door of an occupied dwelling, shooting into the caboose of a passing train or into a moving automobile necessarily occupied by human beings, and driving a car at very high speeds along a main street.” UJI 14-203 committee commentary (internal quotation marks and citations omitted). Thus, we have looked to the “number of persons exposed to danger by a defendant’s extremely reckless behavior.” UJI 14-203 committee commentary (internal quotation marks and citations omitted). This Court appeared to momentarily abandon the first indicator in *State v. Brown*, when it announced that “the number of persons may be a factor in assessing the degree of the risk disregarded . . . [but] should not be determinative of the degree of murder charged.” 1996-NMSC-073, ¶ 14, 122 N.M. 724, 931 P.2d 69 (omission in original) (internal quotation marks and citation omitted). The Court subsequently

clarified, however, that it was declining to depart from prior precedent, and would continue to limit depraved mind murder to acts dangerous to more than one person. *Reed*, 2005-NMSC-031, ¶ 37.

{12} Second, depraved mind murder requires an intentional act of “extremely reckless character.” *Dowling*, 2011-NMSC-016, ¶ 11. The act must be “greatly dangerous to the lives of others.” UJI 14-203.

“[T]he accused must subjectively intend to commit an act that has a great likelihood of resulting in death.” *Dowling*, 2011-NMSC-016, ¶ 11 (alteration in original) (internal quotation marks and citation omitted). The act must be “outrageously reckless,” as “[m]ere negligence or recklessness is not enough.” UJI 14-203.

{13} Third, depraved mind murder requires “proof that the defendant had subjective knowledge that his act was greatly dangerous to the lives of others.” *Reed*, 2005-NMSC-031, ¶ 23 (internal quotation marks and citation omitted). As noted above, both first-degree depraved mind murder and second-degree murder require that a defendant *know* the possible consequences of the defendant’s act. *See Suazo*, 2017-NMSC-011, ¶ 16. Subjective knowledge requires that a defendant know that his act is greatly dangerous to the lives of others, but the “defendant does not have to actually know that his victim will be injured by his act.” *State v. Ibn Omar-Muhammad*, 1985-NMSC-006, ¶ 21, 102 N.M. 274, 694 P.2d 922, *holding modified on other grounds by State v. Cleve*, 1999-NMSC-017, ¶ 22, 127 N.M. 240, 980 P.2d 23. “The required mens rea element of ‘subjective knowledge’ serves as proof that the accused acted with ‘a depraved mind’ or ‘wicked or malignant heart’ and with utter disregard for human life.” UJI 14-203 committee commentary (emphasis, internal quotation marks, and citation omitted). Because the subjective knowledge requirement is the same for first-degree depraved mind murder and second-degree murder, the only distinguishing factor in this regard is a defendant’s knowledge that the defendant’s act is greatly dangerous to the life of more than one person. *Cf.* Section 30-2-1(B) (providing that second-degree murder encompasses acts that create a strong probability of death or great bodily harm to an individual or another person).

{14} That leaves us with the fourth primary indicator our Court has used to distinguish depraved mind murder—“an intensified malice or evil intent.” *Reed*, 2005-NMSC-031, ¶ 24 (internal quotation

marks and citation omitted). As explained in our depraved mind murder instruction, depraved mind murder requires that a defendant “intentionally engag[e] in outrageously reckless conduct with a depraved kind of wantonness or total indifference for the value of human life.” UJI 14-203; *see Reed*, 2005-NMSC-031, ¶ 24. “In addition, the defendant must have a corrupt, perverted, or malicious state of mind, such as when a person acts with ill will, hatred, spite, or evil intent.” UJI 14-203. “Whether a person acted with a depraved mind may be inferred from all the facts and circumstances of the case.” *Id.* Today, as in the past, the four primary indicators guide our analysis of Defendant’s conviction for depraved mind murder.

B. The Evidence is Sufficient to Support Defendant’s Conviction for First-degree Depraved Mind Murder

{15} Defendant claims there was insufficient evidence to support his conviction for first-degree depraved mind murder. We exercise our jurisdiction to review Defendant’s conviction under Article VI, Section 2 of the New Mexico Constitution and Rule 12-102(A) NMRA (providing that this Court shall have jurisdiction over appeals of district court judgments imposing a sentence of death or life imprisonment).

Under a sufficiency of evidence analysis, we must determine “whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction.” We must view the evidence in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences in favor of the verdict. It is this Court’s duty on review to determine whether *any* rational jury could have found the essential facts to establish each element of the crime beyond a reasonable doubt.

Reed, 2005-NMSC-031, ¶ 14 (citations omitted).

{16} We have affirmed depraved mind murder convictions in many instances. *See State v. Sena*, 1983-NMSC-005, ¶¶ 2, 9, 11, 99 N.M. 272, 657 P.2d 128 (affirming depraved mind murder conviction where the defendant opened fire on the doorman of a bar, hitting the doorman, but also hitting and killing an innocent bystander); *State v. McCrary*, 1984-NMSC-005, ¶¶ 2-3, 5,

25, 100 N.M. 671, 675 P.2d 120 (affirming depraved mind murder conviction where the defendant discharged about twenty-five shots into tractor-trailers and cabs parked at a carnival site during the night); *State v. Trujillo*, 2002-NMSC-005, ¶¶ 22, 28, 131 N.M. 709, 42 P.3d 814 (concluding the evidence was sufficient to support a depraved mind murder conviction where the defendant opened fire from a second floor balcony into a group of people below, killing a rival gang member).

{17} We have also reversed convictions when it was appropriate to do so. See *Ibn Omar-Muhammad*, 1985-NMSC-006, ¶¶ 15, 27 (reversing depraved mind murder conviction where depraved mind jury instruction set forth an objective standard of knowledge rather than a subjective standard); *State v. Hernandez*, 1994-NMSC-045, ¶¶ 8-9, 117 N.M. 497, 873 P.2d 243 (reversing depraved mind murder conviction where the depraved mind act did not proximately cause the death of the victim); *Brown*, 1996-NMSC-073, ¶¶ 34-35 (reversing depraved mind murder conviction where the defendant was improperly denied jury instruction on intoxication); *Reed*, 2005-NMSC-031, ¶¶ 27, 44 (concluding the evidence was insufficient to support a depraved mind murder conviction where the defendant was playing with a gun, loaded it, and “absent-mindedly” fired in the direction of his friend); *Dowling*, 2011-NMSC-016, ¶¶ 15, 17 (reversing depraved mind murder conviction where jury instruction for depraved mind murder misstated extent of “recklessness” required for conviction). {18} We review the elements of depraved mind murder and determine whether the evidence here supports such a conviction. For the reasons that follow, we conclude that the facts of this case squarely fit within the contours of our clearly established precedent as set forth in this opinion. That being the case, we will not disturb the jury’s verdict. To convict Defendant of depraved mind murder, the jury was required to find the following:

1. The defendant discharged a firearm at a car full of people;
2. The defendant’s act caused the death of Sunni Reza;
3. The act of the defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life;
4. The defendant knew that his act was greatly dangerous to the lives of others;

5. The defendant did not act in self-defense or defense of another;

6. This happened in New Mexico on or about the 31[st] day of May, 2013.

A person acts with a depraved mind by intentionally engaging in outrageously reckless conduct with a depraved kind of wantonness or total indifference for the value of human life. Mere negligence or recklessness is not enough. In addition, the defendant must have a corrupt, perverted, or malicious state of mind, such as when a person acts with ill will, hatred, spite, or evil intent. Whether a person acted with a depraved mind may be inferred from all the facts and circumstances of the case. See UJI 14-203.

{19} Defendant does not deny that he discharged his weapon. In fact, he admitted to police that he fired two shots in the air and two shots at Rudy’s vehicle, knowing that there were multiple people in the vehicle. Also, Richard Sr. testified that Defendant told Richard Sr. he fired the gun. Defendant claims, however, that he did so in self-defense and the defense of others in his group. Defendant argues that due to Rudy’s actions towards Defendant and those in his group in the first encounter he believed Rudy had returned to fight and they were prepared to defend themselves in the second encounter.

{20} Defendant stated to police that during the second encounter he saw a “guy” jump out of the vehicle from the front passenger seat with a machine gun. He also told police that this person was pointing a rifle straight at him. He said he heard someone saying “shoot” and that he believed he was under assault from a rifle. David Jr. corroborated Defendant’s testimony in testifying that he saw someone from Rudy’s group pointing what he thought looked like a handgun or rifle at them, and that Defendant returned fire. David Jr. claims Defendant did so to protect him and the others in Defendant’s group. Also, witness statements were admitted into evidence that someone from Rudy’s vehicle may have had a weapon and perhaps fired shots at Defendant’s group. Defendant argues that because he was attempting to defend himself and others, he could not have had the necessary “intensified malice or evil intent,” to prove depraved mind murder. *Suazo*, 2017-NMSC-011, ¶ 22 (internal quotation marks and citation omitted). We reject this argument. There was sufficient evidence

for the jury to find Defendant acted with a depraved mind, despite Defendant’s self-defense theory. See UJI 14-203 (“Whether a person acted with a depraved mind may be inferred from all the facts and circumstances of the case.”) When reviewing the sufficiency of the evidence to support Defendant’s conviction, we must resolve all disputed facts in favor of the State. *Reed*, 2005-NMSC-031, ¶ 14.

1. Defendant’s act was greatly dangerous to the life of more than one person

{21} Rudy testified that he picked up three passengers at the community center—Troy, Logan, and Sunni—and that they were occupying the vehicle when Defendant began shooting at them. Clearly, Defendant’s act of shooting at Rudy’s vehicle was greatly dangerous to the life of more than one person.

2. Defendant’s act was outrageously reckless

{22} The jury heard testimony from David Jr. that Defendant fired his handgun twice into the air and twice at Rudy’s vehicle. One of the shots went through the windshield, killing Sunni. As we acknowledged in *Reed*, in the few cases “in which we have affirmed depraved mind murder convictions involving the discharge of firearms, the defendant either admitted, or witnesses testified, that the defendant intentionally fired a weapon under circumstances showing an extreme degree of recklessness.” 2005-NMSC-031, ¶ 33. Such examples include “shooting several times from a balcony of an apartment building into a crowd, killing a rival gang member”; “moving slowly around tractor-trailers parked overnight at a fairground with multiple firearms, shooting twenty-five times into the cabs, and killing a woman in a sleeping compartment”; and “firing four or five times into a crowded bar, killing a bystander.” *Id.* (citations omitted). “In each instance, there was no question that the defendant acted intentionally in firing the weapon.” *Id.* From the evidence presented, the jury could have reasonably come to the same conclusion in the instant case. “[D]epraved mind murder involves an intentional act without regard for consequences.” *Id.* ¶ 25. Shooting at a vehicle full of people qualifies as “outrageously reckless conduct with a depraved kind of wantonness or total indifference for the value of human life.” UJI 14-203.

3. Defendant knew that his act was greatly dangerous to the lives of others

{23} Although Defendant may not have known a child was in Rudy's vehicle, the State presented evidence that Defendant knew there were multiple passengers. See *Ibn Omar-Muhammad*, 1985-NMSC-006, ¶ 21 ("A defendant does not have to actually know that his victim will be injured by his act."). Rudy testified that he told Defendant's group he was going to pick up friends and his vehicle was full. Richard Sr. and Richard Jr. said the group watched Rudy pick up more than one person at the community center.

{24} Defendant's statements to the police provide additional bases for the jury to find Defendant had subjective knowledge of the risk he posed to the lives of those in Rudy's vehicle. Defendant told police that he saw Rudy pick up a "carload of dudes" at the community center, so he knew the vehicle contained multiple passengers. In explaining the second encounter, Defendant admitted that he gave Rudy's group a warning shot and then "tried to shoot the car in the front headlight to scare him." These statements arguably "confirm[] . . . [D]efendant's personal desire to undertake acts that gave rise to dangerous circumstances." *Dowling*, 2011-NMSC-016, ¶ 25. "In such situations, it is evident that the very design of . . . [D]efendant's conduct [was] to frighten or injure someone by exposing others to dangerous acts, thereby permitting a clear inference of subjective knowledge." *Id.*

4. Defendant acted with a depraved mind

{25} The circumstances of the depraved mind act alone, may, in some cases, be sufficient to support the inference that a defendant acted with a depraved mind. See *Dowling*, 2011-NMSC-016, ¶ 45. Although there may have been no "external indicia of . . . [D]efendant's depravity, such as personal animus, the absence of such factors does not preclude the finding of a depraved mind." *Id.* The jury did, however, hear testimony from Rudy that Defendant's group was "mad" that Rudy refused to give them a ride. Additionally, Defendant admitted to police that he "tried to shoot the car in the front headlight to scare [Rudy's group]." Jurors reasonably could have accepted these statements as evidence of depravity.

{26} As far as Defendant's argument that he could not have been acting with a depraved mind because he was acting in self-defense, the jury was free to reject Defendant's self-defense theory. Defendant's statements to police and David Jr.'s

testimony were countered by additional evidence and testimony that no one in Rudy's vehicle had a weapon of any kind. Additionally, detectives testified that apart from Defendant's gun and casings, no other weapons or casings were found. Further, no gun residue was found in Rudy's vehicle. As the State points out, "the jury was entitled to believe the great weight of the evidence—that no one in [the] car had a gun—and to disbelieve any evidence to the contrary." See *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829 ("[T]he jury is free to reject Defendant's version of the facts."). Furthermore, even if the jury believed Defendant was put in fear by the apparent danger presented by Rudy's group, the jury could have found that Defendant's act of firing his handgun into a vehicle occupied by unarmed people was excessive and unreasonable under the circumstances. See UJI 14-5171 NMRA (providing that self-defense requires a finding that a "reasonable person in the same circumstances as the defendant would have acted as the defendant did"). Accordingly, the evidence supports Defendant's conviction for depraved mind murder and we affirm.

C. The Evidence is Sufficient to Support Defendant's Aggravated Assault Convictions

{27} We now turn to Defendant's three aggravated assault convictions. Defendant was convicted under NMSA 1978, Section 30-3-2(A) (1963) for "unlawfully assaulting or striking at another with a deadly weapon." To convict Defendant of aggravated assault, the jury was required to find the following:

1. The defendant discharged a firearm;
2. The defendant's conduct caused Rudy Chavez-Montoya [Logan Fontenelle] [Troy Fontenelle] to believe the defendant was about to intrude on Rudy Chavez-Montoya's [Logan Fontenelle's] [Troy Fontenelle's] bodily integrity or personal safety by touching or applying force to Rudy Chavez-Montoya [Logan Fontenelle] [Troy Fontenelle] in a rude, insolent or angry manner;
3. A reasonable person in the same circumstances as Rudy Chavez-Montoya [Logan Fontenelle] [Troy Fontenelle] would have had the same belief;
4. The defendant used a firearm;
5. The defendant did not act in

self-defense or defense of another;

6. This happened in New Mexico on or about the 31[st] day of May, 2013.

See UJI 14-305 NMRA. Defendant admitted to police that he discharged his firearm—twice in the air and twice at Rudy's vehicle. At trial, David Jr. testified that Defendant fired twice in the air and twice at Rudy's vehicle. Rudy testified that he, Logan, Troy, and Sunni were occupying the vehicle when Defendant began shooting at them. The evidence was such that the jury could have concluded that Defendant's act of shooting at Rudy's vehicle caused the occupants of the vehicle to believe Defendant was about to intrude on their "bodily integrity or personal safety." UJI 14-305. As with depraved mind murder, the jury was free to reject Defendant's self-defense theory. See *State v. Fox*, 2017-NMCA-029, ¶ 12, 390 P.3d 230. We conclude there was sufficient evidence to support the aggravated assault convictions.

D. The District Court's Failure to Give the Jury the No-Retreat Instruction Was Not Fundamental Error

{28} At trial, the district court determined that Defendant was entitled to jury instructions on self-defense and defense of another. See UJI 14-5171; UJI 14-5172 NMRA (containing elements of self-defense and defense of another as set forth in NMSA 1978, Section 30-2-7(A)-(B) (1963)); *State v. Ellis*, 2008-NMSC-032, ¶ 15, 144 N.M. 253, 186 P.3d 245 ("When asserting self-defense against a private citizen . . . a defendant has an *unqualified* right to a self-defense instruction in a criminal case when there is evidence which supports the instruction." (internal quotation marks and citation omitted)); *State v. Sandoval*, 2011-NMSC-022, ¶ 16, 150 N.M. 224, 258 P.3d 1016 ("[C]ase law and commentary treat 'defense of another' and 'self-defense' as virtually identical for purposes of analysis. . . . [A]ssertions made regarding self-defense instructions are also assumed to apply to defense of another instructions." (first alteration in original) (internal quotation marks and citations omitted))).

{29} At the charging conference, the district court, counsel for Defendant, and counsel for the State discussed the jury instructions to be proffered. The district court concluded that the "appearance of immediate danger of death or great bodily harm," contained in the first element of the self-defense and defense of another instruc-

tions would be Logan's act of pointing/shooting at Defendant's group during the second encounter. UJI 14-5171; UJI 14-5172. The jury was not given a self-defense instruction citing Rudy's alleged act of attempting to run over Defendant's group in the first encounter as the cause of the "appearance of immediate danger of death or great bodily harm," because Defendant's shooting was too removed in time from the first encounter with Rudy to cause "immediate" danger. UJI 14-5171; UJI 14-5172. The State argued, and the district court agreed, that too much time had passed between the first encounter and the second encounter to warrant such an instruction.

{30} The State introduced witness statements to the police that during the second encounter, when the shooting occurred, Rudy or someone in Rudy's vehicle may have had a weapon and may have been shooting from the vehicle. Richard Sr. testified that it looked like the driver and passenger were hiding behind their vehicle doors at some point. Defendant told the police that the front passenger exited the vehicle with a machine gun and also said that the passenger pointed a rifle straight at him. David Jr. testified that the front passenger exited the vehicle and had something in his hands, possibly a handgun or rifle. The following instructions were given to the jury:

Evidence has been presented that the defendant killed Sunni Reza in self-defense.

The killing is in self-defense if:

1. There was an appearance of immediate danger of death or great bodily harm to the defendant as a result of Logan Fontenelle pointing and/or shooting a firearm at the defendant; and
2. The defendant was in fact put in fear by the apparent danger of immediate death or great bodily harm and shot at the vehicle which caused the death of Sunni Reza because of that fear;
3. A reasonable person in the same circumstances as the defendant would have acted as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense [sic]. If you have a reasonable doubt as to whether the defendant acted in self-defense you must find the defendant not guilty.

See UJI 14-5171.

Evidence has been presented that the defendant killed Sunni Reza while defending another. The killing was in defense of another if:

1. There was an appearance of immediate danger of death or great bodily harm to Richard Turrieta Sr., Richard Turrieta Jr., and David Candelaria Jr. as a result of Logan Fontenelle pointing and/or shooting a firearm at Richard Turrieta Sr., Richard Turrieta Jr., and David Candelaria Jr.; and
2. The defendant believed Richard Turrieta Sr., Richard Turrieta Jr., and David Candelaria Jr. were in immediate danger of death or great bodily harm from Logan Fontenelle, and shot at the vehicle which caused the death of Sunni Reza to prevent the death or great bodily harm; and
3. The apparent danger to Richard Turrieta Sr., Richard Turrieta Jr., and David Candelaria Jr. would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in defense of another. If you have a reasonable doubt as to whether the defendant acted in defense of another, you must find the defendant not guilty.

See UJI 14-5172.

{31} Defendant argues that in addition to the instructions given above, the district court should have also provided the jury with UJI 14-5190 NMRA—the "stand-your-ground" (no-retreat) instruction: "A person who is threatened with an attack need not retreat. In the exercise of his right of self defense, he may stand his ground and defend himself." The propriety of the jury instructions given by the district court is a mixed question of law and fact requiring de novo review. See *State v. Lucero*, 2010-NMSC-011, ¶ 11, 147 N.M. 747, 228 P.3d 1167. Because this issue was not raised at trial, we review for fundamental error. See Rule 12-321(B)(2)(c) NMRA (2016).

Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which

no court could or ought to permit him to waive. Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand.

State v. Johnson, 2010-NMSC-016, ¶ 25, 148 N.M. 50, 229 P.3d 523 (citation omitted).

In reviewing the self-defense and defense of another jury instructions for fundamental error, we first determine "whether a reasonable juror would have been confused or misdirected by the jury instructions." If we conclude that a reasonable juror would have been confused or misdirected, then we "review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the defendant's conviction was the result of a plain miscarriage of justice."

Sandoval, 2011-NMSC-022, ¶ 20 (alterations and citations omitted). "For fundamental error to exist, the instruction given must differ materially from the uniform jury instruction, omit essential elements, or be so confusing and incomprehensible that a court cannot be certain that the jury found the essential elements under the facts of the case." *State v. Caldwell*, 2008-NMCA-049, ¶ 24, 143 N.M. 792, 182 P.3d 775 (internal quotation marks and citations omitted). "[J]uror confusion or misdirection may stem not only from instructions that are facially contradictory or ambiguous, but from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134.

{32} Defendant relies on *State v. Anderson*, 2016-NMCA-007, 364 P.3d 306 to argue that the district court's failure to provide the jury with the no-retreat instruction mandates reversal of Defendant's conviction for depraved mind murder. In *Anderson*, the victim and the defendant were at a party and began arguing. 2016-NMCA-007, ¶ 3. The victim's girlfriend attempted to intervene and the defendant moved her out of the way. *Id.* The victim punched the defendant, causing the defendant to fall backward into another room. *Id.* A brawl then began between others at

the party. *Id.* The victim's girlfriend, having retrieved a handgun from the victim, then brandished it and brought the brawl to a standstill. *Id.* While the brawl had ceased, the defendant "removed himself and hid behind the doorway of the room into which he fell where he, too, drew a handgun." *Id.* The defendant, believing the victim had taken the gun from his girlfriend, came out from the doorway "with his gun raised and fired six shots from a distance of approximately two to three feet, four of which hit [the victim]." *Id.* The victim died and the defendant was charged with his murder. *Id.*

{33} In that case, the defendant requested a self-defense instruction and the no-retreat instruction, and the district court agreed they should be given. *Id.* ¶ 5. See UJI 14-5171; UJI 14-5190. Due to an oversight on the part of the district court and counsel, the no-retreat instruction was not given to the jury. See *Anderson*, 2016-NMCA-007, ¶ 6. During deliberations, the jury asked if there was a "stand-your-ground" law in New Mexico, but ultimately withdrew the question. *Id.*

{34} Our Court of Appeals concluded in *Anderson* that the no-retreat instruction was critical to the jury's self-defense determination, and the district court's failure to provide the instruction was fundamental error requiring the reversal of the defendant's murder conviction. *Id.* ¶¶ 14, 19. The Court likened the no-retreat instruction to a missing elements instruction, necessarily informing jurors of the meaning of "reasonable" under the third prong of the self-defense instruction. *Id.* ¶ 15. See UJI 14-5171 ("A reasonable person in the same circumstances as the defendant would have acted as the defendant did."). The Court explained that "'reasonable' . . . carries a different meaning when read in conjunction with the no-retreat instruction than it does alone." *Anderson*, 2016-NMCA-007, ¶ 15 ("Read alone, a person exercising the 'degree of attention, knowledge, intelligence, and judgment that society requires of its members' is acting reasonably. . . . When read together with the no-retreat instruction, however, a person who, when threatened with an attack, does not retreat and stands his ground when exercising his right of self-defense is acting reasonably." (citations omitted)). Accordingly, the Court determined that "the jury's understanding of all of the elements of the law governing self-defense was deficient." *Id.* ¶ 12. The Court further concluded "not only that a

reasonable juror would have been misdirected by the jury instructions given, but also that the jury in [the d]efendant's case was misdirected." *Id.*

{35} Before we consider the question of whether the omission of the no-retreat instruction in Defendant's case was fundamental error, we must first apply the standard for reversible error. *Anderson*, 2016-NMCA-007, ¶ 9. We determine if "a reasonable juror would have been confused or misdirected by the jury instructions that were given." *Id.* (internal quotation marks and citation omitted). In Defendant's case, the jury was properly instructed on self-defense and defense of another, and we conclude that a reasonable juror would not have been "confused or misdirected" by the omission of the no-retreat instruction. *Sandoval*, 2011-NMSC-022, ¶ 20; see *State v. Cunningham*, 2000-NMSC-009, ¶ 14, 128 N.M. 711, 998 P.2d 176. We agree with our Court of Appeals that "[w]here the evidentiary basis for the [no-retreat] instruction has been laid," the instruction "alters what 'reasonable' means" under the third prong of the self-defense instruction. *Anderson*, 2016-NMCA-007, ¶ 14. Here, however, the evidentiary basis for the no-retreat instruction was not laid. That being the case, the district court did not err by failing to provide the jury with the no-retreat instruction even though it determined that the self-defense and defense of another instructions were warranted. See *State v. Heisler*, 1954-NMSC-032, ¶ 23, 58 N.M. 446, 272 P.2d 660 ("[W]here self-defense is involved in a criminal case and there is any evidence, although slight, to establish the same, it is not only proper for the court, but its duty as well, to instruct the jury fully and clearly on all phases of the law on the issue that are warranted by the evidence . . ." (emphasis added)); *Benally*, 2001-NMSC-033, ¶ 12 (emphasizing the importance of providing jurors with "an accurate rendition of the relevant law").

{36} Unlike *Anderson*, there is absolutely no indication of juror confusion in Defendant's case. Additionally, the district court in *Anderson* determined that there was sufficient evidence to support the issuance of the instruction, but by oversight, did not give it. 2016-NMCA-007, ¶ 10; see also *id.* ¶ 19 ("[I]n light of the importance that self-defense and no-retreat had in [the d]efendant's case, allowing his conviction to stand without adequate jury instructions would undermine judicial integrity and the legitimacy of the jury's verdict.").

Importantly, the defendant's self-defense theory in *Anderson* rested "on the argument that . . . he had no duty to retreat from the confrontation with [the victim]" in the case. *Id.* ¶ 14. Here, Defendant did not argue he had no duty to retreat from Rudy or Rudy's group, and the district court made no determination that the no-retreat instruction was warranted.

{37} Defendant argues the no-retreat instruction was required because the prosecutor in closing told the jury that "it was not reasonable [for Defendant] to stand ones' [sic] ground because the Turrietas [sic] were running in fear of being shot. Defendant argues this statement "almost forced the jury to find . . . Defendant's decision was not reasonable because there was nothing in the Self Defense Instruction stating . . . Defendant could lawfully choose to stand his ground and shoot back or shoot at the vehicle that had almost killed him, his son and their companions." As the State points out, Defendant's characterization of the prosecutor's statement in closing is misleading. The transcript reveals that the prosecutor said the following: "You heard how the Turrietas responded; they booked it. Does a reasonable person, even thinking there's an appearance of immediate danger, fire at the vehicle? They do not. They do not." We agree with the State that the prosecutor's statement does not appear to be a comment on Defendant's duty to retreat, but rather, the reasonableness of Defendant's act of shooting at the vehicle. As the State correctly identifies, "Defendant has not pointed to anything in the record to show that a no-duty-to-retreat argument formed any part of his theory of the case."

{38} Had we determined that it was error for the district court to fail to provide the no-retreat instruction, *Anderson* instructs us that the next step in the fundamental error analysis is to "consider all the facts and circumstances and decide whether the missing instruction caused such confusion that the jury could have convicted Defendant based upon a deficient understanding of the law regarding self-defense." *Id.* ¶ 13 (alteration, internal quotation marks, and citation omitted). Although we need not reach the second prong of the analysis, we note that based on the proffered self-defense and defense of another instructions and the evidence presented, it would not "shock the judicial conscience" to allow Defendant's conviction to stand, *Johnson*, 2010-NMSC-016, ¶ 25, nor would it constitute a "miscarriage of justice." *Sandoval*, 2011-NMSC-022, ¶ 20.

{39} Although there was an evidentiary

basis to support the district court's proffering of the self-defense and defense of another instructions, there was sufficient evidence to contradict those theories. Because there was not an evidentiary basis to support giving a self-defense instruction regarding Rudy's attempt to run over Defendant's group in the first encounter, the jury only had to decide whether Logan's act of pointing and/or shooting at Defendant's group, if the jury believed those acts occurred, warranted Defendant's gunfire in response. The State introduced a great deal of evidence, including corroborating testimony, that no one in Rudy's vehicle had a weapon and that no shots were fired at Defendant's group. To warrant the no-retreat instruction, one must be "threatened with an attack" and must be "exercis[ing] . . . his right of self-defense." UJI 14-5190. The jury was free to reject Defendant's self-defense theory and find that Defendant's firing shots at Rudy's vehicle and killing Sunni was unreasonable—that "[a] reasonable person in the same circumstances as the defendant would [not] have acted as the defendant did." UJI 14-5171. The jury instructions provided by the district court were accurate and clear. We therefore conclude, after reviewing the instructions in the context of the individual facts and circumstances of this case, that the missing instruction did not cause juror confusion such "that the jury could have convicted Defendant based upon a deficient understanding of the law regarding self-defense." *Anderson*, 2016-NMCA-007, ¶ 13 (alteration, internal quotation marks, and citation omitted). The district court's omission of the no-retreat instruction in this case does not rise to fundamental error. See *Anderson*, 2016-NMCA-007, ¶ 9; *Cunningham*, 2000-NMSC-009, ¶ 18 (distinguishing reversible error from fundamental error and noting that fundamental error requires heightened scrutiny). No-retreat was simply not at issue in this case and thus, no further clarification of *reasonable* under UJI 14-5190 was warranted. See *State v. Barber*, 2004-NMSC-019, ¶ 26, 135 N.M. 621, 92 P.3d 633 (concluding that "missing definition of possession" did not "implicate a critical determination akin to a missing elements instruction," and "no distinct possibility exist[ed] from the evidence that the jury convicted [the d]efendant without finding all the elements beyond a reasonable doubt" (internal quotation marks and citation omitted)).

E. The District Court Did Not Abuse Its Discretion in Admitting the Testimony of Richard Turrieta, Sr.

{40} Defendant claims the district court erred in allowing Richard Sr. to testify while he was under the influence of pain medication. The State called Richard Sr. to the stand on the fourth day of the trial and proceeded with its direct examination. At the end of the direct examination, the State asked Richard Sr. if he was on any medications. Richard Sr. responded that he was. In beginning his cross-examination, counsel for Defendant asked Richard Sr. to provide further explanation about his medications. Richard Sr. testified he was taking hydrocodone for pain. Counsel for Defendant approached the bench, questioning Richard Sr.'s competency to testify. Because a full direct examination had already taken place, the district court instructed counsel to address his concerns in his cross-examination. On cross, Richard Sr. testified that the medication caused memory loss, drowsiness, and tiredness, but that he was "okay" and remembered the incident clearly.

{41} Defendant represents to the Court that after the direct examination of Richard Sr., defense counsel requested a mistrial or the suppression of Richard Sr.'s testimony. Defendant's assertion is not supported by the record or transcripts. Although counsel for Defendant questioned Richard Sr.'s competency before the district court, counsel made no motion to exclude Richard Sr.'s testimony, nor did counsel move for a mistrial. Defense counsel simply continued with his cross-examination, appearing satisfied by the judge's decision and Richard Sr.'s answers to the questions about his medication.

{42} We review a district court's determination as to the competency of a witness to testify under an abuse of discretion standard. See *State v. Perez*, 2016-NMCA-033, ¶ 11, 367 P.3d 909. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *Rojo*, 1999-NMSC-001, ¶ 41 (internal quotation marks and citations omitted). After reviewing the transcripts of the proceedings, we conclude that the district court did not abuse its discretion in admitting Richard Sr.'s testimony.

{43} There is a general presumption that all persons are competent to be witnesses. See *State v. Ruiz*, 2007-NMCA-014, ¶ 23,

141 N.M. 53, 150 P.3d 1003; Rule 11-601 NMRA. "Trial courts have broad discretion to determine the competency of a witness . . ." *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 60, 134 N.M. 77, 73 P.3d 215. The district court must only ensure that a witness "meets a minimum standard, such that a reasonable person could put any credence in their testimony." *Ruiz*, 2007-NMCA-014, ¶ 23 (internal quotation marks and citation omitted). This determination includes an inquiry into the "witness's capacities to observe, recollect, and communicate, as well as appreciate a duty to speak the truth at the meaningful time." *Apodaca*, 2003-NMCA-085, ¶ 62.

{44} Defendant claims he was prejudiced by Richard Sr.'s inaccurate recollection of the events that took place on the date of the incident due to the pain medication Richard Sr. was taking when he testified. As a result, Defendant argues, the jury received "incompetent and misleading facts." Defendant also argues that the fact Richard Sr. admitted to smoking marijuana on the day of the incident in question makes him incompetent as a witness. We reject these arguments.

{45} Reviewing the transcript of Richard Sr.'s testimony, he did not appear to have any difficulty answering questions. Clearly, Richard Sr. met the threshold requirements to testify as a witness. See *Apodaca*, 2003-NMCA-085, ¶ 62. Furthermore, counsel for Defendant waited until the entire direct examination was complete before inquiring about Richard Sr.'s competency, and then made no motion to exclude it. See *id.* ("[T]he party challenging competency bears the burden to show the witness is incompetent." (citation omitted)). Finally, Defendant's arguments that the district court should have excluded Richard Sr.'s testimony suggest that the district court must make a credibility analysis of each witness before allowing the witness to testify. This simply is not the case. "The jury alone is the judge of the credibility of the witnesses and determines the weight afforded to testimony." *Ruiz*, 2007-NMCA-014, ¶ 23 (internal quotation marks and citation omitted). The district court must only ensure that the witness appreciates the duty to speak the truth. See *Apodaca*, 2003-NMCA-085, ¶ 62. The district court did not abuse its discretion when it admitted Richard Sr.'s testimony.

F. Defendant's Claim of Ineffective Assistance of Counsel Was Not Adequately Developed and Will Not Be Considered on Direct Appeal

{46} Defendant claims his trial counsel was ineffective for not requesting a mistrial on multiple occasions during the proceedings. For example, Defendant cites to several instances of misconduct by the State's witnesses in his statement of issues to this Court, which he claims support a mistrial, but he does not address those in his briefs. Defendant also directs the Court to other instances where a mistrial may have been pursued, but does not clearly articulate these instances or make any arguments to support these claims. That being the case, we decline to consider them here. See *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("This Court requires that the parties adequately

brief all appellate issues to include an argument, the standard of review, and citations to authorities for each issue presented. . . . We will not review unclear arguments, or guess at what a party's arguments might be. . . . To rule on an inadequately briefed issue, this Court would have to develop the arguments itself, effectively performing the parties' work for them. . . . This creates a strain on judicial resources and a substantial risk of error. It is of no benefit either to the parties or to future litigants for this Court to promulgate case law based on our own speculation rather than the parties' carefully considered arguments." (alteration, internal quotation marks, and citations omitted)).

III. CONCLUSION

{47} For the foregoing reasons, Defendant's convictions are affirmed.

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

BARBARA J. VIGIL, Justice

WE CONCUR:

JUDITH K. NAKAMURA, Chief Justice

PETRA JIMENEZ MAES, Justice

CHARLES W. DANIELS, Justice

GARY L. CLINGMAN, Justice

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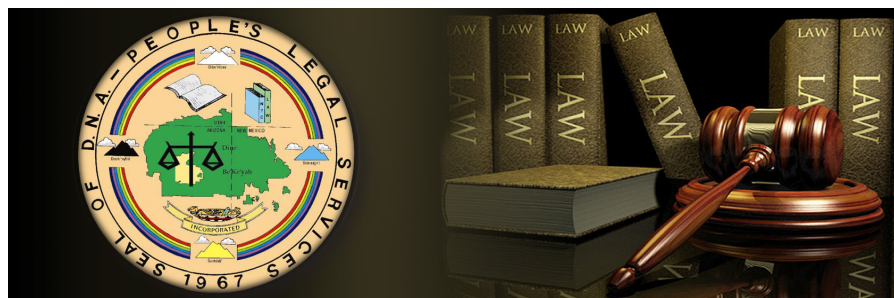
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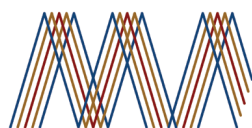
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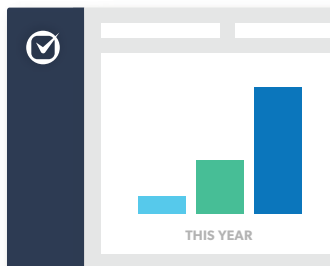
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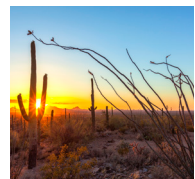
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Positions

Associate Attorney

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Two Openings in the Litigation Division

The Office of the New Mexico Attorney General is recruiting candidates to fill two openings in the Litigation Division based in Santa Fe. The job postings, further details on the positions and how to apply are available at www.nmag.gov/human-resources.aspx or by emailing Division Director Joseph Dworak at jdworak@nmag.gov. For best consideration, applications should be received by March 11, 2019, but the positions will remain open until filled.

The Office of the New Mexico Attorney General is Seeking Attorneys

The Office of the New Mexico Attorney General is seeking attorneys with 2 to 7 years' experience for two openings for Assistant Attorney General Positions in its Open Government Division based in Santa Fe. A copy of the job posting and further details available at www.nmag.gov/human-resources.aspx or by emailing Division Director Sally Malavé at smalave@nmag.gov. Applications reviewed immediately on a rolling basis until positions are filled.

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

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

Associate Attorney

Dixon•Scholl•Carrillo•P.A is seeking an associate attorney with 3 or more years of experience to join them in their thriving civil litigation practice. We seek a candidate with excellent writing and oral advocacy skills and a strong academic background who is ready to be part of a hard-working team in a fun and friendly office. For consideration, please email a resume to lcarrillo@dsc-law.com or via U.S. mail to Lisa J. Carrillo, P.O. Box 94147, Albuquerque, New Mexico 87199-4147.

City of Albuquerque – Contract Attorney

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

Attorney Senior (Position #43808) Civil Court (FT At-Will)

The Second Judicial District Court is accepting applications for an At-Will Attorney Senior in Civil Court. Qualifications: Must be a graduate of an ABA accredited law school; possess and maintain a license to practice law in the State of New Mexico. Five (5) years of experience in the practice of civil law. The Senior Attorney will be assigned to the Elder and Disability Court Initiative. The attorney can expect to perform research and writing, conduct training, be appointed as a Special Master to conduct investigations and hearings and to work with Judges and court staff on the continued development of the Initiative. Experience handling guardianship/conservatorship issues under the probate code, working knowledge of the Developmentally Disabled Waiver Program and Social Security Disability Income and accounting skills are preferred. SALARY: \$30.387 to \$47.48 hourly, plus benefits. Target Pay: \$39.399. Send application or resume supplemental form with proof of education and writing sample to the Second Judicial District Court, Human Resource Office, P.O. Box 488 (400 Lomas Blvd. NW), Albuquerque, NM, 87102. Applications without copies of information requested on the employment application will be rejected. Application and resume supplemental form may be obtained on the Judicial Branch web page at www.nmcourts.gov. CLOSES: March 13, 2019, at 5:00 p.m.

Chief Deputy District Attorney and a Deputy District Attorney

Immediate opening for a Chief Deputy District Attorney and a Deputy District Attorney with the Sixth Judicial District Attorney's Office. Salary depends on experience, w/ benefits. Please send resume to Francesca Estevez, District Attorney, FMartinez-Estevez@da.state.nm.us Or call 575-388-1941.

City of Albuquerque – Contract Hearing Officer

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

Deputy City Attorney

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

Eleventh Judicial District Attorney's Office, Div II

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

Attorney

Tired of billable hours? Ready to help people, not corporate insurance interests? Busy personal injury firm seeking an attorney with 2 to 4 years insurance/personal injury experience. Competitive salary and bonuses available. All applications are confidential. Please send resume to nichole@whitenerlawfirm.com.

Associate Attorney

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

Attorney 1-3 years of experience

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

Contract Personnel Hearing Officer

The City of Albuquerque is soliciting responses from qualified firms or attorneys interested in serving as contract Personnel Hearing Officer for personnel hearings under the City's Merit System Ordinances, §3-1-1 et seq. ROA 1994 and the Independent Hearing Office Ordinance Section §2-7-2 ROA 1994. The hearing officers may also provide services for other miscellaneous hearings under assorted City Ordinances. The full Request for Proposals can be accessed at <https://www.cabq.gov/dfa/procurement-division/solicitations> or by contacting Iris Cordova, Purchasing Program Specialist via email at icordova@cabq.gov. Proposals are due no later than April 1, 2019 @ 4:00pm Local Time.

Assistant City Attorney (2 positions) City of Santa Fe

The Santa Fe City Attorney's Office seeks two full-time lawyers to advise and represent multiple City departments. Each attorney will advise and represent a subset of the following City Departments: Economic Development, Asset Development, Affordable Housing, Community Services, Fire Department, the Police Department, including Internal Affairs, and the Ethics and Campaign Board. One attorney will advise and represent the City in Open Government matters, such as IPRA and Open Meetings Act. One attorney will also enforce the City's Living Wage Ordinance. The City is seeking applicants with good people skills, strong academic credentials, excellent written and verbal communications skills, and an interest in public service. Experience in property law, contracts law, social services law, administrative law, litigation, appellate practice, and related law, particularly in the public context, is preferred. Evening meetings may be required up to a few times a month. The pay and benefits package are excellent and are partially dependent on experience. These positions are located in downtown Santa Fe at City Hall and report to the City Attorney. The positions are exempt and open until filled. Qualified applicants are invited to apply online at https://www.santafenm.gov/job_opportunities.

Business Litigator

We are Slingshot, and we are growing rapidly under a number of successful law brands, including Business Law Southwest and Law 4 Small Business. We're growing quickly, because we are doing things a bit differently than the traditional law firm. We value our people. We value our clients. We are paperless, technically savvy, and compete in ways most firms cannot even dream of. Our clients are busy business leaders, larger and small, who need rapid turnaround, competent advice and strategic thinking. The ideal candidate cannot get flustered with clients who sit on a complaint for 29 days, then urgently request representation and a thorough answer with detailed counterclaims filed the next day. We seek an experienced litigator who despises sales, marketing and office management – who can simply handle small and moderately-sized litigation involving business and commercial-related matters. Strong preference for seasoned litigators in business – accounting, tax, intellectual property, debt collection, HR, bankruptcy or other area of focus desired (but not required). We are very entrepreneurial, and want to entertain the best fit. Tired of the grind at the large law firm, and looking for a more rewarding and entrepreneurial challenge? Contact us and let's talk. Please see our website at <https://www.slingshot.law/seeking/>. We have great benefits. Email references, resume and cover letter to LearnMore@slingshot.law.

Trial Attorney

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

Experienced Family Law Attorney

Cordell & Cordell, P.C., a domestic litigation firm with over 100 offices across 36 states, is currently seeking an experienced family law attorney for an immediate opening in its office in Albuquerque, NM. The candidate must be licensed to practice law in the state of New Mexico, have minimum of 3 years of litigation experience with 1st chair family law preferred. The position offers 100% employer paid premiums including medical, dental, short-term disability, long-term disability, and life insurance, as well as 401K and wellness plan. This is a wonderful opportunity to be part of a growing firm with offices throughout the United States. To be considered for this opportunity please email your resume to Hamilton Hinton at hhinton@cordelllaw.com

Associate Prosecutor

The Pueblo of Laguna is seeking applicants for the position of Associate Prosecutor to represent the Pueblo as plaintiff in Pueblo Court actions. Will present/file criminal complaints and prosecutes individuals accused of violating criminal laws and Pueblo of Laguna laws, codes, and/or ordinances. Assist law enforcement on warrants, subpoenas and charging decisions. Work with service providers to recommend sentences, referrals and other related services. For more information, contact the Pueblo of Laguna Human Resources Department at (505) 552-6654 or visit our website www.lagunapueblo-nm.gov

Environmental Attorney

National firm with an Albuquerque office is seeking an experienced environmental attorney for the rocky mountain region. The candidate should, at a minimum, be licensed in New Mexico (with bar membership in Texas, Colorado, or Wyoming being a plus) and have experience before the New Mexico Environment Department, with bonus points for experience dealing with oil and gas production facilities. Submit letter of interest and resume to NM.Environmental.Attorney@gmail.com

New Mexico Association of Counties Litigation Associate

The New Mexico Association of Counties is seeking an in-house litigation associate for its legal bureau in Albuquerque. Position will allow the successful candidate to participate in litigation in a wide variety of civil practice areas, including civil rights and employment law. We offer an excellent benefits package, competitive salary, and great working environment. Email resume, writing sample and references by March 22, 2019 to bhuss@nmcounties.org

New Mexico Court of Appeals Law Clerks in Albuquerque and Santa Fe

The New Mexico Court of Appeals is hiring for multiple Law Clerk positions that will begin in September 2019. This is an exciting opportunity to work closely with an appellate judge to draft opinions and resolve cases involving all areas of the law. You must have outstanding legal writing skills and be a graduate of an ABA accredited law school. One year of experience performing legal research, analysis and writing, while employed or as a student, is required. Please send resume, writing sample, law school transcript and two letters of recommendation to: AOC, Attn: Nathan Hale, aocneh@nmcourts.gov, 237 Don Gaspar, Room 25, Santa Fe, NM 87501.

Attorney

The Twelfth Judicial District Court is recruiting for a full-time Attorney – Associate (target pay range \$69,476 – \$73,133) or Attorney – Senior (target pay range \$75,056 – \$79,007), dependent upon qualifications. The Court is comprised of two district and three magistrate courts in Otero and Lincoln Counties. The District is situated in the southern, central region of the State and is home to White Sands National Monument, Holloman Air Force Base, Lincoln National Forest, NMSU – Alamogordo, ENMU- Ruidoso, Inn of the Mountain Gods, Ski Apache, and Ruidoso Downs. The area offers tremendous outdoor activities such as hiking, mountain biking, golfing, fishing, camping, skiing, snowboarding, and zip-lining. In nearby Las Cruces and El Paso, you can find lots of additional shopping, outlet malls, sporting events, shows, museums, and a state-of-the-art Top Golf facility. In working for the courts, you are eligible for a complete benefits package that includes medical, dental, vision, and retirement. Please visit our website at www.12thdistrict.net for more information about the district, the complete job description, and information on how to apply, or contact Rosie at (575) 812-5082, or aladref@nmcourts.gov.

Chief Legal Affairs Officer – New Mexico State University

New Mexico State University seeks a highly qualified attorney to serve as Chief Legal Affairs Officer for the NMSU System. As General Counsel, this position leads the day to day operations for the department of University General Counsel (UGC). As a member of the institution's senior leadership team, this position serves as a strategic contributor to the University and achievement of its mission through ongoing collaboration with University leadership, regular engagement with University management staff, training, education, and timely policy guidance. This position provides legal counsel with some management oversight of NMSU's broad and complex legal responsibilities, including, but not limited to: institutional governance (the university system and the New Mexico Department of Agriculture); business transactions including procurement; federal, state and local regulatory matters; internal policy development; research compliance; athletics business and conference compliance; employment, affirmative action and equal employment opportunity; litigation oversight and support; intellectual property; academic affiliation agreements and international academic arrangements; campus safety and security; privacy; New Mexico Inspection of Public Records Act; New Mexico Open Meetings Act; and student conduct and academic matters. All applications must be submitted online. For more information and to apply for the position, click <https://jobs.nmsu.edu/postings/34139>. Requisition No. 19014425. For questions related to this posting may be sent to Lydia Duran, 575-646-2036; lbduran@nmsu.edu. NMSU is an equal opportunity and affirmative action employer committed to assembling a diverse, broadly trained faculty and staff. Women, minorities, people with disabilities, and veterans are strongly encouraged to apply.

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

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

Assistant Federal Public Defender - Albuquerque 2019-01

The Federal Public Defender for the District of New Mexico is seeking a full time, experienced trial attorney for the main office in Albuquerque. More than one position may be filled from this posting. Federal salary and benefits apply. Applicant must have three years minimum criminal law trial experience, be team-oriented, exhibit strong writing skills as well as a commitment to criminal defense for all individuals, including those who may be facing the death penalty. Spanish fluency preferred. Writing ability, federal court, and immigration law experience will be given preference. Membership in the New Mexico Bar is required within the first year of employment. The private practice of law is prohibited. Selected applicant will be subject to a background investigation. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C. ' 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. In one PDF document, please submit a statement of interest and detailed resume of experience, including trial and appellate work, with three references to: Stephen P. McCue, Federal Public Defender, FDNM-HR@fd.org. Reference 2019-01 in the subject. Writing samples will be required only from those selected for interview. Applications must be received by March 22, 2019. Position will remain open until filled and is subject to the availability of funding. No phone calls please. Submissions not following this format will not be considered. Only those selected for interview will be contacted.

Associate Attorney

A regional law firm new to the New Mexico market is seeking a 2 to 5 year associate attorney for its Albuquerque office. The firm provides litigation and other legal services to a range of clients varying from individuals to Fortune 500 companies. This firm is searching for an ambitious attorney looking to not only provide legal services to current clients, but also build new clients. The ideal candidate will find a firm that values work-life balance while rewarding business development. A very competitive compensation and benefits package is commensurate with experience. Candidates should have a strong academic record, excellent writing skills, and a focus on client satisfaction. Admission to the Texas Bar is a plus, but not required. Interested candidates should email a resume and writing sample to bfisher@mayerllp.com.

Transactional Paralegal

We are Slingshot, and we are growing rapidly under a number of successful law brands, including Business Law Southwest and Law 4 Small Business. We're growing quickly, because we are doing things a bit differently than the traditional law firm. We value our people. We value our clients. We are paperless, technically savvy, and compete in ways most firms cannot even dream of. Our Law 4 Small Business brand is competing on a national basis with LegalZoom, RocketLawyer and the other unlicensed legal providers. We are seeking an experienced paralegal who can join our team to help with company formations, trademark registrations and more. This is a transactional position. It is critical you are extremely comfortable on the phone talking to clients and potential clients, working in a paperless work environment, and have excellent computer skills – including Microsoft Office and E-filing. We pay competitively for well qualified candidates, and offer an amazing benefits package to our full-time team members. Degree required, with paralegal certification and at least 2-3 years of paralegal experience. Contact us and let's talk. Please see our website at <https://www.slingshot.law/seeking/>. Email references, resume and cover letter to LearnMore@slingshot.law.

Administrative Assistant

Moses, Dunn, Farmer & Tuthill, P.C., a well-established Albuquerque law firm, has an immediate opening for a full-time administrative assistant with at least two years of experience in an administrative or accounting role. Candidates must have knowledge of basic bookkeeping principles; billing experience; strong computer skills; and the ability to prioritize and perform multiple tasks. Experience with TABS3 and QuickBooks desirable. The Firm offers a competitive compensation and benefits package. Please send your letter of interest, resume and salary requirements to Stephanie Reinhard, stephanie@moseslaw.com.

Full-Time Paralegal

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

Experienced Litigation Secretary

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

Paralegal

The law firm of Butt Thornton & Baehr PC has an opening for an experienced litigation Paralegal (5+ years). Excellent organization, computer and word processing skills required. Must have the ability to work independently. Generous benefit package. Salary DOE. Please send letter of interest and resume to, Gale Johnson, gejohnson@btblaw.com

Legal Assistant

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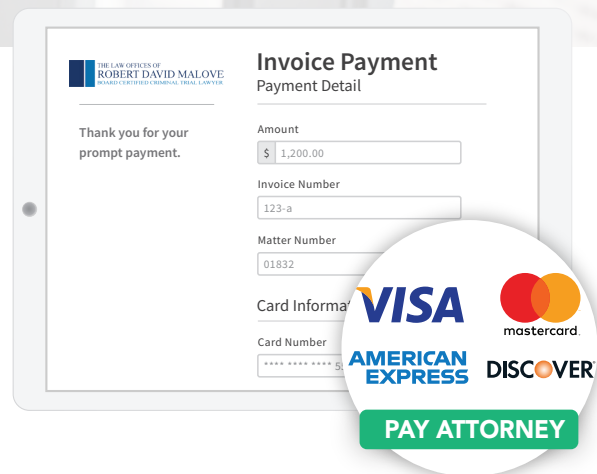
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