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Bar Bulletin

May 29, 2019 • Volume 58, No. 11

Baby Blue, by Anthony Abbate (see page 3)

AbbateFineArt.com

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NEW MEXICO Lawyer

Living in the Light—It's About You
Judges and Lawyers Assistance Program

The New Mexico State Bar Foundation announces a *Cuba* CLE Trip with Cuban Cultural Travel and CLE Abroad

Nov. 8-12, 2019

Highlights:

- Thought provoking lectures from Cuban attorneys and scholars
- Private dance performance by Habana Compas dance company
- Visit to the home of Ernest Hemingway
- Enjoy a musical performance by the Havana Youth Orchestra
- Panoramic tour of Havana Vieja

Cost Per Person

Hotel Nacional: $2,980 (double occupancy) or $3,325 (single occupancy)

Casa Particular: $2,495 (double occupancy) or $2,855 (single occupancy)

Price includes accommodations, daily breakfast, most lunches and dinners, airport transfer to/from Havana airport, admission to museums, air-conditioned transportation, Cuban tourist card/visa and more.

For more information contact, Laura Adams:
760-645-3269 or laura@cubaculturaltravel.com

Registration is open! Deposits due by July 8.
www.nmbar.org/cubatrip

New Mexico State Bar Foundation
Center for Legal Education
505-797-6020 • www.nmbar.org/cle

STATE BAR of NEW MEXICO

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Advertising 29

Meetings

May

30
Trial Practice Section Board
Noon, State Bar Center

June

4
Health Law Section Board
9 a.m., teleconference

5
Employment and Labor Law Section Board
Noon, teleconference

7
Committee on Diversity in the Legal Profession
Noon, State Bar Center

Workshops and Legal Clinics

June

5
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6022

5
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

About Cover Image and Artist: Anthony Abbate currently works in a medium he calls Photographic Rendering. The process begins with photographing the subject matter then taking the images into Photoshop and reworking them, selectively fading or enhancing objects, changing colors, abstracting and embellishing backgrounds, using extensive layering, modification and alteration. Most often the final work looks like a watercolor bursting with intense, brilliant colors. His classic digital images explore a wide range of familiar natural subjects. Abbate's artwork can be viewed at Moss Outdoor in the RailYard, at the Agave Lounge in the Eldorado Hotel and on line at AbbateFineaArt.com.

Notices

Court News

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 in early June in district and magistrate courts in the Sixth and Ninth Judicial Districts. The pilot program will expand to the Second Judicial District Court and the Bernalillo County Metropolitan Court later in June. 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. The 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. Once the plaintiff makes an offer for possibly settling the dispute, an email goes to the defendant with an opportunity to respond. During the first two weeks of negotiations, the parties can request the help of a trained online mediator. If no agreement is reached after 30 days, the case will move forward in court. ODR notices will be emailed to the parties from no-reply@newmexicocourtsdmd.modria.com. The parties should check their inbox, spam and junk mailboxes to ensure they receive the ODR notices.

Third Judicial District Court

Volunteer Attorneys Needed at Self Help Center

The Self Help Center at the Third Judicial Court, is currently seeking volunteer attorneys from the Dona Ana County area, to assist with our monthly legal clinics. The Self Help Center hosts a legal clinic every Wednesday from 1–4 p.m. for pro se litigants dealing with issues in family law. Additionally, clinics are held on the second and last Tuesday of the month for civil issues. The clinics are set up to assist pro se litigants with legal advice and guidance that is outside the scope of the services the court may provide. The clinics are set up to respect the time of our volunteers and limit each clinic from seven to ten individuals. If interested in assisting the Self Help Division, contact David D. Vandenberg at lcrdexv@nmcourts.gov or call 575-528-8399.

Professionalism Tip

With respect to other judges:

I will endeavor to work with other judges to foster a spirit of cooperation and collegiality.

Fifth Judicial District Court

Notice of Mass Reassignment

Gov. Michelle Lujan Grisham has appointed Thomas E. Lilley to fill the judgeship vacancy in the 5th Judicial District Court, Chaves County, Division II. Effective June 14 a mass reassignment of cases will occur pursuant to NMSC Rule 1-088.1. Judge Thomas E. Lilley will be assigned all cases previously assigned to Judge Freddie J. Romero and/or Division II of Chaves County. Pursuant to Supreme Court Rule 1-088.1, parties who are allowed by the rule will have 10 days from July 10 to excuse Judge Thomas E. Lilley.

Sixth Judicial District Court

Notice of Right to Excuse Judge

As of March 25, Hon. James B. Foy is now the District Judge for Division III of the Sixth Judicial District Court. Grant County: 50 percent of all pending and reopened criminal and extradition cases previously assigned to the vacant position of Division III shall be reassigned to the Hon. Thomas F. Stewart, District Judge for Division I, and 50 percent shall be reassigned the Hon. Jarod K. Hofacket, District Judge for Division IV. All pending civil, domestic, emancipation, adoption, miscellaneous sequestered, probate and guardianship/conservatorship cases previously assigned to the vacant position of Division III shall be assigned to the Hon. James B. Foy, District Judge for Division III. All reopened cases of the above case types shall be reassigned fifty percent to the Hon. Thomas F. Stewart, District Judge for Division I, and fifty percent to the Hon. James B. Foy, District Judge for Division III. All pending and reopened domestic violence cases previously assigned to the vacant position of Division III shall be reassigned to the Hon. James B. Foy, District Judge for Division III. All pending and reopened delinquency, youthful offender, competency, abuse and neglect, lower court appeal previously assigned to the vacant position of Division III shall be reassigned to the Hon. Thomas F. Stewart, District Judge for Division I. Hidalgo County: All pending and reopened domestic cases previously assigned to the Hon. Jarod K. Hofacket, District Judge for Division IV, or previously assigned to the vacant position of Division III shall be assigned to the Hon. James B. Foy, District Judge for Division III. All pending and reopened civil, domestic violence, abuse and neglect, adoption and probate cases previously assigned to the vacant position of Division III shall be assigned to the Honorable James B. Foy, District Judge for Division III. All pending and reopened delinquency, youthful offender, criminal, extradition, lower court appeal, and competency cases previously assigned to the vacant position of Division III shall be assigned to the Hon. Jarod K. Hofacket, District Judge, Division IV. Fifty percent of all reopened sequestered miscellaneous cases shall be reassigned to the Hon. James B. Foy, District Judge for Division III, and fifty percent shall be reassigned to the Hon. Jarod K. Hofacket, District Judge for Division IV. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days to excuse Judge Foy, Judge Hofacket or Judge Stewart.

Eighth Judicial District Court

Notice of Mass Case Reassignment

Gov. Michelle Lujan-Grisham announced the appointment of Melissa A. Kennelly to fill the vacancy of Division II of the Eighth Judicial District Court. Effective May 6, a mass reassignment of cases occured. All cases in Colfax and Union Counties previously assigned to Judge Emilio J. Chavez, Division I, are reassigned to Judge Melissa A. Kennelly, Division II. Parties who have not previously exercised their right to challenge or excuse will have 10 days from May 29 to challenge or excuse Judge Melissa A. Kennelly, Division II pursuant to NMRA 1-088.1.

Bernalillo County Metropolitan Court

Investiture of Judge Jason M. Jaramillo

The judges and employees of the Bernalillo County Metropolitan Court cordially invite members of the legal community and the public to attend the in-

vestiture ceremony of the Honorable Jason M. Jaramillo, Division XII, at 5:15 p.m., June 14, in the court's rotunda. Details regarding the reception to follow. Judges who want to participate in the ceremony should bring their robes and report to the First Floor Viewing Room by 4:45 p.m.

Mass Reassignment of Cases

A mass reassignment of cases will occur pursuant to Rule 23-109 NMRA and as a consequence of the recent appointment by the governor. Effective May 17, Judge Jason M. Jaramillo, appointed to Division XII, was assigned civil court cases previously assigned to Judge Daniel E. Ramczyk. Pursuant to Rule 7-106 NMRA, parties who have not yet exercised the right to excuse a judge have 10 days from May 17 to file a Notice of Excusal.

U.S. District Court, District of New Mexico

Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of U.S. Magistrate Judge Stephan M. Vidmar is due to expire on Dec. 26, 2019. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term. The duties of a magistrate judge in this court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be addressed as follows: U.S. District Court, ATTN: Magistrate Judge Merit Selection Panel c/o Human Resources – CONFIDENTIAL, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102. Comments must be received by June 10.

Proposed Amendments to Local Rules of Civil Procedure

Proposed amendments to the Local Rules of Civil Procedure of the U.S. District Court for the District of New Mexico are being considered. A "redlined" version(with proposed additions underlined and proposed deletions stricken out) and a clean version of these proposed amendments are posted on the Court's website at www.nmd.uscourts.gov. Members of the bar may submit comments by email to kelsie_kloepfer@nmd.uscourts.gov or by mail to U.S. District Court, Clerk's Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, Attn: Kelsie Kloepfer, no later than May 31.

State Bar News

2019 Annual Meeting

Resolutions and Motions

Resolutions and motions will be heard at 1 p.m., Aug. 1, at the opening of the State Bar of New Mexico 2019 Annual Meeting at Hotel Albuquerque at Old Town, Albuquerque. To be presented for consideration, resolutions or motions must be submitted in writing by July 1 to Executive Director Richard Spinello, PO Box 92860, Albuquerque, NM 87199; fax to 505-828- 3765; or email rspinello@nmbar.org.

Committee on Women and the Legal Profession

Nominations Open for 2018 Justice Pamela B. Minzner Outstanding Advocacy for Women Award

The Committee on Women and the Legal Profession seeks nominations of New Mexico attorneys who have distinguished themselves during 2018 by providing legal assistance to women who are underrepresented or underserved, or by advocating for causes that will ultimately benefit and/or further the rights of women. If you know of an attorney who deserves to be added to the award's distinguished list of honorees, submit 1-3 nomination letters describing the work and accomplishments of the nominee that merit recognition to Quiana Salazar-King at qsalazar-king@nmilc.org by Monday, June 30. The award ceremony will be held on Aug. 22 at the Albuquerque Country Club. This award is named for Justice Pamela B. Minzner, whose work in the legal profession furthered the causes and rights of women throughout society. Justice Minzner was the first female Chief Justice of the New Mexico Supreme Court and is remembered for her integrity, strong principals, and compassion. Justice Minzner was a great champion of the Committee and its mission.

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- June 3, 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.)
- June 10, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- June 17, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

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

Employee Assistance Program: Managing Stress Tool for Members

The Solutions Group, the State Bar's free Employee Assistance Program, announces a new platform for managing stress. My Stress Tools is an online suite of stress management and resilience-building resources which includes: training videos, relaxation music, meditation, stress tests, a journaling feature and much more. My Stress Tools helps you understand the root causes of your stress and gives you the help you need to dramatically reduce your stress and build your resilience. Your Employee Assistance Program is available to help you, 24/7. Call at 866-254-3555.

Solo and Small Firm Section

Albuquerque Roundtable Discussion

The Solo and Small Firm Section is hosting Roundtable event at 8:30 a.m. on June 3 at the State Bar Center in Albuquerque. The Roundtable events are gatherings in which attendees discuss practice management and other business trends. For more information, contact Deian McBryde at deian@mcbrydelaw.com or 505-465-9086.

UNM School of Law

Law Alumni/ae Association

17th Annual Law Scholarships Golf Classic

The UNM School of Law Alumni/ae Association presents the 17th Annual Law Scholarships Golf Classic on Friday, June 7, which benefits full-tuition merit scholarships at the Law School. If you're not a golfer, that's alright! You can still support by sponsoring students to play, sponsoring a hole/tee, and more. Register and learn more at http://lawschool.unm.edu/alumni/events/golf.html.

Law Library Hours Summer 2019

Through Aug. 18

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	Closed.
Reference	
Monday–Friday	9 a.m.–6 p.m.

Closures

May 27 (Memorial Day)
July 4 (Independence Day)
July 5 (Independence Day)

Other Bars

Albuquerque Bar Association

Monthly Membership Luncheon

William Slease, chief disciplinary counsel with the Disciplinary Board of the New Mexico Supreme Court, will present "Ethics Update" (1.0 G) at the Albuquerque Bar Association monthly luncheon on June 4 at the Embassy Suites, 1000 Woodward Pl NE, Albuquerque, NM 87102. Arrive at 11:30 a.m. for networking. The luncheon and CLE will be noon–1 p.m. To register contact interim-Executive Director Deborah Chavez at dchavez@vancechavez.com or 505-842-6626

New Mexico Criminal Defense Association

Litigating in the 21st Century CLE

Digital evidence is well known for its effectiveness at damaging the defense, but what if there was a way to turn that around? "Litigating in the 21st Century" will show what evidence to focus on gathering for attorney defense and how to keep the government's out at trial, update on State and Federal search and seizure of data, explain the Foreign Intelligence Surveillance Act, and more. Stay sharp in this electronic age and reserve a spot. NMCDLA members, families and friends are invited to the annual membership party and silent auction on June 7. Visit www.nmcdla.org to join NMCDLA and register.

New Mexico Defense Lawyers Association

2019 Young Lawyers Seminar

Join the New Mexico Defense Lawyers Association for its Young Lawyers Seminar on May 31 at Modrall Sperling in Albuquerque. This half-day program is designed to teach associates and junior partners useful skills they can apply to their daily practice and provide opportunities to network and develop business relationships. Visit www.nmdla.org to register and for more information.

Other News

New Mexico Workers' Compensation Administration

Request for Comments

The acting director of the Workers' Compensation Administration, Verily A. Jones, is considering the reappointment of Judge Leonard Padilla to a second five-year term pursuant to NMSA 1978, §52-5-2 (2004). Judge Padilla's term expires on Aug. 31. Anyone wishing to submit written comments concerning Judge Padilla's performance may do so until 5 p.m., June 3. All written comments submitted per this notice shall remain confidential. Comments may be addressed to WCA Acting Director Verily A. Jones, PO Box 27198, Albuquerque, NM 87125-7198; or faxed to 505-841-6813.

U.S. Council for International Business

International Arbitration Event Hosted in Albuquerque

The U.S. Council for International Business is hosting an international arbitration event on June 12 from 11:30 a.m.-1:30 p.m. at the law offices of Modrall Sperling in downtown Albuquerque. Topics include New Mexico and international business, key issues in international arbitration and a panel discussion on issues facing New Mexico companies in international arbitration. The event is open to the public, including local attorneys, in-house corporate counsel, government attorneys, UNM faculty, staff, and students, and community members. This program provides 1.5 G CLE credit. The cost is $10 to help defray the cost of the lunch. R.SV.P. at https://en.xing-events.com/VVMFKJF.html by June 7.

Vilendrer Law, PC

National Survey on Dispute Resolution

Vilender Law PC has commissioned a study on the correlation between client outcomes and various litigation variables. The goal for this research is to help attorneys obtain better litigation and settlement outcomes for their clients. The survey takes approximately 2 minutes and is confidential. The survey can be accesed at https://www.vilendrerlaw.com/survey/. Aggregated results of the survey will be shared at the conclusion of the study.

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

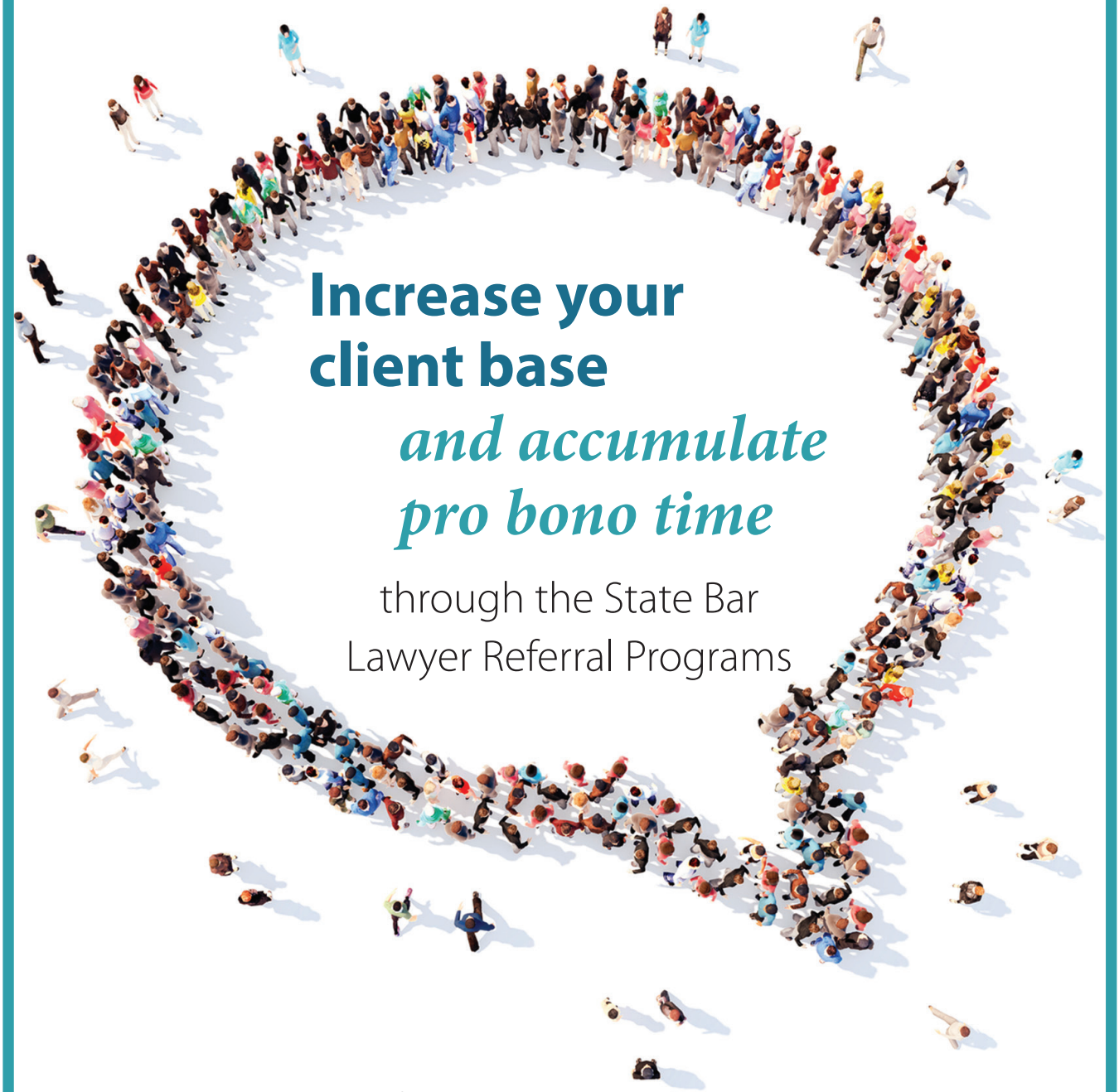
Visit www.nmbar.org/memberappreciation for the details.

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!



Increase your client base

and accumulate pro bono time

through the State Bar Lawyer Referral Programs

The State Bar has two lawyer referral programs to help members connect with potential clients: the **General Referral Program** and the **Legal Resources for the Elderly Program (LREP)**.

- **General Referral Program** panel attorneys agree to provide referral clients with a free, 30-minute consultation. Any services rendered after the initial 30 minutes are billed at the attorney's regular hourly rate. The General Referral Program receives more than 10,000 calls per year.
- **LREP** is a free legal helpline and referral service for New Mexico residents age 55 and older. LREP referrals to panel attorneys are only made after a staff attorney has screened the case and determined that it is appropriate for referral. LREP referrals are made on full-fee, reduced fee and pro bono basis. LREP processes approximately 5,000 cases each year.

New Mexico State Bar Foundation

Contact Maria Tanner at mtanner@nmbar.org or 505-797-6047 for more information or to sign up with the programs.

Legal Education

May

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

31 **2019 Young Lawyers Seminar**
3.0 G
Live Seminar, Albuquerque
New Mexico Defense Lawyers Association

June

3 **Smartphones, Tablets and Other Devices in the Workplace**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

4 **Ethics Update**
1.0 G
Live Seminar, Albuquerque
Albuquerque Bar Association
dchavez@vancechavez.com

5 **2019 Ethics in Civil Litigation, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2019 Ethics in Civil Litigation, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **International Arbitration: Key Issues for New Mexico Businesses**
1.5 G
Live Seminar, Albuquerque
U.S. Council for International Business
https://en.xing-events.com/VVMFKJF.html

14 **Ethics in Negotiations- Boasts, Shading and Impropriety**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **2018 Family Law Institute: Hot Topics in Family Law Day 1**
5.0 G, 1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **Common Tax Pitfalls for Small Business Attorneys (2019)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **Bankruptcy Fundamentals for the Non-Bankruptcy Attorney (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **Ethics of Co-Counsel and Referral Relationships**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Staying Out of the News: How to Avoid Making Techno-Ethical Mistakes that Put You on the Front Page**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Disorder in the Court: An Attorney's Guide to Judicial Misconduct**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Bridge the Gap Mentorship Program CLE (Full Day Program)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Bridge the Gap Mentorship Program CLE (Half-Day Program)**
3.0 G, 1.0 EP
Live Seminar/Webcast
Center for Legal Education of NMSBF
Website/Telephone

24 **How to Avoid Potential Malpractice Pitfalls in the Cloud and in Everyday Law Office Computing**
1.0 G
Live Seminar/Webcast
Center for Legal Education of NMSBF
www.nmbar.org

28 **Fifth Annual Symposium on Diversity and Inclusion (2019)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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.

June

28 **What Starbucks Teaches Us About Attracting Clients the Ethical Way (2018)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Abuse and Neglect in Children's Court (2019))**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

July

7 **Litigating in the 21st Century CLE**
5.7 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

9 **Your Client Wants to Sell on the Web: What You Need to Know Pt 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Your Client Wants to Sell on the Web: What You Need to Know Pt 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **How to Practice Series: Estate Planning (2019)**
5.0 G, 2.0EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Avoid Lawsuits by Cultivating Respect in the Workplace (2019)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Employment and Labor Law Legislative Update (2019)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **Ethics and New Clients: Inadvertent Clients, Intake and More**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Surviving White Collar Cases-Prosecution and Defense Perspectives (2019)**
5.5 G, 1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **2018 Business Law Institute**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **Employee Leave Law**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Mediating the Political Divide**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

August

14 **Lawyer Ethics in Employment Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **IT Sourcing Agreements: Reviewing and Drafting Cloud Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Trust and Estate Planning for Cabins, Boats and Other Family Recreational Assets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Easements in Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

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

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

Effective May 17, 2019

PUBLISHED OPINIONS

A-1-CA-36344	A Landau v. NM Attorney General	Reverse/Remand	05/14/2019
A-1-CA-36283	A Law v. HSD	Affirm	05/16/2019

UNPUBLISHED OPINIONS

A-1-CA-35862	A Rudolph v. Manor Estates	Affirm/Remand	05/13/2019
A-1-CA-37528	State v. C Wheeler	Affirm	05/13/2019
A-1-CA-35736	City of Alb v. 2010 Dodge Silv	Reverse	05/14/2019
A-1-CA-37392	B Franklin v. NM Department of Corrections	Affirm/Remand	05/14/2019
A-1-CA-37718	State v. F Gutierrez	Affirm	05/14/2019
A-1-CA-34599	State v. L Tafoya	Reverse/Remand	05/15/2019
A-1-CA-35640	State v. P Martinez	Reverse/Remand	05/15/2019
A-1-CA-35872	Ashcraft v. Makwa Builders	Affirm	05/16/2019

Effective May 10, 2019

PUBLISHED OPINIONS

none

UNPUBLISHED OPINIONS

A-1-CA-34972	State v. R Martinez-Melgar	Affirm/Reverse	05/06/2019
A-1-CA-37418	Property Owners Committee v. R Cohen	Affirm	05/06/2019
A-1-CA-35160	State v. B Palmer	Affirm	05/07/2019
A-1-CA-35708	T Rabatin v. Governing Board	Affirm	05/07/2019
A-1-CA-36081	ATC Healthcare v. Tax & Rev	Affirm	05/07/2019
A-1-CA-36285	Wells Fargo v. M Martinez	Affirm	05/07/2019
A-1-CA-37318	Nationstar v. J Hickerson	Reverse/Remand	05/07/2019
A-1-CA-37677	State v. D Stapleton	Affirm	05/07/2019
A-1-CA-37560	State v. K Kennedy	Affirm	05/08/2019

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective May 29, 2019

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes open for comment.

Recently Approved Rule Changes Since Release of 2019 NMRA:

Effective Date

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

Civil Forms

4-999 Notice of hearing and rights 01/14/2019

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

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 Court of Appeals

Opinion Numb er: 2019-NMCA-011

No. A-1-CA-34929 (filed October 17, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MELVIN WINN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
JEFF FOSTER MCELROY, District Judge

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Opinion

Michael E. Vigil, Judge

{1} The opinion filed on October 15, 2018, is hereby withdrawn, and this opinion is filed in its stead. Melvin Winn (Defendant) appeals from the judgment and sentence entered upon his conditional guilty plea to one count of failure to register as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA), NMSA 1978, §§ 29-11A-1 to -10 (1995, as amended through 2015). Defendant argues that (1) his misdemeanor Colorado conviction for third degree sexual assault is not "equivalent" to any SORNA offense; and (2) even assuming his Colorado conviction corresponds to a SORNA offense if he had been an adult, because he was fifteen years old at the time he committed the sexual assault, his conduct constituted a delinquent act or youthful offender offense under New Mexico law that is not equivalent to a "conviction" for a SORNA offense. We agree with Defendant's first argument and reverse.

BACKGROUND

{2} On June 8, 1999, when Defendant was fifteen years old, he was accused of committing sexual assault in Colorado. On April 3, 2001, a jury found Defendant guilty of one count of misdemeanor third degree sexual assault, a class 1 misdemeanor, in violation of Colo. Rev. Stat. Section 18-3-404 (1996, amended 2013), and first degree assault (non-sexual offense), a class 3 felony, in violation of Colo. Rev. Stat. Section 18-3-202(1)(a) (1998, amended 2016). Defendant was sentenced to two years confinement for the misdemeanor sexual assault conviction with two years credit for time served.

{3} After Defendant moved to New Mexico, an indictment filed in February 2014 charged Defendant with one count of failure to register as a sex offender in violation of SORNA. Defendant filed a motion to dismiss the indictment, under *State v. Foulenfont*, 1995-NMCA-028, ¶ 3, 119 N.M. 788, 895 P.2d 1329, arguing that, as a matter of law, he did not meet the definition of a "sex offender" who has been convicted of a "sex offense" under SORNA. Citing *State v. Hall*, 2013-NMSC-001, 294 P.3d 1235, Defendant argued that the sexual offense for which he was convicted in Colorado "does not have the same elements as any of the sex offenses listed" in SORNA, requiring registration as a sex offender in New Mexico and that "[t]he only documentation that the State has provided that [Defendant] meets the definition of a 'sex offender' who has been convicted of a 'sex offense' . . . . is a [j]udgment of [c]onviction from Colorado dated July 12, 2001."

{4} The State contended that "Defendant was convicted at [a] jury trial of engaging in sexual contact, intrusion, or penetration with a child for the purpose of his own sexual gratification." The conduct forming the basis of this conviction, the State argued, is equivalent to the registrable New Mexico offense of criminal sexual contact of a minor (CSCM) or criminal sexual penetration (CSP). To provide a factual basis for this assertion, the State tendered an unfiled, unsigned presentence report purporting to describe, based on information provided by the Littleton Police Department, the victim's and Defendant's accounts of the conduct giving rise to his convictions in Colorado.

{5} At the hearing on Defendant's motion to dismiss, Defendant continued to assert that the elements of misdemeanor third degree sexual assault, for which he was convicted in Colorado, did not match any registrable SORNA offense. He further asserted that the State could not rely on the presentence report to establish the requisite factual basis of force, coercion, or penetration in order for Defendant's conduct to come within the scope of one of the potentially applicable SORNA offenses. The presentence report, Defendant asserted, was created based on the police report in the case and not, as is required under *Hall*, based on facts that the jury necessarily found at trial. The State replied that the presentence report clearly established that Defendant's conduct satisfies the definition of a SORNA offense—to wit, CSCM.

{6} In a written order, the district court denied Defendant's motion to dismiss. The order states that "Defendant's conviction if obtained in New Mexico would consist of criminal sexual contact of a minor and would be a registerable offense. For all the above reasons and for the reasons cited in the State's brief in opposition to the [m]otion, . . . Defendant's [m]otion is DENIED."

{7} Thereafter, Defendant entered a conditional guilty plea to the charge of failure to register as a sex offender conditioned upon Defendant's reservation of the right to appeal the district court's denial of his motion to dismiss the indictment. This appeal followed.

DISCUSSION

{8} Contending that his conviction for third degree sexual assault is not equivalent to a registrable SORNA offense,

Defendant argues (1) "[t]he elements of the Colorado misdemeanor offense of [s]exual [a]ssault in the [t]hird [d]egree do not correspond to a registrable offense in New Mexico"; and (2) "[t]he State failed to present evidence establishing that [his] actual conduct as found by the Colorado jury met the elements of any registrable offense in New Mexico."

I. Standard of Review

{9} "In *Foulenfont*, we stated that it was proper for a district court to decide purely legal matters and dismiss a case when appropriate before trial[,]" where dispositive facts are undisputed. *State v. Platero*, 2017-NMCA-083, ¶ 7, 406 P.3d 557 (internal quotation marks and citation omitted); *see* Rule 5-601 NMRA. Whether a district court properly grants or denies a defendant's motion to dismiss an indictment on purely legal grounds presents a question of law that we review de novo. *See State v. Muraida*, 2014-NMCA-060, ¶ 12, 326 P.3d 1113 ("[W]e review de novo whether the district court erred in granting [a d]efendant's *Foulenfont* motion."); *see State v. LaPietra*, 2010-NMCA-009, ¶ 5, 147 N.M. 569, 226 P.3d 668 ("The contours of the district court's power to conduct a pretrial hearing on a motion to dismiss charges . . . is a legal question reviewed under a de novo standard.").

{10} Additionally, whether Defendant's Colorado conviction for misdemeanor third degree sexual assault is "equivalent" to a registrable SORNA offense presents a question of statutory interpretation that is subject to de novo review. *Hall*, 2013-NMSC-001, ¶ 9 ("What constitutes an equivalent offense [under SORNA] involves a question of statutory interpretation. Interpretation of a statute is an issue of law that we review de novo.").

II. Analysis

A. SORNA and the *Hall* Standard for Determining Equivalency

{11} Under SORNA, as it provided at the time pertinent to our analysis, "[a] sex offender residing in this state shall register with the county sheriff for the county in which the sex offender resides." Section 29-11A-4(A). A "sex offender" includes an individual that "changes residence to New Mexico, when that person has been convicted of a sex offense" in another jurisdiction. Section 29-11A-3(H)(2). A "sex offense" is defined as any of the twelve enumerated sex offenses "or their equivalents in any other jurisdiction[.]" Section 29-11A-3(I). Our Supreme Court held in *Hall* that

> an offense is 'equivalent' to a New Mexico offense, for purposes of SORNA, if the defendant's *actual conduct* that gave rise to the out-of-state conviction would have constituted one of the twelve enumerated offenses requiring registration pursuant to SORNA.

2013-NMSC-001, ¶ 1 (emphasis added).

{12} In *Hall*, the defendant moved to New Mexico from California, where he had a prior conviction, which resulted from a plea agreement, for violating the California misdemeanor statute prohibiting "annoying or molesting a child under the age of eighteen." *Id.* ¶¶ 1-2 (internal quotation marks and citation omitted). Upon moving to New Mexico, the defendant did not register as a sex offender, and he was charged with failure to register as a sex offender in violation of SORNA. *Id.* ¶ 3. The defendant filed a motion to dismiss the charge, "arguing that there was no statute in New Mexico equivalent to California's 'annoying or molesting' a minor statute, and therefore his failure to register did not violate SORNA." *Id.* ¶ 4. The record contained no stipulations by the defendant concerning his conduct or documents reflecting the proceedings in California. *Id.* ¶ 28. The district court denied the defendant's motion, and the defendant entered a conditional guilty plea, reserving the right to appeal the denial of his motion to dismiss. *Id.* ¶ 4. Based on the record before it, the Court determined that the State presented insufficient facts to establish that the defendant's actual conduct underlying his California conviction, had it occurred in New Mexico, was equivalent to a SORNA offense, because the State's allegations on the issue completely lacked substantiation. *Id.* ¶¶ 25-28. The case was remanded to the district court for further proceedings with leave for the defendant to withdraw his guilty plea. *Id.* ¶ 30.

{13} In so concluding, the Court described the analytic framework that New Mexico courts should apply in determining whether an out-of-state conviction is equivalent to a SORNA offense. *See id.* ¶¶ 18-24. "When the elements of the out-of-state sex offense are precisely the same elements of a New Mexico sex offense, the inquiry is at an end[,]" and offenses are considered equivalent. *Id.* ¶ 18. But "when the elements are dissimilar, courts should consider the defendant's underlying conduct to determine whether the defendant's conduct would have required registration in New Mexico as a sex offender." *Id.* The Court interpreted "SORNA to mean that the defendant's offense in the foreign state, rather than the statute under which the defendant was convicted, must be the equivalent of an enumerated registrable offense in New Mexico." *Id.* This means that in order "[t]o determine equivalence, courts must look beyond the elements of the conviction to the defendant's actual conduct." *Id.*

{14} The Court also discussed how "a New Mexico court [should] determine the actual conduct that supported the defendant's conviction of a sex offense in another jurisdiction when deciding equivalency under SORNA." *Id.* ¶ 22. "In essence," the Court stated, "the question is whether the out-of-state fact-finder necessarily must have found facts that would have proven the elements of [a] New Mexico registrable offense. If so, the alleged sex offender has committed the equivalent of an enumerated New Mexico sex offense." *Id.* ¶ 22. To determine the factual basis of a conviction resulting from a plea agreement or nolo contendere, courts may consider "the charging document, plea agreement, or transcript of the plea hearing" and that in a bench trial, the courts should consider the "bench-trial judge's formal rulings of law and findings of fact[.]" *Id.* ¶¶ 22-23 (internal quotation marks and citation omitted). The Court also observed that it

> realize[d] that in some cases, such as a guilty plea in which there was no allocution, there will be no factual findings for a New Mexico court to review. In that instance, the court will be limited to comparing the elements of the foreign sex offense to those of the enumerated offenses under SORNA. In some cases, this will mean that out-of-state sex offenders will not have to register in New Mexico, even for serious offenses.

Id. ¶ 24.

{15} Applying the standard in *Hall*, we conclude that the district court erred in concluding as a matter of law that Defendant's actual conduct underlying his Colorado third degree misdemeanor sexual assault conviction, if it had occurred in New Mexico, constituted a SORNA offense.

B. Elements of the Offenses

{16} Defendant argues that "[a]n examination of the statutes at issue verifies that the elements of the [Colorado] misdemeanor offense of [s]exual [a]ssault in the [t]hird [d]egree do not correspond to

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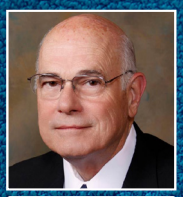

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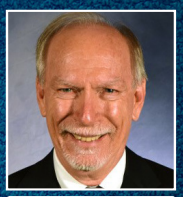

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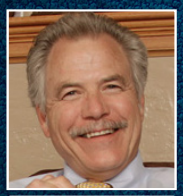

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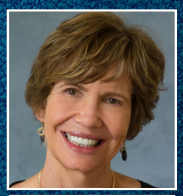

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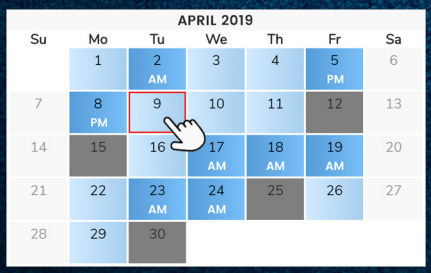

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NM Judges and Lawyers Assistance Program **LAW** – **L**ead and **A**ssist with **W**ellness

The NMJLAP is a program committed to the positive health and well-being of the New Mexico legal community. The NMJLAP serves judges, lawyers, law students and their immediate family members by listening first, then offering referral sources, a peer support network, a monitoring program and education in the form of CLE trainings. At this time in the legal profession where well-being is the topic of many conversations, NMJLAP strives to be a leader in proliferating and developing the transformation in the legal community toward civility, compassion and understanding for colleagues living with any behavioral health condition. Get on board with the ABA, CoLAP and LAPs across the country to create a profession that promotes work/life balance, civility amongst peers, and an environment that nurtures positive health and well-being of the individual.

Exciting 2019 happenings for the NMJLAP are: a presence at the June Judicial Conclave, July Bar Exam, and August State Bar Annual meeting. Look for upcoming details on our October Town Hall Meeting, NEW Facebook page and Twitter account. Visit our website at www.nmbar/jlap.org or call (505) 797-6003 to find out how you can get involved.

In the articles that follow we hope you find something that gives you pause, education, encouragement, or just makes you laugh. NMJLAP loves the NM legal community….we are ***Changed Lives, Changing Lives.*** Visit www.nmbar.org/JLAP for more information.

A Lawyer's TOOLBOX

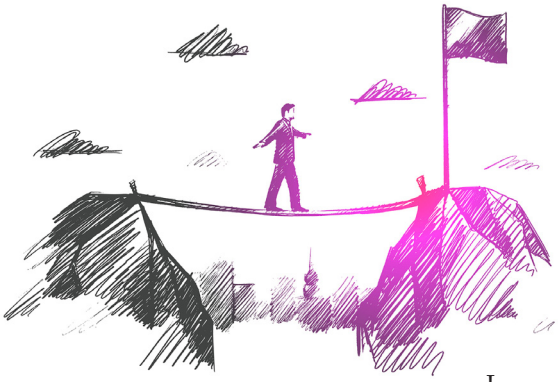
by Briggs Cheney

We are trained to help others. When asked "what do you do?" I have sometimes responded, "I make a living dealing with people who can't get along or are unwilling to compromise or, otherwise, are unwilling to accept life on life's terms." I admit to sarcasm and an unfair generalization. It has been the rare occasion that a client did not genuinely believe in his or her cause. Too often clients are wonderful people who deserve for some wrong to be righted, and because of unfair laws, economics, or the realities of the legal system there is little a lawyer can do. It is a rough racket and it often takes its toll on the lawyer.

As in other professions, lawyers have their *tools*: Westlaw; PowerPoint; SOPA; PC Law and the list goes on—the "tools of the trade." But it is a *rough racket*, and a lawyer needs a *personal* toolbox with tools that help the lawyer cope with the stresses and challenges of the practice of law. Having represented over five hundred lawyers in 46 years, I have seen almost every conceivable mistake that can be made by a lawyer and I have concluded that every lawyer should have a personal toolbox.

My practice of forty-six years has focused on helping and representing lawyers. I am also a recovering alcoholic and I have been in recovery for a very long time. The disease of addiction is very complicated, and it is not fair to blame my alcoholism on the stresses of the practice of law. It is fair to say that a significant part of the solution to the disease of addiction is learning how to live life on life's terms, and this approach is completely transferable to the practice of law. It's a great example of a skill that belongs in a lawyer's personal toolbox. I am always learning about myself, and life, and adding new tools to my personal tool box—some that you might consider for your own toolbox.

> "Control is an illusion, and we all struggle with letting go of the handle and just accepting where the winds of life carry us."



Overcoming Fear

Law is a helping profession. People bring us their problems to fix and we are supposed to know what to do. Too often the solution is not clear, or we don't know what to do. We are stuck, fear sets in, and we do nothing. It is the rare occasion that doing nothing is the correct decision. When I am afraid and unsure—when I am stuck—I think back to a long-ago friend we called *Biker Steve* who was fond of saying: ***"Nothing changes if nothing changes."***

Another friend, *Ilse*, now in her late 80's, offered me her several acronyms for FEAR: that we should not ***F... Everything And Run,*** but remember that often it is a case of ***Future Events Appearing Real*** and that we are ***Forgetting Everything's All Right.***

Lawyers have no control over opposing counsel, witnesses, the judge or the jury, yet the lawyer feels a duty to control the outcome. When I forget this, two of my favorite tools are George Addair's wisdom—***"Everything you want is on the other side of fear"***—and Gilda Radner's (of *Saturday Night Live* fame) reminder:

"I wanted a perfect ending. Now I've learned, the hard way, that some poems don't rhyme, and some stories don't have a clear beginning, middle, and end. Life is about not knowing, having to change, taking the moment and making the best of it, without knowing what's going to happen next. Delicious Ambiguity."

Said less gracefully by a guy we called *the Preacher*, ***"I learned how to kiss by getting slapped; I learned how to ride a bike by falling off; I learned how to fight by getting beat up."***

Acceptance

Years ago, concerned about me, a lawyer friend, Katja, gifted me with pencil sketch by story teller and artist Brian Andreas. The sketch was of a stick person at the tiller of a small sailboat and included the following words: ***"If you hold on to the handle ... it's easier to maintain the illusion of control. But it's more fun if you just let the wind carry you."*** Control is an illusion, and we all struggle with letting go of the handle and just accepting where the winds of life carry us.

"And acceptance is the answer to *all* my problems today. When I am disturbed, it is because I find some person, place, thing, or situation—some fact of my life—unacceptable to me, and I can find no serenity until I accept that person, place, thing, or situation as being exactly the way it is supposed to be at this moment." *The Big Book of Alcoholics Anonymous* 417 (4th ed. 2001).

But acceptance may be the most important tool in our toolbox and, often, the hardest to reach for.

I have had to remember too many times, personally and professionally, as another friend once said, that ***"it's too late to make a better past."*** While there are occasions when I can use the sandpaper or the file and round off some corners, ***"sometimes you just have to hug the cactus."***

Letting Go of Resentments

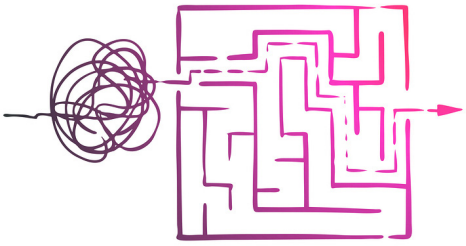
I steadfastly refuse to let another person or institution or situation ruin my day or my serenity. But that is so hard to do. It was many years ago I heard it said, ***"When I let another person get me mad or angry, I am letting that person be my guru – I am letting that person control my life."*** I quickly stuck that tool in my toolbox and since then I have marveled at lawyer colleagues and lawyer clients who let an opposing counsel drive them to distraction—sometimes by design and sometimes just by doing their jobs of advocating for their clients. Either way, lawyers who allow themselves to be derailed by the opponent do a disservice to the client, not to mention to themselves. ***"For every minute you are angry you lose sixty seconds of happiness,"*** or so said Ralph Waldo Emerson.

Resentment comes in different forms. The law business is often less than kind, sometimes cruel, and prone to gossip. I often call on the tool I picked up twenty-two years ago: ***"What other people say about me is none of my business."*** When that tool doesn't work and I am really torqued, one of my favorite tools is remembering that ***"having a resentment is like taking poison and waiting for the other person to die."***

Specialty Tools

Every tool box has its basic tools—the hammer, screwdriver etc. The practice of law often requires specialty tools.

Too often we show up the morning of trial with our Trial Notebook with its tabs and witness outlines and opening and closing mapped out, only to have the judge grant a last-minute motion *in limine*—and the Trial Notebook is rendered useless. Years ago, a retired Marine reminded me of what he was taught in Marine OTS and a tool I have not forgotten: ***"All plans disappear with the enemy's first shot."*** (Military strategy from the 19th century Prussian military Commander Helmuth von Moltke).

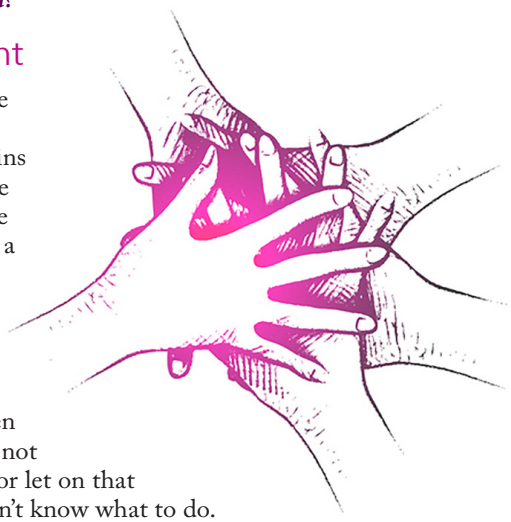


For the occasion when you ask the wrong question, or your witness gives you the wrong answer, remember the wisdom of *Sting*'s pianist and arranger, Gil Evans: ***"There is no such thing as a wrong note. It's the note that follows what you think is a wrong note that's important. Because any note you choose by accident can be given a context that makes it right."***

And for those occasions when you have the chance to outsmart your opponent and be just a little "too" smart, stop and think: ***"Sometimes it is better to be wise than right."*** Scott Simon, NPR *Morning Edition* 12/13/14.

And, sometimes, in the end, none of the tools do the trick and we need to reach for the tool that reminds us: ***"Don't judge the result – did I do the best I could?"***

A Last Thought



We all suffer with the condition of "Legal Egotism." Some strains of that "condition" are unattractive, but I use the term referring to a lawyer's belief that he or she, alone, has to fix or save their client. ***"Alone"*** is the operative word. When we feel alone, we are not supposed to show it or let on that we are scared and don't know what to do. We forget we often can't change a client's circumstance, and we get angry. I don't have the answer for that other than: ***none of us are alone.*** I acknowledge that the tools above are just borrowed words and wisdom. Missing are the "magic directions." Probably there are none. Instead, the magic is in believing we aren't alone, "letting go of the handle," and experiencing life's "Delicious Ambiguity." ■

Briggs Cheney practices with Sheehan & Sheehan, P.A. in Albuquerque. His practice has focused on the representation of lawyers in the civil and disciplinary arenas and he has been active in local, state and national bars in all matters relating to lawyers and the legal profession.

Improve your practice and LIFE.

Empathy helps build connection!

by Caitlin Dillon

Interacting with human beings will always be the most difficult part of being a lawyer. Even the most experienced practitioners can be derailed by an individual in crisis. Human beings are inherently emotional creatures and, unlike the law, don't follow precedent and or move in predictable patterns. People come to lawyers in times of legal crisis, and there is an expectation that lawyers are the fixers. Lawyers are the people who are supposed to negotiate problems in a logical, professional, and diligent manner. How can lawyers most effectively communicate with clients in crisis - to really hear their problems? How can lawyers best build a client relationships? They can start by practicing empathy.

There is a growing body of research grounded in neuroscience and psychology that suggests that empathic interactions improve human interaction in general. Empathy is a process with both cognitive and affective components which enables individuals to understand and respond to others' emotional state which contributes to compassionate behavior and moral agency.[1] Empathy is a vital component of human connection. When individuals feel with others, care about others and act with compassion, their communications and outcomes improve. Helen Riess says "empathic capacity" requires specialized brain circuits. When people show empathy for others, they are usually good at perceiving what others feel, able to process the information, and able to respond effectively."[2]

In the legal realm, a client's emotional recitation can leave the lawyer feeling anything from discomfort to outrage. Even though the lawyer was not physically present for the trauma, the brain registers the client's emotional and physical pain. The client's feelings are perceived by the lawyer who sees their facial expressions and body language and hears their tone of voice. Often in this moment the lawyer may feel overwhelmed by the trauma or feelings being conveyed. Riess describes the importance of taking care of the listener's own human reaction before trying to help. She suggests starting with an inventory of physical reactions that can include sweaty palms or a racing heart. The lawyer should recognize their own emotional reactions in these difficult conversations. To manage these reactions, it is helpful to take deep breaths and to engage with curiosity. To engage with curiosity, draw out the client with statements such as "tell me more about how you feel." Brené Brown says empathy is about connecting to the emotions that underpin an experience. "If you've ever felt grief, disappointment, shame, fear, loneliness, or anger, you're qualified."[3] Empathy occurs when a person, such as a lawyer, connects with the emotion that the client is feeling, not with the specific event or situation.[4]

It is important to remember that empathy is very different from sympathy. A good visual illustration of the difference can be seen in Brown's 2013 video on empathy.[5] She discusses how empathy creates connection between individuals and how sympathy creates distance and disconnection. She points out that sympathy is the moment when someone tries to make things better by saying, "at least you still have x, y, z," or by forcing a silver lining into the other's perspective. Lawyers tend to default to sympathy; however, they cannot begin to fully understand a problem unless they make a connection with the client who is sitting right in front of them. Empathy can be the foundation of that connection. [6]

Consider and reflect from the client's perspective. How many times have you shared something difficult and been told, "Look at the bright side" or "At least you still have …"? How did that sympathetic response make you feel? Conversely, how many times have you shared something difficult and the response was, "That is really hard," or even, "I don't know what to say"? Did the empathetic response make you feel more connected than the sympathetic response? According to Brown, it just takes looking into someone's eyes and seeing yourself reflected back in an engaged way.[7] Empathy is not about saying the right thing, or making the other person feel better. It is about connecting to the emotion the other person is feeling.

Empathy is not an innate trait.[8] It can be learned by anyone at any age, and mastered with courageous and regular practice. "While it hurts not to be loved, it can be unbearable not to have our deepest selves be seen, acknowledged, accurately understood, and embraced." Yet, lawyers tend to "talk to" rather than "talk with" a client. A client can be overwhelmed when the lawyer talks to them using legal jargon and procedures. When that happens, a lawyer misses the opportunity to build a relationship. "Empathy is the accurate understanding of another person's internal experience. It has nothing to do with agreeing or disagreeing with that experience." [9] Stepping into another person's life and experience is a delicate business. It is that delicate business in which lawyers are engaged every single day.[10] To solve problems, lawyers must listen to and be attuned to non-verbal cues which vary from client to client. To effectively practice empathy, lawyers must engage in self-reflection, becoming aware of their own emotional triggers. With awareness, the lawyer can acknowledge their

continued on page 8

Making the Connection

Our legal training
leads us to stiff-arm
not only our clients and each other,
but ourselves.

Connect to reality
not judging, not being judged,
living with the challenges we have.

Connect, then, and communicate.
When you miss the mark, step back, accept the hurt.
Say, "I'm sorry, now I know how I came across."

And, fortified,
connect, and
communicate.
If you can communicate,
you can help.

– Susan E. Page
February 2019

Susan E. Page is retired from the state, and serves on the Bernalillo County Behavioral Health Initiative Steering Committee, representing the Harm Reduction Subcommittee. She received the State Bar's Pro Bono Award in 2018. She lives with bipolar disorder.

Why Lawyers, Why Mindfulness, Why Now?

by Michelle DuVal

As the classroom begins to fill for my mindfulness class at the UNM Center for Life, I once again notice an interesting trend. Younger and younger faces are starting to find themselves in need of some inner peace.

Two of these faces belong to a couple of late forty-something men, both trim and in good shape, and they greet each other with strong claps on the back and some booming banter. Traditionally, people seeking meditation and the calm it promises are people who have discovered that a great career, great kids, or great contributions to their community are not in and of themselves enough to guarantee them happiness or immunity from the psychic pains of older life. In the past, the only people seeking meditation were the 60 plus crowd, the folks who had been there and done that, and now were looking for something that could satisfy their souls after the main thresholds of busy living had been crossed.

And another trend I've been witnessing? A heck of a lot of this younger crowd seem to be lawyers.

Patrick Griebel is one these men. He's a practicing litigation attorney, former defense attorney, and in recent years he's been on a path toward mindfulness, because in his words, after a divorce and the challenges of his career and young children, "I needed a reset."

Later on in the class his friend Joseph Sapien, a founding partner of Sapien Law, brought me an article about lawyers and mindfulness, and I was especially struck by the first line: "How ironic it is that many of the qualities that makes us great lawyers can be toxic to us as human beings."[1] Like his friend Patrick, Joseph was also looking for something to help him deal with the day-to-day stress of such a contentious work environment.

And just the other day when I gave a presentation at the law offices of Hinkle Shanor, I asked the group if they've ever had the experience of feeling their mind being pulled in ten million different directions, with few of them being positive ones. One the lawyers chimed in, "That sounds like my life on a daily basis."

So what exactly is mindfulness, and why are so many lawyers being drawn to the practice right now?

What is Mindfulness?

If you Google mindfulness, you get a quite a heady paragraph, and though I'm not saying that definition is wrong, it definitely can and probably should be simplified. Mindfulness is simply Intentional Awareness, i.e., developing the skill or the ability to stabilize your mind. Stated yet another way, mindfulness is the exercise of putting your mind where you want it to be, when you want it to be there. And because the cultivation of any type of skill requires some practice, that's what we do when we practice mindfulness meditation. We practice mindfulness. We practice giving our minds just one thing to do, just one present moment experience to focus on, and when we see our minds wandering off, we train the capacity to not only notice our wandering minds and relate to them kindly, but also to bring them back again.

We build these skills in our meditation, which is usually done in a simplified environment—for example, sitting in a chair or on a cushion in a relatively quiet space—so that we can eventually learn how to take that mental stability out with us into our daily lives.

And the result? People start to feel better. They start to feel more at ease and with a greater sense of calm. Because again, simply put, any time the mind feels out of control, we feel stressed, and any time the mind is focused and able to spring back, we feel more at peace. A simple idea, but not necessarily an easy one to master. That's why we need some training and practice.

Another one of my students, Chris Youngblood, is the CEO of the engineering firm Chaves Grieves. His company perennially wins awards for being one of the best and healthiest places to work. Recently, Chris implemented mindfulness training into the core of his company's wellness programs, which includes nutrition, physical fitness, and financial wellness. "Mindfulness," Chris says, "is a game changer, as far as I'm concerned. It's the missing piece. Because if your mind's not in good shape, it doesn't matter how healthy your body is, you're still going to struggle."

Lawyers and Mindfulness

After taking my eight-week Mindfulness Based Stress Reduction program, I chatted with Patrick about what he felt the benefits of mindfulness were for him as a lawyer, and why he thinks these practices are drawing in so many other attorneys. "Lawyers can get so wrapped up in the work, and any good lawyer tends to take things personally, which makes interactions with opposing counsel, the court and the clients sometimes way more heavy and negative than it needs

to be," he said. Patrick continued, "We also tend to be really logical and analytical, which actually is what makes mindfulness a perfect fit for us. There's a great logic to the practice. I mean, it makes sense. There's no part of the training that asks you to make a leap of faith. Lawyers tend to like that. We want to see the facts and the proof, which mindfulness has a lot of."

When I asked him how his own practice has helped him, he sighed, "How much time do you have?" Give me the top three ways, I tell him. Patrick explained, "One, I'm a lot less negative about my job and what I'm up against on any given day. Two, I'm a lot more focused at work, and when I lose focus, I can do a short meditation which immediately gets me back on track. And three, I'm a better dad."

Once again, I feel that all too familiar lump welling in my throat. I'm always amazed and utterly inspired by how even just a short introduction to the practice of mindfulness meditation can make such a huge difference in a person's life. I too, could go on and on about the benefits, the science, and the very practice itself, but words never quite do it justice. As with most things, to truly know it, you have to try it. And I hope so much that you do. ■

Endnotes

[1] Brenda Fingold, *Mindfulness and Well-Being*, Trial, Mar., 2018, https://www.justice.org/what-we-do/enhance-practice-law/publications/trial-magazine/mindfulness-and-well-being.

Michelle DuVal, MA, is the leading provider of Mindfulness Training in the Southwest United States, with her ongoing programs appearing in such top institutions as Presbyterian, Sandia National Laboratories, the University of New Mexico, the Albuquerque Public School system, the American Lung Association, and more.

Improve your practice and LIFE. Empathy helps build connection! *continued from page 5*

own emotions and practice empathy in the client interaction and still maintain appropriate professional and ethical boundaries. Practicing empathy doesn't mean that lawyers sacrifice their own values and preferences. It means that lawyers "feel with" clients who are trying to explain their issues.[11] Engaging in this "feel with" process with clients creates better communication and also helps manage expectations. This framework and authentic connection allows lawyers to be the most effective advocates for their clients.

People become lawyers for many different reasons. Underlying the decision to practice law is most often a desire to help people or to create meaningful change. Gabor Maté writes that we are wired to be in tune with one another's needs, which is one of the roots of empathy, and that meaning is found in pursuits that go beyond the self. "In our own hearts most of us know that we experience the greatest satisfaction not when we receive or acquire something but when we make authentic contribution to the well-being of others or to the social good."[12]

Building an empathic connection with a client builds trust and improves outcomes for both the client and the lawyer. The client is happier, and the lawyer is less "burned out" because there is a greater sense of meaning found in their connection. Win or lose, most clients, and most people for that matter, just want to be seen and heard. ■

Endnotes

[1] H. Riess, J.M. Kelly, R.W. Bailey, E.J. Dunn & M. Phillips, *Empathy Training for Resident Physicians: A Randomized Controlled Trial of Neuroscience-Informed Curriculum.* 27 (10) Journal of General Internal Medicine, 1280 (2012).

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[3] BRENÉ BROWN, DARE TO LEAD: DARING GREATLY AND RISING STRONG AT WORK 140 (New York: Penguin Random House, Inc.) (2018)

[4] See BRENÉ BROWN, DARING GREATLY: HOW THE COURAGE TO BE VULNERABLE TRANSFORMS THE WAY WE LIVE, LOVE, PARENT AND LEAD (New York: Penguin Random House, Inc.) (2015).

[5] Videotape: RSA 21st Century Enlightenment: Brené Brown on Empathy 2013) (Retrieved from https://www.thersa.org/discover/videos/rsa-shorts/2013/12/Brené-Brown-on-Empathy).

[6] Id.

[7] BRENÉ BROWN, DARING GREATLY: HOW THE COURAGE TO BE VULNERABLE TRANSFORMS THE WAY WE LIVE, LOVE, PARENT, AND LEAD 41 (New York: Penguin Random House, Inc.) (2015).

[8] MADELINE LEVINE, TEACH YOUR CHIDLREN WELL: WHY VALUES AND COPING SKILLS MATTER MORE THAN GRADES, TROPHIES OR "FAT ENVELOPES" 288 (New York: Harper Collins) (2012).

[9] Id. at 290

[10] Id.

[11] Id. at 293.

[12] GABOR MATE, IN THE REALM OF HUNGRY GHOSTS: CLOSE ENCOUNTERS WITH ADDICTION 415 (Berkeley, CA: North Atlantic Books) (2010).

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by Pamela Moore and William Slease

Two recent studies—one on law student well-being and the other on lawyer well-being—confirmed what the profession has suspected for years: as a group, law students and lawyers struggle more than the rest of the population with alcoholism, substance abuse and mental health challenges.[1] Virtually every lawyer at some point experiences periods of great stress, anxiety and significant work-life imbalance from practicing law. But identifying or quantifying these challenges is only the first step. What's next? How do we as a profession move forward in creating healthier lawyers? In this article we briefly discuss why the legal profession can and should create a brighter future for lawyer well-being.

Reed Smith, LLP, is a global law firm with over 1,500 lawyers—a number equal to one-fifth of the attorneys in New Mexico. In 2008, it launched "Wellness Works," a program designed to support the well-being of the firm's lawyers and staff.[2] The program offers training and support on physical fitness, stress management, work-life balance, healthy habits and mindfulness. Wellness Works also offers the same support for issues of substance abuse and mental health. Sandy Thomas, the firm's Global Managing Partner, astutely observed "this firm's most valuable resource is its people, which makes their health and well-being critical to our firm, our clients and our success." Why is a well-being program initiated by a massive law firm important? Because it reflects the cultural shift that must take place if lawyers and legal employers expect to make meaningful changes in lawyer well-being.

There are many reasons for legal employers to reform the culture that historically was built around endless billable hours and tilted the work-life balance almost exclusively to work. It is a culture that encourages coping with stress by being "tougher" or by self-administering alcohol and drugs to ease the pain.

Changing the culture is the right thing to do. Untreated substance abuse and mental illness ruin the lives of our colleagues, friends, families and selves. Ours is a profession dedicated to taking care of the needs of others. Shouldn't we take care of each other?

It is also the economically smart thing to do. Healthy lawyers are more productive, competent and effective. They miss less work. They are more focused, engaged and energetic. They contribute to a positive work environment. Further, they are at lower risk for committing malpractice, thereby lowering the economic risks to both the lawyer and the firms for which they work.

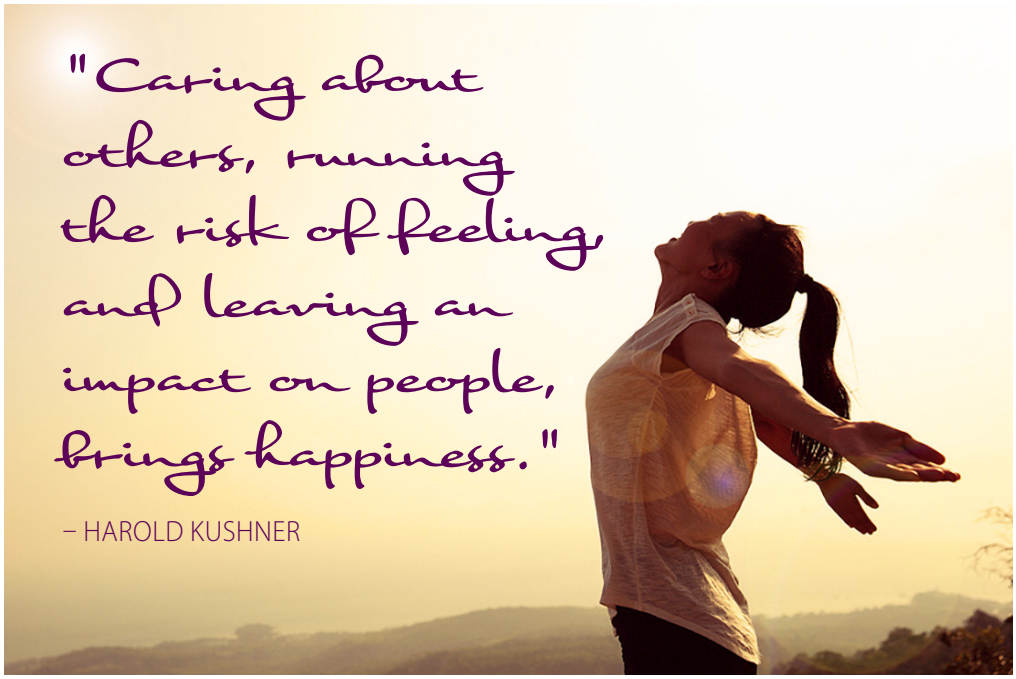
Leaders of the profession recognize the importance of making meaningful changes to address lawyer well-being. For example, the Conference of Chief Justices in 2017 adopted a resolution stating its support for the goals of reducing lawyer impairment and improving lawyer well-being. The resolution encouraged every jurisdiction to review a report by the National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*.[3] If our leaders are actively engaged in this initiative, shouldn't we all be?

There are obstacles to making the necessary changes. The most common and challenging is to encourage lawyers to use the available resources to help with their personal struggles and to overcome the stigma associated with seeking help for substance abuse or mental health challenges. This stigma remains the biggest hurdle to professionals receiving the help and support they need. The fear of being labeled or judged can be isolating and keep attorneys from reaching out for help. But it need not be that way. As individuals–whether you feel the effects of depression, anxiety, stress or another mental health condition—seeing and knowing that you are not alone is a vital component in recovery and can restore you to a state of positive health and well-being. And as connected human beings across the planet, what affects one, affects the entire group, organization and family. If you learned a peer, colleague or friend received a diagnosis of diabetes or cancer, would you shun her? Or would you empathize and reach out with compassion to let her know she is not alone and you will support her through this difficult time in her life? Which enables the person to heal faster and get back to a state of well-being? Addiction is no different. Evidence-based research proves addiction is a disease, not a moral failing.[4]

Having the courage to say something or take active steps to help when we see a colleague in trouble can cut through the fear and isolation and eviscerate the stigma. As human beings we are *ALL* going to struggle or feel overwhelmed at times. But it is critical that when you see a colleague who is not well, you reach out. Inquire "Are you ok?" Be prepared to listen. Taking action prevents the regret that inevitably follows when we fail to take action. In 2016, two UNM law school students took their own life to the shock of the law school and the entire UNM campus.[5] What is startling is their fellow classmates acknowledged that they knew the students were struggling but chose to do nothing. These classmates now look back and wish they would have said something, done something. The New Mexico Judges and Lawyers

Assistance Program hears this about judges and attorneys. "I knew he/she was struggling and not well, it has been going on for years, but …." But what?

If you cannot bring yourself to act, you still have options. You can call NMJLAP or the Employee Assistance Program. All calls are confidential and you can remain anonymous. When NMJLAP has connected with a member of the legal community that is struggling, the overwhelming response is, "Thank you! I'm so glad you called and listened. I didn't know who to talk to and I do need help." Do not be someone who looks back with regret that you could have done something to help another, but chose to look away.



It is past time for a culture change in the profession on lawyer well-being. That change must come from all of the stakeholders in the profession: the judiciary, regulatory agencies, large law firms, public employers and every member of the bar. We are all responsible for fostering a culture that: (1) reinforces the importance of well-being and a proper work-life balance; (2) eliminates the stigma associated with seeking help for addiction or mental health challenges; and (3) emphasizes well-being and health as a priority for law students and lawyers.

There are steps every one of us can take, right now. Begin a well-being program at your workplace. Establish a well-being task force in your local bar association. Offer to host a "mocktail" hour with new members of the bar in your community to promote socialization not centered on alcohol. Mentor a new attorney and teach the importance of civility, professionalism and well-being in the practice of law. Encourage a friend or colleague in need to seek help before they become embroiled in the disciplinary system. Seek help yourself if the need arises. Commit to making your own well-being and that of your colleagues a priority by modeling and encouraging well-being behavior and seeking an appropriate work-life balance. ■

Endnotes

[1] See Organ, J, Jaffe, D, and Bender, K, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, Journal of Legal Education Vol 66, No. 1 (2016); Krill, Patrick R. et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, Journal of Addiction Medicine (February, 2016).

[2] See https://www.reedsmith.com/en/news/2018/01/reed-smith-launches-wellness-works-globally

[3] National Task Force for Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (2017) , available at https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf

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[5] Staci Zaretsky, The Struggle: Two Suicides in Two Months at the Same Law School (Aug. 23, 2016), https://abovethelaw.com/2016/08/the-struggle-two-suicides-in-two-months-at-the-same-law-school/.

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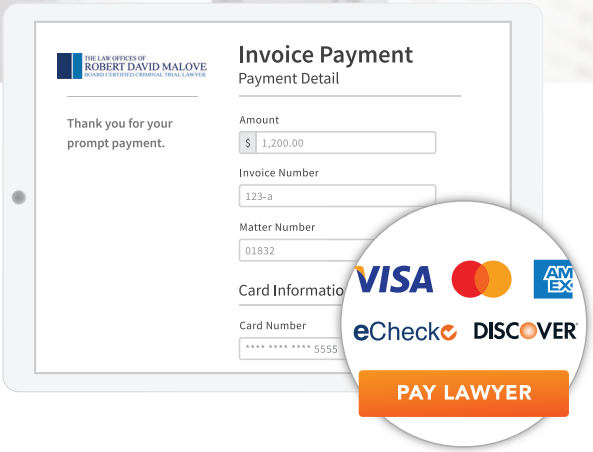

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any registrable sex offense in New Mexico." The State concedes that the elements of the applicable offenses are not identical, and we agree.

{17} The Colorado unlawful sexual contact statute at issue provides in pertinent part:

> (1) Any actor who knowingly subjects a victim to any sexual contact commits sexual assault in the third degree if:
> (a) The actor knows that the victim does not consent; or
> (b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or
> (c) The victim is physically helpless and the actor knows that the victim is physically helpless and the victim has not consented; or
> (d) The actor substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission[.]
> . . . .
> (1.5) Any person who knowingly, with or without sexual contact, induces or coerces a child . . . to expose intimate parts or to engage in any sexual contact, intrusion, or penetration with another person, for the purpose of the actor's own sexual gratification, commits sexual assault in the third degree. For the purposes of this subsection (1.5), the term "child" means any person under the age of eighteen years.
> . . . .
> (2) Sexual assault in the third degree is a class 1 misdemeanor, but it is a class 4 felony if the actor compels the victim to submit by use of such force, intimidation, or threat . . . or if the actor engages in the conduct described in . . . subsection (1.5) of this section.

Colo. Rev. Stat. § 18-3-404(1)-(2). Based on the State's allegations, the potentially applicable SORNA offenses to this case are CSC, CSCM, and CSP. *See* NMSA 1978, § 30-9-12(A), (C) (1993) (defining "criminal sexual contact" as "the unlawful and intentional touching of or application of force, without consent, to the unclothed intimate parts of another who has reached his eighteenth birthday, or intentionally causing another who has reached his eighteenth birthday to touch one's intimate parts" perpetrated "by the use of force or coercion" or if "the perpetrator is armed with a deadly weapon"); NMSA 1978, § 30-9-13(A), (B)(2) (2003) (defining "criminal sexual contact of a minor" as "the unlawful and intentional touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one's intimate parts" of a child age thirteen to eighteen when "the perpetrator uses force or coercion" if "the perpetrator is in a position of authority over the child" or "armed with a deadly weapon"); NMSA 1978, § 30-9-11(A) (2009) (defining "criminal sexual penetration" as "the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, or the genital or anal openings of another, whether or not there is any emission").

{18} As we have already stated, the judgment and sentence tendered to the district court, the authenticity of which is not disputed, states that Defendant was convicted of third degree sexual assault in violation of Colo. Rev. Stat. Section 18-3-404. The judgment and sentence further reflects that Defendant's sexual assault conviction was sentenced as a class 1 misdemeanor. Defendant, therefore, must have been convicted under Colo. Rev. Stat. Section 18-3-404(1). Section 18-3-404(1) contains no element requiring the sexual contact prohibited under the statute to include sexual penetration, the use of force or coercion, the use of a deadly weapon, or position of authority in perpetration of the offense. Because the potentially equivalent SORNA offenses in this case contain one or more of these additional elements, it follows that the statute under which Defendant was convicted in Colorado is not, on its face, equivalent to a SORNA offense. *See Kvech v. N.M. Dep't of Pub. Safety*, 987 F. Supp. 2d 1162, 1210-11 (D.N.M. 2013) ("Unlike Colorado's Unlawful Sexual Contact statute[, Colo. Rev. Stat. Section 18-3-404(1)(a)], New Mexico's criminal sexual contact in the fourth degree requires the additional elements of force or coercion, or that the perpetrator be armed with a deadly weapon. The Court agrees . . . the elements of the statute under which [the plaintiff] was convicted in Colorado[, Colo. Rev. Stat. Section 18-3-404(1)(a),] is not an equivalent offense to one of New Mexico's enumerated sex offenses under SORNA[.]"). We therefore turn to the question of whether Defendant's actual conduct, had it occurred in New Mexico, would require registration pursuant to SORNA.

C. Defendant's Actual Conduct

1. Use of the Presentence Report to Determine Defendant's Actual Conduct

{19} We now address the primary issue raised by this appeal: whether the district court erred in considering the presentence report tendered by the State to determine the factual basis for its finding of Defendant's actual conduct. Defendant argues that the district court erred in considering the allegations concerning the conduct underlying his Colorado conviction contained in the "unsigned, unfiled presentence report" for a factual basis to establish Defendant's actual conduct. Specifically, Defendant contends that the unsigned, unfiled presentence report "is neither sufficiently reliable nor reflective of facts the jury had to have found to support the district court's equivalency finding."

{20} The State in turn argues that *Hall* "does not mandate that the [presentence report] is legally insufficient for a court to consider as a component of evidence establishing equivalency[,]" and that this Court, in *State v. Orr*, 2013-NMCA-069, ¶ 13, 304 P.3d 449, "expressed approval for using an 'investigative report' to determine actual conduct." We are unconvinced by the State's reliance on *Orr* in this case. In *Orr*, we concluded that the elements of the North Carolina crime of "taking indecent liberties with children" are not equivalent to any SORNA offense, and therefore analysis of the defendant's actual conduct was required. *Id.* ¶¶ 5, 10, 13. Because the evidentiary basis for the state's charge that the defendant's actual conduct underlying his North Carolina conviction was supported by no evidence or documentation from the North Carolina case, we concluded that the record was insufficient to determine whether the defendant's conduct, had it occurred in New Mexico, would have required registration pursuant to SORNA. *Id.* ¶¶ 12-13. However, the state indicated during the pendency of the appeal that it had obtained several documents, including an investigatory report, which shed light on the underlying facts of the defendant's North Carolina conviction. *Id.* ¶ 13. Following *Hall*, we remanded to the district court for further proceedings to determine the defendant's actual conduct. *See Orr*, 2013-NMCA-069, ¶ 13.

{21} *Orr* does not hold that a mere investigative report, in and of itself, is sufficient

under *Hall* to determine actual conduct for purposes of an equivalency analysis under SORNA. Neither did *Orr* disturb the gravamen of the *Hall* Court's standard for determining equivalency—that New Mexico courts are limited to considering facts that the out-of-state jury necessarily found in convicting the defendant. Nevertheless, we do agree that, under *Hall* and *Orr*, when a properly authenticated, admissible investigatory or presentence report contains facts necessarily found by the out-of-state jury, those facts may be considered in a court's equivalency analysis. Such a showing with regard to the unsigned, unfiled presentence report was not made in this case.

{22} Here, as Defendant points out in his brief, the facts contained in the presentence report

> do[] not reflect (or even purport to do so) what information was presented to the jury or what the jury necessarily found. Further the document does not contain any signature, attestation that anything [in] it is true, or even some indication that it is the final version of it and that [D]efendant agreed with everything in it or failed to contest anything in it. In fact, although the State asserts the Colorado sentencing court found the [presentence report] sufficiently reliable for sentencing purposes, the State submitted no evidence showing the Colorado sentencing court did so or what information the sentencing court credited or discredited in the [presentence report].

In other words, Defendant argues, and we agree, that the presentence report lacks proof of authenticity and reliability, and therefore constitutes inadmissible evidence that the district court erred in considering and determining Defendant's actual conduct underlying his Colorado sexual assault conviction. *See* Rule 11-901(A) NMRA ("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 11-801(C) NMRA ("Hearsay [m]eans a statement that . . . the declarant does not make while testifying at the current trial or hearing, and . . . a party offers in evidence to prove the truth of the matter asserted in the statement."); Rule 11-802 NMRA ("Hearsay is not admissible except as provided by these rules[.]"); Rule 11-803(6), (8) NMRA (stating the requirements for establishing that a public or business record are excepted from the general rule against admissibility of hearsay); *State v. Soto*, 2007-NMCA-077, ¶ 27, 142 N.M. 32, 162 P.3d 187 ("A foundation is ordinarily unnecessary when introducing a public record into evidence because a public official is presumed to properly perform his duty and because it is thus more likely that the public record will be accurate. However, when questions are raised about the manner in which the record was made or kept or when other sufficient negative factors are present, a determination of trustworthiness must be made by the trial court before admitting the record." (internal quotation marks and citations omitted)), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110; *State v. Ramirez*, 1976-NMCA-101, ¶ 47, 89 N.M. 635, 556 P.2d 43 ("Traditional rules of evidence require a party seeking the introduction of documents to establish that the documents are in fact what they purport to be. Because the reports in [the *Ramirez*] case were stamped with the letterhead of the State of New Mexico does not, without more, indicate that they are records of a regularly conducted activity or factual findings resulting from an investigation made pursuant to authority granted by law. This is particularly true when the defendant seeks to introduce an altered version of the original report."), *overruled on other grounds by Sells v. State*, 1982-NMSC-125, ¶¶ 7-10, 98 N.M. 786, 653 P.2d 162. The federal district court's decision in *Kvech* lends this conclusion additional support. In *Kvech*, the district court ruled that in determining whether the plaintiff's Colorado conviction under Colo. Rev. Stat. Section 18-3-404(1)(a) (the same statute under which Defendant was convicted) was equivalent to a SORNA offense, an affidavit of probable cause for an arrest warrant for the plaintiff was inadmissible to prove the plaintiff's actual conduct. *Kvech*, 987 F. Supp. 2d at 1210-11. The district court reasoned that "[t]he Colorado fact[-]finder would not have necessarily found all of the facts alleged in" the affidavit when the Colorado court accepted the plaintiff's plea. *Id.* at 1210.

{23} In so concluding, we also reject the State's reliance upon *State v. Lloyd*, 132 Ohio St. 3d 135, 2012-Ohio-2015, ¶ 31, 970 N.E.2d 870, and *In re Millan*, 730 N.Y.S.2d 392, 428-29 (N.Y. Sup. Ct. 2001), *overruled on other grounds sub nom. People v. Millan*, 743 N.Y.S.2d 872 (N.Y. App. Div. 2002). While observing that a presentence report may be considered by the state courts in Ohio and New York in determining a defendant's actual conduct for purposes of equivalency analysis under the sex offender registration statutes in those states, neither case addresses the issue before this Court—whether a district court should be permitted to consider an unsigned, unfiled presentence report in determining a defendant's actual conduct for purposes of SORNA. As such these cases are distinguishable and therefore do not apply.

2. Use of the Judgment and Sentence to Determine Defendant's Actual Conduct

{24} Defendant argues that the Colorado judgment and sentence does not provide a factual basis to support a finding that Defendant's actual conduct underlying his Colorado conviction, had it occurred in New Mexico, would have required registration under SORNA. Defendant contends that "insofar as he was convicted of the misdemeanor version [of third degree sexual assault] not involving force or coercion, the only conclusion supported by the verdict is that the jury did not find that he used force or coercion in the course of the sexual assault, even if it found that he did, at some point, batter the victim." We agree.

{25} We repeat that the Colorado judgment and sentence reflects that Defendant was convicted, after a jury trial in Colorado, of one count of third degree sexual assault, a class 1 misdemeanor, pursuant to Colo. Rev. Stat. Section 18-3-404. Additionally, as we concluded above, the misdemeanor form of third degree sexual assault, described under Colo. Rev. Stat. Section 18-3-404(1), (2), contains no element requiring that the prohibited sexual contact must include sexual penetration, the use of force or coercion, the presence of a deadly weapon, or a position of authority in commission of the offense, as is required under the potentially applicable SORNA offenses—CSC, CSCM, and CSP. It follows logically from the Colorado judgment and sentence that the Colorado jury did not necessarily find, in convicting Defendant of third degree misdemeanor sexual assault, all of the facts required to convict Defendant of one of the potentially applicable SORNA offenses. The fact that Defendant was also convicted by the Colorado jury of felony first degree assault does not prove, as the

State asserts, that Defendant used force or coercion in the commission of the sexual assault, where no admissible evidence was tendered to the district court drawing a causal connection between the sexual assault and the assault of the victim. *Cf. State v. Stevens*, 2014-NMSC-011, ¶ 40, 323 P.3d 901 (recognizing that there must be evidence of a causal connection between a sex act and the commission of a felony in order to sustain a conviction for second degree CSP, which requires the jury to find a person was forced or coerced to engage in a sex act during the commission of a felony). Accordingly, based on the record before it, we conclude that Defendant's actual conduct, as demonstrated by the judgment and sentence, had it occurred in New Mexico, did not constitute an offense requiring registration pursuant to SORNA.

{26} Because we conclude that the district court erred in ruling that Defendant's Colorado conviction, had it occurred in New Mexico, required registration pursuant to SORNA, we do not address Defendant's second argument.

CONCLUSION

{27} The judgment and sentence is reversed, and this case is remanded to the district court for further proceedings consistent with this opinion.

{28} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

JULIE J. VARGAS, Judge

STEPHEN G. FRENCH, Judge

Certiorari Granted, February 18, 2019, No. S-1-SC-37420

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-012

No. A-1-CA-35864 (filed November 13, 2018)

ALBUQUERQUE JOURNAL and
KOB-TV, LLC,
Plaintiffs-Appellees,
v.
BOARD OF EDUCATION OF
ALBUQUERQUE PUBLIC SCHOOLS,
and RIGO CHAVEZ, in his capacity as
custodian of records of Board of
Education for Albuquerque Public Schools,
Defendants,
and
MAUREEN SANDERS,
Witness-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
NANCY J. FRANCHINI, District Judge

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Opinion

J. Miles Hanisee, Judge

{1} Non-party Appellant Maureen Sanders appeals the district court's discovery order requiring her to answer Plaintiffs' deposition questions regarding, and to produce notes she took during, conversations that she claims are privileged under either the Open Meetings Act (OMA), NMSA 1978 §§ 10-15-1 to -4 (1974, as amended through 2013), or Rule 11-503(B)(3) NMRA's attorney-client privilege. Concluding that the district court (1) properly determined that there exists no OMA privilege in New Mexico, and (2) did not abuse its discretion in determining that Sanders failed to meet her burden of establishing the applicability of the attorney-client privilege, we affirm.

BACKGROUND

The Historical Facts Underpinning the Underlying Case

{2} The underlying case between two media outlets—the Albuquerque Journal and KOB-TV, LLC (collectively, Plaintiffs)—and the Albuquerque Public Schools (APS) Board of Education (the Board) and APS's records custodian Rigo Chavez (collectively, Defendants) is an enforcement action under the New Mexico Inspection of Public Records Act (IPRA), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2018) (the IPRA action). In the IPRA action, Plaintiffs seek to enforce their right to inspect public records that Defendants have withheld from inspection based on claims that those records are exempt from inspection.

{3} The IPRA action was borne of the events surrounding and immediately preceding the abrupt resignation of Winston Brooks from his position as APS Superintendent on August 15, 2014—just two days after the start of the 2014-2015 school year—and the $350,000 buyout of Brooks' contract that the Board approved as part of Brooks' Resignation and Settlement Agreement (the Settlement Agreement). On August 11, 2014, the Board met in a closed session to discuss a report prepared by attorney Agnes Padilla (the Padilla Report, or Report) at the request of Board President Analee Maestas. The Report was commissioned after Maestas and Board member Martin Esquivel became aware of "misconduct allegations involving [Brooks]" and what they later described as the possibility of litigation against APS resulting therefrom. The closed meeting was convened for the purpose of "discuss[ing] a limited personnel matter regarding [Brooks'] performance, evaluation, improvement plan, reports or concerns received by the president of the [B]oard or [members of the] Board of Education related to [Brooks], [Brooks'] contract, and possible disciplinary action."

{4} During the closed meeting, Brooks and his attorney Maureen Sanders waited in a room separate from where the Board was meeting with its attorney, Tony Ortiz. More than once during the closed meeting, Ortiz left the Board to speak with Brooks and Sanders. Four days later, the Board and Brooks entered into the Settlement Agreement. Included as part of the Settlement Agreement was a reference letter for Brooks signed by Maestas and containing a positive review of Brooks' tenure as APS Superintendent, noting the Board's appreciation for his service, and "wish[ing] him well in his future endeavors." The Settlement Agreement provided that APS "will maintain [the] reference letter for Brooks in his personnel file" and "[i]f contacted by anyone seeking references for Brooks

. . . [the letter] will be the only official reference provided by [APS]." It further provided that APS "shall maintain . . . the [Padilla R]eport . . . in a file separate from Brooks' personnel file, and it shall not be released to anyone, including potential future employers in response to a request for Brooks' personnel file." The Settlement Agreement contained no discussion of the reasons underlying the decision to prematurely terminate Brooks' contract with APS and provided only that "[n]othing in this [a]greement or in its execution admits wrongdoing of any kind by either party" and that the agreement was "mutually entered for the benefit of each party."

Plaintiffs' IPRA Requests and Subsequent Enforcement Action

{5} Between August 7 and September 3, 2014, Plaintiffs made a combined seven written requests of APS to inspect, among other public records, the Padilla Report and "documents referencing any complaints or allegations of misconduct regarding . . . Brooks." Defendants provided for inspection of certain requested records, denied the existence of any responsive records to other requests, and denied certain requests based on claimed exemptions under IPRA. Plaintiffs thereafter filed the IPRA action, alleging that "Defendants have failed to satisfy their burden of showing that the documents that Plaintiffs[] requested were completely exempt from disclosure under any of the exceptions enumerated in Section 14-2-1." In defending against the IPRA action, Defendants argued that the records withheld, including the Padilla Report, are protected by (1) the attorney-client privilege, (2) the attorney work-product doctrine, and/or (3) IPRA's exception for "letters or memoranda that are matters of opinion in personnel files." *See* § 14-2-1(A)(3), (6), (8).

Plaintiffs' Attempt to Prove Waiver of Privilege as to the Padilla Report Through Sanders

{6} During the course of litigating the IPRA action, Plaintiffs were allowed to depose Padilla, Maestas, and Esquivel in order to adduce evidence relevant to the central issue of Defendants' claim that the Padilla Report is attorney-client privileged. Based on information learned in those depositions indicating that either the Padilla Report itself or its substance may have been disclosed to third parties, including possibly Sanders, Plaintiffs subpoenaed Sanders to produce "[a]ll documents, records, or things reflecting or recording any communications from [APS] or any APS representative, agent or attorney concerning any complaints or allegations of misconduct regarding Winston Brooks or [his wife] Ann Brooks made to APS or any member of the APS Board . . . after January 1, 2014." Sanders objected to the subpoena based in relevant part on a claim of attorney-client privilege. In her objection, Sanders explained that "[t]he only documents responsive to the subpoena are notes [she] made . . . at a meeting she attended with Tony Ortiz . . . and Winston Brooks . . . on August 11, 2014." She further explained, "[t]here are four pages of notes from that meeting and two pages might be viewed as responsive to the [s]ubpoena."

{7} Plaintiffs also sought to depose Sanders to determine if conversations she had with various APS attorneys—particularly, her conversations with Ortiz on August 11 during the closed meeting—effected a waiver of the attorney-client privilege asserted by Defendants as to the Padilla Report. At her deposition, Sanders testified that she "represent[s Brooks and his wife] in matters that are related to . . . the employment and termination of employment of Winston Brooks" as superintendent of APS. She acknowledged that she had at least one conversation with APS attorney Art Melendres—whom she described as Brooks' attorney "during the time that he was [S]uperintendent" and continuing "after his employment ended in several matters that were pending"—at some point before the August 11 Board meeting, though she refused to describe the conversation based on a claim of attorney-client privilege. Regarding what occurred on August 11, Sanders explained that she accompanied Brooks to the Board meeting because "there was an agenda item involving . . . Superintendent Brooks' employment matters." She further explained that she and Brooks were asked to "sit in a room next to the boardroom" and that on more than one occasion, Ortiz left the boardroom and came to speak with her and Brooks. Sanders could not recall exactly how many times Ortiz came to speak with them during the meeting.

{8} Sanders declined to answer Plaintiffs' questions regarding the conversations she had with Melendres and Ortiz, including whether Ortiz had described to her any portion of the Padilla Report, which she stated she neither received a copy of nor reviewed in full or in part. Specifically, she refused to answer the following questions:

- "What do you remember about [the] conversation [with Art Melendres]?"
- "When you were talking with Tony Ortiz at the time of the Board meeting, on or about August the 11th, . . . did you discuss a report or an investigation done by Agnes Padilla?"
- "Did Agnes[Padilla's] name come up?"
- "Did Mr. Ortiz describe any portions of th[e Padilla R]eport to you?"
- "[W]hen you were meeting with Mr. Ortiz at the time of the Board meeting, did you discuss the [Padilla R]eport in any way?"
- "Do [the] notes [you took during your conversations with Ortiz] include information communicated to you by Tony Ortiz?"
- "When did discussions first begin between APS and Mr. Brooks or you regarding the possibility that he might resign?"

As the basis for refusing to answer these questions, Sanders asserted that her communications with Melendres and Ortiz were protected by the attorney-client privilege because her client, Brooks, "[a]s superintendent of APS[,]" shared a "common interest" with Melendres' client, APS, and Ortiz's client, the Board, making their communications privileged.[1] She alternatively refused to answer questions "on the basis of . . . open meetings confidentiality." When Plaintiffs attempted to explore the basis of Sanders' claim of a common interest privilege, Sanders additionally declined to answer questions regarding when the purported common interest arose and whether she considered APS "an adverse party" to Brooks during the course of her representation of Brooks.

[1]For clarity, we note that, although the record indicates that (1) Melendres and Ortiz represented different clients—Melendres represented APS, including Brooks in his official capacity as APS Superintendent, and Ortiz represented the Board only—and (2) Sanders had separate conversations with each attorney at different points in time, Sanders treated APS and the Board as a single unit for purposes of identifying the party with which Brooks purportedly shared a common interest. In other words, Sanders did not argue that the attorney-client privilege independently protected her conversation with Melendres based on a separate common interest that Brooks and APS, as Brooks' employer responsible for defending him in his official capacity, may have shared prior to August 11.

Plaintiffs' Motion to Compel Sanders' Testimony and Sanders' Claims of Privilege

{9} Plaintiffs thereafter filed a motion to compel Sanders to answer the questions she had refused to answer during her deposition regarding her communications with APS's attorneys[2] and to produce the notes she took during the August 11 meeting.[3] Noting that they took Sanders' deposition to determine only "if APS waived . . . asserted privileges by sharing the [R]eport or its contents with Ms. Sanders or Mr. Brooks[,]" Plaintiffs argued that the privileges asserted by Sanders—an OMA privilege and/or the attorney-client privilege—did not either exist or apply, respectively, under the facts of the case to shield from disclosure that which "APS's attorneys communicated to [Sanders]."

{10} In responding to the motion, Sanders first argued that "executive session communications are not discoverable" based on the OMA's allowance for public bodies to meet in closed session to discuss "limited personnel matters." According to Sanders, "[a]though [she] and Superintendent Brooks were in a separate room [during the August 11 closed Board meeting], they were essentially a part of the executive session during their communications with Mr. Ortiz." Sanders contended that "[a]s such, the communications are not subject to the public's right to know about the discussions at an open meeting."

{11} Sanders next expanded upon her claim that her communications with APS's attorneys are protected from compelled disclosure under the attorney-client privilege due to a common interest shared by APS and Brooks. With respect to Melendres, Sanders noted that "Art Melendres of the Modrall Law Firm has represented APS for years, including the entire time Winston Brooks was Superintendent[, and t]he Modrall Law Firm continued to represent Superintendent Winston Brooks in other APS[-]related matters after his employment with APS ended." With respect to Ortiz, Sanders asserted that "[f]rom August 11, 2014 to August 15, 2014[,] when a Settlement Agreement was executed Mr. Ortiz and Ms. Sanders were representing two constituents of APS: its Board and its Superintendent." Sanders thus contended that any communications between her and APS attorneys were privileged because New Mexico's attorney-client privilege extends to communications made "between the client or client's lawyer and another lawyer representing another in a matter of common interest[.]" Rule 11-503(B)(3). Sanders argued that "[i]n this case, APS and Superintendent Brooks had a commonality of interest which protected the confidential conversations to which Ms. Sanders was a participant before, during and after the August 11, 2014 Board meeting." According to Sanders, that common interest was "identified in the [a]genda for the August 11, 2014 Board meeting" and "related to [Brooks'] performance, evaluation, improvement plan, reports or concerns received by the President of the Board related to [Brooks], his contract or possible disciplinary action." Based on that, Sanders concluded that "the requirements of attorney-client privilege under the common interest rule have been met as to the communications involving Ms. Sanders and APS attorneys."

{12} In their reply, Plaintiffs argued that Sanders had "offer[ed] no evidence that APS and Mr. Brooks had decided on any joint effort or strategy, much less that they shared an *identical* legal interest in regard to the communications from APS's attorneys." Plaintiffs also argued that Sanders had failed to prove "that the communications at issue were confidential" and "were intended to be confidential at the time they were made." Plaintiffs pointed out that Sanders and APS's attorneys "had no written agreement to maintain the confidentiality of [their] communications nor did any person assert any promise or expectation of confidentiality." Thus, Plaintiffs contended that Sanders had not met her burden of proving that the attorney-client privilege applied to shield from disclosure her communications with APS's attorneys and asked the district court to grant their motion.

{13} Following a hearing, the district court granted Plaintiffs' motion to compel Sanders to answer questions and produce in part the notes she took during the August 11 meeting. The court did so after concluding that (1) "[n]o Open Meetings Act [p]rivilege exists in New Mexico[,]" and (2) it "has not been provided with a factual basis to find that there was a common interest between APS and . . . Brooks[] between August 11 and August 15, 2014. Presentation of counsel is insufficient to establish that basis." The district court thus ordered Sanders to (1) "respond to the questions asked her during her deposition" and (2) "produce the notes of what Mr. Ortiz told Ms. Sanders and Mr. Brooks regarding the Padilla [R]eport and other documents."

DISCUSSION

{14} On appeal, Sanders advances the same arguments she made below: (1) that communications regarding "limited personnel matters" that occur during an executive session of a public body are not discoverable based on the OMA, and (2) that her communications with APS's attorneys and any notes she took on August 11, 2014, are protected by the attorney-client privilege based on the common interest they shared in the communications. She effectively argues that the district court erred in concluding that no privilege applies under the facts of this case to protect her communications with APS's attorneys from discovery. Defendants, who filed a brief in support of Sanders' appeal, submit that this appeal involves two additional issues: (1) whether "an employer waive[s] IPRA protection of a personnel report regarding an employee by discussing that report with the subject employee" and (2) whether "a plaintiff in an IPRA case [is] permitted to ask witnesses about the document that may divulge the content of the protected document[.]" We disagree with Sanders on the merits of her arguments and with Defendants that this appeal involves any issues other than those advanced by Sanders.

Standard of Review

{15} We review discovery orders and initial determinations regarding the applicability of privileges for an abuse of

[2]Where the term "APS's attorneys" is used in this opinion, it reflects the parties' original use of that term, which we understand to collectively refer to Melendres and Ortiz.

[3]Plaintiffs expressly limited their motion with respect to Sanders' notes to "only the documentation of what was said by Mr. Ortiz to Ms. Sanders and Mr. Brooks." Plaintiffs made clear that they "do not seek those portions of the notes, if any, that are notes of confidential communications from Mr. Brooks to Ms. Sanders, or which constitute Ms. Sanders' mental impressions." Regarding communications from APS's attorneys, Plaintiffs were clear that they sought only communications *from* APS's attorneys *to* Sanders and Brooks, not communications made either by Sanders to Melendres and Ortiz or between Sanders and Brooks.

discretion. *See Santa Fe Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 9, 143 N.M. 215, 175 P.3d 309; *Gingrich v. Sandia Corp.*, 2007-NMCA-101, ¶ 8, 142 N.M. 359, 165 P.3d 1135. "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 11, 314 P.3d 688 (internal quotation marks and citation omitted). We review de novo a district court's construction of a privilege, including its determination regarding whether one exists under New Mexico law. *Cf. Pincheira v. Allstate Ins. Co.*, 2008-NMSC-049, ¶ 14, 144 N.M. 601, 190 P.3d 322 (reviewing de novo determinations regarding "the intricate interplay among discovery and privilege rules related to trade secrets").

General Rules Governing Discovery and Assertions of Privileges

{16} Rule 1-026(B)(1) NMRA provides that "[p]arties may obtain discovery of any information, *not privileged*, which is relevant to the subject matter involved in the pending action." (Emphasis added.) Privileged information, then, is not discoverable. *Pincheira*, 2008-NMSC-049, ¶ 22. "[F]or a privilege to exist in New Mexico, it must be recognized or required by the Constitution, the Rules of Evidence, or other rules of [our Supreme] Court." *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 35, 283 P.3d 853 (internal quotation marks and citation omitted); *see* Rule 11-501 NMRA (providing in the Rules of Evidence that "[u]nless required by the [C]onstitution, these rules, or other rules adopted by the [S]upreme [C]ourt, no person has a privilege to[:] A. refuse to be a witness; B. refuse to disclose any matter; C. refuse to produce any object or writing; or D. prevent another from being a witness, disclosing any matter, or producing any object or writing"). Legislated privileges, i.e., privileges provided by statute, "are generally regarded as an unconstitutional intrusion into judicial rule-making" and are, therefore, not recognized. *Breen v. N.M. Taxation & Revenue Dep't*, 2012-NMCA-101, ¶ 23, 287 P.3d 379. "The burden of proving an assertion of privilege rests upon the party asserting such claim." *Krahling v. Exec. Life Ins. Co.*, 1998-NMCA-071, ¶ 15, 125 N.M. 228, 959 P.2d 562.

I. Section 10-15-1(H)(2) of the OMA Does Not Create a Privilege For or Immunize From Discovery "Limited Personnel Matters" Discussed in a Closed Meeting

{17} Section 10-15-1(H)(2) of the OMA exempts from certain requirements of the OMA "limited personnel matters[,]" which are defined as "the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee[.]" Based on this exemption, Sanders argues that "limited personnel matters" discussed during public meetings that are closed pursuant to the OMA are not a proper subject of discovery. While acknowledging that the OMA "does not specifically address whether the discussions occurring within an executive session are immune from discovery for litigation purposes[,]" Sanders asks this Court to conclude that allowing discovery of her conversations with Ortiz will "impair the public policy decision made by the Legislature" to allow sensitive, private personnel matters to remain confidential. She reasons that the OMA, "by allowing executive sessions related to limited personnel matters, certainly indicates a strong public policy to protect the confidentiality of those deliberations."

{18} The problem with Sanders' argument is that it fails to recognize that "confidentiality" and "privilege" are "legally distinct concepts." *See State ex rel. Balderas v. ITT Educ. Servs., Inc.*, 2018-NMCA-044, ¶ 10, 421 P.3d 849. "[I]nformation that is confidential is not necessarily protected by a legally recognized privilege." *Id.* Critically, Sanders identifies no privilege—either adopted by our Supreme Court or recognized under the Constitution—on which to base her argument that communications regarding "limited personnel matters" that occur during a closed public meeting are immune from discovery. To the extent she suggests that we construe Subsection (H)(2) as either creating or supplying the justification for recognizing such a privilege, we decline to do so in light of established New Mexico privilege law. *See Republican Party of N.M.*, 2012-NMSC-026, ¶ 35; *Breen*, 2012-NMCA-101, ¶ 23. We therefore conclude that the district court properly determined that Section 10-15-1(H)(2) of the OMA does not provide a stand-alone basis for Sanders to resist discovery.

II. Sanders Failed to Meet Her Burden of Establishing the Applicability of the Attorney-Client Privilege to Her Communications With APS's Attorneys

A. Proving the Applicability of the Attorney-Client Privilege Based on a Claimed Common Interest

{19} To establish the applicability of the attorney-client privilege, Sanders bore the burden of proving all elements of the privilege as to each communication claimed to be privileged. *See Santa Fe Pac. Gold Corp.*, 2007-NMCA-133, ¶¶ 19-21; *Piña v. Espinoza*, 2001-NMCA-055, ¶ 24, 130 N.M. 661, 29 P.3d 1062. In New Mexico, the basic elements of the attorney-client privilege are "(1) a communication (2) made in confidence (3) between privileged persons (4) for the purpose of facilitating the attorney's rendition of professional legal services to the client." *Santa Fe Pac. Gold Corp.*, 2007-NMCA-133, ¶ 14; *see* Rule 11-503(B).[4] The third element—"between privileged persons"—may be established by demonstrating that the communication occurred "between the client or client's lawyer and another

[4]Commonly known as the "common interest doctrine," this aspect of the attorney-client privilege rule may function as either an extension of the privilege or an exception to waiver of the privilege. *See* Rule 11-503(B)(3); Rule 11-511 NMRA (providing that the rule of waiver "does not apply if the disclosure is a privileged communication"); Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It,* 15 B.U. Pub. Int. L.J. 49, 54-55 (2005) (explaining that "[m]any courts characterize [the doctrine] as an extension of the attorney-client privilege and many more describe it as an exception to the traditional waiver of the attorney-client privilege that occurs when a client discloses confidential communications to a third party" (footnote omitted)). In this case, Sanders invokes the doctrine in its function as an extension of the privilege, i.e., to establish the privilege in the first instance, not to directly defend against a claim of waiver resulting from a third-party disclosure. *Cf. Santa Fe Pac. Gold Corp.,* 2007-NMCA-133, ¶¶ 19, 25 (setting up a three-part burden-shifting analysis in a case where the doctrine was raised as a defense to waiver based on undisputed disclosure of a purportedly privileged document to a third party). We point out this distinction in order to make clear why our common interest doctrine analysis both adds to and differs in some respects from the framework adopted and followed in *Santa Fe Pacific Gold Corp.*

lawyer representing another in a matter of common interest[.]" Rule 11-503(B)(3). A person who relies on this subsection to claim privilege as to particular communications bears the additional burden of establishing, at a minimum, a factual basis allowing the district court to find that: (1) the parties to the communication shared an identical legal interest in the subject matter of each communication claimed to be privileged; (2) the communication was made "during the course of a joint defense effort between the resisting party and the third party" and "in furtherance of that effort"; and (3) the shared identical legal interest existed at the time the communication was made as reflected by a preexisting, or at the very least contemporaneous, agreement of the parties.[5] *Santa Fe Pac. Gold Corp.*, 2007-NMCA-133, ¶¶ 16, 18, 24; *see Ken's Foods, Inc. v. Ken's Steak House, Inc.*, 213 F.R.D. 89, 93 (D. Mass. 2002) ("While a written agreement is not a prerequisite for invoking the common interest doctrine, parties seeking to invoke the exception must establish that they agreed to engage in a joint effort and to keep the shared information confidential from outsiders." (citation omitted)). "[A]lthough a common interest agreement can be inferred where two parties are clearly collaborating in advance of litigation, mere 'indicia' of joint strategy as of a particular point in time are insufficient to demonstrate that a common interest agreement has been formed." *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 284-85 (4th Cir. 2010). Additionally, "a shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within [the common interest doctrine]." *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). There must be some showing that the parties, indeed, came to an agreement "embodying a cooperative and common enterprise towards an identical legal strategy." *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 284 F.R.D. 132, 139 (S.D.N.Y. 2012) (internal quotation marks and citation omitted). Evidence of the parties' agreement is critical because "the privilege should not be used as a post hoc justification for a client's impermissible disclosures." *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 365 (3d Cir. 2007).

{20} A party's bald assertions that disclosure of information sought in discovery would violate a privilege are insufficient to meet his or her burden. *See United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶ 267, 96 N.M. 155, 629 P.2d 231. When a party asserts a privilege as a basis for withholding information in discovery, "the party shall make the claim expressly and shall describe the nature of the . . . communications . . . not . . . disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege." Rule 1-026(B)(7)(a); *see Piña*, 2001-NMCA-055, ¶ 24 (explaining that the party asserting the privilege must do so "with sufficient detail so that [the party seeking disclosure], and ultimately the [district] court, may assess the claim of privilege as to *each* withheld *communication*").

{21} "We expressly disapprove of the practice of permitting the proponent of a privilege to rely on an initial conclusory assertion of a privilege and to gradually unveil the basis for her claims of privilege." *Piña*, 2001-NMCA-055, ¶ 25. "The party resisting discovery has the burden to clarify and explain its objections and to provide support therefor." *United Nuclear Corp.*, 1980-NMSC-094, ¶ 267 (internal quotation marks and citation omitted). Such support may be provided through a variety of mechanisms, including submission of a privilege log or an affidavit, in camera interview, or other means "as required by the circumstances of a particular case." *Piña*, 2001-NMCA-055, ¶¶ 24, 28; *see Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 21, 138 N.M. 398, 120 P.3d 820 (contemplating the need for an in camera interview to determine whether certain communications claimed to be privileged were made for the purpose for which the privilege was established); *see also SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 514 (D. Conn. 1976) (ordering the deponent lawyer to submit an affidavit for in camera review that describes the conversations he had with a third party to determine whether a common interest existed between the parties at the time of the communication); 2 Paul R. Rice, *Attorney-Client Privilege in the United States* § 11:12, at 1066-67 (2017-2018 ed.) (explaining that courts have accepted ex parte affidavits despite "an element of adversarial unfairness in this process" because "the courts feel justified in following this procedure when they are faced with the undesirable alternatives of sacrificing the confidentiality of the communication or leaving the issue unresolved"). "Failure to adequately support a claim of privilege thwarts both the adversarial process and meaningful independent judicial review and justifies denial of the claim of privilege." *Piña*, 2001-NMCA-055, ¶ 24.

B. Whether the District Court Abused Its Discretion in Determining That Sanders Failed to Meet Her Burden

{22} Here, the district court concluded that it had "not been provided with a factual basis to find that there was a common interest between APS and . . . Brooks[] between August 11 and August 15, 2014." We understand the district court's ruling in this regard to reflect its determination that Sanders failed to meet her burden of establishing the essential elements necessary to prove the applicability of the attorney-client privilege, based on a claimed common interest, to her communications with APS's attorneys. We consider whether the district court's conclusion was "clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Benz*, 2013-NMCA-111, ¶ 11 (internal quotation marks and citation omitted).

{23} As noted previously, after first asserting the attorney-client privilege based on a purported common interest during her deposition, Sanders refused to answer the question, "[W]hat do you believe th[e] joint interest [between Brooks and APS and its Board] to have been?" She additionally refused to answer the following questions: (1) "When did discussions first begin between APS and Mr. Brooks or you regarding the possibility that he might resign?" (2) "[W]hen did [the common interest] arise?" and (3) "Did you consider APS . . . an adverse party to [Brooks] during the course of [your] representation?" Sanders' deposition testimony thus not only fails to provide a factual basis establishing any of the elements of a common interest but also employs the very practice this Court "expressly disapprove[d] of" in *Piña*—that is, relying on an initial conclusory assertion of a privilege and failing to provide basic information necessary to assess the claim of privilege. 2001-NMCA-055, ¶ 25. Moreover, her refusal to answer questions regarding formation of the common interest—coupled with her failure to thereafter supply a factual basis

[5]This third element was not addressed in *Santa Fe Pacific Gold Corp.*, a case in which it was apparently undisputed that the parties between whom disclosure occurred had "entered into a common interest agreement." 2007-NMCA-133, ¶ 19.

allowing the district court to find that she, Melendres, and Ortiz indeed established a common interest agreement prior to disclosing any potentially privileged information—justifies the district court's denial of her claim of privilege. *See id.* ¶ 24; *cf. In re Teleglobe Commc'ns Corp.*, 493 F.3d at 365 (explaining that "the privilege should not be used as a post hoc justification for a client's impermissible disclosures"); *Ken's Foods, Inc.*, 213 F.R.D. at 93 (explaining that "parties seeking to invoke the [common interest] exception must establish that they agreed to engage in a joint effort and to keep the shared information confidential from outsiders").

{24} Additionally, our review of the district court record confirms that it contains bare and unsupported assertions by Sanders, her counsel, and Ortiz regarding what the parties' purported common interest generally was. Notably, those assertions, themselves, were vague, unclear, and not entirely consistent. In responding to Plaintiffs' motion to compel, Sanders merely cited the agenda for the August 11, 2014 Board meeting in identifying the common interest as "relat[ing] to [Brooks'] performance, evaluation, improvement plan, reports or concerns received by the President of the Board related to [Brooks], his contract or possible disciplinary action." Then, at the hearing on Plaintiffs' motion to compel when asked by the district court to "tell [it] what the common interest is" because the court did not understand it as presented, Sanders' counsel stated, "The common interest is to work out a possible exit for . . . Brooks. If . . . both sides decided that it was in the best interest for him to leave, then they were working on that . . . common interest." When pressed by the district court to explain the "identical legal interest tied to [Sanders' and Ortiz's] communications[,]" Sanders' counsel offered, "I think that the identical legal interest is for both sides to be looking at whatever legal issues may exist with regard to working out this common goal to separate amicably." Sanders' counsel summed up the matter with, "What's the common legal goal here? They're trying to make a plan." Ortiz, in joining Sanders to argue against the motion, described the parties' common interest as, "You have a problem with an employee; you invite him in. What's our common interest? Our common interest is, we're trying to resolve this issue. . . . When this starts out, the common interest is, [c]an we sit down and work this out?"

{25} Critically, the record contains no indication that Sanders either employed or attempted to employ any of the means available to her—e.g., affidavit or seeking in camera presentation of testimony or evidence to the district court—to supply the facts necessary to meet her burden. And she did not do so despite relative clarity in our law permitting privilege proponents to employ a variety of procedures—such as submission of a privilege log, an affidavit, an ex parte affidavit, live testimony, or some other means of demonstrating a factual basis for establishing the applicability of the privilege—to demonstrate the applicability of a privilege given the particular circumstances of a given case. *See Piña*, 2001-NMCA-055, ¶¶ 24, 28 (providing that the plaintiff "must provide a privilege log" and that the log, "together with any supplemental affidavits[,] must affirmatively demonstrate an objectively reasonable basis for each assertion of privilege[,]" but also explaining that the procedural guidelines for asserting a privilege "are not immutable" and that "[t]hey may be modified as required by the circumstances of a particular case"); *see also Albuquerque Rape Crisis Ctr.*, 2005-NMSC-032, ¶ 21 (noting that the court may need to conduct an in camera inspection to determine whether certain communications are discoverable); *cf. State v. Perez*, 1985-NMCA-041, ¶ 13, 102 N.M. 663, 699 P.2d 136 (remanding the case for an in camera hearing to determine a factual matter after concluding that "[w]ithout conducting the in camera hearing, the court was in no position to determine" the necessary factual question before it).

{26} Even on appeal, Sanders merely lists seven pieces of "evidence" that she contends "established" that Brooks and the Board had "an identical interest" and that she argues provided the district court with "substantial evidence to support the claim of common interest." That "evidence" comprises: (1) the minutes of the Board's July 16, 2014 meeting indicating that the Board convened in executive session to discuss Brooks' performance improvement plan; (2) Maestas's July 18, 2014 statement to her fellow Board members, explaining why she wanted to commission Padilla to conduct "an independent investigation into allegations regarding Superintendent Brooks"; (3) the minutes of the Board's August 11 meeting, indicating that the closed meeting lasted from 5:01 p.m. until 10:07 p.m. and that no action was taken on the "limited personnel matter" regarding Brooks; (4) the settlement agreement, including certain specific provisions therein; and (5) three findings from the district court's own order in which the district court (a) recognized that Ortiz represented the Board and Sanders represented Brooks, (b) referred to the purpose of the August 11 closed meeting as identified in the meeting minutes, and (c) noted that Ortiz came into the separate room where Sanders and Brooks were located during the closed meeting and had conversations with them.

{27} We fail to see—and Sanders fails to explain—how this "evidence" establishes the elements of a common interest and compels a contrary conclusion to that reached by the district court. At best, it arguably offers indicia that Brooks and APS at some time—possibly even various times—shared a common goal or desire (e.g., to clear Brooks' name, or to keep the Padilla Report from being disclosed, a common desire we note they continue to share), which is insufficient to establish that they shared an identical legal interest in the matters that Melendres and Ortiz communicated to Sanders. *See In re Pac. Pictures Corp.*, 679 F.3d at 1129 (stating that "a shared desire to see the same outcome in a legal matter is insufficient" for the common interest exception to apply); *Hunton & Williams*, 590 F.3d at 283-85 (" '[I]ndicia' of joint strategy as of a particular point in time are insufficient to demonstrate that a common interest agreement has been formed."). Indeed, much of what Sanders contends supports her position of a common interest instead suggests the possibility that Brooks' interests were *not* aligned with those of the Board, which had investigated allegations of his possible misconduct and then convened in a lengthy and non-public executive session regarding that personnel matter after having received the Padilla Report. Particularly given the existence of facts that give rise to the appearance that the parties had antagonistic interests, it was incumbent upon Sanders to not only combat that appearance but also affirmatively and specifically establish the existence of an agreement between the parties regarding the identicality of their *legal* interest in communications they intended to be privileged.

{28} Moreover, what we do see from our review of the record is that the evidence Sanders now points to was not presented by Sanders to the district court—either as an evidentiary proffer or even in her

response brief—as supplying a basis for finding the existence of a common interest. Indeed, much of that evidence was proffered by Plaintiffs, not Sanders, for purposes unrelated to the issue of whether the Board and Brooks had a common interest at the time of Sanders' communications with Ortiz. Sanders' reliance on such evidence now, after the fact, fails to supply a basis for reversing the district court's determination that it had not been provided a factual basis for finding a common interest.

{29} Because we cannot say that the district court's ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case, we conclude that the district court did not abuse its discretion in ruling that Sanders failed to meet her burden of establishing the applicability of the attorney-client privilege. We acknowledge the difficult position in which Sanders has been put and her ensuing effort to zealously represent her client and meet her ethical obligations as a lawyer. Having failed her burden of establishing privilege, however, we reject Sanders' contention that the district court's order or this Court's affirmance of the same results in "compel[ling] her to do that which her ethical obligations prohibit." *See* Rule 16-106(B)(6) NMRA (permitting a lawyer to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with . . . a court order"); Rule 16-106(A) (providing that "[a] lawyer shall not reveal information . . . *unless* . . . disclosure is permitted by Paragraph B of this rule" (emphasis added)).

III. Defendants' Arguments Are Without Merit

{30} Defendants join Sanders in her arguments regarding the OMA and the applicability of the common interest aspect of the attorney-client privilege, adopting them by reference and offering no additional argument or analysis to support those proffered bases for reversal. Defendants advance two additional arguments for why this Court should reverse the district court's order and conclude that Plaintiff's motion to compel should be denied.

{31} Defendants first contend that Plaintiffs' "discovery request to compel Ms. Sanders' testimony under the rationale that it might create a broader waiver of the entire [Padilla] Report is faulty" and that this Court "should not allow the search for a waiver as a rationale to compel the discovery sought from Ms. Sanders." This argument first reflects a misunderstanding of Plaintiffs' argument regarding the relevance and discoverability of Sanders' testimony. The record plainly establishes that Plaintiffs seek Sanders' testimony for the limited purpose of proving that APS voluntarily disclosed the Padilla Report or its substance to Sanders, thereby effecting a waiver of the attorney-client privilege and the attorney work product protection and defeating Defendants' claim that the Report is exempt from inspection under Section 14-2-1(A)(6), (8).

{32} Defendants' argument also reflects a misunderstanding of the limited scope of this appeal, including the applicable law that resolves it. Defendants argue that this Court "should begin the analysis of any alleged waiver" by recognizing "the clear protections IPRA affords employer/employee information" via Section 14-2-1(A)(3)'s exemption for "letters or memoranda that are matters of opinion in personnel files." Defendants' argument ignores that this Court is not presently faced with any questions regarding the applicability of Section 14-2-1(A)(3)'s exemption, much less whether any waiver has occurred under any IPRA exception. We agree with Plaintiffs that because the district court has not yet been asked to rule on whether Section 14-2-1(A)(3)'s exemption applies, this argument is not properly before us.

{33} Defendants next argue that Plaintiffs "should not be permitted to compel testimony about the substance of the [Padilla] Report" by "forc[ing] Ms. Sanders to discuss what she may have heard about the [R]eport during executive session." Again, Defendants did not raise this issue before the district court below, and it is not properly before us in this interlocutory appeal.

CONCLUSION

{34} For the foregoing reasons, we affirm the district court's order.

{35} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

STEPHEN G. FRENCH, Judge

JENNIFER L. ATTREP, Judge

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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.

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

Communications Coordinator

The State Bar of New Mexico seeks a FT Communications Coordinator to assist with publications, digital communications, and media relations/marketing. Successful candidates will have superb communications skills, high attention to detail, critical thinking, copy-editing skills, and a working knowledge of the Adobe Creative Suite. Ideal candidates will have experience with uniform writing styles (AP), website content management, social media, graphic design, and media relations. Bachelor's degree/equivalent experience preferred. Email cover letter, resume, and 2 writing samples to hr@nmbar.org. Excellent benefits and EOE. $15-$18 per hour, DOE.

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The City of Albuquerque Legal Department is seeking a full-time Legal Office Administrator to manage and oversee the Legal Department's fiscal and budget operations, outside vendor contracts and grant administration, and provide management of front desk personnel. The Legal Office Administrator is responsible for coordinating assigned activities with other divisions and outside agencies and providing highly responsible and complex administrative support to the City Attorney. A strong financial and budgetary management background is imperative. 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.

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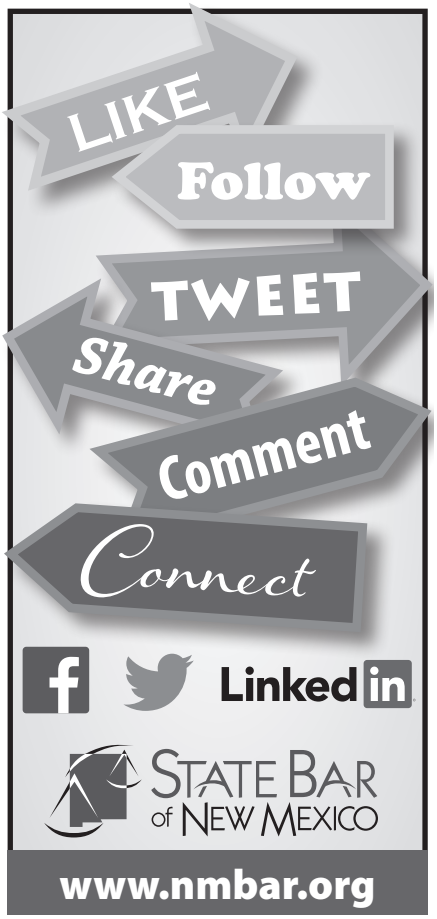

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Submission deadlines are also on Wednesdays, two weeks prior to publishing by 4 p.m. Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by publisher and subject to the availability of space.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

For more advertising information, contact: Marcia C. Ulibarri at 505-797-6058 or email mulibarri@nmbar.org

The 2019 publication schedule can be found at www.nmbar.org/BarBulletin.

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Incubating New Lawyers and New Ideas

Entrepreneurs in Community Lawyering (ECL) is well into its third year of operation with a full cohort of seven entrepreneurial solo practitioners who offer a broad range of affordable legal services. Joseph Torrez, Milos Marjanovic, Ted Kaiman, Carlos E. Martinez, Brian Smith, Beckham Rivera and Denisha Pierre have benefited enormously from your efforts. Thanks to each of you for sharing so generously your time and expertise to mentor and train ECL's participating lawyers. ECL would not be here without you.

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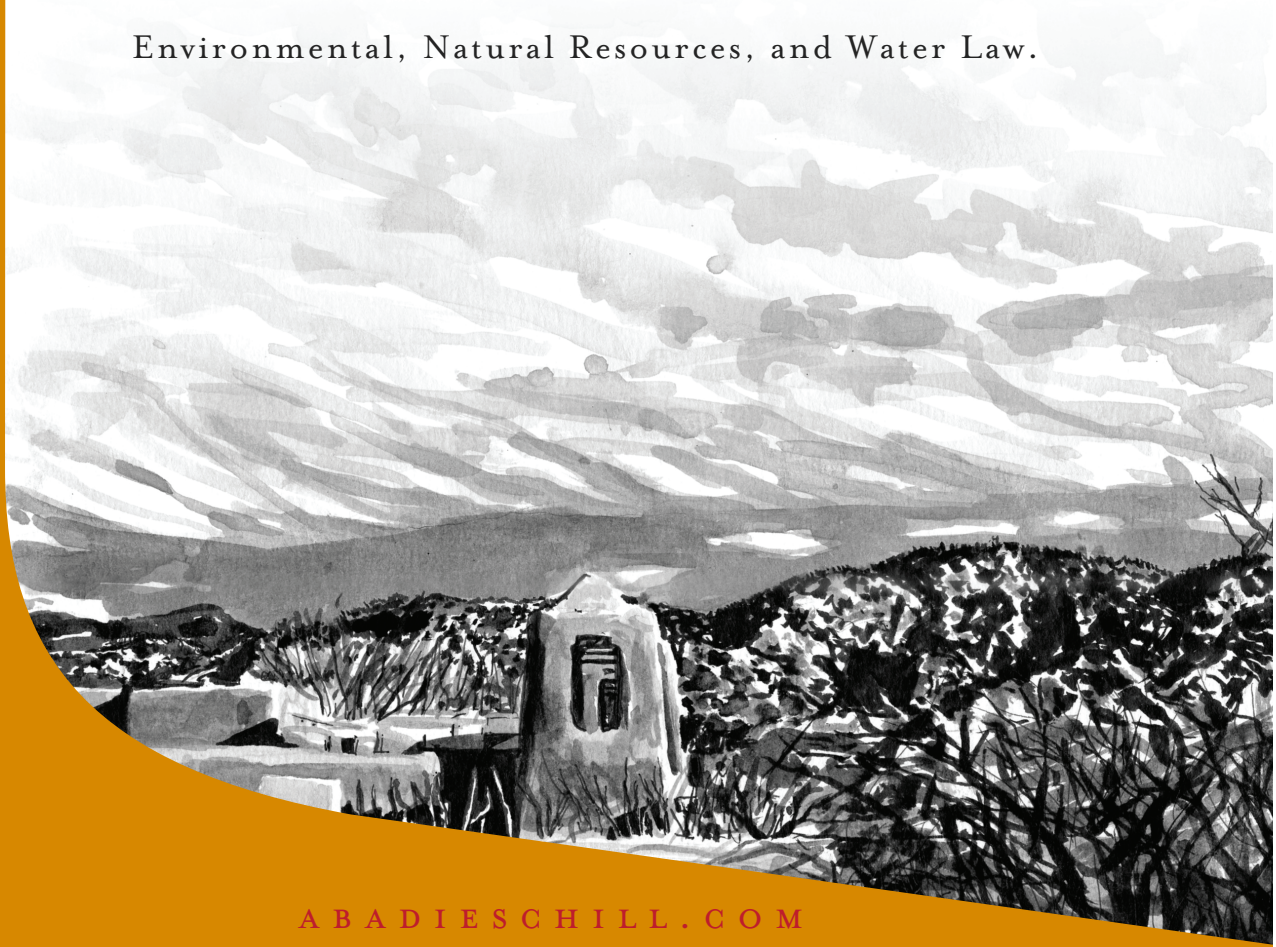

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