Official Publication of the State Bar of New Mexico

Bar Bulletin

October 30, 2019 • Volume 58, No. 22

Some Are Sun, by Sandi J. Ludescher (see page 3)

Inside This Issue

Welcome To Our New Associates.

Jamie Allen

Amanda Krasulick

Modrall Sperling is pleased to announce that Jamie Allen and Amanda Krasulick have joined our firm's Albuquerque office.

Jamie, a graduate of Emory University School of Law, centers her practice on matters involving Native American and environmental law, including CERCLA and water quality issues. She also assists in litigation involving personal injury and tort liability and with employment law matters. She has interned at the U.S. Attorney's Office for the District of New Mexico and served on Emory Law's Volunteer Clinic for Veterans. Jamie also gained experience handling regulatory issues with the Federal Aviation Administration, Southern Region and as a staff member of Emory University's Turner Environmental Law Clinic.

Amanda focuses her practice on litigation including insurance and commercial disputes. She also assists in matters involving employment such as wrongful termination and discrimination. Amanda graduated from the University of New Mexico School of Law, *magna cum laude*. During law school, Amanda was a judicial extern at the New Mexico Supreme Court for Justice Edward Chavez. While working at the Child and Family Justice Clinic at the University of New Mexico, she represented clients in guardianship matters.

Problem Solving. Game Changing.

Modrall Sperling

Lawyers

Albuquerque **Santa Fe**

www.modrall.com

The *Bar Bulletin* (ISSN 1062-6611) is published every other week by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

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

October 30, 2019 • Vol. 58, No. 22

Table of Contents

Meetings

October

31
Trial Practice Section Board
Noon, State Bar Center

November

5
Health Law Section Board
9 a.m., teleconference

6
Employment and Labor Law Section Board
Noon, teleconference

8
Prosecuters Section Board
Noon, State Bar Center

12
Appellate Practice Section Board
Noon, teleconference

12
Bankruptcy Law Section Board
Noon, U.S. Bankruptcy Court, Albuquerque

13
Children's Law Section Board
Noon, Children's Court, Albuquerque

Workshops and Legal Clinics

October

30
Common Legal Issues for Senior Citizens Workshop
Presentation: 2-3 p.m. POA/AHCD
Workshop: 3-3:30 p.m., UNM-Taos Bataan Hall, Taos, (505) 797-6005

November

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

13
Common Legal Issues for Senior Citizens Workshop
Presentation: 10-11:15 a.m. POA/AHCD
Workshop: 11:30 a.m.-12:30 p.m., Mora Senior Center, Mora, (505) 797-6005

15
Roswell Legal Fair
1–4 p.m., Roswell Adult Center, Roswell 505-216-2939

20
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

About Cover Image and Artist: Ludescher began painting at 13, selling her seascapes right on the beaches of California. Now, she lives near Santa Fe. And, sometimes, sells paintings right off her easel along the road. She's also lived in Eastern Europe, Central America and the Pacific Northwest where she worked as a journalist. She also plays harp professionally, much of it for hospice patients. Music is a big part of her life; she plays other instruments also to an advanced level. Its influence is evident in her artwork. She celebrates life in both music and art. Painting has always been her greatest passion. She has a BFA from the University of New Mexico in painting, drawing, printmaking and a minor in art history. Her work is in collections in Tokyo, Toronto, England, Laguna Beach, Washington, D.C. and Seattle, to name a few, and has been featured in calendars and magazines with worldwide circulations.

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at https://supremecourt.nmcourts.gov/. To view all New Mexico Rules Annotated, visit New Mexico OneSource at https://nmonesource.com/nmos/en/nav.do

Supreme Court Law Library

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

Eighth Judicial District Court

Judicial District Court Nominating Commission

Seven applications were received in the Judicial Selection Office as of 5 p.m., Oct. 16, for the Judicial Vacancy in the Eighth Judicial District Court due to the retirement of the Honorable Jeff Foster McElroy effective Oct. 31. The Eighth Judicial Distric Nominating Commission will meet at 9 a.m. on Nov. 1, at the Taos District County Courthouse, located at 105 Albright Street, Taos to evaluate the applicants for this position. The commission meeting is open to the public. Those wishing to make public comment are requested to be present at the opening of the meeting. The names of the applicants in alphabetical order: Timothy Roland Hasson, Lisa Beth Jenkins, Floyd William Lopez, Elizabeth Ann Musselman, Jeffry Alan Shannon, Elizabeth Jacqueline Travis and Morgan Holly Wood.

Pro Bono Committee Free Legal Fair

The Eighth Judicial District Court Pro Bono Committee will be hosting a free legal fair from 4-7 p.m. on Oct. 30 in Bataan Hall located at 121 Civic Plaza Drive, Taos. There will also be a free Legal Resources for Elderly Program workshop also in Bataan Hall from 2-3 p.m.

Eleventh Judicial District Court

Suspension of Subsection (C) of Local Rule LR11-302

LR11-302 (C) states: "As a sanction for all other technical violations, the probationer shall be incarcerated for five days." The judges of the Eleventh Judicial District Court have decided that effective immediately, subsection (C) of LR11-302 is suspended indefinitely. The remainder of LR11-302 remains in effect.

Bernalillo County Metropolitan Court

Volunteers are Neded for Legal Clinics

The Legal Services and Programs Committee of the State Bar and the Bernalillo County Metropolitan Court hold a free legal clinic from 10 a.m. until 1 p.m. the second Friday of every month. Attorneys answer legal questions and provide free consultations at the Bernalillo County Metropolitan Court, 9th Floor, 401 Lomas Blvd NW, in the following areas of law: landlord/tenant, consumer rights, emndployee wage disputes, debts/bankruptcy, trial discovery preparation. Clients will be seen on a first come, first served basis and attendance is limited to the first 25 persons.

New Mexico Court of Appeals

Election Announement

The judges of the Court of Appeals selected J. Miles Hanisee as their Chief Judge on Oct. 7. A member of the COA since 2011, Judge Hanisee was most recently retained by voters in 2018. He previously served as an Assistant United States Attorney for over a decade, as a law clerk to two 10th Circuit judges, and was in private practice when appointed to the COA. He earned degrees from Pepperdine University School of Law and Louisiana State University.

Professionalism Tip

With respect to my clients:

I will be courteous to and considerate of my client at all times.

State Bar News

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

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

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

Board of Editors

Seeking Applications for Open Positions

The Board of Editors of the State Bar of New Mexico will have open positions beginning Jan. 1, 2020. Both lawyer and non-lawyer positions are open. The Board of Editors meets at least four times a year (in person and by teleconference), reviewing articles submitted to the *Bar Bulletin* and the quarterly *New Mexico Lawyer*. This volunteer board reviews submissions for suitability, edits for legal content and works with authors as needed to develop topics or address other concerns. The Board's primary responsibility is for the *New Mexico Lawyer*, which is generally written by members of a State Bar committee, section or division about a specific area of the law. The State Bar president, with the approval of the Board of Bar Commissioners, appoints members of the Board of Editors, often on the recommendation

2020 Budget Disclosure

Deadline to Challenge Expenditures

The State Bar of New Mexico Board of Bar Commissioners (BBC) has completed its budgeting process and finalized the 2020 Budget Disclosure, pursuant to the State Bar Bylaws, Article VII, Section 7.2, Budget Procedures. The budget disclosure will be available in its entirety by Nov. 1 2019, on the State Bar website at www.nmbar.org on the financial information page under the About Us tab. **The deadline for submitting a budget challenge is on or before noon, Dec. 2, 2019**, and the form is provided on the last page of the disclosure document.

The BBC will consider any challenges received by the deadline at its Dec. 11, 2019, meeting.

Address challenges to:
Executive Director Richard Spinello
State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199
rspinello@nmbar.org

Challenges may also be delivered in person to the State Bar Center, 5121 Masthead NE, Albuquerque, NM 87109.

— *Featured* —
Member Benefit

Fastcase
Smarter legal research.

Fastcase is a free member service that includes cases, statutes, regulations, court rules and constitutions. This service is available through www.nmbar.org. Fastcase also offers free live training webinars. Visit www.fastcase.com/webinars to view current offerings. Reference attorneys will provide assistance from 8 a.m. to 8 p.m. ET, Monday–Friday. Customer service can be reached at 866-773-2782 or support@fastcase.com. For more information, contact Christopher Lopez, clopez@nmbar.org or 505-797-6018.

of the current Board. Those interested in being considered for a two-year term should send a letter of interest and résumé to Evann Kleinschmidt at ekleinschmidt@nmbar.org. Apply by Dec. 1.

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.

Intellectual Property Law Section

Pro Bono Fair

The Intellectual Property Law Section seeks volunteer attorneys for its second Pro Bono IP Fair Saturday, Nov. 2 at the UNM School of Law. Many creatives and inventors in our community need our help to get their journey started. The Fair will be open from 10 a.m. to 2 p.m., but you need not commit to that entire time. Attorneys will provide free consultations (limited to the time spent at the Fair) in all areas of IP law and/or business law. Visit nmbar.org/IPLaw for more information!

Solo and Small Firm Section

November Luncheon

Sonya Chavez, the first female to be appointed chief U.S. marshal, is the featured speaker for the noon, Nov. 12 luncheon at the State Bar Center. Marshal Chavez earned her M.A. from UNM and began her career as television anchor and spokesperson for the Bruce King gubernatorial administration before joining the FBI where she committed 22 years as a special agent in Chicago and Albuquerque. She will discuss many challenges that face the marshal's service, from violent crime to border enforcement, and also moderate an open discussion of issues with all attendees. The luncheon is open to all members of the bar. Please R.S.V.P. to Member Services at memberservices@nmbar.org by Nov. 8.

2019 Annual Meeting

The Solo and Small Firm Section will host their Annual Meeting at 4 p.m. on Dec. 16. Section members are invited to attend the annual meeting to hear what the section has done in 2019 and the exciting plans for 2020. Refreshments and appetizers will be provided. The meeting will be preceded by a CLE co-sponsored by the section that will run from 3 – 4 p.m. Members can attend in person, attend the CLE and then and stay on via webcast, or call-in via teleconference. To R.S.V.P. for the meeting, please email Member Services at memberservices@nmbar.org.

New Mexico Judges and Lawyers Assistance Program

Santa Fe Attorney Support Group Meeting

The new attorney support group, Recovery Responsibilities, explores non-traditional recovery approaches, and has a focus on meditation and other creative tools in support of the recovery process from addiction of any kind. It meets from noon to 1 p.m. the first and

third Wednesday of every month at the District Courthouse, 225 Montezuma Ave, Room 270. For more information, contact Victoria Amada, vamada@nmag.gov, 505- 620-7056.

Natural Resources, Energy and Environment Law Section
Section Nominations Open for 2019 Lawyer of the Year Award

The Natural Resources, Energy and Environmental Law Section will recognize an NREEL Lawyer of the Year during its annual meeting of membership, which will be held in conjunction with the Section's CLE on Dec. 20. The award will recognize an attorney who, within his or her practice and location, is the model of a New Mexico natural resources, energy or environmental lawyer. Award criteria and nomination instructions are available at www.nmbar.org/NREEL. Nominations are due by Nov. 15 to Member Services at memberservices@nmbar.org.

UNM School of Law
Law Library Hours
Fall 2019

Through Dec. 31

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.
Holiday Closures	
Thanksgiving: Nov. 28-29	
Winter Break: Dec. 23-Jan. 1, 2020	

Other Bars
Albuquerque Bar Association
Appellate Law Update

Please join the Albuquerque Bar Association for an update on appellate court cases affecting an array of practice areas by Tim Atler. The lunch will take place Nov. 5 at the Embassy Suites, 1000 Woodward Pl NE, Albuquerque. There will be a networking time from 11:30 a.m.-noon and the lunch and CLE will take place from noon-1 p.m. The cost is $30 for members, $35 for non-members and $5 for walk-ups. Please register for lunch by 5 p.m., Nov. 1. To register please contact the Albuquerque Bar Association's Interim Executive Director Deborah Chavez at dchavez@vancechavez.com or 505-842-6626.

Albuquerque Lawyers Club
Monthly Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its November lunch meeting. Dick Minzner is the featured speaker. The title of his presentation is "Likely Legislative Issues." Included amongst the topics will be marijuana, film subsidies, payments to college athletes, the early childhood education trust fund, free college and tax reform. The lunch meeting will be held at noon on Nov. 6 at noon at Seasons Restaurant, located at 2031 Mountain Road NW, Albuquerque. For more information, please email ydennig@gmail.com or call 505-844-3558.

New Mexico Black Lawyers Association
Annual CLE

The New Mexico Black Lawyers Association invites members of the legal community to attend its annual CLE, "When They See Us: Navigating Expungement in New Mexico." (1.0 G) on Nov. 15 at the State Bar of New Mexico (5121 Masthead NE, Albuquerque, NM 87109). Lunch will be served prior to the CLE from 12:15 until 1:15 p.m., and the CLE will last from 1:30-2:30 p.m. Registration is $50 for attorneys seeking credit, and $40 for NMBLA members, co-sponsors, government/non-profit attorneys, attorneys who are not seeking CLE credit, and paralegals. The deadline to request a refund is Nov. 8. For more information, or to register online, please visit www.newmexicoblacklawyersassociation.org.

New Mexico Criminal Defence Lawyers Association
Trial Skills College

However many times you've stepped into court, the NMCDLA Trial Skills College on Nov. 7-9 will take you to the next level for the next time you walk onto that floor. Fine-tuning your jury selection, opening statements, examinations and closing arguments with some of the best attorneys in the state is a prospect you just can't miss. Reservations are limited to insure a small faculty to participant ratio. Faculty includes: Ahmad Assed, Theresa Duncan, Devon Fooks, Shammara Henderson and Wendy York. Seats are available to criminal defense lawyers with a few civil rights slots also open. Early registration is encouraged as case files will be sent in advance. More information may be found at the New Mexico Criminal Defense Lawyers Association, www.nmcdla.org or info@nmcdla.org.

Other News
Christian Legal Aid
Training Seminar

New Mexico Christian Legal Aid invites new members to join them as they work together to secure justice for the poor and uphold the cause of the needy. They will be hosting a training seminar on Nov. 1, from noon-5 p.m. at The State Bar of New Mexico located at 5121 Masthead St NE, Albuquerque. Join them for free lunch, free CLE credits and training as they update skills on how to provide legal aid. For more information or to register, contact Jim Roach at 243-4419 or Jen Meisner at 610-8800 or christianlegalaid@hotmail.com.

Santa Fe Neighborhood Law Center
Update on Annual CLE Conference

The Santa Fe Neighborhood Law Center's annual December CLE, "Policy and Law Conference" will no longer be held. After 12 years the SFNLC, a non-profit policy and advocacy organization, has ceased its operations and is terminating its existence. Through litigation, agency advocacy and educational civic forums, the SFNLC advanced the rights of people threatened with foreclosures, improved City policies and procedures for review and approval of proposed developments, and conducted a major policy and law conference every December since 200 devoted to solutions for issues important to the life of Santa Fe. We thank the many presenters and participants for your suport, attendance, hard work and wisdom over the years. Any questions should be directed to Daniel Yohalem, president of the SFNLC Board, at dyohalem@aol.com.

Report by Disciplinary Counsel
Disciplinary Quarterly Report

Reporting Period: July 1, 2019 – September 30, 2019

Final Decisions
Final Decisions of the NM Supreme Court 2

Matter of Rafael Padilla, Esq., (No. S-1-SC-37594). The New Mexico Supreme Court issued an order on July 9, 2019, suspending Respondent from the practice of law for a period of one (1) year, six (6) months of which were deferred, and Respondent was placed on probation for that period of time for violations of Rules 16-101.

Matter of Jennie Deden Behles, Esq., (No. S-1-SC-37393). The New Mexico Supreme Court issued an Opinion on September 23, 2019 in connection with its March 5, 2019 Order disbarring Respondent.

Summary Suspensions
Total number of attorneys summarily suspended 0

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

Disability Inactive Status
Total number of attorneys removed from disability inactive states 0

Charges Filed

Charges were filed against an attorney for allegedly failing to provide competent representation; failing to act with reasonable diligence and promptness; failing to fully keep the client informed of the status of the matter; charging an unreasonable fee; failing to ensure an orderly termination of representation during the period when Respondent was no longer representing the client; and engaging in conduct prejudicial to the administration of justice.

Injunctive Relief
Total number of injunctions prohibiting the unauthorized practice of law 0

Reciprocal Discipline
Total number of attorneys reciprocally disciplined 0

Reinstatement from Probation
Petitions for reinstatement filed 3

Matter of G. Paul Howes, Esq. (S-1-SC-23414) Respondent petitioned for reinstatement on May 7, 2019 to the practice of law from a reciprocal disbarment.

Matter of Joseph M. Tapia, Esq. (S-1-SC-18414) Respondent petitioned for reinstatement on July 27, 2019 to the practice of law from an indefinite suspension.

Matter of Eric D. Dixon, Esq. (S-1-SC-37204) Respondent petitioned for reinstatement on September 11, 2019 to the practice of law from an indefinite suspension.

Formal Reprimands
Total number of attorneys formally reprimanded 0

Informal Admonitions
Total number of attorneys admonished 0

Diversion
Total number of attorneys referrred to diversion 3

Letters of Caution
Total number of attorneys cautioned 3

Attorneys were cautioned for the following conduct: (1) trust account violations; (2) failure to communicate; and (3) lack of competence.

Complaints Received

Allegations	**No. of Complaints**
Trust Account Violations	2
Conflict of Interest	8
Neglect and/or Incompetence	64
Misrepresentation or Fraud	7
Relationship with Client or Court	23
Fees	9
Improper Communications	1
Criminal Activity	0
Personal Behavior	2
Other	22
Total number of complaints received	138

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 Oct. 11, 2019

PUBLISHED OPINIONS

A-1-CA-35894	M Sanchez v. J Lujan	Reverse/Remand	10/07/2019

UNPUBLISHED OPINIONS

A-1-CA-36226	T Oliver v. Six Springs	Affirm	10/07/2019
A-1-CA-36919	State v. J Dixon	Affirm	10/07/2019
A-1-CA-37747	NM Board of Dental Health Care v. R Belfon	Affirm	10/07/2019
A-1-CA-38119	State v. Daniel P.	Affirm	10/07/2019
A-1-CA-36627	State v. D Loflin	Affirm	10/08/2019
A-1-CA-37549	M Vigil v. C Alba	Reverse/Remand	10/09/2019
A-1-CA-37661	R Del Real v. A Meraz	Reverse/Remand	10/09/2019
A-1-CA-38027	State v. C Garcia	Affirm	10/09/2019
A-1-CA-36134	State v. J Jaramillo	Affirm/Reverse/Remand	10/10/2019
A-1-CA-36614	Old Republic Insurance v. Eclipse Aviation Corp.	Affirm	10/10/2019
A-1-CA-37819	A Moralez v. L Moralez	Affirm/Vacate/Remand	10/11/2019

Effective Oct. 18, 2019

PUBLISHED OPINIONS

A-1-CA-36856	State v. J Garcia, Jr.	Affirm	10/17/2019

UNPUBLISHED OPINIONS

A-1-CA-36895	State v. J Ibarra	Reverse/Remand	10/18/2019
A-1-CA-38012	State v. M Perkins	Affirm/Reverse/Remand	10/18/2019

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

Legal Education

October

30 **How to Practice Series: Demystifying Civil Litigation, Pt. 2 – Taking and Defending Depositions (2018)**
4.5 G, 2.0 EP
Live Replay/Live Webcast
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Basic Guide to Appeals for Busy Trial Lawyers (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

30 **Federal Fiduciary Income Tax Workshop**
6.6 G
Live Seminar, Albuquerque
Halfmoon Education
www.halfmoonseminars.org

31 **Post-Mortem Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Role and Responsibilities of Duty Attorney**
1.0 G
Live Seminar, Albuquerque
Administrative Office Of The District Attorneys
www.nmdas.com

November

1 **ADR: Mediator Best Practices, Skills and Self-Care**
4.7 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

1 **Skills for Effective Depositions**
2.0 G,
Live Seminar, Santa Fe
New Mexico Office Of Attorney General
www.nmag.gov

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

6 **The Tripartite Relationship**
1.0 EP
Live Seminar, Albuquerque
Butt Thornton And Baehr
www.btblaw.com

7 **NMCDLA Trial Skills College**
14.0 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers
www.nmcdla.org

7 **Indian Law: The Multidisciplinary Practice**
5.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Business Law 101: Back to Basics**
4.5 G, 1.5 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **Reefer Madness Part Deux: Chronic Issues in New Mexico Cannabis Law**
5.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **Unlocking the Opportunity of Complex Asset Charitable Gifts**
1.2 G,
Live Seminar, Albuquerque
National Christian Foundation
www.ncfgiving.com

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.

14 **2019 Probate Law Institute**
6.5 G, 1.0 EP
Live Webcast/Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

15 **When They See Us: Navigating Expungement in New Mexico**
1.0 EP
Live Webinar, Albuquerque
New Mexico Black Lawyers Association
www.newmexicoblacklawyersassociation.org

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

21 **A Comedic De-Briefing of the Law**
3.5 G, 3.5 EP
Live Seminar, Albuquerque
Comedian of Law
www.comedianoflaw.com

21 **2019 Animal Law Institute: The Law and Ethics of Wild Animals in Captivity**
5.3 G, 1.0 EP
Live Webcast/Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Tribal Energy in the Southwest**
10.2 G
Live Seminar, Albuquerque
Law Seminars International
www.lawseminars.com

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

22 **Deal or No Deal? Ethics on Trial with Joel Oster (2019)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Risk Management Annual CLE**
5.0 G, 2.0 EP
Live Seminar, Santa Fe
New Mexico General Services Department
www.generalservices.state.nm.us

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

26 **8 Mistakes Experienced Contract Drafters Usually Make**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

December

3 **Immigration Law: Updates and Best Practices in Preparing VAWA Applications**
1.0 G, 1.0 EP
Live Webcast/Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

3 **Water Rights in New Mexico**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
NBI Inc
www.nbi-sems.com

3 **ADR Excellence: Does Practice Make Perfect?**
1.5 G
Live Webinar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Oil & Gas Law in New Mexico**
6.0 G, 1.0 EP
Live Webcast/Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Volunteer Attorney Program Orientation**
2.0 EP
Live Seminar, Albuquerque
Volunteer Attorney Program
www.lawaccess.org

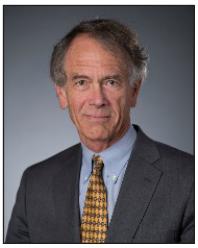
5 **Orientation and Ethics of Pro Bono**
2.0 EP
Live Seminar, Albuquerque
Volunteer Attorney Program
505-814-5033

Rothstein, Donatelli, LLP is pleased to announce that **Mark Donatelli** has been selected for inclusion in the 2020 edition of *The Best Lawyers in America* (criminal defense-general practice, white collar). This marks 30 consecutive years he has been selected by his peers. He directs the firm's seven attorney criminal law practice group in the firm's Santa Fe and Albuquerque offices.

Eric Dahlstrom has been selected by his peers for inclusion in the 25th edition of *The Best Lawyers in America* for his work in gaming law and Native American law. This is his 14th year of recognition.

Angelica M. Lopez has joined the Rodey Law Firm. Lopez is a member of Rodey's litigation department where her practice focuses on products and general liability defense and health law and medical malpractice defense. Prior to attending law school, Lopez served as a court clerk for the Second Judicial District Court. Lopez received her law degree from the University of New Mexico School of Law graduating *summa cum laude*.

Modrall Sperling is pleased to announce that Jamie Allen and Amanda Krasulick have joined the firm's Albuquerque office.
Amanda Krasulick, a *magna cum laude* graduate of the University of New Mexico School of Law, focuses her practice on litigation including insurance and commercial disputes. Krasulick also assists in matters involving employment such as wrongful termination and discrimination.



Richard Hughes has been selected by his peers for inclusion in the 25th edition of *The Best Lawyers in America* for his work in gaming law and Native American law. This is his 12th year of recognition.

Peter Schoenburg has been selected by his peers for inclusion in the 25th edition of *The Best Lawyers in America* for his work in bet the company litigation: criminal defense: general practice and criminal defense: white-collar. This is his 24th year of recognition.

Thomas L. Stahl was elected as president and managing director of the Rodey Law Firm on Sept. 18. Stahl joined the Rodey Firm in 1989. His practice focuses on the defense of employers in state and federal court, and in forums for alternative dispute resolution, such as mediation and arbitration. He served as the leader of Rodey's Labor and Employment Practice Group from 2004 – 2012 and a member of the executive committee from 2012 - 2019. Stahl is certified by the New Mexico Board of Legal Specialization as a specialist in employment and labor law. He is a co-author of the *New Mexico Employment Law Desk Reference–Second Edition*, Rodey Law Firm 2013. Stahl is listed in *The Best Lawyers in America*, *Southwest Super Lawyers*, *Chambers & Partners*, and *Benchmark Litigation* for his experience and expertise in labor and employment law.

Modrall Sperling is pleased to announce that Jamie Allen and Amanda Krasulick have joined the firm's Albuquerque office.
Jamie Allen, a graduate of Emory University School of Law, focuses on natural resource law, including CERCLA matters and water quality issues. Allen has experience with Native American law matters including economic development in Indian country. She also assists in litigation involving personal injury and tort liability, and with employment law matters.

Michelle Hernandez, a shareholder with Modrall Sperling, has been selected as an individual honoree for the Albuquerque Business First Diverse Business Leader Awards, honoring New Mexico business leaders who are advancing diversity and inclusion in the workplace. Hernandez is immediate past chair of the Albuquerque Hispano Chamber of Commerce, serving on its board of directors since 2013. She was regional president for the Hispanic National Bar Association from 2015 to 2019. Hernandez is vice chair of Modrall Sperling's Diversity and Inclusion Committee. In addition, she is a member of the International Women's Forum and the Leadership New Mexico Core Program.

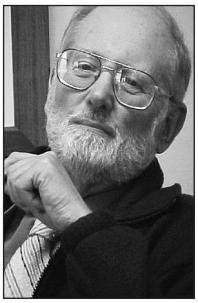
Ashley Cook has joined Giddens + Gatton Law, P.C., as an Associate Attorney, according to George "Dave" Giddens, founding shareholder of the firm. Cook recently graduated from the University of New Mexico School of Law, where she finished in the top 5 percent of her class. Last year, she interned with the U.S. Department of Justice, Criminal Division, in the Office of International Affairs, in Washington, D.C. Cook will work in all areas of the firm's practice. Cook earned her undergraduate degree at the University of New Mexico where she graduated summa cum laude with a Bachelor of Science in Biochemistry.

David Bunting, Albuquerque Construction Litigation "Lawyer of the Year." Best Lawyers compiles its lists of outstanding attorneys by conducting exhaustive peer-review surveys in which thousands of leading lawyers evaluate their peers. Lawyers honored as "Lawyers of the Year" receive the highest ratings in surveys for their abilities, professionalism, and integrity.

Jennifer Anderson, shareholder with Modrall Sperling, has been selected as one of the Top 250 Women in Litigation in the United States by Benchmark Litigation for the eighth consecutive year. Anderson's practice is focused on employment, class actions, mass torts, insurance, healthcare, products liability and commercial litigation. In addition, she has served as trial counsel in pro bono cases, including an intellectual property case for a large, non-profit medical services provider and small family related issues. Anderson serves as chair of the firm's employment practice group, and is a past head of Modrall Sperling's Litigation Department. Anderson has been recognized by Chambers USA since 2013, and is among those in listed in *The Best Lawyers in America* and *Southwest Super Lawyers*..

Daniel G. Acosta, managing attorney for the Law Offices of Daniel G. Acosta, staff counsel for Farmers Insurance Exchange, received a presidential appointment to the American Bar Associations' Commission on Racial and Ethnic Diversity in the Profession for the 2019-2020 bar year. Acosta is an active member of the Tort Trial and Insurance Practice Section of the ABA where he recently completed a three year term on TIPS Council, the governing body of the Section, and has served as chair of the Diversity and Inclusion Committee and Staff Counsel Committee with TIPS. During his tenure, Acosta developed and implemented the TIPS Middle School Outreach Project, which provides a "Day in the Life of an Attorney" program to middle school students in underserved communities across the country to encourage those students to consider a career in the law. The project is in its seventh year.

Cordell & Cordell, the nation's largest domestic litigation firm focusing on representing men in family law cases, recently hired senior litigation attorney **Linda L. Ellison** in its Albuquerque office (6565 Americas Parkway NE, Suite 900, Albuquerque, NM 87110). Ellison earned her Juris Doctor from the University of New Mexico and received her Bachelor of Arts from Saint Mary's College. She is a member of the State Bar of New Mexico and the Albuquerque Bar Association. Prior to joining Cordell & Cordell, Ellison practiced family law, bankruptcy and personal injury. Ellison has a tremendous amount of compassion for people going through the emotional and financial turmoil, uncertainty, and fear that are inherent in the legal system. She understands the process is not quick and that litigation takes time, energy, and money. "People who have family law issues are going through an intensely emotional time and need someone to help guide them through that process by giving them sound legal and practical guidance," she said. "I am here to help you through every step of the process as we discuss your options, possible outcomes, and plan for the future."



Michael Gary Sutin, humanist, loving husband and father, respected and exemplary Albuquerque and Santa Fe attorney, consummate hiker, and noted poet, died on Sept. 7, at his daughter Ellen's home in Austin, Texas. The following day, wrapped in a shroud, with burial Kaddish read aloud, he was laid to rest in Eloise Woods Community Natural Burial Park in Cedar Creek, Texas.

Sutin was born June 6, 1935 in Terre Haute, Ind. Sutin's father, Lewis R. Sutin (The Great Dissenter, Amazon 2017) and mother, Eloise Brown, left Terre Haute in Dec. 1945, settling in Albuquerque on Jan. 1, 1946. Sutin was a graduate of Bandelier Grade School, Jefferson Junior High School, and Highland High School. Sutin was a lover of pseudonyms and at Highland, his were Whitey Pistachio, Steve Grizonavich and Whately Petunias. During high school, Sutin played baseball, was a thespian, and worked as a sports stringer and reporter for the Albuquerque Journal.

After three years at University of Arizona, where he met and married his love, Esther Sacherson,Sutin received his LLB degree from the University of New Mexico School of Law. Sutin then joined the small but exceptional law firm started by his father and Irwin S. Moise. They were joined by Franklin Jones, Norman Thayer, and Michael.

The firm, renamed Sutin, Thayer & Browne, expanded over time to 60 or more lawyers, reaching a level of great respect and influence. Sutin's specialties were real estate, public prescriptive easements, mortgage finance, trusts, estates, wills and contracts, and probate. He was highly regarded in the legal community and was recognized by or elected to national legal organizations. And he was the managing partner of the firm for several years. In 1986, Sutin and Esther moved to Santa Fe, and Michael worked in the firm's Santa Fe office.

Sutin was engaged in many civic pursuits for the betterment of the Albuquerque and Santa Fe communities. Of mention, he was instrumental in passage of a fair housing ordinance in Albuquerque; was involved in lobbying the passage of state human rights legislation; was a leader in the Jewish Welfare Fund, United Jewish Appeal, and Israel Bond organizations; was successfully involved with significant First Amendment church-state litigation; and was vocal in regard to First Amendment speech rights.

Sutin played a significant part in the restructuring of Santa Fe Economic Development, Inc. to concentrate on promotion of jobs and enhance business development, and he served on the city's Urban Policy Committee. He also incorporated and served on the first board of directors of the Historic Neighborhood Association.

Upon retiring, Sutin and Esther moved to Austin to be near their daughter, Ellen. Esther, a respected and well-known artist, died in 2017, and was also buried in Eloise Woods. Michael was an avid mountain hiker and daily runner. He headed the New Mexico Mountain Club and hiked every known trail in the Sandia Mountains. Not content, Sutin summited Wheeler Peak in Taos, Mt. Rainier, and Mt. Whitney, moving on to glaciers in Mexico and Ecuador.

Sutin started his serious poetic adventure in Santa Fe. His poems appeared in various publications and in his own anthologies, including Voices from the Corner/Voces del Rincon (Pennywhistle Press 2001), Naked Ladies on the Road (Sunstone Press 2005), and Graven Images (Sunstone Press 2008), the latter winning the 2008 New Mexico Book Awards competition.

Sutin is survived by his three children: Jennifer Leonard, Ellen Macdonald, and Brian Sutin; grandchildren: Ben and Zak Leonard, Ian and Sam Macdonald, Nathan Zhang Sutin, and step grandchild David Wang; sons-in-law and daughter-in-law: John Leonard, Paul Macdonald, and Fang Zhang (Rose) Sutin; brother: Jonathan B. Sutin and his spouse Malka Sutin, their three children: Elyana McCeney, Jessica Ashcroft, and Joshua Sutin; their spouses Michael McCeney, William Ashcroft, and Miranda Sutin; and Jonathan and Malka's eight grandchildren; Michael's sister in law: Bette Allen and her spouse Jack and their two children: Marc Allen and Julia Meissner.

Longtime New Mexico attorney, **Oliver Burton Cohen**, a.k.a., Ollie or O.B., died at home in Albuquerque, on Friday, Sept. 6, at the age of 92. He is survived by Elizabeth Johanna (O'Grady) Cohen, his wife of 67 years; his daughters, Julia and Dianne Cohen; son, Paul Cohen; and grandchildren, Jeremy and Alisha Brach. His oldest son, Mark Daniel Cohen, blessed be his memory, passed away in 2002.

Born in Pittsburgh, PA, in 1926 to Henry Cohen and Julia (Price) Cohen, immigrants from Eastern Europe, Cohen was a first-generation American and proud member of America's greatest generation who served in WWII. The youngest of five children, his siblings; Raymond, Mildred, Florence, and Betty all pre-deceased him. Cohen's father, Henry, died at the height of the depression when Cohen was eleven years old. He grew up quickly after his father passed and got his first pair of long pants at age thirteen. Cohen helped support his family by doing odd jobs including digging graves and working in a slaughterhouse where the workers were given free hot dogs.

Cohen's uncle, "Ike," was a neighborhood barber who kept an eye on him after his father died, giving him a quarter every time he went into the barbershop for a haircut. This sparked a lifelong passion in Cohen for trimming bushes and pets hair. He attended Alderdice High School in the Squirrel Hill section of Pittsburgh and developed strong friendships with the neighborhood boys who taught him to play pool and dice and generally instructed him in the arts of the time. His favorite story from growing up was when a gang of would-be toughs led by the little brother of Billy Conn (then light-heavyweight boxing champion of the world) came into his neighborhood looking for a fight. They found it when Homer Hassan, the cousin of Cohen's childhood friend Kamil Naffa, knocked Conn out with one punch and the rest of Conn's gang fled in turn.

Cohen separated from the army at Roswell Army Air Field in 1946. He attended college in Montana and returned to New Mexico on a 1930s Harley Davidson flathead in 1950 wearing a leather helmet, goggles and motorcycle kidney belt. He was driving his Harley around the University of New Mexico campus

when he met his dear friend and future business partner Ralph Brutche, and was introduced to his soon to be wife Elizabeth Johanna O'Grady at the Alvarado Train Station the following year when she came to visit from Chicago. Elizabeth never went back to Chicago and Cohen never went back to Pittsburgh. He could not afford a traditional engagement ring so he strapped his kidney belt around a tree at the apartment where Elizabeth was staying when he proposed to her. Cohen and Elizabeth were married by Eugene Lujan, chief justice of the New Mexico Supreme Court, in 1952, and remained married until Cohen's death on Sept. 26.

Cohen worked for developer Dale Bellamah building the Princess Jean Park subdivision and was later in the second graduating class from the University of New Mexico School of Law. Elizabeth's mother, Mary Marie O'Grady, moved in with the family when Elizabeth had her first child and "Grammy" O'Grady was part of the family until her death in 1973. Oliver practiced law in Albuquerque for 40 years before retiring and spent the last decades of his life surrounded by family, pets, and friends. He will be loved and missed and remembered always.

Marvin H. Gladstone, a lawyer, rights advocate, antiwar activist, educator, husband, father, grandfather and uncle, died suddenly on May 9 at home in Albuquerque at the age of 91. Gladstone was the patriarchal figure in two melded diverse families, and was known for his unconditional affection, generosity, sense of humor, crossword skills, encyclopedic legal mind and penchant for white-rum martinis. He could recall details of cases he tried 40 years ago, down to the street addresses of his clients. A few years after the 1987 death of Evelyn, his wife for 42 years, he married Patti, and they began a new life together, moving from Edgewater, N.J., to Albuquerque. They became known as strong backers of such progressive causes as public education and immigrant rights. A 1960 graduate cum laude of Rutgers Law School, Gladstone became the oldest lawyer to pass the New Mexico bar in 1995. With Patti he helped found the Media Arts Collaborative Charter School, a pioneering public high school that won national recognition for its strong graduation rate, and one of only a few public high schools offering intensive training in the broad range of 21st century digital media. Gladstone leaves behind Patti and an extended family that includes four children, their spouses, seven grandchildren and two rescue dogs.

Before the Disciplinary Board of the Supreme Court of the State of New Mexico

In the Matter of Michael Garrett, Esq.

Disciplinary No. 2018-11-4420

An Attorney Licensed to Practice Law Before the Courts of the State of New Mexico

Formal Reprimand

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

You represented a client as personal representative of the estate of her son in a wrongful death case. The statutory beneficiaries in the wrongful death case were your client's three grandchildren. You filed a wrongful death claim on behalf of your client as personal representative and as next friend of her three minor grandchildren and the case was removed to United States District Court. You secured a settlement at defendants' insurance policy limits of $1,000,000.00. That settlement amount was reduced by your fee of 33.3% and other litigation costs.

The proposed settlement called for a portion of the settlement funds to be distributed to third parties purporting to have claims against the estate, including two towing companies and one of their employees, despite the fact that you did not represent those individuals, they were not parties to the lawsuit, and their claims were adverse to the statutory beneficiaries because they reduced the amount available to the statutory beneficiaries. The proposed settlement further called for the remainder of the settlement to be split evenly between your client and the statutory beneficiaries. Your client had not asserted a claim on her behalf, and you did not advise her to retain separate counsel if she believed that she had a claim to the funds.

The parties filed a joint motion to dismiss the case without requesting a guardian ad litem, without seeking approval of the settlement which included minor beneficiaries, and without seeking approval of payment of funds to third parties who were not statutory beneficiaries. The presiding judge in the case ordered the parties to show cause why a guardian ad litem should not be appointed to ensure the settlement was in the minors' best interests. Neither you nor defense counsel responded to the judge's order. Subsequently the judge appointed a guardian ad litem.At the time of the appointment of the guardian ad litem, you had received the settlement proceeds, deposited them in your trust account and distributed your attorney fee to yourself.

The guardian ad litem filed a report in the case. While the guardian ad litem found the total settlement reasonable, he questioned several aspects of the settlement, including the 25% recovery directly to your client, certain expenses claimed by you, the amount of attorney's fees to you, the claims paid to the third parties and the lack of a structured settlement for the minor beneficiaries. The guardian ad litem further found the distribution made directly to you jeopardized the ability to structure future benefits for the minor children. You were ordered to deposit the entirety of the funds you had previously distributed into the Court registry, which you ultimately complied with.

A fairness hearing was scheduled. In the interim, your client discharged you and retained new counsel. At that hearing, new counsel for your client stated that she did not believe the settlement as proposed was fair. Over the course of several months, the parties negotiated a settlement which did not include the payment to third parties or your client individually, allowed for a structured settlement agreement for the minors and reduced your fee. The Court accepted this new agreement.

Your conduct in this matter was found to have violated Rule 16-101, by failing to provide competent representation, Rule 16-107, by engaging in representation that presented a concurrent conflict of interest, and Rule 16-804(D), by engaging in conduct that is prejudicial to the administration of justice. Because you were cooperative throughout the disciplinary process and admitted your transgressions, it is hoped that this formal reprimand is sufficient to impress upon you the importance of avoiding conflicts of this nature and in securing extra protection in wrongful death cases when the statutory beneficiaries are minors.

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

Dated October 11, 2019
The Disciplinary Board of the
New Mexico Supreme Court

By
Hon. Cynthia Fry (Ret.)
Board Chair

Before the Disciplinary Board of the Supreme Court of the State of New Mexico

In the Matter of Daniel M. Faber, Esq.

Disciplinary No. 2018-12-4421

An Attorney Licensed to Practice Law Before the Courts of the State of New Mexico

Formal Reprimand

You are being issued this Formal Reprimand pursuant to a Conditional Agreement Admitting the Allegations and Consent to Discipline, which was approved by a Disciplinary Board Hearing Committee and a Disciplinary Board Panel.

Your misconduct arose from your failure to honor your agreement to ensure payment to a third-party from a settlement you obtained on behalf of a client. In July 2017, your client obtained money from a company which provides high-interest loans to individuals who have a pending claim and/or lawsuit for damages, with the provision that if there is no recovery, the individual owes nothing. The client specifically agreed that that he would receive nothing from any recovery until the amount owed to the company was paid, after payment of attorney's fees, costs, and medical liens. More important, you signed a document from the company which stated: "I hereby irrevocably agree not to disburse any monies to my client until the payoff amount due to [the company] has been fully paid to [the company]."

When you settled your client's case, you had enough funds to pay the company. The company demanded payment. Your client directed you to disburse his share to him in total, without paying the company. Yet, despite your clear promise to pay, you refused to pay the company. The debt has continued to grow.

This matter is analogous to cases involving letters of protection issued to medical providers. Refusal to honor a letter of protection constitutes a violation of Rule 16-804(C) ("conduct involving dishonesty . . . or misrepresentation" constitutes "professional misconduct"). See Rawson, 1992-NMSC-036, ¶ 18. Also, "an attorney's obligation to abide by a client's directives 'does not extend to assisting the client in defrauding courts and creditors.'" In re Moore, 2000-NMSC-019, ¶ 4, 4 P.3d 664 (quoting Rawson, 1992-NMSC-036, ¶ 18).

We acknowledge the difference between a medical provider and a litigation-funding company that charges exorbitant interest rates, but a lawyer's promise to one is no different than a lawyer's promise to the other. A lawyer should not make a promise that he or she does not intend to honor.

Your actions are in violation of Rules of Professional Conduct 16-115(D), by not promptly delivering to the company amounts it was entitled to receive or conversely, 16-115(E), by not holding the amount to which there was a dispute in your IOLTA account until the dispute was resolved; and Rule 16-804(C), by refusing to honor your promise to make the payment.

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

Dated October 2019
The Disciplinary Board of the
New Mexico Supreme Court

By
Hon. Cynthia A. Fry
Board Chair

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF ADMISSION

Sara Rose Klemundt
Law Offices of the Public Defender
505 Marquette Avenue, NW, Suite 120
Albuquerque, NM 87102
505-369-3600
sara.klemundt@lopdnm.us

Amanda Krasulick
Modrall, Sperling, Roehl, Harris & Sisk, PA
PO Box 2168
500 Fourth Street, NW (87102)
Albuquerque, NM 87103
505-848-1800
akrasulick@modrall.com

Thomas D. Kricka
New Mexico Legislative Council Service
490 Old Santa Fe Trail
Santa Fe, NM 87501
505-986-4600
tom.kricka@nmlegis.gov

Dominic L. LaFayette
New Mexico Human Services Department
Child Support Enforcement Division
2732 N. Wilshire Blvd.
Roswell, NM 88201
575-624-4011
575-624-6187 (fax)
dominic.lafayette@state.nm.us

Joseph Patrick Laux
7721 N. Moonlight Lane
Paradise Valley, AZ 85253
602-821-1616
pat@jplaux.com

Isaac A. Leon
Briones Business Law Consulting, PC
8500 Menaul Blvd., NE
Albuquerque, NM 87112
505-246-0120
il@brionesbusinesslaw.com

Chang-Hsing Jason Liang
3974 Sorrento Valley Blvd., Suite 100, PMB #910984
San Diego, CA 92121
858-736-7983
jliang@lziip.com

Katherine Elena Liljestrand
8750 Georgia Avenue, Apt. 1003D
Silver Spring, MD 20910
505-417-0581
kliljestrand@msn.com

Maya Lindgren
Law Offices of the Public Defender
505 Marquette Avenue, NW, Suite 120
Albuquerque, NM 87102
505-369-3600
maya.lindgren@lopdnm.us

Angelica Michelle Lopez
Rodey, Dickason, Sloan, Akin & Robb
201 Third Street, NW, Suite 2200
Albuquerque, NM 87102
505-768-7310
505-768-7395 (fax)
alopez@rodey.com

David Paul Lopez
Office of the Fifth Judicial District Attorney
400 N. Virginia Avenue, Suite G-2
Roswell, NM 88201
505-622-4121
505-622-4126 (fax)
dlopez@da.state.nm.us

Vladimir L'Ouverture
282 Giotto
Irvine, CA 92614
505-228-1455
vladimirlouverture@gmail.com

Cara R. Lynch
3305 Lykes Drive, NE
Albuquerque, NM 87110
505-977-3025
lynch.cara.nm@gmail.com

Benjamin G. Maggard
2921 San Diego Avenue, SE
Albuquerque, NM 87106
505-554-7003
benmaggard@gmail.com

Molly Mae Mahoney
Chapman & Priest
PO Box 92438
4100 Osuna Road, NE, Suite 2-202 (87109)
Albuquerque, NM 87199
505-242-6000
505-213-0561 (fax)
mollymahoney@cplawnm.com

Katie Rose Marion
McGinn, Montoya, Love & Curry PA
201 Broadway Blvd., SE
Albuquerque, NM 87102
505-843-6161
kmarion@mcginnlaw.com

Torry McFall
9015 Vistas Drive, NE
Albuquerque, NM 87113
505-918-0533
torrymcfall@gmail.com

Kasey Marie McGough
3830 Castle Ridge Drive
Longview, TX 75605
903-720-0541
kaseymariemcgough@gmail.com

Gayle E. Miller
2506 W. Tanya Road
Phoenix, AZ 85086
602-487-7349
ggmiller78@gmail.com

Meghan Elizabeth Moore
U.S. Army JAG Corps
207 Hedgerow Lane
Yorktown, VA 23693
757-813-6949
megmoore624@gmail.com

Susana Macias Muñoz
The Justice Legal Team, LLC
755 S. Telshor Blvd., Suite C202
Las Cruces, NM 88011
575-652-4859
susana@thejusticelegalteam.com

Bruce P. Murchison
Office of the Eleventh Judicial District Attorney
333 S. Miller Avenue
Farmington, NM 87401
505-599-9810
bmurchison@da.state.nm.us

Maithreyi Nandagopalan
Law Offices of the Public Defender
505 Marquette Avenue, NW, Suite 120
Albuquerque, NM 87102
505-835-1530
mitha.nandagopalan@lopdnm.us

Bryan Webster Nickerson IV
Office of the Second Judicial District Attorney
520 Lomas Blvd., NW
Albuquerque, NM 87102
505-388-4723
bryan.nickerson@da2nd.state.nm.us

Dominique C. Oliver
deGraauw Law Firm
316 Osuna Road, NE, Suite 302
Albuquerque, NM 87107
505-322-2144
dominique@dglawfirmpc.com

Benjamin Daniel Osborn
United States District Court, District of New Mexico
333 Lomas Blvd., NW
Albuquerque, NM 87102
505-348-2280
benjamin_osborn@nmd.uscourts.gov

Ranime R. Oueis
10336 Dunbar Street, NW
Albuquerque, NM 87114
505-903-1152
oueisra@gmail.com

Kimberly Elaine Panian
1404 Ridgeback Road, Apt. B
Chula Vista, CA 91910
619-240-4132
kimepanian@gmail.com

Certiorari Denied, May 15, 2019, No. S-1-SC-37524.

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-028

No. A-1-CA-35944 (filed January 10, 2019)

CITY OF SANTA FE ex rel.
SANTA FE POLICE DEPARTMENT,
Petitioner-Appellant,
v.
ONE (1) 1989 BLACK SAAB SEDAN
V.I.N. Y53AT76LXK7020541
NEW MEXICO LICENSE NO. 312TNC,
Respondent,
and
ROBERT H. BOULANGER,
Claimant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
FRANCIS J. MATHEW, District Judge

KELLEY BRENNAN,
City Attorney
R. ALFRED WALKER,
Assistant City Attorney
MICHAEL PRINZ,
Assistant City Attorney
Santa Fe, New Mexico
for Appellant

ROBERT H. BOULANGER
New Orleans, Louisiana
Pro Se Appellee

Opinion

Julie J. Vargas, Judge

{1} The City of Santa Fe (the City) appeals the district court's order directing the return, upon stated conditions, of Robert Boulanger's (Claimant) car, which was seized pursuant to the City's forfeiture ordinance, Santa Fe, N.M., Code § 24-9 SFCC 1987 (1993, amended 2012) (Santa Fe Ordinance). This appeal requires us to determine whether the New Mexico Forfeiture Act (NMFA), NMSA 1978, §§ 31-27-1 to -11 (2002, as amended through 2015), preempts the Santa Fe Ordinance. Consistent with this Court's recent holding in *Espinoza v. City of Albuquerque*, ___-NMCA-___, ___ P.3d ___ (No. A-1-CA-35908, Dec. 5, 2018), we conclude that it does and therefore vacate the district court's judgment and remand the matter to the district court with instructions to dismiss the City's forfeiture petition and unconditionally order the return of Claimant's vehicle.

BACKGROUND

{2} On April 22, 2016, law enforcement officials stopped Claimant for a traffic violation. The Santa Fe Police Department took custody of the car pursuant to the Santa Fe Ordinance, after determining that at the time Claimant was driving the car, his driver's license was revoked or denied as a result of a prior DWI arrest or conviction. Claimant sought a hearing on the forfeiture matter, and following a hearing on the merits, the district court ordered the return of Claimant's vehicle pursuant to the "safe harbor" provision of the Santa Fe Ordinance. *See* Santa Fe, N.M., Code § 24-9.6. The City appealed, and in assigning the case to the general calendar, this Court sought briefing from the parties regarding "the preemptive effect, if any, of the amendment to the [NMFA], to prohibit civil forfeiture."

DISCUSSION

A. The NMFA Preempts the Ordinance

{3} The City recognizes in its brief that the preemption issue in this case is the same as the one addressed by this Court in *Espinoza*, ___-NMCA-___, ¶ 3, ___ P.3d ___. In *Espinoza*, we characterized the NMFA as a general law that "applies generally throughout the state, relates to a matter of statewide concern, and impacts everyone across the entire state." *Id.* ¶ 17. We then compared the ordinance at issue therein, the Albuquerque, N.M. Rev. Ordinance ch. 7, art VI, § 7-6-1 to -7 (1992, as amended through 2017) (Albuquerque Ordinance), which purports to allow for *civil* forfeiture, with the NMFA, which was created to "*make uniform* the standards and procedures for the seizure and forfeiture of property subject to forfeiture" and "ensure that *only* criminal forfeiture is allowed in this state." *Id.* ¶ 19 (quoting Section 31-27-2(A)(1), (6)) (emphasis added). We concluded that the Albuquerque Ordinance circumvented the NMFA, since the ordinance by its terms allowed the municipality "to accomplish precisely what the Legislature intended the NMFA to eliminate: *civil* forfeiture." *Id.* In fact, after highlighting the substantive and procedural differences between the NMFA and the Albuquerque Ordinance—conviction as a prerequisite to forfeiture, the availability of replevin hearings, allocation of the burden of proof, and the ability to contest the outcome of the proceedings—we concluded that the Albuquerque Ordinance was "so inconsistent with the terms of the NMFA that the NMFA is the equivalent of an express denial of the [municipality's] authority to enforce the [Albuquerque] Ordinance." *Id.* ¶ 24. At the heart of our conclusion in *Espinoza* was the fact that, while the NMFA "constrains the circumstances under which a person's property may be subject to permanent forfeiture," the Albuquerque Ordinance "simply—and far more strictly—deems

the property associated with the named conduct forfeitable without further consideration." *Id*. We therefore held that the NMFA preempted the Albuquerque Ordinance "because the enforcement of the [Albuquerque] Ordinance frustrates, and, in fact, completely contradicts the Legislature's intent in amending the NMFA." *Id.* ¶ 31; *see ACLU v. City of Albuquerque*, 1999-NMSC-044, ¶ 13, 128 N.M. 315, 992 P.2d 866 (analyzing the preemption issue using the explicitly articulated purposes of the general law to determine whether the local law circumvents and thereby frustrates legislative intent in enacting the statute).

{4} Our task in this case, in light of *Espinoza*, is to determine whether the Santa Fe Ordinance suffers from the same fatal flaws as the Albuquerque Ordinance at issue in *Espinoza*, rendering it unenforceable, or whether it is sufficiently distinguishable to render *Espinoza*'s reasoning inapplicable. Given the substantial similarities between the two ordinances, as well as the City's acknowledgement that the Santa Fe Ordinance at issue here is based on the Albuquerque Ordinance that was subject to preemption in *Espinoza*, we conclude *Espinoza* applies here and the Santa Fe Ordinance is preempted by the NMFA.

{5} The Santa Fe Ordinance, like the Albuquerque Ordinance, is framed as a motor vehicle nuisance abatement tool aimed at reducing the risk of bodily injury, loss of life, and property damage generally associated with the use of motor vehicles in DWI. *See* Santa Fe, N.M., Code § 24-9.2; Albuquerque, N.M. Rev. Ordinance ch. 7, art VI, § 7-6-1 (recognizing that DWI presents a potential risk of "serious bodily injury and loss of life and property"). Both ordinances define as public nuisances the operation of motor vehicles by a person in the commission of a DWI offense or by a person whose license has been suspended or revoked as a result of a DWI arrest. *See* Santa Fe, N.M., Code § 24-9.3 (identifying motor vehicle as public nuisance if "operated by a person who is arrested for a DWI offense" or "[o]perated by a person whose license is currently revoked or denied as a result of a DWI arrest or conviction"); Albuquerque, N.M. Rev. Ordinance ch. 7, art VI, § 7-6-2 (identifying motor vehicle as nuisance if "[o]perated by a person in the commission of a DWI offense" or if "[o]perated by a person whose license is suspended or revoked as a result of conviction for driving while intoxicated"). Like the Albuquerque Ordinance, the Santa Fe Ordinance allows for the seizure of the vehicle of a person who is arrested—but not convicted—of DWI, provides that the vehicle shall not be subject to replevin, and requires that the owner of the property carry the burden of proof—a burden which is distinct from that stated in the NMFA. *See* Santa Fe, N.M. Code § 24-9.5(B), (C), (E); § 24-9.7(A); Albuquerque, N.M. Rev. Ordinance ch. 7, art VI, § 7-6-5(B), (C), (D); Albuquerque, N.M. Rev. Ordinance ch. 7, art VI, § 7-6-7; *see also Espinoza*, ___-NMCA-___, ¶¶ 20-23. In all, the Santa Fe Ordinance is marred by the same features that the *Espinoza* court pointed as a basis for preemption in analyzing the Albuquerque Ordinance.

{6} As was the case in *Espinoza*, the City argues that the distinction between criminal and civil forfeiture renders the purpose of the NMFA different from that of the Santa Fe Ordinance and that the application of the NMFA is limited, based on the absence of an explicit provision incorporating the NMFA into the Santa Fe Ordinance. We flatly rejected both arguments in *Espinoza*. The municipality in *Espinoza*, like the City here, argued that because the Albuquerque Ordinance did not contain "language expressly providing that the NMFA applies," the NMFA could not preempt the Albuquerque Ordinance. *Espinoza*, ___-NMCA-___, ¶ 27. As we noted in *Espinoza*, such an approach "subverts the NMFA's clearly stated purpose" of ensuring that only criminal forfeiture exists in New Mexico; "[t]he inferior of two governing bodies . . . cannot exempt itself from the application of the sovereign's laws." *Id.* ¶¶ 28-29.

{7} In light of the substantial similarities between the two forfeiture ordinances, and the considerable overlap between the legal questions and arguments at issue in *Espinoza* and in this case, we find no reasoned basis to depart from the analysis and conclusion of *Espinoza*. We therefore hold that the NMFA denies the City authority to seize and forfeit property under the Santa Fe Ordinance because the enforcement of the Santa Fe Ordinance not only frustrates, but contradicts, the Legislature's intent in enacting the NMFA. Given this conclusion, we have no occasion to address the remaining issue raised by the City on appeal.

CONCLUSION

{8} The judgment of the district court applying the provisions of the Santa Fe Ordinance is vacated and the matter is remanded to the district court with instructions to dismiss the City's petition and order the unconditional return of Claimant's vehicle.

{9} IT IS SO ORDERED.

JULIE J. VARGAS, Judge

WE CONCUR:

J. MILES HANISEE, Judge

DANIEL J. GALLEGOS,
Judge Pro Tempore

Certiorari Denied, March 13, 2019, No. S-1-SC-37537.

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-029

No. A-1-CA-35414 (filed January 22, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JENNIFER SIMPSON,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
KAREN L. TOWNSEND, District Judge

HECTOR H. BALDERAS,
Attorney General
MARKO D. HANANEL,
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

BENNETT J. BAUR,
Chief Public Defender
TANIA SHAHANI,
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Daniel J. Gallegos, Judge Pro Tempore

{1} Defendant Jennifer Simpson appeals from the district court's denial of her motion to suppress evidence that she contends was obtained as the result of an illegal seizure in violation of the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. Following a hearing resulting in the denial of her suppression motion, Defendant entered a conditional guilty plea to driving while intoxicated (DWI) and driving on a revoked license, reserving her right to appeal the denial of her motion. Defendant contends that she was seized without reasonable suspicion when she stopped her moving vehicle in response to a police officer's tap on the vehicle's window and that the evidence discovered as a result of her illegal detention must be suppressed. We determine that the police officer's initial contact with Defendant was consensual. Accordingly, we affirm the district court's denial of Defendant's suppression motion.

BACKGROUND

{2} On June 17, 2015, in Farmington, New Mexico, Mark Kennedy, a park ranger and animal control officer, was going about his evening duties at a city park complex. At around 11:00 p.m., he noticed a car drive into a nearby parking lot. The parking lot was park property, partially paved, and poorly lit. The driver of the car—later identified as Defendant—parked and turned off her lights. Officer Kennedy found this suspicious because, while not posted as such, the park's official closing time was 10:00 p.m. He reported the suspicious vehicle to dispatch. Farmington Police Officer Nick Adegite arrived in uniform and in a marked patrol car at approximately 11:20 p.m. to investigate Officer Kennedy's suspicious vehicle report. He entered the parking lot and parked near Defendant's stationary vehicle. Officer Adegite at no time engaged his vehicle's emergency lights.

{3} As Officer Adegite approached Defendant's vehicle on foot, Defendant turned on her lights and started to drive away. Officer Adegite then reached out and tapped on the window of Defendant's moving vehicle. Defendant stopped and rolled down her window. Officer Adegite quickly detected the strong odor of alcohol, which led to a DWI investigation and Defendant's eventual arrest. Ultimately, Defendant entered a conditional guilty plea, reserving the right to appeal the district court's denial of her motion to suppress.

DISCUSSION

{4} On appeal, Defendant argues that she was illegally seized when she stopped her vehicle to comply with Officer Adegite's signal to stop because the police officer lacked sufficient reasonable suspicion to make an investigatory stop. For the reasons that follow, we hold that Officer Adegite's tap on Defendant's car window, without more, constituted only a consensual encounter between the officer and Defendant. Therefore, there was no seizure at the time Defendant rolled down her window and Officer Adegite observed a strong odor of alcohol emanating from inside the vehicle.

I. Standard of Review

{5} In reviewing a district court's ruling denying a motion to suppress, this Court draws all reasonable inferences in favor of the ruling and defers to the district court's findings of fact as long as they are supported by substantial evidence. *State v. Jason L.*, 2000-NMSC-018, ¶¶ 10-11, 129 N.M. 119, 2 P.3d 856. If the district court does not state on the record a disbelief of uncontradicted testimony, we "presume the court believed all uncontradicted evidence." *Id.* ¶ 11. "When a seizure occurred and whether it was based on reasonable suspicion are mixed questions of fact and law because they involve the mixture of facts and evaluative judgments." *State v. Eric K.*, 2010-NMCA-040, ¶ 14, 148 N.M. 469, 237 P.3d 771. We evaluate mixed questions de novo. *Id.*

II. The Initial Encounter Was Consensual and Did Not Constitute a Seizure

{6} Investigatory detentions and arrests are considered seizures for the purposes of the Fourth Amendment's protection against unreasonable searches and seizures. *Jason L.*, 2000-NMSC-018, ¶ 14. While both the State and Defendant acknowledge that Defendant was seized

by Officer Adegite at some point during the encounter, they disagree as to when exactly the seizure occurred. Defendant contends that she was seized when she stopped her vehicle in response to Officer Adegite's tap on her window. The State argues that Defendant was not seized until sometime after Officer Adegite observed signs of intoxication, with all prior events being consensual in nature. "The point at which the seizure occurs is pivotal because it determines the point in time the police must have reasonable suspicion to conduct an investigatory stop." *State v. Harbison*, 2007-NMSC-016, ¶ 10, 141 N.M. 392, 156 P.3d 30.

{7} Under *United States v. Mendenhall*, 446 U.S. 544 (1980), "a person is seized within the meaning of the [F]ourth Amendment when, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *State v. Lopez*, 1989-NMCA-030, ¶ 4, 109 N.M. 169, 783 P.2d 479. Whether a defendant has been seized "is a case-by-case determination balancing the intrusion into individual privacy against the [s]tate's interest in crime prevention, looking at the totality of the circumstances." *State v. Murry*, 2014-NMCA-021, ¶ 12, 318 P.3d 180.

{8} The police do not need justification to approach a person and ask that person questions, so long as the actions of the officers do not "convey a message that compliance with their requests is required." *Jason L.*, 2000-NMSC-018, ¶ 14 (internal quotation marks and citation omitted). Police contact is consensual so long "as a reasonable person would feel free to disregard the police and go about his business[] or to decline the officers' requests or otherwise terminate the encounter." *State v. Scott*, 2006-NMCA-003, ¶ 18, 138 N.M. 751, 126 P.3d 567 (internal quotation marks and citation omitted). "However, if an officer conveys a message that an individual is not free to walk away, by either physical force or a showing of authority, the encounter becomes a seizure under the Fourth Amendment." *State v. Gutierrez*, 2008-NMCA-015, ¶ 9, 143 N.M. 522, 177 P.3d 1096 (internal quotation marks and citation omitted). Additionally, for purposes of the Fourth Amendment, "a seizure based on a show of authority, as opposed to physical force, requires '*submission* to the assertion of authority.' " *Harbison*, 2007-NMSC-016, ¶ 13 (quoting *California v. Hodari D.*, 499 U.S. 621, 626 (1991)). However, in *State v. Garcia*, 2009-NMSC-046, ¶ 35, 147 N.M. 134, 217 P.3d 1032, our Supreme Court held that our State Constitution does not require submission to authority, and instead, the "free-to-leave" test articulated in *Mendenhall* provides the standard for determining whether a person is seized for purposes of Article II, Section 10 of the New Mexico Constitution. We decide this appeal on state constitutional grounds, applying the *Mendenhall* "free-to-leave" test.

{9} In determining whether a person was seized, "we evaluate (1) the circumstances surrounding the contact, including whether police used a show of authority; and (2) whether the circumstances of the contact reached such a level of accosting and restraint that a reasonable person would have believed he or she was not free to leave." *Scott*, 2006-NMCA-003, ¶ 17 (internal quotation marks and citation omitted). The first of these determinations is a fact-based inquiry, which we review for substantial evidence. *Jason L.*, 2000-NMSC-018, ¶ 19. The second is a legal inquiry wherein we apply those facts to the law de novo. *Id.*

A. Circumstances Surrounding the Contact

{10} Evaluating the circumstances surrounding the police-citizen contact in this case, we initially observe that the district court did not make any factual findings, save for noting that Officer Adegite did not employ lights or sirens or otherwise make a show of force. A lack of factual findings "is a regular occurrence when we review decisions on motions to suppress evidence in criminal cases." *State v. Gonzales*, 1999-NMCA-027, ¶ 11, 126 N.M. 742, 975 P.2d 355. In these circumstances, we presume that the district court believed the uncontradicted testimony of the two witnesses, Officer Kennedy and Officer Adegite. *See Murry*, 2014-NMCA-021, ¶ 10 ("If the district court does not state on the record a disbelief of uncontradicted testimony, we presume the court believed all uncontradicted evidence." (internal quotation marks and citation omitted)).

{11} As indicated, Officer Adegite arrived after 11:00 p.m. at a poorly lit and partially paved parking lot behind a municipal public park to investigate a report of a suspicious vehicle. He was in uniform and entered the parking lot in a marked patrol vehicle without his emergency equipment activated. Other than Defendant's vehicle, the parking lot was empty and there were no other vehicles or members of the public in the vicinity.

{12} Officer Adegite parked his patrol vehicle in the parking lot. It is unclear from the record how close Officer Adegite parked to Defendant's car or whether Defendant saw the police vehicle as it entered the parking lot. Upon exiting his patrol car, Officer Adegite approached Defendant's vehicle on foot. As he neared the vehicle, Defendant began to drive away. Officer Adegite then tapped on the window of Defendant's moving vehicle (how slowly the vehicle was moving is also unclear from the record), without making any other statement, gesture, or signal. Defendant stopped her vehicle and rolled down the window. It was at that point that Officer Adegite could detect an odor of alcohol coming from inside the vehicle, ultimately leading to Defendant's arrest for DWI.

B. A Reasonable Person Would Have Felt Free to Leave

{13} The initial encounter between Officer Adegite and Defendant entailed little more than the officer's approach toward Defendant's vehicle and his ensuing tap on the car window. The linchpin of Defendant's suppression issue is whether this conduct constituted a "show of [police] authority" at such a level of "accosting and restraint" that it would have conveyed the message to Defendant that she was not free to leave. *Scott*, 2006-NMCA-003, ¶ 17. Three factors should be considered in determining whether a reasonable person would feel free to walk, or more accurately here, to drive away from an encounter with police: "(1) the conduct of the police, (2) the person of the individual citizen, and (3) the physical surroundings of the encounter." *Jason L.*, 2000-NMSC-018, ¶ 15 (internal quotation marks and citation omitted). Examples of circumstances that might indicate a seizure would be "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Lopez*, 1989-NMCA-030, ¶ 3 (quoting *Mendenhall*, 446 U.S. at 554).

{14} Clearly, none of the circumstances enumerated in *Lopez* are present in this case. That is, although Officer Adegite was in uniform and drove into the parking lot in his marked patrol vehicle, there is no evidence that he displayed a weapon, physically touched Defendant, or used

language or tone of voice that would indicate that compliance might be compelled. Further, as the district court found, Officer Adegite did not employ lights or sirens or otherwise make a show of force. He simply tapped on Defendant's window.

{15} A police officer's conduct in tapping on the window of a *parked* car, without more, is typically not enough to constitute a seizure. In *County of Grant v. Vogt*, 2014 WI 76, ¶¶ 4-5, 356 Wis. 2d 343, 850 N.W.2d 253, the officer observed the defendant park in a lot next to a closed park. The officer parked his squad car behind but not blocking the defendant's stationary and idling vehicle, approached the vehicle on foot, and "rapped" on the window. *Id.* ¶¶ 6-7. Although the officer was in uniform, he did not activate his vehicle's overhead lights. *Id.* A majority of the Wisconsin Supreme Court held that this was not a seizure, concluding that "[a]lthough it may have been [the defendant's] social instinct to open his window in response to [the deputy's] knock, a reasonable person in [the defendant's] situation would have felt free to leave." *Id.* ¶ 53. This Court reached a similar holding in an unpublished opinion. *See Padilla v. Motor Vehicle Div.*, No. 30,646, mem. op., at *2 (N.M. Ct. App. Aug. 14, 2012) (non-precedential) ("We conclude that no seizure occurred where the officer parked his marked patrol unit fifteen feet away from [the d]efendant's vehicle, approached [the d]efendant's vehicle on foot, in uniform and displaying his badge, and tapped on the vehicle's window."). Likewise, courts in other jurisdictions have concluded that tapping on the window of a parked vehicle does not, in and of itself, constitute a seizure. *See, e.g.*, *Rutledge v. State*, 28 N.E.3d 281, 289 (Ind. Ct. App. 2015) (determining that a police officer who parked near the defendant's vehicle, approached on foot, and then "tapped on the driver side window and attempted to speak with [the defendant in the parked vehicle]" had not effectuated a seizure because "the degree of intrusion was minor"). *But see State v. Patterson*, 2005 ME 26, ¶¶ 15-16, 868 A.2d 188 (concluding that tapping on the window of a parked car, combined with a vocal request to open the window, constituted a seizure).

{16} Consistent with this line of authority, Professor LaFave notes in his search and seizure treatise that "if an officer merely walks up to a person standing or sitting in a public place (or, indeed, who is seated in a vehicle located in a public place) and puts a question to him, this alone does not constitute a seizure." 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.4(a), at 574-77 (5th ed. 2012) (footnotes omitted). He explains that "[t]he result is not otherwise when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to conversation." *Id.* at 594. He goes on to state that, in order to make a basic inquiry, an officer may tap on the window of a car to get the person's attention without transforming the encounter into a seizure. *Id.* at 594-95.

{17} The communicative effect of an officer's tap or knock on a vehicle's window is to gain the attention of the occupant(s) of the vehicle; it does not necessarily indicate "that compliance with the officer's request might be compelled[,]" *Lopez*, 1989-NMCA-030, ¶ 3 (internal quotation marks and citation omitted), nor does it communicate that a person is otherwise not free to leave. *Cf. Murry*, 2014-NMCA-021, ¶ 24 (holding that a reasonable innocent person receiving an order to open his car door from a uniformed police officer "would perceive that he was not free to disregard the order, let alone free to leave"). Moreover, "[t]he critical factor is whether the policeman, even if making inquiries a private citizen would not, has otherwise conducted himself in a manner which would be perceived as a nonoffensive contact if it occurred between two ordinary citizens." *Garcia*, 2009-NMSC-046, ¶ 38 (internal quotation marks and citation omitted). Gaining the attention of a vehicle occupant by tapping on the vehicle's window would generally be perceived as nonoffensive contact if it occurred between two ordinary citizens.

{18} What makes this case different, at least in Defendant's view, is that her vehicle was in motion at the time Officer Adegite tapped on the window. Defendant likens this case to a traffic stop. *See State v. Funderburg*, 2008-NMSC-026, ¶ 13, 144 N.M. 37, 183 P.3d 922 (stating that "[w]hen an officer stops an automobile and detains the occupants for an investigatory stop, the officer has effected a seizure" (internal quotation marks and citation omitted)).[1] As a general rule, a traffic stop constitutes a seizure. *See id.*; *see also Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (holding that "stopping an automobile and detaining its occupants constitute a seizure" under the Fourth Amendment, even where "the purpose of the stop is limited and the resulting detention quite brief" (internal quotation marks and citation omitted)). However, we are not persuaded that we are dealing with a traffic stop in this case.

{19} That is to say, the circumstances of Officer Adegite's approach—on foot—toward Defendant's vehicle as it was idling in the parking lot, followed by a tap on the window as it started pulling away, appear to be more akin to an encounter with a pedestrian or with the occupant of a parked car than to a typical traffic stop. *See United States v. Adegbite*, 846 F.2d 834, 838 (2d Cir. 1988) (holding that where a vehicle "had barely started [driving] in a parking lot, moved only fifteen to twenty yards, and was waved to a halt by DEA agents on foot," the situation was "more analogous to the cases of pedestrians and parked cars to which the *Mendenhall* seizure test is applied[,]" and recognizing that the "normal circumstances of a vehicle stop," which "generally involve abundant displays of authority, including police uniforms, sirens and flashing lights, and signals to pull off the highway[,]" were not present). Given the conspicuous absence of the typical displays of authority attendant to a traffic stop—sirens, flashing lights, signals to pull off the highway—we decline to treat this case as one involving a typical traffic stop.

{20} Defendant also asserts that a reasonable person would have felt compelled to stop pursuant to NMSA 1978, Section 30-22-1(C) (1981), which prohibits resisting, evading, or obstructing an officer. The plain language of Section 30-22-1(C) prohibits "willfully refusing to bring a vehicle to a stop when given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed officer *in an appropriately marked police vehicle*[.]" (Emphasis added.) In this case, along with the lack of typical displays of authority attendant to a traffic stop mentioned above,

[1]We note that Defendant did not make this specific "traffic stop" argument at trial. However, Defendant did contend that the window tap caused her to stop her vehicle, and she presented the necessary evidence to support the legal principle. Therefore, we will consider the argument on its merits. *See State v. Paananen*, 2015-NMSC-031, ¶ 11, 357 P.3d 958 (determining that an issue was preserved where the state sufficiently asserted the issue and adduced the evidence necessary to support the legal principle, and where the defendant had an opportunity to respond).

we also note that Officer Adegite was not in his police vehicle when he approached Defendant's vehicle and tapped on the window. Defendant has not provided us with any argument or authority as to how Section 30-22-1(C) applies here when Officer Adegite was not *in* his police vehicle. Where a party cites no authority to support an argument, we may assume no such authority exists. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329.

{21} In the end, we view the fact that Defendant's vehicle was moving as but one of the myriad factors to be evaluated in our totality of the circumstances analysis. *See Michigan v. Chesternut*, 486 U.S. 567, 572-73 (1988) (eschewing bright-line tests and describing the *Mendenhall* free-to-leave test as "necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation"). In this case, Officer Adegite, alone, in uniform, and on foot, approached a moving vehicle in a parking lot, and without displaying a weapon or making any gestures or uttering any commands for Defendant to stop, simply tapped on the vehicle's window. Had this window tap occurred in a similar situation involving a parked vehicle, the communicative effect would have been to gain the attention of the vehicle's occupant in order to initiate a consensual encounter and nothing more. We see no meaningful distinction in the communicative effect of the window tap—and surely not of constitutional dimension—on these facts, where the vehicle had barely begun to move after idling in a parking lot.

{22} Viewing the circumstances in their totality, and balancing the intrusion into Defendant's privacy against the State's interest in crime prevention, *see Jason L.*, 2000-NMSC-018, ¶ 14, we conclude that Officer Adegite's approach on foot and his minimally intrusive tap on Defendant's car window did not constitute a "show of authority" at such a level of "accosting and restraint" that it would have conveyed the message to Defendant that she was not free to leave. Therefore, there was no seizure at the point at which Defendant stopped and rolled down her window.

CONCLUSION

{23} Accordingly, we affirm.

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

DANIEL J. GALLEGOS,
Judge Pro Tempore

WE CONCUR:
LINDA M. VANZI, Chief Judge
JULIE J. VARGAS, Judge

Certiorari Granted, May 17, 2019, No. S-1-SC-37570.

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-030

No. A-1-CA-36368 (filed February 5, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
RICKY QUINTANA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY
GERALD E. BACA, District Judge

Certiorari Granted, May 17, 2019, No. S-1-SC-37570.

HECTOR H. BALDERAS,
Attorney General
MAHA KHOURY,
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

BENNETT J. BAUR,
Chief Public Defender
NINA LALEVIC,
Assistant Public Defender
J.K. THEODOSIA JOHNSON,
Assistant Public Defender
Santa Fe, New Mexico
for Appellant

Opinion

Linda M. Vanzi, Judge

{1} The unopposed motion for publication filed by the State was granted. The Memorandum Opinion filed in this case on January 14, 2019, is withdrawn and this Formal Opinion is substituted in its place.

{2} Defendant Ricky Quintana appeals the district court's order of commitment on the ground that the district court improperly extended the period of commitment based on aggravating circumstances from fifteen years to twenty years. We affirm.

BACKGROUND

The Facts Leading to Appeal

{3} Michael Grube (Decedent) was found dead on the floor of Defendant's residence. The State and Defendant stipulated that "Defendant . . . took the life of Michael Grube on or about April 11, 2003, and amputated Mr. Grube's penis, scrotum and testes." Defendant was charged with an open count of murder and tampering with evidence.

{4} Roughly three years later, in June 2006, the parties stipulated that (1) Defendant was incompetent to stand trial and dangerous; (2) there was not a substantial probability that he would attain competency within a reasonable period of time; (3) there was clear and convincing evidence that he committed second degree murder; (4) aggravating circumstances existed; and (5) the court should enter an order of commitment for a period not to exceed eighteen years—a term based on the fifteen-year sentence for second-degree murder with an additional three years for aggravated circumstances. Defendant has been housed at the New Mexico Behavioral Health Institute from the date of arrest to the present.

{5} Approximately eight years later, Defendant was found competent to proceed to trial. However, shortly before trial was to begin, questions about Defendant's competency to stand trial were raised during a motion hearing. The district court vacated the trial setting and instead held an evidentiary hearing in April 2016 pursuant to NMSA 1978, Section 31-9-1.5 (1999) to determine the sufficiency of the evidence for the two charges in this case: an open count of murder and tampering with evidence. After the hearing, the parties stipulated that the evidence was clear and convincing that Defendant had committed the crime of second-degree murder.

{6} At a commitment hearing in February 2017, the district court took additional evidence regarding mitigating and aggravating circumstances. Based on evidence at the April 2016 and February 2017 hearings, the district court found that

> 4. The Defendant committed the murder of [Decedent] with extreme viciousness and brutality, as evidenced by testimony presented at the evidentiary hearing on April 11th, 2016 and the commitment hearing on February 24th, 2017; to include the near decapitation of the body, the removal of the genitals, the stabbing of the anus, as well as the numerous wounds to [Decedent]'s head and torso;
>
> . . . .
>
> 6. . . . Defendant committed the murder of [Decedent] while in a state of psychosis as evidenced by expert testimony at the evidentiary hearing on April 11th, 2016 and the commitment hearing on February 24th, 2017. Based on evidence at those same hearings, . . . Defendant had also previously attacked his brother while in a state of psychosis. If released without supervision, there is a danger that . . . *Defendant would be medically non-compliant and his psychosis would return, thereby creating a threat of harm to the community[.]*

The district court also found that both "[t]he brutality and viciousness with which this crime was committed" and "[the] threat to community safety" were "valid aggravating factor[s] by which to increase Defendant's commitment to the New Mexico Behavioral Health Institute (NMBHI)[.]" Based on these findings, the district court ordered Defendant to be committed to NMBHI for fifteen years (the basic sentence for second-degree murder) plus five years for aggravating circumstances. *See* NMSA 1978, § 31-18-15(A)(4) (2016) (stating that the sentence for a second-degree felony

resulting in death is fifteen years); NMSA 1978, § 31-18-15.1(A) (2009) (permitting alteration of a basic sentence up to one-third based on aggravating or mitigating circumstances).

The New Mexico Mental Illness and Competency Code (NMMIC)

{7} The NMMIC has two purposes: "to protect an incompetent defendant from indefinite and unjust commitment to a mental health institution without due process of law and to protect society from dangerous criminals." *State v. Chorney*, 2001-NMCA-050, ¶ 11, 130 N.M. 638, 29 P.3d 538. Upon a determination by the district court "that there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable period of time . . . , the district court may" conduct criminal commitment proceedings. Section 31-9-1.4. The process for criminal commitment under the NMMIC was described in *State v. Rotherham*, 1996-NMSC-048, ¶ 17, 122 N.M. 246, 923 P.2d 1131. "For criminal commitment, the State must establish by clear and convincing evidence that the defendant committed the criminal act charged." *Id.* "If the State . . . prove[s] that the defendant committed the criminal act charged, the court is required to determine whether the defendant is dangerous." *Id.*; *see* § 31-9-1.5(C)). Section 31-9-1.2(D) states that, in part, " 'dangerous' means that, if released, the defendant presents a serious threat of inflicting great bodily harm on another." "If the court determines by clear and convincing evidence that [the] defendant committed the crime charged and [is] . . . dangerous, the defendant must be detained in a 'secure, locked facility,' Section 31-9-1.5(D)(1), for a period not to exceed the maximum sentence available had he been convicted in a criminal proceeding, Section 31-9-1.5(D)(2)." *Rotherham*, 1996-NMSC-048, ¶ 17.

{8} "The court is further required to conduct a hearing every two years on the issues of competency and dangerousness" and to continue with criminal proceedings if, at any point, the defendant is determined to be competent. *Id.*; *see* § 31-9-1.5(D)(4).

DISCUSSION

{9} Defendant argues that the enhanced sentence based on aggravating circumstances is not permitted under the NMMIC. He does not argue that the commitment order is otherwise erroneous.

{10} Our review of this statutory construction question is de novo. *See Chorney*, 2001-NMCA-050, ¶ 4. "Our task is to ascertain and effectuate the intent of the [L]egislature as to whether the [aggravated circumstances] enhancement can be invoked to enhance a Section 31-9-1.5 commitment." *Chorney*, 2001-NMCA-505, ¶ 4 (internal quotation marks and citation omitted). We strictly construe criminal statutes "providing for more than the basic punishment." *Id.* (internal quotation marks and citation omitted). When construing statutes, we "begin by looking at the language of the statute itself[,]" although "[t]he plain meaning rule must yield on occasion to an intention otherwise discerned in terms of equity, legislative history, or other sources." *State v. Smith*, 2004-NMSC-032, ¶ 9, 136 N.M. 372, 98 P.3d 1022 (internal quotation marks and citation omitted).

{11} Section 31-9-1.5(D)(1), (2) provides that, upon the district court's finding that the defendant committed the crime, and is incompetent and dangerous,

> (1) the defendant shall be detained by the department of health in a secure, locked facility; [and]
>
> (2) the defendant shall not be released from that secure facility except pursuant to an order of the district court which committed him or upon expiration of *the period of time equal to the maximum sentence to which the defendant would have been subject had the defendant been convicted in a criminal proceeding*;

(emphasis added). To the extent Defendant argues that the phrase "maximum sentence" in Section 31-9-1.5(D) refers only to the basic sentences set out in Section 31-18-15, we disagree.

{12} The Criminal Sentencing Act, NMSA 1978, §§ 31-18-1 to -26 (1977, as amended through 2016), plainly distinguishes between basic sentences and enhanced or maximum sentences. The Legislature made clear that a sentence may consist of a "basic" sentence plus additional terms of imprisonment to be imposed after assessment of additional factors. For example, Section 31-18-15(A) defines the "basic sentences" for felonies and Section 31-18-15(B) provides for alteration of those basic sentences: "The appropriate basic sentence of imprisonment shall be imposed upon a person convicted and sentenced pursuant to Subsection A of this section, unless the court alters the sentence pursuant to the provisions of the Criminal Sentencing Act." *See* § 31-18-15.1 ("The judge may alter the basic sentence as prescribed in Section 31-18-15" upon certain findings); § 31-18-17 (providing that a "basic sentence shall be increased" by given periods for habitual offenders). Our cases similarly distinguish between "basic" and "maximum" sentences. *See, e.g.*, *State v. Guerra*, 2001-NMCA-031, ¶ 3, 130 N.M. 302, 24 P.3d 334 ("[T]he *maximum sentence* that may be imposed upon a youthful offender convicted of a non-capital felony is the *basic sentence* prescribed by . . . Section 31-18-15 . . . *plus any enhancements* specifically made applicable to youthful offenders by the Legislature." (emphasis added)); *State v. Gonzales*, 1981-NMCA-086, ¶ 15, 96 N.M. 556, 632 P.2d 1194 (discussing basic and maximum sentences).

{13} Further, our Court in *Chorney* recognized that the use of "maximum sentence" in the NMMIC encompassed not just the basic sentence set forth in Section 31-18-15(A) but also could include enhancements based on a defendant's dangerousness. *See Chorney*, 2001-NMCA-050, ¶¶ 12, 14. In particular, this Court held that "[t]he 'maximum sentence' . . . addresses the possible dangerousness of an incompetent defendant and provides the outer limits for commitment for the purpose of protecting society[,]" *id.* ¶ 12, and that "it is reasonable to conclude that the 'maximum sentence' . . . can consist . . . of basic sentences for the crimes that trigger commitment, and *any enhancements of those basic sentences that are expressly based on inherently dangerous criminal conduct* as set out in Section 31-9-1.5(D) or defined in Section 31-9-1.2." *Chorney*, 2001-NMCA-050, ¶ 14 (emphasis added).

{14} In *Chorney*, the specific question before this Court was "whether the Legislature intended the habitual offender enhancement to be employed even where its application bears no reasonable relationship with dangerousness as defined in the [NMMIC]." 2001-NMCA-050, ¶ 13. The district court had enhanced the defendant's term of commitment beyond the basic sentence because the defendant was a "three-felony habitual offender." *Id.* ¶¶ 2, 13; Section 31-18-17 (providing for enhancement of a basic sentence where the defendant has prior felony convictions). The district court had also enhanced the defendant's term by one year for use of a firearm; on appeal, the defendant did not object to the firearm enhancement and this Court did not comment on the propriety

of that enhancement. *Id*. ¶ 10; *see* § 31-18-16(A) ("When a separate finding of fact by the court or jury shows that a firearm was used in the commission of a noncapital felony, the basic sentence . . . shall be increased by one year[.]"). As to the habitual offender enhancement, this Court observed that "[t]he eight-year enhancement in this case has a more punitive than treatment purpose" and held that the Legislature did not intend that a habitual offender enhancement apply where it did not relate to the NMMIC's treatment or protective purposes. *Id*. ¶¶ 14-16. Because the enhancement there was not related to conduct that was "a specific marker of dangerousness," this Court vacated the enhancement of the defendant's commitment. *Id*. ¶¶ 21-22; *cf. State v. Lopez*, 2009-NMCA-112, ¶ 8, 147 N.M. 279, 219 P.3d 1288 (stating that *Chorney* held that "application of a habitual offender enhancement to extend the duration of commitment was improper because it did not relate to provisions of the NMMIC").

{15} Here, the district court increased the commitment term by five years based in part on the "extreme viciousness and brutality" of Defendant's conduct. Generally, a district court may properly consider the brutality of a defendant's conduct in assessing aggravating circumstances. *See State v. Kurley*, 1992-NMCA-105, ¶ 7, 114 N.M. 514, 841 P.2d 562 ("[T]he brutality of the crime was . . . a circumstance surrounding the crime that could be considered by the trial court in aggravating [the] defendant's sentence."). "The manner in which a crime is committed can bear on a number of factors relevant to sentencing, including [the] defendant's propensity to repeat the crime, the potential for harm resulting from the crime, and [the] defendant's potential for rehabilitation." *Id.* These considerations are also highly relevant to the commitment of an incompetent defendant under the NMMIC, one purpose of which is "to protect society from dangerous [defendants]." *Chorney*, 2001-NMCA-050, ¶ 11; *see Rotherham*, 1996-NMSC-048, ¶ 53 (noting that "the [s]tate cannot release into society an incompetent defendant who has demonstrated a capacity for serious, violent conduct"). Moreover, in the context of commitment proceedings, the circumstances surrounding the alleged criminal conduct, and prior violent conduct may demonstrate dangerousness. *See State v. Gallegos*, 1990-NMCA-104, ¶¶ 12-13, 111 N.M. 110, 802 P.2d 15 ("[T]he fact of guilt under the circumstances of a particular case may permit the trial court to find dangerousness."); *cf. State v. Landgraf*, 1996-NMCA-024, ¶ 23, 121 N.M. 445, 913 P.2d 252 ("A sentence may be properly aggravated based on events surrounding the crimes and the nature of a defendant's threat to society."). In *Gallegos*, where "the [district] court . . . found that a defendant ha[d] cruelly treated a two-year-old child by holding her foot in hot water for half a minute and ha[d] injured his brother with a knife in the course of a family argument," the Court concluded that "the [district] court [could] properly draw an inference that [the] defendant [wa]s dangerous." 1990-NMCA-104, ¶ 13. In that case, the same evidence supported both the district court's finding that the defendant committed child abuse and aggravated battery and its finding that the defendant was dangerous. *Id*. ¶¶ 5, 6, 12.

{16} Defendant contends that his enhanced sentence cannot be justified on the ground that the circumstances surrounding the crime demonstrated that Defendant is dangerous because "dangerousness is a separate—and predicate finding—required before the incompetent defendant may be committed for treatment." Defendant provides no support for the idea that, having determined that a defendant is dangerous as a predicate to commitment, the district court may not also consider the circumstances of the defendant's conduct, and their bearing on defendant's future dangerousness, in determining the term of commitment. Contrary to Defendant's argument, *Chorney* held that a defendant's dangerousness relates directly to the term of commitment, stating, "The 'maximum sentence' . . . addresses the possible dangerousness of an incompetent defendant and provides the outer limits for commitment for the purpose of protecting society." 2001-NMCA-050, ¶ 12. We conclude that the enhancement here was congruent with the NMMIC because the brutality of the conduct and prior violent conduct by Defendant are "specific marker[s] of dangerousness." *Id.* ¶ 21.

{17} Defendant makes one final argument: he argues that aggravating circumstances relate to a defendant's culpability and that a commitment term enhancement based on such culpability is inappropriately punitive and violates due process. The problem with this argument is that it fails to recognize that, in the criminal sentencing context, all sentences are based on the defendant's culpability. In other words, "as applied to sane defendants, all sentences of imprisonment, whether measured by an extended term or not, have as their goals punishment and deterrence." *People v. Pastewski*, 647 N.E.2d 278, 283 (Ill. 1995). "If the punitive character of the [enhancement] precludes its use in determining the maximum commitment period for an [incompetent defendant]," as Defendant argues, "then one must also question whether the regular, nonextended sentencing statutes may be used for that purpose." *Id*. However, Defendant rightly does not argue that commitment for the period of the basic sentence is improperly punitive, as our Supreme Court has stated that "commitment pursuant to Section 31-9-1.5 is not punishment[.]" *State v. Adonis*, 2008-NMSC-059, ¶ 9, 145 N.M. 102, 194 P.3d 717 (alteration, internal quotation marks, and citation omitted)). Hence, so long as the enhancement is consistent with the NMMIC under *Chorney*, the enhancement of a sentence under Section 31-18-15.1 also is not punitive in the commitment context. *See Rotherham*, 1996-NMSC-048, ¶ 53 ("The fact that a criminal defendant is detained for a period of time does not inexorably mean the State has imposed punishment. Rather, because the State seeks to treat an incompetent and to protect the community from danger, detention serves a regulatory rather than a punitive function." (citation omitted)); *cf*. *Pastewski*, 647 N.E.2d at 282 (stating that the district court's application of an enhancement "in determining an [incompetent defendant's] maximum period of commitment [does not] impermissibly alter[] the nature of his confinement, or introduce[] into the commitment an invalid punitive purpose"). We are also not persuaded by Defendant's due process argument which is not developed and lacks merit. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶15, 137 N.M. 339, 110 P.3d 1076 (stating that we will not develop an unclear argument on behalf of a party).

CONCLUSION

{18} For the foregoing reasons, we affirm the district court's order of commitment.

{19} IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:
JULIE J. VARGAS, Judge
JENNIFER L. ATTREP, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-031

No. A-1-CA-36331 (filed February 21, 2019)

COMMUNICATION WORKERS OF AMERICA, AFL-CIO,
Appellant/Cross-Appellee-Petitioner,
v.
STATE OF NEW MEXICO,
Appellee/Cross-Appellant-Respondent.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
CARL J. BUTKUS, District Judge

YOUTZ & VALDEZ, P.C.
SHANE YOUTZ
STEPHEN CURTICE
JAMES A. MONTALBANO
Albuquerque, NM
Rosenblatt & Gosch, PLLC
STANLEY M. GOSCH
Greenwood Village, CO
for Appellant

HECTOR H. BALDERAS,
Attorney General
LORI CHAVEZ,
Assistant Attorney General
Santa Fe, NM
Holcomb Law Office
DINA EILEEN HOLCOMB
Albuquerque, NM
for Appellee

Opinion

Julie J. Vargas, Judge

{1} This case arises from a prohibited practice complaint filed by the Communications Workers of America, AFL-CIO (the Union) against the State of New Mexico (the State). In its complaint, the Union argued that the State violated the Public Employee Bargaining Act (the PEBA). The Public Employee Labor Relations Board's (the Board) Executive Director, Thomas J. Griego, designated as the hearing officer, found the State violated NMSA 1978, Section 10-7E-19(B) (2003) (prohibiting public employers from interfering with, restraining, or coercing public employees in the exercise of their rights guaranteed under the PEBA) and Section 10-7E-19(F) (prohibiting public employers from refusing to bargain collectively in good faith with the exclusive representative). The Board adopted the Hearing Officer's findings and conclusions, with the exception of those related to the Hearing Officer's finding of a violation of Section 10-7E-19(F). The district court, reviewing the case in its appellate capacity, affirmed the Board's decision that no violation of Section 10-7E-19(F) occurred and reversed the Board's decision insofar as it found a violation of Section 10-7E-19(B). Having granted the Union's petition for a writ of certiorari under Rule 12-505 NMRA, we reverse the district court with instructions to remand to the Board for proceedings consistent with this opinion.

I. BACKGROUND

{2} The State has long maintained a practice whereby a bargaining unit employee who files a grievance may use state-paid time to prepare for and participate in grievance meetings, subject to the discretion of the employee's supervisor. Prior to the enactment of the original version of the Public Employee Bargaining Act (PEBA I), NMSA 1978, §§ 10-7D-1 to -26 (1992, repealed 1999), bargaining unit employees were paid for time spent in grievance meetings. In 1994, following PEBA I's enactment, the Union and State entered into a collective bargaining agreement (CBA). In the 1994 CBA, the parties agreed that:

> The Employer shall allow [u]nion officials and stewards who are employees (hereinafter referred to as "employee officials") to attend, on paid status, meetings agreed to by the parties for purposes of administration of this Agreement, including grievance hearings.
> Employee officials may investigate and process grievances on paid status for reasonable periods of time during their normal working hours. Where an employee official needs to consult with another employee concerning a grievance, both employees shall request permission to do so.

Under this CBA, bargaining unit employees were paid for time spent preparing for and participating in grievance meetings, provided they received approval from their supervisor. The 1994 CBA contained a "zipper clause," which provided:

> This agreement shall be deemed the final and complete agreement between the parties and expresses the entire understanding of the Employer and the Unions. This agreement supersedes any and all previous agreements and all conflicting agency and departmental rules, policies and regulations on the same matters except as otherwise specifically provided herein.
> . . . .
> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from collective bargaining, and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Unions, for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and each agree that they shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement. However, the parties continue to have a duty to bargain over any subject or matter

which was not within the knowledge or contemplation of the parties at the time they negotiated or signed this Agreement.

{3} Following PEBA I's repeal in 1999, the Union and State operated for four years without a CBA. During this time, bargaining unit employees continued to be paid for time spent preparing for and participating in grievance meetings. In 2004, after the passage of PEBA II, NMSA 1978, §§ 10-7E-1 to -26 (2003, as amended through 2005), the State and the Union entered into a second CBA. The 2004 CBA largely kept the same language regarding paid time for union officials and stewards, adding limitations on union officials' and stewards' use of union time. Under the 2004 CBA, bargaining unit employees continued to be paid for time spent preparing for and participating in grievance meetings, provided they received approval from their supervisor. The 2004 CBA's zipper clause contained similar language to that of the 1994 CBA, though it deleted the waiver language and stated only:

> [F]or the duration of this Agreement, the Employer is not obligated to bargain over Union initiated changes in terms and conditions of employment unless such changes are proposed pursuant to the terms of this Agreement.
>
> [I]n addition to changes initiated pursuant to its Management Rights (Article 5 of this Agreement), the Employer reserves the right to propose other reasonable changes in the terms and conditions of employment of employees to meet legitimate public service and operating needs, and such changes are subject to negotiation in accordance with the PEBA or any other expedited impasse resolution procedures mutually agreed upon by the parties at the time of such negotiations.

{4} In 2009, the State and the Union entered into a third CBA, which remains in effect. Article 2 of the CBA, titled "Union Rights," provides:

> Section 3. The Employer shall allow [u]nion [o]fficers and stewards to attend, on paid status (utilizing the union time code in the time and labor reporting system), meetings agreed to by the parties for purposes of administration of this Agreement including grievance meetings within the parameters set forth in this section's succeeding paragraphs.
>
> Each union officer or steward shall be entitled to use union time to investigate and process grievances, which they are authorized to settle, within the agency to which they are employed, for reasonable periods of time without charge to pay or to leave. Union time must be pre-approved and will not be disapproved except for operational reasons.
>
> . . . .
>
> When a union officer or steward desires to consult with another employee concerning a grievance on work time, both employees shall request and obtain prior permission to do so.

Section 3 goes on to provide time and procedural parameters for the grant of union time. Article 2 also defines the terms "union officer" and "steward":

> Union [o]fficer means a classified state employee elected as President, Executive Vice-President, Secretary, Treasurer, Agency Vice-President or as Regional Vice President.
>
> Steward means a classified state employee authorized by the local to administer the [CBA].

Under the 2009 CBA, bargaining unit employees continued to be paid for time spent preparing for and participating in grievance meetings, and were paid with either "[u]nion time" or "paid time," i.e., "regular time." The 2009 CBA retained the language of the 2004 CBA's zipper clause.

{5} On December 10, 2013, the Union submitted a grievance on behalf of Jacqueline Quintana. Therein, the Union asserted: "[Quintana] requested union time to meet with [the] representative regarding [a prior] grievance. Management denied use of union time stating the grievant was not a union [o]fficial or [u]nion [s]teward." Quintana subsequently received an e-mail from manager Leon Lopez, explaining he could not grant union time because Quintana was not a union official or steward, which "ha[d] been confirmed with [the Office of Human Resources]." He again wrote to Quintana on December 20, 2013, stating that "management denied you[r] request for union time because the grievant was not a union [o]fficial or [u]nion [s]teward." After citing Article 2, Section 3 of the 2009 CBA, Lopez agreed with management's decision, stating, "You are not a [u]nion [o]fficial or a [u]nion [s]teward; therefore, you would not be entitled to the use of union time."

{6} After the Union continued through the grievance procedure on behalf of Quintana, Behavioral Health Services Division Deputy Director, Karen Meador, wrote to Quintana on January 23, 2014, also upholding management's decision, citing Article 2 of the CBA and stating, "As discussed in the [January 14, 2014] face to face meeting, the Department remains firm in not allowing employees who are neither union stewards nor union officials the opportunity to utilize union time to meet with the Union regarding grievances." The Union's Local 7076 President, Donald Alire, subsequently received a letter dated February 12, 2014, from Human Services Department (HSD) Deputy Cabinet Secretary Charissa Saavedra, reiterating HSD's position that it "has never allowed employees to use union time to meet with a union representative." Contrary to Deputy Secretary Saavedra's claim, Robin Gould, the staff representative for the Union, stated that on February 25, 2014, HSD Human Resources Director Johnna Padilla and Gould "agreed that workers were on paid time."

{7} After discovering that State agencies were granting bargaining unit employees paid time for time spent in grievance meetings, Sandy Martinez, the State Labor Relations Director, "informed the agencies that [u]nion time only applies to [u]nion officers and stewards and the 'union time' code should only be used for officers and stewards." Director Martinez sent a letter on March 5, 2014, to Alire, quoting Article 2, Section 3 of the CBA and stating:

> Please be advised that the State is taking action to ensure that state agencies comply with the above-referenced language. Accordingly, effective the pay period beginning March 29, 2014[,] paid union time will be applied appropriately for union stewards and officers only. Pursuant to Article 2, § 3, bargaining unit employees are not entitled to paid-time of union time. All past practices with regard to paid union time and paid state time that deviated from the above-referenced language of the CBA are ceased.

The Union did not request to bargain re-

garding the change referenced in the State's notice, instead choosing to wait six months before filing a prohibited practices complaint. The Union argued the State's March 5, 2014, "notice informed the [Union] of the [State]'s intent to unilaterally rescind the parties' February 25th agreement and unilaterally change terms and conditions for the rest of the bargaining unit." The Union claimed the State's actions violated Section 10-7E-19(A), (B), (D), (F), and (G).

A. The Hearing Officer

{8} The parties agreed to submit the matter to the Hearing Officer. After reviewing the parties' briefs, affidavits, and exhibits, the Hearing Officer found the terms of the CBA to be ambiguous with regard to payment of bargaining unit employees for time spent preparing for and participating in grievance meetings. Consequently, the Hearing Officer considered the Union's unchallenged evidence of the parties' past practice of paying bargaining unit employees for preparing for and participating in grievance meetings. Indeed, the State's own witness, Labor Relations Administrator Ronald Herrera, stated that he was "aware of at least five (5) instances occurring in 2012 and 2013 in which employees of one (1) agency, the Department of Cultural Affairs, who were not union officers or union stewards, were coded as utilizing union time in the payroll system." Relying on the State's March 5, 2014, letter acknowledgement of a past practice, the affidavit statements of Gould and Alire that the State has engaged in this practice, and six bargaining unit employees' statements and exhibits establishing they were paid either "union time" or "paid time" for time they spent in grievance meetings, the Hearing Officer determined "the past practice of paying employees for preparing and attending their own grievance meetings as either union time or regular work time [was] clearly established." As a result, the Hearing Officer concluded that "the State violated PEBA § 10-7E-19(B) when it unilaterally altered a mandatory subject of bargaining and a longstanding past practice thereby unlawfully restraining and interfering with employees' rights under PEBA."

{9} The Hearing Officer also determined that the State violated Section 10-7E-19(F) by unilaterally altering a mandatory subject of bargaining. The Hearing Officer concluded that the Union was relieved of its duty to request bargaining after receiving the March 5, 2014, letter because the State presented the Union with a *fait accompli*, thereby rendering any request to bargain fruitless. The Hearing Officer found the Union had not established a violation of Section 10-7E-19(A), (D), or (G). The State appealed the Hearing Officer's decision to the Board.

B. The Board

{10} The Board convened on April 7, 2015, to hear the State's appeal. After hearing argument from both parties, the Board voted to adopt the Hearing Officer's findings of fact, conclusions of law and rationale "with the exception of those relating to finding a violation of PEBA § 10-7E-19(F)." In explaining its decision to reverse the Hearing Officer's Section 10-7E-19(F) recommendation, the Board stated "that the Union did not adequately explain why it took no action in a six-month period to request bargaining." Both parties appealed the adverse portions of the Board's decision regarding Section 10-7E-19(B) and (F) to the district court.

C. The District Court

{11} The district court reviewed the case in its appellate capacity under Rule 1-074 NMRA. The district court affirmed the Board's finding that no violation of Section 10-7E-19(F) occurred, explaining that the Union was not relieved of its duty to request bargaining because the State provided the Union with sufficient time to do so and had not implemented the change before notifying the Union. The district court reversed the Board's finding that the State violated Section 10-7E-19(B) because such a finding appeared "inconsistent" with the Board's decision in favor of the State on the Section 10-7E-19(F) issue. Upon the Union's petition, this Court granted certiorari.

II. DISCUSSION

{12} The Union argues the State violated Section 10-7E-19(B) and (F) by unilaterally altering a binding past practice regarding the compensation of bargaining unit employees for time spent preparing for and participating in grievance meetings. The State argues in response that there was no binding past practice and, even if there was, the district court correctly determined that the Union was required to request bargaining on the issue and failed to do so. We are therefore asked to determine (1) whether a binding past practice existed that constituted a mandatory subject of bargaining, and (2) whether the State's notice to the Union regarding the change in past practice constituted a *fait accompli*, thereby precluding a finding that the Union's failure to request bargaining served as a waiver of its right to bargain.

A. Standard of Review

{13} "Upon a grant of a petition for writ of certiorari under Rule 12-505, this Court conducts the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal." *N.M. Corr. Dep't v. AFSCME, Council 18*, 2018-NMCA-007, ¶ 9, 409 P.3d 983 (internal quotation marks and citation omitted omitted), *cert. denied*, ___-NMCERT-___ (No. S-1-SC-36688, Oct. 24, 2017). "We independently review the entire record of the administrative hearing to determine whether the [Board]'s decision was arbitrary and capricious, not supported by substantial evidence, or otherwise not in accordance with law." *Id.* (internal quotation marks and citation omitted); *see* NMSA 1978, § 10-7E-23(B) (providing the standard of review from the board to the district court). "When reviewing an administrative agency's conclusions of law, we review de novo." *AFSCME, Council 18*, 2018-NMCA-007, ¶ 9 (internal quotation marks and citation omitted). Similarly, "[w]e apply a de novo standard of review to administrative rulings regarding statutory construction." *Id.* (alteration, internal quotation marks, and citation omitted). "In the absence of guidance from our own courts, [our] New Mexico Supreme Court has directed that we should interpret language in the PEBA in the manner that the same language of the National Labor Relations Act has been interpreted." *Cty. of Los Alamos v. Martinez*, 2011-NMCA-027, ¶ 21, 150 N.M. 326, 258 P.3d 1118 (alteration, internal quotation marks, and citation omitted); *see Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 18, 125 N.M. 401, 962 P.2d 1236. "We will not disturb the agency's factual findings if supported by substantial evidence, although we engage in a whole record review." *Montano v. N.M. Real Estate Appraiser's Bd.*, 2009-NMCA-009, ¶ 8, 145 N.M. 494, 200 P.3d 544. "Substantial evidence is evidence that a reasonable mind would regard as adequate to support a conclusion." *Id.* ¶ 9 (internal quotation marks and citation omitted).

B. Past Practice

{14} Before discussing the legal impact of the State's March 5, 2014, letter on the parties' claimed past practice regarding "union time" and "paid time," we must first determine whether a past practice existed. The evidence establishing the State's past practice of paying bargaining unit em-

ployees to prepare for and participate in grievance meetings, subject to supervisory approval, was unchallenged in the parties' briefs, affidavits, and exhibits submitted to the Hearing Officer. Moreover, Director Martinez acknowledged the past practice in her March 5, 2014, letter stating, "All past practices with regard to paid union time and paid state time . . . are ceased." We therefore defer to the Board's finding that this past practice existed. *See Montano*, 2009-NMCA-009, ¶ 8 ("We will not disturb the agency's factual findings if supported by substantial evidence, although we engage in a whole record review.").

{15} Having determined a past practice existed, we must now consider whether the past practice is binding on the parties notwithstanding the terms of the CBA. The interpretation of a CBA's terms "is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960); *see Cruz-Martinez v. Dep't of Homeland Sec.*, 410 F.3d 1366, 1370 (Fed. Cir. 2005) ("Clear and long-standing practices of the parties—in other words, 'past practices'—can establish terms of the agreement that are as binding as any specific written provision. . . . Generally, factors relevant to a finding of a binding past practice are the duration and consistency of its application and the parties' acquiescence in it."); *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1243 (10th Cir. 1998) ("It is well-established that when interpreting the terms of a labor contract, a fact-finder is entitled—and indeed, in some cases required—to look to the past practices of the parties and the 'common law of the shop' to determine the parties' contractual obligations."); *see also* § 10-7E-17(A)(1) (providing that "public employers and exclusive representatives . . . shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties"). As we have previously indicated, the "common law of the shop," i.e., past practices, are used to interpret ambiguous phrases contained in a CBA. *See Alarcon v. Albuquerque Pub. Sch. Bd. of Educ.*, 2018-NMCA-021, ¶ 74, 413 P.3d 507, *cert. denied*, ___-NMCERT-___ (No. S-1-SC-36811, Jan. 23, 2018).

{16} In the present case, the Hearing Officer determined that the CBA was ambiguous regarding the grant of "union time," concluding that the "CBA does not limit the use of 'union time' solely to union officers and stewards—its use is a matter of an employee's supervisor's discretion." The Hearing Officer thus concluded, "There is no express limitation on [the] use [of 'union time'] other than the reasonable exercise of a supervisor's discretion." The Hearing Officer's Report and Recommendation, including his findings of fact, conclusions of law and rationale, were adopted by the Board, except those findings relating to the State's refusal to bargain in good faith. We acknowledge the absence of express language including bargaining unit employees in the list of those entitled to paid status for grievance meetings. However, in light of the parties' course of dealing throughout the years, and the language in the CBA providing that "both employees shall request and obtain prior permission" in those instances where "a union officer or steward desires to consult with another employee concerning a grievance on work time," we agree with the Board that there is an ambiguity with respect to the type of employees entitled to "union time" for purposes of grievance meetings. *See ConocoPhillips Co. v. Lyons*, 2013-NMSC-009, ¶ 23, 299 P.3d 844 ("In evaluating whether a term is ambiguous, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance." (internal quotation marks and citation omitted)). Moreover, given the CBA's silence on the issue of granting "paid time," i.e., "regular time," for grievance meetings, we conclude the CBA is ambiguous on this matter as well. The State, relying on *E.I. Du Pont & Co., Inc.*, 294 N.L.R.B. 563 (1989), argues that any past practice regarding the grant of "union time" or "paid time" to bargaining unit employees for time preparing for and participating in grievance meetings cannot be considered an implied term of the CBA. *E.I. Du Pont & Co., Inc.* states:

> In distinguishing between terms of the agreement and existing practices, we do not suggest that an agreement can never be read as encompassing past practices that are not specifically written into it. But where . . . the contract contains a clause stating that the written agreement is to be the parties' "entire Agreement" except as to any later supplemental agreements "executed in the same manner" as the main agreement, and the past practices in question are *inconsistent* with the written terms, those practices cannot properly be considered implied terms of the agreement.

Id. at 563. However, in this case, we are not faced with a past practice that is *inconsistent* with a CBA's terms—here, the CBA's terms are ambiguous on the subject matter.

{17} Nonetheless, the State argues that binding application of the past practice is prohibited by the CBA's zipper clause. This Court adopted the National Labor Relation Board's standard in *Radioear Corp.*, 214 N.L.R.B. 362 (1974), to determine whether a zipper clause eliminated an otherwise binding past practice. *Martinez*, 2011-NMCA-027, ¶¶ 22-25. In *Radioear Corp.*, the National Labor Relations Board concluded:

> [T]he answer to the question of the employer's bargaining obligation does not, in our view, call for a rigid rule, formulated without regard for the bargaining postures, proposals, and agreements of the parties, but rather, more appropriately, should take into consideration such various factors as (a) the precise wording of, and emphasis placed upon, any zipper clause agreed upon; (b) other proposals advanced and accepted or rejected during bargaining; (c) the completeness of the bargaining agreement as an integration[—]hence the applicability or inapplicability of the parol evidence rule; and (d) practices by the same parties, or other parties, under other collective-bargaining agreements.

214 N.L.R.B. at 363 (alteration and internal quotation marks omitted). In the absence of Board findings regarding the zipper clause's effect, if any, on the past practice involved in the present case, we conclude the Board acted arbitrarily and capriciously in determining that the parties' past practice on the issue of granting "union time" or "paid time" to bargaining unit employees is as binding as the written provisions of the CBA, and is therefore a mandatory subject of bargaining. *See Bernalillo Cty. Health Care Corp. v. N.M. Pub. Regulation Comm'n*, 2014-NMSC-008, ¶ 9, 319 P.3d 1284 ("An agency's ruling is arbitrary and capricious if the agency failed to consider an important aspect of the problem[.]" (internal quotation marks and citation omitted)). Given the fact-bound nature of the effect of the zipper

clause on the past practice, we remand to the Board to make necessary findings and to determine whether the past practice is binding notwithstanding the CBA's zipper clause. If the Board determines the past practice is binding, the Board must then, consistent with the remainder of this decision, determine whether the State's change of this past practice violated the PEBA.

C. Request to Bargain

{18} The Union argues the Board and the district court erred in finding no violation of Section 10-7E-19(F) and that the district court erred in reversing the Board's finding that the State violated the Union's Section 10-7E-19(B) derivative claim.[1] The Union's claims under both Subsection (F) and Subsection (B) of Section 10-7E-19 are based on the State's purported refusal to bargain prior to eliminating the past practice of paying bargaining unit employees for time spent preparing for and participating in grievance meetings, subject to supervisory approval; as such, we address Subsection (F) and Subsection (B) together. Section 10-7E-19(F) provides: "A public employer or his representative shall not . . . refuse to bargain collectively in good faith with the exclusive representative[.]" Section 10-7E-19(B) provides: "A public employer or his representative shall not . . . interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act[.]" Section 10-7E-17(A)(1) sets forth the scope of bargaining: "[P]ublic employers and exclusive representatives . . . shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties." Similarly, the National Labor Relations Act (NLRA) prohibits an employer from "refus[ing] to bargain collectively with the representatives of his employees," 29 U.S.C. § 158(a)(5) (2012), and further provides that the duty "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]" 29 U.S.C. § 158(d).

{19} As the United States Supreme Court has held:

> Clearly, the duty [to bargain collectively] may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact—'to meet and confer'—about any of the mandatory subjects. A refusal to negotiate in fact as to any subject which is within [§] 8(d), and about which the union seeks to negotiate, violates [§] 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of [§] 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of [§] 8(a)(5) much as does a flat refusal.

NLRB v. Katz, 369 U.S. 736, 743 (1962) (alteration and footnotes omitted); *see Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) ("Sections 8(a)(5) and 8(d) of the NLRA . . . require an employer to bargain in good faith with respect to wages, hours, and other terms and conditions of employment. . . . The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." (internal quotation marks and citation omitted)).

{20} To avoid waiving its right to bargain, a union has an obligation to request bargaining when an employer unilaterally changes a mandatory subject of bargaining. *See Ciba-Geigy Pharm. Div.*, 264 N.L.R.B. 1013, 1017 (1982) ("Despite the fact that an employer may have made a unilateral change in a mandatory subject of bargaining, it is well settled that such action may have been permissible if the union had waived its right to bargain over the particular matter."). A union will not, however, "be held to have waived bargaining over a change that is presented to it as a *fait accompli*." *Dresser-Rand Co. v. NLRB*, 838 F.3d 512, 518 (5th Cir. 2016) (internal quotation marks and citation omitted). We adopt the National Labor Relations Board's interpretation of what constitutes a *fait accompli*: "[I]f the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*." *Ciba-Geigy Pharm. Div.*, 264 N.L.R.B. at 1017. Under this analysis, we glean two methods of establishing a *fait accompli*: timing *or* intent. *See Haddon Craftsmen, Inc.*, 300 N.L.R.B. 789, 790 (1990) (analyzing the union's claim of a *fait accompli* under both the timeliness of the notice and the employer's intent); *accord Aggregate Indus. v. NLRB*, 824 F.3d 1095, 1103-05 (D.C. Cir. 2016); *Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1260 (6th Cir. 1995).

1. The Timing of the State's Notice

{21} In this case, the Board's sole explanation for finding no violation of Section 10-7E-19(F) centered on the timing of the State's notice. "To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain." *Ciba-Geigy Pharm. Div.*, 264 N.L.R.B. at 1017. Although the Union argues on appeal that the State's notice was untimely, it expressly waived this argument during the Board hearing. As a result, we will not review this argument on appeal. *See Selmeczki v. N.M. Dep't of Corr.*, 2006-NMCA-024, ¶¶ 23-24, 139 N.M. 122, 129 P.3d 158 (explaining that we "require preservation of issues raised on appeal from an administrative decision[,]" and declining to review an issue waived by a party during an administrative proceeding).

2. The State's Intent

{22} Beyond the timing of the State's notice, the Board did not address whether the State's notice constituted a *fait accompli* because the State had no intention of altering its plans. The language contained in an employer's notice of changes to mandatory subjects of bargaining may be insufficient to establish a *fait accompli* on its own. *See Aggregate Indus.*, 824 F.3d at 1103 (concluding that the employer's notice to the union that it was "going to" enact a policy change was its announcement of a bargaining position, not its unwillingness to negotiate). However, the notice's language, in conjunction with additional evidence of the employer's fixed intent, may serve to establish a *fait accompli*. *See Mercy Hosp.*, 311 N.L.R.B. 869, 873 (1993) ("The [b]oard looks for objective evidence in determin-

[1]To the extent the Union argues an independent, rather than a derivative, basis for its Section 10-7E-19(B) claim, we decline to review this argument as the Union has not cited authority for such a proposition. *See Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482 ("Where a party cites no authority to support an argument, we may assume no such authority exists.").

ing whether an employer has unlawfully presented a union with a *fait accompli*. Further, an employer's use of positive language in presenting its proposal does not constitute an indication that a request for bargaining would be futile." (internal quotation marks omitted)); *Haddon Craftsmen, Inc.*, 300 N.L.R.B. at 790 (explaining that the record "yields no *objective* evidence that, at this point, the [employer] acted in a manner that relieved the [u]nion of its obligation to request bargaining by, e.g., informing the [u]nion that bargaining would be futile or by implementing the changes before announcing them to the [u]nion" (footnote omitted)).

{23} Significantly, the Board's decision contains no indication that it considered the possibility that the State had already implemented, or was in the process of implementing, its stated shift in policy, so as to warrant a finding that the State had no intention of changing its mind. However, Director Martinez's affidavit sheds some light on this issue:

> 5. Due to the misinterpretation by State agencies of the application of [u]nion time, I informed the agencies that [u]nion time only applies to union officers and stewards and the "union time" code should only be used for officers and stewards.
>
> 6. I also clarified with State agencies that bargaining unit employees do not have a right to meet with a [u]nion officer or steward regarding a grievance on work time, but that an employee must request to be able to do so from the employee's supervisor.
>
> 7. I sent notice to Donald Alire, CWA Local 7076 President, on March 5, 2014, informing him of the State's action to ensure the agencies were complying with the collective bargaining agreement.

Although Director Martinez's statement does not specify the date she informed the agencies of this policy, her statement nonetheless suggests that the State had implemented, or began implementing, its shift in policy when it sent the March 5, 2014, letter to Alire. Such an inference is further supported by the facts and circumstances of the Quintana grievance, which reflect that, well prior to Director Martinez's March 5, 2014, notice, the State denied Quintana's request for union time to participate in a grievance meeting and later agreed with the Union that "workers were on paid time."

{24} The Board failed to consider the State's intent in determining whether it presented the Union with a *fait accompli*. The Board's decision was therefore arbitrary and capricious, *see Bernalillo Cty. Health Care Corp.*, 2014-NMSC-008, ¶ 9 ("An agency's ruling is arbitrary and capricious if the agency failed to consider an important aspect of the problem[.]" (internal quotation marks and citation omitted)), and we remand for the Board to consider this issue as well.

III. CONCLUSION

{25} We reverse the district court with instructions to remand to the Board for a determination of whether the CBA's zipper clause eliminated the past practice of paying bargaining unit employees for time spent preparing for and participating in grievance meetings in light of the factors provided in *Radioear*, and, if not, whether the State's actions constituted a *fait accompli* on the basis of the State's intent, thereby excusing the Union from requesting bargaining.

{26} IT IS SO ORDERED.

JULIE J. VARGAS, Judge

WE CONCUR:

J. MILES HANISEE, Judge

JENNIFER L. ATTREP, Judge

Certiorari Denied, May 9, 2019, No. S-1-SC-37644.

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-032

Nos. A-1-CA-35193 and A-1-CA-35225 (filed April 1, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
KARL CANDELARIA,
Defendant-Appellant,
and
STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
NORA CHEE,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Christina P. Argyres, District Judge

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

BENNETT J. BAUR,
Chief Public Defender
J.K. THEODOSIA JOHNSON,
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant Karl Candelaria
JONATHAN TSOSIE
Denver, Colorado
BEN A. ORTEGA
Albuquerque, New Mexico
for Appellant Nora Chee

Opinion

Emil J. Kiehne, Judge Pro Tempore

{1} Defendants Nora Chee and Karl Candelaria each appeal from separate judgments and sentences following a jury verdict finding them both guilty of fraud, forgery, and conspiracy to commit fraud, and Defendant Chee guilty of embezzlement, arising from a scheme in which they stole over $200,000 from the franchisor of Defendant Chee's business by writing unauthorized checks to themselves. Because the two cases arise from the same facts, and Defendants raise similar claims, we consolidate these cases for decision. *See* Rule 12-317(B) NMRA.

{2} Defendants make the following claims on appeal: (1) that the evidence was insufficient to support their convictions for forgery, because the checks and signature stamp that they used to carry out their scheme were authentic, even though their use of those items was unauthorized; (2) that the district court erred in denying their motions to dismiss the charges against them on speedy trial grounds on the stated basis that the motions were filed after the deadline for filing pretrial motions in the district court's scheduling order; (3) that the district court erred when it allowed late-disclosed evidence to be used at trial and did not grant a continuance to allow Defendants to further investigate it; (4) that the district court erred when it allowed a substitute witness to testify as a records custodian; and (5) that the district court erred in allowing a variety of unfairly prejudicial evidence to be admitted at trial. Defendant Candelaria also challenges his two convictions for fraud, arguing that they violate his right to be free from double jeopardy. We agree that Defendant Candelaria's two fraud convictions violate the prohibition on double jeopardy, and remand to the district court with instructions that one of the convictions be vacated. We affirm the district court's judgments and sentences in all other respects.

BACKGROUND

{3} Defendant Chee owned a business called Care Connections, which was a franchise of Around the Clock Healthcare Services (ATC), a medical staffing company based in New York. Care Connections, as a franchisee of ATC, provided Registered Nurses (RNs), Licensed Practical Nurses (LPNs), and various other healthcare workers to healthcare facilities in need of temporary staff. Ms. Chee was also an RN. Chee's boyfriend, Defendant Candelaria, was an employee of Care Connections, where he performed administrative tasks. He was not an RN, nor was he an employee of ATC.

{4} ATC offered a program called the "daily pay program" or "quick pay program," which allowed RNs to submit a timesheet verifying the work that they had done for a healthcare facility, and be paid by ATC that same day rather than having to wait until the end of the next pay period. ATC provided its franchisees, including Defendant Chee's franchise, with check stock and the signature stamp of ATC's Chief Financial Officer, David Kimbell, to facilitate the quick pay program. ATC placed firm restrictions on Defendant Chee's ability to use the signature stamp and check stock: she was authorized to issue checks only to RNs, for amounts of $500 or less, with a limit of one check per person per day. As a principal of the franchise, Defendant Chee was not authorized to issue quick pay checks to herself, even for services she rendered as an RN. Defendant Candelaria was not entitled to receive quick pay checks, because he was not an RN, and thus could not have provided any services that would have entitled him to receive a quick pay check.

{5} Mr. Kimbell and David Savitsky, the Chief Executive Officer of ATC, discovered in 2009 that Care Connections had issued a number of quick pay checks to Defendants Chee and Candelaria in 2008 and 2009, in amounts totaling over $200,000. No documentation established that Defendants performed any work to justify the issuance of those checks. The checks were deposited into two different bank accounts that Defendant Chee had opened, and the money was often quickly withdrawn. Defendant Chee was the only person authorized to make withdrawals from those accounts. During the relevant time period, Defendant Chee also wrote checks for large amounts of money from those accounts to Defendant Candelaria.

{6} Both Defendants were arrested on June 3, 2011, and charged with multiple counts of forgery ($2500 or less), contrary to NMSA 1978, Section 30-16-10(A), (B) (2006); conspiracy to commit forgery, contrary to Section 30-16-10(A), (B) and NMSA 1978, Section 30-28-2 (1979); and fraud (between $2,500 and $20,000), contrary to NMSA 1978, Section 30-16-6 (2006); plus one count of conspiracy to commit fraud (between $2,500 and $20,000), contrary to Section 30-16-6 and Section 30-28-2. The State also charged Defendant Chee with multiple counts of embezzlement, contrary to NMSA 1978, Section 30-16-8 (2007), and Defendant Candelaria with one count of fraud (over $20,000), contrary to Section 30-16-6. The district court consolidated Defendants' cases for trial, and Defendant Chee was convicted of twenty-two counts of forgery, one count of embezzlement, one count of fraud, and one count of conspiracy to commit fraud. Defendant Candelaria was convicted of ten counts of forgery, two counts of fraud, and one count of conspiracy to commit fraud.

DISCUSSION

I. Substantial Evidence Supported Defendants' Forgery Convictions

{7} Defendants claim that substantial evidence did not support their forgery convictions. Specifically, Defendants contend that their conduct did not constitute the crime of forgery because the quick pay checks and signature stamp used in the scheme were genuine, and Defendant Chee endorsed the checks with her own genuine signature. We disagree.

{8} "Although framed as a challenge to the sufficiency of the evidence, Defendant[s'] argument requires us to engage in statutory interpretation to determine whether the facts of this case, when viewed in the light most favorable to the verdict, are legally sufficient to sustain" their convictions for forgery, and we therefore apply de novo review. *See State v. Barragan*, 2001-NMCA-086, ¶ 24, 131 N.M. 281, 34 P.3d 1157, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110.

{9} "Forgery consists of falsely . . . making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud; or knowingly issuing or transferring a forged writing with intent to injure or defraud[.]" Section 30-16-10(A)(1). "Forgery has been defined as a crime aimed primarily at safeguarding confidence in the genuineness of documents relied upon in commercial and business activity." *State v. Baca*, 1997-NMSC-018, ¶ 5, 123 N.M. 124, 934 P.2d 1053. Forgery "requires a lie," but "it must be a lie about the document itself: the lie must relate to the genuineness of the document." *Id.* Indeed, as Defendants correctly observe, New Mexico case law interpreting our forgery statute has long recognized a distinction between a document "which is not genuine" (which can form the basis of a forgery conviction), and a genuine document "the contents or allegations of which are false" (which cannot). *Territory v. Gutierrez*, 1906-NMSC-003, ¶ 5, 13 N.M. 312, 84 P. 525. The Supreme Court of the United States has also recognized the same historic distinction in the law of forgery. *See Gilbert v. United States*, 370 U.S. 650, 658 (1962) ("Where the 'falsity lies in the representation of facts, not in the genuineness of execution,' it is not forgery."); *see also Moskal v. United States*, 498 U.S. 103, 119 (1990) (Scalia, J., dissenting) ("A forged memorandum is 'falsely made'; a memorandum that contains erroneous information is simply 'false.' ").

{10} Attempting to seize upon that distinction, Defendants argue that the checks at issue in this case merely "told lies" by, in effect, falsely representing that Defendants were entitled to deposit the checks, but "were not lies in and of themselves" because both the checks and the signature stamp were genuine. In response, the State, while not disputing that the checks and the signature stamp were genuine, argues instead that Defendants' use of them beyond ATC's authorization to do so constitutes forgery.

{11} We conclude that the jury could properly find that Defendants committed forgery. Although the checks themselves and the signature stamp were genuine, our appellate courts have long held that a defendant may commit forgery by signing another person's name without authority and, conversely, that signing another's name with authorization is not forgery. *See State v. Smith*, 1927-NMSC-012, ¶ 7, 32 N.M. 191, 252 P. 1003 (holding that an indictment's allegation that the defendant committed forgery by "falsely" signing another's name sufficiently alleged that the defendant signed the name without authority to do so); *State v. Lopez*, 1969-NMCA-115, ¶¶ 13-16, 81 N.M. 107, 464 P.2d 23 (concluding that the defendant was properly convicted of forgery for attempting to cash a check made out to another person and endorsing that person's name without authorization), *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, ¶ 17, 109 N.M. 668, 789 P.2d 616; *State v. Saavedra*, 1979-NMCA-096, ¶¶ 10-12, 93 N.M. 242, 599 P.2d 395 (holding that the defendant was properly convicted of forgery for signing account holder's name to stolen checks); *cf. Clark v. State*, 1991-NMSC-079, ¶ 12, 112 N.M. 485, 816 P.2d 1107 ("It is clear, we think, that 'wherever authority is given to sign the name of another to a writing, there can be no forgery.' " (quoting 36 Am. Jur. 2d *Forgery* § 9 (1968))).

{12} In sum, whether a defendant signs another's name by hand, or uses a signature stamp, his or her actions tell a lie about the document itself—that it has been made with the approval of the apparent signer, and is therefore genuine—and does not merely tell a lie about a fact or facts stated in the document. We therefore conclude that Defendants' use of a signature stamp and the checks outside the scope of their authorization to do so were acts which, when combined with the required intent to injure or defraud, constituted forgery.

{13} Defendants rely on several cases in support of their contrary position, but all of them are distinguishable. *See State v. Carbajal*, 2002-NMSC-019, 132 N.M. 326, 48 P.3d 64; *Gutierrez*, 1906-NMSC-003; and *State v. Leong*, 2017-NMCA-070, 404 P.3d 9, *cert. denied*, 2017-NMCERT-___ (No. S-1-SC-36576, Aug. 18, 2017). Each of the cited cases held only that a defendant's act of signing his *own* name does not support a forgery conviction. *See Carbajal*, 2002-NMSC-019, ¶¶ 18-19 (stating that the defendant did not commit forgery by signing his own name to another person's traveler's check); *Gutierrez*, 1906-NMSC-003, ¶¶ 1, 4, 9 (holding that a notary

public could not be guilty of forgery for signing his own name to a certificate of acknowledgement that contained false statements); *Leong*, 2017-NMCA-070, ¶ 16 (reversing the defendant's conviction for forgery based upon the act of signing his own name to an affidavit of residency that contained a false statement).

{14} Defendant Candelaria's reliance on *United States v. Hunt*, 456 F.3d 1255 (10th Cir. 2006), is similarly misplaced. In that case, the defendant had check-writing authority for his employer, but exceeded that authority by personally signing checks totaling over $2 million to false payees that he controlled, and then using the money for his own purposes. *Id.* at 1256-57. The Tenth Circuit held that this misconduct did not constitute forgery because the defendant "signed each of the 65 checks using his own true name," and thus the checks "were genuinely executed, not 'falsely made,' because they do not purport to be anything other than checks written by an . . . agent [of the defendant's employer]." *Id.* at 1263. In explaining its decision, the Tenth Circuit said that "common-law forgery cases consistently use the word 'genuine' to refer to genuineness of execution or authorship, not authority to act as an agent for another[,]" *id.* at 1267, and Defendant Candelaria concludes from this statement that his (and Defendant Chee's) lack of authority to sign the checks with Mr. Kimbell's signature stamp did not constitute forgery. But *Hunt* is unavailing because the defendant in that case signed his own name, and thus his execution of the checks was genuine in the sense that he was the true signer, albeit one acting beyond the authority that his employer gave to him. Here, by contrast, Defendants used another person's signature stamp to sign the checks without authority to do so, conduct which constitutes forgery under New Mexico law. The Tenth Circuit itself has recognized that an agent commits forgery if he or she signs the principal's name without authority to do so. *See Selvidge v. United States*, 290 F.2d 894, 895 (10th Cir. 1961) (holding that the defendant, who, without authority, endorsed her employer's checks "as the agent of her named principal" did not commit forgery, but observing that if she had signed the name of her principal without authority to do so, "the crime of forgery would have been complete").

{15} Defendant Candelaria also relies on language in *Hunt* indicating that because banks are generally liable if they pay on a forged check, and are rarely aware of private limitations on an agent's authority, "[h]olding banks liable in cases of forgery would make no sense . . . if any check signed by an agent without actual authority qualified as 'forged.' " 456 F.3d at 1262. Again, Defendant Candelaria's reliance on *Hunt* is unavailing. First, we reject any argument that Defendants should escape punishment for their wrongful conduct merely because a third party may ultimately be responsible for satisfying the victim's financial loss resulting from that wrongful conduct. Moreover, the quoted language appears in the portion of the *Hunt* opinion in which the Tenth Circuit was discussing the early development of the common-law crime of forgery, and is difficult to reconcile with the present-day reality that banks are not automatically liable for paying out on forged checks. Under New Mexico's version of the Uniform Commercial Code, a bank's customers have a duty to examine their statements and promptly notify the bank of any unauthorized payments. *See* NMSA 1978, § 55-4-406(c) (1992). A customer's failure to do so constitutes a defense to a claim that the bank improperly paid on a forged check. *See* § 55-4-406(d), (e) (stating that a customer who does not exercise reasonable promptness in examining statements for unauthorized payments may be precluded from recovering from the bank).

{16} Finally, contrary to Defendant Chee's assertion, *State v. Deutsch*, 1985-NMCA-123, 103 N.M. 752, 713 P.2d 1008, does not advance her cause. Chee relies on *Deutsch's* statement that where an agent with a "general power" to act for his principal endorses his principal's name, that is not forgery because the endorsement is fully effective, *see id.* ¶ 53, and argues that she did not commit forgery because she had authority to act for ATC. Careful analysis reveals that the language in *Deutsch* that Chee now relies on was nonbinding dicta. The defendant in *Deutsch* was not an agent who had a general power to sign for his principal, but endorsed and cashed checks belonging to a company that he once fully controlled but had since been placed in trusteeship. *Id.* ¶¶ 2-8. He was convicted on multiple counts of forgery, and this Court reversed the forgery convictions that were based on checks on which the defendant had signed his own name, but upheld the forgery convictions relating to checks on which the defendant falsely signed the trustee's name. *Id.* ¶¶ 48, 54-56. Quite simply, *Deutsch* did not hold that a defendant's act of signing another person's name without authorization cannot support a forgery conviction.

II. The District Court Did Not Err in Denying Defendants' Speedy Trial Motions as Untimely Filed

{17} Defendants claim that the district court erred by summarily denying their speedy trial motions on the ground that they were filed after the deadline for pretrial motions set forth in the district court's scheduling order. We disagree.

{18} We apply a de novo standard of review in deciding whether the district court had the legal authority to require that a motion to dismiss on speedy trial grounds be filed by a certain date before trial. *See State v. Foster*, 2003-NMCA-099, ¶ 6, 134 N.M. 224, 75 P.3d 824 ("We review de novo questions of law concerning the interpretation of Supreme Court rules and the district court's application of the law to the facts of this case.").

{19} The Local Rules of the Second Judicial District Court required the district court to enter a scheduling order with a pretrial motions deadline. While these cases were pending, our Supreme Court implemented a case management pilot program, Rule LR2-400 NMRA (2014), in the Second Judicial District Court.[1] Because Defendants' cases were pending on June 30, 2014, they were assigned to a "special calendar." *See* LR2-400(B)(1), (L). In turn, LR2-400.1[2] governed the process for cases on the special calendar, but those cases were subject to the same sanctions for failure to comply with time limits as those under LR2-400. *See* LR2-400.1(P)(4). LR2-400(G)(4) required district court judges to issue a scheduling order for criminal cases on various "tracks," and specified the period of time before trial for filing pretrial motions. *See* LR2-400(G)(4)(a)(vi) (requiring pretrial motions in track 1 cases

[1]LR2-400 was recompiled and amended as LR2-308 NMRA, effective December 31, 2016. Any reference to the rule in this opinion will be cited as LR2-400, the version of the rule in effect at the time the district court made its ruling.

[2]A copy of LR2-400.1 is available at https://seconddistrictcourt.nmcourts.gov/case-management-order.aspx by selecting "Adopted Rule for 'Special Calendar.' "

to be filed at least fifty days before trial); LR2-400(G)(4)(b)(vi) (requiring pretrial motions in track 2 cases to be filed at least sixty days before trial); and LR2-400(G)(4)(c)(vi) (requiring pretrial motions in track 3 cases to be filed at least seventy days before trial). LR2-400(I) stated that "[i]f a party fails to comply with any provision of this rule, including the time limits imposed by the scheduling order, the court shall impose sanctions as the court may deem appropriate in the circumstances[.]"

{20} In accord with LR2-400, the district court issued scheduling orders on January 26, 2015,[3] setting an April 8, 2015 deadline for pretrial motions, and setting Defendants' cases for trial in July 2015. The scheduling order stated, in bold, that "[i]f a party fails to comply with the dates outlined in the [s]cheduling [o]rder, the Court shall impose sanctions. Sanctions may include, but are not limited to, dismissal with o[r] without prejudice, suppression or exclusion of evidence, a monetary fine imposed upon a party's attorney, or a monetary fine imposed on the attorney's employing office with appropriate notice to the office and opportunity to be heard." As provided for under the local rule, the scheduling orders also stated that the district court could grant a twenty-day extension for good cause shown as long as it would not cause the trial date to be extended. *See* LR2-400(G)(6).

{21} Defendant Chee filed her speedy trial dismissal motion on June 4, 2015, and Defendant Candelaria filed his counterpart motion on June 10, 2015, both well after the April 8, 2015 deadline. Neither motion acknowledged that the pretrial motion deadline had previously expired, nor made any attempt to show good cause to support an extension. The district court, without reaching the merits of Defendants' speedy trial arguments, summarily denied the motions because they were filed after the scheduling order's pretrial motion deadline.

{22} As a threshold matter, we must first decide whether Defendants' challenges to the district court's authority to apply the timeliness requirements of LR 2-400 to their speedy trial motions were preserved for appellate review. The State argues that Defendant Candelaria did not preserve his claim because he never challenged the district court's authority to enforce its scheduling order. Even if not preserved, we exercise our discretion to address it here because the question whether speedy trial motions are subject to the deadlines set forth in pretrial orders presents an issue of law that is likely to recur in the Second Judicial District Court, and perhaps elsewhere, making it a matter of general public interest. *See* Rule 12-321(B)(2)(a) NMRA; *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 28, 133 N.M. 669, 68 P.3d 909 (stating that a matter of general public interest is one that "is likely to settle a question of law affecting the public at large or a great number of cases and litigants in the near future"). As to Defendant Chee, she first raised a challenge to the district court's authority to deny her speedy trial motion as untimely in her reply brief on appeal, and therefore, technically speaking, she abandoned this claim. *See State v. Hosteen*, 1996-NMCA-084, ¶ 20, 122 N.M. 228, 923 P.2d 595 (stating that claims not argued in an appellant's brief in chief are "deemed abandoned"). Nevertheless, because we are addressing Defendant Candelaria's identical claim, we will address hers as well.

{23} We conclude that the district court had the authority, both inherent and under LR2-400, to deny Defendants' speedy trial motions as untimely under the pretrial scheduling order. *See State v. Le Mier*, 2017-NMSC-017, ¶ 29, 394 P.3d 959 (stating that "our courts are encouraged to ensure the timely adjudication of cases, to proactively manage their dockets, and to utilize appropriate sanctions to vindicate the public's interest in the swift administration of justice"); *State v. Ahasteen*, 1998-NMCA-158, ¶ 28, 126 N.M. 238, 968 P.2d 328 (acknowledging district courts' inherent authority to control their dockets), *abrogated on other grounds by State v. Savedra*, 2010-NMSC-025, ¶¶ 3, 8, 148 N.M. 301, 236 P.3d 20. A pretrial motion deadline serves several important purposes: it provides the district court with sufficient time to review legal arguments and evidence that may affect a future trial, and affords the opposing party a fair opportunity to muster arguments and evidence in response to the motions. If district courts lacked the authority to set and enforce pretrial motion deadlines, and were obligated to drop everything and entertain a party's last-minute motions, then defendants or the State could wait until the eve of trial to file pretrial motions intended to disrupt the proceedings. New Mexico law does not require such a result.

{24} Defendants do not dispute that they filed their motions to dismiss well after the filing deadline for pretrial motions under the scheduling order, nor do they deny that district courts generally have the authority under LR2-400 and their own inherent powers to sanction parties who fail to comply with pretrial motion deadlines. Nor do Defendants argue that they were unable to file their speedy trial motions before the pretrial deadline passed. Instead, Defendants argue that motions raising speedy trial claims are exempt from the district court's authority to set and enforce a pretrial motion deadline.

{25} In support of this contention, Defendant Candelaria relies on *State v. Taylor*, 2015-NMCA-012, 343 P.3d 199, for the proposition that "[t]he right to a speedy trial is fundamental and is not waived even if never asserted[,]" and argues that a district court must consider and rule on a speedy trial motion, even one filed in violation of a properly-issued scheduling order. *Id.* ¶ 18 (citing *State v. Garza*, 2009-NMSC-038, ¶ 32, 146 N.M. 499, 212 P.3d 387). We disagree. Defendant Candelaria takes the quoted language out of context. *Taylor* does not stand for the proposition that the right to assert a speedy trial violation is somehow immune from the district court's authority to set pretrial motion deadlines. *See* 2015-NMCA-012, ¶ 18. In *Taylor*, we merely held that a defendant who stipulated to a continuance for a specific purpose was not foreclosed from asserting his right to a speedy trial later on in the proceedings. *Id.* In so holding, this Court relied on *Garza*, in which our Supreme Court explained that even if a criminal defendant does not assert the right to a speedy trial at the beginning of a case or in a vigorous fashion, he or she is not foreclosed from asserting that right in the future. *See* 2009-NMSC-038, ¶¶ 31-34. Rather, the manner and timing of a defendant's assertion of the right to a speedy trial is simply one of several factors that a court considers when analyzing a speedy trial claim. *Id.*

{26} Defendant Candelaria also relies on *State v. Aragon*, 1982-NMCA-173, ¶ 10, 99 N.M. 190, 656 P.2d 240, as supporting the notion that a speedy trial motion is not subject to time limits set forth in the rules of criminal procedure or in the local rules. But that case held no such thing. Rather, *Aragon* stands for the commonsense proposition that a criminal defendant cannot be expected to file a speedy trial motion

[3]The file stamp on the face of the orders mistakenly states that they were filed on January 26, 2014.

before a claim materializes. In *Aragon*, the district court refused to consider the defendant's motion to dismiss under the so-called six-month rule, because another, then-existing rule required that pretrial motions be filed within twenty days after the defendant's arraignment. This put the defendant in an impossible position, because it would have required him to seek dismissal under the six-month rule before a violation of that rule even occurred. This Court concluded that the defendant's dismissal motion was timely raised, reasoning that "[a] defendant cannot be held to speculate at the time of arraignment or within twenty days therefrom whether there may be a violation of the six[-]month rule." *Id.* ¶ 10. The present case is easily distinguishable because Defendants' speedy trial claims had already accrued, and could have been asserted, before the pretrial motion deadline expired in April 2015. In their speedy trial motions, filed in July 2015, Defendants Candelaria and Chee both argued that the elapsed time from the filing of the indictment exceeded two and a half years, well beyond the time period necessary to trigger a speedy trial inquiry. Even if Defendants had filed their dismissal motions two months earlier, by the April 2015 scheduling deadline, the length of delay at that time would still have triggered an inquiry into the speedy trial factors. *See Garza*, 2009-NMSC-038, ¶ 2 (extending "the length of delay necessary to trigger the speedy trial inquiry to twelve months for simple cases, fifteen months for cases of intermediate complexity, and eighteen months for complex cases").

{27} Defendants' reliance on *State v. Urban*, 1989-NMCA-053, 108 N.M. 744, 779 P.2d 121, and *State v. Lujan*, 1985-NMCA-111, 103 N.M. 667, 712 P.2d 13, also fails. Defendants cite these cases for the proposition that a motion asserting a fundamental right to due process is not subject to pretrial motion deadlines. Again, we disagree. The statements in *Lujan* and *Urban*, on which Defendants rely, are terse and devoid of analysis. *See Urban*, 1989-NMCA-053, ¶ 24; *Lujan*, 1985-NMCA-111, ¶ 29. By contrast, a long line of New Mexico cases squarely holds that motions asserting the denial of constitutional rights are indeed subject to pretrial motion deadlines. *See, e.g.*, *State v. Rivas*, 2017-NMSC-022, ¶ 58, 398 P.3d 299 (Nakamura, C.J., specially concurring) (recognizing that untimeliness of a defendant's motion to suppress is "a complete and sufficient basis for denying the motion"); *City of Santa Fe v. Marquez*, 2012-NMSC-031, ¶ 28, 285 P.3d 637 (stating that "Rule 5-212(C) [NMRA] requires that motions to suppress be filed before trial and that the district courts must adjudicate suppression issues before trial, absent good cause"); *State v. Vialpando*, 1979-NMCA-083, ¶ 6, 93 N.M. 289, 599 P.2d 1086 (failing to file a motion to suppress within the time frame required by our rules of criminal procedure held to provide sufficient grounds to deny the motion); *State v. Helker*, 1975-NMCA-141, ¶ 7, 88 N.M. 650, 545 P.2d 1028 (stating "we hold that the rules of criminal procedure can put a time limitation on the exercise of a constitutionally protected right"). We do not see, and Defendants do not explain, how a broad reading of the cited language in *Lujan* and *Urban*, language unaccompanied by any serious analysis, can be reconciled with this line of cases.

{28} We hold that the district court properly denied Defendants' speedy trial motions as a sanction for their untimely filing.

III. Defendant Candelaria's Two Fraud Convictions Violate Double Jeopardy

{29} Defendant Candelaria claims that his two convictions for fraud violate his right to be free from double jeopardy, arguing that because the two corresponding jury instructions covered overlapping time periods it is possible that he was convicted twice for the same conduct. We review de novo a defendant's claim that his right to be free from double jeopardy was violated. *See State v. Boergadine*, 2005-NMCA-028, ¶ 12, 137 N.M. 92, 107 P.3d 532.

{30} Defendant Candelaria was convicted of two counts of fraud—Count 11 (fraud over $2,500 but less than $20,000), relating to conduct occurring between September 22, 2008, and January 22, 2009; and Count 13 (fraud over $20,000), which encompassed acts from July 8, 2008 to January 22, 2009. Aside from the increased dollar amount and the extended date range, the indictment and jury instruction for Count 13 are identical to those relating to Count 11, and nowhere in these documents does the State describe the specific conduct on which these charges are based.

{31} Defendant Candelaria objected to the overlapping date ranges in the jury instructions at trial, and the State responded that the difference between the two counts was in the way that the various checks were deposited, but did not make it clear what that difference was. The district court ruled that it would allow the date ranges to overlap, but would address the issue at sentencing if it remained an issue at that time. Defendant Candelaria did not raise the matter again.

{32} Both the New Mexico and United States Constitutions guarantee defendants the right not to "be twice put in jeopardy for the same offense." *State v. Armendariz*, 2006-NMSC-036, ¶ 19, 140 N.M. 182, 141 P.3d 526 (internal quotation marks and citations omitted), *overruled on other grounds by State v. Swick*, 2012-NMSC-018, ¶ 31, 279 P.3d 747. The double jeopardy clause "protects against multiple punishments for the same offense." *Swafford v. State*, 1991-NMSC-043, ¶ 6, 112 N.M. 3, 810 P.2d 1223 (internal quotation marks and citation omitted). Accordingly, the pertinent question "is whether the defendant is being punished twice for the *same offense*." *Id.* ¶ 8.

{33} There are two types of multiple punishment cases—unit of prosecution cases and double description cases. *Id.* ¶¶ 8-9. This case is a unit of prosecution case, because Defendant Candelaria alleges that his two convictions for fraud violate his right to be free from double jeopardy. "In unit of prosecution cases, the defendant is charged with multiple violations of a single statute based upon acts that may or may not be considered a single course of conduct." *State v. Bello*, 2017-NMCA-049, ¶ 11, 399 P.3d 380 (internal quotation marks and citation omitted).

{34} Typically, in a unit of prosecution case, we employ a two-part test to determine the Legislature's intent. *Swick*, 2012-NMSC-018, ¶ 33. We "analyze the statute at issue to determine whether the Legislature has defined the unit of prosecution. If the unit of prosecution is clear from the language of the statute, the inquiry is complete. If the unit of prosecution is not clear from the statute at issue, including its wording, history, purpose, and the quantum of punishment that is prescribed, courts must determine whether a defendant's acts are separated by sufficient 'indicia of distinctness' to justify multiple punishments." *Id.* We note that we have already determined that the Legislature did not clearly define the unit of prosecution for

fraud. *See Boergadine*, 2005-NMCA-028, ¶ 20.[4] Accordingly, the statutory definition of fraud provides no guidance in deciding whether the conduct in this case constitutes two acts of fraud, or just one.

{35} Because the unit of prosecution for fraud has not been clearly defined by the Legislature, the parties each encourage us to apply the six-factor test set forth in *Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624, to determine whether the conduct in this case contained "sufficient indicia of distinctness" to justify multiple convictions. But even if we were to apply the *Herron* factors and find the acts sufficiently distinct, this would not resolve the question of whether the date ranges charged in the jury instructions could have allowed the jury to convict Defendant Candelaria twice for the same underlying act.

{36} We addressed a similar issue in *State v. Cook*, 2006-NMCA-110, 140 N.M. 356, 142 P.3d 944. In *Cook*, we considered whether the defendant's two convictions for tampering with evidence violated his right to be free from double jeopardy where the jury instructions were undifferentiated, and the counts in the indictment were identical. *Id.* ¶ 7. We observed that the evidence supporting the two counts of tampering with evidence "was occasionally vague and equivocal," and that the parties' closing arguments did not clarify the factual basis for each count. *Id.* ¶¶ 11-12. We held that, even if the evidence could have supported two different counts, because the jury instructions "did not make clear to the jury which conduct it should consider to support each charge" the two convictions for tampering with evidence violated the defendant's double jeopardy rights. *Id.* ¶ 19.

{37} Although the two counts in *Cook* covered the same time frame, and here we simply have an overlap of the time period at issue, we believe *Cook* to be instructive. There, we vacated one conviction for tampering with evidence because the jury could have relied on the same evidence in convicting the defendant of the same crime twice. *See id.* ¶¶ 18-19. A similar danger is present here, because the jury could have relied on evidence that fell within the overlapping time period to convict Defendant Candelaria of both counts of fraud. Accordingly, we examine the State's closing argument to determine whether it clarified the factual basis for the fraud counts. *See State v. Luna*, 2018-NMCA-025, ¶ 10, ___ P.3d ___ (noting that we may look to the State's closing argument for evidence of the specific factual basis supporting its theory of the case), *cert. denied*, 2018-NMCERT-___ (No. S-1-SC-36896, March 16, 2018).

{38} During its closing argument, the State attempted to differentiate between the two counts of fraud, but at times appeared to conflate them. The State addressed Count 11 as follows:

> [B]asically, this fraud count, this September 22nd to January 22nd, this is referring to the behavior where [Defendants] Chee and Candelaria worked together. [They] would write checks to [Defendant] Candelaria. He would sign them over, 'Pay to the order of Chee,' they would be deposited into her account and then immediately withdrawn. That's what we're looking at.
>
> So we're looking at September through January. We know in that time there was a lot of money taken just by [Defendant Candelaria]. Here we have $15,000 in September; $4,000 in October, $2,000 in January. We have to show that they obtained over $2,500—she obtained over $2,500 as a result of this.
>
> Well, just looking at the [Defendant Candelaria] check, just in October we have $4,500 deposited into her account, immediately withdrawn. So yes, we hit that $2,500 mark.

{39} Later, the State addressed Count 13 as follows:

> And lastly, we have fraud over $20,000. We're looking at the time periods between July 8, 2008, and . . . January 22nd, 2009. During that time, we have all of those checks deposited into his account. In just August we have $25,000 of checks in his name deposited into Nora Chee's account. And we know also that on months when there weren't any checks in his name, he was receiving payouts from her. . . . The total obtained between the two of them was $214,000. So we hit that $20,000 amount. . . . And this happened between July and January of 2009. So during that time, just in checks to him, just in checks deposited into [Defendant] Chee's account, we have $52,000 of checks written to him, deposited into her account, endorsed by him before they're deposited. That's the fraud.

Based on the discussion above, it is not clear how the two counts are distinguishable. In discussing both counts, the prosecutor referred to checks written to Defendant Candelaria, which were then endorsed over to Defendant Chee and deposited into one of her bank accounts.

{40} Because the factual basis for differentiating between Counts 11 and 13 is not clear from the indictment, the jury instructions, or even the State's closing argument, we conclude that the jury could have convicted Defendant Candelaria twice for the same conduct. *See Cook*, 2006-NMCA-110, ¶ 19. Accordingly, we remand this case to the district court with instructions that the fraud count carrying the lesser sentence be vacated. *See State v. Montoya*, 2013-NMSC-020, ¶ 55, 306 P.3d 426 (holding that the conviction carrying the shorter sentence must be vacated when it is necessary to vacate a conviction to avoid violating the double jeopardy clause).

IV. The District Court Did Not Abuse Its Discretion in Admitting Evidence

{41} Defendants challenge several of the district court's evidentiary rulings. We address each of them in turn. "We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse." *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72. "An abuse of discretion occurs when a ruling is against logic and is clearly untenable or not justified by reason." *Id.* (internal quotation marks and citation omitted).

A. Late-Disclosed Evidence

{42} Defendants argue that the district court abused its discretion in allowing the State to present evidence that it did not disclose until two weeks before trial, and declining to give them a continuance to

[4]The Legislature amended the fraud statute, Section 30-16-6, in 2006, roughly a year after Boergadine was decided. However, the amendments did not affect Boergadine's unit of prosecution analysis. They simply changed the dollar amounts associated with each level of punishment, and added language stating that the misappropriation or taking of a firearm valued at less than $2,500 is a fourth degree felony. See § 30-16-6.

further investigate the evidence disclosed, or sanction the State for the late-disclosed evidence. We are not persuaded.

{43} While preparing to be a witness at trial, Mr. Savitsky discovered a letter written in 2000 by Ed Teixeira, then the executive vice president and chief operating officer of ATC, advising Defendant Chee that she was not allowed to write quick pay checks to herself because she was a principal of the franchise, and advising her that nine quick pay checks that she had written to herself had been stopped. Mr. Teixeira also discovered additional checks "tending to incriminate co-defendant Candelaria." He provided the evidence to the State, which turned it over to defense counsel the next day.

{44} We first address Defendant Candelaria's argument that the district court was required to sanction the State for the late disclosure under LR2-400 and Rule 5-501 NMRA. We reject this argument because the State did not violate the rules when it turned over the evidence to the defense one day after it was received from Mr. Teixeira. *See* LR2-400(D)(3) (2014) ("The state shall have a continuing duty to disclose additional information to the defendant within five (5) days of receipt of such information.").

{45} In deciding whether the district court abused its discretion in admitting the late-disclosed evidence, or declining to grant a continuance for the defense to investigate and respond to it, we consider the following factors: "(1) whether the [s]tate breached some duty or intentionally deprived the defendant of evidence; (2) whether the improperly non-disclosed evidence was material; (3) whether the non-disclosure of the evidence prejudiced the defendant; and (4) whether the trial court cured the failure to timely disclose the evidence." *State v. Duarte*, 2007-NMCA-012, ¶ 15, 140 N.M. 930, 149 P.3d 1027 (internal quotation marks and citation omitted). "The test for materiality . . . is whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (internal quotation marks and citation omitted).

{46} With regard to the letter to Defendant Chee from Ed Teixeira, we hold that the district court did not abuse its discretion in admitting it into evidence and not granting a continuance. We have already concluded that the State did not violate any discovery obligation because it produced the letter to Defendants one day after it was received. We do not believe that earlier disclosure of the letter would have changed the result of the case, nor did it unfairly prejudice Defendants, because it was cumulative of Mr. Savitsky's testimony that Defendant Chee was aware that she was not permitted to write quick pay checks to herself, and that the use of quick pay checks was limited to payments for nurses in amounts of $500 or less. Defendants explored this testimony during pretrial interviews with Mr. Savitsky, and were thus aware of this evidence well in advance of trial, regardless of when they received the letter. Moreover, the district court attempted to cure any possible prejudice by granting defense counsel's request "to talk to Mr. Savitsky for five or ten minutes" about the letter before he testified at trial. After this interview, Defendants did not request additional time to discuss the issue with Mr. Savitsky or assert any further need to investigate the letter. Because Defendants were already aware of the substance of this evidence, earlier disclosure of the letter would not have changed the outcome of the trial.

{47} Defendant Chee argues that she was unfairly prejudiced by the late disclosure of the letter, and that the district court should have granted a continuance, because "given the eight[-]year gap between the letter and the charging period, it is possible that ATC could have had other letters or correspondence in its possession that were also written to Nora Chee, but which may have told Chee a different and conflicting message." A continuance, she argues, would have allowed her to subpoena ATC's records to discover whether any contrary information existed. But Defendant Chee already knew, before the letter was disclosed, that ATC witnesses would testify that she was aware that she lacked permission to write quick pay checks to herself. Thus, she did not need the letter to alert her to the potential benefit of subpoenaing ATC to discover whether it had any written records that might have contradicted its position that she was not allowed to write checks to herself.

{48} With regard to the late-disclosed checks, Defendant Chee contends that their earlier disclosure might have altered her defense strategy in some unspecified way, or caused her to move to sever the trial, but she does not explain why those checks would have prompted her to do so. We decline to review this undeveloped claim, because "[w]e will not review unclear arguments, or guess at what [a party's] arguments might be." *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076. Even if Defendant Chee had developed an argument along these lines, we would still decline to review it because, as she admits, the checks were not made part of the appellate record and, therefore, we would not be able to review their content or evaluate their potential effect on Defendant Chee's defense strategy. *See State v. Jim*, 1988-NMCA-092, ¶ 3, 107 N.M. 779, 765 P.2d 195 ("It is [the] defendant's burden to bring up a record sufficient for review of the issues he raises on appeal.").

B. Testimony of the Substitute Records Custodian

{49} At trial, the district court excluded Stephanie Baca, a records custodian for the Metropolitan Detention Center (MDC), from testifying as a witness for the State because she was present in the courtroom during the testimony of other witnesses, in violation of Rule 11-615 NMRA. The district court allowed the State to call a different witness, Michael Martindale, who was the civil litigation administrator for MDC, and Ms. Baca's supervisor, to testify as records custodian. Defendant Chee argues that it was improper to allow this "surprise witness" to authenticate a letter written by Defendant Candelaria to Defendant Chee. In the letter, written while both Defendants were incarcerated at MDC, Defendant Candelaria admitted to committing the crimes, and said he would testify that Defendant Chee was unaware of his conduct. Defendant Chee argues that Mr. Martindale did not properly authenticate the letter, and that the district court should not have allowed him to testify because her attorney only had a few minutes to interview Mr. Martindale before he testified.

{50} We reject this claim, because Defendant Chee does not explain how allowing Mr. Martindale to testify prejudiced her. *See State v. Griffin*, 1988-NMCA-101, ¶ 11, 108 N.M. 55, 766 P.2d 315 ("Failure to disclose a witness'[s] identity prior to trial in itself is not grounds for reversal. The objecting party must show that he was prejudiced by such non-disclosure."). Accordingly, we decline to reverse the district court on this basis. *See id.* We also do not see, and Defendant Chee does not explain, how the letter's admission prejudiced her. After all, the letter contained Defendant Candelaria's confession to committing the crimes, and essentially absolved Defendant Chee from any criminal wrongdoing. Thus, we need not consider her claim that the letter was not properly authenticated.

C. Defendant Candelaria's Challenge to the Admission of His Booking Sheet, Racist Tattoo, and Letter to Defendant Chee

{51} Defendant Candelaria challenges the admission of his letter to Defendant Chee, in which he confessed to committing the crimes, arguing that it was not properly authenticated by Mr. Martindale. Defendant Candelaria also argues that the admission of his booking sheet at the MDC, and the fact that he was required to show the jury his forearm tattoo, which he contends bore a racist image, exposed the jury to unfairly prejudicial evidence.

1. Defendant Candelaria's Letter to Defendant Chee

{52} Mr. Martindale was called to authenticate a letter that Defendant Candelaria wrote to Defendant Chee, in which he confessed to the crimes, indicated that he intended to "implicate David Savitsky in a plan to take the franchise" from Defendant Chee and to testify that she was unaware of his conduct, and instructed Defendant Chee to destroy the letter. Defendant Candelaria argues that Mr. Martindale was unable to properly authenticate the letter that was admitted into evidence because he did not have personal knowledge of the letter, had not seen the original letter, could not identify Defendant Candelaria's handwriting, and was not able to produce a mail log for the letter.

{53} The envelope that contained the letter was addressed to Defendant Chee in "F8-13[,]" and stated that Defendant Candelaria was in "E-7, Cell 13." Mr. Martindale testified that Defendant Chee was assigned to Unit F, Pod 8, Cell 13, and that Defendant Candelaria was assigned to Unit E, Pod 7, Cell 13, the locations specified in the letter. Mr. Martindale also testified about the general procedures that are followed when an inmate is booked and when an inmate receives mail. He testified that the mail log for the letter was never located despite efforts to find it. He also testified that he had not seen the original letter, but only saw photocopies of the letter and the envelope it purportedly came in.

{54} Our rules of evidence provide that evidence is authenticated if a party can "produce evidence sufficient to support a finding that the item is what the proponent claims it is." Rule 11-901(A) NMRA. A party can authenticate an item by providing evidence of the "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Rule 11-901(B)(4). A writing can be shown to have come from a specific person "by virtue of disclosing knowledge of facts known peculiarly to him[.]" Fed. R. Evid. 901 advisory committee note, Example (4); *see State v. Loza*, 2016-NMCA-088, ¶ 22, 382 P.3d 963 (noting that New Mexico courts refer to federal cases for guidance on authentication issues).

{55} We conclude that the evidence was sufficient to permit a reasonable jury to believe that Defendant Candelaria wrote the letter to Defendant Chee. The letter included Defendants' cell numbers in the MDC, and Mr. Martindale confirmed Defendants were indeed housed in those locations. The letter also contained facts peculiarly known to Defendant Candelaria, and statements that only someone in his position would make, including that Defendant Chee's business was a franchise; that David Savitsky was involved in the case; that the case involved writings (as evidenced by the letter's statement that a handwriting expert would exonerate Defendant Chee); and contained several statements that he loved Defendant Chee. To be sure, Defendants made arguments weighing against the letter's authenticity, but those went to the weight of the evidence, not its admissibility. We therefore hold that it was not an abuse of discretion for the district court to determine that the letter had been sufficiently authenticated.

C. The Booking Sheet and Tattoo

{56} Defendant Candelaria argues that allowing his MDC booking sheet to be admitted into evidence, and requiring him to show the jury his forearm tattoo, were unfairly prejudicial, and should have been excluded under Rule 11-403 NMRA ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice."). We disagree.

{57} A booking sheet is created by jail staff, based on information that arrestees provide them when they are brought into the jail. The booking sheet here contained Defendant Candelaria's photograph, stated that he had a "Fu Manchu" tattoo, identified Defendant Chee as his emergency contact and as his girlfriend, and stated that they shared the same address. Defendant Candelaria contends that the booking sheet and the tattoo only demonstrated that Defendant Candelaria knew Defendant Chee, arguing "[t]he State conflates identity with proof that [Defendant] Candelaria committed the crime." Defendant's contention misses the mark. At trial, the State did not present any eyewitness testimony, or photographic or videographic evidencev, that Defendant Candelaria had written or cashed the quick pay checks. Defendant Candelaria affirmatively relied on the absence of such evidence at trial, and even moved for a directed verdict on that basis. Admitting the booking sheet, and requiring Defendant Candelaria to show his tattoo to the jury, tended to establish that he was indeed the same person who had been booked into the MDC, that he was there at the same time as Defendant Chee (her booking sheet was also admitted into evidence), and inferentially that he was the author of the letter to Defendant Chee admitting that he committed the crimes. This evidence, combined with the letter itself and Mr. Martindale's testimony linking the letter to Defendants' location within the jail, provided a nexus between Defendant Candelaria and the crimes charged. The evidence therefore had substantial probative value.

{58} As for the other prong of the Rule 11-403 analysis, Defendant Candelaria has failed to demonstrate that the probative value of this evidence was substantially outweighed by a danger of unfair prejudice. Defendant Candelaria argues that the booking sheet was unnecessary because he "never claimed that he was not Karl Candelaria or that police did not arrest him," but this argument misses the point. Defendant Candelaria did not admit that he was the author of the incriminating letter, and the booking sheet helped to show that he was its author. As for the tattoo, Defendant Candelaria's counsel argued that it depicted a "caricature of an Asian man with kind of an exaggerated head dress and mustache, and very slanted eyes[,]" and that it therefore could potentially offend the jury. Defendant Candelaria, however, failed to include a photograph of the tattoo in the appellate record, and we are therefore unable to fairly evaluate the potential for unfair prejudice created by the tattoo. It was Defendant Candelaria's burden to provide a complete record for our review on appeal, and we decline to reverse the district court's ruling on this basis. *Jim*, 1988-NMCA-092, ¶ 3 ("It is [the] defendant's burden to bring up a record sufficient for review of the issues he raises on appeal.").

CONCLUSION

{59} For the foregoing reasons, we remand this case to the district court with instructions to vacate Defendant Candelaria's fraud conviction carrying the lesser sentence. We affirm the district court's judgments and sentences against Defendant Candelaria and Chee in all other respects.

{60} IT IS SO ORDERED.
EMIL J. KIEHNE,
Judge Pro Tempore

WE CONCUR:
LINDA M. VANZI, Judge
JULIE J. VARGAS, Judge

Classified

Positions

Associate Attorney

Tucker, Yoder, Hatfield, Eley & Associates, the largest firm in San Juan County, practicing in New Mexico and Colorado, has an immediate associate opening in its Farmington office for civil, domestic relations and criminal practice. Ideal candidates will be team players, ready to assist clients in a variety of cases. New Mexico and Colorado bar admission a plus. Salary depending on experience. Please send cover letter and resume to jennifer@tbylaw.com

Prosecutors

Immediate openings for Prosecutors interested in creating safer communities and a better legal system, one case at a time. Imagine collaborating with a diverse team of professionals, having a manageable caseload with a competitive salary in a great workplace environment. We have positions available in Las Vegas, NM with the Fourth Judicial District Attorney's Office. If you are interested in learning more about the positions or wish to apply, contact us at (505) 425-6746, or forward your letter of interest and resumé to Richard D. Flores, District Attorney, c/o Mary Lou Umbarger, Office Manager, P.O. Box 2025, Las Vegas, New Mexico 87701 or e-mail: mumbarger@da.state.nm.us

Escrow Processor

Face paced title company looking for talent just like you! We are now hiring for escrow processor positions. Responsibilities include working with real estate brokers, lenders and attorneys to acquire and organize all necessary documents needed for closing. Prepare and distribute title company closing documents. Preparation and disbursement of funds. Requirements: Basic computer skills, Ability to multi-task, detail oriented, problem solving skills and an ability to thrive under pressure. Previous real estate, legal or accounting experience a plus. Full Benefits EOE. Send resume to Julie Buckalew at Julie.buckalew@stewart.com

Associate Attorney

Stiff, Keith & Garcia is a successful and growing law firm representing national clients, looking for a lawyer to work as an associate in the areas of insurance defense and civil litigation. Flexible work environment available. Minimum of 2 years of litigation experience. Strong academic credentials, and research and writing skills are required. We are a congenial and professional firm. Excellent benefits and salary. Great working environment with opportunity for advancement. Send resume to resume01@swcp.com

Trial Attorney

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

Entry-Level Attorney Positions

JUST PASSED THE BAR? Put that Degree to work for you! We have entry-level attorney positions immediately available with the Fourth Judicial District Attorney's Office in Las Vegas, NM. Excellent opportunity to gain valuable experience in the courtroom with a diverse team of mentor attorneys. Requirements include J.D. and current license to practice law in New Mexico. Please forward your letter of interest and resumé to Richard D. Flores, District Attorney, c/o Mary Lou Umbarger, District Office Manager, P.O. Box 2025, Las Vegas, New Mexico 87701 - or via e-mail: mumbarger@da.state.nm.us Competitive salary and great workplace environment!

Litigation Attorney

With 51 offices and over 1,400 attorneys, Lewis Brisbois is one of the largest and most prestigious law firms in the nation. Our Albuquerque office is seeking associates with a minimum of three years litigation defense experience. Candidates must have credentials from ABA approved law school, actively licensed by the New Mexico state bar, and have excellent writing skills. Duties include but are not limited to independently managing a litigation caseload from beginning to end, communicating with clients and providing timely reporting, appearing at depositions and various court appearances and working closely with other attorneys and Partners on matters. Please submit your resume along with a cover letter and two writing samples to phxrecruiter@lewisbrisbois.com and indicate "New Mexico Litigation Attorney Position". All resumes will remain confidential. LBBS does not accept referrals from employment businesses and/or employment agencies with respect to the vacancies posted on this site. All employment businesses/agencies are required to contact LBBS's human resources department to obtain prior written authorization before referring any candidates to LBBS. The obtaining of prior written authorization is a condition precedent to any agreement (verbal or written) between the employment business/ agency and LBBS. In the absence of such written authorization being obtained any actions undertaken by the employment business/agency shall be deemed to have been performed without the consent or contractual agreement of LBBS. LBBS shall therefore not be liable for any fees arising from such actions or any fees arising from any referrals by employment businesses/agencies in respect of the vacancies posted on this site.

Trial Support and Appellate Attorney

Durham, Pittard & Spalding, LLP is looking to hire a trial support and appellate attorney to join its Santa Fe office. Durham, Pittard & Spalding, LLP handles a wide variety of complex civil trials and appeals, including a significant number of cases representing plaintiffs throughout New Mexico who have suffered a catastrophic injury or wrongful death. Durham, Pittard & Spalding, LLP's attorneys frequently assist other trial attorneys with briefing, hearings, and strategic trial support, and act as lead counsel, handling appellate briefing and oral argument in a wide range of complex appeals in both state and federal court. The candidate should have 3-10 years of applicable experience, a strong work ethic, research and writing talent, and a sense of teamwork and camaraderie. Judicial clerkship experience is encouraged but not mandatory. Please send a letter of interest, resume, list of references, and a writing sample to mfinn@dpslawgroup.com.

Litigation Attorney

Keller & Keller is an award winning personal injury law firm located in Albuquerque. We are seeking an attorney with 0-5 years of experience to join our personal injury litigation team. We are proud to offer an attractive compensation and benefits package, including a salary commensurate with experience, medical insurance, 401(k) retirement plan and paid time off. All applicants must have an active license to practice law in New Mexico. The Litigation Attorney will work directly with two Litigation Attorneys and two Litigation Paralegals on a daily basis. Responsibilities include: strategic planning and discussion regarding cases; planning for and meeting court established deadlines; client contact; court appearances; trial preparation; motion practice; mediations; and depositions. We are looking for a person with critical thinking skills and the ability to apply those skills in a fast-paced environment. Excellent interpersonal communication skills with clients and coworkers is a must. Additionally, the candidate must be able to apply their knowledge and skills to make decisions and take action on cases. Interested candidates should forward a cover letter and resume to Zachary Farmer at zfarmer@2keller.com. No phone calls, please. All inquiries will be confidential.

Supreme Court of New Mexico Law Library Reference Attorney Job Pay Range: $25.107 - $40.799 Target Pay Range: $25.107 - $34.153

The Supreme Court of New Mexico seeks applicants for a full-time, at-will Reference Attorney (Attorney Assistant) position for the Supreme Court Law Library in Santa Fe, NM. SUMMARY: Under general direction and review, as assigned by the Law Librarian, perform legal research, evaluation, analysis, and writing, make recommendations, and provide administrative assistance, customer service, technical support, and training. Respond to information requests from pro se litigants, inmates, attorneys, judges, court staff, other government employees and members of the public. QUALIFICATIONS: Education: Must be a graduate of a law school meeting the standards of accreditation of the American Bar Association; possess and maintain a license to practice law in the State of New Mexico. Experience: One (1) year of experience in the practice of applicable law or as a law clerk. To Apply: View the full position description and application information at https://www.nmcourts.gov/careers.aspx Applicants should submit a Letter of Interest, Resume, Writing Sample, and New Mexico Judicial Branch Application for Employment to: Supreme Court of New Mexico, Attn: Agnes Szuber Wozniak, 237 Don Gaspar, Room 30, Santa Fe, NM 87501; Phone: 505-827-4201 / Fax: 505-827-4837; Email: supasw@nmcourts.gov

Deputy District Attorney and HIDTA- Deputy District Attorney

Immediate openings for a Deputy District Attorney and HIDTA- Deputy District Attorney in Deming. A Deputy District Attorney in Lordsburg, and an Senior Trial Attorney in Silver City. Salary Depends on Experience. Benefits. Please send resume to Francesca Estevez, District Attorney, FMartinez-Estevez@da.state.nm.us or call 575-388-1941.

Attorney

Respected Albuquerque firm seeks an attorney with 2 to 5 years' experience for an associate position with prospects of becoming a shareholder. Our firm offers a wide variety of civil practice areas serving the needs of our worldwide business clientele, including transactions, employment, litigation and commercial legal advice. Please visit our website for more information about our practice areas and attorneys. Moses, Dunn, Farmer and Tuthill, P.C. has been an AV Preeminent firm serving New Mexico clients for more than 65 years. We offer a competitive compensation package. Please send your resume to Alicia L. Gutierrez, P.O. Box 27047, Albuquerque, NM, 87125.

Assistant County Attorney

Doña Ana County is seeking an Assistant County Attorney who will perform internal counsel duties such as draft ordinances, review contracts, consult in matters of potential liability, attend public meeting and hearings on behalf of the Board of County Commissioners, County Manager, elected officials, department directors, and other appointed boards and commissions and defends and/or represents the County in limited litigation matters. The full job description and application procedures can be found at https://careers-donaanacounty.icims.com.

Senior Trial Attorney/Deputy District Attorney Taos County

The Eighth Judicial District attorney's office is accepting applications for a Senior Trial Attorney/Deputy District Attorney in the Taos office. The Senior Trial Attorney position will handle a combination of misdemeanor and felony level cases, whereas the Deputy District Attorney position will handle primarily felony level cases. Senior Trial and Deputy District Attorney positions are mid-level to advanced level positions of which is a minimum of two (2) to four (4) years of criminal law experience is preferred, respectively. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please submit a letter of interest and a resume to Suzanne Valerio, District Office Manager, 105 Albright St., Suite L, Taos, New Mexico 87571, or submit electronically to svalerio@da.state.nm.us. Applications will be accepted until and attorney has been hired for the position.

Legal Advertisement Request For Proposals

Bids will only be received through UNM's Supplier Portal and sourcing site found at the links below. University Counsel Legal Services The University of New Mexico, Albuquerque, New Mexico, RFP 2154-20. Due date is Friday, December 13, 2019 no later than 2:00 PM (MDT). Additional information may be obtained at the Purchasing Department. For further information, please contact: Contracts Specialist, Adam Gonzales at (505) 277-1733 or agonzales44@unm.edu. This request For Proposal (RFP) can be found on the UNM Public Sourcing page at the web site: https://bids.sciquest.com/apps/Router/PublicEvent?CustomerOrg=UNM. Offerors should register on the Supplier Portal in order to respond and receive amendment notices. https://bids.sciquest.com/apps/Router/PublicEvent?CustomerOrg=UNM

Experienced Attorney for Civil Litigation Defense Firm

The Albuquerque office of Ray | Peña | McChristian, PC is growing and we want you to join our busy practice. You should have enough years of experience (3-10+) to take a file and run with it from initial evaluation through discovery and up into trial. We're trial lawyers and we have plenty civil litigation defense work to keep you challenged. Check out our website at www.raylaw.com for more information about the scope of our practice. If you join us, you'll be well supported with the infrastructure of a multi-state firm even as you get the chance to work with a group of top-notch legal professionals that want you to succeed. We offer a competitive salary, great benefits and a straight-forward shareholder track. Send your resume to cray@raylaw.com and get started on the next stage of your career.

Associate Attorney

Holt Mynatt Martínez P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking associate attorneys with 0-5 years of experience to join our team. Duties would include providing legal analysis and advice, preparing court pleadings and filings, performing legal research, conducting pretrial discovery, preparing for and attending administrative and judicial hearings, civil jury trials and appeals. The firm's practice areas include insurance defense, civil rights defense, commercial litigation, real property, contracts, and governmental law. Successful candidates will have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. Salary commensurate with experience, and benefits. Please send your cover letter, resume, law school transcript, writing sample, and references to rd@hmm-law.com.

New Mexico Licensed Attorney with Litigation Experience

Allen, Shepherd, Lewis & Syra, P.A. is seeking a New Mexico licensed attorney with 1-5 years of litigation experience. Experience in construction defect, professional malpractice or personal injury preferred. Candidates considered for a position must have excellent oral and written communication skills. Available position is exempt and full time. Excellent salary and benefits. Please send resume with cover letter, unofficial transcript, and writing sample to HR@allenlawnm.org or Allen, Shepherd, Lewis & Syra, P.A. Attn: Human Resources, PO Box 94750, Albuquerque, NM 87199-4750. EEO.

Litigation Associate

Regional law firm seeks an associate attorney with 3 - 6 years' experience to assist in its busy litigation practice in Albuquerque. Candidates must possess strong research and writing skills and have significant experience drafting pleadings, dispositive motions, and discovery. Candidates with experience in the following practice areas will be given preferential consideration: commercial litigation, consumer finance and creditor rights, mortgage lending and servicing, real estate, bankruptcy, and banking. Compensation includes competitive salary, bonus program, and benefits. Please send resume and writing sample to mdowns@msa.legal.

General Counsel

New Mexico's leading Workers' Compensation provider is accepting applications for the position of General Counsel. The General Counsel is the primary legal adviser to NM Mutual and provides overall legal direction, vision and strategy in support of business objectives to executive leadership and business units. Duties include directing legal affairs, corporate governance, and government/industry relations on behalf of New Mexico Mutual. The successful candidate will have a minimum of eight years of leadership or management of in-house, corporate, regulatory, or private law firm practice. Prior General Counsel and insurance compliance or regulatory experience highly desired. Excellent salary, benefits, and corporate culture. Please submit a resume and cover letter to humanresources@newmexicomutual.com. Visit us at our website at www.newmexicomutual.com/about-us/careers for more information on our benefits and state-of-the-art home office.

Attorney Experience in Tribal Law

We are looking for an attorney with a minimum of 5 years experience in tribal law. Excellent writing skills and a developed sense of ethics a Must. Native preferred. Send resume and your own requirements to cbs@stetsonlaw.com.

Public Regulation Commission Hearing Examiners (2 positions: PRC #49592, #49594) Job ID 108916 Santa Fe

Salary $32.89-$52.54 Hourly; $68,418-$109,292 Annually; Pay Band LJ. This position is continuous and will remain open until filled. Hearing Examiners provide independent recommended decisions, including findings of fact and conclusions of law, to the NMPRC Commissioners in adjudicated cases involving the regulation of public utilities, telecommunications carriers and motor carriers. They manage and organize complex, multi-discipline and multi-issue cases; preside over evidentiary hearings sometimes involving up to 20 parties, 40 witnesses and thousands of pages of evidence; and write recommended decisions, accomplished by reading and analyzing the evidence, and incorporating that evidence and analysis into a recommended decision similar to a court opinion. The ideal candidate will have experience practicing law in areas directly related to public utility regulation; experience as an administrative law judge or hearing officer; educational experience in areas directly related to public utility regulation, such as economics, accounting or engineering; and experience practicing law involving substantial research and writing. Minimum qualifications include a J.D. from an accredited school of law and five years of experience in the practice of law. Must be licensed as an attorney by the Supreme Court of New Mexico or qualified to apply for a limited practice license (Rules 15-301.1 and 15-301.2 NMRA). For more information on limited practice license please visit http://nmexam.org/limited-license/ . Substitutions may apply. To apply please visit www.spo.state.nm.us

Assistant Attorney General

The Office of the New Mexico Attorney General is recruiting for Assistant Attorney General and Legal Assistant positions in Civil and Criminal Affairs. The job postings and further details are available at www.nmag.gov/human-resources.aspx.

City of Santa Fe Seeks Outside Real Estate Counsel:

The City of Santa Fe City Attorney's office is soliciting Request for Quotes (RFQ) for outside legal services to assist the City in complex real estate transactions. We seek particular expertise in lease, sale, and/or other disposition and development agreements, as well as closing and conveyance document drafting. In addition, we seek a firm with experience in title review and quiet title actions. Specific projects for outside counsel may include the Midtown Project, Santa Fe Estates, and affordable housing projects. Interested attorneys and law firms should submit a cover letter and a price schedule to Irene Romero: ikromero@santafenm.gov

Senior Trial Attorney
Assistant Trial Attorney
Entry Level Attorney

The 13th Judicial District Attorney's Office is accepting resumes for experienced Senior/Mid-level/Entry Level Trial Attorney's. This position requires a minimum of five years of experience as a prosecutor; and it requires handling complex felony litigation. Salary is commensurate with experience. Send resumes to Krissy Fajardo, Program Specialist, P.O. Box 1750, Bernalillo, NM 87004, or via E-Mail to: kfajardo@da.state.nm.us. Deadline for submission of resumes: Open until filled.

Contract Civil Legal Attorney

PROGRAM: Peacekeepers, Espanola NM; STATUS: Regular/Part Time/Exempt; BENEFITS: No; RATE OF PAY: DOE; EDUCATION: Juris Doctorate; EXPERIENCE: 10 years' experience in family law. REQUIRED CERTIFICATES: None; Practice civil and family law with an emphasis on domestic violence orders of protection within the Eight Northern Pueblos.

See what positions are open

Caught you browsing the job ads. Something in you yearns for a Better Place, with Better Pay. We're that place. Awarded "Best Places to Work." We've grown from 15 to 47 in 2 years. We've tripled our team, our client base, and our culture. We haven't lost anyone to resignation (Except to go to law school). We work hard, have fun and are enormously grateful for The team we have, in our mission to represent wrongfully injured clients. Are you good? That good? Are you driven to help, learn and get even better? Are you hungry to do more? Something more meaningful? Are you a team player? (That means you cooperate and Collaborate.) Then stop flipping pages, slightly frustrated. Check us out at HurtCallBert.com/careers. Watch employee testimonial videos. See what positions are open. Answer our questionnaire. You just might make the cut.

Experienced Litigation Attorney

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

Department of Finance and Administration seeks General Counsel

The Department of Finance and Administration (DFA) is hiring for the position of General Counsel. DFA's mission is to guide, serve, and support public entities to ensure fiscal accountability and effective government is responsive to all New Mexicans. The General Counsel represents the Department in legal matters that involve the Secretary's Office and the Department's five divisions, including the DFA Cabinet Secretary's Office, State Budget Division, Board of Finance, Financial Control Division, and Local Government Division. Preferred applicants will have a commitment to public service and significant legal practice experience in public law. The successful candidate will have familiarity with or the ability to master the following areas: the General Appropriations Act; legislative drafting and interpretation; public records inspection and retention; conduct of meetings subject to the Open Meetings Act; representation of public bodies; administrative adjudications, appeals, and rulemakings; negotiation and preparation of contracts; federal and state grant programs; joint powers agreements; garnishments; public procurement; public finance, bond issuances, and bond refundings; local government taxes and finances; civil litigation, appeals, and records management. This list is not exhaustive and conveys the DFA General Counsel's diverse practice. Successful applicants must have strong analytic, research, communication and interpersonal skills. The salary range is from $85,000 to $100,000 per year. Interested attorneys may submit an application to Matt Garcia, General Counsel to the Governor, directed to Vanessa.Kennedy@state.nm.us. Learn more about DFA at www.nmdfa.state.nm.us.

New Mexico Public Education Department's Special Education Bureau – Attorney Supervisor and Attorney Advanced

The New Mexico Public Education Department is seeking attorneys for its Special Education Bureau. The openings include an Attorney Supervisor position, and a Lawyer Advanced position. More details about the positions and how to apply are available at http://www.spo.state.nm.us/. Please check the website periodically for updates to the list of available positions.

Lawyer Position

Hennighausen & Olsen, L.L.P., seeks an attorney to practice in the following areas: civil, contract, water law, natural resources, and property. If interested, please send resume and recent writing sample to: Managing Partner, Hennighausen & Olsen, L.L.P., P.O. Box 1415, Roswell, NM 88202-1415. All replies are kept confidential. No telephone calls please.

Assistant District Attorney

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

Assistant Trial Attorney

Assistant Trial Attorney wanted for immediate employment with the Seventh Judicial District Attorney's Office, which includes Catron, Sierra, Socorro and Torrance counties. Employment will be based primarily in Sierra County (Truth of Consequences). Truth of Consequences is a short one hour drive from Las Cruces. Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Will also have full benefits and excellent retirement plan. Send resume to: Seventh District Attorney's Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park Street, Socorro, New Mexico 87801. Or email to: jbmauldin@da.state.nm.us .

Presenting Officer

The Pueblo of Isleta ("Owner") is soliciting for a qualified contracted attorney to serve as a Presenting Officer for its Social Services, Truancy Department, and Children's Intervention Officer. The attorney must have experience in criminal and juvenile cases involving children and juvenile delinquents. To request a copy of the full Request for Letter of Interest instructions, please email ONLY to Mary C. Montoya, Procurement Senior Buyer, poi70303@isletapueblo.com and Elaine Zuni, Procurement Director, poi70301@isletapueblo.com. Letter of Interest responses are due no later than Thursday, November 14, 2019, 3:00 p.m. MST. Responses received after the due date and emailed responses WILL NOT be accepted—no exceptions.

Attorney

Krehbiel & Barnett, P.C., a medical malpractice defense firm, seeks an attorney with at least two years of experience. We are a small law firm looking to expand. We seek an attorney who is willing to grow with the practice. Candidate should have strong writing and analytical skills. Please send letter of interest and resume to Katie Barnett at kbarnett@lady-justice.us.

Pueblo of Laguna is seeking applicants for the following positions:
Associate Judge adjudicates cases, prepares decisions, and carries out other functions of the judicial processes. Hears, tries, and determines cases to ensure the enforcement of and compliance with Pueblo codes and ordinances. Entertains pleadings from outside jurisdictions; holds hearings for bench warrants, requests for search warrants, extradition proceedings, etc. Adjudicates civil and criminal cases; imposes judgment, fines, penalties, and/or sentences. Drafts orders, opinions, or other pleadings. Refers to other courts on certain cases for disposition. Develops and maintains comprehensive case files, narrative and statistical reports. Public Defender represents indigent clients accused of violating ordinances of the Pueblo of Laguna. Performs competent defense, arrangements of bail, posting bond, pretrial conferences, representation in court appearances, and post-trial representation. Ensures civil rights are protected. Utilizes plea bargain process in the interests of the accused. Contact clients of hearings, case developments, and obligations. Interviews, gathers evidence, and analyzes to formulate legal representation. Prepares pleadings, motions, legal briefs, orders, and appellate documents. Works with relevant personnel or entities regarding appropriate recommendations for case resolution, sentences, and referrals. Reviews codes and/or ordinances; recommends amendments. For more information, contact the Pueblo of Laguna Human Resources Office at (505) 552-6654 or visit our website www.lagunapueblo-nsn.gov

Letters of Interest
The 13th Judicial District Court TJDC is accepting letters of interest from qualified individuals to provide legal representation in juvenile and adult drug courts in Valencia County. The TJDC is seeking one contractor for the 2020 fiscal year beginning on November 18, 2019 and ending on June 30, 2019. Responsibilities shall include but are not limited to: advising clients during the drug court process, participating in both team meetings on a weekly basis, participating in both drug courts weekly, attending national and state training, and participation in the AOC certification process. Familiarity with the current drug court model is preferred. Interested persons can contact Beth Williams, Deputy Court Executive Officer at 505-865-2464 or lludeaw@nmcourts.gov.

Senior Employee Relations Specialist (IRC76316)
The Los Alamos National Laboratory Human Resources – Employee Relations Group is seeking a Senior Employee Relations Specialist with an expert level of knowledge to perform creative problem solving involving complicated employee relations matters. With approximately 9,000 diverse workers, Employee Relations administration at LANL is as challenging as it is interesting. The Senior Employee Relations Specialist will be responsible for complex workplace investigations. Requirements include extensive knowledge of employee relations best practices and procedures and legal requirements affecting employee relations administration, including Title VII, ADA, FMLA, etc. Position typically requires a bachelor's degree and a minimum of 12 years of related experience or equivalent combination of education and experience. While this positon does not involve the practice of law, nor does it require bar admission or a law degree, lawyers have held these positions in the past and found them extremely rewarding. To see the full job ad and/or to apply go to: http:// lanl.jobs. Qualified applicants should apply to IRC76316. For specific questions about the status of this job, call Antoinette Jiron at (505) 665-0749. Los Alamos National Laboratory is an EO employer – Veterans/Disabled and other protected categories. Qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, sexual orientation, gender identity, disability or protected veteran status.

Traffic Arraignment Attorney
The City of Albuquerque Legal Department is hiring an Assistant City Attorney position in the Property and Finance division of the City Attorney's Office. The position will administer the traffic arraignment program and assist in areas of real estate and land use, governmental affairs, regulatory law, procurement, general commercial transaction issues, civil litigation and. The department's team of attorneys provide legal advice and guidance to City departments and boards, as well as represent the City and City Council on complex matters before administrative tribunals and in New Mexico State and Federal courts. Attention to detail and strong writing skills are essential. Applicant must be an active member of the State Bar of New Mexico in good standing or able to attain bar membership within three months of hire. Salary will be based upon experience. Please submit resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or amaragon@cabq.gov.

Associate Attorney
Atkinson, Baker & Rodriguez, P.C. is an aggressive, successful Albuquerque-based complex civil commercial and tort litigation firm seeking an extremely hardworking and diligent associate attorney with great academic credentials. This is a terrific opportunity for the right lawyer, if you are interested in a long term future with this firm. A new lawyer with up to 3 years of experience is preferred. Send resumes, references, writing samples, and law school transcripts to Atkinson, Baker & Rodriguez, P.C., 201 Third Street NW, Suite 1850, Albuquerque, NM 87102 or e_info@abrfirm.com. Please reference Attorney Recruiting.

Personal Injury Associate
Caruso Law Offices, an ABQ plaintiff personal injury/wrongful death law firm has an immediate opening for associate with 3+ yrs. litigation experience, including arbitration, bench and jury trial. Must have excellent communication, organizational, and client services skills. Good pay, benefits and profit sharing. Send confidential response to Mark Caruso, mark@carusolaw.com or 4302 Carlisle NE, ABQ NM 87107 or fax 505-883-5012. See our website at www.carusolaw.com

Part-Time Paralegal
Part-time paralegal 20-25 hours/week. May work from home as needed. Must have extensive litigation experience. Discovery expertise, Medical malpractice experience and Spanish fluency are a plus. Please send resume and salary requirements to kelly@collinsattorneys.com

Paralegal
The law firm of Butt Thornton & Baehr PC has an opening for an experienced litigation Paralegal (4+ years). Excellent organization, computer and word processing skills required. Must have the ability to work independently. Generous benefit package. Salary DOE. Please send letter of interest and resume to, Gale Johnson, gejohnson@btblaw.com

Paralegal
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.

Legal Secretary
AV rated insurance defense firm seeks full-time legal assistant with five plus years' experience in insurance defense and civil litigation. Position requires a team player with strong word processing and organizational skills. Proficiency with Word, knowledge of court systems and superior clerical skills are required. Should be skilled, attentive to detail and accurate with a Minimum typing speed of 75 wpm. Excellent work environment, salary and benefits. Please submit resume to mvelasquez@rsk-law.com or mail to 3880 Osuna Rd. NE, Albuquerque, NM 87109

Legal Assistant
The law firm of Fadduol, Cluff, Hardy & Conaway, a personal injury law firm, is looking for a self-motivated Legal Assistant to provide support to the legal staff with administrative functions as necessary. You will provide a broad spectrum of legal services under the supervision of an attorney. The ability to perform, at times, under pressure due to strict deadlines and adapt to duties as needed is paramount. Experience as a legal assistant or paralegal is preferred. Competitive pay and full benefits. Phone calls will not be accepted. Please send your resume and cover letter to fchclaw@gmail.com.

Legal Assistant/Secretary
Medium sized downtown litigation firm is accepting resumes for a full-time legal assistant position. We are seeking a motivated, team-orientated person with experience with civil litigation, court rules and filing procedures. Candidates must have solid clerical, organizational, computer and word processing skills. Excellent benefits. Salary will be based on experience and skills. Please email resumes and references to jobs@conklinfirm.com.

Litigation Paralegal
Small, friendly, plaintiffs' personal injury firm, & Borg, LLC, seeks experienced litigation paralegal. Applicant must be able to handle all parts of case management from beginning through trial. Some travel may be required. Good communication, computer and organizational skills required. Strongly prefer candidate with 2+ years of legal experience. We offer a pleasant work environment in central Albuquerque and excellent salary opportunity for qualified applicant. Non-smokers preferred. Send resume to: nathan@borg.com.

Services

Must Marketing Agency (We're Local)
Here To Handle Your Law Firm's Social Media Social Media Management $125/week (Brand Awareness). Social Media Marketing Starting at $250/week (Get More Clients). Interested? MustMarketingAgency@gmail.com

Office Space

Prime Office Space—Centrally Located
Professional office space to lease. Convenient for clients and to Courthouse. Lots of natural light and windows. Private office, secretarial and reception areas. Reserved, covered parking. Conference Room. Private bathroom. Kitchen. Storage. Approximately 1,000 square feet. Available immediately. Summit Building. Contact Jennifer at 505-880-1211.

500 Tijeras NW
Beautiful office space is available with reserved on-site tenant and client parking. Walking distance to court-houses. Two conference rooms, security, kitchen, gated patios and a receptionist to greet and take calls. Please email esteffany500tijerasllc@gmail.com or call 505-842-1905.

Office Space for Lease – Downtown
Beautiful space to sub-lease with lots of natural light, cork floors, free tenant parking, enclosed patio space, front door security, shared kitchenette, conference rooms and lobby. Four-to-six offices plus common area available approximating 2,500-3000 square feet. Available January 1, 2020 for 3-5 year term. Rent is slightly below downtown market rate of $17.00 per square foot; includes utilities. Walking distance to Courthouses, government buildings and downtown restaurants. Access to basement storage. Please contact: sublease2019@outlook.com

Prime Downtown Location at Plaza500 –
Professional office suite available on the 5th floor of the prestigious Albuquerque Plaza Building. This Class A Office space provides fully furnished offices with IT, dedicated phone line, mail services and full-time receptionist. Parking access and short-term leases available. New tenants receive monthly access to the recently renovated Hyatt Regency Albuquerque fitness center. 201 Third Street NW. Please Contact Sandee at 505-999-1726.

Office Space in Journal Center For Lease

Available Soon. A beautiful office space, in great location in Journal Center one block north of the Bar Center, for Lease. 2,500 square feet, reception area, five office rooms including a master suit with vaulted roof , brick finishes and a gas fire place that looks into the reception area, a reception area, computer room, and one additional small work station. The fireplace also looks into the reception area. A medium sized conference room, also with brick finish and book shelves. Partially furnished, including receptionist desk and chairs conference table and chairs, a small kitchen with new refrigerator, dishwasher and sink with hot and cold running water. Bathrooms are part of the common area for this and the next door office and not included in the square footage for rent purposes. Landlord pays utilities, monitored security, quarterly pest control, maintenance and taxes all for $17.95 a square foot per annum or $3,739.58 per month. Will require a 2 year lease commitment and a security deposit equal to the first month's rent. If interested, call 858-3303 and ask for Pam.

Free standing Office Building for Rent - 833 Lomas Blvd. NW Conveniently located to all Courthouses

Light, Bright and open floor plan: 4 spacious offices, copy room, conference room with kitchenette, light-filled reception area and plenty of storage.Clean space with high ceilings and beautiful wood details, only $2,000 p/month. Contact April Ager 505.269.5771

Santa Fe Office Wanted

Established civil solo attorney 505-930-2407

Office Space 620 Roma N.W.

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

Miscellaneous

Want To Purchase

Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201

For Sale

New Mexico Reports Volumes 4-147. Call Ira M. Karmiol at (505)-250-4556 if you prefer reading case law from a book.

DIAL 222-2222 !!!

222-2222 phone number is now available in Albuquerque! Fantastic opportunity to identify, brand and grow your practice. Long term lease available and affordable. Contact rwr2d2@aol.com for immediate details.

Search For Will

Max G. Fernandez, age 92 and resident of Albuquerque, NM, passed March 23, 2019. Peggy (Montoya) Fernandez, age 61 and resident of Albuquerque, NM, passed July 31, 2018. Please contact Crystal Ortega at 505-720-5280

CUDDY & McCARTHY, LLP

Attorneys at Law

THE FIRM WELCOMES

RIPLEY B. HARWOOD

Ripley B. Harwood who joined Cuddy & McCarthy as Of Counsel on October 1, 2019 in our Albuquerque office. Rip practices in the areas of Insurance, Government and Commercial Defense, Torts Law, Products Liability, Employment Discrimination, Professional Negligence and General Civil Litigation.

MARYANN T. ROMAN

MaryAnn T. Roman who joined the Firm as an Associate. Her practice areas include Administrative and Regulatory Law, Education Law and Public Sector Representation, Employment and Civil Rights Law and General Civil Litigation.

PAUL M. ROYBAL

Paul M. Roybal who joined the Firm as an Associate. His experience and practice areas include Education, Insurance Defense, Government Affairs, Employment and Labor, Real Estate and Commercial Disputes.

SANTA FE OFFICE
1701 Old Pecos Trail, Santa Fe, NM 87505
Tel: 505-988-4476 • Fax: 888-977-3814

ALBUQUERQUE OFFICE
201 Third St NW, Suite 1300, Albuquerque, NM 87102
Tel: 505-888-1335 • Fax: 888-977-3816

www.cuddymccarthy.com