

BAR BULLETIN

April 3, 2019 • Volume 58, No. 7



Gallup Clouds Rain, by Claire Hurrey (see page 3)

Inside This Issue

Notices	4
2019 State Bar of New Mexico Annual Awards Call for Nominations.....	5
Young Lawyers Division Annual Law Day Call-in Program	9
Clerk Certificates	12

From the New Mexico Supreme Court

2019-NMSC-006, S-1-SC-37204: In re Dixon.....	23
2019-NMSC-007, S-1-SC-36229: State v. Romero.....	29

CLE Planner

*Upcoming programming
from the
Center for Legal Education*



We ♥ Our Members!

The State Bar is excited to announce our inaugural

MEMBER APPRECIATION DAY

Friday, June 7

STATE BAR CENTER in ALBUQUERQUE

Join us for

FREE CLE ★ Free Food

DOOR PRIZES ★ Games

Special Members-Only Discounts ★ FUN

Visit www.nmbar.org/memberappreciation for the details.

SPONSORSHIP OPPORTUNITIES AVAILABLE!

Contact Stephanie Wagner at swagner@nmbar.org.



STATE BAR
of NEW MEXICO



Bar Commissioners
will be planning
individual events in
their districts this
year. Stay tuned for
more information!



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505-797-6000 • 800-876-6227 • Fax: 505-828-3765
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April 3, 2019 • Vol. 58, No. 7

Table of Contents

Notices	4
Calendar of Continuing Legal Education.....	7
Court of Appeals Opinions List.....	11
Clerk Certificates.....	12
Rule Making Activity	22

From the New Mexico Supreme Court

2019-NMSC-006, S-1-SC-37204: In re Dixon.....	23
2019-NMSC-007, S-1-SC-36229: State v. Romero	29
Advertising	37

Meetings

April

9

Bankruptcy Law Section Board

Noon, United States Bankruptcy Court

9

Appellate Practice Section Board

Noon, teleconference

10

Tax Section Board

Noon, teleconference

10

Children's Law Section Board

Noon, Children's Court

11

Business Law Section Board

4 p.m., teleconference

12

Prosecutors Section Board

Noon, teleconference

18

Public Law Section Board

Noon, Legislative Finance Committee,
Santa Fe

19

Family Law Section Board

9 a.m., teleconference

Workshops and Legal Clinics

April

5

Civil Legal Clinic

10 a.m.–1 p.m., First Judicial District Court,
Santa Fe, 1-877-266-9861

12

Civil Legal Clinic

10 a.m.–1 p.m., Bernalillo County
Metropolitan Court, Albuquerque, 505-
841-9817

17

Family Law Clinic

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

18

Common Legal Issues for Senior Citizens Workshop Presentation

10–11:15 a.m., Espanola Senior Center,
Espanola, 1-800-876-6657

24

Consumer Debt/Bankruptcy Workshop

6–9 p.m., State Bar Center, Albuquerque,
505-797-6094

25

Common Legal Issues for Senior Citizens Workshop Presentation

10–11:15 a.m., Campos Senior Center,
Santa Rosa, 1-800-876-6657

About Cover Image and Artist: "As my vision travels across immense space, over large colorful masses, through atmospheres of beautiful light, I endeavor to share this with the viewer" Claire E. Hurrey. These landscape oil paintings represent Hurrey's interest in how mass occupies space, in innumerable variations of weather and reflected light that create atmospheres of beauty. Both plain air studies and photographs were used for these studio works of the New Mexico landscape, painted from 2015-2016. Hurrey said, "My eyes are wide open to New Mexico's vast and immense desert spaces, big skies and dramatic clouds, set over red rock cliffs with deep violet shadows, all held together by the light of its arid air." Hurrey has a Bachelors in Sociology and Fine Art, a Masters in Drawing, and a Masters of Fine Art in Painting. See more about Claire E. Hurrey and her paintings at www.cehurrey.com.

Notices

COURT NEWS

New Mexico Supreme Court Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The library has an extensive legal research collection of print and online resources, including Westlaw, LexisNexis and HeinOnline. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe.

Building Hours: Mon.-Fri. 8 a.m.-5 p.m.
Reference & Circulation Hours:

Mon.-Fri. 8 a.m.-4:45 p.m.

For more information:

Call: 505-827-4850

Email: libref@nmcourts.gov

Click: <https://lawlibrary.nmcourts.gov>

New Mexico Commission on Access to Justice

The next meeting of the Commission is April 12 from noon-4 p.m. at the State Bar of New Mexico. Commission goals include expanding resources for civil legal assistance to New Mexicans living in poverty, increasing public awareness, and encouraging and supporting pro bono work by attorneys. The Commission will be engaged in a strategic planning process at this meeting and would like to strongly encourage interested members of the public and bar to attend. More information about the Commission is available at www.accessjustice.nmcourts.gov.

Administrative Office of the Courts

Notice of Online Dispute Resolution

The New Mexico Judiciary plans to implement online dispute resolution in debt and money due cases. Courts piloting ODR are: Second Judicial District Court; Bernalillo County Metropolitan Court; district and magistrate courts in Silver City, Deming and Lordsburg; Bayard Magistrate Court in the Sixth Judicial District; and district and magistrate courts in Clovis and Portales in the Ninth Judicial District. The free service allows the parties to negotiate online to quickly resolve debt and money due cases without appearing in court. If a resolution is reached, the ODR system will prepare a stipulated settlement agreement and electronically file it in court. Participation in ODR is required. If no agreement is reached after 30 days, the case will move forward in court. The

Professionalism Tip

With respect to parties, lawyers, jurors and witnesses:

I will not adopt procedures that needlessly increase litigation expense.

plaintiff's attorney or a self-represented plaintiff will receive an email notification to begin ODR after the defendant files an answer to the complaint. Additional information about ODR is available on the Judiciary's alternative dispute resolution web page: <https://adr.nmcourts.gov>.

First Judicial District Court Mass Reassignment

Effective April 1, a mass reassignment of all Division VI cases previously assigned to Judge David K. Thomson will occur pursuant to NMSC Rule 23-109, the Chief Judge Rule. Judge Bryan Biedscheid has been appointed by Gov. Michelle Lujan Grisham to Division VI of the First Judicial District and will maintain a Civil Docket. Parties who have not previously exercised their right to challenge or excuse will have ten days from April 24 to challenge or excuse Judge Bryan Biedscheid pursuant to Rule 1-088.1.

Second Judicial District Court Appointment of Judge Daniel E. Ramczyk

Gov. Michelle Lujan Grisham announced the appointment of Daniel E. Ramczyk to fill the vacancy of Division VI of the Second Judicial District Court, effective March 18. Judge Ramczyk was assigned Criminal Court cases previously assigned to Judge Briana H. Zamora. Attorneys and members of the public 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 criminal and civil procedure that applies to district courts.

Appointment of Lisa Chavez Ortega- Amended

Gov. Michelle Lujan Grisham announced the appointment of Lisa Chavez Ortega to fill the vacancy of Division XIII of the Second Judicial District Court. Effective April 8, Judge Chavez Ortega was assigned Civil Court cases previously assigned to Judge Valerie H. Huling. Attorneys and members of the public 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 applies to district courts.

Appointment of Joshua Andrew Allison

Gov. Michelle Lujan Grisham announced the appointment of Joshua Andrew Allison to fill the vacancy of XXIII of the Second Judicial District Court. Effective April 8, Judge Allison will be assigned Civil Court cases previously assigned to Judge C. Shannon Bacon. Attorneys and members of the public 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 applies to district courts.

Appointment of Amber Chavez Baker

Gov. Michelle Lujan Grisham announced the appointment of Amber Chavez Baker to fill the vacancy of XXII of the Second Judicial District Court. Effective March 25, Judge Chavez Baker was assigned Family Court cases previously assigned to Judge Deborah Davis Walker. Attorneys and members of the public 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 applies to district courts.

Bernalillo County Metropolitan Court Judicial Investiture Ceremonies

Members of the legal community and the public are invited to attend the investiture of the Hon. Brittany Maldonado Malott, Division X; Hon. Felicia Blea-Rivera, Division XV; and Hon. David A. Murphy, Division XVI. The ceremony will be held at 5:15 p.m. on April 12 in the Bernalillo County Metropolitan Court Rotunda. Judges who wish to participate in the ceremony are asked to bring their robes and report to the first floor viewing room by 5 p.m.

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

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.

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.

Board of Bar Commissioners Appointments

The Board of Bar Commissioners will make appointments to the groups below. Qualified candidates should send a letter of interest and brief resumé by May 1 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Young Lawyer Delegate to ABA House of Delegates

The BBC will make one appointment of a young lawyer delegate to the American Bar Association House of Delegates for a two-year term, which will begin at the conclusion of the 2019 ABA Annual Meeting in August and expire at the conclusion of the 2021 ABA Annual Meeting. The delegate must be willing to attend ABA mid-year and annual meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar; however, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. Members wishing to serve as the young lawyer delegate to the HOD must have been admitted to his or her first bar within the last five years or be less than 36 years old at the beginning of the term; be an ABA member in good standing throughout the tenure as a delegate; and report to the N.M. YLD Board during the YLD Board's scheduled board meetings throughout the tenure as a delegate.

DNA – People's Legal Services, Inc.

The BBC will make two appointments to the DNA – People's Legal Services, Inc., Board for four-year terms. Active status attorneys in New Mexico may apply.

Civil Legal Services Commission

The BBC will make one appointment to the Civil Legal Services Commission for a three-year term. All members of the Commission must have experience with the civil legal matters affecting low-income persons. Active status attorneys in New Mexico may apply.

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 resumé by April 15 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

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), Sept. 26-28 (Taos, Retreat), 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.

Natural Resources, Energy and Environmental Law Section

Meet the Regulators Event

The New Natural Resources, Energy and Environmental Law Section has organized a social event to meet and mingle with regulators from the Environmental Improvement Board, Interstate Stream Commission, Office of the State Engineer, Department of Environment, Energy Minerals and Natural Resources Department, Public Regulation Commission, Department of Game and Fish, State Land Office, Attorney General's Office, Department of Agriculture, Mining Commission, Water Quality Control Commission and others. The event is from 3:30-5:30 p.m., April 12, at the Roundhouse Rotunda in Santa Fe. Refreshments and hors d'oeuvres provided.

New Mexico Judges and Lawyers Assistance Program Attorney Support Groups

- April 8, 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#.
- April 15, 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#.
- May 6, 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 sign up, contact Erica Candelaria at ecandelaria@nmbar.org or 505-797-6093.

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.

Solo and Small Firm Section Scott Gordon Discusses Workplace Respect

On April 16, Scott Gordon will conduct a practical and academic discussion of the laws surrounding employment harassment and discrimination and how to cultivate respect in the workplace. Gordon is director at the Rodey Law Firm and has conducted this presentation to lawyer groups including the Tenth Circuit judges and staff. A superb discussion among attendees is inevitable. The Solo and Small Firm hosts these monthly luncheon programs with an open invitation to all judges and attorneys. This is the final luncheon in the spring series and it will take place from noon-1 p.m. at the State Bar Center. R.S.V.P. to Breanna Henley at bhenley@smbar.org.

Roundtable Discussions in Carlsbad and Farmington

The Solo and Small Firm Section is hosting Roundtable events in Carlsbad on April 8 and in Farmington on May 13. The Roundtable events are gatherings in which attendees discuss practice management and other business trends. For more information, contact Deian McBryde at deian@mc-brydelaw.com or 505-465-9086 or Breanna Henley at bhenley@nmbar.org.

Young Lawyers Division Annual Law Day Call-in Program

Join the Young Lawyers Division to provide free, basic legal information by telephone in celebration of Law Day on Saturday, April 27 from 8:30 a.m.-noon, in Albuquerque and in Farmington. See page 9 for details!

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.

Reference

Monday–Friday	9 a.m.–6 p.m.
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Nominate deserving colleagues for UNM Law Alumni/ae Association Awards

Help the UNM Law Alumni/ae Association recognize accomplished members of their legal community with the Distinguished Achievement Award and Alumni Promise Award. Deadline for nominations is April 17. For award criteria and nomination form, visit <http://lawschool.unm.edu/alumni/events/daad.html>.

OTHER BARS Albuquerque Bar Association Monthly Luncheon and Annual Legislative Update

Join the Albuquerque Bar Association for their monthly luncheon and annual legislative update, from 11:45 a.m.-1:15 p.m., April 9 at the Embassy Suites 1000 Woodward Pl NE, Albuquerque. Dick Minzner will be presenting his annual legislative update. Lunch will take place from 11:45 a.m.-12:15 p.m. and the CLE will run from 12:15-1:15 p.m. The cost is \$30 for members and \$35 for non-members. There is \$5 walk-up fee. Register for lunch by 5 p.m. April 5 and note that ABA is 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.

Annual Celebration of Law Day

The State Bar of New Mexico and the Albuquerque Bar Association invite Members and the public community to join in the Annual Celebration of Law from 11:30 a.m.-1 p.m. Day, May 1, at the Embassy Suites 1000 Woodward Pl NE, Albuquerque. The cost is \$40 per person. Table rates and sponsorship options to follow. To register contact Breanna Henley at bhenley@nmbar.org or 505-797-6039.

New Mexico Women's Bar Association Annual Henrietta Pettijohn Reception

The New Mexico Women's Bar Association invites members to attend its Annual Henrietta Pettijohn Reception Honoring the Hon. Nan Nash (Ret.) The 2019 Rising Star Award, honoring an outstanding young attorney, will be presented to Jazmin

Notices continue on page 9

Legal Education

April

- | | | |
|--|--|--|
| <p>11 Due Diligence in Business Transactions
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics (2017)
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>23 2019's Best Law Office Technology, Software and Tools- Improve Client Service, Increase Speed and Lower Your Costs
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>12 Fifth Annual Symposium on Diversity and Inclusion
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 Criminal Rules Hot Topics (2018)
2.5 G, 0.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>25 Employment and Labor Law Legislative Update
1.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>16 Avoid Lawsuits by Cultivating Respect in the Workplace
1.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 How to Practice Series: Estate Planning
5.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>26 Undue Influence and Duress in Estate Planning
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>16 To Indemnify, or To Hold Harmless?
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 Changing Minds Inside and Out of the Courtroom
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>26 Veterans disability Law Bootcamp
5.7 G
Live Seminar, Albuquerque
Vet Defender</p> |
| <p>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 NMSBF
www.nmbar.org</p> | <p>18 Beneficiary Designations in Retirement Accounts: Protecting a Lifetime of Savings
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>26 Surviving White Collar Cases – Prosecution and Defense Perspectives
5.5 G, 1.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>17 29th Annual Appellate Practice Institute (2018)
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 Lawyer Ethics and Investigations for and of Clients
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>26 Uniform Partition of Heirs Property Act (and Deeds 101)
1.5 G
Live Seminar, Albuquerque
Ghost Ranch, New Mexico
www.nmbar.org</p> |
| | <p>23 Mother Nature and Leases: Drafting Issues to Protect Against Storm and Other Damage
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 Emerging Ethical Issues in the Practice of Law
2.0 G, 1 EP
Webcast/Live Seminar, Albuquerque
Paralegal Division
lsanders@pbwslaw.com</p> |

- | | | |
|---|---|---|
| <p>29 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 Litigation and Argument Writing in the Smartphone Age (2017)
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 Tax Pitfalls for the Small Business Attorney
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>29 Add a Little Fiction to Your Legal Writing (2017)
2.0 G
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
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 Retain Your Clients: A Roadmap to Effective, Ethical Client Service
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>29 Ethical 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>30 Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice and More
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | |

May

- | | | |
|---|---|--|
| <p>3 The Law of Background Checks: What Clients May/May Not Check
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
www.nmbar.org</p> | <p>22 How to Practice Series: Divorce Law in New Mexico
4.5 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>7 Incentive Compensation in Businesses, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 34th Annual Bankruptcy Year in Review Seminar
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>22 The Lifecycle of a Trial, from a Technology Perspective (2017)
4.3 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>8 Incentive Compensation in Businesses, Part 2
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 Pretrial Practice in Federal Court (2018)
2.5 G, 0.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>22 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>9 Drafting Demand Letters
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 Basic Guide to Appeals for Busy Trial Lawyers (2018)
3.0 G,
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>24 Ethical Issues in Contract Drafting
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |

CLE calendar continues on page 10.

Celebrate Law Day by Giving **FREE** Legal Advice

Join the Young Lawyers Division to provide free, basic legal information by telephone in celebration of Law Day on

Saturday, April 27 from 8:30 a.m.–noon

at the State Bar Center located at 5121 Masthead St NE, Albuquerque
or the 11th Judicial District Attorney's Office located at 335 S Miller Ave, Farmington

Throughout the Ask-a-Lawyer Call-in Program, New Mexico residents from around the state phone in with questions typically related to areas of family law, landlord/tenant disputes, consumer law, real estate, probate, employment law, contracts and general practice.

Volunteer attorneys are needed to receive calls and provide up to 15 minutes of legal advice. Practice area(s) can be indicated upon sign-up. Attorneys fluent in Spanish are needed.

Arrival time is 8:30 a.m., calls will begin at 9 a.m. Breakfast and coffee will be served.



Thank you for aiding in the Young Lawyers Division's mission to support and encourage public service to New Mexico residents who may not be able to afford a lawyer or do not know where to turn for legal assistance.

Visit
www.nmbar.org/AskALawyer
to sign-up!

**Ask-a-Lawyer
Call-in Program**



Irazaqui-Ruiz. The event will start at 6 p.m. on April 18, at Hotel Albuquerque, 800 Rio Grande Blvd. NW. Join the Women's Bar Association for hors d'oeuvres, to recognize our honorees, and to support law student bar review scholarships. Ticket prices \$25 for students; \$50 for members; \$60 for non-members. Visit www.nmwba.org/shop-1 to purchase tickets. There will be on-site child care provided for Women's Bar Association members. Contact Barbara Koenig at bkoenig617@gmail.com by no later than April 11 to R.S.V.P. for childcare.

OTHER NEWS **New Mexico Christian Legal Aid**

20th Anniversary Celebration

New Mexico Christian Legal Aid 20th Anniversary Celebration is at 6 p.m., on April. 5, at The Rock at Noon Day. The event will also have a silent auction along with Emcee: Steve Stucker from KOB-TV and keynote speaker Marcus "Goodie" Goodloe, Ph.D. For more information contact christianlegalaid@hotmail.com

New Mexico Legal Aid **Free Legal Fair in Española**

The First Judicial District Pro Bono Committee is hosting a free legal fair in Española at 10 a.m. on April 6, at the Hernandez Community Center 19418 A US-8421 Rodeo RD., just North of Española. The legal Fair will be first-come, first-served. Spanish language interpreters will be available. Volunteer Attorneys can register at <https://bit.ly/2TtW5va>. For more information contact C. Tattiana Kinahan at 505-814-5033 or by email at Tattianak@nmlegalaid.org.

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

June

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|---|---|---|
| <p>3 Smartphones, Tablets and Other Devices in the Workplace
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>6 2018 Ethics in Civil Litigation, Part 2
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 Ethics of Co-Counsel and Referral Relationships
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>5 2018 Ethics in Civil Litigation, Part 1
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>14 Ethics in Negotiations- Boasts, Shading and Impropriety
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | |

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
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective March 15, 2019

PUBLISHED OPINIONS

No published opinions

UNPUBLISHED OPINIONS

A-1-CA-35601	N Cutliff v. Vis-Com Inc	Affirm	03/11/2019
A-1-CA-36799	A Gamble v. Timberon Water	Affirm	03/11/2019
A-1-CA-37457	F Valenzuela v. A Snyder	Affirm	03/11/2019
A-1-CA-37703	State v. P Stonecipher	Affirm	03/11/2019
A-1-CA-37039	Citimortgage Inc v. J Garfield	Reverse/Remand	03/12/2019
A-1-CA-37281	B Franklin v. T Hatch	Affirm	03/12/2019
A-1-CA-35824	M Peralta v. S Britt	Affirm	03/13/2019
A-1-CA-36235	Pacific Dental v. NM Dental Board	Affirm	03/13/2019
A-1-CA-37075	CYFD v. Leroy J	Affirm	03/13/2019
A-1-CA-37273	State v. R Griego	Affirm	03/13/2019
A-1-CA-37498	CYFD v. Morelia B	Affirm	03/14/2019
A-1-CA-37532	CYFD v. Latasha W	Affirm	03/14/2019

Effective March 22, 2019

PUBLISHED OPINIONS

A-1-CA-34617	State v. L Telles	Affirm	03/20/2019
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UNPUBLISHED OPINIONS

A-1-CA-36090	Tiller Design v. Tax & Rev	Affirm	03/18/2019
A-1-CA-37603	State v. K Hoihjelle	Affirm/Reverse	03/18/2019
A-1-CA-37617	State v. M Montoya	Affirm	03/18/2019
A-1-CA-37709	State v. C Sanchez	Affirm	03/18/2019
A-1-CA-35981	E Noll v. Dept of Public Safety	Affirm	03/19/2019
A-1-CA-36301	R Urquijo v. D Fernandez	Affirm	03/20/2019
A-1-CA-37008	State v. C White	Affirm	03/20/2019
A-1-CA-37635	City of Rio Rancho v. R Preut	Reverse	03/20/2019
A-1-CA-34632	State v. G Montoya	Affirm/Vacate/Remand	03/21/2019

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

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

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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

Effective April 3, 2019

PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:

Please see the summary of proposed rule amendments published in the March 6, 2019 issue of the Bar Bulletin. The actual text of the proposed rule amendments can be viewed on the Supreme Court's website at the address noted below. The comment deadline for the proposed rule amendments is April 3, 2019.

RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2019 NMRA:

Local Rules for the Sixth Judicial District Court

LR6-213 Electronic filing authorized 09/01/2019

Local Rules for the Twelfth Judicial District Court

LR12-201 Electronic filing authorized 09/01/2019

Local Rules for the Thirteenth Judicial District Court

LR13-208 Electronic filing authorized 09/01/2019

Effective Date

Rules of Civil Procedure for the District Courts

1-003.2 Commencement of action; guardianship and conservatorship information sheet 07/01/2018

Rules of Civil Procedure for the District Courts

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

1-140 Guardianship and conservatorship proceedings; mandatory use forms 01/14/2019

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

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-006
No. S-1-SC-37204 (filed January 17, 2019)

IN THE MATTER OF
ERIC D. DIXON

An Attorney Suspended from the
Practice of Law in the Courts of
the State of New Mexico

JANE GAGNE
Albuquerque, NM
for Disciplinary Board

GARY C. MITCHELL
Ruidoso, New Mexico
for Respondent

Opinion

Petra Jimenez Maes, Justice

{1} This opinion follows disciplinary proceedings against attorney Eric D. Dixon. The Disciplinary Board found that Dixon, among other things, knowingly made false statements to the Ninth Judicial District Court and later to Disciplinary Counsel related to the representation of his client Jessica Aguilar (Jessica). The false statements began after the district court awarded summary judgment against Jessica on claim preclusion grounds, due to Dixon's prior voluntary dismissal with prejudice of a federal lawsuit that he had filed on behalf of "Jessica Aguilar." The Board concluded that Dixon violated Rule 16-101 NMRA (competence), Rule 16-301 NMRA (meritorious claims and contentions), Rule 16-303 NMRA (candor toward the tribunal), Rule 16-801 NMRA (bar admission and disciplinary matters), and Rule 16-804 NMRA (misconduct), and recommended that he be suspended from the practice of law for one year.

{2} We adopted the Board's findings and conclusions with one modification, which we explain later in this opinion. We indefinitely suspended Dixon from the practice of law for a period of no less than nine months, effective thirty days from November 9, 2018. We further ordered

that before filing a petition for reinstatement, Dixon must complete ten hours of ethics continuing legal education classes, with at least half of the credit earned for in-person classes, and must take and pass the Multistate Professional Responsibility Examination with a minimum scaled score of eighty. We ordered Dixon to pay the costs of his disciplinary proceedings and now issue this formal opinion.

{3} We write to emphasize to the bench, bar, and public that a lawyer's duty of candor is clear and unequivocal: "Attorneys are officers of the court, and our system of justice works only if the courts can rely on attorneys to fulfill their duty of candor to the tribunal." *In re Chavez*, 2013-NMSC-008, ¶ 26, 299 P.3d 403. This case illustrates how easily a lawyer's decision to pursue a litigation strategy that is less than truthful can lead to multiple violations of the duty of candor, to the detriment of the legal system, the legal profession, and the public.

I. BACKGROUND

{4} Dixon, who has been a sole practitioner since 1990 focusing on criminal defense and civil rights work, does not come before us with a clean slate. He was the subject of a public censure by this Court for an unrelated incident that occurred in 2011. *See In re Dixon*, S-1-SC-33713, *Bar Bulletin*, N.M. State Bar, Sept. 2, 2015, at 16 ¶ 2 (Public Censure filed Aug. 24, 2015). In that proceeding, several witnesses testified that they saw

Dixon honk his horn and accelerate his car toward a Ninth Judicial District Court judge who was crossing the street. *Id.* Substantial evidence showed that Dixon "knew it was [the judge] who was crossing the street and purposefully drove his vehicle in a manner designed to frighten and harass him." *Id.* ¶ 4. In our public censure of Dixon, we observed that his conduct "strikes at the very core of our legal system's reliance on a professional, respectful relationship between the bench and bar to ensure the effective administration of justice." *Id.* ¶ 1. We admonished Dixon for "engag[ing] in threatening and unprofessional conduct," and we "caution[ed] him against engaging in such irresponsible and unprofessional behavior in the future." *Id.* ¶¶ 1, 10. Dixon's conduct that led to this proceeding, much of which occurred after his public censure, suggests that he did not heed our warning.

{5} To understand the events that resulted in Dixon's suspension in this proceeding, one must ask, who is Jessie Aguilar? Dixon answered that question in an e-mail to opposing counsel on June 11, 2015: "There is no Jessie Aguilar[;] there is a Jessica Aguilar . . ." That statement serves as the inflection point in this case. Before June 11, 2015, Dixon's conduct was, at best, extremely careless and sloppy¹; afterwards, his conduct became increasingly deceptive until he made the false statements at issue in this proceeding. We explain, drawing from the Board's findings of fact and viewing the evidence in the light most favorable to those findings. *See In re Bristol*, 2006-NMSC-041, ¶ 28, 140 N.M. 317, 142 P.3d 905.

{6} In October of 2013, Dixon entered into separate contingency fee agreements with Aguilar and nine male individuals. At about the same time, Dixon submitted tort claims notices to the Roosevelt County Clerk on behalf of Jessica and his nine male clients. The notice on Jessica's behalf pertained to an incident while she was an inmate at the Roosevelt County Detention Center (RCDC) in which she was allegedly "forced to endure a body cavity search against her wishes" by two unnamed female RCDC employees. The notices for Dixon's nine male clients alleged that, while they were inmates at the RCDC, they had been involved in "one or more of the pepper ball incidents" at the hands of Officer James Andes. Dixon did not enter into a contingency fee agreement with or file a tort claims notice on behalf of anyone

¹Many of the events underlying this disciplinary proceeding are the subject of an appeal pending before the Court of Appeals. *See Aguilar v. Roosevelt Cty. Bd. of Cty. Comm'rs*, No. A-1-CA-36828. Our discussion and analysis of the facts set forth in this opinion are based on the findings and conclusions of the Board and are not intended to influence the outcome of the appeal.

specifically named Jessie Aguilar.

A. The Federal Lawsuit

{7} Dixon filed a complaint in April of 2014 in the United States District Court for the District of New Mexico (the Federal Lawsuit). The complaint named Officer Andes and the Roosevelt County Board of County Commissioners as defendants and alleged that on September 26, 2013, Officer Andes had “fired at least five rounds of pepper balls” into a day room at the RCDC, injuring the inmates who were present. The caption of the complaint named ten individuals as plaintiffs: Dixon’s nine male clients and a tenth person identified as “Jessica Aguilar.” The body of the complaint alleged various civil rights violations and tort claims against the defendants and included specific allegations about only two of the plaintiffs, neither of whom was Jessie Aguilar.

{8} In the early stages of the Federal Lawsuit, all indications were that Jessie Aguilar was a male inmate who had been present during the pepper ball incident alleged in the complaint. For example, Dixon used masculine pronouns to refer to Jessie Aguilar in Dixon’s initial disclosures and in his portion of the joint status report filed with the court. Further, in October of 2014, Dixon filed a motion to amend the complaint that included a proposed first amended complaint (FAC). The court never gave leave to file the proposed FAC, which included new details about the alleged abuses and injuries suffered by four more of the plaintiffs. Like the original complaint, the proposed FAC mentioned Jessie Aguilar only in the case caption.

{9} Beginning in November of 2014, clues about Jessie Aguilar’s identity began to emerge as the Federal Lawsuit proceeded. On November 7, Dixon e-mailed opposing counsel that he had lost contact with five of his clients, including Jessie Aguilar. But later that month, Dixon’s assistant faxed a release for Jessica’s medical records—signed “Jessica Aguilar”—to opposing counsel. Similarly, in January of 2015, Dixon e-mailed opposing counsel a list of the plaintiffs’ addresses, including the address of “Jessica Aguilar,” and stated that “Jessica Aguilar” was available for deposition “here locally.” And in February of 2015, Dixon’s assistant instructed Jessica to answer interrogatories addressed to Jessie

Aguilar, and Jessica’s answers were served on opposing counsel. The case caption on the certificate of service for the answers and on a few subsequent pleadings included the name “Jessica Aguilar” instead of “Jessie Aguilar.” The answers also included a verification signed by Jessica declaring under oath that she was a plaintiff in the Federal Lawsuit. The answers described Jessica’s injuries as “injury to eyes from the pepper ball spray; [and] depression due to possible PTSD,” with no reference to injuries resulting from a body cavity search.

{10} The Board made several findings relevant to this time period. First, in late 2014 and early 2015 Dixon traveled extensively to Houston, Texas to assist his elderly parents. Dixon’s father succumbed to illness and died in February of 2015. Further, no evidence was presented that Dixon knew that his assistant had faxed Jessica’s medical release to opposing counsel. Likewise, Dixon did not personally sign Jessica’s interrogatory answers, and no evidence was presented that he had reviewed the answers before they were served on opposing counsel. Dixon’s assistant, who is related to Jessica by marriage, undertook those actions to help Dixon. Additionally, Dixon’s assistant changed “Jessie” to “Jessica” in the case caption on the certificate of service for the interrogatory answers, and Dixon likely copied and pasted the same caption into subsequent pleadings. {11} The Federal Lawsuit culminated in settlement negotiations in early 2015. Dixon asserted Jessica’s claims to opposing counsel as part of the negotiations, and the defendants offered to settle Jessica’s claims for \$1,000, which Jessica rejected. Dixon then sent the June 11 e-mail described above, in which he informed opposing counsel, “There is no Jessie Aguilar[;] there is a Jessica Aguilar and her claim was not included in the complaint.” Dixon further stated,

I will agree to dismiss Jessie Aguilar with prejudice with the understanding that I can bring a law-suit in the name of Jessica Aguilar. She claims that her POD was shot with pepper balls around the same time. She put on her contact lens which had film on them and burned her eyes. In addition, she was taken to the public health department

by two jail guards and had a pelvic exam done while both guards viewed the procedure which was very humiliating to her.

Opposing counsel refused to agree that dismissing Jessie Aguilar would not prejudice Jessica from filing a subsequent lawsuit in state court. Nonetheless, on June 16, 2015, Dixon filed a notice of dismissal with prejudice “of all claims . . . that were brought or could have been brought by Jessie Aguilar.” No settlement monies were paid to Jessica as a result of the Federal Lawsuit.

B. The State Lawsuit

{12} Ten days later, Dixon filed a complaint on Jessica’s behalf in the Ninth Judicial District Court for Roosevelt County (the State Lawsuit). The complaint named as defendants the Roosevelt County Board of County Commissioners and “Jane Does I and II, in their official capacities as Detention Officers.” The complaint alleged that Jessica was forced to undergo a pelvic exam without her consent “apparently to look for contraband.” It further alleged that two female RCDC employees had remained in the room while a nurse performed the examination and asked Jessica personal and medical questions. The complaint sought unspecified damages for negligence, invasion of privacy, assault, and battery.

{13} On August 7, 2015, the defendants filed a motion for summary judgment on claim preclusion grounds, based on Dixon’s dismissal with prejudice of Jessie Aguilar from the Federal Lawsuit. The district court granted the motion for summary judgment. Dixon later filed a motion to reconsider, which the district court denied. Dixon’s litigation strategy in these proceedings led to his first knowingly false statement found by the Board.

{14} On August 24, 2015, the same day that we filed the public censure in Dixon’s unrelated disciplinary proceeding, Dixon filed his response to the motion for summary judgment in the State Lawsuit. Instead of explaining the confusion in the Federal Lawsuit about the identity of Jessie Aguilar, Dixon stated that “Jesse Aguilar filed a claim in the United States District Court,” and that “Jessica Aguilar[,] a female[,] and Jesse Aguilar, a male[,] are not the same person.”² Dixon maintained that Jessica was never a

²We find no reference in the Federal Lawsuit to a “Jesse” Aguilar, arguably a third Aguilar in this proceeding. That spelling first occurred in Dixon’s response to the motion for summary judgment, which included an affidavit in which Jessica stated under penalty of perjury, “I have never been referred to as Jesse Aguilar.” Dixon relied on Jessica’s statement to argue that “Jesse” and Jessica are not the same person and that “Jessica Aguilar has never been known as Jesse Aguilar.” We adopted the hearing committee’s finding that Dixon was unaware that Jessica had ever been known as Jessie. However, we view the timing and circumstances of Dixon’s use of the name “Jesse” as highly suspicious and likely intended to evade the truth and confuse this matter even further.

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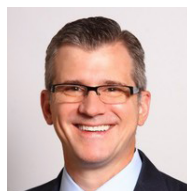
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5.5 G 1.0 EP

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3.0 EP

9 a.m.–Noon

\$159 Standard Fee

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2.5 G 0.5 EP

1–4 p.m.

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April 29

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2.0 G

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1.0 G

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party to the Federal Lawsuit, and he elaborated that “Jessica Aguilar has never been known as Jesse Aguilar . . .” The Board did not find clear and convincing evidence that these representations were intentionally misleading. But we observe that at the very least, these representations were evasive and inconsistent with Dixon’s earlier admission that “[t]here is no Jessie Aguilar[;] there is a Jessica Aguilar.”

{15} Dixon crossed the line separating truth from falsehood in a later filing in support of his motion to reconsider the district court’s award of summary judgment against Jessica. Arguing again that Jessica’s claims were not part of the Federal Lawsuit, Dixon asserted that “counsel always intended to file a lawsuit for Jessica Aguilar and in fact filed a Motion to Amend the Complaint filed in Federal Court to bring Jessica Aguilar into the law-suit.” (Emphasis added.) That assertion was provably false. Neither the motion to amend nor the proposed FAC in the Federal Lawsuit sought to add Jessica as a plaintiff, to add her name to the case caption, to add allegations about an alleged body cavity search, or to join the two unnamed RCDC employees as defendants. The Board later found clear and convincing evidence that Dixon “never intended for the Proposed FAC to bring [Jessica] Aguilar into the Federal Lawsuit” and that his statement to the contrary was intentionally misleading. The district court denied Dixon’s motion to reconsider, and Jessica’s appeal in the State Lawsuit is pending in the Court of Appeals at the time of the writing of this opinion.

C. The Disciplinary Proceedings

{16} Counsel for Roosevelt County later filed a complaint with the Board related to Dixon’s conduct in the Federal and State Lawsuits. Disciplinary Counsel initiated an investigation and eventually filed a specification of charges against Dixon. Dixon’s deceptive behavior continued in the disciplinary proceedings.

{17} In response to Disciplinary Counsel’s initial inquiry, Dixon wrote a letter describing his version of events in the Federal Lawsuit. Dixon continued to represent that he had filed the Federal Lawsuit on behalf of Jessie Aguilar, one of ten individuals who was “incarcerated

at the [RCDC] in Portales, New Mexico” and “who had been pepper-ball sprayed at the [RCDC].” Explaining that the defendants had taken the depositions of five of the plaintiffs, Dixon asserted, “Neither the deposition of Jesse Aguilar or Jessica Aguilar was ever notice[d] or requested.”³ Once again, that statement was provably false. Counsel for the defendants in the Federal Lawsuit electronically served on Dixon via e-mail a notice of deposition for Jessie Aguilar on January 20, 2015. The Board later found that Dixon had constructive notice, if not actual notice, that Jessie Aguilar’s deposition had been “noticed” when Dixon stated to the contrary to Disciplinary Counsel.

{18} Dixon also introduced in the disciplinary proceedings a novel explanation for including Jessie Aguilar in the Federal Lawsuit, an explanation the Board found “not credible.” Dixon testified in his deposition that he had named Jessie Aguilar as a plaintiff based on a discussion with Roy Montano, one of the other plaintiffs in the Federal Lawsuit.

[T]here is an extended family that I’ve represented for many years, Roy Montano—Montano is the uncle of Jessica Aguilar. And when I spoke to Mr. Montano, my recollection was that he said he had a nephew by the name of Jesse Aguilar that had been pepper-ball sprayed.

Dixon further testified that he had included Jessie Aguilar in the Federal Lawsuit, despite the absence of a contingency fee agreement, because he had represented Montano before and trusted him. In finding that Dixon’s explanation was “not credible,” the Board specifically noted that Dixon had never mentioned the alleged conversation with Montano until after Montano’s death in May of 2017, despite “numerous opportunities, including in these proceedings, [when] it would have been to [Dixon’s] advantage to raise the matter of Roy Montano telling him about a nephew, Jessie Aguilar.”

II. DISCUSSION

{19} The Board concluded that Dixon violated Rules 16-101, -301, -303, -801, and -804. We review the Board’s conclusions of law de novo. See *In re Bristol*, 2006-NMSC-041, ¶¶ 18, 26.

A. Duty of Candor

{20} “[T]he integrity of the adjudicative process requires that a lawyer act truthfully and honestly before the court.” *In re Montoya*, 2011-NMSC-042, ¶ 33, 150 N.M. 731, 266 P.3d 11 (per curiam). Indeed, the duty of candor applies to every facet of a lawyer’s professional responsibilities. See, e.g., Rule 16-303 (setting forth a lawyer’s duties of candor toward the tribunal); Rule 16-401(A) NMRA (providing that a lawyer shall not knowingly make a false statement of fact to a person who is not a client); Rule 16-701 NMRA (“A lawyer shall not make, elicit, or endorse a false or misleading communication about the lawyer or the lawyer’s services.”); Rule 16-801 (providing that a lawyer shall not knowingly make a false statement of fact “in connection with a bar admission application or in connection with a disciplinary matter”); Rule 16-804(C) (defining professional misconduct for a lawyer, in part, as “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation”). Dixon’s false statements in this proceeding violated Dixon’s duty of candor under several of these rules.

{21} As a threshold matter, we pause to address Dixon’s argument that the Board’s reliance on the statements described in this opinion as a basis for discipline violated his due process rights to notice and an opportunity to respond. Dixon essentially argues that the Board performed a bait-and-switch because the specification of charges alleged only that he knew that Jessie Aguilar and Jessica were the same person and that he therefore improperly filed the State Lawsuit after he had filed and dismissed the Federal Lawsuit on Jessica’s behalf. Dixon argues that the Board rejected Disciplinary Counsel’s theory of misconduct and substituted its own theory without giving him notice and an opportunity to defend himself. See, e.g., *Mills v. N.M. State Bd. of Psychologist Exam’rs*, 1997-NMSC-028, ¶ 14, 123 N.M. 421, 941 P.2d 502 (“Procedural due process requires notice and an opportunity to be heard prior to a deprivation of a protected liberty or property interest.”).

{22} Dixon’s argument lacks merit. The specification of charges provided notice that Dixon’s conduct in the Federal and State Lawsuits was under scrutiny, including whether he had been truthful in the

³We again note Dixon’s troubling use of the name “Jesse” Aguilar. We adopted the Board’s findings that treated Dixon’s use of “Jesse” as a mistake or typographical error. We emphasize, however, that the timing and circumstances of Dixon’s use of “Jesse,” for example when denying receipt of a notice of deposition for “Jesse” Aguilar, suggest an intentional effort to mislead the Board and this Court.

summary judgment proceedings in the State Lawsuit and in the disciplinary proceedings. Dixon hired counsel and vigorously contested the allegations against him at each level of the proceedings, including before this Court. We see no lack of due process under these circumstances. See *id.* (“The specific requirements of procedural due process . . . could encompass any number of the following components: (1) notice of the basis for the government action; (2) a neutral decision maker; (3) the opportunity to orally present a case against the state; (4) the opportunity to present evidence and witnesses against the state; (5) the opportunity to cross-examine witnesses; (6) the right to have an attorney present at the hearing; and (7) a decision based on the evidence presented at the hearing accompanied by an explanation of the decision.”).

1. Candor toward the tribunal

{23} Rule 16-303(A)(1) prohibits a lawyer from “knowingly . . . mak[ing] a false statement of fact . . . to a tribunal.” Dixon violated Rule 16-303(A)(1) by knowingly and falsely representing to the Ninth Judicial District Court that he had “filed a Motion to Amend the Complaint filed in Federal Court to bring Jessica Aguilar into the law-suit.” Dixon, as the author of the motion to amend and of the proposed FAC, knew that neither document mentioned Jessica or purported to provide any factual or legal support for her claims beyond what may (or may not) have been included in the original complaint. We therefore agree with the Board that there was clear and convincing evidence that “Dixon intentionally misled the court in the State Lawsuit” with that representation and that Dixon “never intended for the Proposed FAC to bring Jessica Aguilar into the Federal Lawsuit.”

{24} Dixon takes issue with the Board’s reliance on “one sentence” out of “[t]housands of pages of documents [that] were generated in the case” to support a violation of Rule 16-303(A)(1). That argument ignores the context in which Dixon made the false statement. Dixon’s “one sentence” resulted from a litigation strategy in the State Lawsuit that needlessly clouded the truth about what had occurred in the Federal Lawsuit. Rather than acknowledging and explaining the confusion that he had created, Dixon advanced a narrative that he had filed the Federal Lawsuit on behalf of a male Jessie Aguilar who was present during the alleged pepper ball incident at RCDC. But as Dixon himself had

previously explained, “There is no Jessie Aguilar.” And as the Board found, “No male by the name of Jessie, Jesse or Jessy Aguilar or any other spelling of that name was housed at the RCDC on September 30, 2013.” Additionally, Dixon never came forward in these proceedings with a credible explanation for naming a male Jessie Aguilar in the Federal Lawsuit. Nonetheless, Dixon pushed harder and harder on that tenuous narrative until he knowingly made a statement that was demonstrably false. Under these circumstances, Dixon’s complaint that the Board plucked a single statement out of context to support a violation of Rule 16-303(A)(1) rings hollow.

2. Candor in disciplinary proceedings

{25} Dixon also violated Rule 16-801(A), which prohibits a lawyer from knowingly making a false statement of material fact in connection with a disciplinary proceeding. Dixon falsely stated to Disciplinary Counsel that opposing counsel in the Federal Lawsuit had not given notice of or requested the deposition of “Jesse” Aguilar. Dixon’s statement flowed from the same strategy that he had employed in the district court, which once again resulted in a knowing falsehood. We agree with the Board that Dixon’s statement was false and that he had constructive notice, if not actual notice, of its falsity at the time that he made it. Further, we note that the Board found that Dixon’s explanation for including Jessie Aguilar in the Federal Lawsuit based on a conversation with Montano was not credible “given the totality of circumstances of this case.” That finding, which is supported by substantial evidence, is tantamount to a determination that Dixon fabricated his story about Montano telling him that Montano’s non-existent nephew, Jessie Aguilar, was present during the pepper ball incident. Substantial evidence supports the Board’s conclusion that Dixon violated Rule 16-801(A).

3. Professional misconduct

{26} These knowingly false statements, made in multiple settings and over an extended period of time, violated Rule 16-804. Dixon’s actions in the State Lawsuit and in this disciplinary proceeding amounted to conduct involving dishonesty, deceit, and misrepresentation. See Rule 16-804(C). In addition to the harms caused by the knowingly false statements themselves, this case illustrates the pernicious nature of statements that fall just short of that threshold. Dixon’s repeated dissembling and splitting of hairs in the State Lawsuit and in the disciplinary pro-

ceedings about Jessie Aguilar’s identity led to his false statements in both proceedings. Had Dixon simply acknowledged and explained the confusion in the Federal Lawsuit, he would have avoided much of the trouble that has followed.

{27} Due to Dixon’s lack of candor throughout these proceedings, we may never know why “Jessie Aguilar” was named in the Federal Lawsuit. The lack of certainty is intolerable. It already has delayed Jessica’s state law claims and ultimately may preclude them altogether, depending on the outcome of her appeal. Dixon therefore has committed misconduct prejudicial to the administration of justice. See *In re Montoya*, 2011-NMSC-042, ¶ 23 (“[A] failure of candor to the court can prejudice the administration of justice in violation of Rule 16-804(D) NMRA.”).

B. Competence

{28} The mandate of Rule 16-101 is unequivocal: “A lawyer shall provide competent representation to a client.” Dixon failed to provide competent representation to Jessica in the Federal Lawsuit by treating her as though she was the same person as the plaintiff Jessie Aguilar. It is equally clear that Dixon never entered into a contingency fee agreement with or filed a tort claims notice on behalf of Jessie Aguilar. As previously discussed, it remains impossible to tell who the Jessie Aguilar named in the Federal Lawsuit actually was. However, there is no doubt that before the Federal Lawsuit was filed, Dixon had agreed to represent Jessica for her claims arising from the events described in her tort claims notice.

{29} Dixon’s filing of the Federal Lawsuit on behalf of “Jessie Aguilar” therefore placed Jessica’s claims on precarious footing. That is especially true given the similarities of Jessica’s claims and the allegations in the Federal Lawsuit, which (1) named one of the same defendants implicated by Jessica’s tort claims notice; (2) arose from events that occurred at about the same time and location as the events described in Jessica’s tort claims notice; and (3) did not offer any specific allegations to distinguish Jessie Aguilar’s factual or legal claims from Jessica’s. The potential for confusion with Jessica’s claims under these circumstances should have been manifest to a competent attorney.

{30} Dixon further jeopardized Jessica’s claims when, in the Federal Lawsuit, he (1) asserted Jessica’s claims to opposing counsel during settlement negotiations;

(2) attempted to negotiate a settlement on Jessica's behalf when opposing counsel knew that the defendants were making an offer to Jessica of \$1,000, which Jessica rejected; (3) sought agreement from the defendants—which they refused—that dismissing “Jessie Aguilar” would not prejudice Jessica from filing a subsequent lawsuit in state court; and (4) voluntarily dismissed the claims of “Jessie Aguilar” with prejudice and without any monies paid to Jessica. A competent attorney would have realized that dismissing the claims of “Jessie Aguilar” with prejudice under these circumstances would imperil a subsequent lawsuit on Jessica's behalf related to the events described in her tort claims notice. Dixon failed to provide competent representation to Jessica.

{31} In our order indefinitely suspending Dixon, we rejected the Board's second basis for a violation of Rule 16-101 because it was not supported by substantial evidence. See Order, *In re Dixon*, No. S-1-SC-37204 (N.M. Sup. Ct. Nov. 9, 2018). The Board concluded that Dixon failed to provide competent representation to Jessie Aguilar “as evidenced by bringing suit on his behalf without ever speaking with him, and then by dismissing his claims with prejudice without first consulting him.” That conclusion is inconsistent with the overriding theme of the Board's findings and conclusions that Dixon never represented a male Jessie Aguilar because a male Jessie Aguilar never existed in connection with the allegations in the Federal Lawsuit. We therefore reject that portion of the Board's conclusion related to Dixon's violation of Rule 16-101. See Rule 17-316(D)(1) NMRA (“The Supreme Court . . . may . . . reject any or all of the findings, conclusions or recommendations of the Disciplinary Board.”).

C. Meritorious claims and contentions

{32} Rule 16-301 provides in pertinent part, “A lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous” We agree with the Board that Dixon violated Rule 16-301 by filing frivolous claims on behalf of Jessie Aguilar in the Federal Lawsuit, an (apparently fictitious) individual with whom Dixon never spoke “before filing suit and who was not even incarcerated at RCDC on the date in question.” The Board found that “Dixon never met or spoke with Jessie Aguilar about the Civil Complaint filed on his behalf, and was never asked by Jessie Aguilar to represent him in connection

with claims asserted on his behalf in the Federal Lawsuit.” The Board also found that “[n]o male by the name of Jessie, Jesse or Jessy Aguilar or any other spelling of that name was housed at the RCDC on September 30, 2013.” And the Board found that Dixon's sole explanation for naming a male Jessie Aguilar in the Federal Lawsuit was not credible. Dixon therefore lacked any basis in law and fact for filing claims on behalf of a male Jessie Aguilar.

{33} We agree with Dixon, however, that one of the Board's findings in support of this violation was contrary to law. The Board found that Dixon lacked a good faith basis, in particular, for Jessie Aguilar's state law claims at least in part because “no notice was ever provided on behalf of Jessie Aguilar in accordance with the New Mexico Tort Claims Act.” Dixon rightly asserts that the lack of formal, written notice is not determinative of the validity of a claim under the Tort Claims Act. We have interpreted the notice provision of the Tort Claims Act as setting forth a functional standard, requiring consideration of the totality of the circumstances known to the governmental entity and “whether . . . a reasonable person would have concluded that the victim may claim compensation.” See, e.g., *Lopez v. State*, 1996-NMSC-071, ¶ 12, 122 N.M. 611, 930 P.2d 146 (discussing NMSA 1978, § 41-4-16 (1977)). In this case, Roosevelt County may have received “actual notice” of the pepper ball incident alleged in the Federal Lawsuit, and therefore, “whether the facts give rise to a reasonable inference that a claim may be filed is a threshold inquiry to be resolved by the court.” *Id.* ¶ 16. We therefore reject this finding. See Rule 17-316(D)(1).

III. DISCIPLINE

{34} We indefinitely suspended Dixon from the practice of law for a period of no less than nine months. We consider an indefinite suspension to be an appropriate sanction for Dixon due not only to the intentional, harmful nature of his conduct in this proceeding, but also to his prior discipline. See Am. Bar Ass'n, *Annotated Standards for Imposing Lawyer Sanctions* (ABA *Annotated Standards*), Standard 8.2 (2015) (“Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.”). In Dixon's public censure, we admonished him for engaging in conduct that “erodes the foundation of our legal

system and undermines its reputation in the eyes of the public.” *In re Dixon*, No. S-1-SC-33713, ¶ 9. We further stated, “Without an unwavering public demonstration of trust and respect between the members of the bench and the bar, we cannot expect the public to trust and respect us.” *Id.*

{35} Dixon's conduct in this proceeding raises similar concerns. A lawyer who makes false statements, tells half-truths, and otherwise attempts to mislead harms the legal system and the legal profession. The essential aim of our legal system is to seek truth in the pursuit of justice; for a lawyer, all other duties and responsibilities are secondary. See ABA *Annotated Standards* 6.11 annot. (“A lawyer who engages in deceptive conduct in legal proceedings violates the most fundamental duty of an officer of the court.”). Thus, a lawyer who subordinates truth to obtaining a successful outcome for a client or to avoiding personal responsibility undermines the rule of law and erodes public trust and confidence in the legal system. We must demand better from each other. Dixon's suspension serves as a reminder of the importance of a lawyer's duty of candor.

{36} We are unmoved by the mitigating factors found by the Board. We acknowledge that Dixon faced significant hardships during the Federal Lawsuit, including his parents' failing health and an unconstitutional visitation policy at the RCDC. While those challenges may have influenced Dixon's performance in the Federal Lawsuit, they do not diminish his responsibility for his lack of candor, which is our primary concern. That is especially true given Dixon's considerable experience practicing law and his refusal to acknowledge the full extent of the seriousness of his conduct. See ABA *Annotated Standards* 9.22 (listing aggravating factors including prior disciplinary offenses, dishonest motive, multiple offenses, deceptive practices during the disciplinary process, and substantial experience in the practice of law). We therefore conclude that an indefinite suspension is warranted.

{37} Dixon's indefinite suspension will require him to petition the Board for reinstatement and to come before this Court again before he can resume the practice of law. See Rule 17-214(B)(2) NMRA. If Dixon satisfies the conditions for reinstatement and chooses to petition for reinstatement, he will have the burden of demonstrating by clear and convincing evidence the following: (1) that he “has the moral qualifications to practice law”;

(2) that he “is once again fit to resume the practice of law”; and (3) “that the resumption of [his] practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or the public interest.” Rule 17-214(E). In light of the serious concerns raised by Dixon’s conduct in this proceeding and described in his public censure, we encourage Dixon to take each of these elements seriously before he chooses to seek reinstatement. See Rule 17-214(B)(2) (providing that if the Supreme Court denies a petition for reinstatement, the lawyer may not petition again for reinstatement “prior to the

expiration of a twelve (12) month period”).

IV. CONCLUSION

{38} We adopt the Board’s findings of fact and conclusions of law as modified in our order dated November 9, 2018 and in this opinion. We indefinitely suspend Dixon from the practice of law for a period of no less than nine months, subject to the conditions stated earlier in this opinion, and we order him to pay the costs of this proceeding as provided in our November

9, 2018 order.

{39} IT IS SO ORDERED.

Sitting by designation

WE CONCUR:

JUDITH K. NAKAMURA, Chief Justice

BARBARA J. VIGIL, Justice

CHARLES W. DANIELS, Justice, retired

Sitting by designation

GARY L. CLINGMAN, Justice, retired

Sitting by designation

From the New Mexico Supreme Court

Opinion Number: 2019-NMSC-007

No. S-1-SC-36229 (filed December 27, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ANDREW ROMERO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY

George P. Eichwald, District Judge

BENNETT J. BAUR,
Chief Public Defender
KIMBERLY CHAVEZ COOK,
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

HECTOR H. BALDERAS,
Attorney General
MARTHA ANNE KELLY,
Assistant Attorney General
ANITA CARLSON,
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

Opinion

Gary L. Clingman, Justice

{1} Defendant Andrew Romero appeals his convictions arising from the shooting death of Rio Rancho Police Officer Gregg Nigel Benner during a traffic stop. Defendant was convicted of first-degree murder under NMSA 1978, Section 30-2-1(A)(1) (1994); two counts of tampering with evidence under NMSA 1978, Section 30-22-5 (2003); shooting at or from a motor vehicle under NMSA 1978, Section 30-3-8(B) (1993); conspiracy to commit armed robbery under NMSA 1978, Section 30-28-2 (1979) and NMSA 1978 Section 30-16-2 (1973); aggravated fleeing a law enforcement officer under NMSA 1978, Section 30-22-1.1 (2003); and concealing identity under NMSA 1978, Section 30-22-3 (1963). The sentencing jury found aggravating circumstances in Defendant's first-degree murder conviction because Defendant murdered Officer Benner when Officer Benner was acting in the lawful discharge of an official duty and Defendant knew Officer Benner to be a peace officer at the time of the crime. NMSA 1978, § 31-20A-5(B) (1981). For his crimes, the trial court sentenced Defendant to life in prison without the possibility of parole

plus sixty years. Defendant appeals directly to this Court. *See* N.M. Const. art. VI, § 2; Rule 12-102(A)(1) NMRA (requiring that appeals from sentences of life imprisonment be taken to the Supreme Court).

{2} Defendant raises eleven issues on appeal: (1) the trial court erred by not transferring venue outside of the Albuquerque metropolitan area; (2) the trial court erred by not excusing for cause those jurors who were exposed to publicity about the case; (3) the presence of excessive security during the trial prejudiced Defendant; (4) the trial court erred in admitting evidence of uncharged robberies; (5) the trial court should have ordered severance of count five, conspiracy to commit armed robbery; (6) the trial court erred in admitting a video recording of Defendant's nonverbal gestures; (7) the trial court erred in admitting a recording of Defendant's jail telephone call; (8) cumulative error deprived Defendant of a fair trial; (9) Defendant's conviction of shooting at or from a motor vehicle constitutes double jeopardy; (10) the State failed to prove the essential elements of aggravated fleeing; and (11) the State failed to prove deliberate intent, an element necessary to maintain Defendant's first-degree murder conviction. We affirm all of Defendant's convictions except for his conviction of shooting at or from a motor vehicle, which we vacate on double jeopardy grounds.

I. BACKGROUND

{3} Officer Benner was shot and killed during a routine traffic stop at approximately 8 p.m. on May 25, 2015. Officer Benner had initiated the traffic stop of a Dodge Durango because it had a suspicious license plate. Officer Benner initially pulled the Durango over in a parking lot next to Arby's on Southern and Pinetree in Rio Rancho. Tabitha Littles drove the Durango, and a passenger in the vehicle identified himself to Officer Benner as Albert Fresquez. Witnesses later identified Defendant as this passenger. Unbeknownst to Officer Benner, approximately seven hours before the traffic stop, Defendant and Ms. Littles had robbed a Taco Bell in Albuquerque. Officer Benner's traffic stop was unrelated to the Taco Bell robbery.

{4} During this initial traffic stop Officer Benner moved to the rear of the Durango, and, as he began approaching the passenger side, the Durango suddenly accelerated out of the parking lot. While Officer Benner was moving around the Durango, Defendant removed his pistol from under his seat and was holding it between his seat and the center console of the vehicle. Officer Benner pursued the fleeing Durango and caught up to it a short distance away. During the short pursuit, Defendant shoved Ms. Littles out of the Durango, took control of the vehicle, and then brought the vehicle to a stop. As Officer Benner again approached the Durango, this time on the driver side, Defendant fired his pistol four times. All four bullets struck Officer Benner, and he was mortally wounded. Defendant then fled from the scene in the Durango. A multiagency, city-wide manhunt ensued.

{5} At 2:40 a.m. on May 26, 2015, approximately six and a half hours after Defendant shot Officer Benner, Defendant robbed a Shell/Giant gas station. While investigating that robbery, police officers attempted to stop a Chevrolet Impala fleeing from police. During the pursuit, officers observed an object being thrown from the front passenger window. When the chase ended, police found Defendant sitting in the front passenger seat of the Impala and arrested him. Officers recovered the object that was thrown from the front passenger window of the Impala during the chase. It was a nine millimeter Beretta pistol which was later determined to be the pistol used to kill Officer Benner. Defendant's DNA was found on the pistol. When officers searched Defendant, they found the keys to the Dodge Durango that Officer Benner

had pulled over and which had fled the scene of his murder.

{6} On June 11, 2015, a grand jury indicted Defendant on ten counts related to Officer Benner's murder. On October 3, 2016, a jury found Defendant guilty of seven of those counts. The trial court sentenced Defendant to life in prison without parole plus sixty years. This direct appeal followed Defendant's sentencing. Additional facts will be provided as necessary in the discussion below.

II. DISCUSSION

A. The Trial Court's Decision to Change Venue to Valencia County

{7} Media coverage of this case was robust and almost entirely negative toward Defendant. Politicians and the public used Defendant and the murder of Officer Benner as a rallying cry for anticrime legislation. Because of the extensive media coverage, Defendant filed a motion to change venue to Rio Arriba County, McKinley County, or Taos County. The trial court granted Defendant's motion to change venue but moved the trial to Valencia County. The trial court concluded that Valencia County was an appropriate venue, and cited public excitement in Sandoval County as reason for the move. See NMSA 1978, § 38-3-3(B)(3) (2003) (requiring a change of venue upon motion if, 'because . . . of public excitement . . . involved in the case, an impartial jury cannot be obtained in the county to try the case'). Although the trial court's final ruling on venue did not move the trial to one of the three counties Defendant requested in his written motion, defense counsel suggested during a pretrial hearing on the motion that Valencia County was an acceptable alternative.

{8} The trial court summoned 800 prospective jurors, and 300 of those prospective jurors filled out a special questionnaire. The trial court ultimately assembled 150 people for the venire. At the conclusion of voir dire, Defendant renewed his motion to change venue. The trial court denied Defendant's renewed motion.

{9} For the reasons that follow, Defendant's argument that the trial court erred when it initially moved the venue to Valencia County is rendered moot because an impartial jury was actually seated. This Court needs only to address the trial court's decision to keep the trial in Valencia County following jury selection.

1. Standard of Review

{10} We review the trial court's venue determination for abuse of discretion. *State v. House*, 1999-NMSC-014, ¶ 31, 127 N.M. 151, 978 P.2d 967. If the trial court

denies a motion to change venue based on presumed prejudice and proceeds with voir dire, "we will limit our review to the evidence of actual prejudice." *State v. Barrera*, 2001-NMSC-014, ¶ 16, 130 N.M. 227, 22 P.3d 1177. The determination of "[a]ctual prejudice requires a direct investigation into the attitudes of potential jurors." *House*, 1999-NMSC-014, ¶ 46. "A finding of no actual prejudice following voir dire, if supported by substantial evidence, necessarily precludes a finding of presumed prejudice." *Barrera*, 2001-NMSC-014, ¶ 16. To prove that reversible error occurred during voir dire, Defendant must show that the trial court abused its discretion by not excusing a juror who demonstrated actual prejudice. See *Fuson v. State*, 1987-NMSC-034, ¶¶ 8, 11, 105 N.M. 632, 735 P.2d 1138. The trial court's decision to wait until after voir dire to rule on a motion to change venue is squarely within the trial court's discretion and will only be reviewed for an abuse of discretion. *Barrera*, 2001-NMSC-014, ¶ 16. The party that opposes the trial court's venue decision bears the burden of proving an abuse of discretion. *House*, 1999-NMSC-014, ¶ 31.

2. The Trial Court Did Not Abuse Its Discretion By Holding the Trial in Valencia County Because the Selected Jurors Demonstrated No Actual Prejudice

{11} After voir dire was complete and a jury was selected, the trial court reconsidered venue in Valencia County on Defendant's renewed motion to change venue. At that time the trial court not only had the evidence Defendant provided concerning media saturation but also the attestations of the jurors who would actually hear the case. Voir dire revealed no actual prejudice in the jury selected.

{12} During voir dire, the attorneys and the judge questioned potential jurors about the publicity surrounding the trial and whether they could be fair and neutral arbiters. Each empaneled juror affirmed the ability to be a neutral finder of fact. Defendant specifically identifies seven jurors who, he argues, should have been excused for cause because of media exposure. Jurors 4, 20, 22, and 38 were empaneled on the jury, and Defendant used peremptory challenges to excuse Jurors 33, 45, and 65.

{13} Jurors 20, 22, and 38 acknowledged that they had seen news coverage about the case but testified that it would not affect their ability to be impartial. Jurors 4 and 33 expressed a degree of sadness or

sympathy for the victim but attested that they could still be fair and impartial finders of fact. Juror 45 indicated in a pre-voir-dire questionnaire that Defendant might be guilty, and Juror 65 wanted to "see justice," but both freely affirmed that Defendant was innocent until proven guilty and that they could be fair and impartial.

{14} A careful examination of the record reveals that the trial court took great care to empanel a jury that could fairly decide the case. Our case law is clear. "Exposure of venire members to publicity about a case by itself does not establish prejudice or create a presumption of prejudice." *Barrera*, 2001-NMSC-014, ¶ 18 (internal quotation marks and citation omitted). "[T]he pertinent inquiry is whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." *Id.* (omission in original) (internal quotation marks and citation omitted). We find no evidence of such fixed opinions. As noted previously, every juror Defendant asserts should have been removed for cause affirmatively stated that he or she could be impartial and would strive to decide the case fairly. The trial court seated a jury and in so doing determined that actual prejudice did not exist among the jurors selected.

{15} Defendant asks us to look past the affirmative statements of the jurors during voir dire and argues that these jurors should have been dismissed for cause merely because some had heard details of the case and that "a juror's affirmation of impartiality is not conclusive" (internal quotation marks and citation omitted). On matters of credibility we will not replace the trial court's judgment with our own. See *State v. Hernandez*, 1993-NMSC-007, ¶ 52, 115 N.M. 6, 846 P.2d 312. The trial court is in a better position than this Court "to assess the demeanor and credibility of prospective jurors." *Id.*; see *State v. Johnson*, 2010-NMSC-016, ¶ 34, 148 N.M. 50, 229 P.3d 523 ("The trial court . . . is in the best position to determine whether voir dire has sufficiently exposed any biases that may preclude jurors from acting fairly and impartially" (internal quotation marks and citation omitted)). The record provides no evidence that the trial court manipulated the jurors, or in any way persuaded them to declare impartiality. Furthermore, the transcript of voir dire makes clear that the trial court gave the attorneys ample time and granted them great latitude to question prospective jurors regarding their potential biases. Each juror that Defendant

argues should have been excused freely affirmed the ability to be impartial.

{16} This Court cannot engage in judgment of the jurors' character from the cold record before it. The trial court determined through voir dire that the jurors, although they may have heard of the case, were capable of impartiality. "More is not required." *Barrera*, 2001-NMSC-014, ¶ 18. We decline to adopt Defendant's argument that any exposure by the jurors to news about the case necessarily requires that those jurors be dismissed. If we were to adopt Defendant's argument, our trial courts would be hard pressed to hold a trial given today's media saturated society. The trial court did not abuse its discretion by declining to excuse those jurors for cause. {17} This Court need not decide the merit of the trial court's initial decision to move the venue to Valencia County. As we have discussed, an unbiased jury was actually selected and seated, rendering this issue moot. Actual prejudice, not presumed prejudice, is the standard by which we review the trial court's decision in this case. *Id.* ¶ 16. The parties and the trial court made sufficient inquiry during voir dire into the actual prejudice of the jurors. The jurors selected did not exhibit actual prejudice. The trial court acted within its discretion to deny the renewed motion to change venue. Defendant's argument therefore fails.

B. Prejudicial Effect of Security Presence in the Courtroom

{18} Defendant argues that the level of courthouse security during voir dire rose to such an extreme that the jurors could not help but be prejudiced against Defendant. Because of this, Defendant moved for a mistrial during the second day of voir dire.

1. Standard of Review

{19} A trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. *State v. Ernest Joe Gallegos*, 2009-NMSC-017, ¶ 21, 146 N.M. 88, 206 P.3d 993. "We review the security arrangements only to determine if the security arrangements were an abuse of discretion by the trial court." *State v. Martinez*, 1982-NMCA-020, ¶ 10, 97 N.M. 540, 641 P.2d 1087.

2. The Trial Court Did Not Abuse Its Discretion by Denying Defendant's Motion for a Mistrial Due to the Security Presence During Voir Dire

{20} The mere presence of security personnel at a trial "need not be interpreted as a sign that the defendant is particularly

dangerous or culpable." *Holbrook v. Flynn*, 475 U.S. 560, 560 (1986). "Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence." *Id.* at 569. In fact, "it is entirely possible that jurors will not infer anything at all from the presence of the guards." *Id.* Depending on where the guards sit, how they are armed, and the number of officers present, the jury may perceive the security "more as elements of an impressive drama than as reminders of the defendant's special status." *Id.* The presence of armed guards in our society has, in many cases, desensitized the public in that "they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm." *Id.*

{21} The record contains little evidence of what the security team actually looked like during voir dire and later during trial. Although not evidence, defense counsel's statements are illustrative. *State v. Jacobs*, 1985-NMCA-054, ¶ 24, 102 N.M. 801, 701 P.2d 400 (stating that defense counsel's claim that the jury observed the defendant wearing handcuffs "is not evidence" of "the facts of the [claim]"). Here, defense counsel stated, "I would ask the court to consider having these corrections guys not patrol the hallway with AR-15s. I know rifles. One guy was carrying six 30-round clips. I don't know who he expects to shoot with six 30- or 25-round clips, but it's overkill and it's dangerous . . ." The trial judge said twice that he would ask the sheriff to "tone down" the security presence, specifically "with regard to . . . long rifles." But Defendant provided this Court with no photographs of the security at the courthouse and no witness testimony regarding security and never asked the judge to take judicial notice of any fact. Defense counsel made certain claims about the security, but without evidence this Court simply cannot take those claims as undisputed fact. *Id.* ¶ 24 ("As to the facts of the incident, there is nothing. All we have is counsel's claim, which is not evidence."). Defendant does not raise any claims of overbearing security other than during voir dire. The record does not indicate whether the trial court cured the issue.

{22} Defendant had the opportunity to ask about every prospective juror's thoughts, impressions, and feelings regarding the courthouse security. Defendant did not elicit a single response that indicated

the security was so pervasive as to prohibit impartiality. Jurors admitted that they noticed the security presence but most jurors indicated they felt safe; some thought the security was to protect Defendant; others thought it was a precaution in the event of protestors; and still others thought the security was standard. All jurors affirmed that the security did not affect their ability to be fair and impartial.

{23} This Court has nothing to consider except the jurors' testimony about their thoughts regarding the security, which consistently indicates the security was not prejudicial. Defendant does not bring to our attention any other concerns regarding security beyond what was urged during voir dire. This Court cannot speculate as to how intrusive or prejudicial the security might have been. It is trial counsel's duty to preserve error and present sufficient evidence of the preserved error for appellate review. Defendant did not meet his burden to prove prejudice, actual or otherwise. We conclude that the trial court did not abuse its discretion by denying Defendant's motion for mistrial.

C. The Trial Court's Decision to Permit Evidence of Uncharged Robberies

{24} In the months leading up to Officer Benner's murder, Defendant and his accomplice, Ms. Littles, committed at least seven armed robberies to support their drug habit. During trial, Ms. Littles described how she and Defendant typically robbed businesses and how she and Defendant had robbed a Taco Bell only a few hours prior to Officer Benner's murder. Ms. Littles identified the Taco Bell that she and Defendant robbed, she identified Defendant robbing the Taco Bell on surveillance video, she identified the Durango that she drove as the getaway vehicle, and she identified the type and caliber of pistol Defendant used in the robbery. Additional testimony detailed how, following Officer Benner's murder, Defendant robbed a Shell/Giant station in Albuquerque on May 26, 2015, at approximately 2 a.m. The detective investigating both the Taco Bell robbery and the Shell/Giant robbery identified Defendant as the perpetrator of both robberies.

{25} The trial court ruled that evidence of the Taco Bell and Shell/Giant robberies was admissible to show "Defendant's identity, intent, motive, and plan" and that its "probative value . . . outweighed any undue prejudice." The trial court ultimately allowed the State to briefly inquire about the earlier robberies that Defendant had

perpetrated with Ms. Littles between March 22, 2015, and May 24, 2015 (earlier robberies), to provide context for her plea agreement or as a preemptive disclosure should Defendant elect to use them to discredit Ms. Littles' testimony.

1. Standard of Review

{26} Admission of evidence of other crimes under Rule 11-404(B) NMRA is within the sound discretion of the trial court, and its determination will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Otto*, 2007-NMSC-012, ¶ 9, 141 N.M. 443, 157 P.3d 8. Likewise, the exclusion of relevant evidence under Rule 11-403 NMRA "explicitly recogniz[es] the large discretionary role of the [trial court] in controlling the introduction of evidence." *State v. Day*, 1978-NMCA-018, ¶ 26, 91 N.M. 570, 577 P.2d 878 (internal quotations marks and citation omitted). In testing the balance between the relevant probative value and prejudicial effect of evidence under Rule 11-403, an abuse of discretion results "when the trial court's decision is contrary to logic and reason." *Davila v. Bodelson*, 1985-NMCA-072, ¶ 12, 103 N.M. 243, 704 P.2d 1119.

2. The Trial Court Did Not Abuse Its Discretion by Allowing Testimony About the Earlier Robberies

{27} "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Rule 11-404(B)(1). Defendant properly preserved his objection to Ms. Littles' testimony about the earlier robberies. Nonetheless, the trial court was within its discretion to admit the testimony. Evidence of a defendant's crimes, wrongs or other acts "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Rule 11-404(B)(2). Under Rule 11-404(B)(2) the list of permissible uses of prior bad act evidence is not exhaustive. *Otto*, 2007-NMSC-012, ¶ 10. Proffers of other wrongs excluding those to prove character may be admissible, but the trial court must always "determine that the probative value of the evidence outweighs the risk of unfair prejudice, pursuant to Rule 11-403." *Id.*

{28} The trial court allowed testimony about the earlier robberies to give context to Ms. Littles' plea deal and to rebut impeachment by Defendant. The trial court refused to allow the State to delve into the

details of every single robbery Ms. Littles admitted committing with Defendant. Instead, the trial court limited the State's inquiry to the general method the pair used to rob businesses, that the earlier robberies occurred, and that Ms. Littles was with Defendant at each occurrence. Additionally, the State's inquiry gave context to Ms. Littles' relationship with Defendant and Ms. Littles' role during earlier robberies, which were relevant to her role and physical position during the murder of Officer Benner. It is not the job of this Court to speculate on every conceivable purpose a portion of testimony may have, and "[i]f there are reasons both for and against a court's decision, there is no abuse of discretion." *State v. Smith*, 2016-NMSC-007, ¶ 27, 367 P.3d 420. The trial court was within its discretion to allow Ms. Littles to testify about the earlier robberies.

3. The Trial Court Did Not Abuse Its Discretion by Allowing Evidence of the Robberies on May 25 and May 26

{29} Under Rule 11-404(B)(2), evidence of the robberies committed on May 25, 2015, and May 26, 2015, is "admissible for . . . proving motive . . . [or] identity" of the person who murdered Officer Benner. Defendant contends that the Taco Bell robbery on May 25, 2015, and the Shell/Giant robbery on May 26, 2015, are not probative of identity or motive in the murder of Officer Benner. Defendant is incorrect. The State presented evidence proving identity by showing that Defendant committed the Taco Bell and Shell/Giant robberies wearing the same clothes that Defendant was wearing at the time Officer Benner pulled him over and that Defendant used the same pistol in the Taco Bell and Shell/Giant robberies that he used to murder Officer Benner. Upon Defendant's arrest following the Shell/Giant robbery, officers found on Defendant the key to the Dodge Durango that fled the scene of Officer Benner's murder and which Defendant had used in the Taco Bell robbery, again bearing on identity. Consciousness of his guilt of the Taco Bell robbery gave Defendant a motive to kill Officer Benner and thereby avoid apprehension and a return to prison. Ms. Littles testified that "Andrew always said he was never going to go back to prison. It was either going to be him or the cops."

{30} The probative value of evidence about the Taco Bell and Shell/Giant robberies outweighs any unfair prejudice to Defendant. The evidence was admissible as probative of both identity and motive

in the murder of Officer Benner. The trial court did not abuse its discretion by admitting evidence of the Taco Bell and Shell/Giant robberies.

4. The Trial Court Did Not Abuse Its Discretion by Declining to Sever the Charge of Conspiracy to Commit Armed Robbery

{31} Defendant argues that if the evidence of the May 25 and May 26 armed robberies was probative of conspiracy to commit armed robbery, then the trial court's denial of the motion to sever the highly prejudicial conspiracy charge was an abuse of discretion. "The decision to grant a severance motion lies within the trial judge's discretion and will not be overturned on appeal unless the joinder of offenses results in *actual* prejudice against the moving party." *State v. Garcia*, 2011-NMSC-003, ¶ 16, 149 N.M. 185, 246 P.3d 1057 (emphasis in original). "Even when the trial court abuses its discretion in failing to sever charges, appellate courts will not reverse unless the error actually prejudiced the defendant." *State v. Leonardo Gallegos*, 2007-NMSC-007, ¶ 18, 141 N.M. 185, 152 P.3d 828. "If the evidence would have been cross-admissible, then any inference of prejudice is dispelled and our inquiry is over." *Id.* ¶ 20.

{32} In addition to providing evidence of identity and establishing motive for the murder, the Taco Bell and Shell/Giant robberies are admissible as "background evidence to show the context of other admissible evidence," *State v. Allen*, 2000-NMSC-002, ¶ 43, 128 N.M. 482, 994 P.2d 728, in this case, conspiracy to commit armed robbery. The evidence of the Taco Bell and Shell/Giant robberies was admissible as probative of both murder and conspiracy to commit armed robbery. The evidence was cross-admissible, Defendant was not prejudiced, and the trial court did not abuse its discretion by refusing to order severance of conspiracy to commit armed robbery.

D. Admission of Nonverbal Portion of Interrogation Video

{33} Agent Steve Montano of the New Mexico State Police interrogated Defendant following his arrest on May 26, 2015. During a portion of Defendant's interrogation Agent Montano left the room. While Agent Montano was absent, video surveillance recorded a shift in Defendant's demeanor. Defendant made hand gestures in the shape of a gun. From Defendant's position in the holding cell during interrogation, Defendant could see across the

hall into another holding cell occupied by his cousin Crystal Romero, who had been arrested with Defendant after the Shell/Giant robbery. His hand gestures were made in Crystal's direction. At trial Defendant moved to suppress the video. The trial court admitted the muted video showing Defendant's demeanor.

1. Standard of Review

{34} In reviewing an order denying the suppression of evidence, "we defer to the district court's findings of fact that are supported by substantial evidence, and we review the district court's application of the law to the facts de novo." *State v. Randy J.*, 2011-NMCA-105, ¶ 10, 150 N.M. 683, 265 P.3d 734. Here, the relevant facts are undisputed. We determine whether, as a matter of law, the district court erred in admitting the video showing Defendant's nonverbal conduct. We conclude that it did not.

2. The Trial Court Did Not Err When It Admitted Evidence of Nonverbal Conduct by Defendant

{35} "Under the Fifth Amendment, the privilege against self-incrimination only protects the accused from being compelled to provide the state with evidence of a testimonial or communicative nature." *Randy J.*, 2011-NMCA-105, ¶ 16 (internal quotation marks and citation omitted); see also *State v. Harris*, 2017 WI 31, ¶ 46, 892 N.W.2d 663 (stating that the Fifth Amendment to the United States Constitution protects an individual from interrogation compelled by law enforcement but not from the individual's own incriminating actions).

{36} The two-fold issue before this Court is whether Defendant was (1) compelled (2) to communicate. We conclude that Defendant's non-verbal conduct was not compelled. Therefore, we need not reach the issue of whether his conduct amounted to a communication.

{37} The muted video depicting Defendant's gestures and demeanor showed Defendant after he had already been *Mirandized* and had invoked the right to remain silent. If the demeanor evidence communicated a response to a question or if Agent Montano had otherwise compelled Defendant to answer, then any response Defendant gave would likely be protected. But this was not the case after Agent Montano left the room and Defendant was alone. Defendant did not gesture in response to a question asked by Agent Montano or any law enforcement officer. Defendant "was not subjected to compel-

ling influences [or] psychological ploys" and his voluntary conduct cannot be said to have been compelled. See *Arizona v. Mauro*, 481 U.S. 520, 529 (1987). Defendant's demeanor and hand gestures were not protected under the Fifth Amendment to the United States Constitution.

{38} The trial court based its decision to show the muted video of Defendant to the jury on a correct application of the law, and that decision is supported by sufficient evidence.

E. The Trial Court's Admission of Defendant's Jail Telephone Call

{39} The trial court admitted the recording of a jail telephone call that the State presented as evidence implicating Defendant in Officer Benner's murder. Defendant objected, arguing that the identity of the inmate making the call could not be sufficiently authenticated to warrant admission under Rule 11-801(D)(2)(a) NMRA (allowing admission of an opposing party's own statement as an exclusion from hearsay).

1. Standard of Review

{40} We review a trial court's admission or exclusion of evidence for an abuse of discretion. *State v. Bailey*, 2017-NMSC-001, ¶ 12, 386 P.3d 1007. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *Id.* (quoting *State v. Apodaca*, 1994-NMSC-121, ¶ 23, 118 N.M. 762, 887 P.2d 756 (internal quotation marks omitted)).

2. The Trial Court Did Not Abuse Its Discretion by Allowing the Jail Telephone Call Recording to Be Played for the Jury

{41} "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Rule 11-901(A) NMRA. A witness's identification of a voice requires only a "minimal showing" that the voice belongs to the person the witness purports that it to belongs to and sets a "low threshold for admissibility." *State v. Loza*, 2016-NMCA-088, ¶ 22, 382 P.3d 963 (internal quotation marks and citation omitted); *State v. Padilla*, 1982-NMCA-100, ¶ 5, 98 N.M. 349, 648 P.2d 807. "The identity of a party making a telephone call may be established by either direct or circumstantial evidence." *State v. Roybal*, 1988-NMCA-040, ¶ 13, 107 N.M. 309, 756 P.2d 1204, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110. The jury is left to decide the weight given to the

evidence. *Loza*, 2016-NMCA-088, ¶ 22.

{42} Defendant argues that the State provided no date for the phone call, that there were thirteen other inmates named "Andrew" at the Albuquerque Metropolitan Detention Center (MDC) when the call was placed, and that inmates often switch their personal identification numbers (PIN) to either avoid having their phone calls recorded or simply because they are out of money on their phone cards. Considering the totality of the circumstances, these arguments are without merit. Sufficient evidence justifies the trial court's decision to admit the recording into evidence. The inmate in the recording self-identifies as "Andrew," uses Andrew Romero's PIN, and asks about a person named "Crystal," which is the name of Defendant's cousin who was arrested with him. The inmate references his move from detention in Sandoval County to MDC. This move is consistent with the State's claim that Defendant was moved to MDC so that he could appear at a probation violation hearing in Albuquerque. The State points out that Defendant's move to MDC placed him there two weeks after the murder of Officer Benner, coinciding with the inmate's inquiry about the media coverage of his case and his statement, "Still? Why, it's already been two weeks. A la verga." At the time the call was made, media attention surrounding the case was high, which coincides with the inmate's statement about the high profile nature of the case. Additionally, the inmate's question, "What about what's her name; did I really shoot her or no?" and the response, "Yeah, you shot her in the foot," is consistent with the injury Ms. Littles sustained when a bullet fired by Defendant at the scene of Officer Benner's murder ricocheted and struck her in the foot.

{43} Detective Richard Romero of the Rio Rancho Police Department identified the inmate on the call as Defendant after having listened to three other phone calls, all of which were placed with Andrew Romero's PIN. In *United States v. Thomas*, the identifying witness conversed with the accused three times. 586 F.2d 123, 133 (9th Cir. 1978). In *United States v. Smith*, the identifying witness heard the defendant's voice only twice. 635 F.2d 716, 719 (8th Cir. 1980). In both cases, the witnesses' identifications were sufficient to admit the voice evidence. See *Padilla*, 1982-NMCA-100, ¶ 5. Here, not only does Detective Romero identify Defendant's voice as the same voice he identified in three other calls, but

substantial corroborating evidence indicates that Defendant placed the telephone call that was recorded and played for the jury.

{44} The circumstances described here are sufficient to make the “minimal showing” of familiarity with Defendant’s voice to justify Detective Romero’s identification. The trial court’s decision to admit the recording was not against logic and was not an abuse of discretion.

F. Cumulative Error

{45} Defendant contends that cumulative error by the trial court requires a new trial. Defendant argues that the cumulative effect of the errors previously discussed, statements made by the prosecutor during closing argument and error in allowing two in-court identifications by witnesses, deprived Defendant of a fair trial. “The doctrine of cumulative error applies when multiple errors, which by themselves do not constitute reversible error, are so serious in the aggregate that they cumulatively deprive the defendant of a fair trial.” *State v. Carrillo*, 2017-NMSC-023, ¶ 53, 399 P.3d 367 (internal quotation marks and citation omitted); see also *State v. Alfred Baca*, 1995-NMSC-045, ¶ 39, 120 N.M. 383, 902 P.2d 65 (reversing multiple convictions based on cumulative error). In this case, because we conclude that no trial error occurred, cumulative error did not deprive Defendant of a fair trial.

1. The Contents of Prosecutor’s Slide During Closing Were Not Prejudicial

{46} Defendant asserts that the trial court erred by not issuing a limiting instruction to the jury after the word “stitches” appeared on the prosecutor’s Power Point slide used during closing argument. Defendant contends that by showing the jury the word “stitches” the State was attempting to imply that Defendant’s aunt, who was in prison at the same time as Ms. Littles, engaged in witness intimidation.

{47} The State and Defendant are “allowed wide latitude in closing argument and the trial court has wide discretion in . . . controlling closing argument.” *State v. Venegas*, 1981-NMSC-047, ¶ 12, 96 N.M. 61, 628 P.2d 306. The trial court determined that the Power Point slide did not warrant a limiting instruction. From our perspective, the word “stitches” does not carry the inherent prejudicial connotation that Defendant urges. Importantly, the Power Point slide Defendant objected to is not part of the record before this Court;

therefore, we have no way of putting the word “stitches” into context. Without a record of the objection, this Court will not consider this issue.

2. Two In-Court Identifications of Defendant Made by Witnesses Were Not Error

{48} During trial and for the first time, two eyewitnesses, one from the scene of Officer Benner’s murder and one from a gas station visited by Defendant and Ms. Littles, identified Defendant as the man they saw around the time of Officer Benner’s murder. Defendant argues that the in-court identifications were “tainted by pretrial publicity.” This Court recently addressed this very issue in *State v. Ramirez*, 2018-NMSC-003, ¶ 33, 409 P.3d 902, in which we held that “[i]t is only when law enforcement are the source of the taint that due process concerns arise.”

{49} Defendant had ample procedural safeguards at his disposal to address the fallibility of eyewitness testimony, among which was “the right to the effective assistance of an attorney who can expose the flaws of eyewitness testimony on cross-examination and focus the jury’s attention on such flaws during opening and closing arguments.” *Id.* ¶ 35 (citing *Perry v. New Hampshire*, 565 U.S. 228, 245-47 (2012)). Defense counsel did just that. They brought the witnesses’ inconsistencies to the jury’s attention on cross-examination and in closing argument. It is the responsibility of the jury to weigh a witness’s credibility and determine the accuracy of an in-court identification. *State v. Cheadle*, 1983-NMSC-093, ¶ 15, 101 N.M. 282, 681 P.2d 708, *overruled on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36, 210 P.3d 783. The trial court did not err by allowing the in-court identifications.

G. Defendant’s Conviction for Shooting at or from a Motor Vehicle Constitutes Double Jeopardy

{50} Defendant’s conviction for shooting at or from a motor vehicle violates the Double Jeopardy Clause of the New Mexico Constitution and must be vacated. N.M. Const. art. II, § 15 (“No person shall . . . be twice put in jeopardy for the same offense.”). The Double Jeopardy Clause protects Defendant from being punished both for the murder of Officer Benner and for causing great bodily harm to Officer Benner by shooting from a motor vehicle, where both convictions were predicated on Defendant’s unitary act of shooting Officer Benner. *State v. Montoya*, 2013-

NMSC-020, ¶ 54, 306 P.3d 426. One of the convictions must be vacated. Because first-degree murder carries a greater sentence than shooting at or from a vehicle, *compare* NMSA 1978, § 31-18-14 (2009) (stating that a capital felony carries a sentence of “life imprisonment or life imprisonment without the possibility of . . . parole”) *with* NMSA 1978, § 31-18-15(A)(4) (2007, amended 2016) (stating that a second-degree felony resulting in death carries a fifteen-year sentence), this Court must vacate Defendant’s conviction for shooting at or from a motor vehicle. *State v. Torres*, 2018-NMSC-013, ¶ 28, 413 P.3d 467.

H. Sufficiency of the State’s Evidence to Convict Defendant on the Charges of Aggravated Fleeing and Murder in the First Degree

1. Standard of Review

{51} In challenging the sufficiency of evidence used to convict a defendant of a crime, “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.” *State v. Reed*, 2005-NMSC-031, ¶ 14, 138 N.M. 365, 120 P.3d 447 (internal quotation marks and citation omitted). We review “the evidence in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences in favor of the verdict.” *Id.* We will “determine whether *any* rational jury could have found the essential facts to establish each element of the crime beyond a reasonable doubt.” *Id.*

2. The State Presented Sufficient Evidence for a Rational Jury to Convict Defendant of Aggravated Fleeing

{52} Defendant was charged with and convicted of aggravated fleeing a law enforcement officer (aggravated fleeing) contrary to Section 30-22-1.1(A). Defendant argues that insufficient evidence existed to prove all of the elements of aggravated fleeing. The relevant provision of the statute reads,

Aggravated fleeing a law enforcement officer consists of a person willfully and carelessly driving his vehicle in a manner that endangers the life of another person after being given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed law enforcement officer in an appropriately

marked law enforcement vehicle *in pursuit* in accordance with the provisions of the Law Enforcement Safe Pursuit Act.

Section 30-22-1.1(A) (emphasis added). Defendant contends that the State did not carry its burden with regard to “in pursuit” because Defendant was not pursued when he fled the scene of Officer Benner’s murder. Defendant does not dispute that, upon fleeing from Officer Benner’s murder, Defendant drove the Durango in a manner that endangered the lives of others or that Officer Benner was a uniformed law enforcement officer in an appropriately marked law enforcement vehicle.

{53} The State is correct when it points out that although Section 30-22-1.1(A) includes “in pursuit” in its language, “pursuit” is not an element of the Uniform Jury Instruction or of the instruction the jury actually received. Tracking UJI 14-2217 NMRA, the instruction to the jury stated, For you to find the defendant guilty of aggravated fleeing a law enforcement officer . . . , the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle,
2. The defendant drove willfully and carelessly in a manner that endangered the life of another person,
3. The defendant had been given a visual or audible signal to stop by Officer Gregg Benner in an appropriately marked law enforcement vehicle,
4. The defendant knew that Officer Gregg Benner had given him an audible or visual signal to stop,
5. This happened in New Mexico, on or about the 25th day of May, 2015.

The absence of “pursuit” in the jury instruction is not dispositive of whether pursuit is an element essential to aggravated fleeing. In this case we conclude that sufficient evidence existed to properly convict Defendant under Section 30-22-1.1(A).

{54} During the initial traffic stop, Officer Benner attempted to approach the passenger side of the Durango when it suddenly accelerated out of the Arby’s parking lot. Inside the Durango, Defendant with his Beretta pistol in hand told Ms. Littles, “Drive bitch,” and Defendant put the vehicle in gear. As Ms. Littles and Defendant fled from Officer Benner, the Durango

nearly collided with a bush, at which point Defendant grabbed the steering wheel and straightened out the vehicle. Defendant then jumped from the passenger seat to the driver seat and shoved Ms. Littles out of the moving vehicle. Shortly thereafter, Defendant brought the Durango to a stop and waited for a pursuing Officer Benner to catch up. Defendant waited until Officer Benner approached the Durango then fired his Beretta four times. Defendant then fled driving the Durango.

{55} Defendant’s flight from Officer Benner was part of a continuing course of aggravated fleeing. It began when Officer Benner lawfully stopped the Durango and continued when Defendant put the Durango in gear with gun in hand and ordered Ms. Littles to drive. Defendant’s flight and Officer Benner’s pursuit ended when Defendant subsequently stopped a second time and killed Officer Benner. The facts of this case demonstrate that Defendant’s flight resulted in Officer Benner’s pursuit, which ended with the second traffic stop.

{56} The jury found sufficient evidence to convict Defendant of aggravated fleeing.

3. The State Presented Sufficient Evidence for a Rational Jury to Convict Defendant of Murder in the First Degree

{57} The Defendant argues that there is insufficient evidence of “deliberate intent” to support his conviction for first-degree murder. The jury found that Defendant’s conduct rose above a “mere unconsidered and rash impulse” and that Defendant possessed “the deliberate intention to take away the life of Gregg Benner.” See UJI 14-201 NMRA (providing essential elements of willful and deliberate murder).

{58} This Court has held that rational juries could draw “inferences of deliberation from . . . evidence of the defendant’s attitude toward the victim, and the defendant’s own statements.” *State v. Flores*, 2010-NMSC-002, ¶ 21, 147 N.M. 542, 226 P.3d 641 (citing *State v. Duran*, 2006-NMSC-035, ¶ 11, 140 N.M. 94, 140 P.3d 515). Ms. Littles testified that Defendant shoved her out of the vehicle after the two initially fled in the Durango because “he didn’t want [her] to be involved in anything that was going to happen.” Ms. Littles also testified that Defendant had told her on “quite a few” occasions that “he was never going back to prison. It was either going to be him or the cops.” Finally, Ms. Littles testified that during the initial traffic stop Defendant repositioned his pistol

from under his seat to alongside the center console of the Durango, held in his hand. Ms. Littles provided substantial evidence about Defendant’s state of mind which was probative of Defendant’s deliberate intent to murder Officer Benner.

{59} In addition to Ms. Littles’ testimony, witnesses and forensic experts testified about the number and timing of the shots fired by Defendant. *State v. Astorga*, 2015-NMSC-007, ¶ 65, 343 P.3d 1245 (concluding that the manner in which a killing occurs can support an inference of deliberation). The jury heard how Ms. Littles and Defendant initially sped away from Officer Benner and that Defendant shoved Ms. Littles from the vehicle, stopped the vehicle, and allowed Officer Benner to catch up and approach the vehicle where Defendant then shot him. The jury heard that Defendant fired two shots into Officer Benner, and then he paused and fired two more.

{60} Ms. Littles’ statements about Defendant’s state of mind immediately prior to the murder were probative of deliberation in the context of all of the evidence introduced on that element of first-degree murder.” *Id.* ¶ 65. Defendant’s act of moving his pistol from a hidden position into a firing position supports an inference of Defendant’s resolve to kill. See *State v. Isiah*, 1989-NMSC-063, ¶ 34, 109 N.M. 21, 781 P.2d 293 (moving a knife into the defendant’s lap from a concealed position showed deliberateness rather than a random act), *overruled on other grounds by State v. Lucero*, 1993-NMSC-064, 116 N.M. 450, 863 P.2d 1071. A jury could also reason that, after shoving Ms. Littles out of the vehicle and saying he didn’t want her to be involved in anything that was going to happen, then waiting for Officer Benner to approach, Defendant had determined exactly what was going to happen and that he would kill Officer Benner rather than surrender or flee. *State v. Sosa*, 2000-NMSC-036, ¶ 14, 129 N.M. 767, 14 P.3d 32 (concluding that waiting for the victim is reasonable evidence of deliberate intent).

{61} From Defendant’s pause between two-round bursts, a rational jury could infer that Defendant was aiming or adjusting his fire, which could reasonably indicate thought and intent to kill. Cf. *State v. Tafoya*, 2012-NMSC-030, ¶¶ 47, 54, 285 P.3d 604 (acknowledging that multiple shots fired in very quick succession where victims were shot only once each does not indicate deliberation). Similarly, Defendant firing four controlled shots that all struck

Officer Benner, as opposed to emptying the entire magazine of the pistol, could be inferred as deliberate and controlled. See *State v. Largo*, 2012-NMSC-015, ¶ 33, 278 P.3d 532 (identifying as deliberation delaying discharge of the rifle while the victim pleaded for mercy).

{62} “[J]ust because each component may be insufficient to support the conviction when viewed alone does not mean the evidence cannot combine to form substantial, or even overwhelming, support for the conviction when viewed as a whole.” *State v. Rojo*, 1999-NMSC-001, ¶ 23, 126 N.M. 438, 971 P.2d 829. When Officer Benner initially pulled over Defendant and Ms. Littles, Defendant had robbed a Taco Bell a few hours earlier and knew that there was an arrest warrant out for his violation of probation. Defendant had several options, including whether to (1) cooperate with Officer Benner during the stop and likely be arrested, (2) attempt to flee from Officer Benner, or (3) exercise the option

that he chose—wait until Officer Benner’s approach to the Durango was so close that Defendant could not miss and then shoot Officer Benner in the chest four times at point-blank range. See *Astorga*, 2015-NMSC-007, ¶¶ 4-5, 63. The jury could reasonably determine that “Defendant contemplated all of these choices and, even if he did not make his final decision until the last second, the decision to kill [Officer Benner] was nonetheless a deliberate one.” See *id.* ¶ 63 (describing circumstances of a deputy’s murder during a traffic stop and concluding that “the manner of the killing alone supported an inference of deliberation”); *Sosa*, 2000-NMSC-036, ¶ 14 (concluding that a murder where the victim was attempting to escape from the attacker is a circumstance sufficient to support deliberate intent).

{63} The State presented sufficient evidence for a rational jury to conclude that Defendant manifested a deliberate intention to kill Officer Benner from the

time the traffic stop was initiated until Defendant fired the fourth shot from his pistol into Officer Benner’s chest.

III. CONCLUSION

{64} For these reasons we affirm Defendant’s convictions for first-degree murder, tampering with evidence, conspiracy to commit armed robbery, aggravated fleeing a law enforcement officer, and concealing identity. We vacate Defendant’s conviction for shooting at or from a motor vehicle on double jeopardy grounds.

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

GARY L. CLINGMAN, Justice

WE CONCUR:

JUDITH K. NAKAMURA, Chief Justice

PETRA JIMENEZ MAES, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

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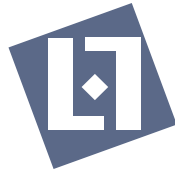
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Established Albuquerque Law Firm seeking Paralegal with 3 to 5 years of experience in the area of criminal law. Applicants must be knowledgeable of the criminal rules and procedures in both state and federal courts, proficient in filing pleadings within the different courts throughout New Mexico, as well as federal court. Organization and attention to detail is a must. CJA experience is a plus, but not required. To apply, please send resume to Penimah Silva, pcs@fbdlaw.com.

Paralegal

Hinkle Shanor, LLP's Santa Fe office is seeking a paralegal to join its medical malpractice defense team. 3-5 years litigation experience is preferred, but not required. Ideal candidates will have experience in medical negligence matters, including preparation of medical chronologies and summaries. Past experience in civil practice handling pre-trial discovery through trial preparation is also a plus. Undergraduate degree or paralegal certificate is preferred, but work experience may be considered in lieu thereof. Competitive salary and benefits; all inquiries will be kept confidential. Please e-mail resume resumes to gromero@hinkle-lawfirm.com and ztaylor@hinklelawfirm.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

Paralegal

The City of Albuquerque Legal Department is seeking a Paralegal to assist an assigned attorney or attorneys in performing substantive administrative legal work from time of inception through resolution and perform a variety of paralegal duties, including, but not limited to, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings, and setting up and maintaining a calendar with deadlines. Excellent organization skills and the ability to multitask are necessary. Competitive pay and benefits available on first day of employment. Please apply at <https://www.governmentjobs.com/careers/cabq>. Position posting closes April 5, 2019.

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F/T paralegal needed for fast paced family law office. Excellent computer skills, ability to multitask and being a good team player are all required. Pay DOE. Fax resume: 242-3125 or mail: Law Offices of Lynda Latta, 715 Tijeras Ave. NW, 87102 or email: holly@lyndalatta.com No calls.

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Paralegal

Litigation Paralegal with minimum of 3- 5 years' experience, including current working knowledge of State and Federal District Court rules, online research, trial preparation, document control management, and familiar with use of electronic databases and related legal-use software technology. Seeking skilled, organized, and detail-oriented professional for established commercial civil litigation firm. Email resumes to e_info@abrfirm.com or Fax to 505-764-8374.

Member Services Program Assistant

The State Bar of New Mexico seeks a Member Services Program Assistant for its Member Services Department for up to 25 hours per week. The Member Services Department provides administrative support to the volunteer-driven sections, divisions, and committees of the State Bar of New Mexico. The Member Services Program Assistant will assist the Member Services Program Manager in providing administrative and event support to these groups. The successful applicant must be able to work as part of a team and have excellent project management, communication skills (both written and verbal), and customer service and computer skills including proficiency with Microsoft Word, Excel, and Outlook. Experience with survey and advertising software (SurveyMonkey and ConstantContact, or similar) is a plus. Prior work experience in the legal environment is not necessary. Compensation \$14.00-\$15.00 per hour DOE. Please email cover letter and resume to hr@nmbar.org. Best consideration date: 4/5/19; position open until filled. EOE.

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Paralegal

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

Criminal Defense Assistant/ Paralegal

Experienced criminal law assistant/paralegal to assist sole practitioner in all aspects of a busy, dynamic, often high profile criminal defense practice. Applicant would be essentially the only employee. Spanish speaker is important. Applicant would need to become a notary public. Because attorney is in court much of the time, applicant would need to feel comfortable working alone in the office much of the time. Position requires regular direct contact with clients, opposing counsel, probation officers, judges' chambers, law enforcement officers, etc. Intelligence, self confidence, and assertiveness required. Excellent interpersonal communication skills and organizational skills a must. Position requires an ability to quickly adapt to rapidly changing priorities on a daily basis. Competitive salary commensurate with experience and abilities. Raises, health, dental, retirement, etc., can be negotiated after a tryout period. Please send resume and references to: dc@sernalaw.com

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