Official Publication of the State Bar of New Mexico

BAR BULLETIN

April 22, 2020 • Volume 59, No. 8

Reach for the Sky, by Rhonda Spidell (see page 3) www.rhondaspidell.com

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.

Inside This Issue

CLE programming from the Center for Legal Education

Register online at www.nmbar.org/CLE or call 505-797-6020.

Live Webcasts

RESCHEDULED FROM APRIL 24

2020 Health Law Legislative Update

Friday, May 1

Times and credits coming soon on our website.

Join Representative Debbie Armstrong and Coverage Innovation Officer Abuko Estrada for a discussion of the 2020 Legislative session, bills that passed that impacted New Mexico Health Law as well as their goals and plans for the interim session. Regulatory action related to COVID-19 will be included.

Live Replay Webcasts

April 24
Fluff is for Pillows, Not Legal Writing (2019)
3.0 G
1–4 p.m.
$143 Replay Fee

April 28
How to Practice Series: Demystifying Civil Litigation Part 1 (2018)
6.0 G
9 a.m.–4 p.m.
$251 Replay Fee

April 29
How to Practice Series: Demystifying Civil Litigation Part 2 (2018)
4.5 G 1.8 EP
9 a.m.–4:20 p.m.
$265 Replay Fee

April 30
How to Practice Series: Demystifying Civil Litigation Part 3 (2018)
4.3 G 2.0 EP
9a.m.–4:25 p.m.
$265 Replay Fee

May 6
Speaking to Win: The Art of Effective Speaking for Lawyers
5.0 G 1.0 EP
9 a.m.–3:50 p.m.
$251 Replay Fee

Upcoming Webinars

April 24
Lincoln on Professionalism
1.3 EP
11 a.m.–12:20 p.m.
$89 Standard Fee

April 29
Foreign Investment Crackdown
1.0 G
Noon–1:30 p.m.
$82 Standard Fee

May 6
The Accidental Lawyer: Terms of Engagement
1.3 EP
11 a.m.–12:20 p.m.
$89 Standard Fe

New Mexico State Bar Foundation
Center for Legal Education

LinkedIn

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

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

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24
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Noon, teleconference

28
Intellectual Property Law Section Board
Noon, teleconference

May

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

Workshops and Legal Clinics

April

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

May

6
Divorce Options Workshop
Canceled
505-797-6022

27
Consumer Debt/Bankruptcy Workshop
Canceled
505-797-6094

About Cover Image and Artist: Rhonda's photography is inspired by light. George Eastman once said, "Embrace light. Admire it. Love it. But above all, know light. Know it for all you are worth and you will know the key to photography." Rhonda's background combines art and science with degrees in both disciplines (UNM, GA State, NMTech). She taught science through the lens of art and in her words, "the art and science connection was a natural way of observing the world and developing my photography." She travels all over the world discovering, observing and photographing, most recently trips to Iceland, New Zealand and the UK. Five years ago she retired from a rewarding career in teaching and is now devoted full time to fine art photography. Rhonda's work can be viewed at Albuquerque Photographers' Gallery and on rhondaspidell.com.

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.

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/application.php, or emailed to you by emailing Beverly Akin at akin@law.unm.edu. The deadline for applications has been set for May 13 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 June 2 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.

Professionalism Tip

With respect to the courts and other tribunals:

I will be a vigorous and zealous advocate on behalf of my client, but I will remember that excessive zeal may be detrimental to my client's interests or the proper functioning of our justice system.

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.

Second Judicial District Court

Destruction Of Exhibits:

Pursuant to 1.21.2.6.17 FRRDS (Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy exhibits filed with the court, the Domestic (DM/DV) for the years of 2009 to 2013 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Parties are advised that exhibits may be retrieved beginning April 8-22. Should you have cases with exhibits, please verify exhibit information with the Special Services Division, at 841-6717, from 8 a.m. to 4 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel for the plaintiff(s) or plaintiffs themselves and defendant's exhibits will be released to counsel of record for defendants(s) or defendants themselves by order of the court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by order of the court.

Announcement of Vacancies

Two vacancies on the Second Judicial District Court will exist in Albuquerque as of May 20 due to the creation of two additional judgeships by the legislature. The two positions will be criminal positions. 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/application.php, or emailed to you by emailing Beverly Akin at akin@law.unm.edu. The deadline for applications has been set for May 12 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 June 1 at the Second Judicial District Courthouse located at 400 Lomas Blvd NW, Albuquerque, N.M. 87102, to evaluate the applicants for this position. The committee meeting is open to the public.

Third Judicial District Court

Announcement of Vacancy

A vacancy on the Third Judicial District Court will exist in Las Cruces as of May 20 due to the creation of an additional judgeship by the legislature. Third Judicial District Court anticipates that the new judgeship may be assigned a docket of some combination of criminal, civil and/or domestic cases. There will also be an assignment to specialty courts as deemed necessary. 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/application.php, or emailed to you by emailing Beverly Akin at akin@law.unm.edu. The deadline for applications has been set for May 8 at 5 p.m. Applications received after that date will not be considered. Applicants seeking

(Continued on page 9)

Richard B. Spinello, Esq.
State Bar of New Mexico
Executive Director

Greetings State Bar of New Mexico Members,

I'd like to take a moment to recognize a State Bar staff member. On March 27, 2020, Executive Director Richard B. Spinello is celebrated his 20-year anniversary as a State Bar/Bar Foundation employee!

Richard has held many leadership roles within the organization including general counsel, public and legal services director and managing staff attorney for the Legal Resources for the Elderly Program. In his current role, as Executive Director, Richard has contributed a great deal to the continued success of both organizations!

Please join me in congratulating Richard and in showing our sincere appreciation for his service and tireless dedication to the State Bar/Bar Foundation, the legal community, and the citizens of NM he has served over the years!

Sincerely,

Ernestina R. Cruz, President
State Bar of New Mexico

STATE BAR of NEW MEXICO

The State Bar of New Mexico is HERE

Resources to Improve Your Wellness and Productivity During the COVID-19 Crisis

FREE On-Demand CLE Courses

Compliments of the NEW MEXICO STATE BAR FOUNDATION
CENTER FOR LEGAL EDUCATION

The **Center for Legal Education (CLE)** is a non-profit New Mexico accredited CLE course provider dedicated to providing high quality, affordable educational programs to the legal community. CLE is proud to announce all 25 of our On-Demand CLE courses are now available to our members free of charge. Members can complete up to four hours of these On-Demand courses for credit in the 2020 MCLE compliance period.* They can be viewed 24/7 at any location for your convenience!
https://bit.ly/2X7BjXP

*According to Rule 18-201 NMRA, self-study (or On-Demand) credits cannot be carried over into the next compliance year. On-Demand courses taken in 2020 cannot be applied to 2019 or 2021 compliance periods. For more information, visit www.nmbar.org/mcle.

FREE The Complete Guide to Working Remotely as a Lawyer

Compliments of Clio®

Work outside the office—securely, efficiently, and successfully
This in-depth guide will cover practical tips for working remotely, whether you're completely new to remote work, or whether you've tried it in the past. This FREE PDF includes:

- 10 steps to follow for successful remote work
- What to do if you still need to meet clients in person
- A basic list of tools to use for remote lawyering

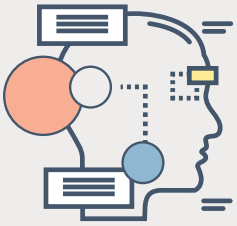
https://bit.ly/3aBUvAK

FREE Wellness Resources

Compliments of State Bar of New Mexico
Judges and Lawyers Assistance Program

- **Well-Being Webinars:** Free webinars have been recorded and posted on this website www.solutonsbiz.com. To access the webinar simply click on the "Employee Assistance Program" link, then "webinar" and scroll down to "Managing Stress in Difficult Times".

- **Counseling:** The EAP counselors are readily available to provide confidential and FREE video and phone counseling. Someone is available to answer your call 24 x 7. To access this service call 866-254-3555 and identify yourself with the New Mexico Judges and Lawyers Assistance Program.



- **Mental Health Resources:** Mental Health Resources for the Legal Profession during COVID-19: https://bit.ly/3dRW27P

- **Support Groups:** The NMJLAP hosts an Attorney Support Group every Monday evening from 5:30-6:30pm via Zoom. We share our struggles, support and encourage one another. This is a time to stay connected and socialize via the internet. ALL ARE WELCOME. Send Pam Moore an email at pmoore@nmbar.org and she will provide you with the link information.

- Confidential Helpline: Judges: 888-502-1289; Lawyers and Law Students: 800-860-4914 **https://bit.ly/2wbAqSN**

Want More?

Check Out the State Bar's COVID-19 Information Hub

www.nmbar.org/covid-19

- Official communications from the State Bar
- Official Communications and orders from the Supreme Court of New Mexico and other Courts
- Official Communications from Federal and State governmental agencies
- Pandemic preparedness webinars and CLE programming
- Resources for working remotely
- Mental health and wellness tips and resources
- And more!

Dear members of the New Mexico Bench and Bar:

Each year the Supreme Court of New Mexico and State Bar of New Mexico hold independent meetings to engage with their constituents and provide meaningful education and networking opportunities. In 2020 both entities planned to hold these meetings together for a historic meeting of the Bench and Bar in New Mexico. Unfortunately, the COVID-19 situation has impacted our ability to hold these events as initially planned.

New Mexico Judicial Conclave
The Supreme Court has decided the Judicial Conclave will be conducted online to provide web-based training for judges rather than holding the event in conjunction with the annual meeting of the State Bar. The Conclave remains scheduled for June 17-19.

Training for our judges is necessary to continue advancing judicial excellence in New Mexico. Technology will allow judges to receive their training online rather than at a large in-person gathering. This approach is a prudent public health safeguard because of the COVID-19 outbreak.

State Bar of New Mexico Annual Meeting
The State Bar has decided to cancel the 2020 Annual Meeting. We are currently researching options for holding a smaller event for members this fall at the State Bar Center. This event will include continuing legal education, social events, and an awards ceremony to honor our 2020 Annual Award recipients. Please stay tuned for more details.

Though we are saddened we will not be able to come together as a group of judges and lawyers, the community we share is still active and supportive. We encourage you to lean on each other during these challenging times and we look forward to our next in-person gatherings. In the meantime, please reach out if you have any questions, concerns or suggestions.

Sincerely,

Chief Justice Judith K. Nakamura
Supreme Court of New Mexico

President Ernestina R. Cruz
State Bar of New Mexico

(Continued from page 4)
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 June 10 at the Third Judicial District Courthouse, 201 W Picacho Ave, Las Cruces, N.M. 88005, to evaluate the applicants for this position. The committee meeting is open to the public.

Eleventh Judicial District Court

Candidate Announcement

The Eleventh Judicial District Court Nominating Commission convened on March 30 in Gallup and completed its evaluation of the two applicants for the one vacancy on the Eleventh Judicial District Court. The Commission recommends the following candidate to Governor Michelle Lujan Grisham: **R. David Pederson**

Twelfth Judicial District Court

Announcement of Vacancy

A vacancy on the Twelfth Judicial District Court will exist in Alamogordo 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/application.php, or emailed to you by emailing Beverly Akin at akin@law.unm.edu. The deadline for applications has been set for May 11 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 June 11 at the Otero County District Courthouse, 1000 New York Avenue, Alamogordo, N.M. 88310, to evaluate the applicants for this position. The committee meeting is open to the public.

Thirteenth Judicial District Court

Notice of Mass Case Reassignment

Gov. Michelle Lujan Grisham appointed James A. Noel to fill the vacancy of Division V and Christopher G. Perez to fill the vacancy of Division VII in the Thirteenth Judicial District Court. Effective March 11 a mass reassignment of cases occurred to the new judges. All cases in the Thirteenth Judicial District Court previously assigned to Judge Louis P. McDonald or to Division V, are reassigned to Judge Christopher G. Perez, Division VII. All cases in the Thirteenth Judicial District Court previously assigned to Judge John F. Davis or to Div. VII, are reassigned to Judge James A. Noel, Div. V. Parties who have not previously exercised their right to challenge or excuse will have ten days from April 22 to challenge or excuse Judge Noel or Judge Perez pursuant to NMRA 1-088.1.

New Mexico Employee Labor Relations Board

Audiotape Destruction

Notice is hereby given that New Mexico Public Employee Labor Relations Board will be destroying audiotape recordings of hearings, conferences and board meetings before the New Mexico Public Employee Labor Relations Board between 2004 and 2008. The contents of the audiotapes have been transferred to a digital format and will continue to be maintained in the PELRB's electronic records. If you have any questions regarding the destruction of these audiotapes, please contact the PELRB Executive Director at: Tom.Griego@state.nm.us 505-831-5422.

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 rspinello@nmbar.org.

— Featured —

Member Benefit

fastcase
Smarter legal research.

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

Board of Bar Commissioners

ABA House of Delegates

The Board of Bar Commissioners will make one appointment to the American Bar Association House of Delegates for a two-year term, which will expire at the conclusion of the 2022 ABA Annual Meeting. The delegate must be willing to attend meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar; however, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. Members wishing to serve on the board must be a current ABA member in good standing and should send a letter of interest and brief resume by May 15 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Judicial Standards Commission

The Board of Bar Commissioners will make one appointment to the Judicial Standards Commission for a four-year term. The time commitment for service on this Commission is substantial and the workload is voluminous. Receiving, reviewing, and analyzing substantial quantities of electronic documents are necessary to prepare for Commission matters. Strict adherence to constitutional, statutory, and regulatory authority governing the Commission is mandatory, expressly including but not limited to confidentiality. Commissioners meet at least six times per year for approximately three hours per meeting. A substantial amount of reading and preparation is required for every meeting. In addition to regular meetings, the Commission schedules at least three weeklong trailing dockets of trials. Additional trials, hearings, or other events may be scheduled on special settings. Additionally, mandatory in-house training sessions may periodically take place. Unless properly recused or excused from a matter, all Commissioners are required to faithfully attend all meetings and participate in all trials and hearings. Appointees should come to the Commission with limited conflicts of interest and must continually avoid, limit, or eliminate conflicts of interest with the Commission's cases, Commission members, Commission staff, and with all others involved in Commission matters. Members wishing to serve on the Commission should send a letter of interest and brief resume by May 15 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

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

- Canceled Until Further Notice

This support group explores non-traditional recovery approaches and has a focus on meditation and other creative tools in support of the recovery process from addiction of any kind. It meets at the District Courthouse, 225 Montezuma Ave, Room 270, Santa Fe. For more information, contact Victoria at 505-620-7056.

People with Wisdom

- Canceled Until Further Notice

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.

Monday Night Support Group

- April 27
- May 4
- May 11

As of March 30, this group will be meeting every Monday night via Zoom and phone conference call. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#. The Zoom link will be on the NMJLAP website or email Pam at pmoore@nmbar.org and she will email it to you.

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030, Bill Stratvert at 505-242-6845, or Pam Moore at 505-228-1948.

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.

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.

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: 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

- June 9: Damon Ely, Bill Slease, and Jerry Dixon presenting on malpractice an insurance issues (1.0 EP)

- July 7: Judge Shannon Bacon (1.0 G)
- Sept. 15: Douglas Brown presenting on a small/family business update (1.0 G)

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.

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/.

Legal Education

April

22 **Drafting Ground Leases, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Rock-n-Roll Law**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Lincoln on Professionalism**
1.3 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

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

24 **Fluff is for Pillows, Not Legal Writing (2019)**
3.0 G
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

27 **Bernalillo County Attorney Retreat**
3.0 G, 1.0 EP
Live Seminar
Office Of The Bernalillo County Attorney
505-314-0180

28 **How to Practice Series: Demystifying Civil Litigation, Part 1**
6.0 G
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

29 **How to Practice Series: Demystifying Civil Litigation, Part 2**
4.5 G, 1.8 EP
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

29 **Lawyer Ethics in Real Estate Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Foreign Investment Crackdown**
1.5 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

30 **How to Practice Series: Demystifying Civil Litigation, Part 3**
4.3 G, 2.0 EP
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

May

1 **Lawyer Ethics When Clients Won't Pay Fees**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

1 **2020 Health Law Legislative Update**
3.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

6 **The Accidental Lawyer: Terms of Engagement**
1.3 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

Notice of Possible Event Cancellations or Changes:
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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.

6 **Speaking to Win: The Art of Effective Speaking for Lawyers**
5.0 G, 1.0 EP
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

13 **How Ethics Rules Apply to Lawyers Outside of Law Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Annual Estate Planning Update**
5.0 G, 1.0 EP
Live Seminar
WILCOX & Myers, P.C.
www.wilcoxlawnm.com

15 **Closely Held Stock Options, Restricted Stock, Etc.**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

21 **Drafting Waivers of Conflicts of Interest**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
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Opinions

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

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
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Effective March 27, 2020

PUBLISHED OPINIONS

A-1-CA-36814	M O'Brien v. J Behles	Affirm/Reverse/Remand	03/24/2020
A-1-CA-37086	M O'Brien v. J Behles	Affirm/Reverse/Remand	03/24/2020

UNPUBLISHED OPINIONS

A-1-CA-37653	S Burns v. B Burns	Affirm03/23/2020	
A-1-CA-37949	CYFD v. Kenneth M	Affirm	03/23/2020
A-1-CA-38140	State v. E Martinez	Affirm	03/24/2020
A-1-CA-38240	State v. F Flores	Reverse/Remand	03/24/2020
A-1-CA-37210	Smith v. Aramark Services	Affirm	03/25/2020
A-1-CA-37313	State v. R Gipson	Affirm	03/25/2020
A-1-CA-37638	E Jones v. B Jones	Dismiss	03/25/2020
A-1-CA-38331	State v. R Solomon	Affirm	03/25/2020
A-1-CA-36611	D Jevne v. M Kooi	Affirm	03/26/2020
A-1-CA-37633	P Guggino v. Southwest Primary	Reverse/Remand	03/26/2020
A-1-CA-37909	State v. G Moreno	Affirm	03/26/2020
A-1-CA-38151	State v. F Sainz	Affirm	03/26/2020

Effective April 3, 2020

PUBLISHED OPINIONS

A-1-CA-36469	State v. J Apodaca	Reverse/Remand	04/01/2020
A-1-CA-36567	D Wiles v. HSBC Bank	Affirm	04/02/2020

UNPUBLISHED OPINIONS

A-1-CA-36915	Ferguson Enterprises, Inc. v. National Heating	Reverse/Remand	03/30/2020
A-1-CA-37105	State v. J Pacheco	Affirm	03/30/2020
A-1-CA-37287	State v. N Valles	Affirm	03/30/2020
A-1-CA-38361	State v. P Montoya	Affirm	03/30/2020
A-1-CA-37387	State v. A. Alirez	Reverse/Remand	03/31/2020
A-1-CA-37602	M Torrez v. D Sanchez	Affirm	03/31/2020
A-1-CA-38655	CYFD v. Melissa B	Affirm	03/31/2020
A-1-CA-37626	State v. R Cox	Affirm	04/02/2020
A-1-CA-38075	State v. J Frias	Affirm	04/02/2020
A-1-CA-38517	CYFD v. Teresa P-P	Affirm	04/02/2020

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

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From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-060

No. A-1-CA-36160 (filed June 28, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DONALD G. KNIGHT,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
FREDDIE J. ROMERO, District Judge

Certiorari Denied, September 13, 2019, No. S-1-SC-37832.
Released for Publication October 29, 2019.

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Opinion

Kristina Bogardus, Judge.

{1} Defendant appeals his conviction, following a bench trial, of four counts of sexual exploitation of children (possession), contrary to NMSA 1978, Section 30-6A-3(A) (2007, amended 2016), and ten counts of sexual exploitation of children (manufacture), contrary to Section 30-6A-3(D).[1] These crimes are commonly referred to as possession and manufacture of child pornography. On appeal, Defendant challenges the sufficiency of the evidence supporting his convictions for both crimes and contends his convictions for multiple counts of each violate double jeopardy. Agreeing with Defendant's double jeopardy argument as it relates to possession, we remand to the district court to vacate three of the four counts of possession. We otherwise affirm.

BACKGROUND

{2} Defendant's charges stem from his use of FrostWire, a peer-to-peer, file-sharing network, to access child pornography. At trial, Sergeant Douglas Perham with the Chaves County Sheriff's Department was the only witness to testify. He was qualified as an expert in investigation, retrieval, and forensic evaluation within the area of sexual exploitation of children. Sergeant Perham's testimony established the following.

{3} Peer-to-peer, file-sharing networks allow users to share and download any files that they wish, from music to books to child pornography. In order to access a peer-to-peer network, users have to download a program onto their computer for that network. Once the program is downloaded, a global unique identifier (GUID) is assigned to the computer to which the program is downloaded. Users of file-sharing networks are able to search for files using keywords and can download any of the search results they choose. All downloads are placed into a shared folder created by the program unless the user makes changes to the program's default settings.

{4} On April 28, 2011, Sergeant Perham logged into a law enforcement database that indicated an Internet Protocol (IP) address in Chaves County was sharing files suspected to be child pornography. The suspected files were identified by hash values,[2] which are alphanumeric values assigned to every unique file. Sergeant Perham testified there has not been a forensically documented instance of different files having the same hash value.

{5} Using Shareaza LE, a law enforcement version of the peer-to-peer, file-sharing program Shareaza, Sergeant Perham connected to the IP address identified by the database. Sergeant Perham downloaded one complete file on April 28, 2011. On May 10, 2011, Sergeant Perham was again able to connect to the identified IP address and received an additional three partial downloads of other files. Sergeant Perham reviewed the downloaded files and confirmed they contained child pornography. Pursuant to a search warrant, Sergeant Perham obtained information from the internet service provider associated with the IP address, including a physical address in Roswell, New Mexico, and the name "Donald Knight." A vehicle located at the physical address was also registered to "Donald Knight."

{6} A search of the home at the physical address was conducted pursuant to another search warrant. Defendant was not present at the time of the search, but arrived after being contacted. The southwest bedroom door of the home, which was padlocked, was forced open. Inside the bedroom, Sergeant Perham located a HP Pavilion computer and, using an onsite preview program, was able to locate a video that he previously received as a download.

{7} Upon his arrival, Defendant voluntarily spoke with Sergeant Perham. Defendant told Sergeant Perham that his room was the southwest bedroom and that it was padlocked because his adult son would take things from the room. Defendant stated that he was aware of peer-to-peer networks and was familiar with how they work. Defendant admitted to using LimeWire and FrostWire. While he expressed familiarity with known

[1]All references to Section 30-6A-3 in this opinion are to the 2007 version of the statute.

[2]Witnesses and trial counsel used the terms "SHA-1 value," "SHA value," and "hash value" interchangeably throughout trial. For clarity and consistency, we use "hash value" throughout this opinion.

child pornography search terms, Defendant only admitted to searching for adult pornography. Defendant stated that he would occasionally get "pop ups" of child pornography.[3] Defendant admitted to receiving five to ten downloads containing child pornography. Defendant reported that he would delete files containing child pornography when he found them. Defendant denied sharing and was unaware how Sergeant Perham was able to get a download from his computer. However, Defendant also stated that he understood how file sharing worked and that he was not sharing when his computer was off. Defendant admitted to leaving his computer on a lot of the time.

{8} In total, the HP Pavilion computer, several other computers, numerous DVDs and CDs,[4] a memory card, and an external hard drive were seized. All of the seized items were taken to the Chaves County Sheriff's Department Internet Crimes Against Children laboratory and subjected to forensic examination. Using Forensic Tool Kit, a forensic examination software program, Sergeant Perham was able to locate child pornography on the HP Pavilion computer, the external hard drive, and twelve of the DVDs. FrostWire, the peer-to-peer, file-sharing network that Defendant admitted to using, was found on the HP Pavilion computer, and the computer's GUID matched the GUID identified by Sergeant Perham's Shareaza LE software when it downloaded the files containing child pornography.

{9} After the close of evidence during the bench trial, the State filed an amended criminal information charging Defendant with four counts of possession of child pornography, contrary to Section 30-6A-3(A); four counts of distribution of child pornography, contrary to Section 30-6A-3(B); and eleven counts of manufacturing child pornography, contrary to Section 30-6A-3(D). On Defendant's motion, the district court granted a directed verdict on all four distribution counts and a single manufacturing count. The district court convicted Defendant on all remaining counts.

DISCUSSION

I. Sufficiency of the Evidence

A. Standard of Review

{10} To the extent that Defendant's argument requires us to interpret the statutes criminalizing the possession and manufacture of child pornography, "that presents a question of law which is reviewed de novo on appeal." *State v. Chavez*, 2009-NMSC-035, ¶ 10, 146 N.M. 434, 211 P.3d 891. "In interpreting a statute, our primary objective is to give effect to the Legislature's intent." *State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125. "In discerning legislative intent, we look first to the language used and the plain meaning of that language." *Id.* "[W]hen a statute contains clear and unambiguous language, we will heed that language and refrain from further statutory interpretation." *Id.* "After reviewing the statutory standard, we apply a substantial evidence standard to review the sufficiency of the evidence at trial." *Chavez*, 2009-NMSC-035, ¶ 11.

{11} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). "[S]ubstantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and citation omitted). "In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176.

B. General Criminal Intent Is the Mens Rea for Intentional Possession of Child Pornography and Intentional Manufacture of Child Pornography

{12} As a threshold matter, Defendant asks us to hold that general criminal intent is insufficient to sustain a conviction for possession of child pornography under Section 30-6A-3(A) or manufacture of child pornography under Section 30-6A-3(D). Defendant's argument relies on the analysis found in *State v. Granillo*, 2016-NMCA-094, 384 P.3d 1121. We recently rejected the same argument for a different subsection of this statute in *State v. Franco*, 2019-NMCA-____, ¶ 13, ____ P.3d ____ (No. A-1-CA-35470, June 13, 2019).

{13} In that case, as a matter of first impression, we addressed "the intent necessary to sustain a conviction for intentional distribution of child pornography under Section 30-6A-3(B)." *Franco*, 2019-NMCA-____, ¶ 13. Relying on *Granillo*, the defendant urged us to determine that general criminal intent was insufficient to convict under that statute. *Id.* However, we reasoned that *Granillo* was not controlling because Section 30-6A-3(B) does not contain a tiered mens rea. *Franco*, 2019-NMCA-____, ¶ 16. Therefore, unlike the statute involved in *Granillo*, NMSA 1978, § 30-6-1(D)(1) (2009) (criminalizing intentional child abuse by endangerment), Section 30-6A-3(B) could not be said to "lean[] away from the common law approach." *Franco*, 2019-NMCA-____, ¶ 16 (internal quotation marks and citation omitted). Because Section 30-6A-3(B) "only describes a particular act and does not include an intent to do a further act or achieve a further consequence[,]" we concluded that, under the common law, Section 30-6A-3(B) only required general criminal intent. *Franco*, 2019-NMCA-____, ¶ 16.

{14} Like Section 30-6A-3(B), Section 30-6A-3(A) and Section 30-6A-3(D) do not include an intent to do a further act or achieve a further consequence. Rather, they too only describe a particular act. *Compare* § 30-6A-3(B) ("It is unlawful for a person to intentionally distribute any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age."), *with* § 30-6A-3(A) ("It is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age."), *and* § 30-6A-3(D) ("It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age."). Therefore, we see no reason to reach a different conclusion for these crimes. Accordingly, we hold that both Section 30-6A-3(A) and Section 30-6A-3(D) also require only general criminal intent—"purposely do[ing] an act which the law declares to be a crime." UJI 14-141 NMRA.

{15} Both Defendant's sufficiency challenges appear to be premised on his argument for a heightened mens rea, which we

[3]Sergeant Perham testified that, to his knowledge, peer-to-peer networks do not have "pop ups."

[4]The terms "CD" and "DVD" were used interchangeably by the witness, trial counsel, and the district court. Because the record is not clear and in the interest of clarity and consistency, we use DVD to refer to any CD or DVD seized from Defendant's home.

have rejected. Nevertheless, we address whether the State has proven Defendant acted with general criminal intent beyond a reasonable doubt. "The element of general criminal intent is satisfied if the [s]tate can demonstrate beyond a reasonable doubt that the accused purposely performed the act in question." *State v. Gonzalez*, 2005-NMCA-031, ¶ 23, 137 N.M. 107, 107 P.3d 547 (alterations, internal quotation marks, and citation omitted); *see* UJI 14-141. "Intent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence." *State v. Sosa*, 2000-NMSC-036, ¶ 9, 129 N.M. 767, 14 P.3d 32 (internal quotation marks and citation omitted).

C. Substantial Evidence Supported Defendant's Convictions for Intentional Possession of Child Pornography

{16} Defendant argues that there was insufficient evidence of his mens rea and, therefore, insufficient evidence to support his convictions for possession of child pornography. Viewing the following evidence in the light most favorable to Defendant's convictions, we disagree.

{17} The State presented evidence of the following. Defendant was familiar with known child pornography search terms. When Defendant's home was searched, law enforcement officers found a HP Pavilion computer in his bedroom. On that computer, Sergeant Perham was able to locate videos containing child pornography. Sergeant Perham identified four specific videos that were located on Defendant's HP Pavilion computer in relation to Defendant's charges for possession of child pornography. Sergeant Perham testified as to the file names for all four of the identified videos. Each of the file names identified contained the same child pornography search terms that Defendant expressed familiarity with. From this evidence, the district court could have reasonably concluded that Defendant acted with the requisite intent.

{18} Defendant relies on the following testimony to support his contention there was insufficient evidence presented of his intent. Sergeant Perham testified that it would be possible for an "innocuous" search to receive results containing child pornography and that he was unaware of whether a FrostWire user could preview results before downloading them. Sergeant Perham also testified that Defendant advised that he would delete files containing child pornography when he would find them. However, Defendant concedes that this Court rejected similar arguments in *State v. Adamo*, 2018-NMCA-013, ¶ 19, 409 P.3d 1002 (stating the fact-finder was free to accept or reject the defendant's contentions regarding intentionality including that the downloads were made "unwittingly"), and *State v. Santos*, 2017-NMCA-075, ¶¶ 12-20, 404 P.3d 797 (rejecting the "[d]efendant's contention that deleting the materials shows the intent to get rid of the materials—not an intent to possess the materials" (alteration and internal quotation marks omitted)). However, Defendant argues that under a heightened mens rea those decisions should be no more than persuasive. Because we have rejected Defendant's request to require a heightened mens rea, we see no reason to revisit our decisions in *Adamo* and *Santos* in this case. Accordingly, the district court, as fact-finder, was free to reject Defendant's version of the evidence of his intent. *See Adamo*, 2018-NMCA-013, ¶ 19; *Santos*, 2017-NMCA-075, ¶ 15.

{19} We conclude there is substantial evidence supporting Defendant's convictions for possession of child pornography under Section 30-6A-3(A).

D. Substantial Evidence Supported Defendant's Convictions for Intentional Manufacture of Child Pornography

{20} Defendant argues there is insufficient evidence to support his convictions for manufacture of child pornography. In so arguing, Defendant contends: (1) the State failed to prove that any of the images were copied instead of moved; (2) Sergeant Perham's testimony regarding creation date "was demonstrably inaccurate," so the State failed to prove dates of manufacture; and (3) there was insufficient evidence of his mens rea.

{21} We address Defendant's first two arguments together. In these arguments, Defendant cites a number of websites that contain discussions of technical information including duplication of files, moving files to another location, "burning" a recordable disc, the differences between recordable discs, and creation dates for files and recordable discs. Defendant requests that we take judicial notice of this information, contending that the facts contained in the cited websites "necessarily should and would have affected the fact-finder's evaluation of the evidence." Sergeant Perham's testimony regarding the creation dates went unchallenged by Defendant at trial. *See State v. Jim*, 2014-NMCA-089, ¶ 22, 332 P.3d 870 ("It is well established that a party may not invite error and then proceed to complain about it on appeal."). Moreover, Defendant did not introduce any of this evidence to the district court during his bench trial, nor did he ask the district court to take judicial notice of the facts he seeks to present for the first time on appeal.

{22} Unlike the district court, this Court is not a fact-finding court. "[W]e do not consider new facts when conducting appellate review." *City of Aztec v. Gurule*, 2010-NMSC-006, ¶ 11, 147 N.M. 693, 228 P.3d 477. Rather, "our scope of appellate review is limited to a consideration of those facts disclosed by the record." *Gen. Servs. Corp. v. Bd. of Comm'rs of Bernalillo Cty.*, 1965-NMSC-112, ¶ 6, 75 N.M. 550, 408 P.2d 51, *overruled on other grounds by Gurule*, 2010-NMSC-006, ¶ 17. Accordingly, we decline Defendant's invitation to take judicial notice of facts not presented during trial and therefore reject Defendant's first two arguments regarding the sufficiency of the evidence.

{23} We now turn to Defendant's third sufficiency argument, which pertains to mens rea. The evidence presented at trial established the following. At trial, Sergeant Perham identified ten separate videos to support Defendant's charges for manufacture of child pornography. Sergeant Perham testified that the videos were contained on five different pieces of media: three videos on one DVD; one video on a second DVD; two videos on a third DVD; one video on a fourth DVD; and three videos on an external hard drive. The four DVDs and the external hard drive were all found in Defendant's locked bedroom. Sergeant Perham provided the file names for all ten videos at trial, and all contained the same child pornography search terms that Defendant was familiar with. The district court could have reasonably concluded that Defendant acted with the requisite intent based on this evidence.

{24} Defendant contends that the following testimony means there was insufficient evidence that he acted intentionally. Sergeant Perham testified that the majority of the files contained on the seized items were adult pornography. Sergeant Perham also testified that the files could have been part of a batch transfer that did not require the transferor to view the file names. Defendant does not cite any authority indicating that such testimony requires the fact-finder to conclude that Defendant did not act intentionally, and we see no basis for reaching that conclusion. Rather, Defendant's argument concerning the inferences that could be drawn about his intent was for the district court, as fact-finder, "to accept or reject in its consideration and weighing of the evidence." *Adamo*, 2018-NMCA-013, ¶ 19.[5]

[5]*Adamo* addressed the intent necessary for possession of child pornography. *Id.* ¶ 12. In this opinion, we have held that general criminal intent is the mens rea for both possession of child pornography and manufacture of child pornography. We therefore conclude that *Adamo*'s reasoning as to intent is also relevant to this inquiry.

{25} We conclude there is substantial evidence supporting Defendant's convictions for manufacture of child pornography under Section 30-6A-3(D).

II. Double Jeopardy

A. Standard of Review

{26} We review Defendant's double jeopardy claims de novo. *See State v. Bernal*, 2006-NMSC-050, ¶ 6, 140 N.M. 644, 146 P.3d 289 ("A double jeopardy claim is a question of law that we review de novo."). "The constitution protects against both successive prosecutions and multiple punishments for the same offense." *State v. Sena*, 2018-NMCA-037, ¶ 35, 419 P.3d 1240, *cert. granted*, 2018-NMCERT-___ (No. S-1-SC-36932, May 25, 2018); *see* U.S. Const. amend. V; N.M. Const. art. II, § 15. Defendant raises unit-of-prosecution claims, "in which an individual is convicted of multiple violations of the same criminal statute." *Bernal*, 2006-NMSC-050, ¶ 7. "For unit-of-prosecution challenges, the only basis for dismissal is proof that a suspect is charged with more counts of the same statutory crime than is statutorily authorized." *Id.* ¶ 13.

B. Defendant's Multiple Convictions for Intentional Possession of Child Pornography Violate Double Jeopardy

{27} The district court convicted Defendant of four counts of possession of child pornography contrary to Section 30-6A-3(A). Defendant argues, and the State concedes, that *State v. Olsson*, 2014-NMSC-012, 324 P.3d 1230, requires us to vacate all but one count. While we are not bound by the State's concession, *State v. Tapia*, 2015-NMCA-048, ¶ 31, 347 P.3d 738, we accept the concession because we conclude that it is supported by our precedent. *See Olsson*, 2014-NMSC-012, ¶¶ 45, 47 (holding the defendant could only be convicted of one count of possession of child pornography under Section 30-6A-3(A) because the unit of prosecution was "insurmountably ambiguous"). Therefore, we hold that Defendant's four convictions for possession of child pornography violate double jeopardy and must be reduced to a single conviction. *See Olsson*, 2014-NMSC-012, ¶ 47.

C. Defendant's Multiple Convictions for Intentional Manufacture of Child Pornography Do Not Violate Double Jeopardy

{28} The district court convicted Defendant of ten counts of manufacture of child pornography contrary to Section 30-6A-3(D). Defendant argues that his multiple convictions under this statute violate double jeopardy. In determining legislative intent regarding the unit of prosecution in any particular case, New Mexico courts employ the following two-part test:

> First, courts look to the plain language of the statute to determine if the Legislature has defined the unit of prosecution. If so, the inquiry is complete and proceeds no further. If the unit of prosecution is not clearly defined in the plain language of the statute, courts usually proceed to analyze whether a defendant's acts are separated by sufficient indicia of distinctness to justify multiple punishments. In determining distinctness, the district court reviews six factors that were originally articulated in *Herron*[*v. State*], 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624. As applied to the [Sexual Exploitation of Children] Act, the *Herron* factors are described to be: (1) time between criminal acts, (2) location of the victim during each act, (3) existence of any intervening events, (4) distinctions in the manner of committing the acts, (5) the defendant's intent, and (6) the number of victims. If there is not sufficient distinctness between the acts that are separately charged, the rule of lenity applies. Under the rule of lenity, doubt is resolved in a defendant's favor and against turning a single act into multiple offenses.

State v. Sena, 2016-NMCA-062, ¶ 9, 376 P.3d 887 (internal quotation marks and citations omitted).

{29} This Court previously applied that test to determine the unit of prosecution under Section 30-6A-3(D). In *State v. Leeson*, the defendant took numerous highly sexually suggestive photographs of his girlfriend's daughters. 2011-NMCA-068, 149 N.M. 823, ¶ 2, 255 P.3d 401. As a result, the defendant was charged with twenty counts of manufacturing child pornography under Section 30-6A-3(D). *Leeson*, 2011-NMCA-068, ¶ 8. Before his trial, the defendant made a motion to merge the manufacturing counts into a single count; at the close of trial, the district court denied the motion. *Id.* ¶¶ 4, 6. On appeal, this Court first looked to the language of the statute criminalizing the manufacture of child pornography, which states "it is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if one of more of the participants in that act is a child under eighteen years of age." *Id.* ¶ 15 (quoting § 30-6A-3(D)).

{30} The *Leeson* Court noted that the Legislature has provided definitions for some of the terms contained in Section 30-6A-3(D). *Leeson*, 2011-NMCA-068, ¶ 16. "Manufacture" was defined as "the production, processing, copying by any means, printing, packaging or repackaging of any visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more the participants in that act is a child under eighteen years of age." *Id.* (quoting NMSA 1978, § 30-6A-2(D) (2001)). "Obscene" was also defined, Section 30-6A-2(E); additionally, we noted our Supreme Court has concluded that " '[a]ll child pornography, not just hard-core child pornography, is unacceptable and intolerable to New Mexico citizens and, therefore, obscene under the Sexual Exploitation of Children Act.' " *Leeson*, 2011-NMCA-068, ¶ 16 (emphasis omitted) (quoting *State v. Myers*, 2009-NMSC-016, ¶ 39, 146 N.M. 128, 207 P.3d 1105). "Visual or print medium" is defined as

> any film, photograph, negative, slide, computer diskette, videotape, videodisc, or any computer or electronically generated imagery; or
>
> any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photograph, negative, slide, computer diskette, videotape, videodisc, or any computer generated or electronically generated imagery[.]

Leeson, 2011-NMCA-068, ¶ 16 (quoting § 30-6A-2(B)).

{31} Based on the language of the statute and the relevant definitions, this Court "conclude[d] that the unit of prosecution for Section 30-6A-3(D) is clear from the face of the statute." *Leeson*, 2011-NMCA-068, ¶ 14. The *Leeson* Court stated that "[a] violation of the statute occurs where a criminal defendant intentionally produces or copies a photograph, electronic image, or video that constitutes child pornography." *Id.* ¶ 17. Accordingly, "each photograph [the d]efendant took of the child victims was a discrete violation of the statute." *Id.* Therefore, "double jeopardy did not require the counts against [the d]efendant to be merged." *Id.*

{32} Defendant asks us to distinguish *Leeson*. He argues that *Leeson* applies only to "the original production of an exploitative image" by photographing an act of sexual abuse of a child and that copying of electronic files is different because it can be accomplished either individually or in batches. We are not persuaded.

{33} This Court has recognized that "[t]he language of Section 30-6A-3(D) for manufacture of child pornography differs from the language for possession and distribution." *Sena*, 2016-NMCA-062, ¶ 16. "Notably, Section 30-6A-3(D) defines manufacture somewhat differently than possession and distribution, and Section

30-6A-2(D) provides a more specific and detailed definition for the word 'manufacture.' " *Sena*, 2016-NMCA-062, ¶ 16. The definition of "manufacture" includes "copying by any means," § 30-6A-2(D), and "visual or print medium" includes films, § 30-6-2(B)(1). This indicates that the unit of prosecution for the charges at issue here is each copy of an electronic video file, no matter whether each such a file is copied individually or whether multiple files are copied in a batch. Therefore, under these facts and circumstances, the reasoning of *Leeson* and *Sena* apply to the statutory language at issue in Defendant's case.[6]

{34} Accordingly, we hold that Defendant's ten convictions for manufacture of child pornography do not violate double jeopardy. *See Leeson*, 2011-NMCA-068, ¶ 17.

CONCLUSION

{35} We hold that general criminal intent is the mens rea for possession of child pornography under Section 30-6A-3(A) and manufacture of child pornography under Section 30-6A-3(D). We remand to the district court with instructions to vacate three of Defendant's four convictions for possession of child pornography. We affirm Defendant's remaining convictions.

{36} IT IS SO ORDERED.
KRISTINA BOGARDUS, Judge

WE CONCUR:
M. MONICA ZAMORA, Chief Judge
ZACHARY A. IVES, Judge

[6]Under Section 30-6A-2(D), several different types of acts constitute "manufacturing." Each such act may be combined with one of the types of "visual or print medium," as defined in Section 30-6A-2(B), which can produce a large number of combinations. In *Leeson* and in this case, the statutory language at issue made clear the appropriate unit of prosecution. Perhaps it is time for the Legislature to clarify its intended unit of prosecution for the statutory language not at issue in either case.

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-061

No. A-1-CA-36299 (filed July 18, 2019)

A. BLAIR DUNN,
Plaintiff-Appellant,
v.
KATHY BRANDT, Guardian Ad Litem for Second Judicial District Court, and SECOND JUDICIAL DISTRICT COURT,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
ALBERT J. MITCHELL, Jr., District Judge

Released for Publication October 29, 2019.

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Opinion

Linda M. Vanzi, Judge.

{1} Plaintiff A. Blair Dunn appeals the dismissal of his enforcement action under the Inspection of Public Records Act (IPRA). NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2019). We affirm because disclosure of the records to Plaintiff is barred by a protective order or by the judicial deliberation privilege recognized in *Pacheco v. Hudson*, 2018-NMSC-022, ¶ 39, 415 P.3d 505.

Background

{2} Plaintiff is the petitioner in a domestic relations matter in the Second Judicial District Court (the SJDC) that involves his child, now ten years old. *See Dunn v. Dunn*, No. D-202-DM-2011-00839. On Plaintiff's motion, the district court appointed Defendant Kathleen Brandt (Brandt) as guardian ad litem to the child. *See* NMSA 1978, § 40-4-8 (1993) (permitting appointments of guardians ad litem); *see also* Rule 1-053.3 NMRA (governing appointment of guardians ad litem in domestic relations cases).[1] Consistent with Rule 1-053.3(F), the order required Brandt to:

> **a**. interview the child face-to-face outside the presence of both parents and counsel i[f] the child is [six] (6) years of age or older;
> **b**. interview all parties and any available parent subject [to] Rule[] 16-402 NMRA;
> **c.** interview each mental health professional treating the child after obtaining any necessary authorization
> **d.** interview any other person[s] and/or review any relevant records the [guardian ad litem] deems reasonably necessary after obtaining any necessary authorization;
> **e.** determine the child's wishes, if appropriate;
> **f.** submit, but do not file, a written report of investigation and separate written recommendations to all parties and counsel at least ten days before the recommendations are filed with the court, except in the case of emergency;
> **g.** file the recommendations, but not the report, with the [c]ourt; perform the duties to the child as set forth in Rule 1-053.3(H) and (I) NMRA[;] and[]
> **i.** [i]nvestigate any health/medical issues affecting the minor child.

Plaintiff served Brandt with a discovery request seeking "all correspondence received by you or produced by you—whether transmitted by electronic means or by USPS—with either party or any other person in relation to the [domestic relations] case." In response, Brandt sought a protective order, in which she asserted that she "serves as an arm of the [district c]ourt and assists the [district] court in discharging its duty to adjudicate the child's best interests and as such should not have to disclose her work prior to the submission of a report" and that "P[laintiff]'s discovery request is overbroad, oppressive and unduly burdensome. Moreover it appears to be calculated as part of a litigation strategy to intimidate [Brandt] or otherwise force her to withdraw." Plaintiff apparently did not respond to Brandt's motion, and the district court issued a protective order on March 3, 2016 (the protective order), stating, "The Guardian ad Litem's Motion for Protective Order is granted. The Guardian ad Litem shall not be required to respond to P[laintiff]'s Interrogatories or Request for Production."

[1]Amendments to Rule 1-053.3 became effective on December 31, 2017. These amendments are not relevant to our analysis. All citations herein are to the current rule, except as noted.

{3} Four days later, Plaintiff emailed Brandt a request to "produce all records of communications sent or received by you in any form in the [domestic relations] case." Plaintiff stated, "As . . . you are an arm of the [district c]ourt please treat this [as] an IPRA request . . . to you in your official capacity." Brandt did not respond to this request. On March 11, 2016, Plaintiff sent a copy of the request to the designated custodian of records at the SJDC. After first requesting additional time to respond, the records custodian denied Plaintiff's request on March 30, 2016. *See* § 14-2-10 (permitting the records custodian to request additional time to respond to broad requests); § 14-2-11 (governing denial of IPRA requests). The records custodian based the denial on its conclusion that (1) Brandt's records were not public records as defined by IPRA; (2) the SJDC records custodian is not the proper custodian of the records; (3) the records are subject to the protective order issued in the domestic relations case; and (4) Brandt is entitled to quasi-judicial immunity under *Kimbrell v. Kimbrell*, 2014-NMSC-027, 331 P.3d 915.

{4} Plaintiff filed the instant action for a declaratory judgment ordering production of the records, naming both Brandt and the SJDC as defendants. All parties moved for summary judgment. After hearing argument, the district court granted summary judgment in favor of Brandt and the SJDC (collectively, Defendants) and denied Plaintiff's motion. Plaintiff appealed.

Discussion

{5} Summary judgment is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 1-056(C) NMRA. On appeal, Plaintiff does not argue that the presence of a "genuine issue as to any material fact" requires reversal of the district court's judgments. Instead, he maintains that the district court erred in ruling that, assuming records responsive to his IPRA request exist, Defendants nevertheless did not violate IPRA by withholding them. "We review an order granting summary judgment de novo." *Associated Home & RV Sales, Inc. v. Bank of Belen*, 2013-NMCA-018, ¶ 22, 294 P.3d 1276.

{6} "Our democratic system of government necessarily 'assumes the existence of an informed citizenry. . . . Without some protection for the acquisition of information about the operation of public institutions . . . the process of self-governance contemplated by the Framers would be stripped of its substance.' " *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 1, 283 P.3d 853 (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 31-32 (1978) (Stevens, J., Brennan, J. & Powell, J. dissenting)). IPRA "give[s] practical effect to this principle[.]" *Republican Party of N.M.*, 2012-NMSC-026, ¶ 1. "Recognizing that a representative government is dependent upon an informed electorate," the Legislature declared "that all persons are entitled to the greatest possible information regarding the affairs of government[.]" Section 14-2-5. Any analysis of IPRA actions therefore "begin[s] . . . with the strong presumption that the public has a right to inspect the [records] at issue." *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-096, ¶ 16, 148 N.M. 934, 242 P.3d 501. "This right is limited only by the Legislature's enumeration of certain categories of records that are excepted from inspection." *Republican Party of N.M.*, 2012-NMSC-026, ¶ 13. The statutory exceptions conclude with a catch-all category: "as otherwise provided by law." Section 14-2-1(H). This category "includes statutory and regulatory bars to disclosure, constitutionally mandated privileges, and privileges established by our rules of evidence." *Pacheco*, 2018-NMSC-022, ¶ 39 (internal quotation marks and citation omitted).

{7} On appeal, Plaintiff argues that a guardian ad litem's records are subject to IPRA because a guardian ad litem acts as an "arm of the court." In support of this proposition, Plaintiff argues that the nine factors set forth in *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, 287 P.3d 364, indicate that Brandt functioned as a public entity whose records fall within IPRA's reach. Plaintiff further argues that the quasi-judicial immunity recognized in *Kimbrell* does not immunize Brandt from IPRA actions, and that none of the exceptions to IPRA apply to Brandt's records. Plaintiff does not address Brandt's argument that the protective order precludes disclosure here, except to state that "[t]he protective order does not provide a shield because it is rooted in the same flawed logic as the IPRA denial" and that "[i]t is beyond argument that [Plaintiff] is allowed to accept the reasoning of the [d]istrict [c]ourt that [Brandt] was an agent of the [district c]ourt, and upon that basis assert that [Brandt] was potentially subject to IPRA."

{8} IPRA does not address the effect of a protective order on disclosure of public records, nor did we locate, after diligent search, a New Mexico case considering whether a protective order falls within IPRA's "as otherwise provided by law" exception. *Compare* § 14-2-1(H), *with* 65 Pa. Stat. and Cons. Stat. Ann. § 67.305(a)(3) (West 2009) (providing that records may be exempt from public "disclosure under any . . . Federal or State law or regulation *or judicial order or decree*" (emphasis added)). *See Pacheco*, 2018-NMSC-022, ¶ 39. Without deciding that question, we nevertheless conclude that the district court properly granted summary judgment to Defendants because the protective order precludes disclosure of Brandt's records to Plaintiff under the circumstances here. We also conclude that, to the extent the SJDC is in possession of communications between the district court and Brandt, the judicial deliberation privilege recognized in *Pacheco* protects those records from public disclosure.

I. The Protective Order Precludes Disclosure of Brandt's Records to Plaintiff Under the Circumstances

{9} Assuming without deciding that Brandt's records are public records subject to IPRA, denial of Plaintiff's request did not violate IPRA because the protective order prohibits disclosure of the records to Plaintiff. It is undisputed that the protective order prohibits disclosure to Plaintiff of the same materials covered by the IPRA request. Moreover, Plaintiff does not assert that the district court lacked jurisdiction to enter the protective order. "[P]ersons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 386 (1980); *In re Philip M. Kleinsmith*, 2005-NMCA-136, ¶¶ 11-12, 138 N.M. 601, 124 P.3d 579. Statutes governing public access to records do not negate this fundamental rule. In *GTE Sylvania, Inc.*, for instance, the United States Supreme Court held that an agency did not "improperly" withhold public documents when a federal district court injunction prohibited it from releasing the documents pending trial. *GTE Sylvania, Inc.*, at 378, 386. The Court noted that, because of the injunction, "[t]here simply has been no discretion for the agency to exercise[,]" *id.* at 386, and that there was nothing in the Freedom of Information Act's (FOIA) text or history to suggest that, "in adopting [FOIA] to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents." *Id.* at 387.[2] Several states

[2]Our courts have declined to rely on federal case law to construe IPRA, noting that IPRA provides greater access to public records than its federal counterpart and differs in other respects. *See, e.g., San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 38, 150 N.M. 64, 257 P.3d 884. Here, however, we rely on *GTE Sylvania, Inc.* only as to the impact of a court order on an agency's ability to comply with a statute. To the extent we construe IPRA, we rely on New Mexico case law.

have applied this reasoning in the context of their own public records laws. *See, e.g.*, *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 64 (stating that, "where a . . . court with personal and subject-matter jurisdiction issues an injunction, the injunction must be obeyed, however erroneous it may be, until it is modified or set aside by the court itself or reversed by a higher court" even when the records sought are public records); *Bangor Publ'g Co. v. Town of Bucksport*, 682 A.2d 227, 230 (Me. 1996) ("The [defendants] . . . properly refused to disclose the documents that had been ruled exempt by the protective order. Both were parties to the protective order; thus each would be in contempt for violating a court order if they disclosed the confidential documents.").

{10} Similarly, we discern nothing in IPRA's plain language or in IPRA case law suggesting that our Legislature intended to require a governmental entity to disclose public records in defiance of a court order. Although the exceptions to IPRA's mandate of disclosure are narrowly drawn, a party may prevail on an IPRA enforcement action under Section 14-2-12 only if the custodian's denial of the request is "wrongful." *Faber v. King*, 2015-NMSC-015, ¶ 11, 348 P.3d 173 ("IPRA . . . forbids the agency from wrongfully denying the request."). An agency's denial of an IPRA request is wrongful when the agency withholds documents based on an inapplicable privilege or exemption. *See, e.g.*, *Edenburn v. N.M. Dep't of Health*, 2013-NMCA-045, ¶ 40, 299 P.3d 424 (stating that the agency was "liable for wrongful withholding" of the requested documents where the agency relied on a privilege that had been negated by case law). However, a denial in accordance with an enforceable court order can hardly be wrongful. *See City of Las Cruces v. Pub. Emp. Labor Relations Bd.*, 1996-NMSC-024, ¶ 9, 121 N.M. 688, 917 P.2d 451 (noting that "[t]here may be circumstances under which the information contained in a [public] record can be justifiably withheld" (internal quotation marks and citation omitted)); *In re Philip M. Kleinsmith*, 2005-NMCA-136, ¶ 11 ("Generally, a party must obey an order issued by a court with subject matter and personal jurisdiction until the order is set aside."); *cf. GTE Sylvania, Inc.* 445 U.S. at 387 ("To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents . . . would do violence to the common understanding of the term 'improperly' and would extend [FOIA] well beyond the intent of Congress."). Indeed, "[t]he orderly process of law demands that respect and compliance be given to orders issued by courts possessed of jurisdiction . . . and one who defies the order of a court having jurisdiction does so at his peril." *Gedeon v. Gedeon*, 1981-NMSC-065, ¶ 15, 96 N.M. 315, 630 P.2d 267 (internal quotation marks and citation omitted).

{11} Moreover, to view IPRA as superseding a protective order would be contrary to constitutional separation of powers principles. "The district court is given broad discretion" to issue protective orders under Rule 1-026(C) NMRA. *Bd. of Comm'rs of Doña Ana Cty. v. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 8, 134 N.M. 283, 76 P.3d 36, *overruled on other grounds by Republican Party of N.M.*, 2012-NMSC-026, ¶ 18. Rule 1-026 provides that the district court may limit discovery in a number of situations. *See* Rule 1-026(B)(2) (providing that "[t]he court shall limit use of discovery methods" when the discovery sought is duplicative or burdensome); Rule 1-026(C) (permitting the district court to issue a protective order, in its discretion, that prohibits, limits, or directs discovery). Rule 1-026 is promulgated by our Supreme Court, which has "the ultimate rule making authority over procedure[.]" *State v. Serna*, 2013-NMSC-033, ¶ 14, 305 P.3d 936. "[The Supreme] Court's plenary authority to regulate procedure stems from [its] constitutional power of 'superintending control over all inferior courts.' " *Id.* (quoting N.M. Const. art. VI, § 3). Based on the constitutional authority vested in the Supreme Court, it is well-settled that "the Legislature cannot override by statute what th[e Supreme] Court has promulgated by rule." *Serna*, 2013-NMSC-033, ¶ 13. Since the protective order here was permitted by Rule 1-026 and issued by a court with jurisdiction, it follows that "construing [IPRA] to invalidate [this] otherwise providently entered protective order would raise serious constitutional questions about the validity of that law." *Commonwealth v. Fremont Inv. & Loan*, 944 N.E.2d 1019, 1023 (Mass. 2011); *see Gonzales v. Atnip*, 1984-NMCA-128, ¶ 23, 102 N.M. 194, 692 P.2d 1343 ("Any legislative scheme which would control or exercise the inherent powers of the judiciary would be violative of Article III and Article VI, Section 1 of the New Mexico Constitution." (internal quotation marks and citation omitted)). We conclude that the district court properly granted summary judgment to Defendants because the protective order barred disclosure of the requested records to Plaintiff.

{12} *Faber* does not hold otherwise. In that case, the plaintiff sued a public entity for gender discrimination in employment, and the federal district court granted the defendant's motion for a stay of discovery pending resolution of a motion to dismiss based on immunity. *See* 2015-NMSC-015, ¶ 2. The plaintiff then filed an IPRA request "seeking employment data for every attorney who had been employed by the the [defendant's o]ffice." *Id.* ¶ 3. The records custodian denied the request, stating that the request "appear[ed] to circumvent the discovery process and the [stay]." *Id.* (internal quotation marks omitted) The plaintiff then filed an IPRA enforcement action in the state district court. *See id.* ¶ 4. "The state district court found that the stay of discovery entered by the federal court did not preempt the statutory rights granted . . . by IPRA, and that the [defendant] violated IPRA by denying [the plaintiff]'s . . . request." *Id.* The state district court awarded damages and the defendant appealed. *See id.* ¶ 5.

{13} On appeal, the Supreme Court noted that "[t]he determination of the IPRA violation was not at issue." *Id.* Hence, the Court did not address the propriety of the district court's ruling that the discovery stay did not foreclose the plaintiff's IPRA action. Moreover, *Faber* is distinguishable on its facts. Unlike here, the federal court's order did not prohibit disclosure of any records to the plaintiff. Instead, the stay merely paused the discovery process pending the court's determination of whether the defendant was immune from suit. *See id.* ¶ 2; *cf. City of Allentown v. Brenan*, 52 A.3d 451, 456 (Pa. Commw. Ct. 2012) (holding that a public records request was not barred by a court order where the federal judge's order did not preclude disclosure of the requested records, but rather, was "premised solely upon the untimeliness of [the p]laintiffs' " motion to compel disclosure and a lack of authority, and the federal judge "never suggested that the additional discovery materials were precluded or protected from disclosure").

{14} We recognize that IPRA and discovery are different and distinct methods to obtain information and that citizens' involvement in litigation alone does not deprive them of their ability to obtain public records under IPRA. *Cf. Republican Party of N.M.*, 2012-NMSC-026, ¶ 49 (noting differences between discovery and IPRA requests). Our holding does not undermine that principle. Instead, it rests entirely on the fact of the protective order and the public's interest in "the orderly process of law." *Gedeon*, 1981-NMSC-065, ¶ 15 (internal quotation marks and citation omitted). A contrary holding would subject Defendants to conflicting orders from the court, which would work a "disservice to the orderly administration of justice[.]" *Bangor Publ'g Co.*, 682 A.2d at 231.

II. The Judicial Deliberation Privilege Precludes Disclosure of Communications Between the District Court Judge and Brandt

{15} Plaintiff argues that the SJDC is obliged to disclose communications between Brandt and the judge presiding

over the domestic relations case. Plaintiff contends he "is entitled to [Brandt's] communications with the [district c]ourt. No statutory or otherwise cognizable privilege or exception applies to such communications." However, in *Pacheco*, decided in the midst of briefing for this appeal, our Supreme Court held that a judicial deliberation privilege protects from public disclosure a judge's "internal decision-making communications that are at the core of the constitutional duties of the judicial branch[.]" 2018-NMSC-022, ¶ 3. Applying a "functional analysis," the Court went on to hold that the privilege protects from disclosure a judge's communication with the judge's staff, as well as other "judicial branch colleague[s]." *Id*. ¶¶ 46, 54. Thus, the question here is whether the judge's communications with Brandt fall within that privilege.

{16} We conclude that they do. "The function of Rule 1-053.3 guardians ad litem is without question to act as an arm of the court[.]" *Kimbrell*, 2014-NMSC-027, ¶14; *see* § 40-4-8. Moreover, the guardian ad litem "assists the court in discharging *its duty* to adjudicate the child's best interests." Rule 1-053.3(A) (emphasis added). Other provisions of Rule 1-053.3 emphasize the guardian ad litem's role vis á vis the appointing judge. For instance, Rule 1-053.3(C) provides that "[t]he guardian ad litem appointed under this rule is a 'best interests attorney' who shall provide independent services to protect the child's best interests without being bound by the child's or either party's directive or objectives and who shall make findings and recommendations." Rule 1-053.3(F)(1) and (2) set forth the guardian ad litem's duties, which include interviewing the parties and relevant service providers, as well as determining the child's wishes. The guardian ad litem must file recommendations with the district court. Rule 1-053.3(F)(4) and (5). Importantly, Rule 1-053.3(D) provides that "[i]n no event shall the court delegate the ultimate determination of the child's best interests, unless the parties have agreed to arbitrate such issues[.]" Together, these provisions indicate that, in carrying out the delegated tasks, a guardian ad litem "act[s] as an extension of the court by performing quasi-judicial functions of investigating the facts and report[s] to the court what placement [i] s in the child's best interests." *Collins ex rel. Collins v. Tabet*, 1991-NMSC-013, ¶ 22, 111 N.M. 391, 806 P.2d 40 (emphasis, alteration, internal quotation marks, and citation omitted). Impairment of a guardian ad litem's work therefore "obstruct[s] the pathway to ascertaining the truth and impair[s] the judge's ability to perform his or her judicial duties." *Kimbrell*, 2014-NMSC-027, ¶ 12. In other words, as to the specific cases for which guardians ad litem are appointed, their function is tantamount to that of a member of the judge's staff. *Cf. Pacheco*, 2018-NMSC-022, ¶ 53 (holding that the privilege protects communications between a judge and a law librarian whose duties include providing legal information and research services to judges). It follows that the judicial deliberation privilege bars public disclosure of Brandt's communications with the district court judge presiding over the domestic relations matter.

Conclusion

{17} We hold that the district court properly granted Defendants' motions for summary judgment and denied Plaintiff's motion because, assuming without deciding that Brandt's records and communications fall within IPRA's definition of "public records," the protective order precludes disclosure of Brandt's records to Plaintiff and the judicial deliberation privilege protects communications between Brandt and the district court. Because these conclusions are dispositive, we do not address whether (1) the quasi-judicial immunity recognized in *Kimbrell* protects Brandt from an IPRA enforcement suit; (2) Plaintiff properly named Brandt as a defendant in this IPRA action; or (3) Plaintiff's IPRA action is an improper collateral attack on the protective order. We therefore affirm the district court's dismissal of Plaintiff's complaint.

{18} IT IS SO ORDERED.
LINDA M. VANZI, Judge

WE CONCUR:
KRISTINA BOGARDUS, Judge
ZACHARY A. IVES, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-062

No. A-1-CA-36473 (filed July 24, 2019)

THE CADLE COMPANY,
Plaintiff-Appellant,
v.
STEPHEN J. SEAVALL,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BEATRICE J. BRICKHOUSE, District Judge

Released for Publication October 29, 2019.

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Opinion

Julie J. Vargas, Judge.

{1} The Cadle Company (Plaintiff) appeals the district court's grant of summary judgment in favor of Stephen J. Seavall (Defendant), arguing the district court erred in finding Plaintiff's 2016 lawsuit was based on a judgment rendered in 1987, and was time-barred by NMSA 1978, Section 37-1-2 (1983) (providing that "[a]ctions founded upon any judgment of any court of the state may be brought within fourteen years from the date of the judgment, and not afterward"). We reverse.

BACKGROUND

{2} Defendant entered into a stipulated judgment with Sandia Federal Savings and Loan Association against Defendant for $36,388.12 in July 1987 (the 1987 Judgment). The 1987 Judgment was eventually transferred to Plaintiff. Plaintiff filed suit on the 1987 Judgment in June 2001, and the district court entered judgment in Plaintiff's favor in June 2002 (the 2002 Judgment). Plaintiff filed suit on the 2002 Judgment in 2009, and the district court entered judgment in Plaintiff's favor in September 2009 (the 2009 Judgment). Neither party argues, nor does our review of the record reveal, that Plaintiff ever executed upon any of these judgments.

{3} In July 2016 Plaintiff filed its "complaint on a judgment" stating that it was the holder of a judgment against Defendant, citing to the 2009 Judgment. Plaintiff further contended that the amount of the 2009 Judgment remains unpaid and Plaintiff is entitled to a judgment for the unpaid amount. Plaintiff sought a judgment against Defendant in the principal amount of $136,876.03, which included interest that had accrued since the 1987 Judgment, plus interest thereafter at the rate of 8.75 percent. Defendant filed a motion for summary judgment or, alternatively, to dismiss for failure to state a claim. In his motion, Defendant argued that New Mexico law permits only one revival of a judgment and that Plaintiff's 2016 lawsuit was barred under Section 37-1-2.

{4} The district court granted summary judgment in Defendant's favor, concluding that the 2009 Judgment, upon which Plaintiff was suing, was founded on the 2002 Judgment, which was founded on the 1987 Judgment. Thus, the district court found that the 2016 lawsuit was barred under Section 37-1-2 as it was "an action to revive a judgment" and was "filed more than twenty-nine years after the 1987 Judgment was rendered." The district court further found:

> Plaintiff argues Section 37-1-2 places no limit on the number of times a party may bring an action on a judgment. This is true. However, Section 37-1-2 does limit the period for bringing such actions to fourteen years.

This appeal followed.

DISCUSSION

{5} Plaintiff argues that the district court erred in granting summary judgment as the 2016 lawsuit was not an action to revive a judgment, but was a "separate action on the 2009 [J]udgment[.]" Plaintiff contends that the 1987 Judgment merged into the 2002 Judgment and that the 2002 Judgment merged into the 2009 Judgment, such that the 2002 and 2009 Judgments were "new and separate judgment[s]" and that the 2016 lawsuit, being "premised on the 2009 [J]udgment[,]" was therefore timely. Before turning to the question of whether Plaintiff's 2016 lawsuit was barred under Section 37-1-2, we must first determine the legislative intent behind New Mexico's statutory scheme concerning the life and execution of judgments, and whether New Mexico law permits actions on judgments that produce new judgments upon which new limitations periods will run.

A. Standard of Review

{6} Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 1-056(C) NMRA. "If the facts are undisputed and only a legal interpretation of the facts remains, summary judgment is the appropriate remedy." *Ciolli v. McFarland Land & Cattle Co.*, 2017-NMCA-037, ¶ 12, 392 P.3d 635 (internal quotation marks and citation omitted). "We apply a de novo standard of review to the legal conclusions." *Id.*

{7} "In construing a statute, our charge is to determine and give effect to the Legislature's intent." *Atherton v. Gopin*, 2015-NMCA-087, ¶ 19, 355 P.3d 804 (internal quotation marks and citation omitted). "Where a statute touches an issue in the common law, we interpret the statute's language in the context of that law." *Id.* "In 1876, New Mexico's territorial Legislature determined that 'the common law as recognized in the United States of America[,] shall be the rule of practice and decision.' " *San Juan Agric. Water Users Assoc. v. KNME-TV*, 2011-NMSC-011, ¶ 20, 150 N.M. 64, 257 P.3d 884 (quoting NMSA 1978, § 38-1-3 (1876)). "The common law, upon its adoption, came in and filled every crevice, nook and corner in our jurisprudence where it had not been stayed or supplanted by statutory enactment[.]" *San Juan Agric. Water Users Ass'n.*, 2011-NMSC-011, ¶ 20 (alteration, internal quotation marks, and citation omitted). "We presume that the Legislature enacts

statutes that are consistent with the common law and that the common law applies unless it is clearly abrogated." *Id.* "A statute will be interpreted as supplanting the common law only if there is an explicit indication that the [L]egislature so intended." *Id.* (internal quotation marks and citation omitted).

B. The History of New Mexico's Statutory Scheme for the Life and Execution of Judgments

{8} We begin by discussing the common law background to the relevant statutory scheme. "At common law the life of a judgment was [twenty] years, but, if an execution was not issued thereon within a year and a day, the judgment became dormant, and an alias execution could not issue thereon, unless revived by scire facias." *Browne & Manzanares Co. v. Chavez* (*Browne* I), 1898-NMSC-004, ¶ 11, 9 N.M. 316, 54 P. 234. Although dormant, a judgment was not dead until the close of its twenty-year life, and its "vitality" (i.e., the ability of a judgment creditor to execute upon the judgment) could be restored by means of revival for the balance of its twenty-year life. *Id.* ¶¶ 12-14. Alternatively, at common law, the judgment creditor could bring an action of debt—also referred to as an action on a judgment—"which is a new and independent action, resulting in the entry of a new judgment." 47 Am. Jur. 2d *Judgments* § 722 (2019); *see* 3 William Blackstone, Commentaries *158-59 (explaining that a creditor who has "obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, [] may afterwards bring an action of debt upon this judgment[.]"); 2 Abraham Clark Freeman, *A Treatise of the Law of Judgments*, § 1063, at 2217-18 (5th ed. 1925) ("Though a judgment be dormant . . . it will nevertheless sustain an action founded upon it. . . . if [the judgment creditor] proceeds within the time allowed for revivor.").

{9} The New Mexico territorial Legislature's first statutes bearing upon the execution and revival of a judgment, 1897 Compiled Laws of New Mexico Sections 3085 and 3086, C.L. 1897, provided:

> § 3085. That hereafter it shall not be necessary to bring proceedings in any court to revive a judgment having been already obtained before a court of competent jurisdiction in this territory, except in cases where such judgment had been rendered for a period of five years or more next preceding the issue of final process for the enforcement of the same.
>
> § 3086. An execution may issue at any time, on behalf of any[] one interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing an action to revive the same.

Following its enactment of Sections 3085 and 3086, C.L. 1897, our territorial Legislature enacted 1897 Compiled Laws of New Mexico Section 2914, C.L. 1897, which was compiled as part of the chapter entitled "Time of Commencing Actions." Section 2914 provided that "[a]ctions founded upon any judgment of any court of the Territory of New Mexico may be brought within seven years from and after the rendition of such judgment, and not afterward[.]"

{10} The text of these statutes remained largely untouched until 1965, when our Legislature amended all three statutes.[1] The successor to Section 2914, C.L. 1897, NMSA 1953, Section 23-1-2 (1965) (Vol. 5, 1975 Pocket Supp.), provided that "[a]ctions founded upon any judgment of any court of the [State of New Mexico] may be brought within seven (7) years from and after the rendition or revival of the judgment, and not afterward[.]" The successor to Section 3085, C.L. 1897, NMSA 1953, Section 21-9-19 (1965) (Vol. 4, Repl., 1975 Pocket Supp.), was amended and recompiled to read:

> It is not necessary to bring proceedings in any court to revive a judgment obtained before a court of competent jurisdiction in this state. A judgment may be revived once only, by filing, for that purpose, a transcript of the docket of the judgment in the office of the county clerk of the county in which the judgment was entered, before the expiration of the limitation upon actions founded upon judgments as provided by [S]ection 23-1-2. . . . The revival commences as of the first date when an action founded upon the judgment would, without the revival, be barred by the limitation of [S]ection 23-1-2[.]

The successor to Section 3086, C.L. 1897, NMSA 1953, Section 21-9-20 (1965) (Vol. 4, 1975 Pocket Supp.), was amended to provide that "[a]n execution may issue at any time, on behalf of anyone interested in a judgment, within seven [7] years after the rendition or revival of the judgment."

{11} In 1971, the Legislature amended the revival and execution statutes. Section 21-9-20 was recompiled and amended at NMSA 1978, Section 39-1-19 (1971), to provide:

> It is not necessary to bring proceedings in any court to revive a judgment obtained before a court of competent jurisdiction in this state. A judgment may be revived once only, by filing, for that purpose, a transcript of the docket of the judgment in the office of the county clerk of the county in which the judgment was entered, before the expiration of the limitation upon actions founded upon judgments as provided by Section 37-1-2. . . . The revival commences as of the first date when an action founded upon the judgment would, without the revival, be barred by the limitation of Section 37-1-2[.]

Additionally, Section 21-9-20 was recompiled and amended at NMSA 1978, Section 39-1-20 (1971), which provided that "[a]n execution may issue at any time, on behalf of anyone interested in a judgment, within seven years after the rendition or revival of the judgment."

{12} Most recently, the Legislature returned to these statutes in 1983, repealing Section 39-1-19 as well as recompiling and amending Section 23-1-2 at Section 37-1-2, as follows: "Actions founded upon any judgment of any court of the state may be brought within fourteen years from the date of the judgment, and not afterward." When analyzing these concurrent actions by the 1983 Legislature, this Court explained that "the [L]egislature clearly linked the repeal of Section 39-1-19, providing streamlined revival procedure, with the extension of the limitations period for actions founded upon judgments." *Fischoff v. Tometich*, 1991-NMCA-144, ¶ 15, 113 N.M. 271, 824 P.2d 1073. We concluded that "[w]e believe in repealing the long-standing statutory provision creating a simplified procedure for revival of judgments, the [L]egislature expressed its intent that common-law actions on the judgment be the exclusive means of revival." *Id.*

[1]Between 1891 and 1965, the Legislature amended and recompiled Section 2914, C.L. 1897 on one other occasion at NMSA 1915, Section 3347 (1891), which eliminated the following provision from Section 2914, C.L. 1897: "That actions may be brought upon any existing judgment which, but for this proviso, would be barred within one year from and after the passage of this act, and not afterward; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred." The statute was also amended to recognize that New Mexico had become a state since the passage of Section 2914. No changes were made to the statute when it was recompiled at NMSA 1929, Section 83-102 (1891), and NMSA 1941, Section 27-102 (1891).

{13} The history of New Mexico's statutory scheme reveals no clear abrogation of the common law right to pursue an action on the judgment. *See Sims v. Sims*, 1996-NMSC-078, ¶ 23, 122 N.M. 618, 930 P.2d 153 (holding that "when legislation directly and clearly conflicts with the common law, the legislation will control"); *Atherton v. Gopin*, 2015-NMCA-087, ¶ 20, 355 P.3d 804 (holding that when a statute is silent as to an issue found in common law, "the statute does not abrogate the common law"). We therefore conclude that our Legislature did not supplant this common law action, and that, consistent with several states, New Mexico law permits judgment creditors, during the life of a judgment, to "bring an action upon the judgment and obtain a new judgment upon which the limitations period will run again." Restatement (Second) of Judgments § 18 cmt. c (Am. Law. Inst. 1982); *see Agribank, FCB v. Holland*, 27 S.W.3d 462, 463 (Ark. Ct. App. 2000) (recognizing that "the judgment creditor can start the limitation period anew by bringing an action on the judgment and obtaining a new judgment"); *Salinas v. Ramsey*, 234 So. 3d 569, 571-72 (Fla. 2018) ("An action on a judgment is an action independent of the original action in which the judgment was obtained, the main purpose of which is to obtain a new judgment which will facilitate the ultimate goal of securing satisfaction of the original cause of action. An action on a judgment provides an opportunity, when the limitations period has almost run on the judgment, to obtain a new judgment that will start the limitations period anew." (footnote, internal quotation marks, and citations omitted)); *Dahlin v. Kroening*, 796 N.W.2d 503, 505 (Minn. 2011) (explaining that Minnesota's ten-year statute of limitations "provides that an action on a judgment may be brought within ten years after the entry of a judgment resulting in a renewal of the judgment for an additional ten years"); *Koerber v. Middlesex Coll.*, 383 A.2d 1054, 1057 (Vt. 1978) (same). Moreover, as the Minnesota Court of Appeals explained, "an action on a judgment results in a new judgment, which may then serve as the basis for a subsequent action on a judgment, such that multiple renewals of a judgment are permissible so long as each is renewed by an action on the prior judgment commenced within [the limitations period]." *Amica Mut. Ins. Co. v. Wartman*, 841 N.W.2d 637, 641 (Minn. Ct. App. 2014) (internal quotation marks and citation omitted).

C. Plaintiff's 2016 Lawsuit Was an Action on a Judgment and Thus Not Barred under Section 37-1-2

{14} Plaintiff asserts the district court erred in finding that the 2016 lawsuit was a revival of the 1987 Judgment rather than an action on the 2009 Judgment. We agree. Section 37-1-2 "refers to and controls actions in regular form, brought upon judgments to revive them or to recover upon them or upon foreign judgments, and the like." *Crowell v. Kopp*, 1919-NMSC-065, ¶ 7, 26 N.M. 146, 189 P. 652 (discussing former version of Section 37-1-2), *overruled on other grounds as recognized by Abarca v. Henry L. Hanson, Inc.*, 1987-NMCA-068, ¶ 9, 106 N.M. 25, 738 P.2d 519; *see Fischoff*, 1991-NMCA-144, ¶ 8 n.1 (extending *Crowell*'s interpretation of the phrase "actions founded upon any judgment," found in the predecessor to Section 37-1-2, to the same language found in Section 37-1-2). Following the Legislature's 1983 repeal of Section 39-1-20, New Mexico no longer has a statutory procedure for revival of judgments. *See Fischoff*, 1991-NMCA-144, ¶ 15 (concluding that revival is now achieved by means of common law revival suits). "In states which have no procedure by which a judgment may be revived or renewed, a party must bring an action on the judgment as a case at bar which is deemed an independent action separate and distinct from the original suit in which the prior judgment was rendered." 46 Am. Jur. 2d *Judgments* § 370 (2019). And so, while both a revival and an action on a judgment are now pursued by means of lawsuits, the distinction between the two actions appears to be the relief sought: a revival seeks to ensure the vitality of an existing judgment while an action on a judgment seeks an entirely new judgment. On the face of its complaints, Plaintiff was not seeking to ensure the vitality of an imminently-dormant judgment; rather, it sought an entirely new judgment. Having concluded that our Legislature did not clearly abrogate the common law action on a judgment, we see no reason why Plaintiff's 2016 lawsuit should not be considered an action on a judgment rather than a revival. As we have concluded above, each of Plaintiff's actions on its prior judgments produced new judgments, from which the limitations period runs anew. Thus, although the 1987 Judgment's limitations period would have terminated in 2001, each of Plaintiff's actions on the previous judgment produced a new judgment, each with its own fourteen-year limitations period. Because Plaintiff received a new judgment in 2009, it is statutorily permitted to maintain an action on that judgment for fourteen years from the date of that judgment, and having timely filed its action in this case within that period, the district court erred in dismissing the 2016 lawsuit on grounds that it was barred under Section 37-1-2.

{15} To the extent our holding—mandated by the lack of a statutory abrogation of the common law action on a judgment—has the potential to extend the life of an original judgment in perpetuity, it is for the Legislature, not this Court, to determine when, if ever, the common law action on a judgment is no longer permissible under New Mexico law.

CONCLUSION

{16} We reverse and remand to the district court.

{17} IT IS SO ORDERED.
JULIE J. VARGAS, Judge

WE CONCUR:
MEGAN P. DUFFY, Judge
JAMES J. WECHSLER, Judge Pro Tempore

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-063

No. A-1-CA-36069 (filed July 25, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
LIBORIO MARTINEZ,
Defendant-Appellant.

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

Released for Publication October 29, 2019.

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Opinion

Julie J. Vargas, Judge.

{1} Pursuant to a conditional plea agreement, Defendant Liborio Martinez appeals the district court's denial of his motion to suppress certain evidence discovered after he was stopped for speeding. On appeal, Defendant argues that police engaged in an illegal search of his vehicle when Officer Anthony Perez: (1) opened the door of Defendant's vehicle; and (2) broke "the plane of the car" and entered the vehicle, transforming the traffic stop into a search that required a warrant. We conclude that, under the circumstances of this case, the district court erred in concluding that Officer Perez's actions of opening Defendant's door was not a search that required a warrant. We therefore reverse.

BACKGROUND

{2} Defendant's conviction stems from a traffic stop initiated by Officer Perez. After observing Defendant driving ten miles per hour over the speed limit, Officer Perez made a U-turn, pulled behind Defendant's vehicle, and activated his emergency lights. Defendant failed to pull over for a "couple miles" over the course of approximately two minutes, prompting Officer Perez to call for assistance. During this time, Defendant did not noticeably increase his speed or take any action to indicate he sought to flee from Officer Perez. Instead, Defendant appeared to maintain his speed and only increased or decreased his speed according to the flow of traffic in front of his car.

{3} After Defendant pulled over, Officer Perez exited his vehicle and walked toward the rear passenger's side of Defendant's car. Officer Perez testified that as he approached Defendant's vehicle, he was unable to see whether anyone was in the back because although it was daylight, the rear window was "dark." Officer Perez approached the front passenger's side window and was able to see through that window. The window was not rolled all the way down and he testified that he had a "narrow" point of view. Through that window, however, he could see Defendant holding a cell phone in one hand and trying to light a cigar or a cigarette with the other.

{4} As he approached Defendant's passenger's side window, Officer Perez lowered his head to look inside Defendant's vehicle and initiated the following exchange:

> Perez: How are we doing, sir?
> Defendant: Good. You?
> Perez: Officer Perez with State Police.
> Defendant: Hey, how's it going?

Approximately four seconds elapsed from the time Officer Perez lowered his head to look inside the vehicle and the verbal exchange described above was completed. Three seconds into the exchange, as Defendant said "Hey," but before he asked "how's it going," Officer Perez opened the front passenger's side door of Defendant's vehicle. Officer Perez testified that he opened Defendant's door so as to speak with Defendant and prevent him from possibly fleeing. Officer Perez testified that he was unsure why Defendant failed to stop and was initially concerned that Defendant might drive away while Officer Perez was outside of his patrol vehicle.

{5} After about twenty seconds of standing outside Defendant's car with the front passenger's side door open, Officer Perez asked Defendant if he had been drinking. Defendant responded that he had not, to which Officer Perez responded that he could smell alcohol. Officer Perez testified that he first noticed an odor of alcohol after he opened the car door. Defendant stated, "Perhaps it's the beer in here," to which Officer Perez asked, "Where is it?" Officer Perez observed an unopened bottle of beer in the back seat, instructed Defendant to exit the vehicle, initiated a DWI investigation, and arrested him. Defendant was charged with speeding, contrary to NMSA 1978, Section 66-7-301 (2015), and aggravated driving under the influence of intoxicating liquor (DWI), contrary to NMSA 1978, Section 66-8-102(D)(1) (2010, amended 2016).

{6} Defendant filed a motion to suppress, which the magistrate court denied. Defendant was found guilty of aggravated DWI and appealed to the district court. Defendant filed a motion to suppress in the district court, arguing that Officer Perez's conduct in opening Defendant's door as well as his conduct of entering the vehicle amounted to searches, both of which required a warrant. The district court denied Defendant's motion. Defendant appealed to this Court pursuant to a conditional guilty plea to the DWI charge, which reserved his right to appeal "any suppression motions[.]"

DISCUSSION

{7} "[A]ppeals from magistrate courts are de novo." *State v. Foster*, 2003-NMCA-099, ¶ 9, 134 N.M. 224, 75 P.3d 824; *see* NMSA 1978, § 35-13-2(A) (1996) ("Appeals from the magistrate courts shall be tried de novo in the district court."). "In a de novo appeal, . . . a district court conducts a new trial as if the trial in the lower court had not occurred." *Foster*, 2003-NMCA-099, ¶ 9. When a party raises a pretrial motion in a de novo appeal, the district court "is to make an independent determination of the mer-

its of the motion." *City of Farmington v. Piñon-Garcia*, 2013-NMSC-046, ¶ 9, 311 P.3d 446.

{8} Our "review of a district court's ruling on a motion to suppress involves a mixed question of fact and law." *State v. Rowell*, 2008-NMSC-041, ¶ 8, 144 N.M. 371, 188 P.3d 95 (internal quotation marks and citation omitted). "We review the contested facts in a manner most favorable to the prevailing party and defer to the factual findings of the district court if substantial evidence exists to support those findings." *Id.* "[W]e then review de novo the [district] court's application of law to the facts to determine whether the search or seizure were reasonable." *State v. Leyva*, 2011-NMSC-009, ¶ 30, 149 N.M. 435, 250 P.3d 861.

{9} The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. Under the Fourth Amendment, "searches and seizures must be reasonable." *State v. Bond*, 2011-NMCA-036, ¶ 11, 150 N.M. 451, 261 P.3d 599. "Warrantless searches [and seizures] are presumed to be unreasonable" and "[t]he [s]tate bears the burden of proving . . . reasonable[ness]. *Id.* ¶ 11. We note that Defendant does not challenge the legality of the traffic stop. *See Leyva*, 2011-NMSC-009, ¶ 31 (explaining that the question of whether the initial stop was lawful is not an issue when the defendant does not contest its legality). Rather, Defendant argues Officer Perez's conduct in opening Defendant's car door was a search requiring either a warrant or justification under an exception to the warrant requirement.

{10} The State argues that opening Defendant's car door did not transform a lawful detention into a search that required a warrant, relying on *State v. Simpson*, 2016-NMCA-070, 388 P.3d 277. In *Simpson*, an officer received a report that a male who smelled of alcohol entered a restaurant, passed out in the restroom, left the restaurant, got into a dark blue car, moved the car from one parking space to another, and in so doing, almost struck several other vehicles in the parking lot. *Id.* ¶ 3.

{11} The officer arrived at the parking lot and approached a dark blue vehicle with "very dark tinted windows[,]" which he confirmed was the "correct vehicle." *Id.* ¶ 4 (internal quotation marks omitted). Although the dark tint prevented the officer from seeing inside the car or determining whether it was occupied, he walked to the driver's side window, which was cracked a couple of inches, knocked on the car window, waited for a response to no avail, and saw a female in the passenger seat and a man in the back seat. *Id.* ¶¶ 4, 24. "There was nobody in the driver's seat, so there was no one to open the driver's side window, and because of the dark tinted windows, [the officer] could not see inside the vehicle to determine what the occupants were doing." *Id.* ¶ 4. The officer believed "the safest way to make contact with the occupants was to open the driver's side door." *Id.*

{12} A divided panel of this Court held that the officer's "conduct in opening the [defendant's car] door did not transform his lawful investigative detention into a search that required a warrant[.]" *Id.* ¶ 20. Relying on *State v. Lovato*, 1991-NMCA-083, 112 N.M. 517, 817 P.2d 251, the majority concluded that "[u]nder all the circumstances confronting [the officer], this safety precaution was reasonable and permissible under the governing law." *Simpson*, 2016-NMCA-070, ¶ 22. Also, citing *State v. Cobbs*, 1985-NMCA-105, 103 N.M. 623, 711 P.2d 900, the majority explained that "even when an officer is merely investigating a traffic offense, he faces an inordinate risk when he approaches a subject seated in an automobile[,]" and the officer may therefore "take reasonable safety precautions while conducting investigatory detentions[.]" *Simpson*, 2016-NMCA-070, ¶ 23 (internal quotation marks and citation omitted).

{13} Our review of *Simpson* and the cases it cites reveals that the common concern raised in each of those cases was officer safety. In *Lovato*, this Court concluded it was not unreasonable for officers to open a car door after they received a report of a drive-by shooting, they pulled over a car they believed to be the car described in the report, their visibility was limited because of the late hour, they believed that either the occupants were armed or that there was a firearm in the vehicle, three people exited the vehicle from the front and two people exited from the back, and the officers were unsure whether another occupant was lying on the floor of the vehicle. 1991-NMCA-083, ¶¶ 2, 33. We explained that "the officers had not yet determined that all the occupants of the vehicle had exited the vehicle[,]" and that the officers "were still confronted with a potential danger." *Id.* ¶ 35. This Court held in *Lovato* that "[u]nder such circumstances, the police were not required to forego reasonably prudent steps necessary for their own safety[,]" and relied on *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (permitting "a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual"), and *Cobbs*, for the proposition that "[l]aw enforcement officers carrying out an investigatory stop are permitted to make a limited search for weapons that might be used to harm them." *Lovato*, 1991-NMCA-083, ¶ 34.

{14} In *Cobbs*, this Court evaluated the constitutionality of an officer's patdown search of a suspect after receiving a report of "suspicious persons" and a possible residential burglary in progress, pulling over a vehicle that left the residence involved in the reported burglary, and ordering the suspects to exit the vehicle. 1985-NMCA-105, ¶¶ 4-6, 18. This Court explained that the risk to an officer who approaches a subject in a vehicle "increases immeasurably when the officer is called upon to investigate a serious crime." *Id.* ¶¶ 21-25. Thus, requiring an "officer to question the suspects before ordering them from the car and frisking them is an untenable demand[,]" and the officer was justified under the circumstances present in that case "in ordering the defendant out of the car and frisking him before questioning him." *Id.* ¶ 25. We further held that the right to conduct a protective search is "automatic" when

> the suspect has been stopped upon the suspicion that he has committed, was committing, or was about to commit a type of crime for which the offender would likely be armed, whether the weapon would be used to actually commit the crime, to escape if the scheme went awry, or from protection against the victim or others involved.

Id. ¶ 34 (internal quotation marks and citation omitted). However, to conduct a protective search upon a person suspected of a nonviolent offense, "additional articulable facts of potential danger must be present, as well as the suspicion of criminal activity." *Id.* ¶ 35.

{15} Applying the foregoing authorities and the circumstances surrounding Officer Perez's conduct in opening Defendant's car door, we are persuaded that Officer Perez's conduct transformed an otherwise lawful investigative detention into a search that required a warrant. We acknowledge Officer Perez's testimony that he was initially concerned that Defendant might drive away, and that he was unable to see inside Defendant's vehicle through the rear passenger's side window. However, we find significant differences between the circumstances of this case and those relied upon in *Simpson*. Unlike the officers in *Lovato* who were investigating a violent crime, Officer Perez pulled Defendant's vehicle over for a speeding violation. Furthermore, unlike the officer in *Simpson*, who came upon an empty driver's seat, knocked on the window with no response, saw a male in the back seat during an investigation for a male DWI suspect and testified that the "safest way to make contact with the occupants was to open the driver's side

door," *Simpson*, 2016-NMCA-070, ¶ 4, Officer Perez's overarching concern when he opened Defendant's door was to "get inside," have a conversation, and possibly take Defendant's keys. Unlike the officer in *Simpson*, Officer Perez did not have difficulty making contact with Defendant when he approached the vehicle, yet he opened the door to Defendant's vehicle within three seconds of his initial contact.

{16} To the extent that the State cites *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977), for the analogous proposition that an officer may, for reasons of officer safety, order a driver to get out of the car, we are not presented with a case wherein the officer took action out of concern for his safety. Nor do the circumstances leading up to and culminating in Officer Perez's opening of Defendant's car door support an objectively reasonable belief that Defendant posed a threat to Officer Perez's safety. *See Leyva*, 2011-NMSC-009, ¶ 25 (explaining that a protective search of a stopped vehicle for reasons of officer safety "must be based upon the objectively reasonable belief that the individuals stopped pose a threat to officer safety"); *cf. id.* ¶ 61 n.9 ("Even if [the officer] himself had not discredited any attempt to include [the defendant's] delay in pulling over after the emergency lights had been activated, we would not find this factor especially weighty in the reasonable suspicion analysis."). Thus, the present case is distinguishable from *Mimms*, *Lovato*, and *Simpson*.

{17} Insofar as the district court based its ruling on the possibility that Defendant would flee because he failed to stop for an extended period of time, the State has not cited authority to support the proposition that the possibility of a motorist's flight in his or her vehicle during a traffic stop provides a basis to open the door to a defendant's vehicle without a warrant or without some other justification under an exception to the warrant requirement. *See Bond*, 2011-NMCA-036, ¶ 11 (explaining that "[t]he [s]tate bears the burden of proving that a warrantless search or seizure is reasonable"). Indeed, under the facts of this case, we cannot conclude that Officer Perez reasonably believed that Defendant would flee after pulling his vehicle over. *See State v. Garcia*, 2005-NMSC-017, ¶ 33, 138 N.M. 1, 116 P.3d 72 (explaining that "[the appellate courts] may uphold a search or seizure if the facts known to the officer, viewed objectively, would provide valid constitutional grounds for the officer's actions"). We acknowledge that Defendant failed to pull over for a "couple miles" over the course of approximately two minutes, and that Officer Perez called for assistance during that time. However, neither Officer Perez's testimony nor his dash-cam video indicate that Defendant increased his speed or otherwise took evasive measures after Officer Perez activated his emergency lights. Rather, Defendant appeared to either maintain or adjust his speed according to the flow of traffic. Furthermore, neither Officer Perez's testimony nor his dash-cam video reveal any actions by Defendant after pulling his car over that would demonstrate he might drive away. In fact, when Officer Perez approached Defendant's car, he found him holding his cell phone in one hand and trying to light a cigar or cigarette with the other, and neither of those actions suggest that Defendant was planning to drive away. Accordingly, we cannot conclude that the facts of this case give rise to a reasonable belief that Defendant would flee after pulling over.

{18} We conclude that under the circumstances of this case the State failed to present evidence of "additional articulable facts of potential danger . . . as well as the suspicion of criminal activity" to support a protective search as part of Defendant's traffic stop. *Cobbs*, 1985-NMCA-105, ¶ 35. Officer Perez's conduct in opening Defendant's car door amounted to a search that required a warrant. *See State v. Cleave*, 2001-NMSC-031, ¶ 11, 131 N.M. 82, 33 P.3d 633 ("A search is an intrusion on a person's reasonable expectation of privacy." (internal quotation marks and citation omitted)); *see also McHam v. State*, 746 S.E.2d 41, 49 (S.C. 2013), ("[We h]old the opening of the door of an occupied vehicle is an intrusion, however slight, that generally constitutes a search for purposes of the Fourth Amendment. In such cases, a search results based on the fact that it enables the officer to observe portions of the interior of the vehicle that would not otherwise be readily visible to those who are outside the vehicle."), *abrogated on other grounds by Smalls v. State*, 810 S.E.2d 836, 839 n.2 (S.C. 2018). As we have explained above, "[w]arrantless searches are presumed to be unreasonable . . . [and t]he [s]tate bears the burden of proving . . . reasonable[ness]." *Bond*, 2011-NMCA-036, ¶ 11 (citation omitted). "[T]o prove that a warrantless [search or] seizure is reasonable, the [s]tate must prove that it fits into an exception to the warrant requirement." *Id.* (internal quotation marks and citation omitted).

{19} "The Fourth Amendment allows a warrantless search of an automobile and of closed containers found within an automobile when there is probable cause to believe that contraband is contained therein." *State v. Bomboy*, 2008-NMSC-029, ¶ 5, 144 N.M. 151, 184 P.3d 1045; *see California v. Acevedo*, 500 U.S. 565, 580 (1991) ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."); *United States v. Ross*, 456 U.S. 798, 825 (1982) ("If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."). The State has not argued, nor does our review of the evidence demonstrate, that Officer Perez had probable cause to believe contraband or evidence was contained in Defendant's vehicle at the time he opened the door. Nor does the State argue Officer Perez's search fits into any of the other "[r]ecognized exceptions to the warrant requirement[; i.e.,] exigent circumstances, searches incident to arrest, inventory searches, consent, hot pursuit, open field, and plain view." *Bond*, 2011-NMCA-036, ¶ 11 (internal quotation marks and citation omitted). We therefore conclude that Officer Perez's warrantless search of Defendant's vehicle was unreasonable and impermissible under the Fourth Amendment. Accordingly, we need not proceed to Article II, Section 10 of the New Mexico Constitution. *See State v. Ketelson*, 2011-NMSC-023, ¶ 10, 150 N.M. 137, 257 P.3d 957 (requiring that under our interstitial approach, "we first consider whether the right being asserted is protected under the federal constitution. . . . If the right is protected by the federal constitution, then the state constitutional claim is not reached." (internal quotation marks and citation omitted)). Furthermore, in light of our holding, we need not address whether Officer Perez, or any portion of his body, actually entered Defendant's vehicle.

Inevitable Discovery

{20} The State argues that even if opening Defendant's door was an unlawful search, the inevitable discovery doctrine permits the admission of any evidence obtained as a result of such conduct. "The inevitable discovery doctrine is an exception to the exclusionary rule." *State v. Romero*, 2001-NMCA-046, ¶ 10, 130 N.M. 579, 28 P.3d 1120. "Application of this doctrine permits the admission of unlawfully seized evidence if that evidence would have been seized independently and lawfully in due course." *Id.* This "doctrine applies where evidence that was obtained through unlawful police conduct inevitably would have been otherwise discovered through a different and independent means." *State v. Haidle*, 2012-NMSC-033, ¶ 39, 285 P.3d 668. "For the doctrine to apply, the alternate source of evidence must be pending, but not yet realized." *Romero*, 2001-NMCA-046, ¶ 10. The State bears the burden "to prove by a preponderance of the evidence that absent the illegal search, the [evidence] would have been discovered by independent and lawful means." *Id.*

{21} In arguing that the evidence obtained as a result of opening Defendant's

door—namely the detection of the odor of alcohol—would have been discovered through different and independent means, the State argues "Officer Perez would have smelled alcohol while continuing to interact with Defendant as part of the speeding investigation." A brief period of time passed before Officer Perez detected the odor of alcohol with the door open, and thus, according to the State, "it is more likely than not that Officer Perez would have made the same observation over the minutes it would have taken to complete the detention for speeding." Here, the State appears to confuse possibility with inevitability. We are not tasked with speculating as to whether Officer Perez *could* have detected the odor of alcohol had he continued with his traffic investigation, but rather whether he *would* have obtained such evidence through lawful means wholly independent of his illegal actions. *See Haidle*, 2012-NMSC-033, ¶ 39. We therefore find the State's argument unavailing.

CONCLUSION

{22} For the foregoing reasons, we reverse the district court's denial of Defendant's motion to suppress, and remand to the district court to permit Defendant to withdraw his conditional plea. *See State v. Jean-Paul*, 2013-NMCA-032, ¶ 34, 295 P.3d 1072 (permitting the defendant to withdraw her conditional plea after prevailing on her appeal of the district court's denial of her motion to suppress).

{23} IT IS SO ORDERED.
JULIE J. VARGAS, Judge

WE CONCUR:
MEGAN P. DUFFY, Judge
CYNTHIA A. FRY, Judge Pro Tempore

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-064

No. A-1-CA-36038 (filed July 31, 2019)

NORMAN GAUME,
Plaintiff-Appellant,
v.
THE NEW MEXICO INTERSTATE STREAM COMMISSION, JIM DUNLAP, in his official capacity as Chairman of the Commission, THE GILA SUBCOMMITTEE OF THE NEW MEXICO INTERSTATE STREAM COMMISSION, BUFORD HARRIS, in his official capacity as Chairman of the Gila Subcommittee of the Commission, AMY HAAS, in her official capacity as Acting Director of the Commissions, SCOTT VERHINES, in his official capacity as New Mexico State Engineer and Secretary of the Commission,
Defendants-Appellees.

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

Released for Publication October 29, 2019.

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Opinion

Linda M. Vanzi, Judge.

{1} In this appeal, we consider whether the district court can award damages for a wrongful injunction when it did not require Plaintiff to post security under Rule 1-066(C) NMRA. We conclude that the district court had no discretion to award damages to a wrongfully enjoined Defendant in the absence of an injunction bond. Accordingly, we reverse the district court's award of attorney fees accrued in seeking to dissolve a wrongful injunction.

BACKGROUND

{2} This case began when Plaintiff Norman Gaume filed a complaint against the New Mexico Interstate Stream Commission (the Commission) based on purported violations of the Open Meetings Act (OMA), NMSA 1978, §§ 10-15-1 to -4 (1974, as amended through 2013). The majority of Plaintiff's complaint focused on the Gila Committee, a committee created by the Commission to gather facts about the Gila River Basin and provide input to the Commission concerning matters related to the Arizona Water Settlements Act (AWSA), Pub. L. No. 108-451, 118 Stat. 3478 (2004); see generally Adrian Oglesby, Implementation of the Arizona Water Settlement Act in New Mexico: An Overview of Legal Considerations, 52 Nat. Resources J. 215 (2012) (discussing history of the AWSA and the Gila River). Plaintiff alleged that the Gila Committee violated the OMA by meeting on at least thirteen occasions in private and without notice. See § 10-15-1(B) (establishing public meeting requirement); § 10-15-1(D) (discussing notice requirement). Additionally, Plaintiff alleged that the Commission approved at least two large service contracts at non-public meetings held in violation of the OMA. See § 10-15-1(H)(6) (providing that "[t]he actual approval of purchase of the item or final action regarding the selection of a contractor shall be made in an open meeting").

{3} Plaintiff also petitioned for a temporary restraining order (TRO) and preliminary injunction preventing the Gila Committee "from taking any action or making any decision related in any way to the AWSA or the Gila River." As the basis for the TRO and preliminary injunction, Plaintiff claimed that there was an immediate risk of harm because the Gila Committee could "create new policy regarding proposals considered under the AWSA," which could lead to the improper spending of state and federal funds. In addition, Plaintiff requested that the Commission "be enjoined in the same manner as the [Gila Committee]" because the Commission could take action relying on the Gila Committee's recommendations.

{4} Judge Raymond Ortiz granted Plaintiff's request for a TRO ex parte, without a hearing, on October 23, 2014. The TRO broadly ordered the Commission to "not take any action regarding the Gila River and/or the [AWSA]" or "hold any meeting of the [Commission] or the [Gila Committee]." The district court set a hearing for the next week for the Commission to "show cause before the [district c]ourt why the [TRO] should not be extended or a preliminary injunction issued." The day after the district court issued the TRO, the Commission filed an emergency motion to dissolve the TRO, claiming that Plaintiff's allegations were false. The Commission also requested that the district court require Plaintiff to post a $1 million bond to compensate the Commission for costs and damages for the wrongfully granted TRO. See Rule 1-066(C). The Commission

argued that the injunction bond was necessary because the TRO had the possibility of preventing the State from obtaining approximately $62 million in federal funding under the AWSA if the Commission did not submit Gila River-related proposals to the Secretary of the Interior by the end of the year.

{5} On October 30, 2014, the day set for the hearing on the preliminary injunction, six local governments moved to intervene in support of the Commission. As a result, the district court spent much of the hearing resolving the motion to intervene. However, after the Commission informed the district court that it needed to hold meetings within the next two weeks in order to meet deadlines under the AWSA, the court agreed to modify the TRO and rescheduled the hearing on the preliminary injunction for November 12, 2014. The district court entered a modified TRO on November 3, 2014, which provided:

> 1. The [TRO] granted at Plaintiff's request on October 23, 2014, is hereby modified to allow the [Commission] to hold public meetings.
> 2. The Commission is further allowed to conduct any and all business, take any and all actions or votes, and make any and all decisions concerning issues that are not related to the Gila River Basin and the [AWSA].
> 3. With regard to the Gila River Basin and the AWSA, the Commission is allowed to hold public, informational meetings . . . but is not allowed to make decisions on AWSA or Gila River Basin items at those meetings.
> 4. This order shall remain in force until further order of this Court.[1]

{6} Before the November 12, 2014, hearing, Judge Francis Mathew replaced Judge Ortiz and rescheduled the hearing for November 20. At the hearing, the Commission renewed its argument that the district court should dissolve the TRO because it did not require Plaintiff to post an injunction bond or show good cause as to why he should not post a bond under Rule 1-066(C). When the district court asked Plaintiff how much of a bond he could afford in light of the millions of dollars in damages the State could potentially incur Plaintiff stated that he could only afford a $500 bond. The district court replied that $500 would be insufficient and dissolved the TRO. Additionally, after a short recess, Plaintiff voluntarily dismissed his petition for a preliminary and permanent injunction.

{7} The case proceeded forward on the merits of Plaintiff's OMA claims, and both parties eventually moved for summary judgment. The district court granted partial summary judgment to the Commission on all of Plaintiff's claims that the Gila Committee violated the OMA. However, the court granted partial summary judgment in favor of Plaintiff on his claims that the Commission violated the OMA through its approval process of two service contracts. Following the ruling on the merits, the parties litigated the issue of attorney fees and costs. The district court ruled that it would not award the Commission any attorney fees for its successful defense of the majority of Plaintiff's OMA claims because it did "not find that Plaintiff brought his action without sufficient information or belief that good grounds supported it, although he was mistaken in his belief as to some of the grounds." See § 10-15-3(C) (providing that "[a] public body defendant that prevails in a court action brought under this section shall be awarded its reasonable attorney fees from the plaintiff if the plaintiff brought the action without sufficient information and belief that good grounds supported it"). However, the district court found that the TRO was "overly broad when issued, restraining the [Commission] from performing [its] lawful duties contrary to the law." For this reason, the district court awarded the Commission $35,752.50 (plus applicable gross receipts tax) for the portion of its attorney fees related to its efforts to dissolve the TRO. This appeal followed.

DISCUSSION

{8} The sole issue on appeal is whether the district court abused its discretion in awarding damages in the form of attorney fees to the Commission. Plaintiff makes three arguments against the propriety of the district court's attorney fee award. First, Plaintiff argues that the district court cannot impose damages against him personally, but only against a bond required by Rule 1-066(C), which the district court did not require in this case. Second, Plaintiff argues that the TRO was not wrongful because Plaintiff prevailed on two of his OMA claims relating to the approval of service contracts. Lastly, Plaintiff claims that assessing attorney fees against Plaintiff would contravene the public policy of OMA. We conclude that Plaintiff's first argument is determinative in this appeal and hold that the district court abused its discretion in awarding attorney fees in the absence of an injunction bond.

Standard of Review

{9} "New Mexico adheres to the so-called American rule that, absent statutory or other authority, litigants are responsible for their own attorney[] fees." N.M. Right to Choose/NARAL v. Johnson (NARAL), 1999-NMSC-028, ¶ 9, 127 N.M. 654, 986 P.2d 450 (internal quotation marks and citation omitted). However, our courts recognize an equitable exception to this rule for awarding attorney fees as damages to a wrongfully enjoined defendant. Id. ¶¶ 21-22. We review the award of attorney fees for an abuse of discretion. Parkview Cmty. Ditch Ass'n v. Peper, 2014-NMCA-049, ¶ 23, 323 P.3d 939. The district court abuses its discretion "when its decision is contrary to logic and reason." NARAL, 1999-NMSC-028, ¶ 6 (internal quotation marks and citation omitted). Additionally, the district court abuses its discretion when its decision is "premised on a misapprehension of the law." Id. ¶ 7 (internal quotation marks and citation omitted). In determining whether the district court premised its decision on a misapprehension of the law, we review the application of the law to the facts de novo. Id.

{10} In support of Plaintiff's first argument that the district court could not award attorney fees against him because it did not require him to post an injunction bond, Plaintiff cites Rule 1-066(C), which provides:

> No restraining order[or] preliminary injunction . . . shall issue or occur except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, . . . provided, however, that for good cause shown and to be recited

[1]We note that our Rules of Civil Procedure only authorize a district court to keep a TRO granted without notice in place for a maximum of twenty days. See Rule 1-066(B)(2) ("Every temporary restraining order granted without notice . . . shall expire by its terms within such time after entry, not to exceed ten (10) days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period[.]" (emphases added)). By the time the district court entered the modified TRO, the original TRO had been in place for twelve days. Thus, it would appear that the modified TRO only remained effective until November 12 (i.e., nine more days) at most. However, as neither party disputes the district court's power to extend the TRO beyond the twenty days provided by Rule 1-066(B)(2),we do not express an opinion as to the effect of the district court's indefinite extension of the TRO.

> in the order made, the court or judge may waive the furnishing of security.[2]

(Emphasis added.) Plaintiff claims the emphasized language indicates that Defendants may seek payment for damages incurred due to a wrongful injunction solely from the security that the district court requires under Rule 1-066(C). While we agree with Plaintiff that the Commission has no right to recover damages in the absence of an injunction bond, the answer does not lie in Rule 1-066(C). Rather, the answer stems from the lack of a common law cause of action for a wrongful injunction, which Rule 1-066(C) seeks to remedy. We explain.

History of Wrongful Injunctions and the Injunction Bond

{11} Injunctions were first used by the English High Court of Chancery as early as the fourteenth century. See David W. Raack, A History of Injunctions in England Before 1700, 61 Ind. L.J. 539, 555 (1986). In the early history of equity jurisprudence, the chancellor often issued preliminary injunctions ex parte without requiring the plaintiff to put up any security. See Teasdale v. Jones, 40 Mo. Ct. App. 243, 246 (1890); Note, Interlocutory Injunctions and the Injunction Bond, 73 Harv. L. Rev. 333 (1959) (noting that requiring the plaintiffs to put up security when seeking ex parte injunctions did not become standard practice in England until the mid-nineteenth century). However, in those cases where it was later determined that the plaintiff was not entitled to the injunction, the chancellor had limited power to award damages for the wrongful injunction. See Russell v. Farley, 105 U.S. 433, 436 (1881) (alluding to the practice of the High Court of Chancery and stating that "[w]here no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation"). Consequently, wrongfully enjoined defendants seeking damages had to file suit for malicious prosecution,[3] in which they had to prove the plaintiff obtained the injunction through malice or want of probable cause—a difficult burden to meet. See Teasdale, 40 Mo. App. at 246; see also 2 James L. High, A Treatise on the Law of Injunctions § 1648, at 1233 (Chicago, Callaghan & Co. 3rd ed. 1890) (stating that "to support such action [for malicious prosecution], the plaintiff's pleading must clearly negative the existence of probable cause for the injunction; it will not suffice to allege that the writ was unjustly and wrongfully sued out, but there must be distinct allegations of malice or a want of probable cause"). Thus, in cases where a plaintiff requested an injunction to which he or she was not entitled (but did so in good faith) the wrongfully enjoined defendants had no remedy. Courts characterized the defendant's damages as damnum absque injuria, that is, damage without a wrongful act for which there was no legal redress, because courts regarded the damages caused by the injunction as flowing from judgment of the court, rather than the plaintiff. See Hamilton v. Hecht, 299 S.W.2d 577, 579 (Mo. Ct. App. 1957) (discussing common law liability for the plaintiffs who sought an injunction in good faith, which was later dissolved and stating that "[a]ny damages suffered by [the] defendant because of the [wrongful] injunction were traceable directly to the court which had issued it, and were damnum absque injuria"); damnum absque injuria, Black's Law Dictionary (11th ed. 2019); see also 1 Charles Fisk Beach, Jr., Modern Equity: Commentaries on the Law of Injunctions § 158, at 177-78 (Albany, H.B. Parsons 1895) (stating that neither law nor equity furnished a remedy to a wrongfully enjoined defendant if the plaintiff requested the injunction in good faith because the damages were regarded as flowing from the court's order).

{12} This "defect" in the common law led to the creation of the injunction bond. See Powell v. Woodbury, 83 A. 541, 545 (Vt. 1912) ("No action lies at common law for damages caused by an injunction unless it was sued out maliciously and without probable cause. To remedy this defect, injunction bonds were devised, and then there were two remedies, one on the bond and one for malicious use of the process without probable cause."); Glen Jean, Lower Loup & D.R. Co. v. Kanawha, Glen Jean & E.R. Co., 35 S.E. 978, 978-79 (W. Va. 1900) ("The very purpose of the [L]egislature in requiring an injunction bond to cover actual damages sustained [for a wrongful injunction] was to supply this defect in the common law[.]"). As one court put it,

> An injunction is a high prerogative writ; executed and enforced in a summary manner. By service of the writ, the party is required immediately to withdraw and cease operations; hence the propriety in requiring a bond for the indemnity of the party in such damages as he may sustain, by reason thereof.

Gear v. Shaw, 1 Pin. 608, 615 (Wis. 1846). Early American courts of equity used their broad discretion to frame orders granting injunctions to condition the grant of a TRO or preliminary injunction on a plaintiff's agreement to post a bond. See Commerce Tankers Corp. v. Nat'l Mar. Union of Am., AFL-CIO, 553 F.2d 793, 800 (2d Cir. 1977); Teasdale, 40 Mo. App. at 246-47 (1890); 1 Fisk Beach, Jr., supra, § 158 at 177-78; Howard C. Joyce, Treatise on the Law Relating to Injunctions §§ 158, 161, at 269, 274 (1909). Additionally, as early as 1788, states began enacting statutes and rules requiring the plaintiffs to post injunction bonds when seeking a TRO or preliminary injunction. See Interlocutory Injunctions and the Injunction Bond, supra, at 333. Eventually, every state—including New Mexico—as well as the federal courts, adopted statutes or rules providing for the posting of injunction bonds. See Dan B. Dobbs, Should Security Be Required As a Pre-Condition to Provisional Injunctive Relief, 52 N.C. L. Rev. 1091, 1196-97 (1974) (noting that every state, except Massachusetts,[4] has a statutory or rule provision for an injunction bond); 42 Am. Jur. 2d Injunctions § 315 (2019) (noting that "[t]he Federal Rules of Civil Procedure and the statutes of the majority of the states require an injunction bond"). While some of these provisions, like New Mexico's, allow the trial court to waive the injunction bond requirement for good cause, others require plaintiffs to post bonds in every case. Compare Rule 1-066(C) (allowing the district court judge to waive the security requirement for good cause), with Cal. Civ. Proc. Code § 529(a) (West 1992) ("On granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction.").

[2]Contrary to Rule 1-066(C), Judge Ortiz's orders granting and modifying the TRO did not explicitly waive the furnishing of security. Nonetheless, the parties do not dispute that Judge Ortiz granted and modified the TRO without requiring Plaintiff to post security.

[3]New Mexico courts have merged the tort of malicious prosecution with the tort of abuse of process into the single cause of action for malicious abuse of process. See Hinkle v. State Farm Fire & Cas. Co., 2013-NMCA-084, ¶ 13, 308 P.3d 1009. However, for ease of reference, we refer to the tort by its historic title in this section.

[4]Massachusetts has since enacted a rule to this effect. See Mass. R. Civ. P. 65(c) (2019).

{13} Essentially a contract to indemnify, the injunction bond created a significantly easier way for wrongfully enjoined defendants to recover damages. See Interlocutory Injunctions and the Injunction Bond, supra, at 343. Although trial courts retained varying degrees of discretion in determining whether to award damages on the bond, the wrongfully enjoined defendants no longer had to prove the plaintiff's malice or lack of probable cause. See City & Cty. of Denver v. Ameritrust Co. Nat. Ass'n, 832 P.2d 1054, 1056 (Colo. App. 1992) (discussing the different standards of discretion courts have in awarding damages on the injunction bond). Instead, the defendants merely had to show that they suffered damages due to an injunction to which the plaintiff was not entitled. See, e.g., Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1051 (2d Cir. 1990) ("Under [Rule] 65(c), a party subjected to a preliminary injunction in district court who is later found to have been 'wrongfully enjoined' may recover against the security bond damages suffered as a result of the injunction."); Parker Tampa Two, Inc. v. Somerset Dev. Corp., 544 So. 2d 1018, 1021-22 (Fla. 1989) ("The standard for determining whether an injunction was wrongfully issued is simply whether the petitioning party was unentitled to injunctive relief."); Hay v. Baumgartner, 903 N.E.2d 1044, 1047 (Ind. Ct. App. 2009) ("Where a temporary injunction is dissolved and not replaced by a permanent injunction, the enjoined party is generally entitled to compensation for the damages it incurred." (internal quotation marks and citation omitted)); Webb v. Beal, 1915-NMSC-030, ¶ 9, 20 N.M. 218, 148 P. 487 ("[I]f on investigation it is found that the plaintiff had no just right either in the law or the facts to justify him in asking and obtaining from the court such a harsh and drastic exercise of its authority, he should indemnify the defendant in the language of his bond for all damages he might sustain[.]" (internal quotation marks and citation omitted)).

{14} However, in cases where the trial court did not require the plaintiff to post security, courts continued to adhere to the historical practice of denying damages to the wrongfully enjoined. See, e.g., Meyers v. Block, 120 U.S. 206, 211 (1887) ("Without a bond for the payment of damages or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything."); Robinson v. Kellum, 6 Cal. 399, 400 (1856) ("An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of the [c]ourt through malice, and without probable cause. If the act complained of is destitute of these ingredients, then the only remedy of the injured party is an action upon the injunction bond[.]"); Manlove v. Vick, 55 Miss. 567, 569 (1878) ("It is well settled, both at common law and under statutory provisions requiring the giving of bonds as conditions precedent to obtaining certain statutory writs, that no action can be maintained against the party issuing the writs, except by showing malice and want of probable cause in their issuance."); Iron Mountain Bank v. Mercantile Bank, 4 Mo. App. 505, 506 (1877) ("There can be no recovery of damages arising from a[wrongful] injunction, except in an action on the bond, unless it be averred and shown that the process of the court was abused maliciously and without probable cause."); City of Yonkers v. Fed. Sugar Ref. Co., 221 N.Y. 206, 208 (1917) ("There was no liability at common law for damages resulting from an injunction erroneously granted unless the case was one of malicious prosecution."). To hold otherwise, as one scholar observed, would be "tantamount to permitting a malicious[]prosecution action against a plaintiff without allowing him the usual common[]law shields of good faith and probable cause." Interlocutory Injunctions and the Injunction Bond, supra, at 343-44. This appears to remain the general rule today in every jurisdiction that has addressed the question. See generally, Annotation, Liability Apart From Bond and in Absence of Elements of Malicious Prosecution for Wrongfully Suing out Injunction, 45 A.L.R. 1517 (Originally published in 1926) (collecting cases on the subject and observing that "[i]n the absence of the elements of an action for malicious prosecution, it is established by the great weight of authority that no action will lie by the defendant in an injunction suit, independently of bond or undertaking, for damages for the wrongful suing out of the injunction").

The Commission Cannot Recover Damages in the Absence of an Injunction Bond

{15} The Commission cannot point to, and we cannot find, a New Mexico case permitting a wrongfully enjoined defendant to recover damages despite the lack of an injunction bond. While no New Mexico court has had the opportunity to decide this issue, our Court has previously appeared to acknowledge the common law rule that a wrongfully enjoined defendant cannot recover damages in the absence of a bond. In Insure N.M., LLC v. McGonigle, 2000-NMCA-018, 128 N.M. 611, 995 P.2d 1053, the district court granted the plaintiff a TRO and preliminary injunction prohibiting the defendant from soliciting specific customers of the plaintiff. Id. ¶ 5. After a final hearing on the merits of the case, the district court dissolved the preliminary injunction and denied the plaintiff's request for a permanent injunction. Id. The defendant cross-appealed the district court's grant of the preliminary injunction. Id. ¶¶ 1, 26. On appeal, we determined that the defendant's cross appeal was moot because the district court properly dissolved the preliminary injunction and denied the permanent injunction. Id. ¶ 26. Additionally, while it is unclear from the opinion, it appeared that the district court did not require the plaintiff to post an injunction bond because the defendant requested that we "remind the [district] court that temporary injunctions where there is a potential for damages if the injunction is wrongful normally should require a bond to protect the parties that may be harmed by the improper injunction." Id. ¶ 27 (internal quotation marks omitted). Although we declined the defendant's request in the absence of a justiciable issue, we noted the defendant's acknowledgment of a "lack of a remedy." Id.

{16} We make clear today what we appeared to accept as truth in McGonigle: a wrongfully enjoined defendant may only recover damages if the plaintiff was required to post an injunction bond. If the district court did not require the plaintiff to provide a bond, the defendant's only alternative is to bring an action for malicious abuse of process. The common law provides no other avenue for redress.

{17} The Commission argues that the lack of a bond is not determinative and relies on Monroe Divison, Litton Business Systems, Inc. v. De Bari, 562 F.2d 30 (10th Cir. 1977), for the proposition that the district court's failure to require an injunction bond does not prevent a defendant from recovering damages. In that case, the federal district court issued a preliminary injunction barring the defendant from competing with the plaintiff, a division of a conglomerate of companies. Id. at 31. When the defendant moved for the posting of security, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the federal counterpart to Rule 1-066, the plaintiff argued that it did not need to provide security because it was "a corporation which ha[d] sufficient assets to assure its ability to pay damages." De Bari, 562 F.2d at 31. The district court denied the defendant's motion to post bond. Id. at 31. After a trial on the merits, the district court found that that the injunction was overly broad. Id. at 32. The defendant then moved to "enforce liability on the wrongful preliminary injunction," which the district court denied. Id. On appeal, the plaintiff argued, "[A]bsent a security bond, there

is no liability for damages or restitution because of a wrongful injunction unless the circumstances give rise to a claim for malicious prosecution." Id. The Tenth Circuit disagreed. The court acknowledged Tenth Circuit precedent in which it held that "the security requirement of Rule 65 gave the trial judge a discretion to dispense with a security bond when the applicant for the injunction had 'considerable assets' and was 'able to respond in damages.' " De Bari, 562 F.2d at 32 (citing Cont'l Oil Co. v. Frontier Ref. Co., 338 F.2d 780, 782-83 (10th Cir. 1964)). However, the court stated, "Rule 65 mandates security for the protection of the person enjoined. That protection is not eliminated when the court relies on the financial strength of the party seeking the injunction in place of the security of a bond." De Bari, 562 F.2d at 32 (citation omitted). Consequently, the appeals court held that, even though the district court failed to comply with the security requirement of Rule 65, "[t]he [district] court's violation of this rule does not destroy the defendant's right to recover for a wrongful preliminary injunction." De Bari, 562 F.2d at 32.

{18} The Commission's reliance on De Bari is misplaced. First, Tenth Circuit decisions are not binding on our Court. See Moongate Water Co. v. Doña Ana Mut. Domestic Water Consumers Ass'n, 2008-NMCA-143, ¶ 20, 145 N.M. 140, 194 P.3d 755 (stating that "we are not bound by the analyses or conclusions" of federal cases). Second, the facts of De Bari are distinguishable. Unlike De Bari, Plaintiff did not argue that he should not have to post a bond because he had substantial assets to assure his ability to cover the Commission's potential damages. See De Bari, 562 F.2d at 31. To the contrary, when asked if he could afford to post security, Plaintiff stated that the most he could provide for a cash bond was $500. Thus, this is not a case where the plaintiff sought to avoid liability under a bond by capitalizing on his financial strength. Furthermore, we question the vitality of De Bari's holding. While De Bari has yet to be overruled, the United States Supreme Court has since stated in absolute terms, albeit in dicta, that "[a] party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 770 n.14 (1983) (emphasis added); see Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 597, n.2 (1984) (stating that "the city would have no claim for reimbursement against respondents for securing an allegedly erroneous injunction [because no bond was posted for the preliminary injunction]"); see also Continuum Co. v. Incepts, Inc., 873 F.2d 801, 803 (5th Cir. 1989) (citing De Bari and noting that "[c]ourts that have waived the bond requirement have apparently assumed that, should the plaintiff later lose on the merits, the defendant may recover the damages inflicted by the injunction. That assumption was rendered doubtful, however, by the Supreme Court's declaration in W.R. Grace & Co."); James T. Carney, Rule 65 & Judicial Abuse of Power: A Modest Proposal for Reform, 19 Am. J. Trial Advoc. 87, 116 (1995) (discussing De Bari and noting that "if the Supreme Court's dicta in W.R. Grace & Co.[] is correct, then no recovery may be had for the issuance of wrongful injunction if no bond is posted"). Therefore, we decline to rely on De Bari.

{19} The Commission also cites cases from other jurisdictions recognizing exceptions to the general rule allowing courts to award damages when the plaintiff did not post an injunction bond. See, e.g., Cagan v. Mut. Benefit Life Ins. Co., 28 F.3d 654, 656 (7th Cir. 1994) (stating that "in all but exceptional cases the lack of an injunction bond means the unavailability of damages for wrongful injunction"). However, the Commission fails to argue how one of these exceptions applies to the present case. Therefore, we decline to address whether our courts should recognize any such exceptions to the general rule we recognize today.

{20} Because we conclude that the district court cannot grant damages for a wrongful injunction in the absence of an injunction bond, the district court had no authority to grant the Commission damages in the form of attorney fees. Hence, the district court abused its discretion. As the Commission has no remedy apart from an independent action for malicious abuse of process, we need not determine whether the injunction was wrongful or whether assessing attorney fees against Plaintiff would contravene the public policy of the OMA. See McGonigle, 2000-NMCA-018, ¶¶ 26-27 (refusing to issue an advisory opinion where the defendant's claim was moot).

CONCLUSION

{21} In sum, we hold that a district court cannot grant damages for a wrongful injunction in the absence of an injunction bond. In such cases, the wrongfully enjoined defendants' only remedy is to pursue an independent action for malicious abuse of process. Accordingly, we reverse the district court's order granting attorney fees to the Commission.

{22} IT IS SO ORDERED.
LINDA M. VANZI, Judge

WE CONCUR:
JACQUELINE R. MEDINA, Judge
BRIANA H. ZAMORA, Judge

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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, Litigation and Open Government 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.

Assistant City Attorney

The City of Albuquerque Legal Department is hiring an Assistant City Attorney position in the Property and Finance division of the City Attorney's Office. The position will administer the traffic arraignment program, approximately 20 hours per week, and assist in areas of real estate and land use, governmental affairs, regulatory law, procurement, general commercial transaction issues, and civil litigation. The department's team of attorneys provide legal advice and guidance to City departments and boards, as well as represent the City and City Council on complex matters before administrative tribunals and in New Mexico State and Federal courts. Attention to detail and strong writing skills are essential. Applicant must be an active member of the State Bar of New Mexico in good standing or able to attain bar membership within three months of hire. Salary will be based upon experience. Please submit a cover letter, resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or amaragon@cabq.gov.

Deputy Director of Policy

The City Attorney's Office seeks an individual 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 .

Senior Trial Attorney

The Office of the Second Judicial District Attorney improves the quality of life of the citizens of Bernalillo County by reducing crime through thoughtful enforcement of the law and the development of a criminal justice system. The Office is an Equal Employment Opportunity Employer and is seeking applicants for a Senior Trial Attorney position. Pursuant to the New Mexico District Attorney's Compensation Plan, the position of attorney is "At Will" and serves at the pleasure of the District Attorney.Please submit all resumes to https://berncoda.com/careers/ * Knowledge, Skills, and Abilities: This position requires comprehensive and current knowledge and skills in the areas of criminal prosecution, rules of evidence and rules of criminal procedure; public relations; organization and supervision; basic computer skills including working knowledge of office systems; fully effective trial skills; ability to draft legal documents; ability to work effectively with other criminal agencies; ability to communicate effectively; ability to research/analyze information and situations. Works independently with minimal consultation with supervisors (except for higher profile or complex cases). Significant prosecutorial discretion on cases within assigned case load. * Requirements: Licensed attorney to practice law in good standing either in New Mexico or another state with a New Mexico limited license, plus a minimum of four (4) years as a practicing attorney in criminal law or three (3) years as a prosecuting attorney. * Preferred Qualifications: Five (5) to seven (7) years or more of relevant prosecution experience. * Working Conditions: Work is performed in office, courtroom and community environments. Some physical effort and travel may be required. Incumbent may be required to work under stressful situations and/or conditions. Salary is commensurate with experience. Resume, writing sample and three professional references must be received at the Office of the Second Judicial District Attorney. This advertisement will remain open until filled. Applicants selected for an interview must notify the Office of the Second Judicial District Attorney of the need for a reasonable accommodation due to a Disability. Please submit all resumes to https://berncoda.com/careers/

Senior Trial Attorney
1st Judicial District Attorney

The First Judicial District Attorney's Office is seeking an experienced attorney for crimes against children, sexual assault, domestic violence and violent crime in the Santa Fe Office. Salary is based on experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to: "DA Employment," PO Box 2041, Santa Fe, NM 87504, or via e-mail to 1stDA@da.state.nm.us.

Assistant City Attorney

The City of Albuquerque Legal Department is hiring an Assistant City Attorney to provide legal services to the City's Department of Municipal Development ("DMD"). The primary area of focus is public works construction law. The work includes, but is not limited to: contract drafting, analysis, and negotiations; regulatory law; procurement; general commercial transaction issues; intergovernmental agreements; dispute resolution; and civil litigation. Attention to detail and strong writing skills are essential. Five (5)+ years' experience is preferred and must be an active member of the State Bar of New Mexico, in good standing. Please submit resume and writing sample to attention of "Legal Department DMD Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or amaragon@cabq.gov.

Litigation Attorney

With 52 offices and over 1,500 attorneys, Lewis Brisbois is one of the largest and most prestigious law firms in the nation. Our Albuquerque office is seeking associates with a minimum of three years litigation defense experience. Candidates must have credentials from ABA approved law school, actively licensed by the New Mexico state bar, and have excellent writing skills. Duties include but are not limited to independently managing a litigation caseload from beginning to end, communicating with clients and providing timely reporting, appearing at depositions and various court appearances and working closely with other attorneys and Partners on matters. Please submit your resume along with a cover letter and two writing samples to phxrecruiter@lewisbrisbois.com and indicate "New Mexico Litigation Attorney Position". All resumes will remain confidential.

Full-Time Associate Attorney in Santa Fe Office

Cuddy & McCarthy, LLP, a 23 attorney law firm with offices in Santa Fe and Albuquerque, New Mexico, has an immediate opening in our Santa Fe office for a full-time Associate Attorney. This is a great opportunity to work in the firm's general civil practice, handling a caseload pertaining to litigation, insurance defense, real estate, labor & employment matters, family law and as well as other areas of law. Candidates have 3-4 years of relevant attorney experience. Our ideal candidate will be responsible, organized, a team player, possess strong people skills, as well as excellent time management skills. Strong research, writing, and oral communication skills are required. Candidates must be committed to serving the diverse needs of our clients. Salary based upon qualifications and experience. Please send cover letter, resume, law school transcript and a writing sample to: ejaramillo@cuddymccarthy.com. All replies will be kept confidential.

Trial Attorney

The Office of the Second Judicial District Attorney improves the quality of life of the citizens of Bernalillo County by reducing crime through thoughtful enforcement of the law and the development of a criminal justice system. The Office is an Equal Employment Opportunity Employer and is seeking applicants for Trial Attorney positions. Pursuant to the New Mexico District Attorney's Compensation Plan, the position of attorney is "At Will" and serves at the pleasure of the District Attorney. Please submit all resumes to https://berncoda.com/careers/ * Knowledge, Skills, and Abilities: Position requires advanced knowledge and skills in the areas of criminal prosecution; rules of evidence and rules of criminal procedure; public relations; organization; basic computer skills including working knowledge of office systems; effective trial skills; ability to research and draft legal documents; work effectively with other criminal justice agencies; mentor and guide less experienced attorneys; communicate effectively; analyze information and situations. Works independently, makes decisions within guidelines and is responsible for case screening and initiation, approving/disapproving charges, case preparation, in-court activities and post-case activity including closing. * Requirements: Licensed attorney in New Mexico or another State with a New Mexico limited license, plus a minimum of two (2) years as a practicing attorney, or one (1) year as a prosecuting attorney. * Preferred Qualifications: Five (5) to seven (7) years or more of relevant prosecution experience. * Working Conditions: Work is performed in office, courtroom, and community environments. Physical effort and travel may be required. Incumbent may be required to work under stressful situations and/or conditions. Salary is commensurate with experience. Resume, writing sample and three professional references must be received at the Office of the Second Judicial District Attorney. This advertisement will remain open until filled. Applicants selected for an interview must notify the Office of the Second Judicial District Attorney of the need for a reasonable accommodation due to a Disability. Please submit all resumes to https://berncoda.com/careers/

Trial Attorneys

The Ninth Judicial District Attorney's Office is seeking entry level and experienced trial attorneys for our Clovis office. We offer immediate trial experience, in depth mentoring and an excellent work environment. Salary commensurate with experience starting at $65,000. Send resume, references and writing sample to Steve North, snorth@da.state.nm.us.

Assistant District Attorney

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

Assistant Trial Attorney

The Office of the Second Judicial District Attorney improves the quality of life of the citizens of Bernalillo County by reducing crime through thoughtful enforcement of the law and the development of a criminal justice system. The Office is an Equal Employment Opportunity Employer and is seeking applicants for Assistant Trial Attorney positions. Pursuant to the New Mexico District Attorney's Compensation Plan, the position of attorney is "At Will" and serves at the pleasure of the District Attorney.Please submit all resumes to https://berncoda.com/careers/ * Knowledge, Skills, and Abilities: This position requires basic knowledge and skills in the areas of criminal prosecution; rules of evidence and rules of criminal procedure; public relations; organization; basic computer skills; effective trial skills; research and drafting legal documents; ability to work effectively with other criminal justice agencies; mentor and guide less experienced attorneys; communicate effectively; analyze information and situations. This position works independently and makes decisions within guidelines which include decisions to dismiss, proceed to trial or negotiate plea agreements. Successful candidate seeks guidance from assigned supervisor and/or higher level attorneys. * Requirements: J.D degree and a current license to practice law in New Mexico or another State with a New Mexico limited license. * Preferred Qualifications: Legal experience totaling up to at least one (1) year. * Working Conditions: Work is performed in office, courtroom, and community environments. Physical effort and travel may be required. Incumbent may be required to work under stressful situations and/or conditions. Salary is commensurate with experience. Resume, writing sample and three professional references must be received at the Office of the Second Judicial District Attorney. This advertisement will remain open until filled. Applicants selected for an interview must notify the Office of the Second Judicial District Attorney of the need for a reasonable accommodation due to a Disability. Please submit all resumes to https://berncoda.com/careers/

Request for Proposals 20-440-1000-00021

Purpose: To seek legal counsel and advice to and representation of the Office of Superintendent of Insurance with regard to proceedings for release , through means other than ancillary receivership or other delinquency proceedings, of general and/or special deposits of insurers being held pursuant to Chapter 59A, Articles 5 and 10 NMSA 1978. To provide legal counsel, advice and representation of the Receiver with regard to receivership or delinquency proceedings of insurers and other private entities which are conducted under Chapter 59A, Article 41, NMSA 1978. www.osi.com or contact Dcrothy.Mendonca@state.nm.us

City of Santa Fe Seeks Outside Real Estate Counsel

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

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

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 are 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."

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/MSC2020.pdf or nmbar.org/CareerCenter.

New Mexico Public Education Department – Attorney Positions

The New Mexico Public Education Department (NMPED) is seeking attorneys for its Office of General Counsel. Strong writing and interpersonal skills are essential. More details about positions and how to apply are provided on the State Personnel Office website at http://www.spo.state.nm.us/. Please check the website periodically for updates to the list of available positions.

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.

Services

Briefs, Research, Appeals

Leave the writing to me— Experienced, effective, reasonable. cindi.pearlman@gmail.com (505) 281 6797

Office Space

Prime Downtown Location at Plaza500 –

Professional office suite available on the 5th floor of the prestigious Albuquerque Plaza Building. This Class A office space provides fully furnished offices with IT, dedicated phone line, mail services and full-time receptionist. Parking access and flexible lease terms available. Tenants also receive monthly access to the Hyatt Regency Albuquerque fitness center to include the rooftop pool, 201 Third Street NW. Please contact Leasing Manager, Cindy Campos at 505-270-4168.

Miscellaneous

Want To Purchase

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

Sell Mineral Rights

Has your client received an offer for mineral rights? We exclusively broker sales for mineral owners. We can help get the highest offer. dave@maxroyalty.com. 385.261.2549.

Staying Healthy and Calm During Stressful Times

Learning how to remain calm in times of stress will not only have immediate soothing effects; it can also, over time, help you lead a healthier, happier life.

FOCUS ON WHAT IS IN YOUR CONTROL. Follow **everyday preventive actions** to keep you and your family healthy. Keep informed, but avoid excessive exposure to mass media and social media.

MAINTAIN CONSISTENCY AMIDST CHANGE. If you are working an adjusted schedule or teleworking, continue to maintain a regular sleep cycle. Adapt your exercise routine at home if you're not attending your regular fitness class or going to the gym.

REMAIN IN THE PRESENT. If you find yourself worrying about something that hasn't happened – and may never happen – tune into the sights, sounds, tastes and other sensory experiences in your immediate moment. Log into **MyStressTools**, your free online resilience-building resource, which includes Relaxation Music, Guided Meditations and mindfulness tools.

STAY CONNECTED. Talk to family and trusted friends about what you are feeling. While heeding social distancing warnings, be careful not to completely isolate.

GET SUPPORT. If you or any family member is feeling particularly anxious or could benefit from an objective ear, reach out to your EAP for added professional assistance.

Call anytime 24/7 at 866-254-3555 to schedule an appointment or video visit.

If you've been seeing an EAP counselor and are restricting your travel and social interactions, consider transitioning to video or telephonic sessions.

Call your affiliate provider directly or call 866-254-3555.

For more information, visit *www.solutionsbiz.com*

The Solutions Group