Official Publication of the State Bar of New Mexico

Bar Bulletin

December 25, 2019 • Volume 58, No. 26

L'anima di Positano by Anthony Abbate (see page 3)

Abbate Fine Art, Santa Fe

Inside This Issue

CLE programming from the Center for Legal Education

Everything I Need to Know about Legal Ethics I Learned from the Kardashians

Thursday, Dec. 26, 2019
9 a.m.–12:15 p.m.
3.0 EP
Live at the State Bar Center • Also available via Live Webcast!

$39 Non-member/Audit (not seeking CLE credit)
$136 Government and legal services attorneys, Young Lawyers Division and Paralegal Division members
$143 Standard Fee
$159 Webcast Fee

Fluff is for Pillows, Not Legal Writing

Thursday, Dec. 26, 2019
1–4:15 p.m.
3.0 G
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$136 Government and legal services attorneys, Young Lawyers Division and Paralegal Division members
$143 Standard Fee
$159 Webcast Fee

Find it Fast and Free (and Ethically) with Google, Fastcase 7 and Social Media Sites

Friday, Dec. 27, 2019
9 a.m.–4:15 p.m.
4.0 G 2.0 EP
Live at the State Bar Center • Also available via Live Webcast!

$99 Non-member/Audit (not seeking CLE credit)
$278 Government and legal services attorneys, Young Lawyers Division and Paralegal Division members
$309 Standard Fee/Webcast Fee

Webinar: The Paperless Law Firm—A Digital Dream

Monday, Dec. 30, 2019
11 a.m.–noon
1.0 G
Online Only

$89 Standard Fee

Webinar: Social Media as Investigative Research and Evidence

Monday, Dec. 30, 2019
2–3 p.m.
1.0 G
Online Only

$89 Standard Fee

Live Replay: 2019 Family Law Institute

Monday, Dec. 30, 2019
9 a.m.–4:30 p.m.
4.0 G 2.0 EP
At the State Bar Center

$278 Standard Fee

New Mexico State Bar Foundation
Center for Legal Education

LinkedIn
505-797-6020 • www.nmbar.org/cle
5121 Masthead NE • PO Box 92860, Albuquerque, NM 87199

STATE BAR of NEW MEXICO

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February

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

26
Consumer Debt/Bankruptcy Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6094

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

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 free in-house use of 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 & 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. The First Judicial District Court Judicial Nominating Commission will meet beginning at 9:00 a.m. on Thursday, Dec. 12, at the Santa Fe County Courthouse located at 225 Montezuma Ave, Santa Fe, New Mexico to evaluate the applicants for this position.

New Mexico Court of Appeals

Announcement of Vacancy

One vacancy on the New Mexico Court of Appeals will exist on Feb. 1, 2020, due to the retirement of the Honorable Judge M. Monica Zamora effective Jan. 31, 2020. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. Sergio Pareja, chair of the Appellate Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website, http://lawschool.unm.edu/judsel/application.php, or emailed to you by contacting the Judicial Selection Office at 505-277-4700. The deadline for applications has been set for Jan. 7, 2020, at 5 p.m. Applications received after that time will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Appellate Court Judicial Nominating Commission will meet on Jan. 17, 2020, to interview applicants for the position at the Court of Appeals 2211 Tucker NE Albuquerque, N.M. 87106. The Commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

Professionalism Tip

With respect to opposing parties and their counsel:

I will consult with opposing counsel before scheduling depositions and meetings or before rescheduling hearings.

First Judicial District Court

Applicant Announcement

Eight applications were received in the Judicial Selection Office, for the Judicial Vacancy in the First Judicial District Court due to the retirement of Honorable Raymond Z. Ortiz, effective Dec. 31. The First Judicial District Court Judicial Nominating Commission will meet beginning at 9 a.m. on Dec. 12, at the Santa Fe County Courthouse located at 225 Montezuma Ave, Santa Fe, New Mexico to evaluate the applicants for this position. The Commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard. The names of the applicants in alphabetical order: **Kathleen (Kit) Ayala, Jerry Anthony Archuleta, Shannon Broderick Bulman, Edward Craig Hay III, Michael R. Jones, Linda Martinez-Palmer, Nathaniel Valencia Thompkins** and **Morgan Holly Wood**.

Second Judicial District Court

Destruction of Exhibits

Pursuant to New Mexico Judicial Retention and Destruction Schedules, the Second Judicial District Court will destroy exhibits filed with the Court, the Criminal (CR) for the years of 2009 to 2013 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Parties are advised that exhibits may be retrieved through Jan. 3, 2020. Should you have cases with exhibits, please verify exhibit information with the Special Services Division, at 841-6717, from 8 a.m. to 3:30 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel for the plaintiff(s) or plaintiffs themselves and defendant's exhibits will be released to counsel of record for defendants(s) or defendants themselves by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Third Judicial District Court

Notice of Right to Excuse Judge

The Third Judicial District Court will be re-assigning two dockets in the Children's Court (JR) and domestic (DM) effective Dec. 16. A percentage of pending domestic cases previously assigned to the Honorable Grace B. Duran, District Judge, Division III, shall be assigned to the Honorable Marci Beyer and the remaining percentage shall be assigned to the Honorable Lisa C. Schultz. All pending children's court cases previously assigned to the Honorable Marci Beyer, District Judge, Division II, shall be assigned to the Honorable Grace B. Duran. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days to excuse Judge Grace B. Duran, Judge Lisa C. Schultz, and Judge Marci Beyer from the date of the newly assigned dockets.

Tenth Judicial District Court

Destruction of Exhibits:

The Tenth Judicial District Court will destroy exhibits filed with the Court in civil cases for the years of 2006 to 2016. Parties are advised that exhibits may be retrieved beginning through Dec. 15. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

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.

Thirteenth Judicial District Court

Nominating Commission and Vacancy Applicants

Three applications were received in the Judicial Selection Office as of Nov. 20 at 5 p.m; for the judicial vacancy in the Thirteenth Judicial District Court due to the retirement of the Honorable Judge Louis P. McDonald, effective Dec. 31. The Thirteenth Judicial District Court Nominating Commission will meet at 9 a.m. on Dec. 16 at the Thirteenth Judicial District Court - Sandoval located at 1500 Idalia Rd, Bernalillo, NM 87004, to evaluate the applicants for this position. The committee meeting is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard. The names of the applicants in alphabetical order: **Steven Paul Archibeque, James Andrew Noel** and **Christopher G. Perez**.

Announcement of Vacancy

A vacancy on the Thirteenth Judicial District Court will exist in Bernalillo, NM as of Feb. 1, 2020, due to the retirement of the Honorable Judge John F. Davis, effective Jan. 31,2020. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. Applications, as well as information related to qualifications for the position, may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php, or emailed to you by contacting Beverly Akin at 505-277-4700. The deadline for applications has been set for Jan. 14, 2020, at 5 p.m. Applications received after that date will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Committee will meet at 9 a.m. on Jan. 28, 2020, at the Thirteenth Judicial District Court - Sandoval located at 1500 Idalia Rd, Bernalillo, NM 87004, to evaluate the applicants for this position. The Committee meeting is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

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.

Notice of Mass Reassignment

Bernalillo County Metropolitan Court Chief Judge Sandra Engel announced the mass reassignment of cases in Division XVI and XIX as a result of the creation of the Metropolitan Court Felony Unit within the Criminal Division. Pursuant to Supreme Court Rule 23-109 NMRA, Chief Judge Engel announced that effective Dec. 2, all criminal cases previously assigned to Judge David A. Murphy and to Judge Linda S. Rogers will be reassigned pursuant to New Mexico Rule of Criminal Procedure for Metropolitan Courts 7-105(A)(2) to one of the Metropolitan Court's 14 remaining Criminal Division Judges. Parties who have not yet exercised a peremptory excusal, pursuant to Supreme Court Rule 7-106 NMRA, will have 10 business days from Dec. 2 to excuse the reassigned judge.

State Bar News

Board of Bar Commissioners

2019 Election Results

The 2019 election for the Board of Bar Commissioners was held on Dec. 2. The results are as follows: **Lucy H. Sinkular** was re-elected to a three-year term and **Tomas J. Garcia** was elected to a one-year term in the First Bar Commissioner District (Bernalillo County); **Carolyn A. Wolf** was re-elected to a three-year term in the Third Bar Commissioner District (Los Alamos, Rio Arriba, Sandoval and Santa Fe counties); and **David P. Lutz** was re-elected to a three-year term and **Connie J. Flores** was elected to three-year term in the Seventh Bar Commissioner District (Catron, Dona Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties). **Parker B. Folse** was re-elected by acclamation to a three-year term in the Sixth Bar Commissioner District (Chaves, Eddy, Lea, Lincoln and Otero counties). No nomination petitions were received for the Fifth Bar Commissioner District (Curry, DeBaca, Quay and Roosevelt counties), so an email was sent out to members in that district, and the Board will make the appointment at its Dec. 11 meeting.

New Mexico Judges and Lawyers Assistance Program

Santa Fe Attorney Support Group Meeting

- Jan. 15, noon-1 p.m.

Recovery Possibilities – this support group 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 at the District Courthouse, 225 Montezuma Ave, Room 270. For more information, contact Victoria at 505-620-7056.

NEW Legal Professionals Support Group focused on Depression/

- Jan. 8, 5:30-7 p.m.
- Jan. 22, 5:30-7 p.m.

This group meets from 5:30-7 p.m. on the first and third Wednesday of every month at the UNM School of Law, King Room. (Law Library, upstairs and to immediate left). The purpose of this group is to address the negative impact anxiety and depression can have in people's lives and to develop the skills on how to regulate these symptoms through learning and developing several different strategies and techniques that can be applied to their life. The process will help the individual to understand and manage cognitive, behavior, and physiological components of anxiety and depression. The group will incorporate cognitive behavioral, psycho educational, and stress reduction techniques that are considered a practical and structured form of psychotherapy. You are not required to sign up in advance, so feel free to just show up! Conact Tenessa Eakins at 505-797-6093 or teakins@nmbar.org for questions.

Attorney Support Groups Substance Abuse

- Jan 6, 5:30 p.m.
- Jan 13, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library. Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

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

Employee Assistance Program

Managing Stress Tool for Members

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

Minimum Continuing Legal Education

Compliance Deadline Approaching

Dec. 31, 2019 is the last day to complete 2019 Minimum Continuing Legal Education requirements. For a list of upcoming MCLE approved courses, visit www.nmbar.org/MCLE. Contact MCLE with questions at 505-797-6054 or mcle@nmbar.org.

State Bar of New Mexico

Licensing Certifications and Fees Due by Feb. 1, 2020

2020 State Bar licensing requirements are now due. To avoid late fees, submit by Feb. 1, 2020. In order to complete annual licensing requirements and pay by credit card, visit www.nmbar.org/licenserenewal. To request a PDF copy of the license renewal form, email license@nmbar.org. For questions, email license@nmbar.org. For technical support, email clopez@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	
Winter Break: Dec. 23-Jan. 1, 2020	

UNM School of Law

Spanish for Lawyers I

This course will teach the basic legal terminology that is used in our judicial system in a variety of practice settings, including criminal law, domestic relations, and minor civil disputes. Practical aspects of language usage will be emphasized, and active participation is required. Lawyers must be conversant in Spanish, as the course is taught entirely in Spanish. All students will be tested prior to the start of class. The class will take place from 4:30 to 6:30 p.m. on Thursdays between Jan. 9 and April 16. This course has been approved by MCLE for 20 general CLE credits. To register, visit http://lawschool.unm.edu/spanishforlawyers/.

Other Bars

Christian Legal Aid

Fellowship Luncheons and Breakfasts

Christian Legal Aid invites members of the legal community to fellowship luncheons/breakfasts which are an opportunity for current attorney volunteers, and those interested in volunteering, to meet to learn about recent issues NMCLA attorneys have experienced in providing legal counseling services to the poor and homeless through the NMCLA weekly interview sessions. They are also opportunities to share ideas on how NMCLA volunteer attorneys may become more effective in providing legal services to the poor and homeless. Upcoming dates are: Feb. 6, 2020, at noon at Tomasitas; April 7, 2020, at 7 a.m. at The Egg and I; June 4, 2020, at noon at Japanese Kitchen; and Aug. 12, 2020, at 7 a.m. at Stripes at Wyoming and Academy. For more information, visit nmchristianlegalaid.org or email christianlegalaid@hotmail.com

Albuquerque Lawyers Club

Monthly Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its next monthly lunch meeting at noon on Jan. 8, 2020 at Seasons Restaurant, located at 2031 Mountain Road, NW, Albuquerque. Dr. Sam Roll is the featured speaker and will be presenting on the topic of "The art and value of not forgiving." The lunch is free for members, $30 for non-members in advance and $35 at the door. For more information, please email Kit Carman at kitcarman6@gmail.com.

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 Nov. 29, 2019

UNPUBLISHED OPINIONS

A-1-CA-36295	State v. Y Garcia	Reverse/Remand	11/25/2019
A-1-CA-37664	Kaywal v. Avangrid Renewables	Affirm	11/25/2019

UNPUBLISHED OPINIONS

A-1-CA-38128	CYFD v. Jeremy K	Affirm	11/25/2019
A-1-CA-36446	State v. C Neal	Affirm	11/26/2019
A-1-CA-36612	State v. I Montoya	Affirm	11/26/2019
A-1-CA-36835	A Stanley v. County of Bernalillo	Affirm	11/26/2019
A-1-CA-36922	State v. A Baca	Affirm	11/26/2019
A-1-CA-36997	State v. G Holguin	Affirm/Remand	11/26/2019
A-1-CA-37892	M Owens v. NM Taxation and Revenue	Affirm	11/26/2019
A-1-CA-37324	State v. C Rodriguez	Dismiss	11/27/2019
A-1-CA-37951	State v. R Barela	Affirm	11/27/2019
A-1-CA-37956	State v. M Jenckes	Affirm	11/27/2019
A-1-CA-38236	CYFD v. Antonio E.	Affirm	11/27/2019

Effective Dec. 6, 2019

UNPUBLISHED OPINIONS

A-1-CA-36521	State v. B Dyke	Affirm	12/02/2019

UNPUBLISHED OPINIONS

A-1-CA-36982	State v. I Sanchez	Reverse/Remand	12/02/2019
A-1-CA-35758	State v. H Torres	Affirm	12/03/2019
A-1-CA-36815	State v. R Valdez	Affirm	12/03/2019
A-1-CA-37030	State v. A Urquidez	Reverse/Remand	12/04/2019
A-1-CA-36100	State v. J Cardoza Jr	Affirm/Reverse/Remand	12/05/2019
A-1-CA-36430	T Abrams v. A Martinez	Affirm/Remand	12/06/2019
A-1-CA-36606	State v. R Sauceda	Affirm	12/06/2019
A-1-CA-36633	State v. A Milligan	Affirm	12/06/2019

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

Legal Education

December

26 **Fluff is for Pillows, Not Legal Writing**
3.0 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Everything I Need to Know about Legal Ethics I Learned from the Kardashians**
3.0 EP
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27 **Find it Fast and Free (and Ethically) with Google, Fastcase 7 and Social Media Sites**
4.0 G, 2.0 EP
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30 **Social Media as Investigative Research and Evidence**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

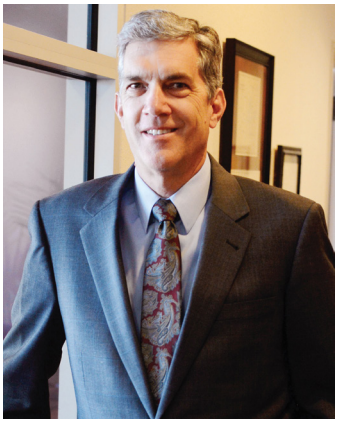
30 **2019 Family Law Institute**
5.0 G, 2.0 EP
Live Replay/Live Webcast
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

February

27 **Introduction to the Practice of Law in New Mexico (Reciprocity)**
4.5 G, 2.5 EP
Live Seminar
New Mexico Board Of Bar Examiners
www.nmexam.org

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location/course type, course provider and registration instructions.

A MESSAGE FROM YOUR State Bar President



Dear Fellow State Bar Members,

The State Bar has experienced another year of active engagement. I am excited to take this opportunity to highlight a handful of this year's many accomplishments.

Three-Year Strategic Plan
In September the Board of Bar Commissioners met over a weekend to develop a long-term strategic plan. During the course of the meetings, we examined the key issues facing the legal profession, your bar association and the needs of our members throughout New Mexico. We developed a comprehensive three-year plan which will help focus our resources where they are most needed by the Bar. The four key components of the plan are:

1) Expand the State Bar's services to all members (initiatives include: greater state-wide attorney engagement; continued expansion of attorney well-being program and an improved association management system/website)
2) Continue to cultivate an open and communicative partnership with the New Mexico Supreme Court with the intent to improve regulatory efficiency and effectiveness. (initiatives include: legal specialization program; roundtable conversations with judiciary)
3) Enhance the State Bar's connection with members through an improved communications plan (initiatives include: continued growth of print publications; analysis of electronic communications and improvements to the State Bar website)
4) Focus inward on organizational infrastructure to ensure the State Bar can better lead the profession in a more sustainable manner. (initiatives include: appropriate governance and programmatic relationship between the State Bar and Bar Foundation and improved IT infrastructure and staffing)

Bar Commissioner District Annual Events
The Board is proud of our diverse state with members in every corner. To that end, we want to increase our outreach to statewide membership. This year we held our first member appreciation day in Albuquerque and bar commissioner districts were invited to host their own local bar meet-up events. I was privileged to attend several of these and found them very enlightening. In particular, I was appreciative of your feedback and ideas on how the State Bar can improve its programs to better-serve all its members. We plan to continue these events so that members in areas other than Albuquerque and Santa Fe can feel more connected to the State Bar. Please be on the lookout for information on a bar commissioner district event in your area.

Legal Specialization
As a replacement to the specialization program which was previously administered by the New Mexico Supreme Court, the Board of Bar Commissioners voted to administer and implement a new legal specialization program in New Mexico. The State Bar program will be modeled on very successful legal specialization programs of other State Bars across the country. It will have requirements similar to the Supreme Court program (including minimum years in practice, percent of practice, peer review, and supplementary CLE). In addition, specialist applicants will be required to pass an exam. We expect this new and improved program will be available to accept applications beginning in fall 2020.

MCLE
The oversight of Minimum Continuing Legal Education transitioned from the Supreme Court to the State Bar late last year. It is the State Bar's priority to provide excellent customer service and assistance to our members. Our goal is to make completing your MCLE requirements as easy – and as useful – as possible.

Annual Meeting
The Annual Meeting is always one of the year's highlights. This year's conference featured ABC News' Dan Abrams, discussions on resilience and fitness to practice, law practice management, prepping for pro bono, immigration issues and even included a visit by President John Adams! This year we honored six incredible members of the legal profession and one program with the State Bar Annual Awards. The Annual Meeting was also a time to enjoy the comradery among New Mexico lawyers which I believe is unique to our state and our smaller membership. If you haven't yet attended an annual meeting, I strongly encourage you to mark your calendars for next year's conference which will be held June 17-20, 2020 in Santa Fe. The 2020 Annual

A MESSAGE FROM YOUR State Bar President

Meeting will be held in conjunction with the New Mexico Judicial Conclave for a historic session of both judges and attorneys.

Bar Bulletin **and Digital Print Center**
As a cost-saving measure, beginning in 2019, the *Bar Bulletin* began to be published semi-monthly. We are now outsourcing the printing which provides additional savings. Even before the creation of a new website, which will occur later in 2020, significant improvements to our website have been made to ease the transition of only receiving the *Bar Bulletin* twice a month. The website now features an online events calendar where you can browse, filter, and save events that are relevant to your practice. Classified ads and an online notices section that mirrors the notices section in the *Bar Bulletin* (but is updated much more frequently) are all available online. You can browse all these features at www.nmbar.org under the "*Bar Bulletin* & Events" tab.

Other Highlights in 2019:
- The State Bar is in the middle of a search for new association management software. The new AMS will allow us to provide much-needed improvements to our online presence, member information-tracking and improve member resources and benefits.
- The Access to Justice Fund Grant Commission awarded a record amount of $650,000 in needed funding to 10 legal service providers. These civil legal service organizations provide vital services across the state.
- The New Mexico State Bar Foundation hosted the third annual Golf Classic tournament which raised more than $32,000! The Bar Foundation is the charitable arm of the State Bar and helps raise funds allocated to several civil legal service providers. The tournament continues to be a great way for members of the bar to unite for a fun event and a good cause. I hope you will consider participating as a golfer or a sponsor of the tournament next year.

2020:
Tina Cruz was sworn in as your 2020 President of the State Bar on Dec. 11 at a wonderful ceremony before the New Mexico Supreme Court. Carla Martinez was also sworn in as President-elect, and Carolyn Wolf as the Secretary-Treasurer. I know that each of these individuals, as well as the entire Board of Bar Commissioners, are committed to lead our organization and work hard to serve you in 2020.

To the extent you don't already, I encourage you to do the following in the year ahead: 1) Find or create a program where you can provide pro bono legal services in your community; 2) Get involved in one or more of the many Sections, Committees or activities of the State Bar or find a voluntary bar organization which fits your interests or passion and 3) Find at least one way to improve your physical and mental health. I promise that you will meet incredible people, enrich your life and your practice and both you and your clients will be better for your efforts.

To say that it has been an honor to serve as your president for 2019 would be a huge understatement. I have truly enjoyed the experiences and opportunities of this past year. Participation in State Bar activities has only made me prouder to be a lawyer and a member of this state's legal community. It also helped me realize how fortunate we are to have such a dedicated and professional team at the State Bar. I am especially grateful to my wife Debbie and to my law firm for supporting me in this endeavor. For 2020, I wish you a happy, healthy, successful and prosperous year.

Enthusiastically,

Gerald G. Dixon,
President, State Bar of New Mexico

THANK You

The State Bar of New Mexico would like to express its appreciation and gratitude to the following attorneys that participate in the **DIVORCE OPTIONS WORKSHOP.** Thank you for your professionalism, time and service to the community in New Mexico.

Gretchen Walther
Tiffany Oliver Leigh
Meredith Johnstone
Linda Helen Bennett
Maria Montoya-Chavez
Martha Kaser
Lucy Sinkular
Allison Pieroni

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-038

No. A-1-CA-34919 (filed February 12, 2019)

TEXASFILE LLC,
Plaintiff-Appellant,
v.
BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF LEA AND KEITH
MANES, IN HIS CAPACITY
AS LEA COUNTY CLERK AND
CUSTODIAN OF PUBLIC PROPERTY
RECORDS,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
Lisa B. Riley, District Judge

Certiorari Denied, August 8, 2019, No. S-1-SC-37578.
Released for Publication September 3, 2019.

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Opinion

Jennifer L. Attrep, Judge.

{1} After numerous exchanges, Plaintiff TexasFile, LLC (TexasFile) and Defendant Lea County (the County), through its county clerk, failed to agree on a method or fee for fulfilling TexasFile's public records request for electronic copies of all the County's real property records and associated indexes. TexasFile filed a lawsuit, alleging that the fee set by the County was unreasonable and amounted to a denial of its records request. TexasFile asserted claims under the Inspection of Public Records Act (IPRA), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2018), the Public Records Act, NMSA 1978, §§ 14-3-1 to -23 (1959, as amended through 2015), and the Recording Act, NMSA 1978, §§ 14-8-1 to -17 (1855-56, as amended through 2017). The County moved to dismiss the complaint. The district court granted the motion on the grounds that (1) TexasFile failed to state a claim upon which relief could be granted under IPRA because its records request had not been denied, and (2) neither the Public Records Act nor the Recording Act provided TexasFile a private right of action. We conclude that the Recording Act's production provisions governed the County's obligation with respect to the records request at issue in this case and that the complaint failed to allege any violation of that act. Therefore, we affirm the district court's dismissal of TexasFile's complaint, albeit on different grounds.

BACKGROUND

{2} The relevant facts for purposes of this appeal are undisputed and drawn from the complaint. TexasFile is a Texas-based commercial entity that provides customers online access, for a fee, to real property records from Texas and other states. In October 2013, TexasFile submitted an IPRA request to the County for "an electronic copy of all Lea County real property image and index records that are maintained in digital form by or on behalf of Lea County." The County responded a few days later, explaining that it could "not provide digital copies of [its] records," but that it had "computers and printers available for public use" at a price of 50 cents per page. Further, hard copies of the "indexing records" could be purchased "at a price per record of $.03 and a set[-]up fee of $15.00," with the charges per year averaging between "$1,100.00 and $1,600.00."

{3} Unsatisfied with obtaining the requested information in the form proposed by the County, TexasFile replied to the County's response several months later renewing its request for electronic production. TexasFile noted that a provision in IPRA requires records custodians to provide public records in electronic form when the records are specifically requested in electronic form and "available" in that form. TexasFile asserted that the County's records "were plainly available" electronically, given that the records were accessible on computer terminals at the County's offices. The County responded that Section 14-8-9.1 (2011) of the Recording Act requires that counties redact certain "protected personal identifier information" before third parties may "digitiz[e] or purchas[e]" records that would otherwise reveal that information. Based on that requirement, and because its records had apparently not yet been redacted, the County advised, "we do not provide digital copies of our records." The County reiterated that it made computers and printers

available to the public during normal business hours, and it charged a copy fee of 50 cents per page. The County added that before leaving its offices, any copy "must be inspected for protected personal identifier information," so that redactions could be made as necessary.

{4} TexasFile replied, contending that Section 14-8-9.1(C) (2011) of the Recording Act required the County to make redactions before digitizing records, and asserting that electronic images should be available to TexasFile. The County responded again, explaining that because it did not have a practice of providing electronic images, it was looking at "options and investigating pricing." After a meeting of the board of county commissioners, the County offered to compile and produce its records in electronic form under the following terms. The County would charge "25 cents per image (page), $100 set[-] up fee plus the cost of the [media] used to convey the records." Any employee time expended in excess of four hours would be charged at $25 per hour. The County reported that a rough estimate of the cost of the records spanning the period from July 1, 2011, to May 2014, "would be around $40,000," plus approximately "$7,000" for the associated index. TexasFile, questioning these estimates, asked the County how it "had arrived at a price of 25 cents per image." After reiterating this request several times and receiving no substantive response, TexasFile concluded that the County had "refused to reconsider the 25-cents-per-image fee."

{5} TexasFile then filed its lawsuit in district court, alleging the County's fee demand "for electronic copies of . . . real property records [was] unreasonable," based on "reasonable fee" provisions appearing in IPRA, the Public Records Act, and the Recording Act. TexasFile's prayer for relief included a request for a declaratory judgment, "declaring [the County's] quoted fees for electronic copies of Lea County's real property records unreasonable as a matter of law." The County moved to dismiss. The County contended that TexasFile had no cause of action under IPRA because IPRA provides a private cause of action only to those parties whose requests for inspection have been "denied," *see* § 14-2-12(A)(2), and TexasFile's request was never denied, as the County at all times made clear the records were available for inspection at its offices. The County further maintained that neither the Public Records Act nor the Recording Act provided TexasFile a private right of action. The district court embraced the County's positions, granted the County's motion, and dismissed TexasFile's complaint with prejudice. The court also denied TexasFile's motion for leave to amend its complaint to seek a writ of mandamus under IPRA, Section 14-2-12(B).

{6} TexasFile's principal argument on appeal is that the district court erred in concluding the complaint failed to allege a "denial," as required for private party enforcement under IPRA, Section 14-2-12(A). In short, TexasFile interprets IPRA's enforcement provision to allow requesters to bring actions in scenarios where custodians impose unreasonably high fees, and because TexasFile alleged facts supporting a claim of an unreasonably high fee here, the district court erred in dismissing its IPRA cause of action. TexasFile adds that, even if we decline to adopt its proposed interpretation of IPRA, we should recognize implied private rights of action under the Public Records Act and the Recording Act.

{7} The County responds that TexasFile does not have standing to sue under IPRA because its request has not been denied and only the Attorney General or a local district attorney has standing to bring an IPRA enforcement action not involving a denial. *See* § 14-2-12(A). The County, along with amicus curiae (New Mexico Association of Counties), next argues that the County's obligation to respond to TexasFile's records request is defined by the Recording Act, as the more specific act, rather than IPRA or the Public Records Act. Because the Recording Act does not require electronic production and permits the County to charge up to $1.00 per page, the County argues that TexasFile's complaint fails to state a claim. The County adds that the Public Records Act and the Recording Act contain no expressions of legislative intent to create implied private rights of action.

DISCUSSION

{8} IPRA and the Recording Act impose competing obligations on the County to respond to TexasFile's request, and thus we are called on to resolve this conflict. We conclude that the Recording Act, as the more specific statute, governed the County's production obligation with respect to TexasFile's records request. Because the Recording Act imposes no requirement on the County to produce its documents electronically, we need not determine whether the County's quoted fee for the electronic production was unreasonable or whether the quoted fee amounts to a denial under IPRA. We further conclude that TexasFile's complaint fails to allege a violation of the production obligations set forth in the Recording Act, and thus we need not decide whether the Recording Act creates a private right of action. Accordingly, we affirm the district court's dismissal of TexasFile's complaint for failure to state a claim upon which relief can be granted.

I. Standard of Review

{9} We review dismissals under Rule 1-012(B)(6) NMRA de novo. *See Wolinsky v. N.M. Corr. Dep't*, 2018-NMCA-071, ¶ 3, 429 P.3d 991, *cert. denied*, 2018-NMCERT-___ (No. S-1-SC-37287, Oct. 26, 2018). A dismissal for failure to state a claim is warranted only when it appears a claimant cannot recover on any version of facts provable under the claim. *See Valdez v. State*, 2002-NMSC-028, ¶ 4, 132 N.M. 667, 54 P.3d 71. In reviewing these dismissals, we accept as true all well-pleaded factual allegations in the complaint and we resolve any doubts in favor of the complaint's sufficiency. *Id.* We review de novo the underlying questions of statutory interpretation and application of the relevant statutory provisions to the facts alleged. *See Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 16, 137 N.M. 26, 106 P.3d 1273.

{10} Where, as here, we consider a ground for affirming not relied upon by or presented to the district court, we may affirm as long as application of the new ground does not require us to look beyond the factual allegations raised and considered in the district court and it would not be unfair to the appellant. *See Freeman v. Fairchild*, 2018-NMSC-023, ¶ 30, 416 P.3d 264; *Wild Horse Observers Ass'n, Inc. v. N.M. Livestock Bd.*, 2016-NMCA-001, ¶ 29, 363 P.3d 1222. Our Supreme Court has explained that an appellee generally need not preserve any specific issues for review and may offer even unpreserved grounds for affirmance on appeal. *See Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 18, 146 N.M. 256, 208 P.3d 901. Thus, we "routinely affirm district court rulings on purely legal issues where the record allows, even when the district court relied on different reasoning, and when the court did not consider the issue at all." *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 141, 356 P.3d 564, *aff'd*, 2016-NMSC-027, 376 P.3d 836. Additionally, we are less likely to find unfairness where an argument is raised in the appellate briefs, as it was here, and the appellant has an opportunity to respond, even where the appellant declines the opportunity. *See Cordova*, 2009-NMSC-021, ¶ 19.

II. Relevant Statutory Provisions

A. The Public Records Act Is Not at Issue

{11} In its complaint, TexasFile asserted a separate claim under the Public Records Act, relying specifically on Section 14-3-18(E). This section directs, in relevant part, that "[a] county or municipality that has inserted data in a *computer database* shall authorize an electronic copy to be made of the *computer database* . . . if the person agrees to pay a reasonable fee." Section 14-3-18(E) (emphasis added). Now on appeal, TexasFile abandons this position—unequivocally maintaining that "Section 14-3-18 of the Public Records Act is *not applicable at all* because it applies only to a 'computer database.' TexasFile did not request a 'computer database'; instead, its request was for 'Lea County real property image and index records.' " (Emphasis added.) Further, the County does not assert that the Public Records Act's county database provision in Section 14-3-18 should apply in this case. In sum, neither party has relied on Section 14-3-18 of the Public Records Act as governing the County's obligation in this case, and thus we give no further consideration to that possibility here. *See Roselli v. Rio Cmtys. Serv. Station, Inc.*, 1990-NMSC-018, ¶ 10, 109 N.M. 509, 787 P.2d 428 (concluding that claims not raised on appeal are abandoned); *Titus v. City of Albuquerque*, 2011-NMCA-038, ¶ 30, 149 N.M. 556, 252 P.3d 780 ("This Court has no duty to review an argument that is not adequately developed.").

B. IPRA and the Recording Act

{12} IPRA and the Recording Act establish statutory schemes with distinct scopes and objectives. IPRA creates a records inspection scheme of general application, granting, with various exceptions, to "every person . . . a right to inspect public records of this state." Section 14-2-1(A). Our Legislature has explained that IPRA's purpose is to ensure that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." Section 14-2-5. Of particular relevance here, IPRA requires that "[a] custodian shall provide a copy of a public record in electronic format if the public record is available in electronic format and an electronic copy is specifically requested." Section 14-2-9(B). IPRA's fee provisions provide that a custodian:

> (1) may charge reasonable fees for copying the public records, unless a different fee is otherwise prescribed by law;
> (2) shall not charge fees in excess of one dollar ($1.00) per printed page for documents eleven inches by seventeen inches in size or smaller;
> (3) may charge the actual costs associated with downloading copies of public records to a computer disk or storage device, including the actual cost of the computer disk or storage device;
> (4) may charge the actual costs associated with transmitting copies of public records by mail, electronic mail or facsimile;
> (5) may require advance payment of the fees before making copies of public records;
> (6) shall not charge a fee for the cost of determining whether any public record is subject to disclosure; and
> (7) shall provide a receipt, upon request.

Section 14-2-9(C).

{13} The Recording Act, and associated statutes, *see* NMSA 1978, §§ 14-9-1 to -9 (1851-52, as amended through 1991) (pertaining to the recording of instruments affecting real estate); NMSA 1978, §§ 14-10-1 to -5 (1903, as amended through 2013) (pertaining to the creation and maintenance of a recording index of all recorded instruments affecting real property), have been around for much longer than IPRA, dating back to the mid-nineteenth century. *See, e.g.*, Section 14-8-1 (1855, as amended through 2011). Our Supreme Court has explained that these recording statutes, taken together, "are intended to protect those having subsequent dealings with the [real property documented and described by real property records]." *Romero v. Sanchez*, 1971-NMSC-129, ¶ 24, 83 N.M. 358, 492 P.2d 140. They accomplish this goal by "providing a place and a method by which an intending purchaser or encumbrancer can safely determine just what kind of title he is in fact obtaining." *Id.* ¶ 23 (internal quotation marks and citation omitted). The recording statutes have thus long required that recorded documents be made publicly available in a book of record in the office of the county clerk, *see* § 14-8-14(A), and they have directed that the book of record is to provide "notice to the public of the contents thereof," Section 14-8-6.

{14} Unlike IPRA, the Recording Act contains no requirement that records be provided in electronic format. *Compare* § 14-2-9 (IPRA's inspection and production section, requiring electronic production), *with* § 14-8-14 (the Recording Act's inspection and production section, omitting any electronic production requirement). Likewise, the Recording Act's fee provisions omit the fee requirements pertaining to electronic production and instead provide that a county clerk:

> (1) may charge reasonable fees for conducting searches and for reproducing or permitting reproduction of their records as well as for certifying documents;
> (2) shall not charge fees in excess of one dollar ($1.00) per page for documents eleven inches by seventeen inches in size or smaller;
> (3) may require advance payment of fees before making copies of public records;
> (4) shall not charge a fee for the cost of determining whether any public record is subject to disclosure; and
> (5) shall provide a receipt, upon request.

Section 14-8-14(B).

III. The Recording Act, Not IPRA, Governs the County's Obligation in This Case

{15} Neither party takes the position that the records TexasFile sought have been or could have been withheld in response to its request.[1] They agree that various statutory provisions require these records to be publicly available and that the County makes them publicly available at its offices. They dispute instead what obligations the County had in responding to TexasFile's records request, given the various statutory provisions at play. And as noted above, IPRA's electronic production directives are at odds with the Recording Act, which contains no requirement that records be produced in electronic form under any circumstances. *Compare* § 1429, *with* § 14-8-14.

[1]In passing, and without explanation, the County asserts that the property records requested by TexasFile are not "public records" as defined in IPRA. We are under no obligation to consider such an undeveloped argument, and given our resolution of this case on other grounds, we do not address this issue. *See Titus*, 2011-NMCA-038, ¶ 30.

{16} In interpreting and construing these statutory provisions, we aim to "give effect to the Legislature's intent." *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 13, 121 N.M. 764, 918 P.2d 350. We read statutes in their entirety and construe each provision in relation with all the others, so as "to produce a harmonious whole." *Id.* ¶ 14. The provisions of one statute, moreover, must be read together in pari materia with other statutes covering the same subject matter, with a presumption that our Legislature enacted each with knowledge of the relevant statutory and common law background. *Pub. Serv. Co. v. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 23, 128 N.M. 309, 992 P.2d 860. We construe statutes together when possible to promote the operation and purpose of each. *Id.* We often achieve this goal by reading a more specific statute as an exception to the provisions of a more general statute and by giving the more specific statute the prevailing effect. *See Prod. Credit Ass'n of S. N.M. v. Williamson*, 1988-NMSC-041, ¶ 5, 107 N.M. 212, 755 P.2d 56 ("A well established principle of statutory construction recognizes that when one statute deals with a subject in general terms and another deals with a part of the same subject more specifically, the more specific statute will be considered an exception to the general statute, and will apply."); *see also Lopez v. Barreras*, 1966-NMSC-209, ¶ 12, 77 N.M. 52, 419 P.2d 251 ("Conflicts between general and specific statutes are resolved by giving effect to the specific statute.").

{17} This is not the first time this Court has been called upon to resolve a dispute involving a custodian's obligation to respond to a public records request in the face of two statutes containing divergent duties. *See Crutchfield*, 2005-NMCA-022, ¶ 1. In *Crutchfield*, a Texas-based commercial entity made an IPRA request for a copy of the Department of Taxation and Revenue's (the Department) electronic severance tax database. *Id.* ¶ 4. The Department rejected the request based on Section 14315.1(C) of the Public Records Act, which permits state agencies to impose use restrictions and royalty fees before producing agency databases. *Id.* ¶ 5. This Court evaluated the Department's obligation to respond to the request given the competing obligations in IPRA and the Public Records Act. We observed that "IPRA unquestionably sets a policy of citizen entitlement to access to public records." *Id.* ¶ 18. But we explained that Section 14-3-15.1(C) of the Public Records Act sets forth provisions of "very specific application relating specifically to copies of computer databases, and specifying conditions for access to and commercial use of the databases." *Id.* ¶ 23. IPRA, by contrast, contained no provision specifically addressing requests for copies of a database, and there was no dispute the requester had in fact sought a copy of the Department's database. *Id.* ¶¶ 4, 23-24. Citing the interpretive canon that the more specific statute controls when two statutes deal with the same subject, this Court concluded that the Legislature must have intended Section 14-3-15.1(C) of the Public Records Act to govern the obligation when requests for databases were made. *Id.* ¶¶ 23-24. Consequently, Section 14-3-15.1(C) created "an exception to the general public policy [favoring the greatest possible public access] underlying the IPRA." *Id.* ¶ 24. And because the more specific provision allowed the Department to deny requests for copies of its database where a requester refuses to meet its terms, this Court concluded the Department was entitled to deny the request notwithstanding IPRA. *Id.* ¶ 27.

{18} We are presented with similarly incongruent statutory obligations, as was the case in *Crutchfield*, and accordingly we find the analysis in *Crutchfield* instructive here. IPRA instructs custodians that they must produce records in electronic format when available and requested in that form, *see* § 14-2-9(B), while the Recording Act imposes no such requirement on county clerks, *see* § 14-8-14. As *Crutchfield* explains, when this kind of conflict arises as a result of a public records request, we look to the statute most specifically addressing the "type of record" sought to determine the custodian's obligation in responding. *See* 2005-NMCA-022, ¶ 24; *see also Albuquerque Commons P'ship v. City Council of City of Albuquerque*, 2011-NMSC-002, ¶ 23, 149 N.M. 308, 248 P.3d 856 ("When faced with two provisions addressing the same topic, we resort to a familiar principle of statutory construction: a statute dealing with a specific subject will be considered an exception to, and given effect over, a more general statute." (internal quotation marks and citation omitted)). In this case, there is no dispute that TexasFile sought all of the County's real property image and index records, and as TexasFile concedes, the Recording Act establishes a scheme for the filing, recording, and inspection of these records. As explained above, the Recording Act has a long history, aiming to provide a mechanism by which prospective purchasers can examine real property records and placing on county clerks associated duties to make these records available and searchable for the public. *See Romero*, 1971-NMSC-129, ¶ 24; *see also* § 14-8-6 (history). IPRA creates no similarly specific scheme for real property records and, indeed, makes no reference to real property records at all. *See* §§ 14-2-1 to -12. In light of the breadth and depth of treatment given real property records in the Recording Act and the absence of the same in IPRA, principles of statutory construction, as employed in *Crutchfield*, counsel that the Recording Act's production provisions govern the County's obligation in responding to TexasFile's request. *See Crutchfield*, 2005-NMCA-022, ¶ 23 ("When two statutes deal with the same subject, one general and one specific, the specific statute controls.").

{19} Furthermore, in examining recent legislative history, we see no intent on the part of the Legislature to apply IPRA's electronic production requirement to the records request in this case. Both IPRA and the Recording Act were amended in 2011. At that time, the provision requiring the electronic production of documents was added to Section 14-2-9 of IPRA. *See* § 14-2-9(B) (2011). During the same session, the Legislature revamped the section in the Recording Act pertaining to searching and charging for records maintained in county clerks' offices. *Compare* § 14-8-14 (1886-87), *with* § 14-8-14 (2011). That amendment conformed the Recording Act's fee provisions in large part to IPRA's fee provisions. *Compare* § 14-8-14(B)(2) to (B)(5), *with* § 14-2-9(C)(1), (2), (5), (6), (7). But significantly, when the Legislature revamped the Recording Act to conform its fee provisions to those set forth in IPRA, it omitted IPRA's electronic production requirement and related fee provisions. *See* § 14-8-14(B) (listing identical fee provisions as those found in Section 14-2-9(C)(2), (5), (6), (7), but omitting provisions pertaining to electronic production found in Section 14-2-9(C)(3), (4)). This omission signals the Legislature's intent that IPRA's electronic production requirement and related fee provisions do not apply to records requests like those at issue in this case. *See, e.g.*, *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 25, 148 N.M. 426, 237 P.3d 728 ("[I]f a statute on a particular subject omits a particular provision, inclusion of that provision in

another related statute indicates an intent that the provision is not applicable to the statute from which it was omitted." (alteration, internal quotation marks, and citation omitted)).

{20} There are many reasons the Legislature could have determined that the electronic production requirement in IPRA was unsuitable for real property records filed and recorded in county clerks' offices—one being the safeguarding of protected personal identifier information. Section 14-2-1(B) of IPRA authorizes, but does not require, public bodies to redact protected personal identifier information before permitting inspection or copying. The Recording Act pushes the protection a step further—requiring, as opposed to merely authorizing, that redaction of protected personal identifier information be made before third parties may purchase copies. *See* § 14-8-9.1(C). And the Recording Act subjects county clerks to damages suffered by injured parties for their failure to comply with the requirements and duties of the Recording Act. Section 14-8-10. So for real property records in particular, the Legislature established heightened protection, perhaps recognizing the additional risks of disclosure of records linking personal identifier information to real property information. *See City of Las Cruces v. Pub. Emp. Labor Relations Bd.*, 1996-NMSC-024, ¶ 9, 121 N.M. 688, 917 P.2d 451 ("To permit disclosure of certain types of information could threaten the well-being of individual citizens by unnecessarily revealing information of a personal nature." (alteration, internal quotation marks, and citation omitted)). And it takes little imagination to appreciate the onerous burden county clerks' offices may bear to redact in electronic format protected personal identifier information from their voluminous records in order to ensure the privacy interests of real property owners. This supports our conclusion that the Legislature acted with intention to exempt county clerks from the electronic production requirement in IPRA.

{21} Notwithstanding *Crutchfield* and basic principles of statutory construction, TexasFile offers various arguments why the County's obligation should be governed not by the Recording Act but instead by IPRA. First, TexasFile points out that New Mexico cases instruct that IPRA provisions are to be construed broadly to carry out its legislative purpose. *See, e.g.*, *San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 15, 150 N.M. 64, 257 P.3d 884 ("Where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed." (internal quotation marks and citation omitted)). That principle, TexasFile maintains, suggests we should look to IPRA for the County's obligation. Our above analysis, however, puts this argument to rest—in cases featuring conflicting guidance, we look to the more specific statute for the obligation, even if this "creat[es] an exception to the general public policy underlying the IPRA." *Crutchfield*, 2005-NMCA-022, ¶ 24.

{22} As an aside, TexasFile contends that a clause in Section 14-8-9.1 (2011) of the Recording Act makes records filed and recorded in county clerks' offices subject to IPRA in its entirety. Section 14-8-9.1(A) (2011), which has since been amended to eliminate the clause TexasFile relies upon, specified that "[e]xcept as provided in this section, all documents filed and recorded in the office of the county clerk are public records, *subject to disclosure pursuant to* [*IPRA*]." (Emphasis added.) TexasFile's contention runs counter to the plain meaning of "disclosure." As used in IPRA, "disclosure" simply means to make a record available for inspection. *See* § 1429(A) ("Requested public records containing information that is *exempt and nonexempt from disclosure* shall be separated by the custodian prior to inspection, and the *nonexempt information shall be made available for inspection*." (emphases added)); *see also Merriam-Webster Dictionary*, https://www.merriamwebster.com/dictionary/disclose (last visited on Jan. 19, 2019) (defining "disclose" as "to open up," "to expose to view," "to make known or public"). Had the Legislature intended to import IPRA's electronic production requirement into Section 14-8-9.1(A), it certainly could have chosen words to that effect. *See State v. Greenwood*, 2012-NMCA-017, ¶ 38, 271 P.3d 753 ("The Legislature knows how to include language in a statute if it so desires." (alteration, internal quotation marks, and citation omitted)). Furthermore, TexasFile's broad interpretation of the former version of Section 1489.1(A) (2011) would render the Recording Act's production and fee requirements in Section 14-8-14(B) superfluous. *See Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236 ("Statutes must be construed so that no part of the statute is rendered surplusage or superfluous." (internal quotation marks and citation omitted)).

{23} In sum, given the conflicting guidance regarding electronic production in IPRA and the Recording Act, the comprehensive and specific treatment of real property records in the Recording Act and the absence of specific treatment in IPRA, the clear omission of an electronic production requirement in the Recording Act, as well as the heightened protection of confidential information in the Recording Act, we conclude that the Recording Act's production requirements governed the County's obligation to respond to TexasFile's records request.

IV. The District Court Correctly Determined That TexasFile Failed to State a Claim

{24} Having concluded that the Recording Act governed the County's obligation here, we next turn to whether the complaint alleged any violations of that act. Under the Recording Act, the County was required to redact any protected personal identifier information before releasing documents to TexasFile. *See* § 14-8-9.1(C). As TexasFile's complaint makes clear, the County insisted on complying with this obligation. The County also was required to make its records available for TexasFile's inspection during regular business hours. *See* § 14-8-14(A). The complaint again reflects that the County proposed to meet this requirement. The County also was authorized to charge "reasonable fees" for conducting searches and reproducing its records, along with fees "not in excess of one dollar ($1.00) per page" for documents eleven-by-seventeen inches in size or smaller. *See* § 14814(B)(1), (2). Whether those authorizations might sometimes conflict is unclear, but they do appear in the conjunctive. Further, TexasFile's complaint alleges that the County quoted a fee of 50 cents per printed page and makes no contention that this fee was unreasonable; the complaint again fails to allege that the County's initial proposal did not comply with Section 14-8-14(B) of the Recording Act. At the same time, the County had no obligation to provide electronic copies because the Recording Act imposes no such obligation, and thus the County's later efforts to accommodate TexasFile gave rise to no violation under any of the provisions TexasFile relies upon. Thus, even if the Recording Act provides a private right of action, the complaint here has failed to allege a violation of that act.

{25} In short, we conclude that TexasFile failed to state a claim upon which relief can be granted and dismissal of the complaint

was appropriate. Given TexasFile's failure to state a claim, we further conclude that the district court correctly denied TexasFile's request for declaratory relief. *See, e.g.*, *Am. Linen Supply of N.M., Inc. v. City of Las Cruces*, 1963-NMSC-176, ¶ 7, 73 N.M. 30, 385 P.2d 359 ("[U]nless a valid cause of action is stated under the rules of substantive law, there can be no recourse to declaratory judgment procedure to reach the desired end."). Finally, given the lack of any violation of a "clear, mandatory duty" on the facts alleged, the district court correctly denied TexasFile's motion to add a request for mandamus to its complaint. *See State ex rel. Whitehead v. Vescovi-Dial*, 1997-NMCA-126, ¶¶ 4, 16, 124 N.M. 375, 950 P.2d 818 (concluding mandamus is inappropriate unless "clear-cut mandatory duty" to perform some action is identified).

CONCLUSION

{26} We affirm the district court's dismissal of TexasFile's complaint.

{27} IT IS SO ORDERED.

JENNIFER L. ATTREP, Judge

WE CONCUR:

LINDA M. VANZI, Judge

J. MILES HANISEE, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-039

No. A-1-CA-34617 (filed March 20, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
LEONARD TELLES,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Fernando R. Macias, District Judge

Certiorari Denied, May 15, 2019, No. S-1-SC-37652.
Released for Publication September 3, 2019.

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Opinion

J. Miles Hanisee, Judge.

{1} A jury convicted Defendant Leonard Telles of second degree murder, kidnapping, attempted tampering with evidence, and two counts of tampering with evidence. On appeal, Defendant argues that (1) his right to a public trial was violated; (2) his convictions for kidnapping, attempted tampering with evidence, and tampering with evidence are not supported by sufficient evidence; and (3) his convictions for kidnapping and attempted tampering with evidence violate double jeopardy. Defendant also seeks reversal of his convictions based upon cumulative error. Unpersuaded, we affirm.

BACKGROUND

{2} Defendant beat Jerome Saiz (Victim) to death with a baseball bat. At trial, Defendant testified that he was at Victim's house, assisting Rebecca Gomez, Victim's ex-girlfriend, with packing so she could move out. At some point after Defendant and Ms. Gomez finished packing, Ms. Gomez's two young daughters alerted them that Victim had arrived. Defendant went into the living room where Victim and Ms. Gomez were arguing. Defendant testified that Victim was holding a baseball bat, seemed "high," and threatened Defendant. Defendant said that Victim "rushed" him, but that he fought Victim off and was able to take the bat away from Victim while Victim was making a phone call. Defendant testified that he warned Victim to stay away, but Victim came at him again, so he used the bat to defend himself.

{3} After the altercation, and seeing Victim lying on the ground unresponsive, Defendant believed Victim to be dead. Defendant told Ms. Gomez that they needed to leave Victim's house. Defendant covered Victim with a blanket and stashed the bat behind the washing machine. He then dragged Victim to a back bedroom, rolled him up in a carpet, and shut the door. Defendant next mopped the blood from the living room floor. He testified that he took these actions, not to prevent the police from finding Victim's body or to conceal evidence, but to prevent Ms. Gomez's two daughters from seeing the body or the blood and getting upset.

{4} Defendant testified that he believed Victim was dead when he dragged him to the back bedroom, but that when he heard police knocking at the door, he "panicked" and began pacing throughout the house. He went to check on Victim, heard Victim making loud snoring noises, and decided to inform the officers that Victim was "knock[ed] . . . out." Defendant also told the officers two things that he admitted at trial were false: first, that Victim had broken into the home—which Defendant misrepresented to the officers as belonging to Ms. Gomez—in the middle of the night; and second, that upon entry, Victim had attacked Ms. Gomez.

{5} At trial, the State took the position that Defendant had not acted in self-defense, but instead had killed Victim willfully and deliberately by repeatedly striking him with the baseball bat. It was also the State's theory that Defendant kidnapped Victim by rolling him up in the carpet so that if Victim regained consciousness, he would not be able to move or call for help. The State argued that Defendant's efforts to mop up the blood in the living room and stash the bat behind the washing machine supported two counts of tampering with evidence. The State additionally argued that, by moving Victim to the back bedroom and rolling him up in a carpet, Defendant was trying to hide evidence of his crimes from the police, thereby *attempting* to tamper with evidence.

{6} The jury convicted Defendant on all counts,[1] and Defendant was sentenced to fifteen years' incarceration for second degree murder with two years of parole; eighteen years' incarceration for kidnapping followed by two years of parole; eighteen months' incarceration for attempted tampering with evidence followed by one year of parole; and three years' incarceration followed by two years of parole for each of the tampering with evidence convictions. The district court ordered Defendant to serve the sentences

[1]Defendant was charged with first degree murder, but the jury was instructed on second degree murder, voluntary manslaughter, and involuntary manslaughter as well. The jury found Defendant guilty of second degree murder.

for murder, kidnapping, attempted tampering, and one of the tampering charges consecutively, but ordered the second tampering with evidence charge to be served concurrent with the sentence for second degree murder. We provide additional facts as needed to address Defendant's claims on appeal.

DISCUSSION

I. Defendant's Right to a Public Trial Was Not Violated

{7} Upon completion of a three-day jury trial, defense counsel learned that the courtroom had been closed to several members of the public, including, it appears, three members of Defendant's family, for a ten to fifteen minute period during closing arguments. The closure occurred, unbeknownst to the district court and the parties, when a court security officer barred entry to the would-be spectators in response to a "Do Not Enter" sign that, for reasons unknown had been affixed to the courtroom door. Defendant filed a post-verdict motion for a new trial, arguing that the closure was of constitutional dimension, and the district court held a hearing to determine the causes and circumstances of the temporary courtroom closure. The upshot of the hearing was two-fold: the district court neither ordered nor was aware of the closure, and no one could say with certainty who posted the closure sign or why. The hearing testimony showed that the bailiff, upon learning of the situation as it unfolded, immediately directed that all members of the public be permitted entry. Despite the exclusion of a few, the courtroom was otherwise full of spectators, including members of the media, who had entered before the brief and inadvertent closure. The district court denied Defendant's motion, emphasizing the limited nature—both in time and scope—of the courtroom closure.

{8} Defendant argues that the period of minutes during which the courtroom was closed violated his right to a public trial under the Federal and New Mexico Constitutions. We review de novo whether a defendant's constitutional rights have been violated. *State v. Turrietta*, 2013-NMSC-036, ¶ 14, 308 P.3d 964.

{9} The Federal Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend. VI. The New Mexico Constitution similarly provides that an accused shall have "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." N.M. Const. art. II, § 14. The values protected by the Sixth Amendment right to a public trial are to ensure a fair trial, remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, encourage witnesses to come forward, and discourage perjury. *See Waller v. Georgia*, 467 U.S. 39, 46 (1984). "The right to a public trial is not absolute and may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Turrietta*, 2013-NMSC-036, ¶ 15 (internal quotation marks and citation omitted). "A total courtroom closure is allowed when there is 'an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.' " *Id.* ¶ 17 (quoting *Waller*, 467 U.S. at 45). To determine whether there is an "overriding interest" sufficient to justify a courtroom closure, the district court must adhere to the following standard: "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the district court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure." *Id.* (alterations in original) (quoting *Waller*, 467 U.S. at 48).

{10} Defendant contends that because the courtroom closure at issue did not meet the "overriding interest" standard, it was unconstitutional. *See id.* But Defendant's application of *Turrietta* to the facts at hand is misplaced. In that case our Supreme Court applied the "overriding interest" standard in the specific context of a courtroom closure sought by the State and ordered over a defense objection. *See id.* ¶¶ 5-6. In this case, the district court had no knowledge of, much less any role in, the closure, and there was no defense objection to the closure, which came and went without notice by the district court or the parties.

{11} New Mexico jurisprudence has yet to address this precise situation. The State urges us to follow federal case law, which has consistently declined to find a violation of a defendant's constitutional right to a public trial where, as is the case here, the closure is fairly characterized as "trivial." We agree, persuaded as we are by the reasoning of the federal cases cited by the State.

{12} In *Peterson v. Williams*, 85 F.3d 39, 41-42 (2d Cir. 1996), the district court properly closed a courtroom during the testimony of an undercover officer, but inadvertently left it closed for an additional fifteen to twenty minutes during the defendant's ensuing testimony. The defendant argued that this inadvertent closure violated his right to a public trial. *Id.* at 41. The Second Circuit disagreed, holding that the closure did not violate the values protected by the right to a public trial because the closure was short and inadvertent and because the relevant portions of the defendant's testimony, which some members of the public may have been prevented from hearing, were repeated by defense counsel in summation. *Id.* at 43-44. In other words, the closure was too trivial to violate the Sixth Amendment. *Id.* at 44; *see also Carson v. Fischer*, 421 F.3d 83, 92-95 (2d Cir. 2005) (holding that the intentional exclusion of the defendant's ex-mother-in-law from the courtroom during testimony of a confidential informant was too trivial to implicate the Sixth Amendment); *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir. 1994) (holding that the defendant was not denied a public trial where the courthouse closed at its usual time, 4:30 p.m., the trial continued for no more than twenty minutes, and only defense counsel's wife and child were prevented from entering); *Snyder v. Coiner*, 365 F. Supp. 321, 323-24 (N.D.W. Va. 1973) (mem. order) (holding that the accidental closure of the courtroom during summation did not amount to denial of a public trial where the closure was relatively short and it was unclear whether any spectators were in the courtroom during the closure), *aff'd on other grounds*, 510 F.2d 224 (4th Cir. 1975).

{13} Defendant cites no authority to support the position he advances: that any wrongful courtroom closure, no matter how trivial or de minimus, violates a defendant's right to a public trial. Nor are we aware of any such authority. Indeed, as the Washington Supreme Court recently observed in analogous circumstances, "[T]here is no jurisdiction we are aware of that has adopted a rule completely rejecting the doctrine of de minimis closures." *State v. Schierman*, 415 P.3d 106, 126 (Wash. 2018).

{14} We agree with the uniform line of authority holding that a courtroom closure that is determined to be trivial does not meaningfully infringe upon the values protected by the right to a

public trial. *See Peterson*, 85 F.3d at 43 (considering the impact of the closure vis-à-vis the "the values furthered by the public trial guarantee"); *see also Weaver v. Massachusetts*, ___ U.S. ___, ___, 137 S. Ct. 1899, 1909 (2017) (recognizing that "not every public-trial violation results in fundamental unfairness"). Such is the circumstance in this case. First, we can only characterize what occurred in this case as a "closure" in the most technical sense of the term, considering that, as Defendant now readily acknowledges, "the courtroom was full of spectators and the media" during the isolated portion of the proceedings—a period of no more than fifteen minutes during closing arguments—around which Defendant's constitutional argument centers. It was, at most, a brief, inadvertent, partial closure, one promptly remedied by the bailiff as soon as the problem was reported. Defendant offers no explanation, and none readily comes to mind, as to how such a limited closure deprived him of a fair trial. *See United States v. Scott*, 564 F.3d 34, 38 (1st Cir. 2009) (concluding that, despite the trial court's directive barring spectators from entering or leaving the courtroom during the jury charge, no closure occurred because "the public was indeed present at the jury charge and with its presence cast the sharp light of public scrutiny on the trial proceedings, thus providing the defendant with the protections anticipated by the public trial provision of the Constitution"). Second, as was true of all the trial's participants, the judge and prosecutor were not aware of the occurrence of the courtroom closure, a circumstance which alleviates any concern that the closure somehow diminished their "sense of . . . responsibility [to the accused] and . . . the importance of their functions[.]" *Waller*, 467 U.S. at 46 (internal quotation marks and citation omitted). Lastly, the closure occurred following the evidentiary stage of the trial during closing statements, at a time when respective counsel were summarizing and commenting on the evidence presented during proceedings that undisputedly had been open to the public. As such, the *Waller* goals of encouraging witnesses to come forward and discouraging perjury are not remotely implicated by the closure here involved. We therefore hold that the brief, inadvertent closure of the courtroom during closing argument was trivial and did not violate Defendant's right to a public trial.

II. Defendant's Challenges to the Sufficiency of the Evidence Supporting His Convictions for Kidnapping, Tampering With Evidence and Attempted Tampering With Evidence Fail

{15} Defendant argues, in perfunctory fashion, that there was insufficient evidence to support his convictions for kidnapping, the two tampering with evidence counts, and attempted tampering with evidence. We begin by cautioning Defendant's appellate counsel that the presentation of these issues is woefully inadequate and undeveloped, spanning less than a single page for each contention and offering scant legal or factual analysis. *See* Rule 12-318(A)(4) NMRA (requiring citations to applicable New Mexico decisions); *State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (observing that the appellate courts are under no obligation to consider undeveloped or unclear arguments); *State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254 (reminding counsel that the appellate courts are not required to do their research); *State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 ("[A]ppellate courts will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists[.]"); *Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104 ("We will not search the record for facts, arguments, and rulings in order to support generalized arguments."). Consequently, and to the extent feasible given the cryptic nature of Defendant's arguments, we briefly address the evidence supporting Defendant's four convictions. Further, where possible, we rely on the counterarguments advanced by the State in its answer brief to better understand the vague sufficiency challenges raised by Defendant.

{16} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). The reviewing court "view[s] the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We disregard all evidence and inferences that support a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

A. Kidnapping

{17} As explained by the State in its response to Defendant's cursory challenge to the sufficiency of the evidence supporting his conviction for kidnapping, the State's case at trial rested on alternative theories regarding how Defendant's act of moving Victim's moribund body to the back bedroom and rolling him up in the carpet constituted kidnapping under NMSA 1978, Section 30-4-1 (2003). First, the State argued that Victim was "kidnapped" based on being "held to service," i.e., prevented from trying to assist himself or reporting the crime to police, in violation of Section 30-4-1(A)(3). *See id.* (providing that "[k]idnapping is the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent . . . that the victim be held to service against the victim's will"); *State v. Vernon*, 1993-NMSC-070, ¶ 13, 116 N.M. 737, 867 P.2d 407 (explaining that to "hold to service" means that the victim must "be held against his or her will to perform some act, or to forego performance of some act, for the benefit of someone or something" (internal quotation marks omitted)), *superseded by statute as stated in State v. Baca*, 1995-NMSC-045, ¶ 41, 120 N.M. 383, 902 P.2d 65. Alternatively, the State argued that Defendant's conduct in moving and wrapping Victim's body was actuated by an intent to inflict death or physical injury on Victim, thus constituting kidnapping under Section 30-4-1(A)(4). *See id.* (providing that "[k]idnapping is the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent . . . to inflict death, physical injury or a sexual offense on the victim"). Consistent with the State's alternative theories, the jury was instructed that, to convict Defendant of kidnapping it had to find that:

> 1. [D]efendant took or restrained or confined or transported [Victim] by force or intimidation;
> 2. [D]efendant intended to hold [Victim] against [Victim's] will:
> [(a)] to inflict death or physical injury on [Victim]
> OR
> 3. [(b)] for the purpose of making [V]ictim do something[,] or for the purpose of keeping [V]ictim from doing something;
> This happened in New Mexico on or about the 20th day of November, 2013.

{18} Thus, Defendant's vague challenge

to the sufficiency of the evidence supporting his kidnapping conviction appears to boil down to a claim that "[n]o service was performed" and that Defendant "committed the murder and then moved [Victim]" in order "to hide the body from Ms. Gomez's children." Citing only to *Vernon*, 1993-NMSC-070, ¶ 13, Defendant argues that his conviction for kidnapping was unsupported by substantial evidence because his act of moving Victim to the back bedroom and rolling him up in the carpet was merely an incidental restraint to the homicide, and thus could not have satisfied the "held to service" element of kidnapping. The State responds that *Vernon* is factually distinguishable from the instant case because the act of asportation that formed the basis for the insufficiently proven kidnapping charge in *Vernon preceded* and was incidental to the ensuing homicide, *see id.* ¶ 6, whereas here, the acts giving rise to the kidnapping charge *followed* and were "separate and distinct" from Defendant's infliction of the injuries that led to Victim's death. Given the parties' substantive disagreement as to the applicability of *Vernon* to the kidnapping statute, we address the current state of the law regarding both.

{19} Assuming, arguendo, that the State failed to prove that Victim was "held to service" within the meaning of that term as interpreted in *Vernon*, Defendant's argument fails to appreciate that *Vernon* was superseded by the Legislature's amendment to the kidnapping statute in 1995, which added the taking of a person "with intent to inflict death, physical injury, or a sexual offense" as an alternative means of committing kidnapping. *Compare* NMSA 1978, § 30-4-1(A)(1)-(3) (1994), *with* NMSA 1978, § 30-4-1(A)(1)-(4) (1995); *see Baca*, 1995-NMSC-045, ¶ 41 (noting that the Legislature amended the statute to include taking a person to facilitate the killing of that person after our Supreme Court decided *Vernon*). Thus, under the post-1995 and current version of the kidnapping statute, a defendant can be found guilty for taking someone against his or her will to hold that person, inter alia, "to service" *or* "to inflict death, physical injury or a sexual offense on [that person]." Section 30-4-1(A)(3), (4). Defendant's argument under *Vernon* that his "incidental movement" of Victim was not sufficient to satisfy the "held to service" element of the kidnapping statute misapprehends the separate and distinct avenues of criminal liability available to and pursued herein by the State.

{20} Having misunderstood the scope of the current, post-*Vernon* iteration of the kidnapping statute and its separate avenues of liability, Defendant fails to address whether sufficient evidence supported the State's alternative theory of kidnapping based on evidence that Defendant intended to inflict death or physical injury on Victim by moving him to the back room and rolling him up in the carpet. This omission is also fatal to Defendant's challenge to the sufficiency of his kidnapping conviction. *See State v. Duttle*, 2017-NMCA-001, ¶ 33, 387 P.3d 885 (explaining that a "general verdict will not be disturbed if there is substantial evidence in the record to support at least one of the theories of the crime presented to the jury"); *see also* Rule 12-318(A)(4) (providing that a finding that is not attacked "shall be deemed conclusive" and that "[a] contention that a verdict . . . or finding of fact is not supported by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence"). Because Defendant has failed to demonstrate any error relating to his kidnapping conviction, we affirm that conviction. *See State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (noting that "it is [the appellant's] burden on appeal to demonstrate any claimed error below").

B. Tampering With Evidence

{21} Defendant challenges his convictions for tampering with evidence as being unsupported by substantial evidence. "Tampering with evidence consists of destroying, changing, hiding, placing or fabricating any physical evidence with intent to prevent the apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another." NMSA 1978, § 30-22-5(A) (2003). Intent to tamper with evidence can be inferred from circumstantial evidence. *See State v. Schwartz*, 2014-NMCA-066, ¶ 36, 327 P.3d 1108 (stating that the jury could infer the defendant's intent to tamper with evidence from evidence, inter alia, that the defendant owned a blue air mattress and sheets and that the victim's body was found in a nearby alley wrapped in a blue air mattress and sheets); *see also State v. Brenn*, 2005-NMCA-121, ¶ 24, 138 N.M. 451, 121 P.3d 1050 (recognizing that "[i]ntent is usually established by circumstantial evidence[,]" which can take the form of evidence of a defendant's own actions and prior inconsistent statements). The jury is free to disregard a defendant's testimony if it finds that the defendant is not credible. *See State v. Cabezuela*, 2011-NMSC-041, ¶ 45, 150 N.M. 654, 265 P.3d 705 (stating that jurors may "reject [the d]efendant's version of the facts" (internal quotation marks and citation omitted)).

{22} The two counts for which Defendant was convicted were premised on his actions of (1) mopping up Victim's blood, and (2) hiding the baseball bat behind the washing machine.[2] At trial, Defendant did not dispute that he mopped up the blood or hid the bat but testified that he did so only to prevent Ms. Gomez's children from seeing and becoming upset by the blood.

{23} On appeal, Defendant does nothing more than refer to this testimony to support his argument that the tampering convictions are unsupported by substantial evidence. However, not only was the jury free to reject Defendant's self-serving account of his motives, *see id.*, but it could also have inferred the requisite intent to support Defendant's tampering convictions from the evidence presented. Specifically, the jury could have found that Defendant was not credible based on the inconsistencies in his testimony regarding the frequency, sequence, and location of the blows he inflicted upon Victim during the attack, as well as the conflicts between his trial testimony and his statements to police at the scene. Further, there was sufficient evidence for the jury to infer that Defendant intended to hide evidence from the police, including the State's showing that he failed to call 911 when he initially thought he had killed Victim, that he did not attempt to remove the children from the house in lieu of disturbing the scene, and that he did not promptly allow officers into the house upon their arrival. Finally, Defendant admitted on cross-examination that his acts of hiding the bat and mopping the floor would make it harder for the police to find the incriminating evidence. We, therefore, affirm Defendant's convictions for tampering with evidence.

[2]Defendant's brief states that the State "failed to present sufficient evidence of three counts of tampering with evidence." We believe this was a clerical error because Defendant was only charged with and convicted of two counts of tampering with evidence.

C. Attempted Tampering With Evidence

{24} Defendant asserts that his conviction for attempted tampering with evidence—premised upon Defendant's act of "wrapping [Victim] in a blanket and carpet and moving [Victim] from the living room to a back bedroom"—was not supported by sufficient evidence because, by moving Victim's body, he actually completed the crime of tampering with evidence. Other than the definitional language of NMSA 1978, Section 30-28-1 (1963), defining an "[a]ttempt to commit a felony" as "tending but failing to effect its commission[,]" Defendant cites no authority, identifies no particularized facts, and develops no argument as to why his conduct in moving Victim's body from one room to another should serve to immunize him from attempt liability. Notable for its absence is any attempt by Defendant to refute the State's trial position that Defendant's conduct was directed not solely at moving Victim, but rather toward an unsuccessful effort to prevent police from discovering Victim. Under these circumstances, we deem Defendant's contention on this issue waived. *See* Rule 12-318(A)(4) (providing that "[a] contention that a verdict . . . is not supported by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence"). We reiterate that because we are under no obligation to review unclear or undeveloped arguments, and because we will not consider an issue if no authority is cited in support of the issue, we conclude that Defendant has failed to show that his conviction for attempted tampering with evidence is unsupported by substantial evidence. *See Guerra*, 2012-NMSC-014, ¶ 21 (observing that we need not consider undeveloped or unclear arguments); *Vigil-Giron*, 2014-NMCA-069, ¶ 60 (stating that when a party cites no authority in support of an argument, we may assume no such authority exists).

III. Defendant's Convictions for Attempted Tampering With Evidence and Kidnapping Do Not Violate Double Jeopardy

{25} Defendant next argues that his right to be free from double jeopardy was violated by his convictions for attempted tampering with evidence and kidnapping. We review Defendant's double jeopardy claim de novo. *See State v. Andazola*, 2003-NMCA-146, ¶ 14, 134 N.M. 710, 82 P.3d 77.

{26} Defendant raises a double description claim, "in which a single act results in multiple charges under different criminal statutes[.]" *State v. Bernal*, 2006-NMSC-050, ¶ 7, 140 N.M. 644, 146 P.3d 289. In conducting a double description analysis, we consider the elements of the statutes using the test set forth by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932), to determine whether each statute at issue "requires proof of a fact which the other does not." *State v. Montoya*, 2013-NMSC-020, ¶ 31, 306 P.3d 426 (internal quotation marks and citation omitted). If one statute is subsumed within the other, the statutes are the same for double jeopardy purposes and a defendant cannot be punished under both statutes. *Id.* Our Courts have modified the *Blockburger* test, noting that "a complete double jeopardy analysis may require looking beyond facial statutory language to the actual legal theory in the particular case by considering such resources as the evidence, the charging documents, and the jury instructions." *Id.* ¶ 49.

{27} Where neither statute subsumes the other, we presume that the Legislature intended separate punishments, but this presumption "may be overcome by other indicia of legislative intent." *State v. Silvas*, 2015-NMSC-006, ¶¶ 12-13, 343 P.3d 616 (internal quotation marks and citation omitted). In analyzing the legislative intent underlying the statutes, we must consider "the language, history, and subject of the statutes" in order to "identify the particular evil sought to be addressed by each offense." *Id.* ¶ 13 (internal quotation marks and citation omitted). "If several statutes are not only usually violated together, but also seem designed to protect the same social interest, the inference becomes strong that the function of the multiple statutes is only to allow alternative means of prosecution." *Montoya*, 2013-NMSC-020, ¶ 32 (internal quotation marks and citation omitted). Where a statute is vague and unspecific, we must look to the State's theory of the case in evaluating the legislative intent by reviewing the charging documents and the jury instructions given. *See Silvas*, 2015-NMSC-006, ¶ 14.

{28} Here, neither statute subsumes the other. Attempted tampering with evidence requires the accused to take a substantial step toward "destroying, changing, hiding, placing or fabricating any physical evidence with intent to prevent the apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another." Section 30-22-5(A). By contrast, kidnapping, as here relevant, requires that one take, restrain, transport or confine a person "by force, intimidation or deception," intending to hold the person to service or with the intent to injure or kill him. Section 30-4-1(A)(3), (4); *State v. Montoya*, 2011-NMCA-074, ¶ 37, 150 N.M. 415, 259 P.3d 820 (noting that the pertinent inquiry for double description purposes is the state's theory of kidnapping). Plainly, each statute requires proof of a fact (or facts) that the other does not—with tampering with evidence focusing on a defendant's intent to hide evidence to avoid prosecution, and kidnapping focusing instead on a defendant's intent in "unlawful[ly] taking, restraining, transporting or confining of a person[.]" *Compare* § 30-22-5, *with* § 30-4-1(A)(3), (4). Tampering with evidence, or an attempt to do the same, does not require that a person be held and made to do something, nor does it require the infliction of death or physical harm upon another. *See* § 30-22-5. Kidnapping does not require that evidence be hidden or altered to prevent a criminal investigation. *See* § 30-4-1(A)(3), (4). Because neither statute subsumes the other, we proceed to consider whether other indicia of legislative intent prohibit Defendant from being punished separately under each statute. *See Silvas*, 2015-NMSC-006, ¶¶ 12-13.

{29} The Legislature clearly intended the statutes here at issue to address distinct social harms. Tampering with evidence is designed to punish individuals who attempt to interfere with the administration of justice by hiding or changing evidence that could be used in a criminal prosecution. *See* § 30-22-5. The pertinent sections of the kidnapping statute, on the other hand, are intended to prevent individuals from harming others or depriving others of their freedom with the intent to force them to do something against their will. *See* § 30-4-1(A)(3), (4). Nor is there any basis to conclude that these two crimes are typically committed together. *Cf. State v. Almeida*, 2008-NMCA-068, ¶ 21, 144 N.M. 235, 185 P.3d 1085 (stating that "a charge for possessing a personal supply of a controlled substance will almost always carry the additional charge of possession of drug paraphernalia").

{30} We hold that Defendant's convictions for attempted tampering with evidence and kidnapping do not violate the prohibition against double jeopardy because neither statute is subsumed within

the other, the statutes address distinct social harms, and because there is no indication that the Legislature intended only alternative punishment for conduct that violates both statutes. *See Montoya*, 2013-NMSC-020, ¶¶ 31-33 (setting forth the inquiry for double description cases).

D. There Was No Cumulative Error

{31} Defendant argues that the violation of his right to a public trial and the violation of his right to be free from double jeopardy, taken together, amount to cumulative error requiring a new trial. Having concluded there was no error, we need not consider this argument.

CONCLUSION

{32} For the reasons set forth above, we affirm Defendant's convictions.

{33} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

M. MONICA ZAMORA, Chief Judge

KRISTINA BOGARDUS, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-040

No. A-1-CA-35888 (filed April 25, 2019)

LOS ALAMOS NATIONAL BANK,
Plaintiff-Appellee,
v.
GEORGE P. VELASQUEZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Sarah M. Singleton, District Judge

Certiorari Denied, August 5, 2019, No. S-1-SC-37688.
Released for Publication September 3, 2019.

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Opinion

M. Monica Zamora, Chief Judge.

Defendant George P. Velasquez (Homeowner) appeals the district court's order granting in rem summary judgment in favor of Plaintiff Los Alamos National Bank (LANB) in this mortgage foreclosure action. On appeal, Homeowner argues that the district court erred in granting summary judgment because LANB failed to establish that it had standing to enforce Homeowner's note at the time it filed its complaint. Homeowner also argues that the district court erred by permitting LANB, as servicer of the loan, to enforce the note. We conclude LANB had standing to enforce the note, as holder and loan servicer, at the time the complaint for foreclosure was filed and therefore affirm. We need not address Homeowner's remaining issue.

BACKGROUND

{2} The following facts are undisputed. In March 2007 Homeowner executed a promissory note in favor of LANB for $273,000, secured by a mortgage. A few years later, Homeowner entered into a home affordable modification agreement with LANB to avoid defaulting on the mortgage. In March 2011 Homeowner defaulted by failing to make payments on the note when due.

{3} On August 23, 2011, LANB filed a complaint for foreclosure against Homeowner. Attached to the complaint was an unindorsed note bearing a statement stamped on the top of the first page by "Title Guaranty & Ins. Co." certifying that it was a true and correct copy of the original note. LANB also attached a copy of Homeowner's mortgage to the complaint.

{4} On February 5, 2012, the district court entered a default judgment in favor of LANB based on Homeowner's failure to answer, and LANB subsequently filed a notice of sale. Shortly thereafter, and before the scheduled sale took place, Homeowner filed for voluntary Chapter 7 bankruptcy in the United States Bankruptcy Court. Within Homeowner's bankruptcy proceedings and on his Schedule D (Creditors Holding Secured Claims), he listed LANB as a secured creditor based on its mortgage, which he valued at $300,000. On March 22, 2012, seven months after it filed its complaint, LANB deposited the original note, indorsed in blank (the indorsed note), with the district court. Absent from this note was the stamped statement from the title company certifying that it was a true and correct copy.

{5} On June 7, 2012, Homeowner filed a motion to set aside the default judgment, requesting proof that LANB was the proper party to foreclose on the mortgage at the time the complaint was filed. Homeowner argued that his failure to timely answer was excusable neglect under Rule 1-060(B)(1) NMRA and raised the defense of standing. Homeowner also attached a document printed from the Federal National Mortgage Association (Fannie Mae) website indicating that Fannie Mae owned Homeowner's loan, and argued at the motion hearing that LANB had "some explaining to do about where the note went" and how it came to "get [the note] back." The district court found that Homeowner satisfied the requirements of Rule 1-060(B), and set aside the default judgment. Homeowner then filed his answer and raised various affirmative defenses, only one of which is relevant to this appeal: LANB lacks standing to enforce the note and foreclose on the mortgage.

{6} LANB filed three motions for in rem summary judgment. In its first motion, LANB asserted it was entitled to summary judgment because it was the holder of the note and Homeowner was in default. The district court denied LANB's first motion for in rem summary judgment because it did not address Homeowner's affirmative defenses.

{7} In its second motion for in rem summary judgment, LANB included its responses to Homeowner's affirmative defenses and maintained that it could enforce the note because it was the holder. In support of this second motion, LANB attached an affidavit from Jamie Gallegos (the Gallegos affidavit), a loss mitigation specialist at LANB. Gallegos detailed the procedural background of Homeowner's loan and then stated, "[LANB] is the holder of the [n]ote and [m]ortgage." In LANB's reply, it attached an affidavit by Jane Finch (the first Finch affidavit), the LANB loan administrative officer who placed the indorsement on the note. Finch explained that LANB began the process to obtain

the original, indorsed note from Fannie Mae twenty-nine days before the complaint was filed. She stated that upon receiving it from Fannie Mae, LANB delivered the original indorsed note to LANB's previous counsel, the Little Law Firm, on August 5, 2011, eighteen days before the foreclosure complaint was filed. Attached to the first Finch affidavit were three exhibits: (1) an e-mail from Jonathan LeDuc of LANB's legal department requesting the original note memorializing Homeowner's loan from Fannie Mae for judgment and foreclosure purposes; (2) a letter from Jonathan LeDuc to the Little Law Firm enclosing the original note for Homeowner's loan; and (3) a Federal Express air bill receipt from Jonathan LeDuc to the Little Law Firm stamped received on August 5, 2011. LANB additionally argued in its reply that Homeowner is judicially estopped from challenging LANB's standing because he acknowledged that LANB was a secured creditor during the course of his bankruptcy proceedings.

{8} At the hearing on LANB's second motion for in rem summary judgment, Homeowner argued:

> Opposing counsel states that he has evidence that [LANB] held the note at the time [of] the filing of the complaint, but I don't see that evidence. The exhibit, which I would object to, to admit into court, is hearsay. And it is basically just a cover letter stating that it has the original note, but a copy of the note is not even attached to it.

LANB did not respond to Homeowner's hearsay claim, but instead focused most of its argument on Fannie Mae's interest in the loan. At the conclusion of the January 25, 2016 hearing, the district court ordered:

> [Our New Mexico case law requires that LANB] show it was the holder at the time it filed its complaint, which can be done by all kinds of evidence, including a person who has first-hand knowledge, including copies of business records that would show that that is the case. So I'm not going to preclude the bank from relying on evidence, such as Ms. Finch's affidavit, in conjunction with the business records, that would show the Federal[]Expressing of the original note to the law firm at the time of the filing of the complaint.

Nevertheless, the district court denied the second motion for in rem summary judgment because it found that Homeowner had offered evidence that Fannie Mae, at least at some point in time, had an interest in the note, and therefore summary judgment was not appropriate until evidence was submitted that Fannie Mae no longer had an interest in the note.

{9} In LANB's third motion for in rem summary judgment, it clarified Fannie Mae's role in the underlying transaction, explaining that Fannie Mae "owns" the mortgage loan and LANB is the "servicer" of the mortgage loan and attaching the affidavit of John Curcio, Assistant Vice President for Fannie Mae (the Curcio affidavit), substantiating this relationship. Attached to the Curcio affidavit was a loan detail from Fannie Mae's Servicer & Investor Reporting platform, providing information regarding mortgage loans acquired and owned by Fannie Mae. Curcio explained that the loan detail reflects the acquisition and history of Homeowner's loan, establishing that Fannie Mae owns the mortgage in the present case and that LANB is the loan servicer. Nevertheless, LANB argued, it had standing to enforce the note based on its status as the servicer of the mortgage and as the holder of the note. In response, Homeowner again contended that the note and mortgage cannot properly be enforced by LANB because it is not the "true owner" of the note and therefore does not have authority to enforce the note. Notably, Homeowner did not dispute any of the material facts set forth in LANB's second motion for in rem summary judgment and reply, and the facts were further incorporated by reference into LANB's third in rem motion for summary judgment. In LANB's reply, it attached a second affidavit by Finch (the second Finch affidavit), this time explaining the procedures followed by LANB in servicing Fannie Mae loans. According to the second Finch affidavit, immediately following the closing, the title company sends LANB a pre-closing copy of the original note, which is marked as a true and correct copy of the original. After and apart from the closing, the title company also delivers the original note to LANB. Upon LANB's receipt of Homeowner's original signed note in this case, Finch personally indorsed it, and recalls doing so within approximately thirty days or so of the closing, a time period consistent with her typical practice. Therefore, Finch explained, the indorsed note is not stamped by the title company because it is the original, not a copy. LANB also cited to an American Bar Association article, Dale Whitman, *The "Person Entitled to Enforce": Lessons Learned from BAC Home Loans Servicing v. Kolenich*, https://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/2012/6_december/rp_articles.pdf, to explain the working arrangement between Fannie Mae and LANB and to refute Homeowner's argument that he could be subject to multiple lawsuits. *See id.* (stating that at the time of foreclosure "Fannie Mae normally delivers possession of the note to its servicer becoming the holder or [person entitled to enforce], while Fannie Mae remains the owner, and will have the right to the proceeds of foreclosure").

{10} The district court determined that LANB had met its evidentiary burden to establish that it was the holder of the note on the date the complaint was filed, as required by NMSA 1978, Section 55-3-301 (1992), and that LANB's evidence concerning its relationship with Fannie Mae was sufficient to set forth the basis of LANB's entitlement to enforce the note. As a separate and additional ground for summary judgment, the district court applied the doctrine of judicial estoppel against Homeowner based on the position taken by him in the bankruptcy proceedings. The district court accordingly granted LANB's third motion for in rem summary judgment and concurrently entered a separate judgment and order of foreclosure. Homeowner appeals.

DISCUSSION

Standard of Review

{11} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Bank of N.Y. Mellon v. Lopes*, 2014-NMCA-097, ¶ 6, 336 P.3d 443 (internal quotation marks and citation omitted). "We review issues of law de novo." *Id.* "The movant need only make a prima facie showing that he is entitled to summary judgment. Upon the movant making a prima facie showing, the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.* (internal quotation marks and citation omitted).

{12} "We review a district court's decision to admit or exclude evidence for abuse of discretion." *Akins v. United Steelworkers of Am.*, 2009-NMCA-051, ¶ 40, 146 N.M. 237, 208 P.3d 457. "The determination of

relevancy . . . rests largely within the discretion of the district court." *Id.* (alteration, internal quotation marks, and citation omitted). "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 11, 314 P.3d 688 (internal quotation marks and citation omitted).

LANB Has Standing to Enforce the Note

{13} Homeowner argues that summary judgment was improper because LANB failed to demonstrate that it came into possession of the note before filing its complaint, and therefore lacked standing to enforce the note. *See Deutsche Bank Nat'l Trust Co. v. Johnston*, 2016-NMSC-013, ¶ 20, 369 P.3d 1046 (stating that standing must be established as of the date the suit was filed in mortgage foreclosure actions). Homeowner points out that LANB failed to produce the indorsed note until six months after filing the complaint and that it was undated. Therefore, the compelling issue is whether LANB made a prima facie showing supported by admissible evidence that it was the holder of the note *at the time it filed* the complaint for foreclosure on August 23, 2011.

{14} Possession of the original, indorsed note at the time of filing of the complaint is required to establish standing in this case. *See PNC Mortg. v. Romero*, 2016-NMCA-064, ¶ 23, 377 P.3d 461 ("In general, a person or entity in possession of a bearer instrument is considered a holder, and a holder of a bearer instrument is entitled to enforce its terms."). Prudential rules of standing apply in mortgage foreclosure cases in New Mexico and require litigants to demonstrate "injury in fact, causation, and redressability to invoke the [district] court's authority to decide the merits of a case." *Johnston*, 2016-NMSC-013, ¶ 13 (internal quotation marks and citation omitted). To effectively show a direct and concrete injury, a party seeking to enforce a promissory note must establish that it has the right to enforce the note under the New Mexico Uniform Commercial Code (UCC). *Id.* ¶ 14; *see also* § 55-3-301. The UCC identifies three scenarios in which a person is entitled to enforce a promissory note: "(1) when that person is the holder of the instrument; (2) when that person is a non-holder in possession of the instrument who has the rights of a holder; and (3) when that person does not possess the instrument but is still entitled to enforce it subject to the lost-instrument provisions of UCC Article 3." *Johnston*, 2016-NMSC-013, ¶ 14.

{15} LANB argues that it was the holder of the note. A "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]" NMSA 1978, § 55-1-201(b)(21)(A) (2005). Here, the note was indorsed without identifying a bearer, and was therefore indorsed in blank and payable to the bearer. *See* NMSA 1978, § 55-3-205(b) (1992) ("If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a 'blank indorsement.' When indorsed in blank, an instrument becomes payable to bearer[.]"); *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 24, 320 P.3d 1 ("A blank indorsement, as its name suggests, does not identify a person to whom the instrument is payable but instead makes it payable to anyone who holds it as bearer paper."), *abrogated on other grounds as recognized by Romero*, 2016-NMCA-064. "Under the UCC, possession of a note properly indorsed in blank establishes the right to enforce that note." *Lopes*, 2014-NMCA-097, ¶ 12.

{16} In evaluating LANB's status as holder of the note, we look for guidance in *Johnston*, in which our Supreme Court gave two examples of how a party claiming to be a holder can establish that it was in possession of the note prior to the commencement of a foreclosure action: (1) by "attaching a note containing an undated indorsement to the initial complaint," or (2) by "producing a note dated before the filing of the complaint at some appropriate time in the litigation." 2016-NMSC-013, ¶ 23. Inasmuch as the indorsed note here under consideration was neither attached to the initial complaint nor dated, this case does not fall into either of the two examples identified in *Johnston*. Our task, then, is to determine whether other evidence exists to establish that LANB had possession of the note at the time it filed the complaint. *See Romero*, 2016-NMCA-064, ¶¶ 24, 28 (discussing that mere production of the indorsed note was insufficient to prove standing at the time the complaint was filed, and the "successor in interest seeking to establish its right to foreclose [must] provide some evidence of a proper indorsement or transfer").

{17} On this score, LANB produced separate affidavits from Ms. Finch, the loan administrator of Homeowner's account who had personal knowledge about the note's chain of title, which show that LANB's legal counsel had possession of the indorsed note when the complaint was filed. These affidavits and accompanying exhibits were sufficient to establish a prima facie showing that LANB was the holder in possession of the note at the time the complaint was filed, thereby shifting the burden to Defendant to show that there is a genuine issue of material fact for trial.

{18} Homeowner's response to LANB's motion for in rem summary judgment did not dispute any of the material facts asserted in the motion, nor did it include an affidavit or other evidence to rebut LANB's prima facie showing. Instead, Homeowner argued that the differences between the note attached to the complaint and the original indorsed note submitted six months later are sufficient on their face to establish the existence of a disputed issue of material fact. On appeal, Homeowner contends that LANB failed to demonstrate through competent evidence that it possessed the right to enforce the note at the time it filed the complaint. Specifically, Homeowner argues: (1) the first Finch affidavit improperly relied on hearsay documents and lacked personal knowledge, and (2) the Gallegos affidavit stated legal and conclusory opinions. Significantly, however, Homeowner did not move to strike either affidavit or any purportedly inadmissible exhibits. *See Chavez v. Ronquillo*, 1980-NMCA-069, ¶ 20, 94 N.M. 442, 612 P.2d. 234 ("A party must move to strike an affidavit that violates Rule [1-056(E) NMRA]."). "If counsel do[es] not object to inadmiss[i]ble matters the court may consider them on the motion for summary judgment." *Id.* (alteration, internal quotation marks, and citation omitted). Accordingly, we conclude that Homeowner did not preserve any issue regarding the admissibility of the affidavits and exhibits for appeal.

{19} Homeowner's only objection to the competency of LANB's evidence came at the hearing on the second summary judgment motion, during which Homeowner's counsel stated: "The exhibit, which I would object to, to admit into court, is hearsay. And it is basically just a cover letter stating that it has the original note, but a copy of the note is not even attached to it." The exhibit consisted of the first Finch affidavit with three documents attached. Homeowner is not clear as to which exhibit he was referring to at the hearing. The district court characterized the exhibit as an affidavit with business records attached, and thus viewed it as admissible evidence. On appeal, Homeowner does not develop his argument

that the attached documents did not fall within the business records hearsay exception. We therefore decline to consider this argument further because this Court "will not review unclear arguments, or guess at what . . . arguments might be." *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076; *see also State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining that appellate courts are under no obligation to review unclear or undeveloped arguments). Moreover, Homeowner does not point us to where in the record he sought to strike the first Finch affidavit. *See Romero*, 2016-NMCA-064, ¶ 30 (giving "little weight to [an] appellate attack" on the admissibility of an affidavit because the defendants did not cite to where in the record they sought to strike it); *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 ("[O]n appeal, the party must specifically point out where, in the record, the party invoked the court's ruling on the issue. Absent that citation to the record or any obvious preservation, we will not consider the issue."). "It is the duty of the appellant to provide a record adequate to review the issues on appeal." *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 65, 146 N.M. 853, 215 P.3d 791. Without a motion to strike the affidavit or clear argument about the hearsay exhibit, we cannot say the district court erroneously considered the first Finch affidavit and its corresponding exhibits.

{20} LANB thus established through competent evidence that it possessed the indorsed note at the time it filed the complaint, and Homeowner offered nothing of substance to rebut this evidence. *See Lopes*, 2014-NMCA-097, ¶ 6 ("Upon the movant making a prima facie showing, the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial on the merits." (internal quotation marks and citation omitted)). While it undoubtedly would have been the better practice for LANB to have attached the indorsed note to the complaint, we acknowledge that such requirement was not clearly articulated in our case law until some years after the complaint was filed in the present case. *See Romero*, 2016-NMCA-064, ¶ 26 (recognizing that the test for establishing standing in foreclosure actions has "evolved dramatically" in recent years). As Defendant has failed to show that a genuine issue of material fact exists on the issue of LANB's status as the holder of the note, we hold that LANB, as holder, had standing to enforce the note and foreclose the mortgage and, accordingly, affirm the district court.

LANB's Loan Servicer Status Does Not Bar Its Enforcement of the Note

{21} Homeowner next argues that LANB cannot enforce the note because its role as a loan servicer does not establish a specific interest in the note or mortgage and because Fannie Mae still owns and maintains an interest in the note. Homeowner contends that without a transfer of interest from Fannie Mae to LANB, LANB has no standing to enforce the note, notwithstanding its possession of the note indorsed in blank. Homeowner's argument raises an issue of first impression as to whether a loan servicer has standing to enforce a note owned by another entity, one which is not a party to the foreclosure action. *Cf. id.* ¶ 15 n.2 (finding issues of fact regarding the plaintiff's standing to enforce an indorsed note, without addressing the plaintiff's apparent status as a loan servicer). We conclude that a loan servicer with authority, either statutorily or contractually, may properly enforce a note owned by another who is not a party to the foreclosure action. As LANB made a prima facie case that it was the holder of the note, it demonstrated its authority, pursuant to the UCC, to enforce the note and the district court did not err when it allowed it do to so.

{22} A loan servicer is generally "responsible for processing payments and supervising any resulting foreclosure or workout." *Id.* (internal quotation marks and citation omitted). The Mortgage Loan Company Act, NMSA 1978, §§ 58-21-1 to 32 (1983, as amended through 2009), defines a servicer as

> a person who collects or receives payments, including principal, interest and trust items such as hazard insurance, property taxes and other amounts due, on behalf of a note holder or investor in accordance with the terms of a residential mortgage loan, and includes working with a borrower on behalf of a note holder or investor, when the borrower is in financial hardship or default, to modify either temporarily or permanently the terms of an existing mortgage loan.

Section 58-21-2(N).

{23} Other jurisdictions have analyzed the issue of whether loan servicers having no ownership interest in a promissory note can assert standing to enforce the note and have uniformly held that a loan servicer may enforce a note so long as it has authority to do so. *See Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1191 (E.D.Va. 1994) (holding that both the servicer and owner of a promissory note had authority to sue to enforce the note); *Arabia v. BAC Home Loans Servicing, L.P.*, 145 Cal. Rptr. 3d 678, 686 (Ct. App. 2012) (concluding that a loan servicer may initiate a foreclosure action in its own name so long as the servicer has been assigned the right to foreclose). Cases from jurisdictions that have considered the question conclude that the authority to enforce a note generally stems from a statutory right to do so found in the UCC, though some courts have found the basis of the right arises from the pooling and servicing agreement between the loan servicer and the owner of the note. *See J.E. Robert Co. v. Signature Prop, LLC*, 71 A.3d 492, 499-501 (Conn. 2013) (concluding that a loan servicer with authority has standing to enforce a note, surveying other jurisdictions and recognizing that some jurisdictions derive that authority from the UCC while others derive that authority from pooling and servicing agreements).

{24} In this case, we have already concluded that LANB was the holder of the note, as it provided evidence that on the day it filed its complaint for foreclosure, it was in possession of the original note, which had been indorsed in blank a few days after it was executed by Homeowner. *See* § 55-1-201(b)(21)(A) (defining "holder" in pertinent part as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession"). As the "holder," LANB is among those entities authorized by statute to enforce the note, notwithstanding the fact that it does not "own" the note. *See* § 55-3-301 (stating that a " '[p]erson entitled to enforce' an instrument means . . . the holder of the instrument").

{25} Other jurisdictions have reached similar conclusions. In *Central Mortgage Co. v. Davis*, 149 A.D.3d 898, 899 (N.Y. App. Div. 2017), the defendant challenged the loan servicer's standing to foreclose, and the court held that the servicer had standing to prosecute "by virtue of its possession of the note at the time of the commencement of th[e] action." The court held that by submitting the note indorsed in blank,

the loan servicer demonstrated that it was a holder under New York's version of the UCC. *Id.* at 899-900. The court explained that "a plaintiff that has possession of the note has standing to foreclose, even where, as here, the plaintiff is the servicer, not the owner, of the mortgage loan." *Id.* at 899.

{26} Our appellate courts' treatment of Mortgage Electronic Registration Systems' (MERS) right to enforce notes it manages is also instructive to our analysis. MERS is an electronic registry for tracking the servicing rights and beneficial ownership interests in mortgage loans throughout the United States. 125 Am. Jur. *Trials* 541 § 8 (2012, updated 2019). Our Supreme Court has held that a MERS assignment of a mortgage is valid if MERS is designated as the nominee on a mortgage contract. *Romero*, 2014-NMSC-007, ¶ 35; *see also Flagstar Bank, FSB v. Licha*, 2015-NMCA-086, ¶ 17, 356 P.3d 1102 (concluding that MERS had authority to assign a mortgage, where MERS' role as nominee for lender and lender's successors and assigns was clear from the face of the mortgage), *abrogated on other grounds by Romero*, 2016-NMCA-064, ¶ 18. Similar to MERS' authority to assign a mortgage when authorized, loan servicers can enforce a note when authorized. Guided by the reasoning employed by other jurisdictions in recognizing the right of a loan servicer to enforce a note, as well as our rationale in allowing MERS to act on behalf of the owner of a note, we hold that a loan servicer may properly enforce a note even without an ownership interest in the note, provided it has authority to do so.

{27} Having established that LANB's role as a loan servicer provided an independent basis for its standing to maintain this action, we turn next to consider Homeowner's arguments challenging the admissibility of LANB's affidavits addressing LANB's servicing relationship with Fannie Mae. *See* Rule 1-056(E) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). Curcio, the assistant vice president for Fannie Mae, explained in his affidavit that Fannie Mae acquired ownership of the mortgage loan and "remains the owner[,]" while LANB is the loan servicer. Homeowner argues, as he did below, that the Curcio affidavit should be stricken because its relevance is somehow diminished by the fact that Fannie Mae is not a party to the present case. Homeowner did not cite any authority for this proposition, and we assume no such authority exists. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We assume where arguments in briefs are unsupported by cited authority, counsel[,] after diligent search, was unable to find any supporting authority."). Nevertheless, we disagree with Homeowner's premise, since Curcio's affidavit was clearly relevant to establish that Fannie Mae was the owner of the loan and LANB was the loan servicer. *See* Rule 11-401(A) NMRA (Relevant evidence is evidence having "any tendency to make a fact more or less probable than it would be without the evidence."); *McNeill v. Burlington Res. Oil & Gas Co.*, 2008-NMSC-022, ¶ 14, 143 N.M. 740, 182 P.3d 121 ("Whatever naturally and logically tends to establish a fact in issue is relevant." (alteration, internal quotation marks, and citation omitted)). Thus, the district court did not abuse its discretion in considering the Curcio affidavit.

{28} Homeowner also argues that the second Finch affidavit fails to demonstrate personal knowledge sufficient to address the issue of LANB's servicing arrangement with Fannie Mae. However, our review of the record reveals that Homeowner did not object to the admissibility of the second Finch affidavit below, and thus, his present argument is not preserved. *See* Rule 12-321 NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."); *Chavez*, 1980-NMCA-069, ¶ 20 ("A party must move to strike an affidavit that violates [Rule 1-056(E)].").

{29} We need not reach Homeowner's argument that Fannie Mae failed to reassign or transfer the indorsed note to LANB, in light of our holding that LANB was the holder of the note and therefore a "person entitled to enforce" the note pursuant to Section 55-3-301. Finally, since we affirm the grant of summary judgment in favor of LANB based on the ground discussed above, it is unnecessary to address the issue of judicial estoppel as an alternative basis for affirmance. *See Porter v. Robert Porter & Sons, Inc.*, 1961-NMSC-010, ¶ 18, 68 N.M. 97, 359 P.2d 134 (stating that our appellate courts "will not make useless orders nor grant relief that will avail appellant nothing").

CONCLUSION

{30} For the aforementioned reasons, we affirm the district court's grant of summary judgment in favor of LANB.

{31} IT IS SO ORDERED.

M. MONICA ZAMORA, Chief Judge

WE CONCUR:

JULIE J. VARGAS, Judge

MEGAN P. DUFFY, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-041

No. A-1-CA-36344 (filed May 14, 2019)

AMY LANDAU, JOYCE RODARTE n/k/a JOYCE SOLISZ, LAWRENCE OTERO, NICOLE BEDER, JEFFREY R. BURKE, PAULA E. GANZ, JAMES GRAYSON, YOLANDA J. HERRERA, ANTHONY MANFREDI, SHANNON MURDOCK, FEMMA M. OLVERA-SCOTT, MELINDA PATE, MARY H. SMITH, JESSICA L. SIERRA, GREGORY D. STOVER, HAMISH THOMSON, MICHAEL P. VALDEZ, MICHAEL SANCHEZ, and MARIA SANCHEZ-GAGNE,
Appellants-Appellants,
v.
NEW MEXICO ATTORNEY GENERAL OFFICE,
Appellee-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Jennifer L. Attrep, District Judge

Certiorari Denied, August 6, 2019, No. S-1-SC-37730.
Released for Publication September 3, 2019,

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Opinion

Edward L. Chávez, Judge Pro Tempore.

{1} Hector Balderas was elected Attorney General in 2014 to begin his term on January 1, 2015. Attorney General Balderas's transition team terminated Appellants, who had been employees within the Office of the Attorney General (OAG), in most cases for several years, before Balderas took office. Appellants appealed to the State Personnel Board (the Board). The Board concluded it did not have subject matter jurisdiction to hear Appellants' appeal because OAG employees are not entitled to the protections of the Personnel Act, NMSA 1978, Sections 10-9-1 to -25 (1961, as amended through 2014). Those protections include the right to dismissal only for just cause, as well as the right to appeal a dismissal. *Selmeczki v. N.M. Dep't. of Corr.*, 2006-NMCA-024, ¶ 15, 139 N.M. 122, 129 P.3d 158 ("Employees subject to the Personnel Act who have completed a probationary period may only be disciplined for just cause."); § 10-9-18(A) (providing for an appeal); § 10-9-18(F) (providing for reinstatement if dismissal was not for just cause); 1.7.11.10(A) NMAC (stating that "just cause" is "any behavior relating to the employee's work that is inconsistent with the employee's obligation to the agency").

{2} The central issue in this case is whether Appellants were "classified" employees covered by the Personnel Act or "exempt" employees not entitled to the procedural protections of the Personnel Act. Attorney General Balderas contends that all employees of the OAG are exempt because they all serve at the pleasure of the attorney general under NMSA 1978, Section 8-5-5 (1988) and therefore may be terminated with or without cause. Appellants contend that Section 10-9-4 of the Personnel Act, as amended in 1963, made all employees of the OAG, with a few exceptions not relevant to them, classified employees who could not be demoted or discharged without the procedural protections of the Act.

{3} We conclude that the Personnel Act controls over Section 8-5-5 because the history of the Personnel Act demonstrates that the Legislature intended it to be a comprehensive revision of the law regarding state employment. As a result, Appellants are classified employees unless the Board finds that their positions satisfy an enumerated exception in Section 10-9-4(A)-(O). We reverse the Board[1] and remand for a hearing consistent with this opinion.

DISCUSSION

I. The Personnel Act Supersedes Section 8-5-5 Because it Covers the Entire Subject Regarding State Personnel, Defines Which State Employees Are Classified or Exempt, and Creates a New and Comprehensive Procedure for the Discharge or Demotion of Classified Employees

{4} The question before us is a legal question that we review de novo. *See Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶¶ 16, 17, 133 N.M. 97, 61 P.3d 806. The Legislature anticipated the possibility that it might enact competing statutes and therefore adopted legislation to explain how irreconcilable statutes are to be interpreted. NMSA 1978, § 12-2A-10 (1997). The most relevant provision is Section 12-2A-10(C), which provides: "[i]f a statute is a comprehensive revision of the law on *a subject*, it prevails over previous statutes on the subject, whether or not the revision and the previous statutes conflict irreconcilably." (Emphasis added.) Section 12-2A-10(C) is consistent with case law holding that repeals by implication, while not favored, will be found where "the last statute is so broad in its terms and so clear and explicit in its words as to show it was intended to cover the whole subject, and therefore[,] to displace the prior statute." *State ex. rel. Bd. of Comm'rs v. Romero*, 1914-NMSC-023, ¶ 6, 19 N.M. 1, 140 P. 1069 (internal quotation marks and citation omitted); *see also Stokes v. N.M. State Bd. of Educ.*, 1951-NMSC-031, ¶ 5, 55 N.M. 213, 230 P.2d 243 (holding that a later act covering an entire subject and furnishing a new and comprehensive system of procedure evinces legislative intent to supersede prior legislation relating to the same subject, even if inconsistent).

{5} Section 8-5-5 was enacted before the Personnel Act. We must determine whether the Legislature intended the Personnel Act to be a comprehensive revision of state public employment law that governs whether OAG employees are classified or exempt. *State v. Natoni*, 2012-NMCA-062, ¶ 5, 282 P.3d 769 ("Our ultimate goal in statutory construction is to ascertain and give effect to the intent of the Legislature."). When construing statutes, courts generally turn first to the plain language of the statutes as the primary indicator of legislative intent. *See State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. Here, however, the plain language of the statutes at issue is contradictory, as we discuss further below. We therefore begin our analysis by describing the history of the enactment and amendments of both Section 8-5-5 and the Personnel Act. *See Davis*, 2003-NMSC-022, ¶ 6 ("The legislative history of the statute, including historical amendments, and whether it is part of a more comprehensive act, is instructive when searching for the spirit and reason the Legislature utilized in enacting the statute" (citation omitted).

A. History of Section 8-5-5.

{6} In 1933, the Legislature created a Department of Justice, 1933 N.M. Laws, ch. 21, § 1, defined the duties, rights and powers of the Attorney General, *id.* §§ 2-4, and their assistants, *id.* § 5, and set the salaries for authorized assistants of the Attorney General, *id.* § 6. In 1955, the Legislature amended Section 5 and repealed Section 6. *See* Chapter 21; 1955 N.M. Laws, ch. 119, §§ 1, 2. The amendment of Section 5 cited as NMSA 1953, § 4-3-5 (1955) (current version at Section 8-5-5)—is at the heart of the dispute before us. This section in 1955 read:

[1]Appellants appealed from the Board's decision to the First Judicial District Court, pursuant to Section 10-9-18(G) ("A party aggrieved by the decision of the board made pursuant to this section may appeal the decision to the district court pursuant to the provisions of [NMSA 1978,] Section 39-3-1.1 [(1999)]") and Rule 1-074(A) NMRA (governing "appeals from administrative agencies to the district courts when there is a statutory right of review to the district court"). Without deciding the merits, the district court certified the appeals to this Court on the ground that they "address an issue of substantial importance because they implicate the New Mexico Attorney General's authority to hire and fire at will, which affects not only [Appellants], but also all current and future employees of the NM[OAG]." *See* Rule 1-074(S) ("[T]he district court may, as a matter of judicial discretion, certify to the Court of Appeals a final decision appealed to the district court, but undecided by that court, if the appeal involves an issue of substantial public interest that should be decided by the Court of Appeals.").

> Assistant attorneys general—Appointment. The attorney general may appoint a first assistant attorney general, and as many other assistant attorneys general together with stenographic, clerical and other necessary employees on a full or part time basis, at salaries to be fixed by him within budget allowances and appropriation limits, as the business of the department shall require, and *who shall hold office during the pleasure of the attorney general.* The assistant attorneys general shall, subject to the direction of the attorney general, have the same power and authority as the attorney general.

(Emphasis added.) In 1965, the title of the first assistant attorney general was changed to deputy attorney general. 1965 N.M. Laws, ch. 214, § 1. In 1979, the Legislature amended Section 8-5-5 by adding Subsection B to authorize the attorney general to appoint "peace officers for the full-time investigation and enforcement of violations of the Controlled Substances Act." 1979 N.M. Laws, ch. 356, § 1. The last amendment of Section 8-5-5 occurred in 1988 when the Legislature enacted two changes. First, the Legislature amended Subsection B to expand the authority of OAG peace officers to investigate and enforce all of the criminal laws of the state, limited only by legislative appropriations. Second, and material to the issue before us, the Legislature made a stylistic change in Subsection A to the language "who shall hold office during the pleasure of the attorney general" by supplanting the word "during" with the word "at." *See* NMSA 1978, § 8-5-5 (1989) Legis. History N.M. Comp. Comm'n ("The 1988 amendment, effective May 18, 1988, made a minor stylistic change in Subsection A[.]")

B. History of the Personnel Act

{7} The Personnel Act was first enacted in 1959, 1959 N.M. Laws, ch. 205, §§ 1-11, but was repealed and replaced in 1961 by a much more comprehensive Personnel Act, which was passed "to establish for New Mexico a system of personnel administration based solely on qualification and ability, which will provide greater economy and efficiency in the management of state affairs." 1961 N.M. Laws, ch. 240, § 2; *see* § 10-9-2. This was the first Personnel Act to create a one-year period of probation during which employees could be discharged or demoted without cause or the benefit of notice and a hearing. 1961 N.M. Laws, ch. 240, § 9(D). However, once employees served their one-year probationary period, employees covered by the Act could not be discharged or demoted without cause, notice, and a hearing. *Id*. § 9(G).

{8} The 1961 Personnel Act also specified in greater detail which state positions—defined as "any state office, job, or position of employment," *id*. § 3(D)—would be covered under the Personnel Act. Section 4 of the 1961 Personnel Act specified that "*all* state positions except" those in twelve categories were covered by the Personnel Act. *Id*. § 4 (emphasis added). Subsections A and I are the exceptions relevant to the issue before us. Subsection A excepted "officials elected by popular vote or appointed to fill vacancies in elective offices, and, except for the governor, their employees, unless the elected officials elect to have their employees covered by the Personnel Act." *Id*. § 4(A). Thus, an elected official was automatically excluded from the Personnel Act, as were his or her employees unless the elected official chose otherwise. An elected official who chose to have employees covered by the Personnel Act could exclude a maximum of two assistants from coverage. *Id*. § 4(I). The New Mexico Attorney General is an elected official and therefore exempt from the Personnel Act. N.M. Const. art. V, § 1. There is no evidence in the record that the Attorney General in 1961 exercised discretion to bring OAG employees under the Personnel Act.

{9} The Legislature in 1961 also passed Senate Joint Resolution Number 1 proposing to amend Article VII, Section 2 of the New Mexico Constitution to "allow the [L]egislature to provide by law for the creation of a personnel system and for the establishment of necessary qualifications for employment of appointive officials and employees." S.J. Res. 1, 25th Leg. (1961). The voters adopted the proposed amendment at the special election held on September 19, 1961. N.M. const. art. VII, § 2(B) Ann. The amendment reads, "[t] he [L]egislature may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee." N.M. Const. art. VII, § 2(B).

{10} Armed with the approval of the voters, in 1963 the Legislature amended the Personnel Act to specify that the Personnel Act was enacted pursuant to Article VII, Section 2 and to broaden the scope of its application. 1963 N.M. Laws, ch. 200, § 1; NMSA 1953, § 5-4-29 (1963) (current version at Section 10-9-2). The Legislature broadened the Personnel Act's scope by amending Subsection 4(A) of the 1961 Personnel Act to delete the language that excluded employees of elected officials from coverage and to eliminate the discretion given to elected officials to bring their employees under coverage of the Personnel Act. 1963 N.M. Laws, ch. 200, § 2; NMSA 1953, § 5-4-31(A) (1963) (current version at Section 10-9-4). The 1963 amendment of Section 4(A) changed the language of that subsection as follows: "cover all state positions except: A. officials elected by popular vote or appointed to fill vacancies in elective offices, and, except for the governor, their employees, unless the elected officials elect to have their employees covered by the Personnel Act." *Id*. (deleted language from the 1961 Personnel Act added)

{11} Elected officials remained excluded from the Personnel Act, NMSA 1953, § 5-4-31(A), and the 1963 Personnel Act still allowed up to two assistants in the office of an elected official to be excluded from coverage under the Personnel Act. NMSA 1953, § 5-4-31(I); *see* § 10-9-4(L). The 1963 Personnel Act also excluded from coverage "heads of divisions of agencies and such other employees serving in policy making capacities as may be determined by the personnel board." NMSA 1953, § 5-4-31(M); *see* § 10-9-4(O). In 1967, the Legislature added one secretary to the list of elected official employees who could be excluded from coverage. 1967 N.M. Laws, ch. 181, § 1; *see* § 10-9-4(L).

{12} The Legislature has revised Section 10-9-4 nine more times since 1967 to add or remove groups of employees from coverage, or to redefine which employees are excluded. *See, e.g.*, 1969 N.M. Laws, ch. 126, § 1 (excluding disadvantaged youth); 1975 N.M. Laws, ch. 182, § 1 (excluding certified school instructors); 1977 N.M. Laws, ch. 247, § 45 (excluding directors of department divisions); 1981 N.M. Laws, ch. 339, § 5 (excluding corrections and criminal rehabilitation employees); 1990 N.M. Laws, ch. 20, § 1 (removing corrections employees from list of those excluded from coverage).

C. The Personnel Act Supersedes Section 8-5-5.

{13} We conclude that the Legislature intended the Personnel Act to supersede Section 8-5-5 based on the enactment and amendment history of these statutes. The Legislature's intent in 1961 to supersede

prior legislation addressing the status of state employees generally is evident from its stated purpose, which was to establish "for New Mexico a system of personnel administration based solely on qualification and ability, which will provide greater economy and efficiency in the management of state affairs." 1961 N.M. Laws, ch. 240, § 2. The Legislature's intent is also reflected in the fact that it sought and obtained constitutional authority to create a personnel system that would establish the qualifications for employment of state employees. S.J. Res. 1, 25th Leg. (1961) The Legislature empowered the Personnel Board to develop a comprehensive administrative procedure for classified public employees covered by the Personnel Act. 1961 N.M. Laws, ch. 240, § 9; *see Barreras v. N.M. Corr. Dep't*, 2003-NMCA-027, ¶ 12, 133 N.M. 313, 62 P.3d 770 (acknowledging the Personnel Board's comprehensive administrative scheme); § 10-9-13 (providing that the Personnel Board shall promulgate rules for a classification plan, a pay plan, and procedures for dismissal and demotion, including notice and appeal procedures, for all positions unless exempted by Section 10-9-4 of the Personnel Act).

{14} The plain language of Section 10-9-4, specifically provides that the Act applies to "all state positions" except those falling within specific categories. The amendments to the Personnel Act from 1963 to 1990 excluding certain employees from the Act's coverage evinces legislative intent for all state employees to be covered by the Act unless they are specifically excluded from coverage by provisions in the Act itself.

{15} Moreover, the Legislature did not alter the Personnel Act in response to its interpretation by the attorney general in office at the time. Former Attorney General Earl E. Hartley issued official opinions in 1961 and 1963 addressing which employees were exempt from the Personnel Act. In 1961, the Director of Personnel asked Attorney General Hartley for an opinion identifying which public entities were covered by the 1961 Personnel Act. Attorney General Hartley opined that the Attorney General and his employees were exempt from the 1961 Personnel Act unless he chose to have his employees covered by the Act. N.M. Att'y Gen. Op. 61-28 (1961). Two years later, after the 1963 amendments to the Act, the Director of Personnel sought another opinion as to which public bodies, formerly exempt under the 1961 Personnel Act, would be subject to the 1963 Personnel Act. N.M. Att'y Gen. Op. 63-27 (1963). In an opinion authored by Thomas A. Donnelly, later a judge on this Court, Attorney General Hartley opined that the Attorney General's employees were no longer exempt from the coverage of the Personnel Act. *Id*.

{16} The fact that the Legislature did not amend the Personnel Act to specifically exclude OAG employees from coverage after Attorney General Hartley's official opinion, which was in temporal proximity to the 1963 amendment to the Personnel Act, is additional compelling evidence that the Legislature intended to supersede Section 8-5-5 and to cover OAG employees under the Act. *See State ex. rel. State Eng'r v. Lewis*, 1996-NMCA-019, ¶ 13, 121 N.M. 323, 910 P.2d 957 ("An early interpretation and uniform administration of a statute by executive officers will not be lightly overturned."); *see also Five Corners Family Farmers v. State*, 268 P.3d 892, 899 (Wash. 2011) (En Banc) (failure to amend a statute in response to an attorney general's opinion interpreting legislation in temporal proximity to the enactment may constitute legislative acquiescence in the interpretation).

{17} Importantly, the 1963 Personnel Act provided that employees of an elected official who had been exempt because the official did not opt to bring them under the 1961 Personnel Act were automatically covered by the 1963 Personnel Act if the employee had served the elected official for at least one year. NMSA 1953, § 5-4-38. Any employee who had not served for at least one year would have to complete a year and pass a qualifying test before they could benefit from the protections of the Act. *Id*. The automatic coverage of employees who had served out a probationary period further reveals the Legislature's intent to apply the Personnel Act to all employees unless they fall within specified categories.

{18} Finally, a 1987 amendment to the Personnel Act to specifically except certain OAG employees from coverage also persuades us that the Legislature intended the Personnel Act to supersede Section 8-5-5. Beginning in 1984, employees in the OAG were assigned to the Rocky Mountain Information Network, which was "a federally funded regional information sharing systems program for law enforcement agencies." Hal Stratton, *Office of the Attorney General, State of New Mexico: History, Powers & Responsibilities, 1846-1990*, at 108 (1990). In 1987, the Legislature enacted Section 10-9-4.1 to address whether those employees were covered by the Personnel Act. In Subsection A, the Legislature stated, "[n]otwithstanding the provisions of Section 10-9-4 . . . , all employees of the [R]ocky [M]ountain [I]nformation [N]etwork who commence employment on or after the effective date of this act are exempt from coverage under the Personnel Act." This language would not have been necessary if, as argued by Attorney General Balderas, all employees of the OAG were exempt from coverage under the Personnel Act. As if to make clear that OAG employees are classified under the Personnel Act, the Legislature in Section 10-9-14.1(B) allowed OAG employees who were assigned to the Rocky Mountain Information Network before passage of Section 10-9-4.1 to elect to become *exempt* from coverage under the Personnel Act. The language authorizing these employees to elect to become exempt from coverage would be superfluous if the Legislature had intended for OAG employees to be exempt in the first place. We refrain from reading statutes in a way that renders its provisions superfluous. *State v. Rivera*, 2004-NMSC-001, ¶ 18, 134 N.M. 768, 82 P.3d 939. Therefore, we must conclude that the option to become exempt employees was necessary because the Legislature intended for OAG employees to be classified under Section 10-9-4.

II. Since the 1963 Enactment of the Personnel Act, OAG Employees Have at Times Been Treated as Classified Employees

{19} The parties each seek to support their arguments by pointing to evidence that OAG employees have historically been treated as classified or exempt. For example, Appellants refer us to the Sunshine Portal, created pursuant to the Sunshine Portal Transparency Act, NMSA 1978, Section 10-16D-1 to -6 (2010, as amended through 2015). The Department of Information Technology updates the portal monthly with information it receives from agencies and the department of finance and administration. Section 10-16D-3(E), (F). The portal lists classified employees by state agency, position title, and salary but does not name the employees. Section 10-16D-3D(11). Exempt employees are named and are also listed by state agency, position title, and salary. Section 10-16D-3D(12). All OAG employees are currently listed as classified employees, except one: the At-

torney General himself. *See* https://www.sunshineportalnm.com/ (last visited Apr. 29, 2019).

{20} For his part, Attorney General Balderas points to evidence that he and other attorneys general have required employees to sign a statement acknowledging that they are exempt employees. It is not clear from the record when this practice began. However, because Attorney General Hartley in 1963 issued an official opinion concluding that the employees of the Attorney General were "no longer exempted from the coverage of the State Personnel Act," N.M. Att'y Gen. Op. 63-27 (1963), it is reasonable to assume that Attorney General Hartley followed his own legal interpretation of the Personnel Act and, therefore, treated OAG employees as classified employees covered by the Personnel Act until he left office in 1964. The record does not reflect how many OAG employees were classified or exempt between 1964 and 1984.

{21} Attorney General Hal Stratton's book—often cited by Attorney General Balderas—provides some insight into how OAG employees were categorized from 1984 to 1990. Stratton, *supra*, at 62, 341. Figure 3 in Attorney General Stratton's book depicts the total number of OAG employees and the number that were exempt or classified from 1984 until 1990. Less than ten percent of the OAG employees were exempt from 1984 until 1987, when Attorney General Stratton took office. Stratton, *supra*, at 109.

{22} Attorney General Stratton disagreed with Attorney General Hartley's opinion and believed that Section 8-5-5(A) made all OAG employees at-will. Stratton, *supra*, at 114. Yet even Attorney General Stratton did not treat all OAG staff as exempt employees. For example, Figure 3 shows that in 1987, there were approximately 137 OAG employees and only approximately 42 were exempt. When Attorney General Stratton left office in 1990 there were approximately 118 OAG employees, of which approximately 62 were exempt, and 56 were classified. Stratton, *supra*, at 109.

{23} The persuasive power of the fact that some attorney generals may have treated their employees as exempt and/or required employees to sign an agreement stating they are exempt from the Personnel Act is virtually nil here. Such an agreement is not enforceable given our conclusion that the Personnel Act applies to OAG employees. *See* 1978 NMSA, §§ 8-5-1 to -18 (1933, as amended through 2019); *Clark v. N.M. Children, Youth & Families Dep't*, 1999-NMCA-114, ¶ 25, 128 N.M. 18, 988 P.2d 888 (stating that "[i]f [the employee] had been made to sign a document that was contrary to the State Personnel Rules or case law, her written acknowledgment would have no effect"); *see also State v. Davidson*, 1929-NMSC-016, ¶ 9, 33 N.M. 664, 275 P. 373 (stating that the powers of the attorney general are defined and limited by statute). Moreover, as we observed above, Attorney General Hartley's opinion concluding that the Personnel Act covers OAG employees is more persuasive because (1) it was contemporaneous with the 1963 amendment of the Personnel Act, and (2) the Legislature, fresh from obtaining constitutional authority to create a personnel system and identify which state employees would be covered by the Personnel Act, did not respond to Attorney General Hartley's opinion by amending the Personnel Act to exclude the OAG from its application.

{24} Without question, the continued existence of the language in Section 8-5-5 that declares that OAG employees "hold office at the pleasure of the attorney general" complicates matters. Such language typically connotes "at will" employment, i.e., employment that may be terminated without cause or process as provided in the Personnel Act. *See Hartbarger v. Frank Paxton Co.*, 1993-NMSC-029, ¶ 4, 115 N.M. 665, 668, 857 P.2d 776 ("An at-will employment relationship can be terminated by either party at any time for any reason or no reason, without liability."). When the Legislature made a minor stylistic change to Section 8-5-5(A) in 1988, it did not delete this language, a fact that might be construed to indicate that the Legislature intended Section 8-5-5 to remain viable despite the Personnel Act. However, when construing statutes, we presume that the Legislature is aware of the statutes and case law extant at the time. Hence, any amendments to Section 8-5-5 must be understood in light of the Personnel Act's comprehensive provisions. *Santa Fe Water Res. All., LLC v. D'Antonio*, 2016-NMCA-035, ¶ 29, 369 P.3d 12 (stating that "when the Legislature recompiles or amends a statute, it is presumed to be aware of other relevant statutes and court holdings at the time of the recompilation or amendment").

{25} The Personnel Act is a comprehensive statute that addresses state public employment; which employees are or are not covered by the Personnel Act; and the procedural protections available to those state employees covered by the Personnel Act. The Legislature has instructed courts that a comprehensive revision of the law on a subject prevails over previous statutes on the subject regardless of whether the statutes are irreconcilable. If the attorney general wants his employees to be exempt from the Personnel Act, he may pursue an amendment to the Personnel Act. *See, e.g.*, § 10-9-4(J). The only OAG employees exempt from the Act are those specifically excluded under Section 10-9-4(A)-(P).

III. Appellants Have the Burden of Establishing Sufficient Facts to Invoke the Subject Matter Jurisdiction of the Board

{26} The Board has subject matter jurisdiction to hear an appeal by a state employee who files an appeal within thirty days of being dismissed. Section 10-9-10(B); § 10-9-18(A). After Appellants appealed their dismissals to the Board, Attorney General Balderas challenged the Board's subject matter jurisdiction, arguing that Appellants are not employees covered by the Personnel Act. Appellants contend that Attorney General Balderas has the burden of demonstrating a lack of subject matter jurisdiction because he challenged the Board's jurisdiction and cite *State v. Begay*, 1987-NMCA-025, ¶ 6, 105 N.M. 498, 734 P.2d 278 ("Demonstrating a lack of jurisdiction is [the] defendant's burden."). We disagree.

{27} In this case, Appellants have the burden of proving that they were employees as defined by the Personnel Act, Section 10-9-3(I), and held positions covered by the Act.[2] Section 10-9-4; *see Lopez v. Career Serv. Review Bd.*, 834 P.2d 568, 573 (Utah Ct. App. 1992) (stating that a party who brings a case before a tribunal of limited jurisdiction must present sufficient facts to invoke the tribunal's jurisdiction). Here Appellants had to present sufficient facts that they held a state job that was not excluded under Section 10-9-4(A)-(O). They have satisfied their burden of proving that they were state employees. However, they also have the burden of establishing that they were not, at the time they were dismissed, a director of a department division excluded under Section 10-9-4(D); one of two assistants or one secretary

[2]The parties do not dispute that Appellants timely appealed their dismissals within thirty days.

designated by Attorney General Balderas or the Legislature as exempt under Section 10-9-4(L); or in a policy-making position as determined by the Board under Section 10-9-4(O). Hence, on remand, the Board must determine whether one or more of the Appellants fall within one of the relevant enumerated exceptions in Section 10-9-4, in which case they do not have the protections of the Personnel Act.

CONCLUSION

{28} Appellants are covered under the Personnel Act unless the Board finds that they are excluded under Section 10-9-4(D), (L), or (O). The Board's dismissal for lack of subject matter jurisdiction is reversed and this matter is remanded for further proceedings consistent with this opinion.

{29} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Judge Pro Tempore

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge Pro Tempore

LINDA M. VANZI, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-042

No. A-1-CA-36643 (filed May 20, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JACOB F.,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
T. Glenn Ellington, District Judge

Released for Publication September 3, 2019.

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Santa Fe, NM

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Opinion

Julie J. Vargas, Judge.

{1} Defendant was arrested for aggravated battery after allegedly attacking his mother with a pair of garden shears. He appeals the district court's determination that he is not mentally retarded,[1] arguing that it erred in its application of NMSA 1978, Section 31-9-1.6 (1999). Because we conclude that the district court improperly placed the burden to demonstrate mental retardation on Defendant despite evidence sufficient to give rise to a statutory presumption that Defendant was mentally retarded, we reverse the district court's Section 31-9-1.6(E) determination and remand the matter to the district court. In light of this determination, we need not and do not consider Defendant's remaining arguments.[2]

BACKGROUND

{2} Following his arrest, Defendant's competency was immediately designated as an issue in the case, and the district court deemed Defendant both incompetent to stand trial and dangerous. Defendant moved for a hearing pursuant to Section 31-9-1.6 to determine whether he was mentally retarded and therefore subject only to civil commitment and not criminal prosecution. *See* § 31-9-1.6(D). Prior to the hearing, two IQ tests were administered to Defendant. Each of the doctors who separately administered the IQ tests testified that Defendant showed symptoms of psychosis during the testing process and each testified that Defendant scored below seventy on the IQ test he administered. Following the hearing, the district court issued an oral ruling, stating,

> First, is whether the defense has established by a reliably administered test that [Defendant] has a full scale IQ of less than seventy. The Court concludes they have not. . . . The question is whether the information received from him taking the test is reliable. The court concludes that . . . the information is not reliable. So, the presumptive level of a seventy test score has not been shown by a preponderance of the evidence to create the legal presumption. That being the case, . . . the State does not have to prove by a preponderance of evidence because the burden has not shifted as he is not . . . his intellectual disability and/or developmental delay in the modern vernacular, mental retardation as described under Section 31-9-1, that sequence has been met.
>
> Of particular concern to the district court in making its determination was the unknown level of psychosis Defendant experienced during the tests and how any such psychosis might have impacted Defendant's scores. In the order resulting from the hearing, the district court reached two conclusions: (1) Defendant failed to establish, "based on a reliably administered intelligence quotient test[,]" that his IQ was at or below seventy, and (2) Defendant "failed to establish by a preponderance of the evidence that [he] was mentally retard[ed] as defined by [Section] 31-9-1.6(E)." Defendant appeals.

DISCUSSION

{3} Defendant argues on appeal that the district court erred when it concluded he was not mentally retarded pursuant to Section 31-9-1.6. Specifically, Defendant argues that the district court erroneously failed to shift the burden of proof to the State to rebut the presumption that Defendant is mentally retarded after two doctors testified that Defendant received a score below seventy on each of two IQ tests administered to him. We review

[2]Defendant also argues that the evidence was insufficient to support a conclusion that he committed one of the felonies giving rise to his detention, in violation of NMSA 1978, Section 31-9-1.5(D) (1999), and that the district court abused its discretion when it allowed the State to obtain a forensic evaluation of Defendant's competence.

[1]Although our Supreme Court has acknowledged it is "no longer acceptable to describe individuals with developmental disabilities as 'mentally retarded[,]' " our statutes continue to use the term. *See State v. Linares*, 2017-NMSC-014, ¶ 1 n.1, 393 P.3d 691. In this opinion, we apply the language used by the Legislature, and, like the Supreme Court in *Linares*, encourage our Legislature to amend the statutes in favor of more respectful terminology.

the district court's determination that Defendant is not mentally retarded for an abuse of discretion. *See Linares*, 2017-NMSC-014, ¶¶ 23, 32.[3] "A district court abuses its discretion when it misapplies or misapprehends the law[,]" *State v. Pacheco*, 2008-NMCA-131, ¶ 34, 145 N.M. 40, 193 P.3d 587, or when its ruling is "against logic and is clearly untenable or not justified by reason[,]" *Linares*, 2017-NMSC-014, ¶ 24 (internal quotation marks and citation omitted). To the extent Defendant's appeal presents questions requiring statutory interpretation, those are questions of law that we review de novo. *Id.* ¶ 41.

{4} "[M]ental retardation" is statutorily defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior." Section 31-9-1.6(E); *see Gutierrez*, 2015-NMCA-082, ¶ 44 (describing statutory definition as a "two-prong test"). An IQ of seventy or below on a "reliably administered" IQ test "shall be presumptive evidence of mental retardation[,]" and creates a statutory presumption that a defendant is mentally retarded. Section 31-9-1.6(E); *Gutierrez*, 2015-NMCA-082, ¶ 44 (internal quotation marks and citation omitted). Once this presumption is established, "the burden shifts to the [s]tate to prove by a preponderance of the evidence that a person does not have mental retardation." *Gutierrez*, 2015-NMCA-082, ¶ 44.

{5} To claim entitlement to the statutory presumption of mental retardation, Defendant must show that he has an IQ of seventy or less and that the test used to determine that IQ was "reliably administered." The parties do not dispute that Defendant scored below seventy on the two IQ tests administered to him. The evidence presented at the hearing to determine whether Defendant is mentally retarded showed that Defendant underwent cognitive testing administered by two different doctors—Dr. Fields and Dr. Andrews. The testing revealed IQ scores of 67 and 68, respectively, scores which both doctors characterized as falling within the "extremely low range."

{6} While the parties agree that Defendant scored below seventy on the IQ tests, they disagree as to whether the IQ tests were "reliably administered," as required by Section 31-9-1.6(E). The State, urging a broad interpretation of the statute, argues that the language of Section 31-9-1.6(E) requiring the IQ test to be "reliably administered" requires proof that the test results themselves are reliable in order to trigger the statutory presumption and that Defendant's psychosis prevented the doctors from obtaining accurate results when they administered their IQ tests to Defendant. According to the State, a strict construction of the statutory language—one limiting the relevant inquiry to the reliability of the administration of the IQ test without requiring accuracy in the result—would run counter to legislative intent and render the "reliably administered" test requirement "useless and superfluous." By contrast, Defendant contends that the Legislature's use of the term "reliably administered" IQ test unambiguously refers to the reliability of the test's administration, not the reliability of its results, noting that to "administer" a test is to "manage or supervise [its] execution[.]" We conclude that Defendant's straightforward reading of the statute must control.

{7} When interpreting a statute, we seek to effectuate the Legislature's intent, which we discern from the language of the statute. *See State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346, 871 P.2d 1352; *State v. Nieto*, 2013-NMCA-065, ¶ 4, 303 P.3d 855. Our interpretation may encompass no more than applying the language of the statute as written:

> [I]f the meaning of a statute is truly clear—not vague, uncertain, ambiguous, or otherwise doubtful—it is of course the responsibility of the judiciary to apply the statute as written and not to second-guess the [L]egislature's selection from among competing policies or adoption of one of perhaps several ways of effectuating a particular legislative objective.

Helman, 1994-NMSC-023, ¶ 22.

{8} As we consider the Legislature's intent in requiring a "reliably administered" IQ test as presumptive evidence of mental retardation, we note that each of the testifying doctors in this case provided a similar definition of what constitutes a "reliably administered" test. Dr. Fields testified that a "reliably administered" test referred to an evaluator's ability to administer the test in a way that a person's performance on that test would remain the same over time, even if tested by different examiners. Dr. Andrews described a "reliably administered" test as one that is well validated and widely accepted among practitioners in the field, that the person administering the test would have experience administering and evaluating the test, and that the test would yield consistent results.

{9} In this instance, neither doctor questioned the efficacy or acceptance of the test used by the other to determine Defendant's IQ, nor did either doctor challenge the methods employed or procedures followed by the other in implementing the tests. Both doctors were experienced in administering and evaluating IQ tests. With regard to the testimony of both doctors that a "reliably administered" test would necessarily yield consistent results, Dr. Fields testified that Defendant's score of 62 on a previously administered IQ test, as well as Defendant's scores of 67 and 68 on the tests he and Dr. Andrews administered, suggested reliability. Dr. Fields opined that the scores were indicative of Defendant's consistent performance at the extremely low range and that future testing would produce scores in a similar range. Dr. Andrews, by contrast, testified that while there appeared to be some "surface" consistency in the IQ scores, the subtests administered to Defendant indicated some significant differences in his performance, suggesting a lack of ability to perform consistently across time due to Defendant's psychotic symptoms. According to Dr. Andrews, these differences in performance in the subtests call into question the accuracy of Defendant's IQ scores of 67 and 68.

{10} Having considered the language of the statute and the testimony of the doctors, we agree with Defendant that the legislative requirement of a "reliably administered" IQ test is directed at the manner in which the test is given to the subject, rather than the accuracy of the results reached. The State fails to point to any language in the statute to support

[3]Defendant contends, and the State concedes, that the applicable standard of review is de novo, but we find the parties' citations in support of their shared view unpersuasive. Defendant cites to *State v. Office of Public Defender ex rel. Muqqddin*, 2012-NMSC-029, 285 P.3d 622, which involves no competency issues at all, and instead relies on principles of statutory construction in resolving a burglary-related question. The State cites to a Section 31-9-1.6 case from this Court, *State v. Gutierrez*, 2015-NMCA-082, 355 P.3d 93, but in doing so ignores the fact that our Supreme Court has subsequently applied an abuse of discretion standard in reviewing a mental retardation determination. We are bound by precedent set by our Supreme Court, *see State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 22, 135 N.M. 375, 89 P.3d 47 (reiterating principle that Court of Appeals is bound by Supreme Court precedent).

its contention that the statute requires a defendant to prove the accuracy of the IQ test results before he or she is entitled to a presumption of mental retardation. For one to be presumed mentally retarded, the plain language of Section 31-9-1.6(E) unambiguously requires nothing more than a showing of a "reliably administered" test that results in a score of seventy or less. Common usage makes clear that the phrase "reliably administered test" addresses the manner in which the test is given and not the accuracy of the results, and there is nothing in the statute to suggest that the two concepts should be viewed as synonymous with one another. *See* NMSA 1978, § 12-2A-2 (1997) ("Unless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar and common usage."). "We will not read into a statute any words that are not there, particularly when the statute is complete and makes sense as written." *State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125.

{11} Furthermore, nothing in the language of the statute raises any "genuine uncertainty as to what the [L]egislature was trying to accomplish" that might necessitate further interpretation beyond the statute's plain language. *Helman*, 1994-NMSC-023, ¶ 23. The plain language of Section 31-9-1.6(E) states, in no uncertain terms, that "[a]n [IQ] of seventy or below on a reliably administered [IQ] test *shall* be presumptive evidence of mental retardation." Section 31-9-1.6(E) (emphasis added). " 'Shall' will be given its mandatory meaning, unless there are indications in the statute that the mandatory reading is repugnant to the manifest intent of the Legislature." *Tomlinson v. State*, 1982-NMSC-074, ¶ 9, 98 N.M. 213, 647 P.2d 415; *see Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24, 206 P.3d 135 ("It is widely accepted that when construing statutes, 'shall' indicates that the provision is mandatory, and we must assume that the Legislature intended the provision to be mandatory absent a clear indication to the contrary."). In furtherance of our constitutional prohibition against prosecuting mentally retarded defendants, *see State v. Rotherham*, 1996-NMSC-048, ¶ 13, 122 N.M. 246, 923 P.2d 1131, the Legislature clearly intended to establish a statutory scheme that set a quantifiable standard to guide courts as they evaluate defendants for mental retardation—a defendant with an IQ of seventy or below is presumed to be mentally retarded.

{12} Importantly, the remaining provisions of Section 31-9-1.6 make clear the Legislature's intent to extend the inquiry into a defendant's mental retardation beyond the presumption-creating stage of the proceedings, as an IQ score of seventy or below does not end the court's inquiry, but merely gives rise to a rebuttable presumption of mental retardation. In the event the state has concerns about the accuracy of a given IQ test, it retains the opportunity to demonstrate that inaccuracy in seeking to overcome the presumption of mental retardation by a preponderance of the evidence. *See Gutierrez*, 2015-NMCA-082, ¶ 44. Thus, the State's argument addressing the accuracy of Defendant's IQ test results is more properly explored during the State's rebuttal, when the level of Defendant's general intellectual functioning will ultimately be determined.

{13} Our decision that a defendant need not prove the accuracy of IQ test results to be entitled to a presumption of mental retardation is not to say that the accuracy of the results of such tests are not affected by the method or manner of their administration. Obviously, a "reliably administered" test is more likely to yield an accurate result than a test that is not "reliably administered." Nonetheless, at the "presumption" stage of the mental retardation analysis, the Legislature has made clear that nothing more is required than that the test be "reliably administered."

{14} Having determined that Defendant is not required to prove the accuracy of the testing results, but only that the testing was "reliably administered" to be entitled to a presumption of mental retardation, we consider the evidence presented at the Section 31-9-1.6 hearing below. As indicated, neither doctor questioned the efficacy or acceptance of the IQ tests used to evaluate Defendant or the underlying methods employed during the testing process. Furthermore, the doctors' ultimate findings as to the numerical values of Defendant's IQ scores were separated by only a single point, with one scoring Defendant's IQ at 67 and the other scoring it at 68, indicating consistency in results. The State presented nothing to suggest that the test each doctor administered to Defendant was unreliably administered, pointing instead to a perceived inaccuracy in the testing results that it attributes to Defendant's psychosis—a cause Dr. Fields testified was unrelated to the "reliable administration" of the tests. Because the testimony presented at the hearing to determine whether Defendant was mentally retarded was sufficient to support a conclusion that Defendant's IQ tests were "reliably administered," the district court was required to presume that Defendant was mentally retarded based on his IQ scores of 67 and 68.

{15} We conclude that the district court misapplied Section 31-9-1.6(E), that Defendant is entitled to a presumption that he is mentally retarded, and that the district court improperly placed the burden on Defendant to prove mental retardation. We therefore remand for such further proceedings as may be necessary to allow the district court to determine whether the State met its burden of proving by a preponderance of the evidence that Defendant was not mentally retarded, either by establishing that Defendant does not have significantly subaverage general intellectual functioning or that he does not have deficits in his adaptive behavior, or both. Based on this disposition, it is unnecessary for us to address the other arguments raised by Defendant.

CONCLUSION

{16} We reverse and remand for further proceedings consistent with this opinion.

{17} IT IS SO ORDERED.
JULIE J. VARGAS, Judge
WE CONCUR:
M. MONICA ZAMORA, Chief Judge
BRIANA H. ZAMORA, Judge

Classified

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Batley Powers Family Law, a nationally recognized firm, seeks an Attorney with 3+ years' experience for its growing practice. We are looking for someone who strives to do their best in an environment that encourages personal growth and development. Strong writing, research, ability to multi-task and good interpersonal skills are a must. Please apply if you play well with others, flourish in a team environment and are interested in embracing the challenges of family law. We offer a competitive salary, excellent benefits and a family friendly work environment. Please email resume by 12/31/19 to andree@batleypowers.com.

Associate Litigation Attorney

Ortiz & Zamora, LLC, is growing and seeks a motivated New Mexico licensed attorney for an associate or senior associate position stationed in its Santa Fe office. Civil litigation experience is preferred and the attorney will manage an active civil litigation docket, will work directly with partners and other attorneys, and will develop and implement litigation strategies. Experience with discovery, motion practice, hearings, and trial preparation desired. Salary D.O.E. Please email your resume to nadine@ortiz-zamora.com.

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.

Associate Attorney

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

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

The School of Law seeks a Supervisor of Student Success.

Under the joint supervision of the Directors of Admissions and Student & Career Services, the Supervisor of Student Success (internal title: Assistant Director for Diversity & Public Interest) will (1) develop, administer, and report on diversity pipelining initiatives and student advising related to public interest/social justice careers, and (2) develop partnerships with community organizations to promote diversity and public interest/social justice legal opportunities, which are essential aspects of the mission of the Law School. Occasional weekend work or travel is required. JD strongly preferred. Apply: unmjobs.unm.edu

Assistant Federal Public Defender-Las Cruces 2020-03

The Federal Public Defender for the District of New Mexico is seeking a full time, experienced trial attorney for the branch office in Las Cruces. More than one vacancy may be filled from this announcement. Federal salary and benefits apply. Applicant must have one year minimum criminal law trial experience, be team-oriented, exhibit strong writing skills as well as a commitment to criminal defense for all individuals, including those who may be facing the death penalty. Spanish fluency preferred. Writing ability, federal court, and immigration law experience will be given preference. Membership in the New Mexico Bar is required within the first year of employment. The private practice of law is prohibited. Selected applicant will be subject to a background investigation. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C. ' 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. In one PDF document, please submit a statement of interest and detailed resume of experience, including trial and appellate work, with three references to: Stephen P. McCue, Federal Public Defender FDNM-HR@fd.org. Reference 2020-03 in the subject. Writing samples will be required only from those selected for interview. Applications must be received by January 31, 2020. Positions will remain open until filled and are subject to the availability of funding. No phone calls please. Submissions not following this format will not be considered. Only those selected for interview will be contacted.

Assistant City Attorney for Litigation Assistant

The City of Albuquerque Legal Department is hiring an Assistant City Attorney for the Litigation Division. The department's team of attorneys represent the City in litigation matters in New Mexico State and Federal Courts, including trials and appeals, and provide legal advice and guidance to City departments. Attention to detail and strong writing skills are essential. Three (3)+ years' experience is preferred, with additional preference for civil defense litigation experience, and must be an active member of the State Bar of New Mexico in good standing. 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

Doughty Alcaraz, P.A., a law firm located in downtown Albuquerque, is seeking a full-time attorney with 1-4 years experience in civil litigation. Excellent benefits. All replies will be kept confidential. Send cover letter, resume and a writing sample to Heather@doughtyalcaraz.com.

Paralegal/Legal Assistant

Well established Santa Fe personal injury law firm is in search of a paralegal/legal assistant. Candidate should be friendly, highly motivated, well organized, detail oriented, proficient with computers and possess excellent verbal and written skills. Duties include reviewing medical records, preparing demand packages as well as meeting with clients and opening claims with insurance companies. We are searching for an exceptional individual with top level skills. We offer a retirement plan (SEP), health insurance, paid vacation, and sick leave. Salary and bonuses are commensurate with experience. Please submit your cover letter and resume to santafelaw56@gmail.com

Paralegal

Paralegal position available with uptown law firm. General civil practice including domestic relations, business transactions, and civil litigation. Looking for that right person who can take initiative by proactively managing cases and timely respond to clients. Must be personal, well-spoken, organized, committed, and able to multi-task. FT position. Send resume and pay requirements to bryan@thehrsolution.org.

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
Solo practitioner seeking an experienced, professional, full-time paralegal for a litigation practice. Practice is limited to probate litigation, guardianships, and elder law (and some plaintiff's personal injury). Experience with probate and guardianships preferred. The ideal candidate will be professional in dress, appearance, and demeanor, and will have an excellent command of the English language. Experience with timekeeping and e-filing essential. Must be able to answer/propound discovery and draft routine pleadings with minimal supervision. Position offers a very pleasant working environment. Salary commensurate with experience; top salary for the best candidates. Please send a cover letter with your resume to ben@benhancocklaw.com.

Legal Assistant
Frye & Kelly, P.C. is a boutique law firm in Albuquerqe, NM. We are seeking a motivated and team-oriented individual for a legal assistant position. Candidates must have solid clerical, organizational, computer and word processing skills. Please email resumes and references to jlw@fryelaw.us.

Office Space

Professional Office – Plaza500
Executive suite situated on the 5th floor of the iconic Albuquerque Plaza Building offering fully furnished offices with IT, dedicated phone line, mail services, reception and parking access. Short term leases available. Tenants receive monthly access to the Hyatt Regency Albuquerque fitness center. 201 Third St. NW. Please contact Sandee at 505-999-1726.

1212 Pennsylvania St NE
Uptown Attorney Office in single story office building shared by sole practitioners and small law firm with centrally staffed reception area, two conference rooms, law library, and kitchen. Office has large windows with natural light, security system, ample parking and access to freeway. $750 month. Phone, internet, copier, postage, and secretarial bays available for additional fee. Call 266-8787 or email manager@ABQlawNM.com.

Miscellaneous

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

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.

2020 *Bar Bulletin* Publishing and Submission Schedule

Starting in January, the *Bar Bulletin* will publish twice a month on the second and fourth Wednesday. Advertising submission deadlines are also on Wednesdays, three weeks prior to publishing by 4 pm.

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

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

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

ARTURO L. JARAMILLO

Summer Law Clerk Program

- ☑ **Does your firm or business want to be part of an ABA Awarded program? It's the only one of its kind in the country!**
- ☑ **Do you want to help ignite first year law students' passion in your field of law?**
- ☑ **Are you committed to promoting diversity and inclusion through the membership of the State Bar?**

If you answered yes to one or all of these questions, then participating in the **Arturo Jaramillo Clerkship Program** can help accomplish these goals! Arturo L. Jaramillo, the first Hispanic president of the State Bar of New Mexico, developed the Summer Law Clerk Program ("Program") in 1993 to offer first year law students of diverse backgrounds the opportunity to clerk in legal settings that provide a foundation for the students' law careers and to promote equal employment opportunities for persons who have historically been under-represented in the legal profession. The Program creates employment opportunities in medium and large law firms, state and local public agencies, and corporate law departments in New Mexico by providing a summer law clerk experience for motivated and deserving law students who meet the programs eligibility criteria.

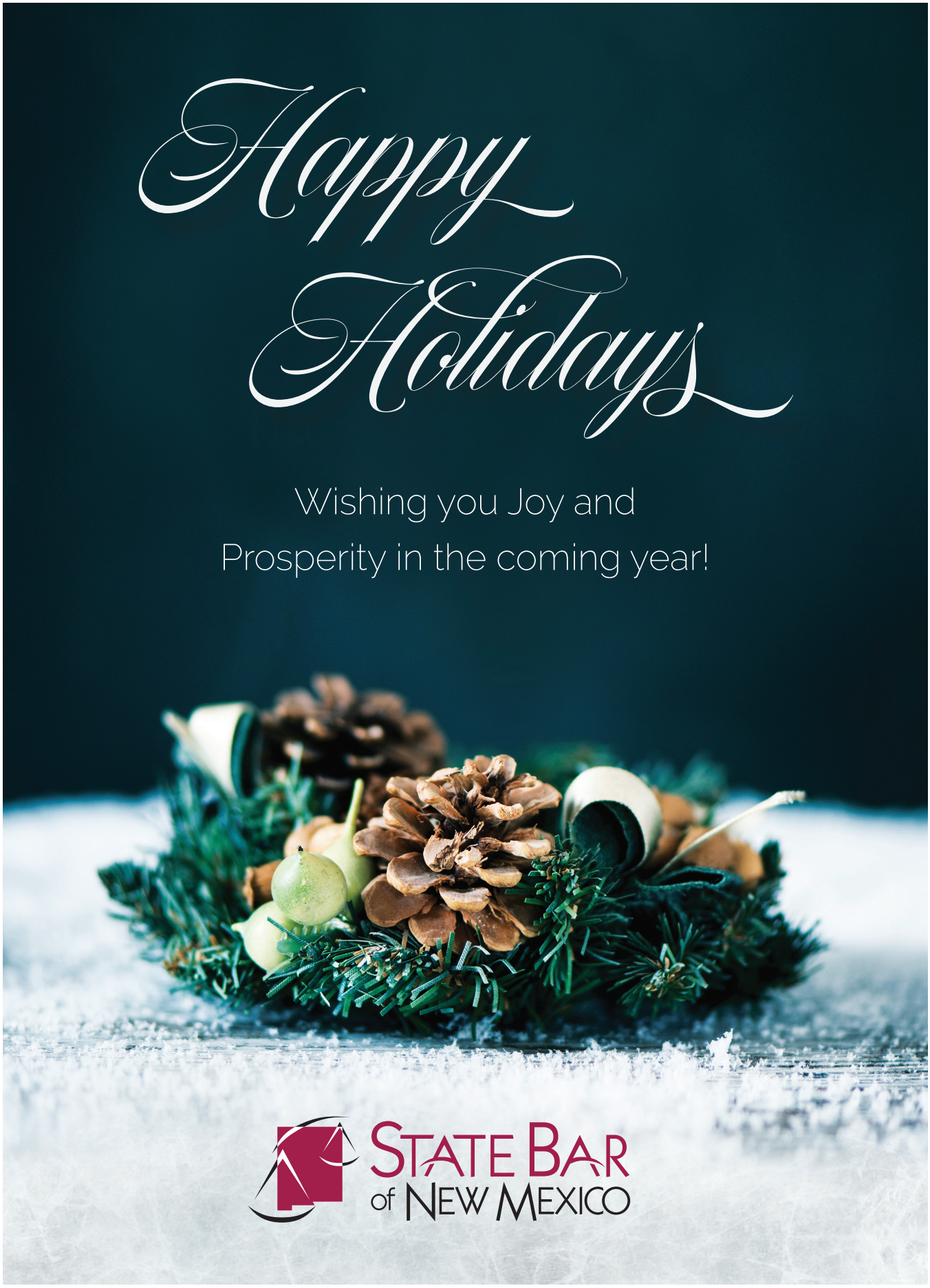
To learn more, please contact the organizers of the program!

lhoward@aclu-nm.org

DChanez@rodey.com

mo@saucedochavez.com

STATE BAR of NEW MEXICO


Happy Holidays
Wishing you Joy and
Prosperity in the coming year!
STATE BAR
of NEW MEXICO