

BAR BULLETIN

March 25, 2020 • Volume 59, No. 6



Shiprock Calling, by Sarah Lough (see page 3)

www.instagram.com/sloughart

Updates, Information, and Event Cancellations Due to the Coronavirus Situation: The State Bar of New Mexico is committed to helping New Mexico lawyers respond optimally to the developing COVID-19 coronavirus situation. To view updates and information about the rapidly developing situation, visit www.nmbar.org/covid-19. For a list of events that have changed or been cancelled due to the coronavirus situation, visit www.nmbar.org/eventchanges or contact the event organizer.

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—SPECIAL INSERT—
YLD in Brief

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Meetings

March

25
Natural Resources, Energy and Environmental Law Section Board
 Noon, teleconference

26
Elder Law Section Board
 Noon, teleconference

26
Trial Practice Section Board
 Noon, teleconference

27
Cannabis Law Section Board
 9 a.m., teleconference

27
Immigration Law Section Board
 Noon, teleconference

April

1
Employment and Labor Law Section Board
 Noon, teleconference

3
Prosecutors Section Board
 Noon, teleconference

Workshops and Legal Clinics

March

25
Consumer Debt/Bankruptcy Workshop
 Canceled
 505-797-6094

26
Common Legal Issues for Senior Citizens
 Canceled
 1-800-876-6657

April

1
Divorce Options Workshop
 Canceled
 505-797-6022

7
Common Legal Issues for Senior Citizens
 Canceled
 1-800-876-6657

22
Consumer Debt/Bankruptcy Workshop
 Canceled
 505-797-6094

About Cover Image and Artist: Sarah Lough has always loved being active and outdoors. It is this passion drives much of her current artwork. Her current works are inspired by her trips to the mountains of Albuquerque and Santa Fe, the vistas of the Four Corners area, and views outside of Las Cruces. Sarah works primarily with acrylic on canvas and sometimes on repurposed wood. Her style has been described as vibrant and colorful and it is influenced by impressionism. Sarah has been practicing law in New Mexico since graduating from University of New Mexico School of Law in 2007. She currently works as an attorney for the Social Security Administration. For more, visit www.instagram.com/sloughart.

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. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m. Reference and circulation hours: Monday-Friday 8 a.m.-4:45 p.m. For more information call: 505-827-4850, email: libref@nmcourts.gov or visit <https://lawlibrary.nmcourts.gov>.

Bernalillo County Metropolitan Court Volunteers are Needed 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, employee 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.

First Judicial District Court Announcement of Vacancy

A vacancy on the First Judicial District Court will exist in Santa Fe as of May 20 due to the creation of an additional judgeship by the Legislature. Inquiries regarding additional 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 Judicial Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: <http://lawschool.unm.edu/judsel/>

Professionalism Tip

With respect to opposing parties and their counsel:

In the preparation of documents and in negotiations, I will concentrate on substance and content.

Notice of Possible Event Cancellations or Changes:

Due to the rapidly changing coronavirus situation, some events listed in this issue of the Bar Bulletin may have changed or been cancelled after the issue went to press. Please contact event providers or visit www.nmbar.org/eventchanges for updates.

application.php, or emailed/faxed/mailed to you by calling Beverly Akin at 505-277-4700. The deadline for applications has been set for April 28 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 beginning at 9 a.m. on May 12 at the Santa Fe County Courthouse, 225 Montezuma Ave., Santa Fe, to evaluate the applicants for this position. The Committee meeting is open to the public.

Second Judicial District Court Destruction of Tapes and Logs

In accordance with 1.17.230 NMAC, Section 1.17.230.502, taped proceedings on domestic matters cases in the range of cases filed in 1982 through 1997 will be destroyed. To review a comprehensive list of case numbers and party names or attorneys who have cases with proceedings on tape and wish to have duplicates made should verify tape information with the Special Services Division 505-841-7401 from 8 a.m.-4 p.m. Monday through Friday. Aforementioned tapes will be destroyed after April 1.

Fifth Judicial District Court Notice of Mass Reassignment

Gov. Michelle Lujan Grisham has appointed Jared G. Kallunki to fill the judgeship vacancy in the Fifth Judicial District Court, Chaves County, Division VIII. Effective Feb. 28 a mass reassignment of cases will occur pursuant to NMSC Rule 1-088.1. Judge Jared G. Kallunki will be assigned all cases, except Criminal type cases (CR and LR), previously assigned to Judge Kea W. Riggs and/or Division VIII of Chaves County. All Sequestered Probate cases in "Adjudicated Case - Report Review" status currently assigned to Judge James M. Hudson, Judge Dustin K. Hunter, and Judge Thomas E. Lilley will also be reassigned to Judge Jared G. Kallunki. Pursuant

to Supreme Court Rule 1-088.1, parties who are allowed by the rule will have 10 days from March 25 to excuse Judge Jared G. Kallunki.

Eleventh Judicial District Court Announcement of Vacancy

A vacancy will exist in the Eleventh Judicial District Court in Gallup due to the retirement of the Honorable Lyndy D. Bennett, effective Feb. 29. Inquiries regarding additional 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 Judicial Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 8 of the New Mexico Constitution. Applications may be obtained from the judicial selection website: <http://lawschool.unm.edu/judsel/application.php>. The deadline for applications has been set for March 16 at 5 p.m. Applications received after that date and 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 Judicial Nominating Commission will meet at 9 a.m. on March 30 at the Gallup District Courthouse, located at 207 W. Hill Ave, Gallup to evaluate the applicants for this position. The Commission 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 speak.

State of New Mexico Workers' Compensation Administration Notice of Destruction of Records

The New Mexico Workers' Compensation Administration will be destroying all exhibits and depositions submitted for causes resolved in 2011, excluding causes on appeal. The exhibits and depositions are stored at 2410 Centre Ave SE, Albuquerque and can be picked up until April 3. For further information, please contact the

Workers' Compensation Administration at 505-841-6028 or 1-800-255-7965 and ask for Heather Jordan, clerk of the court. Exhibits and depositions not claimed by the specified date will be destroyed.

STATE BAR NEWS

Coronavirus Updates

The State Bar of New Mexico is committed to helping New Mexico lawyers respond optimally to the developing COVID-19 coronavirus situation. Visit www.nmbar.org/covid-19 for a compilation of resources from national and local health agencies, canceled events and frequently asked questions. This page will be updated regularly during this rapidly evolving situation. Please check back often for the latest information from the State Bar of New Mexico. If you have additional questions or suggestions about the State Bar's response to the coronavirus situation, please email Executive Director Richard Spinello at rsinello@nmbar.org.

Access to Justice

Fund Grant Commission

The Access to Justice Fund Grant Commission seeks grant applications from non-profit organizations that provide civil legal services to low income New Mexicans within the scope of the State Plan. The 2020-21 RFP is available at nmbar.org/ATJFundGrant. The application due date is noon, April 17 and the grant period will be July 1, 2020 – June 30, 2021 (12 months). Approximately \$900,000 will be awarded. Contact Vannessa Sanchez at vsanchez@nmbar.org with any questions.

Board of Bar Commissioners

Vacancy in Fifth Bar

Commissioner District (Curry, DeBaca, Quay and Roosevelt counties)

A vacancy exists in the Fifth Bar Commissioner District (Curry, DeBaca, Quay and Roosevelt counties). The appointment will be made by the Board of Bar Commissioners to fill the vacancy until the next regular election of Commissioners, and the term will run through Dec. 31. Active status members with a principal place of practice located in the Fifth Bar Commissioner District are eligible to apply. The remainder of the 2020 Board meetings are scheduled for April 17-18 in Albuquerque, June 18 (Eldorado Hotel, Santa Fe, in conjunction with the State Bar of New Mexico Annual Meeting), Sept. 25 in Albuquerque, and Dec. 9 (Supreme Court, Santa Fe). Members interested in serving on the

Board should submit a letter of interest and resume to Kris Becker, at kbecker@nmbar.org or fax to 505-828-3765, by April 10.

Commissioner Vacancy

New Mexico Legal Aid

The Board of Bar Commissioners will make one appointment to the New Mexico Legal Aid Board for the remainder of a three-year term through Dec. 31; this vacancy is to be filled by a member of the Indian Law Section. Members wishing to serve on the NMLA Board should send a letter of interest and brief resume by April 5 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Legal Services and Programs

Committee

Seeking Sponsors for Breaking Good High School Video Contest

The Legal Services and Programs Committee will host the sixth annual Breaking Good Video Contest for 2020. The Video Contest aims to provide an opportunity for New Mexico high school students to show their creative and artistic talents while learning about civil legal services available to their communities. The LSAP Committee would like to invite a member or firm of the legal community to sponsor monetary prizes awarded to first, second, and third place student teams and the first place teacher sponsor. The Video Contest sponsors will be recognized during the presentation of the awards, to take place at the Legal Services & Programs Annual Conference, and on all promotional material for the Video Contest. For more information regarding details about the prize and scale and the Video Contest in general, or additional sponsorship information, visit nmbar.org/BreakingGood.

New Mexico Judges and Lawyers Assistance Program

We're now on Facebook! Search "New Mexico Judges and Lawyers Assistance Program" to see the latest research, stories, events and trainings on legal well-being!

Recovery Possibilities

- April 1, noon-1 p.m.
- April 15, noon-1 p.m.
- May 6, noon-1 p.m.

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

— *Featured* —

Member Benefit



Clio's groundbreaking suite combines legal practice management software (Clio Manage) with client intake and legal CRM software (Clio Grow) to help legal professionals run their practices more successfully. Use Clio for client intake, case management, document management, time tracking, invoicing and online payments and a whole lot more.

Clio also provides industry-leading security, 24 hours a day, 5 days a week customer support and more than 125 integrations with legal professionals' favorite apps and platforms, including Fastcase, Dropbox, Quickbooks and Google apps. Clio is the legal technology solution approved by the State Bar of New Mexico. Members of SBNM receive a 10 percent discount on Clio products.

Learn more at
landing.clio.com/nmbar

Montezuma Ave, Room 270, Santa Fe. For more information, contact Victoria at 505-620-7056.

People with Wisdom

- April 1, 5:30-7 p.m.
- April 15, 5:30-7 p.m.
- May 6, noon-1 p.m.

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. You are not required to sign up in advance, so feel free to just show up! The group meets at 320 Osuna Rd, NE, #A, Albuquerque and

is led by Janice Gjertson, LPCC. Contact Tenessa Eakins at 505-797-6093 or teakins@nmbar.org for questions.

Attorney Support Groups

Substance Abuse

- April 6, 5:30 p.m.
- April 13, 5:30 p.m.
- April 20, 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

A negative working environment may lead to physical and mental health problems, harmful use of substances or alcohol, absenteeism and lost productivity. Workplaces that promote mental health and support people with mental disorders are more likely to reduce absenteeism, increase productivity and benefit from associated economic gains. Whether in a professional or personal setting, most of us will experience the effects of mental health conditions either directly or indirectly at some point in our lives. The NM Judges and Lawyers Assistance Program is available to assist in addition to our contracted Employee Assistance Program (EAP). No matter what you, a colleague, or family member is going through, The Solutions Group, the State Bar's FREE EAP, can help. Call 866-254-3555 to receive FOUR FREE counseling sessions per issue, per year! Every call is completely confidential and free. For more information, <https://www.nmbar.org/jlap> or <https://www.solutionsbiz.com/Pages/default.aspx>.

Ask A Lawyer Call-In Day Volunteers Needed for April 25

Once a year, New Mexico residents can get their legal questions answered free or receive brief legal advice through the Ask-a-Lawyer Call-in Program sponsored by the YLD. The YLD is recruiting volunteer attorneys to staff the phones and answer questions from across the state on a variety of topics including: employment law, divorce, child support, landlord/tenant issues, personal injury, estate planning, real estate and more. This year's program will take place

from 9 a.m.-noon on Saturday, April 27 at the State Bar Center in Albuquerque or at the 11th Judicial District Attorney's Office in Farmington. To volunteer and learn more about this program, visit nmbar.org/AskALawyer.

Real Property, Trust and Estate Section Second Annual Ghost Ranch Retreat and CLE

The Real Property, Trust and Estate Section will be hosting their second annual Ghost Ranch Trip and CLE Presentation on April 30 through May 1. Join your fellow RPTE members for a social bonfire, practice related discussions, and a 3-hour CLE presentation that covers both areas of practice. The RPTE Board has secured 10 hotel rooms to be raffled off to the first 10 members who sign up for the CLE. To learn more about the trip, CLE presentations, and raffle entry, please visit the section website at nmbar.org/rpte.

Public Law Section Now Accepting Nominations for Lawyer of the Year Award

Since 1996, the Public Law Section has presented the annual Public Lawyer Award to lawyers who have had distinguished careers in public service and who are not likely to be recognized for their contributions. The Public Law Section is now accepting nominations for the Public Lawyer of the Year Award, which will be presented at the state capitol at 4 p.m. on May 15. Visit nmbar.org/publiclaw to view previous recipients and award criteria. Nominations are due no later than 5 p.m. on April 20. Send nominations to Andréa Salazar at asalazar@santafenm.gov. The selection committee will consider all nominated candidates.

UNM SCHOOL OF LAW Law Library Hours Spring 2020

Through May 16

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.

Exceptions

Monday-Thursday, March 15-22: During Sprink Break the library will be open to the public from 8 a.m.-6 p.m.

Reference

Monday–Friday

9 a.m.–6 p.m.

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: April 7 at 7 a.m. at The Egg and I; June 4 at noon at Japanese Kitchen; and Aug. 12 at 7 a.m. at Stripes at Wyoming and Academy. For more information, visit nmchristianlegalaid.org or email christianlegalaid@hotmail.com

Albuquerque Bar Association's 2020 Membership Luncheons

- April 14: Morris Chavez, Esq., presenting a legislative update (1.0 G)
- May 1: Law Day presenting on the 19th amendment (1.0 G)
- June 9: Damon Ely, Bill Slease, and Jerry Dixon presenting on malpractice and insurance issues (1.0 EP)

Please join us for the Albuquerque Bar Association's 2020 membership luncheons. Lunches will be held at the Embassy Suites, 1000 Woodward Place NE, Albuquerque from 11:30 a.m.-1 p.m. The costs for the lunches are \$30 for members and \$40 for non-members. There will be a \$5 walk-up fee if registration is not received by 5 p.m. on the Friday prior to the Tuesday lunch. To register, please contact the Albuquerque Bar Association's interim executive director, Deborah Chavez at dchavez@vancechavez.com or 505-842-6626. Checks may be mailed to PO Box 40, Albuquerque, N.M. 87103.

Albuquerque Lawyers Club Monthly Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its April lunch meeting. The lunch meeting will be held on April 1 at noon at Seasons Restaurant, located at 2031 Mountain Road, NW,

Albuquerque. Sandy Donaldson will present "Memories of a Baby Boomer. Introductions will be by Sam Donaldson. The meeting is free to members and \$30 for non-members. For more information, please email Kit Carman at Kitcarman6@gmail.com.

National Conference of Bar Examiners

Testing Task Force Phases 1 and 2 Reports are Available

The National Conference of Bar Examiners' (NCBE's) Testing Task Force (TTF) is undertaking a comprehensive, future-focused study to ensure that the bar examination continues to test the knowledge, skills, and abilities required for competent entry-level legal practice in a changing legal profession. The collaborative study involves input from stakeholders at multiple phases and considers the content, format, timing, and delivery method for NCBE's current tests, which make up all or part of the bar examination in most U.S. jurisdictions: the Multistate Bar Examination (MBE), the Multistate Essay Examination (MEE), and the Multistate Performance Test (MPT). The study also includes the Multistate Professional Responsibility Examination (MPRE), which is administered by NCBE and required for admission in most U.S. jurisdictions. The reports are available at <https://testingtaskforce.org/research/>.

Board of Bar Commissioners Meeting Summary

The Board of Bar Commissioners for the State Bar and the NM State Bar Foundation met on Feb. 7 at the State Bar Center in Albuquerque. Action taken at the meeting follows:

- Approved the Dec. 11, 2019 meeting minutes as submitted;
- Accepted the 2019 Year-End State Bar and Bar Foundation financials;
- Approved the annual recurring electronic payments schedule;
- Approved an intercompany payment to the State Bar from the NM State Bar Foundation in the amount of \$90,500 for the shared costs of the organizations;
- Approved a donation request in the amount of \$1,000 for the Cottonwood Classical Preparatory School We the People Team to travel to Washington, D.C. for the National Finals;

- Received the Client Protection Fund, Access to Justice and Judges and Lawyers Assistance Program 2019 Year-End financials;
- The Board designated net assets in the amount of \$37,217.29 for the Legal Specialization Program start-up costs;
- Approved a resolution to update the signers on the State Bar and the Bar Foundation bank accounts;
- Received an update on the 2020 licensing renewals; there are currently 408 outstanding active members and 138 inactive members who have not renewed their licenses for 2020;
- Reported that the auditors will present the audit at the April 17 meeting;
- Supreme Court Senior Justice Barbara J. Vigil attended the meeting to swear-in the new commissioners as follows: Tomas J. Garcia and Lucy H. Sinkular from the First Bar Commissioner District; Donald C. Schutte from the Fifth Bar Commissioner District; Connie J. Flores from the Seventh Bar Commissioner District; Yolanda K. Hernandez, Paralegal Division Liaison, and Allison Block-Chavez, Young Lawyers Division Chair;
- Approved staff's recommendation to enter into a contract with Euclid Technology as the Bar's new association management software vendor;
- Received a report from the Ad Hoc Licensed Legal Technicians Workgroup which presented four recommendations to the Supreme Court and the Court approved all of the recommendations; the Board referred the recommendations to the Board's Statewide/Rural Outreach Committee;
- Reported that the Executive Committee met to review and discuss the opinion piece that was published in the Albuquerque Journal *Business Outlook* in December and an article explaining the value of membership in the State Bar, which will be published in the *Bar Bulletin* and a copy sent to the writer of the opinion; the committee also met to review the meeting agendas;
- Approved amendments to Article IX, Section 9.1, Sections, of the State Bar Bylaws for which thirty days' notice was provided at the December meeting;
- Received an update from the Regulatory Committee; the Board requested that the committee evaluate the feedback received on the testing requirement for legal specialization and make a recommendation; the committee researched the issue and ac-

cording to the ABA, there are no states that don't require some sort of testing, but there is an alternative to testing which includes helping to design the test; the committee recommended moving forward with the Legal Specialization Program to include testing and the Board approved the recommendation;

- Approved the creation of the Wellness Committee as a standing committee of the State Bar; the committee will be conducting a needs assessment of members;
- Received a report from the Insurance Review Committee; the committee will be meeting with the broker to review the policies and coverages for the State Bar and Bar Foundation;
- Received a report on the Judicial Clerkship Program modeled after the Arturo Jaramillo Clerkship Program; nine applications were received for six positions; the program is for second-year law students and there will be a boot camp for post-graduation clerkships;
- Reported on ATJ Day at the Legislature; the ATJ Commission was recognized with a ceremony at the Roundhouse and a Resolution for 15 years of exemplary service to the people of New Mexico was read on the House floor and presented to the Commission on Jan. 23; referred the creation of an ATJ recognition area in the Bar Center to the Bar Center Committee;
- Received the Board's 2020 Internal Committees and Liaisons to Supreme Court Boards, Committee and Commissions rosters;
- Reported that the Executive Committee will be meeting prior to the April meeting to approve the Bench and Bar Directory Printing Company and make an appointment to the Client Protection Fund Commission;
- Received the 2020 Board meeting dates as follows: Feb. 7, April 17-18, June 18 (Santa Fe, in conjunction with the State Bar Annual Meeting), Sept. 25, and Dec. 9 in Santa Fe;
- Received a presentation on CLE Planning and Development; and
- Received a report from the EAJ/Bar Foundation Committee and the Bar Foundation Executive Committee.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the April 17-18 meeting.

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 Feb. 28, 2020

PUBLISHED OPINIONS

A-1-CA-37742	State v. M Otero	Affirm	02/25/2020
A-1-CA-36400	State v. J Jackson	Affirm	02/26/2020

UNPUBLISHED OPINIONS

A-1-CA-36860	State v. K Frazier	Affirm	02/25/2020
A-1-CA-37874	D Bowman v. J Manforte	Affirm	02/28/2020

Effective March 6, 2020

PUBLISHED OPINIONS

A-1-CA-37052	In the Matter of the Protest of M Gelinas	Dismiss	03/03/2020
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UNPUBLISHED OPINIONS

A-1-CA-37117	RABO Agrifinance v. TERRA, et al.,	Affirm/Remand	03/02/2020
A-1-CA-37334	State v. V Trejo	Affirm	03/02/2020
A-1-CA-37419	State v. M Rael	Affirm/Reverse	03/02/2020
A-1-CA-37926	State v. I Ramirez	Affirm	03/03/2020
A-1-CA-36694	J Young v. H Fisher	Dismiss	03/04/2020
A-1-CA-37295	State v. L Martinez	Affirm	03/04/2020
A-1-CA-35694	State v. N Stammer	Affirm	03/05/2020

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

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

In Memoriam

DONALD CLIFFORD SCHUTTE



**FEBRUARY 05, 1948 –
FEBRUARY 25, 2020**

Donald Clifford Schutte, retired District Court Judge, former Assistant Deputy District Attorney, and private practice lawyer, died unexpectedly in the early morning hours of February 25, 2020. He was born in Dayton, Ohio, to Earl Christian Schutte and Cora Irene Schutte. Don received his B.A. from Bowling Green State University and his J.D. from the University of Akron before moving to New Mexico and settling in Albuquerque, Tucumcari, and Las Vegas.

Don was a member of the State Bar since 1974 and served as a Bar Commissioner for the Fifth Bar Commissioner District (Curry, De Baca, Roosevelt and Quay counties) from 2002-2007 and was reappointed in 2019.

Don was a role model, guiding light, and loving father to his children, as well as an active member in his communities and with the organizations to which he belonged.

Don was preceded in death by his father and mother, Earl Schutte and Cora Schutte; and his brother, Kenneth Schutte. He is survived by his loving partner, Ruth Nelson; his children, Christopher Michael Schutte, Ashley Nichole Schutte, and J. Tyler Schutte (Jayme Abeyta); and his seven grandchildren, Viktorya Schutte, Jaylen Schutte, Julian Schutte, Haylie Adams, Connor Adams, Adelynne Ambrose and Questin Martinez.

Services were held Saturday, February 29 at the Riverside Funeral Home in Santa Fe, N.M. In lieu of sending flowers, the family would appreciate donations for to the New Mexico Paint Horse Association.

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

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

Saturday, April 25 from 8:30 a.m.–noon

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



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

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

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

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

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

Ask-a-Lawyer
Call-in Program



 **STATE BAR**
of NEW MEXICO
YOUNG LAWYERS DIVISION



Sutin, Thayer & Browne was recognized as a family-friendly business during a recent legislative session. For its ongoing commitment in this regard, the firm earned the Platinum Level award—the highest level of recognition—from Family Friendly New Mexico, an organization committed to helping businesses improve their work environments. Tina Gooch, a lawyer with

Sutin and a member of the Family Friendly New Mexico Business Leadership Council, spoke on behalf of the firm from the Roundhouse's Rotunda. "The benefits Sutin has enjoyed as a result of implementing family friendly policies have been immediate and widespread," she says. "For instance, our flexible time policy empowers employees to take care of family issues—meaning they never have to make the difficult choice between being a good employee and a good parent or caregiver."

Jennifer E. Brannen has joined with Daniel E. Brannen Jr., of Brannen Law, to found Brannen & Brannen LLC in Santa Fe. Brannen received her BA from Vassar College in 1994 and graduated from the UNM School of Law in 2019. At UNM, she was a member of the Natural Resources Journal and served as co-editor-in-chief her third year. In the fall of 2018, the Senior Lawyers Division of the New Mexico Bar recognized her essay on "What If It's Legal But Not Ethical?" with a scholarship award. Her experiences interning in the First Judicial District Court in Judge LaMar's Family Court and working at Senior Citizens Law Office cultivated her interests in working with families, especially in the realm of elder law. In January 2020, Brannen & Brannen opened to focus primarily on estate planning and administration, special needs planning, and elder law.

Michael Eshleman, the Otero County Attorney, was elected chairman of the County Attorney Affiliate of the New Mexico Association of Counties during the Association's Legislative Conference in Santa Fe in January. He previously served as secretary of the Attorney Affiliate. He is also chairman of the Alamogordo Public Library Advisory Board and secretary of the Twelfth Judicial District Bar Association."



of the firm will remain unchanged through 2020 in honor of Shane.

Riley, Shane & Keller, P.A. announces the retirement of **Richard J. Shane** from the firm. Shane served as an attorney, shareholder, officer and director for 35 years. Shane's professionalism, competence, knowledge of the law, trial skills, loyalty, warmth and kindness were second to none. Shane will be greatly missed and is deserving of his well-earned retirement. The name



Martinez, Hart, Thompson & Sanchez, P.C. is proud and happy to announce that **Julio C. Romero** has earned ownership in the firm and shareholder status. Romero graduated *cum laude* from UNM Law School in 2014 and clerked for the New Mexico Supreme Court. He has been recognized as a rising star by Southwest Super Lawyers and concentrates his practice on personal injury, children's rights, civil rights claims and representing crime victims. Julio is originally from El Paso, Texas, and has made New Mexico his home for the past 15 years. He has worked with Martinez, Hart, Thompson & Sanchez for 3 ½ years where he has diligently represented and advocated for many New Mexicans across the state. Romero greatly strengthens the firm's ability to represent our clients. He is gratefully accepting referrals in all areas of personal injury, especially those involving injuries to children.

Mike Fisher was born on Aug. 26, 1947 and passed away on Oct. 18, 2019 at 4:25 p.m. surrounded by family, Mike's body died sending his indomitable spirit on to its next adventure! He lived his 32-month challenge with pancreatic cancer in accordance with the strength of his character, as he did all other phases of his life.

Walter Frank Wolf, Jr., age 88, was peacefully called home to The Lord on Jan. 18 while surrounded by family, ending a courageous battle with lung cancer. Walter was born on Jan. 22, 1931 in Washington D.C. as the only child to his parents Walter Frank Wolf and Blanche Estelle Wolf (formerly Underwood), who have preceded him in death. After completing high school, he left the D.C. area to obtain his bachelor's degree in Public Administration (1952) from the College of Wooster in Ohio. Shortly after graduation, Walter was drafted for the Korean War. After completing basic training, he was one of only two men in M Company of the 506 Airborne Infantry to be sent to Kirtland Air Force Base in Albuquerque. While there, Walter served as an electrician's apprentice supporting the development and optimization of nuclear weaponry. Walter ended his service to the nation as a corporal in the United States Army in 1954. After the war, Walter pursued and obtained his law degree from the University of Michigan in 1957. After graduation, Walter returned to the southwest where he learned of an opportunity to work for the Navajo Nation. He relocated to Window Rock, Ariz. and began what would be a lengthy, fulfilling career as a respected lawyer, advisor and advocate for the Navajo Nation. With a vision for the future, he worked with Navajo leaders to create the Navajo Tribal Utility Authority in 1959. Their mission was to bring electricity and other utilities to the rural communities of the Navajo Nation. His work at NTUA was one his passions and he devoted over 60 years of service to the people of the Navajo Nation. Walter and his former wife Barbara (deceased) moved to Gallup in 1966 where they raised sons Greg and Doug. In addition to his legal practice he was involved in many civic activities during his 50-plus years in the community. Walter served as a regent for UNM starting in 1968 and ending as the vice president of the Board of Directors in 1972. In the early 2000's he began splitting time between Gallup and Rio Rancho so that he could be closer to family. During his career as an attorney he received many accolades including the James D. Donovan Individual Achievement Award presented by the American Public Power Association which recognizes individuals on a national level who have made significant contributions to the electric utility industry and public power. Walter was a loving, devoted father and grandfather. He enjoyed golf, gardening, reading and took great pleasure attending and supporting his children's and grandchildren's sporting and scholastic events. He actively supported his alma mater(s) always rooting for Michigan in their battles with Big 10 opponents. He was also an avid Cubs fan and took great pleasure in their 2016 World Series win. Walter is survived by his two sons, Gregory and wife Sue of Chandler, Ariz., and Douglas and wife Annette of Albuquerque. Walter had six grandchildren, Rachel (Erik and their daughters Madelyn, Avery and Peyton), Steven, Tyler, Mikaela, Courtney and Madison. In all endeavors he undertook people were drawn to his selfless and loving nature. He brought much kindness and wisdom to this world. His last message to family was to "take care of yourself".

Tara M. Wood was born on March 16, 1976 to Rocky and Patricia Wood at Cannon AFB, N.M. She grew up in Hobbs, N.M. and graduated from Artesia High School in 1994. She graduated from Lubbock Christian College in 2002. She attended Texas Tech University and graduated with a Masters of Toxicology and from the Texas Tech School of Law with a J.D. in 2005. She was licensed to practice law in both Texas and New Mexico. Survivors are her husband, Dwayne Cephus of the family home, her son Chance Cephus of Lubbock, Texas, her daughter Meghan Cephus of the family home, her mother, Patricia Wood of Artesia, N.M. her maternal grandmother, Jeanette Owens of Artesia, her sisters, Rachael LaBlance, Kansas City, IL and Bettie (Daniel) of Ohio her paternal grandmother, Claudine Davis and numerous aunts, uncles and cousins. She was preceded in death by her infant daughter, Kaylee Wood Cephus, her maternal grandfather, Charles Kuehler, her father, Rocky Wood and her paternal grandfather Dave E. Wood. Tara worked as a public defender, as a prosecutor for the District Attorney's office and operated her own practice, Wood Law, LLC at the time of her death on Nov. 3, 2019.

Col. Joseph N. Wiltgen, USAF, Ret., 87, father, husband, USAF veteran, attorney, judge, passed away in his sleep on Feb. 17. Joe, known to many as col. or judge will be remembered as someone who was always there with a guiding hand. He held four advanced degrees, his BS and JD from DePaul University in Chicago, his MS in management from University of Colorado and his MA in finance from Webster University. He was admitted to practice law before the Supreme Court of the United States in Illinois and New Mexico. He was a certified professional contracts manager and was a fellow of the National Contract Management Association. Joe served more than 30 years in the Judge Advocate General's Department of the Air Force. His distinguished military career included three overseas tours in the United Kingdom, Viet Nam and Korea. He retired from the USAF in 1987. He then went on to serve as administrative law judge for the Workers' Compensation Administration of New Mexico until his retirement in 2001. Joe was also known for his participation in his other interests. He enjoyed playing golf, coin and stamp collecting, and was a mentor to scouts seeking the rank of Eagle Scout. For much of his life he had a canine friend to whom he was devoted and who was in turn devoted to him. He is survived by his children, Yvette Wiltgen, Brett Martinez, and Joseph C. Wiltgen; and his grandchildren, Michaela Murphy, Isaac Phillips, Brandon Wiltgen, Brittany Gabaldon, Brenten Wiltgen, Bryan Wiltgen and Brianna Wiltgen; great-grandchildren, Cooper Gabaldon, Parker Gabaldon and Lily Wiltgen. He also leaves sons and daughters-in-law of whom he was fond. He is survived by his sisters, Mary Rivers and Virginia Lippe; and brother, Robert Wiltgen. He was preceded in death by his parents, Nicholas Eugene Wiltgen and Agnes Marie (Suchy) Wiltgen; brothers, Nicholas A. Wiltgen and Charles M. Wiltgen; and his wife of 62 years, Dolores June (Curtis) Wiltgen.

Donald Clifford Schutte, retired district court judge, former assistant deputy district attorney, and private practice lawyer, died unexpectedly in the early morning hours of Feb. 25. He was born in Dayton, Ohio, to Earl Christian Schutte and Cora Irene Schutte. Don received his B.A. from Bowling Green State University and his J.D. from the University of Akron before moving to New Mexico and settling in Albuquerque, Tucumcari and Las Vegas. Don was a role model, guiding light, and loving father to his children, as well as an active member in his communities and with the organizations to which he belonged. Don was preceded in death by his father and mother, Earl Schutte and Cora Schutte; and his brother, Kenneth Schutte. He is survived by his loving partner, Ruth Nelson; his children, Christopher Michael Schutte, Ashley Nichole Schutte, and J. Tyler Schutte (Jayme Abeyta); and his seven grandchildren, Viktorya Schutte, Jaylen Schutte, Julian Schutte, Haylie Adams, Connor Adams, Adelynn Ambrose and Questin Martinez.

Ron Shortes passed away suddenly but peacefully from cardiovascular disease at his beloved Shortes XX Ranch near Pie Town, N.M., on the Sunday afternoon before Veterans Day 2019. He took his last breath where he always wanted to be within sight of Allegres Mountain, behind the wheel of a (parked) Jeep, surrounded by his classic cars and with his wife (Mary Jo H.-Shortes) by his side. Their plan was to drive to the barn. Ron was born in Lovington, N.M., “on a pool table” (as the story goes) to V.M. and Mary Sue(Power) Shortes. As a boy he enjoyed spending time with his family at their ranch near Capitan, N.M., and with his father in the oil fields. He graduated from Lovington High School in 1966 and returned for his 50th reunion. Ron continued his education at MIT (Massachusetts Institute of Technology) where he earned a degree in Mechanical Engineering but, even in Boston, never compromised his distinctive drawl. A few years later he went on to earn his J.D. from the University of Texas at Austin School of Law. Ron maintained his law license in both Texas and New Mexico until his passing. Ron was an only child and was preceded in death by his parents and grandparents. He was an engaged father of five children: Charles Prescott Berdell V(Scott Shortes) of Seattle, Zeke Shortes of Santa Fe, Diana E.H.-Shortes of New Orleans, Casey (KC) Shortes of Austin and stepson Matthew Stoddard of Philadelphia. Grandchildren include Diego, Clyde, Sayda, Caulder and Delilah. He also maintained close contact with cousins Dan & Don Shortes of Ackerley, Texas.

Edwin Edward Piper, Jr. passed away peacefully at his home in Albuquerque, Saturday, December 21, 2019. He was born June 26, 1929 in Wray, Colorado. Ed Graduated from Colorado State Teachers College, Greeley, CO, in 1951. He served in the U.S. Navy before graduating from University of Colorado Law School, in 1957. He practiced law in Denver before joining a Santa Fe Law Firm in 1957. He relocated to Albuquerque, where he continued his law practice, specializing in transportation law. Throughout his life, Ed enjoyed skiing, golfing, reading, history, and travel. His grandchildren were especially important to him. he will be remembered by his wry sense of humor and will be dearly missed. He was preceded in death by his twin sister, Gloria Elaine Piper, in 1933, his father, Edwin E. Piper, Sr., in 1974; his mother, Lola Scott Piper, in 1993; and his step-son Frank “Pancho” Wells, in August, 2019. He is survived by his wife of 56 years, Elsie Rael Piper; daughter, Lauren Scott Piper; grandchildren, Maddie Franco Bauer (Dave), Grant Franco; brother, Richard A. Piper from Arvada, Colorado; many nieces and nephews. He is further survived by step-daughters, Kathie Wells Chavez (Dennis), Penny Wells Shannen (Tom); grandchildren, Mike King, Kristin Dawe, Elisha Wells, Erica Chavez Webster, Amanda Chavez; and many great-grandchildren.

James “Jim” Baiamonte, 61, long time resident of Albuquerque was taken far too early on March 4. He continued to give until the end by donating his organs to save two lives. Jim is survived by his loving wife of 38 years and high school sweetheart, Kimberly; daughter, Britt (Kyle McMurray); son, Brennan (Laura); four grandchildren, Patrick, Olivia, Jameson, and Molly; father, Phil; brothers, Rob (Terry) and Tom. Jim had a deep devotion to his country and served in the military as an enlisted man and a JAG officer. He practiced law for 33 years and was very accomplished. Jim was a man of many skills, talents, and interests, but above all else, was his love and devotion to his family. He valued time with his children, whether it be talking about books, politics, history, or football. Jim “Poppy” cherished his time spent with his grandchildren. Jim and Kim shared a loving and full life together. There were lots of special trips and adventures with numerous more planned for the future. Jim was many things to many people, but none more so than he was to his wife, Kim. The loss is immeasurable to those who knew him and loved him. His personality was large and the void will never be filled for those left behind. His quick wit, humor, and intelligence truly made Jim one of a kind. A private gathering will be held in his memory.

Legal Education

March

- | | | |
|--|---|--|
| <p>25 Ethics and Conflicts with Clients, Part 2
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 Collateral Consequences: More Than Meets the Eye
5.0 G, 1.0 EP
Live Seminar
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org</p> | <p>30 Immigration Law: Updates and Best Practices in Preparing VAWA Applications
1.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>26 Abuse and Neglect Cases in Children's Court (2019)
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 Implicit Gender Bias
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 Introduction to Legal Research on Fastcase 7 (2019 Annual Meeting)
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>26 2020 Americans with Disabilities Act Update
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 Emergent Issues in Asylum Law
3.0 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 The Sandwich Generation: Strategies for Caregivers (2019 Annual Meeting)
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>26 Who's Your Biggest Critic? Your Boss? A Colleague? Or You?
1.5 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27-28 Bi-Journal UNM Law Symposium: Activism and the Law
4.25 G, 2.0 EP
Live Seminar
Provider
http://lawschool.unm.edu/events/legal-activism/</p> | <p>31 The Intersection of Accounting and Litigation: How to Explain a Financial Story to a Judge and Jury
5.0 G, 1.6 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>26 Using Metrics and Analytics for Ethical Solo and Small Firm Marketing (2019)
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27-29 Taking and Defending Depositions
31.0 G, 4.5 EP
Live Seminar
UNM School of Law
http://lawschool.unm.edu/events/legal-activism/</p> | <p>31 The Future of Fossil Fuels in the U.S. Energy Economy: A Legal Perspective
1.0 G
Live Seminar, Albuquerque
UNM School of Law Natural Resource and Environmental Law Program, the Utton Transboundary Resources Center, Rocky Mountain Mineral Law Foundation and the Young Professionals Committee
505-277-1946</p> |
| <p>27 Regional Seminar
17.2 G, 1.0 EP
Live Seminar
Trial Lawyers College
307-432-4042</p> | <p>30 Business Law 101: Back to Basics
4.5 G, 1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | |

Notice of Possible Event Cancellations or Changes:

Due to the rapidly changing coronavirus situation, some events listed in this issue of the Bar Bulletin may have changed or been cancelled after the issue went to press. Please contact event providers or visit www.nmbar.org/eventchanges for updates.

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.

April

- | | | |
|---|--|--|
| <p>3 Crimes Against Children Conference
5.5 G
Live Seminar
Lea County Child Advocacy Center
575-964-2064</p> | <p>17 2020 Solo and Small Firm Institute
3.5 G, 1.5 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>24 Basics of Trust Accounting: How to Comply with Disciplinary Rule 17-204
1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>8 Drafting LLC Operating Agreements, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 Basics of Trust Accounting: How to Comply with Disciplinary Rule 17-204
1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 Bernalillo County Attorney Retreat
3.0 G, 1.0 EP
Live Seminar
Office Of The Bernalillo County Attorney
505-314-0180</p> |
| <p>9 Drafting LLC Operating Agreements, Part 2
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>21 Drafting Ground Leases, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 Lawyer Ethics in Real Estate Practice
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>14 Spring AODA Conference
13.5 G, 2.0 EP
Live Seminar
Administrative Office Of The District Attorneys
www.nmdas.com</p> | <p>22 Drafting Ground Leases, Part 2
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 Foreign Investment Crackdown
1.5 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>15 2020 Uniform Commercial Code Update
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | | |

May

- | | | |
|---|---|--|
| <p>1 Lawyer Ethics When Clients Won't Pay Fees
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>14 Annual Estate Planning Update
5.0 G, 1.0 EP
Live Seminar
WILCOX & Myers, P.C.
www.wilcoxlawnm.com</p> | <p>21 Drafting Waivers of Conflicts of Interest
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>13 How Ethics Rules Apply to Lawyers Outside of Law Practice
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>15 Closely Held Stock Options, Restricted Stock, Etc.
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>22 Escrow Agreements in Real Estate Transactions
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
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CLERK'S CERTIFICATE OF ADMISSION

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Advance Opinions

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From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Supreme Court

Opinion Number: 2019-NMSC-015

No: S-1-SC-36772 (filed August 8, 2019)

NEW MEXICO INDUSTRIAL ENERGY CONSUMERS,
Appellant,
v.
NEW MEXICO PUBLIC REGULATION COMMISSION,
Appellee,
and
NEW ENERGY ECONOMY,
Intervener-Appellee/Cross-Appellant,
and
PUBLIC SERVICE COMPANY OF NEW MEXICO, and
COALITION FOR CLEAN AFFORDABLE ENERGY,
Interveners-Appellees.

**In the Matter of Public Service Company
of New Mexico's Application for Approval
of its Renewable Energy Act Plan for 2018
and Proposed 2018 Rider Rate Under Rate
Rider No. 36, NMPRC Case No. 17-00129-UT**

APPEAL FROM THE NEW MEXICO PUBLIC REGULATION COMMISSION

Released for Publication October 29, 2019.

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Opinion

C. Shannon Bacon, Justice.

{1} New Energy Economy (NEE) appeals an order issued by the New Mexico Public Regulation Commission (Commission or PRC) approving Public Service Company of New Mexico's (PNM) renewable energy procurement plan (Plan) for the year 2018.¹ The Renewable Energy Act, NMSA 1978, §§ 62-16-1 to -10 (2004, as amended through 2019), requires public utilities like PNM to submit such plans annually for the Commission's approval, *see* § 62-16-4(F)-(I).

{2} PNM submitted an application for the Commission to approve its 2018 Plan in PRC Case No. 17-00129-UT. In its application, PNM sought to demonstrate its compliance with Renewable Energy Act requirements and obtain the Commission's approval of renewable energy procurements, among other items. NEE challenges the Commission's approval of PNM's 2018 Plan by arguing that PNM's proposed procurement of solar energy generating facilities relied on an unfair request for proposal (RFP) process. NEE contends that PNM designed its RFP to limit the universe of potential bidders and select its predetermined, preferred type of renewable energy bid.

{3} We conclude that NEE did not meet its burden of proving that the Commission's approval of the solar energy procurement was unreasonable or unlawful because evidence in the record supports the Commission's determination that the challenged provisions of the RFP were reasonable under the facts and circumstances of this case. We affirm the Commission's final order approving PNM's 2018 Plan.

I. BACKGROUND

{4} In its 2018 Plan, PNM sought the Commission's approval to procure 50 megawatts (MW) of photovoltaic power generation facilities to be constructed beginning in 2018 by Affordable Solar, Inc. Affordable Solar proposed to construct these facilities in response to PNM's RFP for 50 MW of renewable energy. PNM issued its RFP on March 3, 2017, and allowed thirty-one days for responsive bids. Under 17.9.572.13(B), (C) NMAC, PNM

¹New Mexico Industrial Energy Consumers (NMIEC) also appealed the Commission's final order. In its appeal, NMIEC argued that (1) Method A, which adjusts PNM's methodology for calculating customer fuel costs, was adopted by the Commission in an arbitrary, capricious, and biased manner; (2) the Commission improperly modified its order adopting Method A during the pendency of NMIEC's appeal of that order; and (3) PNM's Plan violated the Commission's regulations by failing to account for certain costs attributable to renewable resources. After oral argument in this case, NMIEC moved for withdrawal of its appeal without opposition from any party. NMIEC's withdrawal was based on this Court's opinion in *Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-012, ¶ 113, 444 P.3d 460, which resolved some of the issues raised by NMIEC, and the Legislature's passage of the Energy Transition Act, which, according to NMIEC, "may well moot" other issues raised in its appeal. We do not address the merits of NMIEC's withdrawn arguments in this opinion.

was obligated to select the most cost-effective renewable energy project proposed in response to the RFP. To rank the proposed projects by cost-effectiveness, PNM compared the projects in terms of levelized cost, which is a measure of the cost per unit of energy over the lifetime of a project.

{5} The RFP did not solicit a specific type of renewable energy or a specific type of project through which PNM would receive the energy. In other words, the RFP was not limited to proposals that offered solar energy through a turnkey agreement, such as Affordable Solar's proposal. In this context, a turnkey agreement is an agreement in which one party constructs electricity generating facilities and then transfers ownership of the facilities to another party. By contrast, a purchased power agreement (PPA) is an agreement in which one party generates electricity and another party purchases the electricity without obtaining ownership of the generation facilities. PNM's RFP treated turnkey proposals and PPA proposals differently by requiring only PPA bidders to determine transmission and interconnection costs for their bids. PNM predetermined this information for turnkey proposals. The basis for this distinction is that PNM had control of six locations capable of housing solar generating facilities (PNM-Designated Sites) and was able to predetermine the transmission and interconnection costs for turnkey projects to be housed at these sites. Unlike turnkey projects, PPA projects would not be housed at the PNM-Designated Sites, and PNM therefore did not predetermine transmission and interconnection costs for PPA proposals.

{6} PNM received six bids in response to its RFP: four turnkey bids and two PPA bids. Notably, each of the two submitted PPA bids failed to meet all the requirements of the RFP. One PPA bid failed to include the required transmission and interconnection cost information for PPA bids, and the other PPA bid was expressly contingent upon PNM procuring an additional 50 MW of solar energy in excess of the 50 MW requested in the RFP. PNM did not select either of these PPA bids, and instead selected Affordable Solar's turnkey bid, which had the lowest levelized cost of any bid submitted to PNM, making it the most cost-effective bid.

{7} NEE's appeal is premised on the argument that PNM structured its RFP unfairly in favor of turnkey bidders, which compels reversal of the Commission's final order. Specifically, NEE contends that the Commission's approval of the project was arbitrary, capricious, and not supported by substantial evidence. Guided by our standard of review of NEE's contentions, we disagree and affirm the Commission's final order.

II. STANDARD OF REVIEW

{8} The "party challenging a PRC final order has the burden of establishing that the order is arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." *N.M. Att'y Gen. v. N.M. Pub. Regulation Comm'n*, 2015-NMSC-032, ¶ 9, 359 P.3d 133 (internal quotation marks and citation omitted); *see also* NMSA 1978, § 62-11-4 (1965) ("The burden shall be on the party appealing to show that the order appealed from is unreasonable, or unlawful."). Here, NEE challenges the Commission's final order on the grounds that it is (1) arbitrary and capricious, and (2) not supported by substantial evidence. We have held that "[a]n agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand." *Albuquerque Cab Co. v. N.M. Pub. Regulation Comm'n*, 2017-NMSC-028, ¶ 8, 404 P.3d 1 (internal quotation marks and citation omitted). We have also held that a decision is supported by substantial evidence when it is supported by evidence "that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 24, 142 N.M. 533, 168 P.3d 105 (internal quotation marks and citation omitted). As the party challenging the Commission's final order, NEE carries the burden of proving that the final order is arbitrary and capricious or not supported by substantial evidence to warrant our reversal of the Commission. *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 17, 148 N.M. 21, 229 P.3d 494.

III. DISCUSSION

{9} In its attempt to meet its burden of proof, NEE emphasizes two facets of the RFP: (1) its thirty-one-day deadline for bidders to submit their bids, and (2) its restriction of PNM-Designated Sites to bidders proposing turnkey agreements. Neither of these facets of the RFP proves that PNM structured the RFP in order to select its preferred type of renewable energy bid. NEE also stresses that the hearing examiner in this case recommended that the Commission not approve the Affordable Solar project. The hearing examiner's recommended decision stated that rejection of the project was the correct decision and it was not a "difficult call." Our review is guided by whether substantial evidence supports the Commission's final order—not the hearing examiner's recom-

mended decision. *See Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 27, 140 N.M. 6, 139 P.3d 166 (noting that this Court's "review of a final order by the PRC is not altered when the PRC's order is contrary to the recommendations of its hearing examiner or staff"). As we explain below, evidence in the record supports the Commission's determination in its final order that PNM's RFP gave all bidders a fair opportunity to participate and compete for PNM's selection.

A. The Commission's Approval of the Affordable Solar Project Was Not Arbitrary and Capricious Because Record Evidence Demonstrates That the Challenged Aspects of PNM's RFP Were Consistent with Industry Practice

{10} NEE contends that the thirty-one-day response deadline in PNM's RFP was unfair to bidders proposing PPA agreements because the RFP required these proposals to contain interconnection and transmission cost information. NEE views the requirement as unfair because this information can take months or years to ascertain. NEE also contends that restricting the PNM-Designated Sites to turnkey bidders was unfair to PPA bidders, especially because PNM provided interconnection and transmission cost information for the turnkey proposals at those sites. In essence, NEE alleges that this provision of the RFP was unfair to PPA bidders because they were required to determine their interconnection and transmission costs, while their turnkey-bidder counterparts faced no such requirement. NEE argues that these aspects of the RFP reveal that PNM favored turnkey proposals over PPA proposals and structured the RFP to give turnkey bidders an unfair advantage.

{11} NEE's arguments about the unfairness of PNM's RFP are contradicted by evidence in the record, which demonstrates that the RFP was similar to prior RFPs issued by PNM and other utilities. We highlight four pieces of evidence that belie the notion that PNM's RFP was unfair. First, PNM introduced evidence that three other utilities issued renewable resource RFPs in 2017 with response deadlines of thirty days, twenty-two days, and twenty days—all shorter than PNM's thirty-one-day response deadline. Second, witnesses testified in the proceeding below that developers commonly have renewable energy projects "on the shelf," which means that they are sufficiently developed to provide credible information about project costs and implementation quickly when an RFP is issued. Third, PNM's RFP offered prospective bidders a medium to communicate with PNM regarding the provisions of the RFP, including extension

of deadlines, and no PPA bidder used this medium to request additional time beyond the thirty-one-day deadline. Fourth, PNM's RFP was based on PNM's standard competitive bidding practices that it has used and developed over time.

{12} In light of this evidence in the record, we conclude that the Commission's approval of the Affordable Solar project was not arbitrary and capricious, because a rational connection exists between the facts found by the Commission and its approval of the project. The fact that three utilities other than PNM issued RFPs in 2017 with response deadlines shorter than thirty-one days is evidence that PNM's RFP deadline was within the bounds of industry practice and was not an outlier, as argued in this case. Multiple witnesses testified that developers commonly have projects "on the shelf," which includes having already ascertained interconnection costs, to be able to respond promptly to newly issued RFPs. This testimony contradicts the argument that thirty-one days was an unreasonably short period of time to prepare and submit a responsive bid. The fact that no developers sought an extension of the thirty-one-day response deadline reinforces the Commission's conclusion that the deadline was reasonable. Although an NEE witness testified that PPA bidders might have understood from PNM's RFP requirements that PNM was seeking a turnkey project, this testimony is

speculative and does not render the Commission's order arbitrary and capricious, especially since the terms of the RFP expressly permitted PPA bids. To the extent that NEE argues that PNM harbored a general bias against PPA developers, such a claim is unpersuasive, because two of the three renewable resource proposals in PNM's 2018 Plan involve PPAs. Since this evidence in the record bears a rational connection to the Commission's decision to approve the Affordable Solar project, we conclude that NEE has not met its burden to prove that the Commission's decision was arbitrary and capricious.

B. The Commission's Final Order Is Supported by Substantial Evidence, Even if Conflicting Testimony Exists in the Record

{13} Similarly, NEE has not met its burden to prove that the Commission's approval of the Affordable Solar project was not supported by substantial evidence. The record evidence set out in the preceding paragraphs is "credible in light of the whole record and . . . is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the [Commission]." *N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 24 (internal quotation marks and citation omitted). Although testimony was given in the proceeding below that contradicts the Commission's final decision, an agency decision can be supported by substantial evidence even

when conflicting testimony exists in the record. *Att'y Gen. of N.M. v. N.M. Pub. Serv. Comm'n*, 1984-NMSC-081, ¶ 12, 101 N.M. 549, 685 P.2d 957. It is not this Court's role to reweigh the evidence or determine the credibility of conflicting testimony. See *Gonzales v. N.M. Bd. of Chiropractic Exam'rs*, 1998-NMSC-021, ¶ 23, 125 N.M. 418, 962 P.2d 1253. Since evidence was presented before the Commission that is sufficient for a reasonable mind to accept the Commission's decision to approve the Affordable Solar project, we affirm the Commission's final order approving the project.

IV. CONCLUSION

{14} We conclude that NEE did not meet its burden to prove that the Commission's final order was unreasonable or unlawful, as required for reversal under Section 62-11-4. Thus, we affirm the Commission's final order in its entirety.

{15} IT IS SO ORDERED.

C. SHANNON BACON, Justice

WE CONCUR:

JUDITH K. NAKAMURA, Chief Justice

BARBARA J. VIGIL, Justice

MICHAEL E. VIGIL, Justice

DAVID K. THOMSON, Justice

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-050

No. A-1-CA-35863 (filed June 14, 2019)

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for DONALD L. SCHMIDT and MARY
LEE SCHMIDT,
Plaintiffs-Appellants,
v.
TAVENNER'S TOWING &
RECOVERY, LLC, and FRED
GARNER,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF TORRANCE COUNTY

KEVIN R. SWEAZEA, District Judge

Released for Publication September 24, 2019.

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Opinion

Jacqueline R. Medina, Judge.

{1} Plaintiffs, Donald and Mary Schmidt, owners of a Glastar aircraft (the airplane), sued Defendant, Tavenner's Towing & Recovery, LLC (Tavenner's), on claims for negligence, breach of implied contract, and breach of the implied covenant of good faith and fair dealing, after the airplane caught fire and was completely destroyed while being towed by Tavenner's.¹ The district court granted Tavenner's Rule 1-012(B)(6) NMRA motion to dismiss, arguing that the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. § 14501(c)(1) (2012), preempted Plaintiffs' claims. We reverse and remand.

BACKGROUND

{2} The facts alleged in the amended complaint are as follows. In late 2014, Plaintiffs' airplane crashed in Torrance County, New Mexico. The Torrance County Sheriff's Department contacted Tavenner's to pick

up the airplane. Tavenner's took possession of the airplane, loaded it onto a tow truck, and was in the process of towing the airplane when it caught fire and was completely destroyed. All claims were based on allegations that Tavenner's failed to properly load, care for, and transport the airplane and that this caused the airplane's destruction. The complaint alleges no other conduct resulting in the damages claimed.

{3} Tavenner's filed a motion to dismiss under Rule 1-012(B)(6), arguing that "Plaintiffs' allegations concern the transportation of personal property from a crash site in Moriarty, New Mexico, to Tavenner's Towing & Recovery in Moriarty, NM" and that the FAAAA expressly preempts Plaintiffs' claims. After briefing and a hearing on the matter, the district court entered a memorandum of decision stating that it had reviewed the cases cited by the parties and concluded that Plaintiffs' claims against Tavenner's should be dismissed on the basis of preemption. This appeal followed.

STANDARD OF REVIEW

{4} "A district court's decision to dismiss a case for failure to state a claim under Rule 1-012(B)(6) is reviewed de novo." *N.M. Pub. Schs. Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-067, ¶ 11, 145 N.M. 316, 198 P.3d 342 (internal quotation marks and citation omitted). Preemption is a question of law reviewed de novo. See *Humphries v. Pay & Save, Inc.*, 2011-NMCA-035, ¶ 6, 150 N.M. 444, 261 P.3d 592.

{5} A motion to dismiss under Rule 1-012(B)(6) "merely tests the legal sufficiency of the complaint[.]" by inquiring whether the complaint alleges facts sufficient to establish the elements of the claims asserted. *Env'tl. Improvement Div. of N.M. Health & Env't Dep't v. Aguayo*, 1983-NMSC-027, ¶ 10, 99 N.M. 497, 660 P.2d 587; see *C & H Constr. & Paving, Inc. v. Found. Reserve Ins. Co.*, 1973-NMSC-076, ¶ 9, 85 N.M. 374, 512 P.2d 947. Under this inquiry, "the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *C & H. Constr. & Paving, Inc.*, 1973-NMSC-076, ¶ 9 (internal quotation marks and citation omitted). "A complaint may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim[.]" *Id.* (alteration, internal quotation marks, and citation omitted).

{6} Courts addressing motions to dismiss based on the argument that claims are expressly preempted by federal law ask whether the complaint's allegations show that the preemption provision at issue encompasses a plaintiffs' claims. See *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1428-31 (7th Cir. 1996) (stating, on appeal from an order treating a motion to dismiss common-law claims based on express preemption by the Airline Deregulation Act of 1978 (ADA) as a Fed. R. Civ. P. 12(b) (6) motion and granting that motion, that the court "must determine if the plaintiffs can prove any set of facts that would entitle them to relief" and that this required the court "to interpret whether the ADA's express preemption provision encompasses the plaintiffs' common law claims" while "accepting all the well-pleaded allegations in the complaint as true"); cf. *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (stating, in addressing FAAAA preemption argument raised on summary judgment, that "our task is to identify the domain expressly pre[empted]" (internal

¹Plaintiffs also sued Fred Garner for declaratory relief. Garner is not a party to this appeal.

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Lindsay Cutler, Jessica Streeter, Sean Fitzpatrick

Wills for Heroes

Allison Block-Chavez, Sean Wang, Damon Hudson

YL Spotlight

Deian McBryde, Sean Wang, Allison Block-Chavez



Message from the YLD Chair

I am honored and privileged to continue to serve as the Chair to the New Mexico Young Lawyers Division in 2020. To start the New Year and the new decade, the New Mexico YLD is focused on new and expanded programming focused on the success of New Mexico young lawyers. I would like to share with you a few of the YLD's initiatives for the year.

New for 2020 is YLD programming to support young lawyers navigate repayment of their student loans. We all know that the nation is facing a student loan debt crisis. 44 million Americans are saddled with student loan debt and one in four borrowers are behind or delinquent on their loan payments. The YLD is working with the national Student Borrower Protection Center, the New Mexico Center on Law and Poverty, and the New Mexico Attorney General's Office to develop in person and online educational programming to help borrowers take control of their debt. Programming will focus on the difference between private and federal loans and income-based repayment plans among other issues. Understanding the basics of student loans will allow borrowers to better navigate the student debt maze.

Another highlight this year is the YLD's Lunch with Judges program, which is one of the YLD's most popular networking and professional development programs. In January, Senior Justice Barbara Vigil hosted the YLD at the New Mexico Supreme Court. Justice Vigil led us on a tour of the court and shared with us the rich history of the building and legacy of the justices. Justice Vigil, along with the other justices, lunched with young lawyers and discussed issues facing young lawyers including professionalism, work life balance, and navigating the pathway to the judiciary. The YLD will be providing more Lunch with Judges events across the state to give young lawyers more opportunities to interact with our New Mexico judiciary in an informal setting.

Moreover, I encourage all young lawyers to attend the State Bar of New Mexico's Annual Meeting in Santa Fe June 17-20, 2020. The Annual Meeting will be held in conjunction with the New Mexico Judicial Conclave and the highlights of the agenda include mindfulness, implicit bias in the law, and the generational divide within the bar. The YLD will be hosting its annual programming of #Fit2Practice activities and its Friday night networking reception. The YLD will be hosting Coffee with the Judiciary as part of its Lunch with Judges program where young lawyers will have the opportunity to meet in small groups to candidly talk to judges about their experiences as lawyers and judges. Furthermore, the Annual Meeting is a great opportunity for young lawyers to participate with the YLD, interact with the Bar and the judiciary, and obtain CLEs. I hope to see you there!

If you are wondering about the other programs that the YLD has scheduled for the year, please visit the YLD on the State Bar's webpage at NMBAR.org/YLD. Information on all of our programs is described there along with a calendar of our upcoming events. Interact, view past posts, and keep up with the YLD on Instagram, Facebook, and Twitter by following @NewMexicoYLD.

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Meet the Board



Allison H. Block-Chavez

Chair

Director-at-Large, Position 1

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



Shasta N. Inman

Chair-elect

Director-at-Large, Position 2

Shasta N. Inman (Chair-Elect) is in solo practice, working primarily in Children's Law & Adult Guardianship in counties throughout Central New Mexico. She earned her law degree and a Master of Arts in Gender & Women's Studies from the University of Arizona, James E. Rogers College of Law in December 2015, after receiving a Bachelor of Arts from the University of Nebraska – Lincoln (Go Big Red!). In addition to being NM YLD Chair-Elect, Ms. Inman currently serves on the Children's Law Section Board as Budget Officer, and previously served three years as Children's Law Secretary and one year as YLD Liaison. Ms. Inman is also a prior YLD Liaison to the Elder Law Section.

In the American Bar Association, Ms. Inman is Vice Chair of the ABA YLD Sexual Orientation & Gender Identity (SOGI) Committee and YLD Liaison to the ABA SOGI Commission. She had the honor of participating in the ABA YLD Scholars Program for 2018-2019, and currently serves on the Resolutions and Affiliate Assistance Teams.



Evan Cochnar

Director-at-Large, Position 3

Evan Cochnar serves as YLD director-at-large position 3, having previously served on the YLD board as Region 1 Director. He is a graduate of the University of New Mexico and Syracuse University College of Law. He currently works as a litigation manager at New Mexico State Risk Management Division, Legal Bureau. His experience also includes extensive work in criminal prosecution, working as an Assistant District Attorney in the Second Judicial District Attorney's Office, and in Farmington at the Eleventh Judicial District Attorney's Office. He has also worked at the United States Attorneys Office for the District of New Mexico and in the United States Senate for former Senator Jeff Bingaman. In his free time, Evan enjoys running, traveling, and adventures in general.



Lindsay Kyle Cutler

Director-at-Large, Position 4

Lindsay Cutler joined the YLD Board of Directors in 2019 as a Director-at-Large. Lindsay is an Attorney with the New Mexico Center on Law & Poverty's Economic Equity Team. Lindsay practices housing and consumer law and her areas of advocacy include administrative advocacy, policy reform, litigation, and community education.

Lindsay is a graduate of the University of Mary Washington and UCLA School of Law. Following her undergraduate degree, Ms. Cutler worked in the Laguna Pueblo and Albuquerque Public Schools fostering access and increasing opportunities for families and communities to engage in their children's education. During law school, Ms. Cutler externed with the Navajo Nation and DNA-People's Legal Services and led chaired UCLA's El Centro Veterans' Clinic.



Deian McBryde

Director-at-Large, Position 5

Deian McBryde practices family law and mediation and champions the cause of new lawyers with previous careers before law school. He is a member of several national councils, boards, and committees for the American Bar Association, and a member of the prestigious Family Law Institute of the National LGBT Bar Association. He also established the first scholarship at UNM School of Law for non-traditional career path students. Before becoming an attorney, Deian worked in business, employee development, technology, and the arts. www.mcbridelaw.com

Meet the Board



Mariah McKay
Region 1 Director

Mariah McKay is currently an Assistant District Attorney for the Eleventh Judicial District Attorney's Office, Division 1, in Farmington, New Mexico. She has been an attorney in San Juan County, New Mexico for the last three years. She currently serves as the Regional Director for San Juan and McKinley County, and the Vice Chair on the New Mexico YLD Board. During her time with the New Mexico YLD, she has been involved with Wills for Heroes, Constitution Day, and other outreach programs in rural areas in New Mexico. McKay, is grateful for the continued opportunities to serve San Juan County, and the State of New Mexico.



Breanna Contreras
Region 2 Director

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

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



Shuhao Wang
Region 3 Director

Sean Wang is an associate attorney at Trenchard & Hoskins, where he represents plaintiffs in workers compensation and personal injury cases. He previously worked as a public defender in Roswell. During law school at Northwestern University in Chicago, he had interned at the Cook County public defender and spent a summer volunteering at the Capital Defender in Mississippi. Sean currently lives and works in Roswell.



Jessica Streeter
Region 4 Director

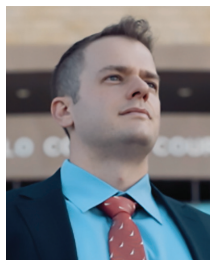
Jessica Streeter serves as Region 4 Director and practices family law at Streeter Law Firm, LLC. A Las Cruces native, Jessica earned her B.A. from NMSU and her J.D. from the UNM School of Law. Before private practice, Jessica was an attorney for the State of New Mexico as an attorney for the Child Support Enforcement Division and as a public defender in Albuquerque and Roswell. Jessica co-chairs the Lunch with Judges program and the Veterans Civil Legal Clinic program.

Meet the Board



Jessica A. Perez
Region 5 Director

Jessica Perez serves as the Region 5 Director on the New Mexico Young Lawyers Division. She is a graduate of UNM School of Law and currently works as an Assistant District Attorney in the 13th Judicial District, Sandoval County. There she prosecutes a variety of felony cases as well serves as the Children's Court Attorney handling a variety of juvenile delinquency cases. While in law school, Jessica was a part of the New Mexico Young Lawyers Division through her position as Student Bar Association President and is thrilled to be part of the board now. In her spare time, she enjoys playing Dungeons & Dragons and scrolling through Pinterest for crochet project ideas.

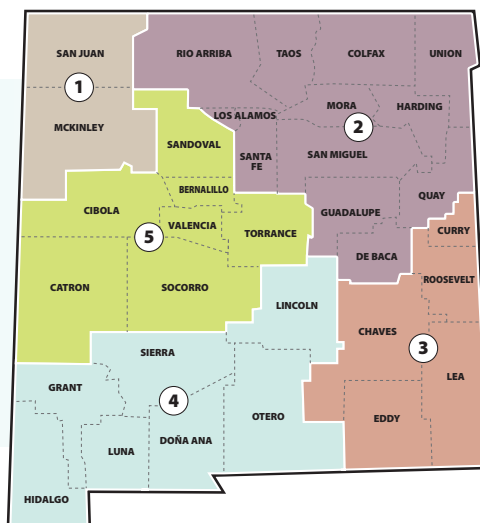


Sean M. FitzPatrick
Immediate Past Chair

Sean FitzPatrick is a graduate of UNM School of Law and is a sole practitioner at his firm FitzPatrick Law, LLC founded in 2016. FitzPatrick currently practices plaintiff's civil litigation focusing on injury and insurance law in Albuquerque, NM. FitzPatrick worked as a prosecutor in Farmington, NM litigating a variety of felony and misdemeanor cases for a few years after law school. FitzPatrick has served on the Young Lawyers Division board for the past several years. Outside of work, you can find FitzPatrick running, biking, or participating in other type 2 fun activities with his wife Eva and new baby Liam.

Young Lawyers Division Region Map

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



Message from the YLD Chair *continued from page 1*

The New Mexico Young Lawyers Division is one of the most active YLD's in the nation. The YLD cannot provide its programming and events without the support and encouragement of many people, including State Bar President Tina Cruz, the Board of Bar Commissioners, and State Bar leadership and staff. Additionally, our YLD and State Bar members are the people power behind the success of our programs. We rely on you, the YLD and State Bar members, to volunteer for pro bono events and attend events. I personally thank you for your continued participation, which has resulted in the YLD's continued success.

I invite you to continue to participate in YLD events. The YLD is here for young lawyers and we want to support you as you, the young lawyer, grow as an attorney. Join us in your community or come to Santa Fe for the Annual Meeting. I am honored to continue to serve as the YLD Chair and I look forward to the year ahead with you! ■

quotation marks and citation omitted)); *Boyz Sanitation Serv., Inc. v. City of Rawlins*, 889 F.3d 1189, 1198 (10th Cir. 2018) (analyzing FAAA preemption argument raised on summary judgment by inquiring whether state and local regulations concerning garbage collection fall within the FAAAA's "preemptive scope" and, if so, whether the impact "is too insignificant to warrant preemption").

PREEMPTION

{7} The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land[.]" U.S. Const. art. VI. "Congress has the power to preempt state law." *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 791 (10th Cir. 2000); see *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (explaining that, as a consequence of the Supremacy Clause, Congress may "pre[empt], i.e., invalidate, a state law through federal legislation"). "In the interest of avoiding unintended encroachment on the authority of the [s]tates, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre[emption]. Thus, pre[emption] will not lie unless it is the clear and manifest purpose of Congress." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993) (internal quotation marks and citation omitted); see *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-17 (1992) (stating that "[c]onsideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the [s]tates are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress" and that "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted" (alterations, omission, internal quotation marks, and citation omitted)); see also *Palmer v. St. Joseph Healthcare P.S.O., Inc.*, 2003-NMCA-118, ¶¶ 38-39, 134 N.M. 405, 77 P.3d 560 (stating the general preemption principles applied by appellate courts in New Mexico, including the "strong presumption against preemption" (internal quotation marks and citation omitted)).

{8} Tavenner's argues that the FAAAA expressly preempts Plaintiffs' state common-law claims. Accordingly, "we must use ordinary principles of statutory interpretation to evaluate whether the state law falls within the scope of the federal provision precluding state action[.]" and "focus on

the plain wording of the clause, which necessarily contains the best evidence of Congress' pre[emptive intent." *Boyz Sanitation Serv., Inc.*, 889 F.3d at 1198 (internal quotation marks and citation omitted); see *Dan's City*, 569 U.S. at 260 (stating that courts attempting to "identify the domain expressly pre[empted]" must "focus first on the statutory language, which necessarily contains the best evidence of Congress' pre[emptive intent" (internal quotation marks and citations omitted)). "[T]he defendant bears the burden of showing Congress' intent to preempt." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 7, 126 N.M. 396, 970 P.2d 582.

DISCUSSION

A. The FAAAA

{9} The preemption provision at issue here evolved from a statute concerning deregulation of the domestic airline industry, summarized by the United States Supreme Court as follows:

The [ADA], 92 Stat. 1705, largely deregulated the domestic airline industry. In keeping with the statute's aim to achieve "maximum reliance on competitive market forces," Congress sought to "ensure that the [s]tates would not undo federal deregulation with regulation of their own." Congress therefore included a preemption provision, now codified at 49 U.S.C. § 41713(b)(1), prohibiting [s]tates from enacting or enforcing any law "related to a price, route, or service of an air carrier."

Two years later, the Motor Carrier Act of 1980, 94 Stat. 793, extended deregulation to the trucking industry. Congress completed the deregulation 14 years therefore, in 1994, by expressly preempting state trucking regulation. Congress did so upon finding that state governance of intrastate transportation of property had become "unreasonably burdensome" to "free trade, interstate commerce, and American consumers." Borrowing from the ADA's preemption clause, but adding a new qualification, § 601(c) of the FAAAA supersedes state laws "related to a price, route, or service of any motor carrier with respect to transportation of property."

Dan's City, 569 U.S. at 255-56 (omission and citations omitted).

{10} Section 14501 of the FAAAA, entitled "Federal authority over intrastate transportation," provides in relevant part: [A s]tate . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). This case involves the interaction between the FAAAA's preemption provision and Plaintiffs' common-law claims.

{11} "[S]tate common-law rules fall comfortably within the language of the [FAAAA] pre[emption provision]." *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 281 (2014). "[T]he current version of this provision applies to state 'laws, regulations, or other provisions having the force and effect of law[.]'" *Id.* at 281-82 (alterations omitted). The United States Supreme Court has explained that "[i]t is routine to call common-law rules 'provisions[.]'" *id.* at 282, and further:

Exempting common-law claims would . . . disserve the central purpose of the [FAAAA]. The [FAAAA] eliminated federal regulation of rates, routes, and services in order to allow those aspects of [motor] transportation to be set by market forces, and the pre[emption provision] was included to prevent the [s]tates from undoing what the [FAAAA] was meant to accomplish.

Id. at 283. "What is important, therefore, is the effect of a state law, regulation, or provision, not its form, and the [FAAAA's] deregulatory aim can be undermined just as surely by a state common-law rule as it can by a state statute or regulation." *Id.* The questions, then, are whether the FAAAA applies and whether Plaintiffs' common-law claims have the prohibited effect.

{12} Under the FAAAA, "motor carrier" means "a person providing motor vehicle transportation for compensation."² 49 U.S.C. § 13102(14) (2012). "Transportation" under the FAAAA includes "a motor vehicle . . . or equipment of any kind related to the movement of passengers and property . . . and services related to that movement, including arranging for, receipt, delivery, elevation, . . . handling, . . . and interchange of . . . property." 49 U.S.C. § 13102(23). The FAAAA's preemption provision contains the following exemption for state regulation of the price charged for nonconsensual tows:

²The complaint contains no allegations concerning compensation. As noted, Tavenner's bears the burden to prove that Plaintiffs' claims fall within the scope of the FAAAA's preemption provision. *Self*, 1998-NMSC-046, ¶ 7. While lack of compensation would undermine Tavenner's preemption argument, Plaintiffs do not make this argument and so we analyze the preemption question as if this definitional requirement is met.

does not apply to the authority of a [s]tate . . . to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

49 U.S.C. § 14501(c)(2)(C) (2012) (emphasis added). This exemption “plainly indicates that tow trucks qualify as ‘motor carriers of property[.]’” *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 430 (2002) (alteration, internal quotation marks, and citation omitted); see *Stucky v. City of San Antonio*, 260 F.3d 424, 431 (5th Cir. 2001), *abrogated on other grounds by Ours Garage & Wrecker Serv.*, 536 U.S. 424 (“The purpose of th[e] FAAAA preemption] provision was to eliminate overlapping state and municipal regulations, which increased costs, decreased efficiency and reduced competition and innovation in the towing services industry.” (emphasis added)). The explicit limitation to laws “relating to the price of for-hire motor vehicle transportation by tow truck,” however, renders the exemption inapplicable to the claims asserted in this case, which involve allegations of damages arising from the towing of an airplane (not a motor vehicle) and do not involve a dispute about “price.” Cf. *Ours Garage & Wrecker Serv.*, 536 U.S. at 429-30 (explaining that “nonconsensual tows” are tows of “illegally parked or abandoned vehicles”).

{13} Federal courts interpreting the FAAAA’s preemption language often refer to decisions interpreting the nearly identical preemption provision in the ADA. See ADA, 49 U.S.C. § 41713(b)(1) (2012) (stating that “a [s]tate . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier”); *Dan’s City*, 569 U.S. at 260 (stating that its reading of the FAAA’s preemption clause was informed by decisions interpreting the parallel language in the ADA’s preemption clause”); see also *Bedoya v. Am. Eagle Express, Inc.*, 914 F.3d 812, 818 (3d Cir. 2019) (observing that, because of the parallels between the ADA and FAAAA, ADA cases are instructive regarding the scope of FAAAA preemption).

{14} The United States Supreme Court has interpreted the phrase “related to” to “embrace[] state laws having a connection with or reference to carrier rates, routes, or services, whether directly or indirectly.” *Dan’s City*, 569 U.S. at 260 (internal quotation marks and citation omitted). Significantly, however, the Court also has cautioned that the FAAAA does not preempt “state laws affecting carrier prices, routes,

and services in only a tenuous, remote, or peripheral manner.” *Id.* at 261 (omission, internal quotation marks, and citation omitted); see also *Boyz Sanitation*, 889 F.3d 1189 at 1198-1200 (concluding that, even if state and local regulations concerning garbage collection fell within the FAAAA’s preemptive scope, the impact “is too insignificant to warrant preemption”). Courts have interpreted Supreme Court precedent as prohibiting the development of “broad rules concerning whether certain types of common-law claims are preempted[.]” and as requiring that courts instead “examine the underlying facts of each case to determine whether the particular claims at issue ‘relate to’ [motor carrier] rates, routes or services.” *Travel All Over the World*, 73 F.3d at 1433 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)).

B. Negligence

{15} The amended complaint asserts a negligence claim based on allegations that Tavenner’s failed to load and transport the airplane properly, did not do “all it could to preserve the [a]irplane[.]” and “did not follow industry standards for towing, transporting and protecting the airplane. Tavenner’s contends that the FAAAA preempts common-law negligence claims because they seek to impose state-based standards of care on motor carriers. We disagree.

{16} First, the purpose of the FAAAA’s preemption clause is to prohibit states from effectively re-regulating the motor carrier industry and to promote “maximum reliance on competitive market forces[.]” 49 U.S.C. § 40101(a)(6) (2012); see *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 372 (2008) (stating that the state law in question “produces the very effect that the federal law sought to avoid, namely, a [s]tate’s direct substitution of its own governmental commands for ‘competitive market forces’”). Plaintiffs’ negligence claim is directed specifically at the manner in which Tavenner’s carried out the service of loading and transporting Plaintiffs’ property. Although Plaintiffs’ negligence claim relates to the transportation of property, the claim does not target or affect the regulation of motor carriers in general. In such instances, courts have declined to find preemption under the FAAAA, concluding that the relation or effect on a motor carrier’s rates, routes, or services to be too tenuous to be preempted. See *Rowe*, 552 U.S. at 370-71 (stating that state laws forbidding gambling would be too tenuous, remote, or peripheral to be preempted); *Bedoya*, 914 F.3d at 821 (“Laws that are directed at members of the general public and that are not targeted at motor carriers are usually viewed as not having a direct effect on motor carriers.” (internal quotation marks and citation

omitted)); *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 134-35 (3rd Cir. 2018) (finding no preemption of class action suit against motor carrier alleging violation of state wage payment and collection act, because the act did not significantly impact or frustrate the FAAAA’s deregulatory objectives); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 340 (5th Cir. 1995) (en banc) (holding that a negligence cause of action was not preempted when it made no specific reference to services and would not significantly affect services); *Nyswaner v. C.H. Robinson Worldwide Inc.*, 353 F. Supp. 3d 892, 896 (D. Ariz. 2019) (holding that a negligent hiring claim was not preempted by the FAAAA because “[n]egligent hiring claims are generally applicable state common law causes of action that apply to a wide variety of industries”). We similarly find the relationship between Plaintiffs’ negligence action to a motor carrier’s prices, routes, and services too tenuous to be preempted by the FAAAA. See *Dan’s City*, 569 U.S. at 261 (cautioning that “state laws affecting carrier prices, routes, and services in only a tenuous, remote, or peripheral manner” are not preempted by the FAAAA (omission, internal quotation marks, and citation omitted)); *Boyz Sanitation*, 889 F.3d 1189 at 1198-1200 (concluding that, even if state and local regulations concerning garbage collection fell within the FAAAA’s preemptive scope, the impact “is too insignificant to warrant preemption”).

{17} Second, because the FAAAA does not provide for alternative sources of damage recovery, Plaintiffs would be left without judicial remedy should their claims be preempted. “It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.” *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). In light of the Supreme Court’s caution “that federal courts should not displace police powers by federal law unless that was the clear and manifest purpose of Congress[.]” federal courts have reasoned that the absence of any alternative judicial remedy or recourse is evidence that common-law actions to recover for personal injury or property damage are not preempted. *Hodges*, 44 F.3d at 338 (analyzing preemption by the ADA); *Nyswaner*, 353 F. Supp. 3d at 896 (analyzing preemption by the FAAAA and stating “[h]ere it seems . . . unlikely that Congress meant to exempt transportation brokers from tortious conduct they would otherwise be liable for at common law”); *Gill v. JetBlue Airways Corp.*, 836 F. Supp. 2d 33, 42 (D. Mass. 2011) (applying the same analysis to preemption by the ADA). In *Dan’s City*, the Supreme Court stated that the result of leaving damaged parties without any judicial recourse to

recover damages “can[not] be attributed to a rational Congress,” 569 U.S. at 265.

{18} In addition, the FAAAA’s inclusion of a provision requiring motor carriers to carry liability insurance “sufficient to pay . . . for each final judgment . . . for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss of or damage to property[.]” 49 U.S.C. § 13906(a)(1) (2012) (emphasis added),³ is strong evidence Congress did not intend to preempt claims for damages resulting from motor carrier negligence. See *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998) (“It would make little sense to require insurance to pay for bodily injury claims if [motor carriers] were insulated from such suits by the preemption provision.”); *Hodges*, 44 F.3d at 338 (“A complete preemption of state law in [the areas of state tort actions] would have rendered any requirement of insurance coverage nugatory.”); *Harris v. Velichkov*, 860 F. Supp. 2d 970, 980-81 (D. Neb. 2012) (“The purpose of requiring such proof of financial responsibility is to ensure that the public is adequately protected from the risks created by a motor carrier’s operations.”); *Creagan v. Wal-Mart Transp., LLC*, 354 F. Supp. 3d 808, 814 (N.D. Ohio 2018) (holding that personal injury claim brought against brokers of motor transport is preempted because the liability insurance requirement only applies to motor carriers themselves, and stating that the insurance requirement “affirmatively establish[es] that a motor carrier may be liable for these types of negligence actions”).

{19} We conclude that the FAAA does not preempt Plaintiffs’ negligence claim.

C. Breach of Implied Contract

{20} Plaintiffs’ amended complaint asserts a claim for “breach of implied contract,” without any allegations establishing the existence of a contract affording Plaintiffs a right to recover from Tavenner’s for its breach. The only allegation even suggesting the existence of a contract is this: “As a direct result of [Tavenner]’s breach and failure to protect and transport the [a]irplane as agreed upon, Plaintiffs have been damaged and are entitled to compensatory damages in an amount to be proved at trial.” There is no allegation establishing the existence of a contract between Tavenner’s and Plaintiffs. To the contrary, the complaint elsewhere alleges that Tavenner’s “agreed to take the [a]irplane in its possession after being contacted by the Torrance County Sheriff’s Department.” Thus, to the extent the complaint may be deemed to allege the existence of any agreement, that agreement was between Tavenner’s and Sheriff, and there is no allegation establishing a legal basis entitling Plaintiffs to recover against Tavenner’s for breach of that agreement. The question whether the complaint sufficiently alleges a contract claim affording Plaintiffs a right to recover against Tavenner’s for its breach was not argued or ruled on by the district court and is not before us. See Rule 12-321(A) NMRA (“To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked.”); *Batchelor v. Charley*, 1965-NMSC-001, ¶ 6, 74 N.M. 717, 398 P.2d 49 (declining to review issue where the appellant failed to meet the burden “to show that the question presented for review was ruled upon by the trial court”). Given the presumption against preemption and that Tavenner’s bears the burden to prove preemption,

we conclude that the allegations are insufficient to permit analysis of the question that is before us—whether the FAAAA expressly preempts the claim. See *Self*, 1998-NMSC-046, ¶ 7. Accordingly, we reverse and remand without reaching the question and leave the issue for the district court to decide in the first instance.

D. Breach of the Covenant of Good Faith and Fair Dealing

{21} Plaintiffs’ claim for breach of the covenant of good faith and fair dealing presents a similar problem. If there is no contract, there can be no covenant and therefore no breach of the covenant. See *Sanchez v. The New Mexican*, 1987-NMSC-059, ¶ 13, 106 N.M. 76, 738 P.2d 1321 (stating that no good faith and fair dealing claim may be brought when there is no contract “upon which the law can impose the stated duty to exercise good faith and fair dealing”). The allegations in the amended complaint are insufficient to permit analysis of the question whether the FAAAA preempts the claim for breach of the covenant of good faith and fair dealing, and we reverse and remand without reaching the question, again leaving the question for the district court to decide.

CONCLUSION

{22} We reverse the district court’s dismissal of Plaintiffs’ claims and remand for proceedings consistent with this opinion.

{23} IT IS SO ORDERED.

JACQUELINE R. MEDINA, Judge

WE CONCUR:

LINDA M. VANZI, Judge

MICHAEL D. BUSTAMANTE,

Judge Pro Tempore

³The ADA similarly mandates liability insurance coverage “sufficient to pay . . . for bodily injury to, or death of, an individual or for loss of, or damage to, property to others[.]” 49 U.S.C. § 41112(a) (2012).

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-051

No. A-1-CA-36098 (filed June 24, 2019)

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

GABRIEL ALVARADO,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY

GARY L. CLINGMAN, District Judge

Released for Publication September 24, 2019.

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Opinion

Megan P. Duffy, Judge.

{1} The State appeals, pursuant to NMSA 1978, Section 39-3-3(B)(2) (1972), the district court's order suppressing Defendant's written statements, made while he was alone in a room at the police station after he had invoked his right to counsel. We reverse and remand.

BACKGROUND

{2} Defendant, a certified massage therapist, allegedly penetrated Victim's vagina with his finger during a session. Victim reported the incident to the police later that day. After Victim underwent a sexual assault nurse examiner (SANE) exam the following afternoon that confirmed injury to her vaginal walls and a tear to her labia, the police went to Defendant's home and asked him to come to the station to give a statement. Defendant agreed and drove himself to the station that afternoon. An officer interviewed Defendant in an audio and video-recorded interview room.

{3} After some introductory conversation, Defendant made several potentially incriminating statements. The officer advised Defendant of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), after which the following exchange took place:

Defendant: I would rather speak first with an attorney. Can I do that?

Officer: That's your—That's your right.

Defendant: Can I do that right now without going to jail? Can I get an attorney first, get together with you in this same room if we have to, and talk to you?

Officer: I'm gonna make a phone call . . . and we're going to make a decision on that.

The district court found that that this was an invocation of Defendant's right to an attorney. Defendant and the officer continued talking for about ten more minutes before the officer ended the interview.

{4} In that period, Defendant continued to talk with the officer, discussing his religion, family, and a prior conviction. Defendant did not specifically discuss the incident with Victim, and the officer did not ask Defendant questions about the incident. The officer finally ended the interview, saying, "You know what, take a second. Let me take a break. You know, we'll take a break from each other. Give—give me a minute; I gotta run and get something anyway."

{5} Defendant asked if he could call his mother with his phone since she might be worrying about him. The officer said, "I'll tell you what, . . . let me run and get

something and I'll come—I'll come right back." Defendant asked if he could have a piece of paper and a pen, and the officer said yes and provided them to Defendant. The officer asked Defendant if he had any weapons, briefly searched him, and took his keys. The officer said he would find out if Defendant would be able to call his mother. Defendant began to respond, saying, "That's fine, I'll decide that here in a second, just let me just write down my—" when the officer interrupted, "Take a minute. Think about it. Okay?" as he left the room.

{6} Immediately after the officer left the room, it is unclear whether Defendant started writing or whether he only held the pen above the paper. The officer returned briefly to give Defendant his phone and left again. Defendant called his sister, asking her to tell his mother he was okay. About eight minutes after the officer left, Defendant clearly started writing. He stopped for a while, waved at both of the cameras in the room, then started writing again.

{7} About twenty minutes after initially leaving Defendant alone, the officer came back and asked, "So what'd you do with the paper here, just drawing?" Defendant said, "I just kind of needed to bounce ideas off of myself," and "I started writing stuff down and I just started processing mentally." Another officer placed Defendant under arrest, at which time a third individual asked Defendant, "Do you want your notes with you?" Defendant said, "No, sir" as he walked out.

{8} Defendant's notes included a page stating, "I tell them everything" connected with a line to "I go to Jail." Another page says, "I have to self destruct[]" and that sucks. But that's my own fault. Im [sic] a product of my decisions. So I can handle the results. I must find my way [b]ack to God." Defendant signed this page and drew a picture of a bomb.

{9} The State charged Defendant with two counts of second-degree criminal sexual penetration, contrary to NMSA 1978, Section 30-9-11(E)(3) (2009). Defendant moved to suppress all written and oral statements made after he invoked his right to counsel. The district court found that Defendant had invoked his right to counsel when he said, "Can I get an attorney first, then get with you, in this same room if we have to, and talk to you?" and suppressed all statements and written evidence occurring after that point, including the written statements at issue here. The State filed a pretrial appeal challenging the district court's suppression of the written statements. See § 39-3-3(B)(2) (permitting the state to appeal "within ten days from

a decision or order of a district court suppressing or excluding evidence . . . if the district attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding”).

DISCUSSION

{10} The State argues that the district court erred in suppressing Defendant’s written statements because they were volunteered. “Appellate review of a motion to suppress presents a mixed question of law and fact. We review factual determinations for substantial evidence and legal determinations de novo.” *State v. Paananen*, 2015-NMSC-031, ¶ 10, 357 P.3d 958 (internal quotation marks and citations omitted); see *State v. Pisio*, 1994-NMCA-152, ¶ 17, 119 N.M. 252, 889 P.2d 860 (reviewing de novo the question of whether a statement was “volunteered”).

{11} “*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.” *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980); *State v. Edwards*, 1981-NMCA-119, ¶¶ 12-14, 97 N.M. 141, 637 P.2d 572 (applying *Innis*). “*Miranda* requires that if at any point a defendant invokes the right to counsel by indicating that he wishes to consult with an attorney before speaking or invokes the right to remain silent by indicating that he does not wish to be interrogated, all interrogation must cease.” *State v. Madonda*, 2016-NMSC-022, ¶ 17, 375 P.3d 424 (internal quotation marks and citation omitted). However, “[t]he federal constitution does not preclude the use of incriminating statements against the accused if those statements can be characterized as volunteered.” *Pisio*, 1994-NMCA-152, ¶ 15. “Volunteered statements of any kind are not barred by the Fifth Amendment[.]” and we have said that “[a] question may qualify as volunteered, even though it is made by one who had previously requested counsel.” *Id.* (internal quotation marks and citation omitted); see *id.* (“Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence[.]” (quoting *Miranda*, 384 U.S. at 478)). “Most volunteered statements fall into one of two categories: statements which the police have made no attempt to elicit, and statements which respond to a police question or which occur during the course of interrogation, but which are totally unresponsive to the question asked.” *Id.* ¶ 16 (quoting 3 William E. Ringel, *Searches and Seizures, Arrests and Confessions* § 27.4(a), at 27-26.6 (2d ed. 1994)).

{12} Our initial inquiry in this case is whether Defendant’s written statements were the product of an interrogation or

its functional equivalent. See *Edwards*, 1981-NMCA-119, ¶ 12 (stating that the threshold inquiry when a defendant alleges a violation of *Miranda* rights is whether there was an interrogation). “Whether a person is interrogated depends on the facts and circumstances of each case.” *State v. Juarez*, 1995-NMCA-085, ¶ 8, 120 N.M. 499, 903 P.2d 241. “Interrogation occurs when an officer subjects an individual to questioning or circumstances which the officer knows or should know are reasonably likely to elicit incriminating responses.” *State v. Fekete*, 1995-NMSC-049, ¶ 41, 120 N.M. 290, 901 P.2d 708 (quoting *State v. Cavanaugh*, 1993-NMCA-152, ¶ 5, 116 N.M. 826, 867 P.2d 1208). “The concern of the Court in *Miranda* was that the interrogation environment created by the interplay of interrogation and custody would subjugate the individual to the will of his examiner and thereby undermine the privilege against compulsory self-incrimination.” *Innis*, 446 U.S. at 299 (internal quotation marks and citation omitted); see *id.* (discussing police practices that do not involve direct questioning but are nevertheless reasonably likely to lead to incriminating statements, such as “the use of line-ups in which a coached witness would pick the defendant as the perpetrator” and other psychological ploys). We too have said that “[i]nterrogation is not limited to express questioning. It can include other, less-assertive police methods that are reasonably likely to lead to incriminating information, but which are beyond those normally attendant to arrest and custody.” *Juarez*, 1995-NMCA-085, ¶ 8. “This includes repeated efforts to wear down a suspect’s resistance and make the suspect change his mind about invoking the rights described in the *Miranda* warnings.” *Madonda*, 2016-NMSC-022, ¶ 19 (alterations, internal quotation marks, and citation omitted).

{13} Defendant contends that the police maintained an interrogation environment even after the officer left the room, and that his written statements must be suppressed because the officer’s continued questioning violated the “bright-line rule” that all interrogation must cease after a defendant invokes his right to an attorney. See *id.* ¶ 18 (“[A]ll questioning must cease after an accused requests counsel” (emphasis omitted) (quoting *Smith v. Illinois*, 469 U.S. 91, 98 (1984))). To the extent that the officer continued questioning Defendant after he had invoked his right to counsel, the “bright-line rule” implicates Defendant’s responses to that questioning, which are not at issue in this appeal. See *id.* The interview, however, had ended before Defendant made his written statements, and we find no basis to determine that those statements were made in response to inter-

rogation. *State v. Greene*, 1977-NMSC-111, ¶¶ 26, 28, 91 N.M. 207, 572 P.2d 935 (holding that the defendant’s incriminating statements regarding the identification of a body in a newspaper article, after he had been advised of his *Miranda* rights, were volunteered because they were not made in response to police questioning and were the product of choice, rather than compulsion).

{14} The circumstances in this case are substantially similar to *Pisio*, where, after the defendant had invoked his right to counsel, the police ceased questioning the defendant and he sat in silence in the detective’s office while the detective completed paperwork. 1994-NMCA-152, ¶ 12. While the officer was “silently completing paperwork[.]” the defendant asked the officer if he would “take the rap” if his alleged rape victim had sex with someone else. *Id.* ¶¶ 12, 18. We rejected the defendant’s argument that “even silence on the part of a police officer can be the functional equivalent of direct questioning” and found “no basis for determining that the police should have anticipated [the defendant’s] response or that [the defendant] framed the question in response to anything specific the detective had said or done.” *Id.* ¶¶ 14, 17. The same conclusion is required here.

{15} In this case, the officer ceased interviewing Defendant and left Defendant alone in the room for approximately twenty minutes, during which time Defendant created his written statements. Like the defendant in *Pisio*, Defendant apparently knew that he was being recorded or observed while alone in the room when he waived to the camera, and he did not make the written statement in response to any questioning or prompting. See *id.* ¶¶ 14, 17 (declining to hold that the defendant was subject to an interrogation when the detective was silent, but “was ready to turn the tape back on if Defendant made a statement with ‘evidentiary value’”); see also *Arizona v. Mauro*, 481 U.S. 520, 523-25 (1987) (holding that an accused, who had asserted right to counsel, was not subjected to interrogation or its functional equivalent when police allowed his wife to speak with him in the presence of an officer, who tape-recorded their conversation). There is no indicia of police efforts designed to wear down Defendant’s resistance or induce Defendant to make incriminating statements. See *Madonda*, 2016-NMSC-022, ¶¶ 21-24 (holding that the defendant’s incriminating statements must be suppressed where right after the defendant invoked his right to counsel, the police “proceeded with techniques they had specifically planned to employ during the interrogation” and “undermined the very warnings which had prompted Defendant to invoke his rights in the first place”). Nor is there any indication

that Defendant's time alone was merely a break in a longer, continuing interrogation, as Defendant suggests. Consequently, we find no basis for determining that the officer should have anticipated Defendant's written statements. *See Pizio*, 1994-NMCA-152, ¶ 17. We conclude that Defendant's notes were volunteered statements and hold that the district court erred in suppressing them.

CONCLUSION

{16} We reverse the portion of the district court's November 10, 2016 order suppressing the written evidence obtained during Defendant's interview on June 18, 2015, and remand for further proceedings consistent with this opinion.

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

MEGAN P. DUFFY, Judge

WE CONCUR:

M. MONICA ZAMORA, Chief Judge

KRISTINA BOGARDUS, Judge

Advance Opinions

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From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-052

No. A-1-CA-36233 (filed June 24, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
JASON RADLER,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF TORRANCE COUNTY

KEVIN R. SWEAZEA, District Judge

Released for Publication September 24, 2019.

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Opinion

Jennifer L. Attrep, Judge.

{1} In this refiled concurrent jurisdiction case, Defendant Jason Radler moved to dismiss, alleging a violation of his constitutional right to a speedy trial. Eight months after the charge was originally filed in magistrate court and five months after the charge was dismissed and then refiled in district court, the district court granted Defendant's motion. The State appealed. We reverse.

BACKGROUND

{2} The State charged Defendant in magistrate court with aggravated driving under the influence of intoxicating liquor, in violation of NMSA 1978, Section 66-8-102(D)(1) (2010, amended 2016). After spending three days in jail, Defendant was arraigned on March 28, 2016, and released on bond. On April 11, counsel for Defendant entered an appearance and made a pro forma demand for speedy trial. On June 27, the State dismissed the magistrate court case and refiled the charge in district court. The district court set trial for December 19.

{3} On November 4, Defendant moved to dismiss. He contended that, because his trial had not commenced before the expiration of the 182-day period that would have governed his case in magistrate court, his right to a speedy trial had been violated and

Rule 5-604(B) NMRA (the rule governing the commencement of trials in refiled concurrent jurisdiction cases) contemplated dismissal. The State responded by observing that Rule 5-604(B) sets out familiar factors from our speedy trial case law—i.e., the length of delay, the reasons for delay, the defendant's assertion of the right, and the prejudice to the defendant from the delay. *See State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499, 212 P.3d 387. With respect to the length of delay, the State noted our Supreme Court in *Garza* had adopted "one year as a benchmark for determining when a simple case may become presumptively prejudicial." *Id.* ¶ 48. The State contended that benchmark constitutes a kind of threshold, and if a defendant cannot establish a delay exceeding the benchmark, the district court need not even consider the other factors set forth in the case law and the rule. Defendant's case had been pending just eight months since the original filing in magistrate court, and the State thus argued his motion should be denied for failure to establish delay exceeding the *Garza* benchmark.

{4} The district court heard argument on Defendant's motion in November 2016. Defendant presented testimony at the hearing, without objection from the State, regarding potential prejudice he had suffered. Defendant explained he had been "offered an opportunity to apply to the academy at

Los Alamos County Fire Department" (the Department), but he did not apply because of his pending case. He noted the application window had recently closed, and thus he had missed the opportunity. The State did not cross-examine Defendant.

{5} The district court observed the delay was "not excessive," but concluded it nonetheless weighed against the State because it extended beyond the period that would have governed in magistrate court. The court added that the State's reasons for dismissing and refiled the case were permissible, and thus the reason for delay factor weighed in the State's favor. Finally, the court observed Defendant had introduced evidence of prejudice, which the State had not countered, and thus the prejudice factor weighed against the State. The district court concluded Defendant's trial had been impermissibly delayed and granted Defendant's motion to dismiss. After a motion for reconsideration and additional argument, the court entered an order dismissing Defendant's charge, finding "the [m]agistrate [c]ourt trial should have been commenced [80 days before the scheduled district court trial and that] Defendant suffered actual prejudice[.]" and concluding the speedy trial factors weighed in favor of Defendant.

DISCUSSION

{6} The State reiterates on appeal that the district court erred in even considering Defendant's motion, maintaining the speedy trial factors are only to be weighed once a defendant has established delay exceeding *Garza*'s twelve-month benchmark. Alternatively, the State contends a proper weighing of the factors compels reversal. Defendant responds that Rule 5-604 contemplates consideration of a claimed speedy trial violation even before a case has been pending twelve months. He adds that he established actual prejudice, obviating any need to cross the presumptively prejudicial benchmark described in *Garza*. He further contends the district court correctly weighed the speedy trial factors and properly dismissed the case. Prior to addressing the parties' arguments, we briefly examine the applicable law relating to speedy trial and Rule 5-604.

I. Applicable Law

A. Speedy Trial

{7} In determining whether a defendant has been deprived of the right to a speedy trial, we analyze the four-factor balancing test set out by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of delay in bringing the case to trial, (2) the reasons for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) the prejudice to the defendant caused by the delay." *State v. Serros*, 2016-NMSC-008, ¶ 5, 366 P.3d 1121. Our Supreme

Court in *Garza* established new guidelines as to when, generally, delays should be characterized as presumptively prejudicial and require scrutiny of the *Barker* factors. *Garza*, 2009-NMSC-038, ¶¶ 47-48 (adopting guidelines of twelve months for simple cases, fifteen months for cases of intermediate complexity, and eighteen months for complex cases). At the same time, the *Garza* Court was careful to note the new guidelines are to be treated as merely guidelines, not rules, and “will not preclude [a] defendant from bringing a motion for a speedy trial violation though the delay may be less than one year.” *Id.* ¶ 49. As a specific illustration of that proposition, *Garza* emphasized a defendant might bring a speedy trial motion even before the relevant presumptive period has passed where the defendant can establish actual prejudice resulting from delay. *Id.*

B. Elimination of the Six-Month Rule and Resulting Revisions to Rule 5-604

{8} In the past, our Supreme Court used the “six-month rule” in both limited jurisdiction courts and district courts to “provide the courts and the parties with a rudimentary warning of when speedy trial problems may arise.” *Garza*, 2009-NMSC-038, ¶¶ 43, 46 (internal quotation marks and citation omitted). The six-month rule “requir[ed] the commencement of trial in a criminal proceeding within six months of the latest of several different triggering events.” *Id.* ¶ 43 (internal quotation marks and citation omitted); see also Rule 5-604(B) NMRA (2009) (previous six-month rule applicable to district courts); Rule 6-506 NMRA (current six-month rule still applicable to magistrate courts). There was no rule, however, providing guidance as to how the six-month rules should apply in refiled concurrent jurisdiction cases—i.e., where a case initially filed in magistrate court is later dismissed and then refiled in district court. *State v. Savedra*, 2010-NMSC-025, ¶ 2, 148 N.M. 301, 236 P.3d 20.

{9} In *Savedra*, our Supreme Court examined earlier case law attempting to interpret the rules in this context and expressed dissatisfaction with the focus those cases gave to the propriety of the State’s justification for dismissing and refiled. *Id.* ¶¶ 7-8. The Court determined that in district courts, “the six-month rule ha[d] become an unnecessary and sometimes counterproductive method for protecting a defendant’s right to a speedy trial” and withdrew the district court rule. *Id.* ¶ 9. The Court directed instead that “defendants may rely upon and assert their right to a speedy trial whenever they believe impermissible delay has occurred; whether that delay is the result of a dismissal and refiled or any other cause.” *Id.* Notably, the Court made no explicit reference to periods of presumptively prejudicial delay as thresholds for these challenges, and instead cited *Garza* for its provision of new “time

frames” guiding a district court’s speedy trial analysis. *Savedra*, 2010-NMSC-025, ¶ 8.

{10} In response to *Savedra*, Rule 5-604 was amended to eliminate the six-month rule in district court. The new rule applies only to refiled concurrent jurisdiction cases. See Rule 5-604(A). For these cases, the rule provides:

If the district court does not initially schedule a refiled case within the trial deadline that would have been applicable had the case remained in the lower court, or if the court grants a continuance beyond that deadline, the defendant may move that the court consider whether the case should be dismissed for violation of the defendant’s right to speedy trial, taking into consideration the following factors:

- (1) the complexity of the case;
- (2) the length of the delay in bringing the defendant to trial;
- (3) the reason for the delay in bringing the defendant to trial;
- (4) whether the defendant has asserted the right to a speedy trial or has acquiesced in some or all of the delay; and
- (5) the extent of prejudice, if any, from the delay.

This paragraph does not prohibit a defendant from filing a motion to dismiss for violation of the right to a speedy trial even if a trial is scheduled within the trial deadline that would have been applicable had the case remained in the lower court.

Rule 5-604(B).

{11} Several features of the revision are noteworthy. The factors set forth in Rule 5-604(B) mirror the *Barker* factors. See *Garza*, 2009-NMSC-038, ¶ 13. Their inclusion is consistent with *Savedra*’s command that evaluation of the propriety of the state’s dismissal and refiled “should be done within the context” of the standard speedy trial challenge a defendant might raise in district court. See *Savedra*, 2010-NMSC-025, ¶ 8. Perhaps more importantly, this rule establishes no specific periods of delay as thresholds to be crossed before a defendant in a refiled case might bring a challenge. The text instead provides that whenever a district court fails to schedule trial within the originally applicable six-month period, the defendant may move for consideration of a speedy trial violation—with no limitation on when that motion might occur. See Rule 5-604(B). Even where the district court does schedule trial within the originally applicable six-month period, the rule adds that the defendant is not prohibited from asserting a violation. *Id.* These provisions arise from *Savedra*’s directive that defendants in these refiled cases may

assert a right to speedy trial “whenever they believe impermissible delay has occurred.” 2010-NMSC-025, ¶ 9.

II. It Was Not Error for the District Court to Consider the Merits of Defendant’s Motion to Dismiss

{12} We review de novo the threshold issue of whether the district court erred in considering Defendant’s motion to dismiss prior to passage of the presumptively prejudicial period of delay. See *State v. Foster*, 2003-NMCA-099, ¶ 6, 134 N.M. 224, 75 P.3d 824 (“We review de novo questions of law concerning the interpretation of Supreme Court rules and the district court’s application of the law to the facts of this case.”). The text of Rule 5-604(B), coupled with the guidance giving rise to the rule in *Savedra*, dispose of the State’s contention that the district court was precluded from considering Defendant’s motion before the *Garza* twelve-month benchmark had been met. Regardless when a challenge may be brought in cases originating in district court, the language of the rule makes clear that for refiled concurrent jurisdiction cases, a defendant may assert the challenge whenever the district court fails to “schedule a refiled case within the trial deadline that would have been applicable” in the court of limited jurisdiction. Rule 5-604(B); see *State v. Montoya*, 2011-NMCA-009, ¶ 8, 149 N.M. 242, 247 P.3d 1127 (“[W]e will give effect to the plain meaning of the rule if its language is clear and unambiguous” (alteration, internal quotation marks, and citation omitted)). Because Defendant’s district court trial date fell beyond the originally applicable six-month date, we conclude Defendant was entitled to raise a speedy trial challenge and the district court committed no error in considering Defendant’s motion. Moreover, because Defendant alleged actual prejudice as a result of the delay, *Garza* and *Savedra* further suggest the district court committed no error by entertaining his motion. See *Garza*, 2009-NMSC-038, ¶¶ 22, 49 (noting guideline periods will not preclude challenge at earlier time where the defendant suffers actual prejudice); see also *Savedra*, 2010-NMSC-025, ¶ 9 (explaining defendants may raise speedy trial challenges whenever they believe impermissible delay has arisen); cf. Rule 5-604(B) (placing no time frame on the filing of speedy trial motions in refiled concurrent jurisdiction cases).

{13} While the district court here was free to entertain Defendant’s motion to dismiss, whether Defendant established a violation of his right to speedy trial is another matter, which we address below.

III. The District Court Erred in Concluding That Defendant’s Right to a Speedy Trial Was Violated

{14} As already noted, in evaluating Defendant’s speedy trial claim, we consider the *Barker* factors—the length of delay, the reasons for delay, the defendant’s assertion

of the right, and the prejudice to the defendant caused by the delay. See *Garza*, 2009-NMSC-038, ¶ 13; see also Rule 5-604(B) (listing speedy trial factors to consider). We weigh these four factors together given “the unique factual circumstances presented in each case.” *Garza*, 2009-NMSC-038, ¶ 14. “In analyzing these factors, we defer to the district court’s factual findings concerning each factor as long as they are supported by substantial evidence, we independently review the record to determine whether a defendant was denied his speedy trial right, and we weigh and balance the *Barker* factors de novo.” *State v. Montoya*, 2015-NMCA-056, ¶ 12, 348 P.3d 1057. To the extent we review the district court’s application of Rule 5-604, our review is de novo. See *State v. Wilson*, 1998-NMCA-084, ¶ 8, 125 N.M. 390, 962 P.2d 636.

A. Length of Delay

{15} The parties agree this is a simple case. *Garza* instructs courts evaluating the length of delay to measure the delay against the relevant guideline established for finding presumptive prejudice. See 2009-NMSC-038, ¶¶ 23-24. For simple cases, *Garza* established a guideline of twelve months. *Id.* ¶ 48.

{16} The district court weighed the length of delay here against the State, concerned that Defendant’s district court trial date had been scheduled eighty days beyond the six-month magistrate court deadline. The district court was, in effect, measuring the length of delay against the magistrate court six-month rule. While Rule 5-604 references the trial deadline in magistrate court, nothing in the rule suggests the length of delay is to be measured against something other than the *Garza* guideline. See Rule 5-604(B). And *Savedra* suggests the *Garza* guideline is in fact the applicable measuring stick in these refiled concurrent jurisdiction cases, explaining that a defendant’s challenge based on dismissal and refiling should occur in “the context of” the standard speedy trial analysis, and citing *Garza* as providing the relevant “new time frames for engaging in the four-factor *Barker* . . . speedy trial balancing test.” *Savedra*, 2010-NMSC-025, ¶ 8. We therefore measure the delay here against the backdrop of *Garza*’s twelve-month guideline.

{17} The parties agree Defendant’s case was pending from the date of his magistrate court arraignment, March 28, 2016, until his district court trial date of December 19, 2016. That constitutes a total delay of approximately eight months and three weeks—several months short of the *Garza* guideline. In other cases where delay has barely exceeded the applicable guideline, New Mexico courts have concluded the length of delay weighs in favor of neither party, or only negligibly in favor of the defendant. See, e.g., *State v. Coffin*, 1999-NMSC-038, ¶ 59, 128 N.M. 192, 991 P.2d 477 (concluding

delay exceeded guideline only “exceptionally slight[ly]” and weighing the delay “neutrally between the parties”); *State v. Laney*, 2003-NMCA-144, ¶ 16, 134 N.M. 648, 81 P.3d 591 (concluding delay exceeding guideline by “sixty-two days” had “little practical effect on the balancing”). The parties have presented no authority providing guidance as to how to weigh delays not exceeding the relevant guideline, but we conclude faithful application of the principles from the minimal-delay cases compels a conclusion that delays not exceeding the guideline will generally weigh against a defendant.

{18} Because the delay here fell several months short of the relevant guideline, we conclude the length of delay weighs against Defendant. The district court erred in measuring the delay against the magistrate court six-month rule and in weighing the length of delay factor in Defendant’s favor.

B. Reasons for Delay

{19} The district court concluded the dismissal and refiling weighed in favor of the State because the State offered reasons for refiling that were considered valid under earlier case law. *Garza*, however, instructs that while the state retains “discretion to dismiss a criminal case in magistrate court and reinstate charges in district court,” that discretion will not justify the delay that occurs in the period the case remains pending in magistrate court. 2009-NMSC-038, ¶ 28. This delay instead, in the absence of a showing of intent or bad faith, constitutes negligent delay and weighs against the state. *Id.* The weight assignable to this kind of negligent delay is closely related to the length of delay—the weight increases with the delay’s “protractedness,” and for shorter periods of delay, negligence will generally weigh only “slightly” against the state. *Id.* ¶¶ 26, 30. The parties agree there was no intentional delay or bad faith established, and the case was only pending in magistrate court for a few months. As a result, we conclude the delay resulting from removal of the case to district court was negligent and weighs slightly against the State. As for the time the case was pending in district court—a period that neither party addresses—it appears the case was proceeding normally and should be weighed neutrally. See *State v. Maddox*, 2008-NMSC-062, ¶ 27, 145 N.M. 242, 195 P.3d 1254 (concluding that period where “case moved toward trial with customary promptness” should be weighed “neutrally between the parties”), *abrogated on other grounds by Garza*, 2009-NMSC-038.

C. Assertion of the Right

{20} The district court gave no apparent consideration to this factor. Generally, a court evaluating this factor should consider the timing and manner of the defendant’s assertion of the right, along with the “frequency and force of the defendant’s objections to [any] delays.” *Garza*, 2009-NMSC-038,

¶ 32 (internal quotation marks and citation omitted). Here, Defendant made only one early, perfunctory demand for speedy trial, and then asked for dismissal as his trial approached. Defendant concedes he did not aggressively assert his speedy trial right and reasons this factor should weigh only slightly in his favor. The State agrees. On the record here, we agree with the parties and conclude this factor weighs only slightly in Defendant’s favor. See *Maddox*, 2008-NMSC-062, ¶ 31 (weighing factor slightly in the defendant’s favor when the defendant’s assertions were “neither timely nor forceful”); *State v. Moreno*, 2010-NMCA-044, ¶ 35, 148 N.M. 253, 233 P.3d 782 (weighing factor only slightly in favor of the defendant when he asserted right once early and generically and later only in a motion to dismiss a few months prior to trial).

D. Prejudice

{21} The district court initially determined Defendant’s testimony regarding his lost opportunity at the Department established actual prejudice and concluded this factor weighed in Defendant’s favor. The parties later clarified that Defendant had not actually lost a job with the Department, as the district court may have originally understood. Defendant had instead foregone an opportunity to attend the Department’s academy, which may have given rise to some unquantified chance at a job offer. The district court acknowledged this distinction but nevertheless concluded the prejudice factor weighed in Defendant’s favor.

{22} Here, we note Defendant presented very little evidence regarding his claim of a lost job opportunity. He offered no information regarding how many offers of employment were typically extended to attendees at the academy, or how many were likely to be extended in this instance. And he offered no other information regarding the likelihood that he would ultimately secure employment based on the initial invitation. Given the very sparse record made, we conclude Defendant’s claim with respect to a lost job opportunity was at best speculative. See, e.g., *Garza*, 2009-NMSC-038, ¶ 37 (concluding the defendant failed to make any cognizable showing of prejudice where showing was not sufficiently “particularized”); *State v. Urban*, 2004-NMSC-007, ¶ 18, 135 N.M. 279, 87 P.3d 1061 (noting that while the defendant gave testimony regarding a lost witness, he “failed to articulate how this witness may have been able to assist in his defense[.]” and concluding his “claims with respect to lost witnesses are, at best, speculative”).

{23} Even if we ignored the limited record made on Defendant’s claim of a lost job opportunity and give the claim fuller consideration, New Mexico courts have previously recognized a distinction between the weighty prejudice arising from the loss of an existing job and the lesser prejudice

arising from the loss of a job offer. Compare *State v. Johnson*, 1991-NMCA-134, ¶ 7, 113 N.M. 192, 824 P.2d 332 (concluding the defendant suffered substantial prejudice when he was suspended from his job following indictment), with *State v. Marquez*, 2001-NMCA-062, ¶ 25, 130 N.M. 651, 29 P.3d 1052 (“[The d]efendant never accepted the position offered to him and, at most, it appears that he lost a job opportunity and not a job.”). Application of that distinction here is instructive, particularly because Defendant has not claimed even the loss of a job offer like the one at stake in *Marquez*—instead he claims only the loss of an opportunity that may have given rise to some indeterminate chance of a later offer. That kind of nebulous chance has not typically been granted any weight in our case law, and we decline to give it weight here. See, e.g., *Garza*, 2009-NMSC-038, ¶ 36 (requiring that lost exculpatory testimony be stated with particularity); see also *Maddox*, 2008-NMSC-062, ¶ 35 (concluding the defendant failed to show prejudice where he could not establish an earlier trial date would have given him the opportunity to

serve sentences concurrently, noting judge retained sentencing discretion); cf. *Marquez*, 2001-NMCA-062, ¶¶ 27-28 (concluding the defendant failed to show loss of employment opportunity where he could not show how pending case or potential jail time prevented him from accepting job offer).

{24} As a result, we conclude the district court erred in determining Defendant established prejudice resulting from the delay in this case. This factor thus does not weigh in Defendant’s favor.

E. Balancing the Factors

{25} In weighing our speedy trial factors, we recognize no single consideration is dispositive. See, e.g., *Barker*, 407 U.S. at 533 (explaining “they are related factors and must be considered together with such other circumstances as may be relevant”). Here, although the reasons for delay and assertion of the right factors weigh slightly in Defendant’s favor, the length of delay and prejudice factors weigh against him. Generally, where a defendant has failed to establish prejudice, the courts find no speedy trial violation. See *Garza*, 2009-NMSC-038, ¶ 40 (“Because

[the d]efendant failed to demonstrate particularized prejudice as a consequence of the ten-month and six-day delay, we cannot conclude that [the d]efendant’s right to a speedy trial was violated.”). In light of all the factors, we conclude Defendant’s right to speedy trial was not violated. See *id.*; see also *Laney*, 2003-NMCA-144, ¶ 30 (concluding no violation occurred where length factor weighed neutrally, reason and assertion factors weighed in the defendant’s favor, and no undue prejudice was established).

CONCLUSION

{26} We reverse the ruling of the district court and remand for reinstatement of the criminal charge against Defendant and for further proceedings consistent with this opinion.

{27} IT IS SO ORDERED.

JENNIFER L. ATTREP, Judge

WE CONCUR:

M. MONICA ZAMORA, Chief Judge
LINDA M. VANZI, Judge



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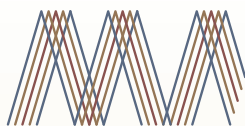
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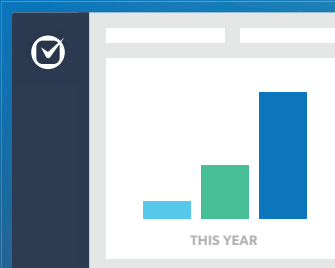


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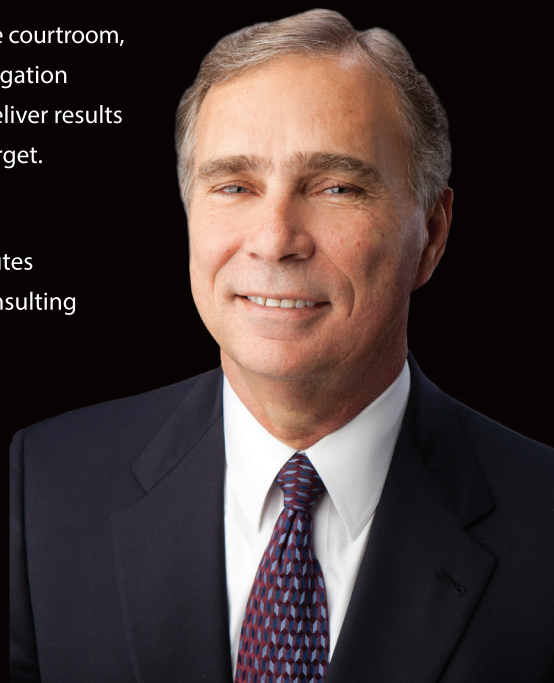
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The Office of the New Mexico Attorney General is currently recruiting for Assistant Attorneys General I, II, and III positions in our Consumer and Environmental Protection and Litigation Divisions of Civil Affairs and in our Medicaid Fraud Control and Special Prosecutions Divisions of Criminal Affairs. The job postings and further details are available at www.nmag.gov/human-resources.aspx.

Deputy City Attorney for Policy

The City Attorney's Office seeks an attorney to work on the evaluation, development and execution of the City's public policy initiatives. The work requires strong writing, analytical and advocacy skills. The successful applicant will work closely with constituents and community agencies with a broad range of interests and positions to shape priorities to positively impact the residents of Albuquerque. The position serves as a liaison to our external partners (which may include governments and nonprofit organizations) and ensures that our advocacy outcomes are effectively identified and achieved. This person will track project status, timelines, deliverables, and project requirements. This role is heavily involved in outreach and works closely with the Chief Administrative Officer and City Attorney to ensure the City continues to address the needs and priorities of Albuquerque communities on an on-going basis. Requirements: Experience with underserved or vulnerable populations; Master's Degree in related field or Juris Doctor. Juris Doctor strongly preferred. If attorney, must be licensed in New Mexico within six months of hire; In-depth understanding of city, state, and federal legislative and budget processes and grant application, administration, and compliance; Strong commitment to social justice, policy advocacy and research. Salary DOE. Please send resumes and cover letters to attention of "Legal Department" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103 or amaragon@cabq.gov.

LREP Staff Attorney

The New Mexico State Bar Foundation seeks a helpline staff attorney for the Legal Resources for the Elderly Program (LREP). This position is for 30-40 hours per week. It includes an excellent benefits package and competitive salary for legal work in the non-profit sector. Duties include providing legal advice and brief legal services to New Mexican Seniors, along with advocating on senior legal issues and collaborating with other legal services providers. Additionally, the attorney will conduct legal workshops and clinics throughout New Mexico (travel and some overnight stays required). The successful applicant must be able to work as part of a busy team in a fast-paced environment and will have a deep interest in elder law and issues affecting the senior community. Excellent customer service and computer skills are required. Fluency in Spanish is a plus. To be considered, applicants must submit a cover letter and resume. In your cover letter, please explain why you are interested in working as a helpline attorney. EOE. For full details and instructions on how to apply visit <https://www.nmbar.org/NmbarDocs/AboutUs/Careers/LREP2020.pdf>

Attorney Associate

The Bernalillo County Metropolitan Court is accepting applications for a full-time At-Will Associate Attorney position in the Self-Help Center and Mediation Office. Education/Experience: Must be a graduate of a law school meeting the standards of accreditation of the American Bar Association; possess and maintain a license to practice law in the state of New Mexico; and have at least three years' experience in the practice of law. Salary \$28,691-\$35,863 hourly DOE plus State of NM benefits package. Please go to <https://metro.nmcourts.gov> for a complete job description, or one may be obtained at the Human Resource office of the Metropolitan Court. Apply at or send application/resume with a legal writing sample (5-page minimum/10-page maximum) to the Bernalillo County Metropolitan Court, H. R. Division, P.O. Box 133, Albuquerque, NM 87103/ or by Fax (505) 222-4823. Applications/Resume must be submitted by 5 p.m. on March 20, 2020.

Prosecutor

Pueblo of Zia Police Department is looking for a part-time Prosecutor. POSITION SUMMARY: The Prosecutor will assist the Pueblo of Zia Police Department and Tribal Officials in enforcing the laws, ordinances and codes of the Pueblo. The Prosecutor will represent the Pueblo during criminal prosecutions in the Pueblo of Zia Tribal Court. The Prosecutor will conduct investigations, research and review cases filed in Tribal Court. The Prosecutor will contact the Police and/or Tribal Officials, as well as any witnesses, victims, and alleged perpetrators to gather evidence which could be used to build a case. Other duties may include law enforcement advisement and Indian Child Welfare Act cases. MINIMUM QUALIFICATIONS: Must be licensed to practice law in the State of New Mexico; Must be in good standing in all jurisdictions the attorney is a member of the Bar; Must be dependable, trustworthy, maintain confidentiality, and be able to work flexible hours when necessary; Juris Doctor from an ABA accredited law school; Must have prosecution and/or trial experience Must possess and maintain a valid NM Driver's License Must pass a driver's license, background, fingerprinting (sensitive positions) and drug screen; Must maintain a high level of confidentiality and ethical standards. Interested applicants should submit letter of interest, resume, supporting documents, and application to the Administrative Services Department. For more information please contact: Phone: 505.867.3304 x249; Fax: 505.867.3308; Email: hr@ziapueblo.org

Attorney

Butt Thornton & Baehr PC seeks an attorney with a minimum five years' experience, at least 3 years' of which are in civil litigation. Butt Thornton & Baehr PC is in its 61st year of practice. We seek an attorney who will continue our tradition of excellence, hard work, and commitment to the enjoyment of the profession. Please send letter of interest, resume, and writing samples to Ryan T. Sanders at rtsanders@btblaw.com.

Commercial Liability Defense, Coverage Litigation Attorney P/T Maybe F/T

Our well-established, regional, law practice seeks a contract or possibly full time attorney with considerable litigation experience, including familiarity with details of pleading, motion practice, and of course legal research and writing. We work in the area of insurance law, defense of tort claims, regulatory matters, and business and corporate support. A successful candidate will have excellent academics and five or more years of experience in these or highly similar areas of practice. Intimate familiarity with state and federal rule of civil procedure. Admission to the NM bar a must; admission to CO, UT, WY a plus. Apply with a resume, salary history, and five-page legal writing sample. Work may be part time 20+ hours per week moving to full time with firm benefits as case load develops. We are open to "of counsel" relationships with independent solo practitioners. We are open to attorneys working from our offices in Durango, CO, or in ABQ or SAF or nearby. Compensation for billable hours at hourly rate to be agreed, generally in the range of \$45 - \$65 per hour. Attorneys with significant seniority and experience may earn more. F/T accrues benefits. Apply with resume, 5-10p legal writing example to revans@evanslawfirm.com with "NM Attorney applicant" in the subject line."

Administrative Assistant/Paralegal

Small AV rated law firm specializing in commercial transactions and litigation is looking for an experienced and motivated administrative assistant/paralegal. Competitive salary and benefits negotiable. Good work environment. Located in the Journal Center area. Please send resumes to gwenb@chappellfirm.com

NMPED Paralegal Position

PARALEGAL - The Public Education Department is looking for a team player with strong writing and interpersonal skills, great attention to detail and follow-through, and an interest in public service. To apply, please fill out an application at <http://www.spo.state.nm.us/applicationguide/>, and email 2 writing samples to Aaron.Rodriguez2@state.nm.us.

Litigation Paralegal

Lewis Brisbois Bisgaard & Smith LLP is seeking a professional, proactive Litigation Paralegal to join our Albuquerque office. Candidates should be proficient in all aspects of the subpoena process, reviewing medical records, and research. Performs any and all other duties as necessary for the efficient functioning of the Department, Office and Firm. Practices and fosters an atmosphere of teamwork and cooperation. Ability to work independently with minimal direction. Ability to work directly with partners, associates, co-counsel and clients. Ability to delegate tasks and engage firm resources in the completion of large projects. Excellent organizational skills and detail oriented. Effective written and oral communication skills. Ability to think critically and analytically in a pressured environment. Ability to multi-task and to manage time effectively. Knowledge of Microsoft Office Suite, familiarity with computerized litigation databases. Ability to perform electronic research using Lexis. QUALIFICATIONS: Minimum of 5+ years of substantive litigation experience; Experienced, well-organized and independent paralegal to provide support to multiple attorneys; Expected to bill a minimum of 1,600 hours annually; E-filing experience in state and federal courts; Comprehensive knowledge of all facets of trial; case management, doc review and trial experience; Proficiency in e-discovery and litigation support; Demonstrated ability to independently manage multiple priorities and have excellent oral and written communication skills Litigation paralegal will exercise excellent judgment and decision making skills, strong organizational skills. CONTACT: All candidates should submit their resume, a writing sample and cover letter and reference ABQ Paralegal in the subject line to: phxrecruiter@lewisbrisbois.com. Please no recruiters and no phone inquiries regarding this posting.

Member Services Coordinator

The State Bar of New Mexico seeks outgoing, detail oriented applicants to join our team as a full-time Member Services Coordinator. The position will serve as a key staff liaison for our practice sections, committees, and divisions and provide administrative assistance in addition to attending meetings. The position will be responsible for website maintenance, sending eblasts, and assisting members with inquiries. The successful candidate will have excellent customer service skills; have highly developed organizational skills; proficiency with Outlook and word processing; abilities to prioritize and multitask; and proven experience with learning new programs and skills. Experience with email marketing, event coordination, and website maintenance a plus. \$16/hour, depending on experience and qualifications. EOE. For full details and instructions on how to apply visit <https://www.nmbar.org/NmbarDocs/AboutUs/Careers/MS2020.pdf> or [nmbar.org/CareerCenter](https://www.nmbar.org/CareerCenter).

Program Assistant II (legal)

Catholic Charities has a full-time job opening for a Program Assistant II (legal) with Domestic Violence and Sexual Assault Survivors Immigration Services. Responsibilities include managing a caseload of clients, maintaining case notes, answering client phone calls and emails, immigration application drafting, obtaining, copying, translation, accurately tracking time. **QUALIFICATIONS:** AA or BA strongly preferred; Bilingual English/Spanish required; plus two years of experience in clerical work required; excellent case management and multi-tasking capabilities required; working experience with low-income immigrants/refugees and or social work involving domestic violence/sexual assault situations is preferred; Handles confidential information; Proficiency in MS, Outlook, and Excel required as well as a demonstrated aptitude to use computer/internet-based systems. Pay range starts at \$14.04 per hour/\$29,203 annually, DOE. We offer an excellent benefits package: medical, dental and vision insurance, short-term and long-term disability insurance, life and AD&D insurance, 401K Plan, 12 paid holidays, paid-time off, and a flexible spending account. E-mail resume and letter of intent to Catholic Charities, Human Resources, to jobs@ccasnm.org. EOE. Only candidates selected for interviews will be contacted directly. Closing date for this posting is 4/8/20.

CLE Program Coordinator

The New Mexico State Bar Foundation Center for Legal Education seeks a career-oriented, full-time, Continuing Legal Education (CLE) Program Coordinator. The Foundation is a non-profit New Mexico accredited CLE course provider dedicated to providing high quality, affordable educational programs to the legal community. CLE offers a full range of educational services including live seminars, live webcasts, live replays, national series teleseminars and online self-study videos. Visit [nmbar.org/CLE](https://www.nmbar.org/CLE). The successful applicant must have an interest or background in effective training delivery methods and eLearning along with excellent project management, customer service, computer, and communication skills. Must be able to manage multiple projects and deadlines. Minimum Associates' degree plus 1 to 2 years related work experience required. Generous benefits package. \$17-20 per hour, depending on experience and qualifications. To be considered, submit a cover letter and resume. EOE. For full details and instruction on how to apply visit <https://www.nmbar.org/NmbarDocs/AboutUs/Careers/CLE2020.pdf>

Litigation Secretary

Lewis Brisbois a national firm with 52 offices is seeking two strong litigation secretaries to join our Albuquerque office. Qualified candidates will meet these requirements, thorough knowledge of legal terminology, State and Federal court procedures; Advanced experience in E-Filing with both State and Federal Courts; Calendaring; Ability to manage and maintain high volume of work flow; 5+ years of litigation experience, including trial preparation; Skills will include strong law and motion background. Must be organized, reliable, and attention to detail is a must; Excellent communication and organizational skills. Please send cover letter and resume by e-mail to PHXrecruiter@lewisbrisbois.com.

Legal Assistant

The Rodey Law Firm is accepting resumes for a legal assistant position in its Santa Fe office. Candidate must have excellent organizational skills; demonstrate initiative, resourcefulness, and flexibility, be detail-oriented and able to work in a fast-paced, multi-task legal environment with ability to assess priorities. Responsible for calendaring all deadlines. Must have a minimum of three (3) years experience as a legal assistant, proficient with Microsoft Office products and have excellent typing skills. Paralegal skills a plus. Firm offers comprehensive benefits package and competitive salary. Please send resume to jobs@rodey.com or mail to Human Resources Manager, PO Box 1888, Albuquerque, NM 87103.

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Miscellaneous

Want To Purchase

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

Will Search

I am searching for a Last Will and Testament of Harold Lee Bennett who died in Farmington on January 17, 2020 and/or the Last Will and Testament of his wife of many years, Adah Bennett (nee McKenzie). Anyone with knowledge of such a document please contact the Law Office of Benjamin Hancock at 505-508-4343, or via e-mail at ben@benhancocklaw.com.

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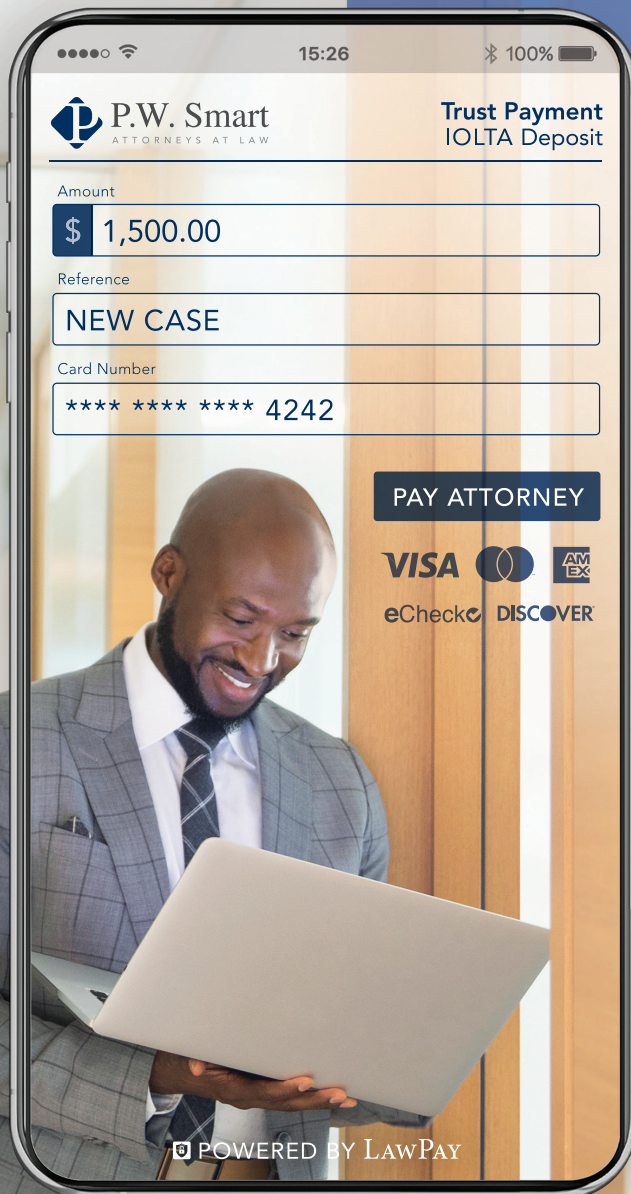
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