

# BAR BULLETIN

June 10, 2020 • Volume 59, No. 11



*Winter Comes*, by Wendy Wilkerson (see page 3)

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## Live Replay Webcasts

### 2020 Health Law Legislative Update

Wednesday, June 10 • 9–11:40 a.m.

**2.6 G**

\$122.50 Replay Fee

### 2019 Real Property Institute

Thursday, June 18 • 9 a.m.–4 p.m.

**5.2 G 1.0 EP**

\$258 Replay Fee

### Indian Law: The Multidisciplinary Practice

Thursday, June 25 • 9 a.m.–3:45 p.m.

**5.0 G 1.0 EP**

\$258 Replay Fee

### Primers, Updates and Practical Health Law Environment (2019)

Thursday, July 16 • 9 a.m.–4:45 p.m.

**5.5 G 1.2 EP**

\$280 Replay Fee

### Animal Law Institute: The Law and Ethics of Wild Animals in Captivity

Thursday, July 23 • 9 a.m.–3:30 p.m.

**5.3 G 1.0 EP**

\$258 Replay Fee

### Reefer Madness Part Deux: Chronic Issues in New Mexico Cannabis Law (2019)

Friday, July 31 • 9 a.m.–3 p.m.

**4.4 G 1.0 EP**

\$236.50 Replay Fee

## Upcoming Webinars

### Stuck in Neutral: Ethical Concerns for the Attorney as Arbitrator or Mediator

Thursday, July 23 • Noon–1:30 p.m.

**1.5 EP**

\$49.50 ADR Committee Members

\$73.50 Standard Fee

### A Lawyer's Guide to Office 365, Presented by Paul Unger

Wednesday, July 15 • 11:30 a.m.–12:30 p.m.

**1.0 G**

\$49 Standard Fee

## Upcoming Teleseminars

### Selection and Preparation of Expert Witnesses in Litigation

Wednesday, July 8 • 11 a.m.–Noon

**1.0 G**

\$79 Standard Fee

### Drafting Employment Agreements, Part 2

Friday, July 10 • 11 a.m.–Noon

**1.0 G**

\$79 Standard Fee

### Lawyer Ethics and Disputes with Clients

Tuesday, July 28 • 11 a.m.–Noon

**1.0 EP**

\$79 Standard Fee

### Drafting Employment Agreements, Part 1

Thursday, July 9 • 11 a.m. – Noon

**1.0 G**

\$79 Standard Fee

### 2020 Family and Medical Leave Update

Friday, July 17 • 11 a.m. – Noon

**1.0 G**

\$79 Standard Fee



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## Meetings

### June

- 10**  
**Business Law Section Board**  
4 p.m., teleconference
- 10**  
**Children's Law Section Board**  
Noon, teleconference
- 10**  
**Tax Section Board**  
9 a.m., teleconference
- 12**  
**Prosecutors Section Board**  
Noon, teleconference
- 16**  
**Solo and Small Firm Section Board**  
10:30 a.m., teleconference
- 18**  
**Public Law Section Board**  
Noon, teleconference
- 19**  
**Family Law Section Board**  
9 a.m., teleconference

## Workshops and Legal Clinics

### June

- 24**  
**Consumer Debt/Bankruptcy Workshop**  
6-8 p.m., Video Conference  
For more details and to register, call  
505-797-6094

### July

- 15**  
**Divorce Options Workshop**  
6-7 p.m., Video Conference  
For more details and to register, call  
505-797-6022

- 22**  
**Consumer Debt/Bankruptcy Workshop**  
6-8 p.m., Video Conference  
For more details and to register, call  
505-797-6094

### August

- 5**  
**Divorce Options Workshop**  
6-7 p.m., Video Conference  
For more details and to register, call  
505-797-6022

- 26**  
**Consumer Debt/Bankruptcy Workshop**  
6-8 p.m., Video Conference  
For more details and to register, call  
505-797-6094

**About Cover Image and Artist:** Wendy Wilkerson paints with gouache on paper, or with soft pastel on paper. Wilkerson takes her own reference photos from the local area, and highlights the natural light and emotion within the images.



# 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](mailto:libref@nmcourts.gov) or visit <https://lawlibrary.nmcourts.gov>.

### Judicial Nominating Commission

#### COVID-19 Meeting Announcement

In light of the pandemic and in an effort to protect the health and safety of everybody involved, Dean Sergio Pareja, chair of the Judicial Nominating Commission, has decided that the upcoming judicial nominating commission meetings will occur exclusively by Zoom (videoconferencing platform). Members of the public will be able to ask questions and make comments through Zoom during the "public participation" portion of the hearing. Although there has never been a New Mexico Judicial Nominating Commission hearing via Zoom before, Dean Pareja believes that it is the best way to proceed under the circumstances. It will protect the health and safety of everybody involved and is likely to result in broader public participation than if the hearing were to be held in person. Commissioners, applicants, and members of the public will all use the same link to join the meeting. If you would like the Zoom invitation emailed to you, please contact Beverly Akin by email at [akin@law.unm.edu](mailto:akin@law.unm.edu) or refer to the individual announcements or visit [lawschool.unm.edu/judsel/index.html](https://lawschool.unm.edu/judsel/index.html).

### New Mexico Court of Appeals Applicant Announcement

Eleven applications were received in the Judicial Selection Office, for the judicial vacancy in the New Mexico Court

## Professionalism Tip

**With respect to the courts and other tribunals:**

I will refrain from filing frivolous motions.

of Appeals, due to the retirement of the Honorable Judge Linda M. Vanzi effective May 29. The names of the applicants in alphabetical order: **Aletheia V.P. Allen, Angelica Anaya Allen, Gerald Edward Baca, Lisa Chai, Lauren Keefe, Marcos D. Martinez, Nicholas Hagen Mattison, James J. Owens, Karl Matthew Rysted, Mark Daniel Standridge and Jane Bloom Yohalem.** The New Mexico Court of Appeals Nominating Commission is scheduled to begin at 9 a.m. on June 29, and will occur exclusively by Zoom. The commission meeting is open to the public and members of the public will be able to ask questions and make comments through Zoom during the "public participation" portion of the hearing. Join Zoom Meeting: <https://unm.zoom.us/j/97810986796>. Meeting ID: 978 1098 6796. Password: 707616

### Third Judicial District Court Applicant Announcement

Nine applications were received in the Judicial Selection Office, for the Judicial Vacancy in the Third Judicial District Court due to the creation of an additional Judgeship by the Legislature. The names of the applicants in alphabetical order: **Heather Chavez, Mark D'Antonio, Casey Fitch, Richard Jacquez, Isabel Jerabek, Robert Lara Jr., Jeanne H. Quintero, G. Alexander Rossario and Stephanie Marie Zorie.** The Third Judicial District Court's Nominating Commission is scheduled to begin at 9 a.m. (MT) on June 10 and will occur exclusively by Zoom. The Commission meeting is open to the public and will be able to ask questions and make comments through Zoom during the "public participation" portion of the hearing. Join Zoom Meeting: <https://unm.zoom.us/j/99992961248>. Meeting ID: 999 9296 1248. Password: 707616

### Twelfth Judicial District Court Applicant Announcement

Four applications were received in the Judicial Selection Office, for the Judicial Vacancy in the Twelfth Judicial District Court due to the creation of an additional

Judgeship by the Legislature. The names of the applicants are: **David Louis Ceballes, II, Albert Richard Greene, III, Ellen Rattigan Jessen and Pilar L. Tirado Murray.** The Twelfth Judicial District Court's Nominating Commission is scheduled to begin at 9 a.m. on June 11, and will occur exclusively by Zoom. The commission meeting is open to the public and will be able to ask questions and make comments through Zoom during the "public participation" portion of the hearing. Join Zoom Meeting: <https://unm.zoom.us/j/95498591747>. Meeting ID: 954 9859 1747. Password: 707616

### Bernalillo County Metropolitan Court New Landlord-Tenant Settlement Program

A mediation program specifically for people involved in landlord-tenant disputes was launched earlier this month. The Landlord-Tenant Settlement Program will give landlords and tenants the opportunity to work out business agreements beneficial to both sides. To be eligible, participants must have an active landlord-tenant case in the Metropolitan Court. The service is free, and parties in a case will work with a volunteer settlement facilitator specially trained in housing matters. Many of the facilitators are retired judges and experienced attorneys who will provide services pro bono. Those interested in participating in the Landlord-Tenant Settlement Program or serving as a volunteer settlement facilitator are asked to contact the court's Mediation Division at: 505-841-8167.

## STATE BAR NEWS

### COVID-19 Pandemic 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](https://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](mailto:rspinello@nmbar.org).

## Board of Editors

### Seeking Applications for Open Positions

The Board of Editors of the State Bar of New Mexico has open positions. Both lawyer and non-lawyer positions are open. The Board of Editors meets at least four times a year (in person and by teleconference), reviewing articles submitted to the Bar Bulletin and the quarterly New Mexico Lawyer. This volunteer board reviews submissions for suitability, edits for legal content and works with authors as needed to develop topics or address other concerns. The Board's primary responsibility is for the New Mexico Lawyer, which is generally written by members of a State Bar committee, section or division about a specific area of the law. The State Bar president, with the approval of the Board of Bar Commissioners, appoints members of the Board of Editors, often on the recommendation of the current Board. Those interested in being considered for a two-year term should send a letter of interest and résumé to Evann Laird at [elaidd@nmbar.org](mailto:elaidd@nmbar.org). Apply by June 30.

## Board of Bar Commissioners Client Protection Fund Commission

The Client Protection Fund Commission is a statewide body whose purpose is to promote public confidence in the administration of justice and the integrity of the legal profession by investigating complaints and reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in the courts of New Mexico. The Board of Bar Commissioners will make one appointment to the Client Protection Fund Commission for the remainder of an unexpired term through Dec. 31, 2021. Active status attorneys in New Mexico who would like to serve on the Commission should send a letter of interest and brief resume by June 10 to Kris Becker at [kbecker@nmbar.org](mailto: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!*

### Monday Night Support Group

- June 8
- June 15
- June 22

This group will be meeting every Monday night via Zoom. 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. Email Pam at [pmoore@nmbar.org](mailto:pmoore@nmbar.org) or Briggs Cheney at [BCheney@DSC-LAW.com](mailto:BCheney@DSC-LAW.com) and you will receive an email back with the Zoom link.

## 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.

— *Featured* —

## Member Benefit

**ruby**

Ruby's friendly, U.S.-based virtual receptionists answer your incoming phone calls, 24 hours a day, just as if they were in your office! Incoming calls go straight to Ruby receptionists who answer with a greeting of your choice. They then connect directly to you (phone, message, voicemail, and more) and keep you up to date on your messages. State Bar members receive an 8% lifetime discount on all plans!

**Call 855-965-4500 or visit**  
**[www.ruby.com/campaign/nmbar/](http://www.ruby.com/campaign/nmbar/)**

Saturday	10 a.m.–6 p.m.
Sunday	Closed.
Reference	
Monday–Friday	9 a.m.–6 p.m.

## OTHER BARS Albuquerque Bar Association's

### 2020 Membership Luncheons

- July 7: Judge Shannon Bacon (1.0 G)
- Sept. 15: Douglas Brown presenting on a small/family business update (1.0 G)
- Oct. 13: Gretchen Walther presenting on hot topics in domestic relations law (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](mailto:dchavez@vancechavez.com) or 505-842-6626. Checks may be mailed to PO Box 40, Albuquerque, NM 87103.

### Albuquerque Lawyer's Club Free CLE Via Webinar

Please join the Albuquerque Lawyers Club and the New Mexico Women's Bar Association for a free CLE via webinar on June 18 from noon-1:30 p.m. Attorneys Stephen Stanwood, Aiden Durham and Stacey Kalamaras comprise the panel. Faculty all have innovative practices around the country. They will discuss lessons learned in striking out on their own. The content will include practical tips in employing social media and tactics for

managing your time in both practicing law and marketing. All are welcome. This is a free CLE opportunity, jointly underwritten as a service to the legal community by NMWBA and Albuquerque Lawyers Club. Please RSVP to [nmwba1990@gmail.com](mailto:nmwba1990@gmail.com).

### OTHER NEWS Texas Tech University School of Law New Degree – Master of Science in Energy

Texas Tech University is launching a new degree this fall. The Master of Science in Interdisciplinary Studies (MSIS) in Energy, with courses offered by instructors from the Petroleum Engineering

Department, the National Wind Institute, the Energy Commerce Department in the Rawls College of Business, and the School of Law. It is designed primarily for working professionals but is open to all. The courses will be offered online, with only one or two in-person weekend visits to the Texas Tech campus during each semester. The degree can be earned in one year. Each semester unit (consisting of three courses) will cost \$14,000 for a total degree cost of \$42,000. The first cohort begins this Fall, and applications are being accepted now. A brochure for the degree program is attached for your review and information. You can also find out more information by visiting the website at [www.depts.ttu.edu/gradschool/Programs/energy/](http://www.depts.ttu.edu/gradschool/Programs/energy/).

**Feeling overwhelmed about the coronavirus? We can help!**  
FREE SERVICE FOR MEMBERS!

## Employee Assistance Program

*Get help and support for yourself, your family and your employees.*

**FREE** service offered by NMJLAP.



**The  
Solutions  
Group**

Services include up to four **FREE** counseling sessions/issue/year for ANY mental health, addiction, relationship conflict, anxiety and/or depression issue. Counseling sessions are with a professionally licensed therapist. Other **FREE** services include management consultation, stress management education, critical incident stress debriefing, video counseling, and 24X7 call center. Providers are located throughout the state.

To access this service call 855-231-7737 and identify with NMJLAP. All calls are **CONFIDENTIAL**.  
Brought to you by the New Mexico Judges and Lawyers Assistance Program  
[www.nmbar.org/JLAP](http://www.nmbar.org/JLAP)



# A MESSAGE FROM YOUR State Bar President



Dear Members of the State Bar of New Mexico:

As we enter the “new normal” brought upon us by the COVID-19 pandemic, I hope you and your loved ones are staying safe and healthy. Though we are all dealing with changes in our daily lives and professional existence, I want you to know that the State Bar of New Mexico continues to be engaged with our members, the judiciary and the public. With that said, I would like to provide you with an update regarding State Bar operations.

## **Bar Center and Events**

Since mid-March, the Bar Center has been closed and all staff have been working remotely. With the exception of some initial event cancellations, most of the State Bar’s programs and services are still operating at full capacity. Staff and the Board of Bar Commissioners are currently working on a plan to reopen the Bar Center recognizing the limitations which will come with the evolving public health orders. In addition, in order to better engage members throughout the state and beyond, we have decided to incorporate virtual options for all events in the near future. Please refer to your email or visit [www.nmbar.org/covid-19](http://www.nmbar.org/covid-19) for up to date information.

## **Free On Demand CLE Opportunities**

Weeks ago, we were excited to announce that all of the State Bar’s On-Demand Self Study CLE courses are currently available free of charge. There has been a significant increase in the number of attorneys taking advantage of this benefit. The State Bar has also made all of its CLE courses planned for this year available remotely. Search live webinars, webcasts, replays, teleseminars, and self-study courses online at [www.nmbar.org/cle](http://www.nmbar.org/cle).

## **MCLE Requirements**

As a reminder, New Mexico has a flexible policy regarding distance learning in order to meet the MCLE credit requirement. It is possible for an attorney licensed in New Mexico to meet his/her full MCLE requirements entirely through on-line courses. Twelve hours of CLE credits are required annually; eight of those hours must be “live” while up to four hours may be in “self-study” format.

In order to avail yourself of the online “live” credit option, the course must take place at a scheduled time with the ability to interact with a moderator in real-time. You do not need to be physically present for the CLE. By contrast, a self-study course is one which is pre-recorded, up to 5 years prior, and can be watched on-demand (at any hour, on any day). If you have questions regarding New Mexico’s MCLE requirements, please feel free to contact [mcle@nmbar.org](mailto:mcle@nmbar.org). The State Bar wants to ensure that, in these difficult times, you find satisfying the MCLE requirements is not burdensome. As such, please take advantage of the State Bar’s CLE programming, to include the Free On Demand options.

## **Annual Meeting Updates**

Earlier this spring, we made the necessary decision to cancel the 2020 Annual Meeting which was to be held in Santa Fe in conjunction with the state court’s Judicial Conclave. We are currently planning an event this fall which will serve as a “Member Appreciation” event and day long Annual Meeting. Please save the date for Friday, Sept. 25. This event will include free live (online based) continuing legal education, resources from sponsors and exhibitors, and awards recognition. We are busy finalizing the details and will provide additional information in the near future.

### Judicial Nominating Commissions

The months of April and May were filled with activity in organizing Judicial Nominating Commissions with the judiciary in connection with vacancies on the New Mexico Court of Appeals and 1st, 2nd, 3rd, and 12th Judicial Districts. For the first time, commission meetings will be taking place virtually. If you want to observe, please visit the University of New Mexico School of Law website and select the “Judicial Vacancies” tab at the bottom of the home page for more information.

### Wellness and Mental Health Resources

In light of the stressors associated with COVID-19, wellness and mental health are now more important than ever. Several years ago, the State Bar was able to implement a free Employee Assistance Program to assist members and their employees. In addition to counseling (now offered virtually) and stress relief tools, the EAP has launched a webinar series. You can choose from “Managing Stress in Challenging Times”, “Together or Alone: Grieving Through Transitions”, and “Parenting Resources During COVID-19”. Visit [www.nmbar.org/covid-19](http://www.nmbar.org/covid-19) for these and more resources. As always, the State Bar’s Judges and Lawyers Assistance Program (JLAP) is available 24/7 by calling 800-860-4914.

Likewise, the State Bar continues with its launch of a standing committee on wellness, which is led by President-Elect Carla Martinez. The Wellness Committee is comprised of practitioners from throughout the state and includes members of the judiciary. We look forward to rolling out various initiatives as the committee continues to navigate the challenges which have arisen in the age of COVID-19.

### Governance

The Board of Bar Commissioners was unable to meet in April; however, the Executive Committee has been meeting regularly through remote means to ensure the State Bar continues to operate effectively and for the benefit of our members and the public. The Board of Bar Commissioners will be meeting virtually this month to conduct official business as well as to participate in strategic planning.

### Access to Justice

Finally, as you can well imagine, COVID-19 has created a dire need for legal representation of those with limited resources. The New Mexico Commission on Access to Justice (ATJ) has been working closely with the judiciary and legal service providers to be responsive to the emerging issues associated with the pandemic. Additional information can be found in this edition of the *Bar Bulletin* regarding ATJ’s efforts. The State Bar will continue to be engaged and active in this dialogue letting our members know of opportunities to be of service during this time through *pro bono* initiatives.

Again, I appreciate the opportunity to work with State Bar staff and the Board of Bar Commissioners for the benefit of the Bar community in 2020. Please feel free to contact me should you have any questions. I can be reached at [tina.cruz@cruzlaw-nm.com](mailto:tina.cruz@cruzlaw-nm.com). Be well and stay healthy!

Sincerely,



Ernestina R. Cruz  
President, State Bar of New Mexico





## New Mexico Commission on Access to Justice

### *Update on Justice For All Strategic Action Plan*

The New Mexico Commission on Access to Justice interrupted its work on implementation of its 2019 Justice For All Strategic (JFA) Action Plan to focus on the various civil legal needs created by the COVID-19 pandemic. The Commission has held biweekly meetings to gather information from Legal Service Providers about COVID-related challenges facing low and middle income New Mexicans, including evictions, foreclosures, access to medical care, unemployment, and obtaining federal stimulus payments. The Commission has made recommendations to the Supreme Court about staying evictions during the pandemic and has worked with Metro Court and the City of Albuquerque to develop a settlement facilitation program to assist landlords and tenants in stayed evictions cases. With regard to remote court hearings, the Commission has worked with legal services providers and courts to identify barriers to technology access and ways to ensure access such as identifying and making recommendations about free wifi hotspots and modifications to court procedure to ensure SRLs do not receive defaults if they are not able to connect to hearings due to technology challenges. Commission staff has also provided technical assistance to court self-help centers around the state as they transition to remote service delivery including telephone legal clinics. The Commission has also examined the need for funding to update on-line resources for persons facing legal problems.

Beginning this summer, the Commission will continue to work on implementing its Justice for All strategic plan, which was designed to ensure that all New Mexicans have effective assistance with essential civil legal needs. Many of the Commission's JFA action items are well-suited to helping low- and middle-income New Mexicans address their civil legal needs during the pandemic, including using technology to help people access courts remotely, assisting the Administrative Office of the Courts and the Supreme Court in developing a court navigator program to help self-represented litigants, and increased public awareness about civil legal services for people who need these services.



The judges of the **Bernalillo County Metropolitan Court** have re-elected Chief Judge Sandra Engel (top left) to head the state's busiest court. Judge Engel has served as chief judge since January of 2019. The Honorable Yvette K. Gonzales (top middle) will continue to serve as the presiding judge of the court's criminal division, the Honorable Frank A. Sedillo (top right) will

continue to serve as presiding judge of the court's civil division, and the Honorable Courtney B. Weaks (bottom left) will continue to serve as the presiding specialty courts judge.



The International Association of Defense Counsel has announced that **Tomas J. Garcia**, a shareholder at Modrall Sperling in Albuquerque, New Mexico, has accepted an invitation to join the IADC, the preeminent invitation-only global legal organization for attorneys who represent corporate and insurance interests. Garcia's practice includes commercial, healthcare, torts/

personal injury and transportation litigation, as well as lobbying. As a litigator, he has experience representing business professionals in corporate disputes, health care facilities, and medical professionals in negligence and regulatory matters, manufacturers and distributors in product defect cases, and commercial transportation companies in actions in state and federal court. As a lobbyist, Mr. Garcia represents businesses and nonprofit organizations on public policy issues before the New Mexico Legislature. Garcia is an elected commissioner on the State Bar of New Mexico Board of Bar Commissioners and a former chair of the state bar's Young Lawyers Division. For the New Mexico Supreme Court, he serves on the Uniform Jury Instructions-Civil Committee and previously served on the Rules of Civil Procedure Committee. In addition, he is a member of the leadership counsel for the American Bar Association Section of Litigation. Garcia has achieved an AV rating from Martindale-Hubbell based on a peer reviews and has been recognized by Southwest Super Lawyers as a Rising Star. He was named "Young Lawyer of the Year" in 2015 by the New Mexico Defense Lawyers Association. Garcia received his J.D. from Georgetown University Law Center. He also holds a Master of Public Policy from Harvard University and a Bachelor of Arts from Yale University.

**Holland & Hart** recently announced that firmwide, 80 attorneys and 36 practices were ranked in 2020 *Chambers USA*, an annual guide identifying top attorneys and law firms in the U.S. Three of the firm's Santa Fe-based attorneys and two practice areas were ranked in New Mexico. Holland & Hart LLP announced that *Chambers USA: America's Leading Lawyers for Business*, an annual guide identifying top attorneys and law firms in the U.S., ranked three Holland & Hart attorneys and two of the firm's *Chambers*-defined practice areas in New Mexico, in its 2020 edition. 2020 Individual Rankings in New Mexico: Bradford Berge: Litigation: General Commercial, Timothy Crisp: Corporate/Commercial and Michael Feldewert: Environment, Natural Resources & Regulated Industries. 2020 Firm Rankings in New Mexico: Environment, Natural Resources & Regulated Industries and Litigation: General Commercial. Firmwide, *Chambers USA* ranked 80 Holland & Hart attorneys and 36 of the firm's *Chambers*-defined practice areas, by market, reinforcing Holland & Hart's leading presence in our eight-state footprint and in Washington, D.C. The firm's Environment practice was ranked nationally for the eleventh consecutive year, and for the third year in a row, the firm is nationally recognized in International Trade: Export Controls & Economic Sanctions. More details can be found in the firmwide press release. London-based *Chambers & Partners* publishes directories that assess and rank the world's leading lawyers. *Chambers USA* rankings are the result of in-depth interviews with clients and other leading law firm lawyers as well as assessing recent matters completed. The qualities on which rankings are assessed include technical legal ability, client service, commercial vision and business understanding, diligence, value for money, and depth of team.

Seven of **Sutin, Thayer & Browne's** lawyers have been recognized as leading individuals in five *Chambers*-designated practice areas. In addition, the Firm itself was recognized in the following areas: Corporate/Commercial; Litigation: General Commercial; and Real Estate. Sutin's *Chambers*-recognized lawyers for this year are: Corporate/Commercial: Robert G. Heyman, Eduardo A. Duffy, Anne P. Browne and Jay D. Rosenblum. Labor and Employment: Barbara G. Stephenson. Litigation: General Commercial: Benjamin E. Thomas. Real Estate: Anne P. Browne. Tax: Suzanne Wood Bruckner.

Five lawyers from **Sutin, Thayer & Browne** have been selected for inclusion to the 2020 *Southwest Super Lawyers* list, a ranking of outstanding lawyers who have attained high degrees of peer recognition and professional achievement. Of the attorneys nominated this year, only 2.5% were selected as Rising Stars, with only 5% selected to join the Super Lawyers list. Southwest Super Lawyers: Barbara G. Stephenson – Employment and Labor and Benjamin E. Thomas – Employment and Labor. Southwest Rising Stars: Stefan R. Chacon – Health Care, Robert J. Johnston – Business/Corporate and Brana L. Meech – Business/Corporate.

**Modrall Sperling** has once again achieved national ranking as a firm from *Chambers USA: America's Leading Lawyers for Business* for its Native American Law practice. Additionally, three of the firm's attorneys rank individually in Nationwide Native American Law. The 2020 edition also lists 18 of the firm's shareholders as leading individuals in nine Chambers-designated practice areas in New Mexico. Modrall Sperling received top rankings as a firm in the following practice areas in New Mexico: Corporate/Commercial including Tax; Environment, Natural Resources & Regulated Industries including Water Law; Labor & Employment including Employee Benefits and Compensation; Litigation: General Commercial; Native American Law; and Real Estate. Modrall Sperling attorneys individually ranked by practice area are: Native American Law (nationwide): Lynn H. Slade, Walter E. Stern III and Deana M. Bennett. Corporate/Commercial (N.M.): Daniel M. Alsup, Peter L. Franklin, Katherine E. McKinney and Chris P. Muirhead. Corporate/Commercial: Tax (N.M.): Marjorie A. Rogers. Environment, Natural Resources & Regulated Industries (N.M.): Stuart R. Butzier, John R Cooney, Lynn H. Slade and Walter E. Stern III. Environment, Natural Resources & Regulated Industries: Water Law (N.M.): Maria O'Brien. Labor & Employment (N.M.): Jennifer G. Anderson, Megan T. Muirhead and Brian K. Nichols. Labor & Employment: Employee Benefits & Compensation (N.M.): Karen L. Kahn. Litigation: General Commercial (N.M.): Timothy C. Holm and R. E. Thompson. Native American Law (N.M.): Deana M. Bennett, Brian K. Nichols, Lynn H. Slade and Walter E. Stern III. Real Estate (N.M.): Margaret L. Meister.

**Bardacke Allison LLP** is pleased to announce Paul Bardacke and Ben Allison were again selected for inclusion in the 2020 Edition of *SuperLawyers*®, and Breanna Contreras was again listed as a Rising Star. Paul is recognized for his expertise in Dispute Resolution and Ben for his expertise in Intellectual Property. Ben is the only Super-lawyer in New Mexico in the field of intellectual property litigation, and one of only several in the Southwest region including Phoenix. Paul has been listed in every edition of *SuperLawyers*® since 2007. Ben Allison was also chosen again by the 2020 edition of IP Stars as Copyright star and Trademark star. IP Stars is published by *Managing Intellectual Property* and is a leading guide for specialists and practitioners in intellectual property worldwide. Ben has been recognized in IP Stars since 2018.

## In Memoriam

www.nmbar.org



**Jacob "Jake" Wishard** took his own life on April 27. He is survived by his father (Alan), wife (Lisa) and daughter (Josephine) and countless friends whose lives he touched.

A native of Penn's Valley, Pennsylvania, he grew up on "Sweet Annie's" herb farm in Tusseyville and later in Centre Hall. He begrudgingly attended Penn's Valley High, much preferring to ride his mountain bike and surveil the woods with the High

Mountain Rangers than to torment his educators with his intellect and bravado. He and the Ranger's left their mark in one of the most legendary graduation pranks in the school's history. An Air Force Veteran, he served "in a bunker, in a bunker" in Omaha, Nebraska during the first Gulf War. Upon his discharge he returned to Penn's Valley where he worked in conservation law enforcement and the family business. He met his future wife and asked her if she did any winter hiking. Six weeks later they moved into a one-room cabin in the woods. He attended Penn State University, where a summer class on accounting profoundly altered the course of his life, when the professor suggested Jacob should

consider going to law school. Jacob and his wife moved to New Mexico in 1999, where he attended the University of New Mexico and earned both his undergraduate and law degrees. There was never a doubt what kind of lawyer Jacob would be. A career prosecutor, he served as an ADA in the 1st, 13th, and 2nd districts of New Mexico. He ultimately joined the US Attorney's Office and served the District of New Mexico in the Las Cruces, Albuquerque and Roswell offices. He loved his job, and his country, and felt no greater honor than to say, "Jake Wishard for the United States."

Some of Jacob's greatest joy came from being bested by his daughter in philosophical debates and personal barbs. Similar in temperament and intellect, the battles were often epic and intractable. She took his breath away with her jaw-dropping insights into human nature. Like her Papa; she has a selfless nature and unwavering sense of fairness. Beyond the law, Jacob was a woodsman who loved outdoor adventures that involved getting his truck stuck, firearms and engineering deluxe campsites. He was no saint, but he was one of the most generous, brilliant, stubborn, and irritating humans on earth. He had a tremendous sense of satire, the kindest of hearts, and a constant eye towards supporting those he cared for—always putting the needs of others before himself.



**Jeanne “Gigi” E. Darricades**, 67, of Alamosa, C.O., died peacefully on April 22 after a five year courageous journey with an incurable cancer. This never deterred her from family, career, or helping others. Jeanne “Gigi” was born to Dr. Alfonso E.L. Darricades and Catherine Visart Mullin Darricades on December 29, 1952 in Chuquicamata, Chile. She spent her early childhood in Chuquicamata. Gigi attended and graduated from Bishop Strachan Boarding School in Toronto, Ontario, Canada. Gigi moved to California and attended De Anza Jr. College, then UC Berkeley where she earned her Bachelors of Arts Degree in Political Science (‘74). She obtained her Master’s Degree in Public Health (‘76) at UC Berkeley, thus following her father’s passion for community health. She began her career in rural health care in New Mexico, establishing clinics in western New Mexico. In 1978 she moved to Gallup as administrator of the McKinley General Hospital after working in Albuquerque as the Assistant Regional Administrator for the Presbyterian Hospital Center. It was there that she met the love of her life Mike Gibson. They moved to Salt Lake City, Utah, in 1981 where she joined Intermountain Health Care Inc. serving in various capacities, including Director of Medical Affairs. While in Salt Lake City she earned her Juris Doctor from the University of Utah, and subsequently was admitted to the Bar in New Mexico, Wyoming and Colorado. Mike and Gigi moved to Gillette, Wyoming, where she practiced Health Care Law. They moved to Colorado in 1997, first living in the City of Craig where Gigi practiced Health Care Law. Gigi and Mike then settled in the City of Alamosa in 2000, and Gigi continued to practice Health Care Law. She subsequently practiced Environmental Law, becoming an expert in Land Conservation Law, representing the Rio Grande Land Trust and numerous private landowners. In 2011, she was appointed president and CEO of Valley Wide Health Systems, again returning to her passion of rural health care. In this capacity she and her Management Team added clinics to the organization in San Luis, Antonito, Monte Vista and Canon City. The new Canon City Health Center was dedicated to Gigi on June 11, 2019. She served as an officer on a number of state wide Boards, including the Medicaid Provider Rate Advisory Committee, Colorado Foundation for Universal Health Care, Colorado Community Managed Health Care Network, and Colorado Community Health Network. The latter organization recognized her contributions by naming her the CHAMPS 2018 Stanley J. Brasher Legacy Award Winner, recognizing her dedication to solving problems of health, poverty, and human rights. In 2020 the organization declared March 6th. Gigi Darricades Day, stating that “She had earned the admiration and respect of her colleagues and staff for her dedication, professionalism, leadership, enthusiasm, fabulous sense of humor, and a legal mind with a big heart”. She retired from Valley Wide in 2019. In Alamosa she embraced the community by serving on several Boards including KRZA, the community radio station, the San Luis Valley Immigrant Resource Center, Adams State College, and the San Luis Valley Federal Bank. She was a supporter of nonprofits, including La Puente, the San Luis Valley Animal League and the Boys and Girls Club, the Rio Grande Headwaters Restoration Project, and the Rio Grande Land Trust. Gigi enjoyed travelling with Mike as they visited England, Africa, Cuba, and Canada. While in New Mexico she fell in love with ballooning and in Utah she obtained her commercial hot air balloon certification. She and Mike participated in numerous balloon rallies and they organized a trip to England to fly there with friends. She also loved challenges on the ground and enjoyed white water rafting. Gigi’s love for animals gave her much joy always having dogs and cats in her life. At the time of her death

her animals were close by. The cats were Coco and Pixie and the dog Lady, who she enjoyed walking along the nearby Rio Grande. In addition to her parents, Gigi is preceded in death by her sister Irene “Renee” Cox, husband of niece Stephen Sproule and great nephew Danny Sproule. She is survived by her husband of 38 years, Mike Gibson. Also surviving Gigi is her sister Constance “Tonton” (Edwin) Baumgartner of Merced, California, brother-in-law Sandy Cox of Langley, B.C. Canada, sister-in-law Miriam (Simon) Richardson of Bedford, England. Gigi will be sadly missed as she was like a second mother to all her nieces, nephews and great nieces and nephews who include: Holly (Stephen deceased) Sproule, Frances (George) Gallegos, Scott (Laura) Baumgartner, Bill (Melanie) Cox, Cathy (Vince) Lambert, Jacob, Maggie, Drew, Francisca, Brett, Samantha, Taylor, Elsie, Ashley, Curtis, Alexandra, Kiara, Wyatt, Riley, Courtney Reid, Oliver (Sarah) and Owen Richardson.

**Russell Lance Miller** was born in Kearney, Neb. From the very beginning of his life, his intelligence, humor, and originality were clear. He was a graduate of Pioneer Pleasant Vale High School in Waukomis, Okla. He graduated summa cum laude from Southwestern Oklahoma State University. He was valedictorian of his law class from Salmon Chase Law School. Lance served his nation in the U.S. military, enlisting in the army reserve at age 17. He rose through the ranks to major. He was first in his class in JAG school. He retired from the Army’s Judge Advocate General’s Corps in 2007. His last assignment to the JAG Corps was as chief of military justice for the 101st Airborne Division, and Fort Campbell. From 2007-2012, he was in private practice as a criminal defense attorney in Clarksville, Tenn. At the time of his death, he was chief deputy district attorney for the 4th Judicial District Attorney’s Office in Santa Rosa. Lance was particularly distinguished in his prosecution work. He was hard working, competitive and lived with intensity. He was overjoyed to be the father of Bruce and Clark Miller, and he was devoted to his dear wife, Fritzie Miller. Lance is also survived by his adult sons, Kory and Cary Miller, his parents, Tracey and Sandra Miller, of Angel Fire, and his sister, Laurie Newman, of Portland, Ore., two nephews Alexander Vischer and Aaron Vischer all of Portland.

# Legal Education

## June

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| <p><b>9 Text Messages &amp; Litigation: Discovery and Evidentiary Issues</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                | <p><b>19 Realizing the Promise of Individualized Sentencing In Federal and State Courts</b><br/>5.5 G, 1.0 EP<br/>Live Webinar<br/>New Mexico Criminal Defense Lawyers Association<br/><a href="http://www.nmcdla.org">www.nmcdla.org</a></p> | <p><b>25 Indian Law: The Multidisciplinary Practice (2019)</b><br/>5.0 G, 1.0 EP<br/>Live Replay Webcast<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  |
| <p><b>10 2020 Health Law Legislative Update</b><br/>2.6 G<br/>Live Replay Webcast<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                                     | <p><b>23 The Ethics of Bad Facts and Bad Law</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  | <p><b>29 Law Practice for Sale: Ethical Strategies for Sellers and Buyers</b><br/>1.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> |
| <p><b>16 Working Remotely: Ethical &amp; Practical Guidance During and After COVID-19</b><br/>1.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>24 One Simple Step, 100% Better Contract</b><br/>1.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  | <p><b>30 Ethics: Practical and Budget-Friendly Cybersecurity for Lawyers</b><br/>1.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  |
| <p><b>18 2019 Real Property Institute</b><br/>5.2 G, 1.0 EP<br/>Live Replay Webcast<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                                   |   | <p><b>30 Mindfulness Based Stress Reduction for Lawyers</b><br/>1.5 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                   |

## July

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| <p><b>8 Selection and Preparation of Expert Witnesses in Litigation</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>10 Drafting Employment Agreements, Part 2</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  | <p><b>17 2020 Family and Medical Leave Update</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  |
| <p><b>9 Drafting Employment Agreements, Part 1</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                      | <p><b>16 Primers, Updates and Practice Advice in the Current Health Law Environment (2019)</b><br/>5.5 G, 1.2 EP<br/>Live Replay Webcast<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>23 Stuck in Neutral: Ethical Concerns for the Attorney as Arbitrator or Mediator</b><br/>1.5 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> |

### Notice of Possible Event Cancellations or Changes:

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

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

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| <p><b>23</b>     <b>Animal Law Institute: The Law and Ethics of Wild Animals in Captivity (2019)</b><br/>                     5.3 G, 1.0 EP<br/>                     Live Replay Webcast<br/>                     Center for Legal Education of NMSBF<br/> <a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>30</b>     <b>Charitable Giving Planning in Trusts and Estates, Part 1</b><br/>                     1.0 G<br/>                     Teleseminar<br/>                     Center for Legal Education of NMSBF<br/> <a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>31</b>     <b>Reefer Madness Part Deux: Chronic Issues in New Mexico Cannabis Law (2019)</b><br/>                     4.4 G, 1.0 EP<br/>                     Live Replay Webcast<br/>                     Center for Legal Education of NMSBF<br/> <a href="http://www.nmbar.org">www.nmbar.org</a></p> |
| <p><b>28</b>     <b>Lawyer Ethics and Disputes with Clients</b><br/>                     1.0 EP<br/>                     Teleseminar<br/>                     Center for Legal Education of NMSBF<br/> <a href="http://www.nmbar.org">www.nmbar.org</a></p>   | <p><b>31</b>     <b>Charitable Giving Planning in Trusts and Estates, Part 2</b><br/>                     1.0 G<br/>                     Teleseminar<br/>                     Center for Legal Education of NMSBF<br/> <a href="http://www.nmbar.org">www.nmbar.org</a></p> |   |

## August

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| <p><b>7</b>     <b>“Boilplate” Provisions in Contracts: Overlooked Traps in Every Agreement</b><br/>                     1.0 G<br/>                     Teleseminar<br/>                     Center for Legal Education of NMSBF<br/> <a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>17</b>     <b>Reps and Warranties in Business Transactions</b><br/>                     1.0 G<br/>                     Teleseminar<br/>                     Center for Legal Education of NMSBF<br/> <a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>24</b>     <b>2020 Trust Litigation Update</b><br/>                     1.0 G<br/>                     Teleseminar<br/>                     Center for Legal Education of NMSBF<br/> <a href="http://www.nmbar.org">www.nmbar.org</a></p> |
| <p><b>13</b>     <b>Lawyers Ethics in Real Estate Practice</b><br/>                     1.0 EP<br/>                     Teleseminar<br/>                     Center for Legal Education of NMSBF<br/> <a href="http://www.nmbar.org">www.nmbar.org</a></p>                                 |   |   |



# Opinions

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

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

## Effective May 15, 2020

### UNPUBLISHED OPINIONS

A-1-CA-38254	State v. D Ellsworth	Affirm	05/11/2020
A-1-CA-38292	State v. D Banks	Reverse/Remand	05/11/2020
A-1-CA-38249	C Gutierrez v. M Shumate	Affirm	05/12/2020
A-1-CA-36529	State v. C Rodriguez	Affirm/Reverse/Remand	05/13/2020
A-1-CA-36609	C Rosenquist v. Genesis	Affirm	05/13/2020
A-1-CA-38007	State v. J Gastelum	Affirm	05/14/2020
A-1-CA-38177	CYFD v. Deanna C	Affirm	05/14/2020
A-1-CA-38190	State v. M Martinez	Affirm	05/14/2020
A-1-CA-38329	State v. J Turrietta	Affirm	05/14/2020
A-1-CA-38516	CYFD v. Venessa S	Affirm	05/14/2020

## Effective May 22, 2020

### PUBLISHED OPINIONS

A-1-CA-37169	State v. S Martinez	Affirm	05/18/2020
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### UNPUBLISHED OPINIONS

A-1-CA-37616	State v. J Manning	Affirm/Remand	05/18/2020
A-1-CA-38147	In the Matter of the Estate of G. Delisle	Affirm	05/18/2020
A-1-CA-38664	CYFD v. Jessica N	Affirm	05/19/2020
A-1-CA-37207	State v. Z Truog	Affirm	05/21/2020

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

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

# Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

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## CLERK'S CERTIFICATE OF ADDRESS AND/OR TELEPHONE CHANGES

the following attorneys at the Albuquerque office of New Mexico Legal Aid, Inc. have a new street address, and new telephone and fax numbers:

**Attorney**  
**Phone Number**  
**Fax Number**

**Grace Allison**  
505-768-6134  
505-551-0345

**Sergio Barron**  
505-545-8553  
505-551-1529

**Alicia Clark**  
505-814-6260  
505-551-0212  
**Sarah V. Coffey**  
505-768-6125  
505-551-1507

**Monica Corica**  
505-273-5163  
505-551-1270

**Lewis G. Creekmore**  
505-768-6122  
575-218-7365

**Cassie M. Fleming**  
505-814-6596  
505-551-0327

**Melanie P. Fritsche**  
505-814-6719  
505-551-1263

**Chris E. Garcia**  
505-814-6443  
505-551-0329

**Derek V. Garcia**  
505-768-6120  
505-551-0336

**Carol E. Garner**  
505-545-8544  
505-551-0326

**Sandra L. Gomez**  
505-273-5065  
505-551-1506

**Lucrecia Rose Jaramillo**  
505-768-6112  
505-551-1214

**Kara Jenelle Johnson**  
505-551-1602  
505-551-1607

**Mari S. Kempton**  
505-545-8540  
505-551-1229

**Chiara Tattiana Kinahan**  
505-814-5033  
505-551-1540

**Jennifer Rose Kletter**  
505-814-5045  
505-551-1078

**Virginia M. Lucero**  
505-273-5042  
505-551-1597

**Riley Masse**  
505-545-8548  
505-551-1284

**Julia Marie Petrucelli**  
505-545-8551  
505-551-1090

**Tom Prettyman**  
505-814-6516  
505-551-1569

**Nathaniel R. Puffer**  
505-814-6593  
505-551-1274

**J. Ryan Roehl**  
505-273-5164  
505-551-1502

**Edna Frances Sprague**  
505-768-6110  
505-551-0339

New Mexico Legal Aid, Inc.  
PO Box 25486  
505 Marquette Avenue, NW,  
Suite 700 (87102)  
Albuquerque, NM 87102

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## CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective December 31, 2019:  
**Stephen Lee Weber**  
39506 N. Daisy Mountain Dr.,  
Suite 122, PMB #263  
Phoenix, AZ 85086

Effective December 31, 2019:  
**Marek Grabowski**  
2575 Manigault Street  
Carmel, IN 46032

Effective January 1, 2020:  
**Anita Holly Reina**  
447 Avital Drive, NE  
Albuquerque, NM 87123

Effective January 1, 2020:  
**Brielle G. Stewart**  
240 Devonshire Drive  
San Antonio, TX 78209

Effective April 1, 2020:  
**David K. Brooks**  
1044 Calico Ridge Drive  
Henderson, NV 89011

Effective April 6, 2020:  
**Matthew C. Ivers**  
3833 N. Canyon Road  
Provo, UT 84604

Effective April 15, 2020:  
**Gordon James Apple**  
787 Osceola Avenue,  
Suite 400  
St. Paul, MN 55105

**Leonard J. DeLayo Jr.**  
708 Las Prados de Guadalupe  
Tr., NW  
Albuquerque, NM 87107

Effective April 24, 2020:  
**Betsy R. Shepherd**  
425 Riverwalk Manor Drive  
Dallas, GA 30132

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## CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective April 28, 2020:  
**Laurence M. Berlin**  
PO Box 685  
Reserve, NM 87830  
520-241-2850  
larryberlin68@gmail.com

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## CLERK'S CERTIFICATE OF NAME CHANGE

As of March 27, 2020:  
**Liesl Danielle Griffin**  
f/k/a **Liesl Danielle Griffin**  
**Moultrie**  
4565 Don Timoteo Drive  
Los Angeles, CA 90008  
323-290-9900  
liesl.d.griffin@gmail.com

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## CLERK'S CERTIFICATE OF LIMITED ADMISSION

On April 20, 2020:  
**Laura Clare Johnson**  
Office of the First Judicial  
District Attorney  
PO Box 2041  
327 Sandoval Street (87501)  
Santa Fe, NM 87504  
505-827-5000  
505-827-5076 (fax)  
cjohnson@da.state.nm.us

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## CLERK'S CERTIFICATE OF WITHDRAWAL AND CHANGE OF ADDRESS

Effective May 1, 2020:  
**Mark Lawton Jones**  
12617 Bell Oak Road  
Edmond, OK 73013

From the New Mexico Supreme Court

**Opinion Number: 2019-NMSC-017**

No: S-1-SC-35922 (filed October 7, 2019)

STATE OF NEW MEXICO,  
Plaintiff-Appellant and Cross Appellee,  
v.  
LLOYD AGUILAR,  
Defendant-Appellee and Cross Appellant.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

STANLEY WHITAKER, District Judge

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## Opinion

### Shannon C. Bacon, Justice.

{1} After deliberation in a murder trial, the jury submitted executed verdict forms to the presiding trial judge. Noticing an apparent conflict in the verdicts, the trial judge, without the knowledge or participation of the parties, returned the forms to the jurors and directed them to read the instructions again and clarify their verdicts. The jury subsequently returned revised verdict forms, which the trial judge accepted in open court with the participation of the parties before the jury was discharged. On the following day, the trial judge notified the parties of his previously undisclosed ex parte contact with the jury. After a post-trial hearing on this issue, the trial court ordered a new trial on all charges on which the jury had returned final verdicts of guilty. {2} Both the State of New Mexico and Defendant Lloyd Aguilar appealed the trial court's order. The State asserts that the trial court's grant of a new trial was in error and Defendant asserts that while the grant of a new trial was appropriate, the principles of double jeopardy bar retrial on the counts of murder and armed robbery. We hold that (1) the trial court's new trial order was not an abuse of discretion, and (2) retrial of the counts on which the jury ultimately returned guilty verdicts would not constitute double jeopardy.

## I. FACTS AND PROCEEDINGS

{3} Defendant was tried on an indictment charging a number of offenses related to a carjacking in which the victim was beaten and shot to death. Several of the charged offenses had complex alternative theories of culpability, which likely resulted in the jury confusion discussed herein.

{4} After the State rested its case, the trial court directed verdicts of acquittal for insufficiency of evidence on the charge of willful and deliberate first-degree murder, conspiracy to commit willful and deliberate first-degree murder, and conspiracy to commit unlawful taking of a motor vehicle. The trial court denied Defendant's motions for acquittal on all remaining charges, including first-degree felony murder with a predicate offense of armed robbery, second-degree murder as a lesser-included offense of the first-degree willful and deliberate murder charge, conspiracy to commit first-degree felony murder, and conspiracy to commit second-degree murder.

{5} On the remaining charges, the trial court gave the jury thirty-one separate instructions. These instructions were complex and potentially confusing. To illustrate this point, we provide below a detailed discussion of the instructions given to the jury. We highlight two particular aspects of the instructions that may have attributed to the jury's apparent confusion at deliberations. First, the jury

was given two different elements instructions and verdict forms for second-degree murder: one for second-degree murder as an included offense of willful and deliberate first-degree murder, and another for second-degree murder as an included offense of first-degree felony murder (as an alternative to willful and deliberate first-degree murder). Second, the jury received a verdict form for "Felony Murder as charged in the alternative to Count 1" and a separate verdict form for "the alternative to Count 1." We discuss these two particularly confusing aspects of the jury instructions, along with the remainder of the instructions below.

{6} The jury received separate elements instructions and corresponding guilty and not guilty verdict forms for

- second-degree murder of the victim "as charged in Count 1" (the count for which the trial court had directed a verdict of not guilty on the charge of willful and deliberate first-degree murder)
- first-degree felony murder of the victim "as charged in the alternative to Count 1," and
- second-degree murder of the victim "as an included offense of the alternative to Count 1," where the corresponding elements instruction tracked UJI 14-212(3) NMRA and told the jury it could find Defendant guilty only if it found the State proved "beyond a reasonable doubt" that Defendant killed the victim but "did not cause the death of [the victim] during the commission of armed robbery[.]" among other essential elements of that crime.

{7} After receiving those three homicide elements instructions, the jury received a stepdown instruction that referenced only "the crimes of Felony Murder and Second Degree Murder as charged in the Alternative to Count 1," without mentioning the earlier elements instruction for the crime of second-degree murder of the same victim "as charged in Count 1." This stepdown instruction told the jury that it should initially deliberate on first-degree felony murder and move to second-degree murder only if it did not reach a guilty verdict on felony murder. The instruction cautioned that the jury could "not find the defendant guilty of more than one of the foregoing crimes" without explaining whether the term "foregoing" referred to all homicide crimes on which the jury had received elements instructions or only the two homicide crimes identified in the stepdown instruction. None of the



instructions clearly addressed any relationship between the two second-degree murder instructions relating to the same victim.

{8} Although each elements instruction named the crime identified with the count number, a subsequent instruction describing verdict options for each count did little to avoid additional confusion:

In this case, there are two possible verdicts as to Count 1, Count 2, [and] the alternative to Count 2, Count 3, Count 4, Count 5, and Count 6:

- (1) guilty; and
- (2) not guilty.

Only one of the possible verdicts may be signed by you as to each charge. If you have agreed upon one verdict as to a particular charge, that form of verdict is the only form to be signed as to that charge. The other form as to that charge is to be left unsigned.

There are three possible verdicts to the alternative to Count 1 (Felony Murder). See [the step-down] Instruction. . . .

{9} Along with the thirty-one jury instructions, the jury received twenty-one separate verdict forms to deliberate on and execute.

{10} After two partial days of deliberation, the jury submitted a package of verdict forms (the “preliminary verdict forms”) to the trial judge. Without notifying counsel, the trial judge reviewed the preliminary verdict forms and noticed that the jury had signed both the guilty verdict form for “Felony Murder as charged in the alternative to Count 1” and the not guilty verdict form for “the alternative to Count 1,” a form which did not specify the name of any particular crime. Because the finding of guilty for “Felony Murder as charged in the alternative to Count 1” negates the possibility of also finding Defendant not guilty of “the alternative to Count 1,” these forms were necessarily in conflict. The trial judge walked the preliminary verdict forms back to the jury and said, as he recounted later,

I’m confused about your verdict. I don’t know what the verdict is. . . . I think you need to read the instructions again to make sure that you are reading—that you understand them. And then we need to know what the verdict is with regard to the alternative to Count 1. Because I’m not sure what that is.

The trial judge also stated later that this was the only ex parte off-the-record contact between him and the jury.

{11} The jury revised the preliminary verdict forms and again submitted the package of forms to the trial court. In these revised verdict forms, the jury voided its preliminary verdict forms that facially indicated a verdict of not guilty “of the alternative to Count 1” and left intact its previous verdict form entry of guilty “of Felony Murder as charged in the alternative to Count 1.” It also voided a previously signed not guilty verdict form for armed robbery and signed a guilty verdict form for that charge. The voided forms included strikethroughs of the foreperson’s previous signature accompanied by his initials, with the word “VOID” written above the strikethroughs and again below the signature block.

{12} The judge notified the parties of the verdict, convened court, and formally accepted the revised verdicts (the “final verdicts”) on the record, without yet disclosing the jury’s earlier verdict submission or the resulting ex parte contact between the trial judge and the jury.

{13} The final verdicts reflected that the jury found Defendant guilty of felony murder as charged in the alternative to Count 1, guilty of conspiracy to commit felony murder as charged in the alternative to Count 2, guilty of armed robbery as charged in Count 3, guilty of conspiracy to commit armed robbery as charged in Count 4, guilty of tampering with evidence as charged in Count 5, guilty of unlawful taking of a motor vehicle as charged in Count 6, not guilty of second-degree murder as charged in Count 1, and not guilty of conspiracy to commit second-degree murder as charged in Count 2.

{14} When the jurors unanimously affirmed their final verdicts in a poll conducted in open court before they were discharged, the attorneys, still unaware of either the earlier verdict form submission or the ex parte contact between the trial judge and jury, did not question the jurors about the differences between the preliminary and final verdicts. The next day, the trial judge disclosed to counsel the earlier off-the-record ex parte exchange with the jury and agreed to consider the parties’ input and motions in response.

{15} Defendant requested alternative forms of relief in response to the disclosure of the ex parte contact. As related to the issues raised in this appeal, Defendant moved for a dismissal of the felony murder

count; in the alternative, Defendant moved for a new trial on all counts except armed robbery, which he moved to dismiss.

{16} Following a hearing on Defendant’s motions, the trial judge entered a written order granting a new trial “in the interest of justice” as provided in Rule 5-614(A) NMRA (Comm. commentary 2009, amended 2016) on all charges except “Conspiracy to Commit Second Degree Murder as charged in Count 2 and Second Degree Murder as charged in Count 1,” the two charges on which the jury had returned not guilty verdicts that were ultimately accepted in open court.

{17} Although the new trial order was based on three separate grounds, the State rests its appeal on the trial court’s determination that a new trial would serve the interest of justice because of the ex parte contact between the trial judge and jury.<sup>1</sup> As to that ground, the order stated,

The [c]ourt acknowledges that even though the judicial contact with the jury was ministerial in nature, the unintended result was that the contact could have potentially influenced the jurors’ changes to the verdict forms without input from the parties. As a result, in fairness to the Defendant, a new trial is warranted to eliminate any potential prejudice to Defendant.

{18} Both parties appealed the trial court’s order: the State arguing that the court abused its permissible judicial discretion in granting a new trial and Defendant arguing that the Double Jeopardy Clauses of the United States and New Mexico Constitutions bar retrial of the murder and armed robbery counts.

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

{19} This Court has exclusive jurisdiction “over interlocutory appeals in situations where a defendant may possibly be sentenced to life imprisonment or death.” *State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821. Felony murder, as defined in NMSA 1978, Section 30-2-1(A) (1994), is an offense that is punishable by life imprisonment. NMSA 1978, § 31-20A-2 (2009).

{20} Both parties are entitled by law to interlocutory review of the trial court’s order, based on their claims about how the trial court erred. See *Carrillo v. Rostro*, 1992-NMSC-054, ¶ 20, 114 N.M. 607, 845 P.2d 130 (noting that a trial court’s denial of a motion to dismiss a pending prosecution on double jeopardy grounds is appealable because the claimed right not to stand trial

<sup>1</sup>The new trial order was also based on (1) the court’s concern that it had committed error and may have prevented a full and fair defense by refusing to permit the jury to see the video of Defendant’s interrogation in which Defendant demonstrated to police how the codefendant allegedly had pointed a pistol toward him at the scene of the crime; and (2) the trial court’s concern that it may not have handled properly a defense challenge to alleged prosecutorial misuse of preemptory challenges to the seating of prospective jurors.

at all “cannot be effectively vindicated after the trial has occurred”) (internal quotation marks and citation omitted); *State v. Griffin*, 1994-NMSC-061, ¶ 11, 117 N.M. 745, 877 P.2d 551 (holding that the State may pursue an interlocutory appeal when it makes a claim that a new trial order “was based on an erroneous conclusion that prejudicial legal error occurred during the trial”).

{21} “We generally review double jeopardy claims de novo . . . [but] where factual issues are intertwined with the double jeopardy analysis, we review the trial court’s fact determinations under a deferential substantial evidence standard of review.” *State v. Baca*, 2015-NMSC-021, ¶ 25, 352 P.3d 1151 (alteration and omission in original) (internal quotation marks and citation omitted).

**B. The Trial Court Did Not Abuse Its Rule 5-614(A) NMRA Discretion When It Ordered a New Trial “In The Interest of Justice”**

**1. A trial court’s discretionary order granting a new trial is reviewed on appeal for manifest abuse of discretion**

{22} The State presents a single issue on its appeal from the trial court’s grant of a new trial: whether the trial judge erred in granting a new trial on the ground that the court’s ex parte contact may have prejudiced the Defendant, despite the fact that the trial court stated that it believed its ex parte contact with the jury about their proposed verdicts was ministerial and not related to the subject matter of the court proceedings.

{23} In order to address this issue, we first review the law governing a trial court’s authority to grant a new trial in the interest of justice and an appellate court’s standard of review of a new trial order.

{24} Rule 5-614(A) provides that “[w]hen the defendant has been found guilty, the court on motion of the defendant, or on its own motion, may grant a new trial if required in the interest of justice.”

{25} In criminal cases, there are two primary categories of new trial motions with different time requirements and different review standards. One is a motion for new trial based on newly discovered evidence, which may be filed within two years after the trial under Rule 5-614(C) and which is specifically governed by a particular set of standards under our case law. See *State v. Volpato*, 1985-NMSC-017, ¶ 7, 102 N.M. 383, 696 P.2d 471 (setting out particularized requirements). This appeal presents no newly discovered evidence issues.

{26} The other category is far broader, authorizing a trial court to grant a new trial “on any other grounds” within the narrow time constraints of the rule. Rule 5-614(C). The governing standard is whether the trial judge determines a new trial is required

“in the interest of justice,” as articulated in Rule 5-614(A). This term has a history of interpretation in the federal courts, where Rule 33(a) of the Federal Rules of Criminal Procedure authorized granting a new trial “in the interest of justice” long before the 1972 adoption of the New Mexico Rules of Criminal Procedure. See, e.g., *United States v. Smith*, 331 U.S. 469, 472 (1947) (observing that the “rule is declaratory of the power to grant a new trial ‘in the interest of justice’ instead of for reasons catalogued as they might have been”).

{27} The federal courts have recognized that the authority to grant a new trial is discretionary and is not limited to situations in which reversible error has been committed:

The basis for granting a new trial under Rule 33 is whether it is required “in the interest of justice.” That is a broad standard. It is not limited to cases where the district court concludes that its prior ruling, upon which it bases the new trial, was legally erroneous.

*United States v. Vicaria*, 12 F.3d 195, 198 (11th Cir. 1994) (upholding order granting a new trial in the interest of justice); see also *United States v. Kuzniar*, 881 F.2d 466, 470 (7th Cir. 1989) (“[C]ourts have interpreted the rule to require a new trial ‘in the interest of justice’ in a variety of situations in which the substantial rights of the defendant have been jeopardized by errors or omissions during trial.”); *United States v. Scroggins*, 485 F.3d 824, 831 (5th Cir. 2007) (“A miscarriage of justice warranting a new trial in certain circumstances may occur even when there has been no specific legal error.” (internal quotation marks and citation omitted)); *United States v. Patterson*, 41 F.3d 577, 579 (10th Cir. 1994) (rejecting the argument that a trial judge erred in granting a new trial in the absence of reversible error in the record).

{28} New Mexico precedent similarly recognizes the broad discretion of a trial court to grant a new trial in the interest of justice. The trial court has a broader power than an appellate court to grant a new trial to prevent miscarriages of justice “even though a defendant is not entitled to a new trial as a matter of right.” *State v. Fuentes*, 1959-NMSC-060, ¶¶ 19-21, 66 N.M. 52, 342 P.2d 1080. “[T]he function of passing on motions for new trial belongs naturally and peculiarly to the trial court.” *State v. Smith*, 1986-NMSC-038, ¶ 17, 104 N.M. 329, 721 P.2d 397, *overruled on other grounds by Gallegos v. Citizens Ins. Agency*, 1989-NMSC-055, ¶ 28, 108 N.M. 722, 779 P.2d 99. “[W]e will not disturb a trial court’s exercise of discretion in denying or granting a motion for a new trial unless there is a manifest abuse of discretion.” *State v. Garcia*, 2005-NMSC-038, ¶

7, 138 N.M. 659, 125 P.3d 638. “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason.” *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citations omitted).

{29} Our law recognizes an important distinction in reviewing a trial court’s exercise of discretion in granting or denying new trials. Although the standard of appellate review is abuse of discretion in both cases, “a much stronger showing is required to overturn an order granting the new trial than denying a new trial.” *Griffin*, 1994-NMSC-061, ¶ 12 (alteration, internal quotation marks, and citation omitted). When a trial court denies a new trial, the question on appeal is whether there was reversible error that would require the appellate court to order a new trial; but when the appellate court is reviewing a grant of a new trial, the grant can be affirmed as within the trial court’s discretion even where the trial court would also have been acting within its discretion to deny the new trial motion. See, e.g., *Mares v. State*, 1971-NMSC-106, ¶¶ 2, 5, 14-15, 83 N.M. 225, 490 P.2d 667 (reversing denial of a new trial motion based on post-trial revelation that a juror had been present for part of the investigation of the crime scene, where the juror’s good friend was a victim, as an abuse of discretion); *State v. Guerra*, 2012-NMSC-027, ¶ 21, 284 P.3d 1076 (affirming denial of new trial motion where two prosecution exhibits were inadvertently left on counsel table and not furnished to the jury, on determination by this Court that the trial court properly found the error to be harmless); *State v. Moreland*, 2008-NMSC-031, ¶¶ 9, 22, 144 N.M. 192, 185 P.3d 363 (affirming district court’s grant of new trial “[b]ecause the trial judge has observed the demeanor of the witnesses and has heard all the evidence, . . . the function of passing on motions for new trial belongs naturally and peculiarly to the trial court” (omission in original) (internal quotation marks and citations omitted)).

{30} We agree with the view that a trial court should exercise its broad new trial authority “sparingly and with caution[.]” *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980), but our precedent instructs that, in light of the trial court’s authority, “an appellate court will reverse the district court’s decision only on a showing of abuse of discretion.” *State v. Guerra*, 2012-NMSC-014, ¶ 45, 278 P.3d 1031. Because a trial court abuses its discretion when it acts in an “obviously erroneous, arbitrary, or unwarranted manner[.]” *State v. Johnson*, 2010-NMSC-016, ¶ 31, 148 N.M.



50, 229 P.3d 523, we must examine the circumstances that led to the trial court's determination that a new trial was in the interest of justice. In our examination, we keep in mind that our standard of review is particularly deferential because the trial court granted a new trial. *Griffin*, 1994-NMSC-061, ¶ 12.

## 2. The trial court did not abuse its discretion in ordering a new trial

{31} Despite the fact that the trial court based its new trial order on three separate perceived trial errors, the State takes issue only with the belatedly disclosed ex parte contact between the trial judge and jury. We address the ex parte contact issue because of its importance to the proper conduct of criminal trials in this State.

{32} Rule 5-610(D) NMRA imposes strict limitations on case-related communications between a trial judge and a deliberating jury:

D. Communications; judge and jury. The defendant shall be present during all communications between the court and the jury unless the defendant has signed a written waiver of the right to be personally present. All communications between the court and the jury must be in open court in the presence of the defendant and counsel for the parties unless the defendant waives on the record the right to be present or unless the communication involves only a ministerial matter. Unless requested by counsel for the defendant, communications between the court and the jury on a ministerial matter may be made in writing after notice to all counsel without recalling the defendant.

{33} As the State concedes, the trial court clearly violated Rule 5-610(D) by communicating with the jury orally, not in open court, and without proper notification to and oversight by the parties. However, the State, relying heavily on *State v. Jojola*, 2006-NMSC-048, 140 N.M. 660, 146 P.3d 305, argues that the trial court's ex parte and off-the-record communication with the jury was merely ministerial and unrelated to the issues of the case and therefore the improper communication was not reversible error according to our case law.

{34} We agree with the State that *Jojola* is the New Mexico precedent most instructive in this case. In *Jojola*, although we affirmed the Court of Appeals in its reversal of a conviction obtained after unauthorized contact between the trial judge and a deliberating jury, we granted certiorari "to clarify our case law" regarding ex parte communications between judge and jury and "to describe the history and rationale

of Rule 5-610(D)." *Id.* ¶ 1. We disagree with the State's contention that *Jojola* supports its challenge to the new trial order in this case.

{35} To begin with, the procedural context of *Jojola* was significantly different. In *Jojola*, we did not hold that a trial judge's improper contact with a jury had to constitute reversible error in order to support a new trial order on appeal. The Court in *Jojola* never considered or addressed the issue of the trial judge's discretion to order a new trial in unauthorized contact situations. Not only did the trial court in that case not order a new trial, no motion for new trial was even made. Instead, we held that because "the State did not rebut the presumption of prejudice that arises from an improper communication" between judge and jury, reversible error required us to vacate the conviction on appeal and remand for a new trial. *See id.* ¶ 13.

{36} Second, the substance of the holding in *Jojola* supports the discretionary grant of a new trial in this case. In *Jojola*, the foreperson of a deliberating jury approached the trial judge privately to report that one juror was holding out for acquittal because she refused to accept the testimony of one of the police witnesses and insisted she would not change her mind. *Id.* ¶ 2. Instead of terminating the conversation at the outset and notifying the parties, the trial judge, as he later recounted, continued the oral ex parte conversation and told the foreperson "to continue and do whatever she had to do and just report—just report to me and I could handle it from there." *Id.* After the foreperson returned to the jury room and while the jury was still deliberating, the trial judge informed counsel of the ex parte contact, instead of waiting until after the jury had returned its verdict and been discharged, as happened in this case. *Id.* Shortly afterward, the jury returned verdicts of guilty. *Id.*

{37} In *Jojola*, we noted that both our precedent and our procedural rules "provide guidance in determining whether a judge's ex parte communication with a juror is acceptable in the first instance, and whether reversal is warranted on appeal" if the communication is unacceptable. *Id.* ¶ 3. With respect to the propriety of ex parte oral communications on any subject, the answer is absolutely clear: such contact is never acceptable. *Id.* ¶ 8 (emphasizing that Rule 5-610(D) "does not allow for private, oral communications between a judge and an individual juror[.]" even when the communications merely relate to housekeeping matters that are not relevant to the case). The trial judge in this case was clearly wrong when he stated at the post-verdict hearing that he did not "think that the contact with the jury was improper[.]"

{38} As we observed in *Jojola*, our con-

cern is not with "the competency or good faith of the trial judge, but rather the lack of a record and the potential harm that may arise from 'having one juror serve as a conduit for communicating instructions to the whole panel.'" *Id.* ¶ 10 (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 461 (1978)).

{39} Communications relevant to the case are governed by even more stringent requirements than those that pertain to pure housekeeping matters:

[C]ommunications between judge and jury relevant to the case [must] occur in open court and in the presence of the defendant, unless presence is waived in writing. Not only does this insure that all communications relevant to the case occurring between judge and jury are captured by a stenographer or other recording device, it also avoids the problem of a judge having to decide solely on the basis of defense counsel's representations whether a defendant voluntarily, knowingly, and intelligently waived his right to be present.

*Id.* ¶ 8 (emphasis omitted).

{40} As in *Jojola*, because the ex parte oral contact here was concededly improper, we proceed to determine whether Defendant may have been prejudiced. The analysis of prejudice differs for case-related and housekeeping contacts. Communications that can properly be characterized as housekeeping or ministerial relate to such matters as "a juror's personal comfort or responding to a simple request for an extra copy of the written jury instructions already provided to the jury." *Id.* ¶ 9. Such communications do "not give rise to a presumption of prejudice." *Id.* ¶ 6.

{41} In contrast, where an unlawful communication has taken place that is related to the case, rather than a housekeeping or ministerial matter, our law imposes a presumption of prejudice "and the State bears the burden of rebutting that presumption by making an affirmative showing on the record that the communication did not affect that jury's verdict." *Hovey v. State*, 1986-NMSC-069, ¶ 12, 104 N.M. 667, 726 P.2d 344; *see id.* ¶¶ 4, 8, 14, 20 (reversing the Court of Appeals and holding that the record failed to rebut the presumption of prejudice resulting from defense counsel's purported waiver of the defendant's presence during a written communication with the jury).

{42} The State argues that the presumption of prejudice required by our case law for case-related contacts should not apply, arguing that the trial judge's ex parte communication related to mere housekeeping, instead of to the case the jury was deciding. We disagree.



{43} The oral exchange between the trial judge and jury foreperson about the jury's return of verdict forms reflecting votes of conviction and acquittal on Defendant's felony murder charges was undoubtedly related to the case. The one clear message conveyed by the trial judge's comments was that the jury's executed verdicts in the case were wrong in some respect and should be reconsidered. It would be incorrect to characterize such a communication as a mere housekeeping matter. It certainly was more case-related than the relatively nonjudgmental comments of the trial judge in *Jojola*. Therefore, we presume that Defendant was prejudiced by the trial judge's communications with the jury.

{44} Given the severe limitations on asking jurors about their deliberations and thought processes, the burden of overcoming the presumption of prejudice is necessarily a difficult one. See, e.g., *State v. Mann*, 2002-NMSC-001, ¶ 18, 131 N.M. 459, 39 P.3d 124 (“[Rule 11-606(B) NMRA] prohibits a juror from testifying as to any matter or statement made during the course of deliberations or to the juror's mental processes.”).

{45} In this case, as in *Jojola*, “the only record of the conversation that we have is what the judge offered to the parties after the conversation had already taken place.” 2006-NMSC-048, ¶ 11. Because the trial judge did not disclose the contact until a day after the jury was discharged, neither party attempted to address the issue in polling the jury. Neither the jury foreperson nor any other witness was called to testify at the post-conviction hearings. Even if we could credit the trial judge with perfect recall of each word of the off-record conversation with the foreperson, “we are left to speculate about how the juror interpreted the judge's comments and gestures and about what the juror reported to the rest of the jury back in the jury room.” *Id.* At the post-conviction hearings, the defense pointed out that the State was relying only on speculation that the unlawful contact might have influenced the jury's changed verdicts. The trial judge responded by emphasizing that, “we're all speculating” about the causal effect of the trial court's contact with the jury. We agree.

{46} The defense was further prejudiced by its lack of knowledge of the unlawful communication in a timely fashion, so that the differences between the preliminary and final verdict forms could have been addressed and clarified by polling the jurors before the trial court discharged the jury. In these circumstances, given the improper communication between the trial judge and jury and its prejudice to Defendant, we conclude that it was not an abuse of discretion for the trial judge to grant a new trial.

### C. Retrial of the Murder and Armed Robbery Counts Would Not Constitute Double Jeopardy

{47} In his cross-appeal, Defendant asserts that the trial court erred by denying his motion to dismiss the armed robbery and felony murder counts based on double jeopardy grounds because the jury signed the not guilty forms for these counts, announced it had reached verdicts, and handed the forms to the trial judge or the trial judge's bailiff—all prior to the trial judge's ex parte communication with the jury. Defendant further breaks his double jeopardy argument into four parts: (1) the trial court's actions created an ambiguity in the jury's decision because of the contradictions between the preliminary and final verdict forms and that these contradictions bar retrial; (2) the preliminary verdict forms acquitted Defendant of armed robbery and the trial judge was compelled to enter a verdict of not guilty for the offense; (3) the jury's preliminary verdict on the alternative count of felony murder was contradictory on its face (simultaneously denoting “guilty” and “not guilty” of felony murder), which required the trial court to clarify this ambiguity and potentially conclude that double jeopardy barred retrial; and (4) the trial court's conduct was so egregious and incurable that double jeopardy principles bar retrial.

{48} “[T]he Double Jeopardy Clauses of the Fifth Amendment of the United States Constitution and Article II, Section 15 of the New Mexico Constitution prevent the State from . . . repeated attempts to convict an individual for an alleged offense[.]” *State v. Baca*, 2015-NMSC-021, ¶ 20, 352 P.3d 1151 (internal quotation marks and citations omitted); see U.S. Const. amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb[.]”); N.M. Const. art. II, § 15 (“[N]or shall any person be twice put in jeopardy for the same offense[.]”). We have said that “[p]erhaps the most fundamental rule” of the Double Jeopardy Clause is “that a verdict of acquittal . . . [cannot] be reviewed, on error or otherwise, without putting a defendant twice in jeopardy, and thereby violating the Constitution.” *Baca*, 2015-NMSC-021, ¶ 21 (alterations and omission in original) (internal quotation marks and citation omitted).

{49} As stated previously, although we review claims of double jeopardy de novo, where factual issues direct this Court's double jeopardy analysis, we apply a deferential standard of review to the trial court's factual findings. *Id.* ¶ 25. We will not substitute our judgment of the facts for that of the trial court, we will not reweigh the evidence, and we will accept all reasonable inferences supporting the findings of fact. *Id.*

{50} The first three sections of Defendant's double jeopardy argument rely upon Rule 5-611 NMRA and *State v. Phillips*, 2017-NMSC-019, 396 P.3d 153. Neither Rule 5-611 nor *Phillips*, however, are suitable to the facts before us.

{51} Rule 5-611(A) requires that a verdict “shall be returned by the jury to the judge in open court.” Rule 5-611(E) provides that “[w]hen a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion.” Defendant asserts that the trial court's failure to follow Rule 5-611(A) subverted his ability to ask the trial court to poll the jury pursuant to Rule 5-611(E).

{52} Defendant's argument presupposes that the preliminary verdict forms were, in fact, the “verdict” for purposes of Rule 5-611. However, this Court has said that a verdict is not final until it is “rendered by the jury in open court and accepted by the court.” *Phillips*, 2017-NMSC-019, ¶ 18 (citing *Harrison v. Gillespie*, 640 F.3d 888, 899 (9th Cir. 2011)) (“Because of the significance of the entire deliberative process, the jurors' preliminary votes in the jury room do not constitute a final verdict, even if they are unanimous. Instead, the verdict must be rendered by the jury in open court and accepted by the court in order to become final.”) (citations omitted)); see also *State v. Holloway*, 1987-NMCA-090, ¶¶ 23-24, 106 N.M. 161, 740 P.2d 711 (concluding that jurors are not bound by their votes in the jury room and may alter their individual verdicts at the time the jury is polled). There is no question that the jury's preliminary verdict forms were not “rendered by the jury in open court and accepted by the court.” *Phillips*, 2017-NMSC-019, ¶ 18. The jury's preliminary verdict forms were no more than an initial vote, and therefore do not serve as a basis for Defendant's Rule 5-611 double jeopardy challenge to retrial.

{53} Defendant's reliance on *Phillips* is likewise inapposite. In *Phillips*, this Court addressed what the trial court must do to ascertain whether a jury is deadlocked. At trial, the jury indicated that it was deadlocked on the greater offense charged, first-degree murder. *Id.* ¶¶ 8-11. There was no signed verdict form presented to the trial court. *Id.* ¶ 18. To understand whether the jury was in fact deadlocked, the trial court polled the jurors. *Id.* ¶ 10. The jury poll revealed that seven jurors believed that they had unanimously agreed on first-degree murder, but five jurors believed they were deadlocked. *Id.* ¶ 11. The five jurors stated they were deadlocked after the trial court instructed them that “deadlocked” meant they could not agree on a verdict.” *Id.* Due to deficiencies in the verdict form, there was no written

record of whether the jury had acquitted the defendant or deadlocked. *Id.* ¶ 2. After polling the jury, the trial court concluded that the jury was deadlocked on first-degree murder, declared a mistrial, and reserved the State's right to retry the defendant on every crime in Count 1. *Id.* ¶ 12. On review, we concluded that the trial judge failed to establish clearly on the record whether the jury deadlocked on first-degree murder or agreed that the defendant was not guilty. *Id.* ¶ 18. Due to the incurable confusion regarding the jury's verdict, we concluded that double jeopardy attached to the first- and second-degree murder counts. *Id.*

{54} Here, unlike in *Phillips*, there was no indication at the time the jury returned to open court that they were deadlocked. The jury's final verdict forms, presented in open court and accepted by the trial court, reflected unanimity by the jury. The final set of jury verdicts were the true verdict of the jury, *see id.* ¶ 18, and therefore, the procedure to determine whether a jury is

deadlocked provided in *Phillips* is not applicable to the facts before us in this case. {55} As an alternative ground for this Court to apply double jeopardy principles to bar Defendant's retrial on any of the charges, Defendant equates the trial judge and his conduct here with the prosecutorial misconduct in *State v. Breit*, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792. Defendant does little to develop this argument in his briefing and therefore, we do not need to address it. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (stating that appellate courts "will not review unclear arguments, or guess at what" a party's arguments might be). Were Defendant's *Breit* argument more developed, however, it would not alter this Court's conclusion. In *Breit*, we held that principles of double jeopardy bar retrial where prosecutorial misconduct is pervasive, incessant, and outrageous. 1996-NMSC-067, ¶ 37. In *Breit*, the prosecutor exaggerated claims, referenced matters that were not admissi-

ble, argued with witnesses, posed improper questions to witnesses, directed belligerent statements toward opposing counsel, and engaged in sarcasm and scorn toward opposing counsel. *Id.* ¶¶ 41-43. *Breit* is not applicable to this matter. The trial court's ex parte communication with the jury bears no resemblance to the pervasive misconduct found in *Breit*.

### III. CONCLUSION

{56} For the foregoing reasons, we affirm.

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

**C. SHANNON BACON, Justice**

### WE CONCUR:

**JUDITH K. NAKAMURA, Chief Justice**

**BARBARA J. VIGIL, Justice**

**PETRA JIMENEZ MAES, Justice, Retired**

**GARY L. CLINGMAN, Justice, Retired**

# Advance Opinions

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From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Supreme Court

**Opinion Number: 2019-NMSC-018**

No: S-1-SC-36669 (filed October 7, 2019)

STATE OF NEW MEXICO

Plaintiff-Petitioner,

v.

MILLARD DOYLE YANCEY

Defendant-Respondent.

**ORIGINAL PROCEEDING ON CERTIORARI**

MARK TERRENCE SANCHEZ, District Judge

Released for Publication November 19, 2019.

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## Opinion

**Judith K. Nakamura,  
Chief Justice.**

{1} If a criminal defendant does not expressly state on the record “I plead guilty,” is the guilty plea enforceable? The Court of Appeals concluded that, where these words are not spoken, the plea is not enforceable no matter the circumstances of the plea proceeding, the overall context of the plea colloquy, or the clarity with which a defendant otherwise manifests an intent to plead guilty. See *State v. Yancey*, 2017-NMCA-090, ¶¶ 1, 16, 37, 406 P.3d 1050. This is incorrect. Whether a plea is knowing and voluntary must be assessed from the totality of the circumstances. See *United States v. Rollings*, 751 F.3d 1183, 1188 (10th Cir. 2014); accord *Garcia v. State*, 2010-NMSC-023, ¶ 50, 148 N.M. 414, 237 P.3d 716. No magic words are either required or adequate to resolve that inquiry. We reverse and remand.

### I. BACKGROUND

{2} Defendant, Millard Yancey, was charged in several related cases with fraud, embezzlement, and racketeering. Upon advice of counsel, he entered into three plea and disposition agreements. The terms of the pleas

were recorded upon the standardized plea-agreement forms approved by this Court. Form 9-408 NMRA.

{3} Following Yancey’s participation in a plea colloquy at a change of plea hearing, the district court accepted and recorded Yancey’s guilty pleas. The pleas entered indicated that no agreement as to sentencing had been reached and identified only what the maximum possible sentence could be. A sentencing hearing was conducted a few weeks later, and Yancey was sentenced in the cases to a total term of twenty-one years of incarceration. A judgment and sentence was entered in each case.

{4} Yancey filed two post-sentencing motions. One of the motions sought withdrawal of the guilty pleas as involuntarily and unknowingly made. In support of this motion, Yancey argued that he entered into the plea agreements with the “understanding that the most time he could receive . . . would be twelve (12) years[.]” The other motion sought reconsideration of the sentence imposed. As to this motion, Yancey emphasized that he was seventy-one years old and in declining health.

{5} At the hearing on these motions, Yancey acknowledged under oath that he did previously: admit that there was a factual basis for the pleas; receive information about his total exposure to incarceration if he pleaded

guilty; and enter into the guilty pleas in open court. Despite these concessions, Yancey nevertheless emphasized that he “did not fully understand the elements of the charges that were being made against [him].”

{6} The district court denied Yancey’s post-sentencing motions and left the sentences intact. Yancey appealed.

{7} The Court of Appeals, in a divided opinion, reversed and ordered the district court to vacate the sentences. *Yancey*, 2017-NMCA-090, ¶ 38. The majority declined to address the arguments Yancey raised in support of his position that the district court erred in declining to allow him to withdraw his plea. *Id.* ¶¶ 15-16. Rather, the majority focused its attention on an issue Yancey did not raise and which the majority characterized as “more fundamental and serious.” *Id.* ¶ 16.

{8} According to the majority, “a glaring omission” had occurred: Yancey “never was asked to, nor did he ever, expressly plead guilty in open court to any crime on the record.” *Id.* In other words, he never said “I plead guilty,” or some similar words expressly acknowledging his guilt. This purported defect, the majority held, was dispositive. *Id.* It rendered Yancey’s guilty pleas constitutionally invalid because, according to the majority, it is “a constitutional requirement that [a] defendant must actually admit he is guilty in open court on the record . . . .” *Id.* ¶ 23. This is necessary, they explained, because a plea “entails a decision of whether to exercise or waive basic constitutional trial rights.” *Id.*

{9} The State filed a petition for writ of certiorari which we granted. Our jurisdiction over this matter is uncontested.

### II. DISCUSSION

{10} Yancey’s appeal comes to us following the district court’s decision to deny Yancey’s motion to withdraw his plea. Typically, this is a matter that we would review for abuse of discretion. *State v. Garcia*, 1996-NMSC-013, ¶ 7, 121 N.M. 544, 915 P.2d 300. But the Court of Appeals took this case in a very different direction when it concluded that the sentences imposed in this case were void because Yancey’s pleas were constitutionally invalid. This modified the question we must now answer.

{11} The specific question here is whether the district court committed legal error by not asking Yancey to affirmatively state at the plea colloquy “I plead guilty,” or some similar words. The answer to this question requires us to evaluate constitutional principles, statutes, and the rules of criminal procedure. Our review of these matters is de novo. *State v. Lohberger*, 2008-NMSC-033, ¶ 18, 144 N.M. 297, 187 P.3d 162; *State v. Lucero*, 2007-NMSC-041, ¶ 8, 142 N.M. 102, 163 P.3d 489.



The third line of text on the opening page of each agreement includes the subheading “Plea.” To the immediate right of the word “Plea,” each states that Yancey “agrees to plead guilty.” The third page of each document asks Yancey to affirm by signature that he read and understood the agreements and that, by pleading guilty, he was giving up: his right to a trial by jury; his right to confront, cross-examine, and compel the attendance of witnesses; and his privilege against self-incrimination. Yancey’s signature appears only a few lines below these words. The plea documents also include signature lines for defense counsel that required counsel to certify that he reviewed the plea with Yancey. Yancey’s counsel signed on this line in each document.

{17} At the change of plea hearing where the district court received Yancey’s pleas, Yancey informed the court that he understood and consented to the terms of the plea agreements, including the range of sentences that the court could impose in all three cases. He acknowledged that, by pleading guilty, it was his intention to give up the important constitutional rights that those who plead guilty relinquish. The court asked Yancey whether he was prepared to “acknowledge and agree that the State has some evidence to prove your guilt of all the charges in all three cases?” Yancey responded affirmatively. The State confirmed aloud in a readily comprehensible manner that it would dismiss certain counts with which Yancey was charged in return for his plea. The plea colloquy ended with the district court asking Yancey directly whether his pleas were “voluntary and not the result of force, threats, or promises other than promises in the plea agreement?” Yancey responded that his pleas were indeed voluntary. Yancey voiced no objection when the district court announced that it was accepting the guilty pleas.

{18} Faced with this evidence, even Yancey’s appellate counsel was required to all but concede that there was no basis for arguing that the plea was invalid on federal constitutional grounds. The arguments in Yancey’s briefs provide no persuasive reason why we should diverge from established precedent. Nor has he proved that the totality of the circumstances test—embraced by the federal judiciary and New Mexico—is somehow flawed, or that structural differences or distinctive state characteristics necessitate some different approach.

{19} Similarly, there is nothing in NMSA 1978, Section 30-1-11 (1963), that suggests, as Yancey argues, that a statement expressly acknowledging guilt is a statutory prerequisite to the entry of a guilty plea. This statute has been construed in the flexible manner already discussed. See *State v. Apodaca*,

{12} Rule 5-303 NMRA “essentially codifie[d]” *Boykin v. Alabama*, 395 U.S. 238 (1969), and requires “an affirmative showing on the record that [a guilty] plea was voluntary and intelligent.” *Garcia*, 1996-NMSC-013, ¶ 9. This does not mean, however, that trial courts must “strictly adhere to a script” or are “bound to a strict unvarying formula of words.” *Id.* ¶ 12 (alteration, internal quotation marks, and citation omitted). Rather, the determination of whether a plea is “knowing and voluntary” is assessed by “the totality of the circumstances” available from the record at the time the plea is taken. *Rollings*, 751 F.3d at 1188 (internal quotation marks and citation omitted). This approach is, as Yancey concedes, consistent with other federal authorities.

{13} Those authorities make clear that no “talismanic incantation” of the words “I am guilty” is required in order for a defendant to plead guilty, at least where “the language used is expressive of the defendant’s culpability.” *United States v. Williams*, 20 F.3d 125, 133-34, 133 n.9 (5th Cir. 1994). Thus, a guilty plea is not invalid simply because the trial court fails, for whatever reason, to specifically ask the defendant how he pleads. See *United States v. Grandia*, 18 F.3d 184, 184 (2d Cir. 1994). Other federal courts have reached the same conclusion under similar circumstances. *E.g.*, *United States v. Luna-Orozco*, 321 F.3d 857, 860-61 (9th Cir. 2003). Persuasive secondary authorities verify these cases are rightly decided. *Guilty Pleas*, 91 Geo. L.J. 362, 372 n.1251 (2003). State courts that have considered the issue have reached the same outcome.

{14} For instance, in *Lane v. State*, 316 S.W.3d 555, 565-567 (Tenn. 2010) the Tennessee Supreme Court concluded that the trial court was not required to ask the defendant “How do you plead?” The court thought it sufficient that the defendant intended to plead guilty, stated he was entering the plea voluntarily, and believed he was pleading guilty. *Id.* Courts in other jurisdictions have taken the same approach when confronted with similar facts. *State v. Holden*, 32 So.3d 803, 804 (La. 2010) (per curiam); *Neighbors v. State*, 591 S.W.2d 129, 130-31 (Mo. Ct. App. 1979); *State v. Jones*, 355 N.W.2d 227, 230 (Neb. 1984); *State v. Williams*, 515 S.E.2d 80, 8283 (N.C. Ct. App. 1999); *State v. Gray*, 549 P.2d 1112, 1113 (Or. 1976) (en banc).

{15} Where a reviewing court is presented with a “silent record,” it is precluded from drawing inferences about whether the plea was voluntary and intelligent. *Boykin*, 395 U.S. at 243. This is not a case involving a silent record.

{16} Each of the plea agreements Yancey signed includes a header, in bold caps, indicating that the document is a plea agreement.

1969-NMCA-020, ¶¶ 13-14, 22, 80 N.M. 155, 452 P.2d 489. And the plain language of Section 30-1-11 does not, expressly, or by implication, address the steps and procedures required to be followed during the plea process. At this point, our discussion is ended. We conclude with one important caveat.

{20} While Yancey was not required to state on the record “I plead guilty” or some similar variant, the very existence of this present appeal reveals that it is “plainly the better course” of practice for the district court to ask the defendant to “specifically utter the words ‘I am guilty.’” *Williams*, 20 F.3d at 134. To be clear, this is not because formalistic incantations unequivocally reveal the intentions of the speaker or because courts can only know the mind of a defendant faced with the choice of whether to plead guilty if he or she says certain, specific words. Rather, it is best practice to ask the defendant to state that he or she “pleads guilty” as these words are the best evidence the defendant does certainly mean to travel the road he or she has started down. But the fact that this is the best evidence in no way means that certain specific words are a legal prerequisite to a valid plea or can ever function, in and of themselves, as irrefutable proof that the defendant knowingly and voluntarily entered a guilty plea.

### III. CONCLUSION

{21} The narrow, bright-line rule the Court of Appeals imposed in this case requiring the formulaic recitation of the words “I plead guilty” (or the like) is inconsistent with New Mexico and federal law. Because the district court did not err when it failed to have Yancey state on the record “I plead guilty,” the Court of Appeals conclusion that this perceived error was jurisdictional in nature is moot. Moreover, we need not decide whether it was appropriate for the Court of Appeals to address sua sponte an error that, it turns out, is no error at all. It is sufficient that the Court of Appeals opinion is vacated in its entirety.

{22} We reverse and remand so that the Court of Appeals can consider the issues Yancey argued below. *Yancey*, 2017-NMCA-090, ¶ 15 (identifying the four issues raised but not considered below).

**{23} IT IS SO ORDERED.**  
JUDITH K. NAKAMURA, Chief Justice

**WE CONCUR:**  
BARBARA J. VIGIL, Justice  
C. SHANNON BACON, Justice  
DAVID K. THOMSON, Justice  
STAN WHITAKER, Chief Judge  
Sitting by designation



# Advance Opinions

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From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

**Opinion Number: 2019-NMCA-070**  
No. A-1-CA-37208 (filed August 22, 2019)

STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
DIMITRICE EDWARDS,  
Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY**  
MATTHEW E. CHANDLER, District Judge

Certiorari Denied, October 25, 2019, No. S-1-SC-37919.  
Released for Publication November 26, 2019.

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## Opinion

### J. Miles Hanisee, Judge.

{1} Defendant Dimitrice Edwards conditionally pled guilty to possession of a controlled substance, in violation of NMSA 1978, Section 30-31-23(E) (2011), and was sentenced to eighteen months of supervised probation. Having reserved the right to appeal the district court's denial of his motion to suppress, Defendant now argues that his constitutional rights were violated based upon an absence of reasonable suspicion underlying the arresting officer's *Terry* stop. Applying the United States Supreme Court's recent decision in *Utah v. Strieff*, 136 S. Ct. 2056 (2016), we conclude that Defendant's preexisting, independent, valid arrest warrant was an intervening cause that attenuated any otherwise unlawful seizure of Defendant or evidence from his person during a search incident to arrest. We therefore affirm the district court's denial of Defendant's motion to suppress.

#### BACKGROUND

{2} Clovis Police Department Officer Christian Townsend was on patrol at approximately 3:00 a.m. when he heard over his police radio that "shots had been fired" at 2221 Llano Estacado, an event venue. Upon learning that a Curry County Sheriff's deputy

was already at the scene and requesting assistance from other law enforcement officers, Officer Townsend rushed to the location with his patrol unit's emergency lights and siren on, unaware if a shooter was present at the scene. Upon arrival, he saw "people leaving the scene" and decided to position his vehicle to "block[] the eastbound lanes of Llano Estacado [to prevent] traffic from moving." Officer Townsend observed there to be "approximately fifty people" in the roadway, in vehicles, and in the parking lot.

{3} In order of proximity to him, Officer Townsend approached "the vehicles and [asked occupants] what they had seen or heard, [their] names or phone numbers or other basic information" and then, one by one, allowed them to leave. Defendant was a passenger in the rear seat of the third or fourth vehicle Officer Townsend approached. When questioned by Officer Townsend, the vehicle occupants collectively responded that none had "seen or heard anything," which was contrary to Officer Townsend's interviews with people in preceding vehicles. Also, the vehicle occupants claimed that they came to "pick somebody up," but had not yet done so, though all five seats in the vehicle were already occupied.

{4} Suspicious, Officer Townsend began what he described as an "investigative detention," requesting identification from each

person, including Defendant, who either handed Officer Townsend identification or provided his name and date of birth. Officer Townsend quickly discovered that Defendant had an outstanding warrant for his arrest, arrested Defendant, and when Defendant was later searched incident to his arrest, narcotics were found on his person. Defendant appeals his conviction and sentence associated therewith.

#### DISCUSSION

{5} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Yazzie*, 2019-NMSC-008, ¶ 13, 437 P.3d 182 (internal quotation marks and citation omitted). First, we review the district court's factual determinations for substantial evidence, and then review the district court's application of the law to those facts de novo. *State v. Tapia*, 2018-NMSC-017, ¶ 10, 414 P.3d 332. Defendant has not argued on appeal that "the New Mexico Constitution affords him greater protection than that afforded under the United States Constitution[.]" and we review his claim only under the Fourth Amendment. *State v. Jason L.*, 2000-NMSC-018, ¶ 9, 129 N.M. 119, 2 P.3d 856.

{6} Assuming without deciding the merit of Defendant's challenges to the existence of reasonable suspicion related to the on-scene deputy's law enforcement bulletin and Officer Townsend's ensuing detention, identification, and arrest of Defendant, we turn directly to the issue upon which we affirm. See *State v. Gonzales*, 2011-NMCA-007, ¶ 13, 149 N.M. 226, 247 P.3d 1111 ("Even if we were to assume without deciding that [the federal statute at issue] was violated in this case, [the d]efendant . . . is not entitled to exclusion of the evidence."). That is, we first resolve whether, under United States Supreme Court precedent, Defendant's preexisting arrest warrant operates to excuse mistaken or unlawful police action preceding Defendant's arrest. Defendant argues that *Strieff* does not justify Officer Townsend's detention of him because the State did not "show how much time elapsed between [Officer Townsend's] act of obtaining [Defendant's] identification and the discovery of the contraband, or any intervening circumstances besides the discovery of the warrant via the impermissible request for [Defendant's] identification." Defendant further contends that "the police conduct was flagrant" because there were "three separate search-and-seizure violations of [Defendant's] rights." Asserting that Defendant was seized from the moment Officer Townsend initially began his interaction with the vehicle in which Defendant was a passenger, Defendant argues that the lack of reasonable suspicion to request his identification cannot be excused under *Strieff*.

{7} The State answers that under *Strieff*, the preexisting warrant for Defendant's arrest constitutes "an intervening circumstance" that in this instance excuses whatever constitutional impropriety this Court might find preceded Defendant's seizure, identification, warrant-based arrest, and the discovery of contraband in the ensuing search of Defendant's person. Speaking to the collective facts of this case, the State asserts "there is no evidence of police misconduct [despite the lack of evidence regarding] . . . the lapsed time between the possible illegality and the acquisition of evidence." We agree with the State and explain.

**Defendant's Arrest Warrant Was an Intervening Cause That Attenuated His Unlawful Seizure From Evidence Obtained After His Arrest**

{8} Long ago, the United States Supreme Court established the exclusionary rule in *Weeks v. United States*, 232 U.S. 383, 398 (1914), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961), disallowing as trial evidence that seized in contravention of the Fourth Amendment. *See Mapp*, 367 U.S. at 655 (declaring such evidence to be inadmissible as well in state courts under the Fourteenth Amendment's Due Process Clause). However, under the Fourth Amendment, the exclusionary rule is applied "only . . . where its deterrence benefits outweigh its substantial social costs," consistent with the principle that "[s]uppression of evidence . . . has always been our last resort, not our first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (internal quotation marks and citation omitted). Accordingly, the Supreme Court has recognized several exceptions to the exclusionary rule, one of which is the attenuation doctrine, addressed in *Strieff* under very similar circumstances to those with which we are faced, and which held that "[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." 136 S. Ct. at 2061 (internal quotation marks and citation omitted).

{9} Indeed, *Strieff* too evaluated an unconstitutional encounter during which an officer requested the defendant's identification, learned of a preexisting and valid arrest warrant, arrested the defendant, and discovered drugs and drug paraphernalia during a search incident to arrest. *Id.* at 2060. Considering three factors originally set forth in *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), namely: (1) the lapsed time between the illegality and the acquisition of the evidence, (2)

"the presence of intervening circumstances," and (3) "the purpose and flagrancy of the official misconduct," the Supreme Court in *Strieff* held that the "unlawful stop was sufficiently attenuated by the pre[existing] arrest warrant." *Strieff*, 136 S. Ct. at 2062-63; *see also Tapia*, 2018-NMSC-017, ¶ 15 (applying *Brown* factors to attenuation inquiry). *Strieff* noted as well that the officer that initiated the mistaken stop acted lawfully thereafter, that the warrant check "was a negligibly burdensome precaution for officer safety[.]" that the unlawful stop was not "part of any systematic or recurrent police misconduct[.]" and that the officer's instance of negligence "occurred in connection with a bona fide investigation." 136 S. Ct. at 2063 (internal quotation marks and citation omitted).

{10} We therefore turn to the facts of this case to ascertain whether or not the attenuation doctrine, as applied to the preexisting, active arrest warrant in *Strieff*, acts similarly here to permit the seizure of evidence from Defendant's person following his arrest, even if that seizure were otherwise unlawful. We proceed to apply the *Brown* factors to this case determine "whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful [detention of Defendant] and the discovery of drug-related evidence on [Defendant's] person." *Id.* at 2061.

{11} Beginning with the first *Brown* factor, the lapsed time between the illegality and the acquisition of the evidence, we agree with Defendant and the State that there is no evidence regarding how much time elapsed between Officer Townsend's unlawful detention of Defendant when he initially made contact with his vehicle, or in the alternative when Officer Townsend requested Defendant's identification. *See Tapia*, 2018-NMSC-017, ¶ 35. Generally, this factor weighs in favor of suppression "unless substantial time elapses between an unlawful act and when the evidence is obtained." *Strieff*, 136 S. Ct. at 2062 (internal quotation marks omitted). Because we lack information that would assist us in determining this factor, we conclude that it favors suppression.

{12} Second, we consider "any intervening circumstances that serve to attenuate the illegal detention from the discovery of the evidence." *Tapia*, 2018-NMSC-017, ¶ 36. Here, because Defendant had a preexisting, untainted, valid arrest warrant, which obligated Officer Townsend to arrest Defendant when he discovered it, this factor "strongly favors" attenuation. *See Strieff*, 136 S. Ct. at 2062-63 (holding that the existence of an arrest warrant was an intervening circumstance where it "was valid, it predated [the officer's] investigation, and it was entirely unconnected with the [investigatory deten-

tion]"). Finally, "we assess the purpose and flagrancy of the police misconduct" *Tapia*, 2018-NMSC-017, ¶ 38. "For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure." *Strieff*, 136 S. Ct. at 2064. Here, Officer Townsend's investigation was clearly not "a suspicionless fishing expedition in the hope that something would turn up." *Id.* (internal quotation marks and citation omitted). Rather, Officer Townsend's aim was to investigate the report of a possible serious crime, a shooting, and so he sought to interview potential departing witnesses in order to ascertain whether they had information that could assist the investigation. At worst, Officer Townsend's mistake in detaining Defendant until he answered questions and provided his identity was negligent insofar as he lacked reasonable suspicion of criminal activity related to Defendant. This is especially so given that Officer Townsend was attempting to investigate a purported shooting contemporaneous to its reported occurrence. There is no evidence that Officer Townsend "approached and addressed Defendant for arbitrary reasons[.]" and similarly "nothing suggests that admission of the evidence will embolden police to engage in unconstitutional" investigatory detentions. *Tapia*, 2018-NMSC-017, ¶ 38. We cannot conclude that Officer Townsend detained Defendant for an improper purpose or that he was flagrant in his unlawful conduct. This factor, therefore, weighs in favor of attenuation. Accordingly, based upon our application of the *Brown* factors in a circumstance markedly similar to *Strieff*, we conclude that Defendant's arrest warrant was an intervening cause that broke the causal chain between Officer Townsend's unlawful detention of Defendant and the seizure of evidence from Defendant after his arrest. As such, under the attenuation doctrine, the evidence discovered on Defendant's person is not subject to the exclusionary rule. We therefore affirm the district court. *See State v. Gallegos*, 2007-NMSC-007, ¶ 26, 141 N.M. 185, 152 P.3d 828 ("[W]e will affirm the [district] court's decision if it was right for any reason so long as it is not unfair to the appellant for us to do so.").

**CONCLUSION**

{13} For the foregoing reasons, we affirm the district court's denial of Defendant's motion to suppress.

{14} **IT IS SO ORDERED.**  
**J. MILES HANISEE, Judge**  
**WE CONCUR:**  
**KRISTINA BOGARDUS, Judge**  
**MEGAN P. DUFFY, Judge**

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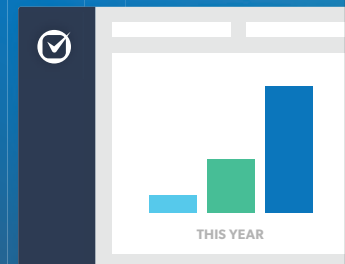
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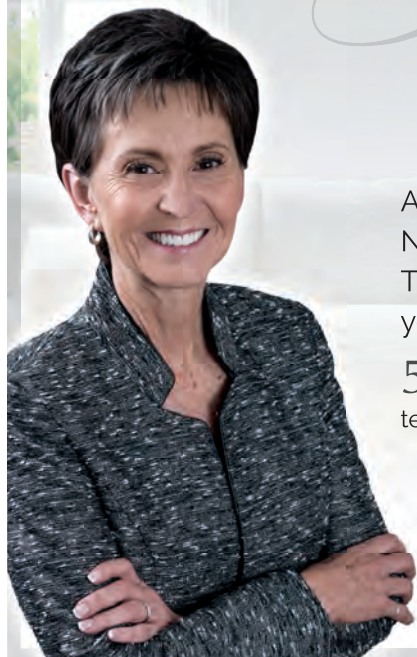
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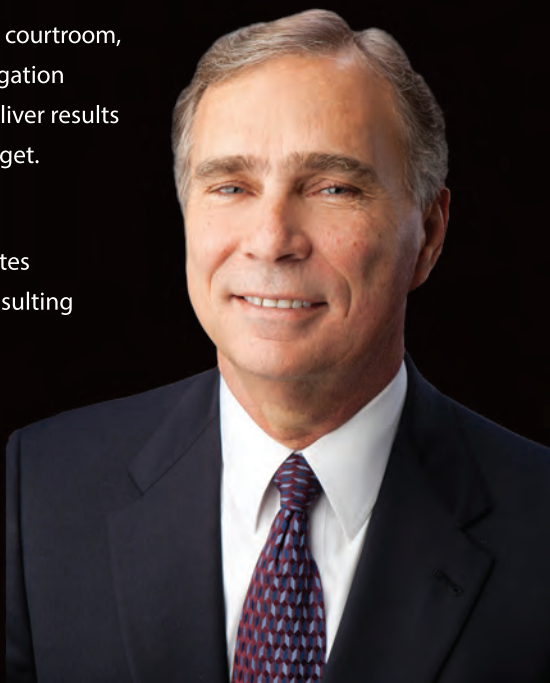
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The City of Albuquerque Legal Department is hiring an Assistant City Attorney position in the Property and Finance division of the City Attorney's Office. The position will administer the traffic arraignment program, approximately 20 hours per week, requiring the attorney to review, approve and negotiate agreements concerning traffic law violations. The attorney will also 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 matters before administrative tribunals and in New Mexico State and Federal courts. This is an excellent position for newly licensed attorneys seeking to establish themselves within the legal field of governmental affairs, or for more experienced attorneys desiring to provide public service. 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](mailto:amaragon@cabq.gov).

#### 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](mailto:amaragon@cabq.gov).

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## Assistant Computer Systems Administrator

The Federal Public Defender for the District of New Mexico is accepting applications for the position of Assistant Computer Systems Administrator. This position will be located in the Albuquerque main office. The Federal Defender organization operates under authority of the Criminal Justice Act, 18 U.S.C. § 3006A, to provide defense services in federal criminal cases and related matters by appointment from the court. Requirements: Must be a high school graduate or equivalent. A bachelor's degree from an accredited college or university with concentration in computer or management information systems is desired, but not required. The ideal candidate will have experience in a law firm or with litigation support and software programs. Experience with Microsoft Server environments is highly preferred. Must have strong communication and organizational skills. Three years of technical experience with an emphasis in user support and training is required, along with experience with Microsoft Office and Windows 7 – 10. Experience installing and repairing automation hardware, software, and basic network administration experience is required. Experience with system and security log management is preferred. Extensive experience with word processing applications such as WordPerfect and Microsoft Word, and converting between the two is ideal. Experience supporting telephone and voice-mail systems is desired but not required. Candidate must be highly motivated and extremely detail oriented. This position is classified as a high-sensitive position. Appointment and retention is subject to a satisfactory background investigation, including, but not limited to, an FBI fingerprint and name check. Duties include but are not limited to: Providing assistance to and receiving technical guidance from the Computer Systems Administrator (CSA); providing specialized and routine user support services including training, resolving hardware, software, peripheral equipment, and data communications systems problems; assisting with the installation, testing and user training on new and updated computer equipment and software; tracing and identifying sources of system failures and errors; ; security monitoring; perform systems maintenance activities; conducting audits and evaluation of automated systems and existing software applications; assisting staff attorneys and investigators with the preparation of matters for trial using PC-based automation applications. May also be responsible for keeping inventory of computer equipment or other office property, and tracking cyclical replacement information. Other duties as assigned. The ACSA reports directly to the CSA in Las Cruces and the Administrative Officer in Albuquerque. Periodic reports of work activities and regular meetings with supervisors to establish priorities for the office will be required. Regular travel may be required for training, to provide backup support, and

to provide assistance with automation-related case preparation work. At least one week per year of travel is required to attend an annual CSA/ACSA training conference. Salary and Benefits: The starting salary for the position falls within a range of \$59,315 (IT-JSP-9, Step 1) to \$77,204 (JSP-12, Step 1). The salary of the successful applicant will be commensurate with the person's qualifications and experience. The position is in the excepted service and does not carry the tenure rights of the competitive Civil Service. The position does offer federal government employee benefits, including health and life insurance programs, retirement, and the Thrift Savings Plan. Salary is payable only by Electronic Funds Transfer (direct deposit). How to Apply: In one PDF document, please e-mail your resumé with cover letter and 3 references to: Melissa Read, Administrative Officer, FDNM-HR@fd.org Reference 2020-05 in the subject. No phone calls please. Applications must be received by June 19, 2020. The Federal Public Defender is an equal-opportunity employer. Position is subject to the availability of funding.

## Services

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### Want To Purchase

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

### For Sale

Office furniture (desks, conference tables, chairs, file cabinets, etc.) and supplies and equipment for sale. Contact Remo Gay at 505-280-1321.

### Search for Will

IN SEARCH OF original Last Will and Testament of FREDRICK M. VAN HOOK of Farmington, NM. Survived by daughter BARBARA VAN HOOK. Please contact Barbara Van Hook at (505) 419-1722.

## 2020 Bar Bulletin Publishing and Submission Schedule

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

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

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



*Fattore v Fattore*, 458 N.J. Super 75 (App. Div. 2019)  
*Galassi v Galassi*, 2009-NMCA-026

## CAN SPOUSAL SUPPORT BE REVISTED AFTER THE FINAL DIVORCE DECREE?

Most people think that once spousal support is granted (or denied), the decision is set in stone. The truth is more nuanced; not only can the amount of spousal support be modified after the fact due to a change in circumstances, but even its allocation, or lack thereof, can be malleable. Two cases illustrate:

In *Fattore v Fattore*, a New Jersey Appeals Court found that even a permanent waiver of spousal support could be vacated. Several years post-divorce, the ex-husband opted to receive VA disability payments in lieu of his military pension, the right to which had been divided 50/50 in the divorce. Since by law, veteran disability benefits may not be divided, the husband's choice effectively pre-empted the better part of his ex-wife's retirement income. The Appeals Court found that choice resulted in a substantial change in circumstances and warranted consideration of an award of spousal support.

On the other side of the spectrum, in *Galassi v Galassi*, a New Mexico District Court stopped the former Ms. Galassi's spousal support because she had remarried and had not demonstrated exceptional circumstances to warrant its continuation. The court's decision was supported both by common law and prior New Mexico case law, which presumed termination of spousal support upon remarriage. In *Galassi*, the spousal support schedule and amount had been established in an MSA during the divorce. Further, it had been designated as "non-modifiable". In a surprise decision, the New Mexico Appeals Court found that "non-modifiable" overrides the presumption that spousal support terminates upon remarriage of the recipient.

In both cases, additional foresight and care in delineating terms could have averted the expense and trauma of post-divorce litigation.

Read more about these cases  
and WBMH's POV on our blog  
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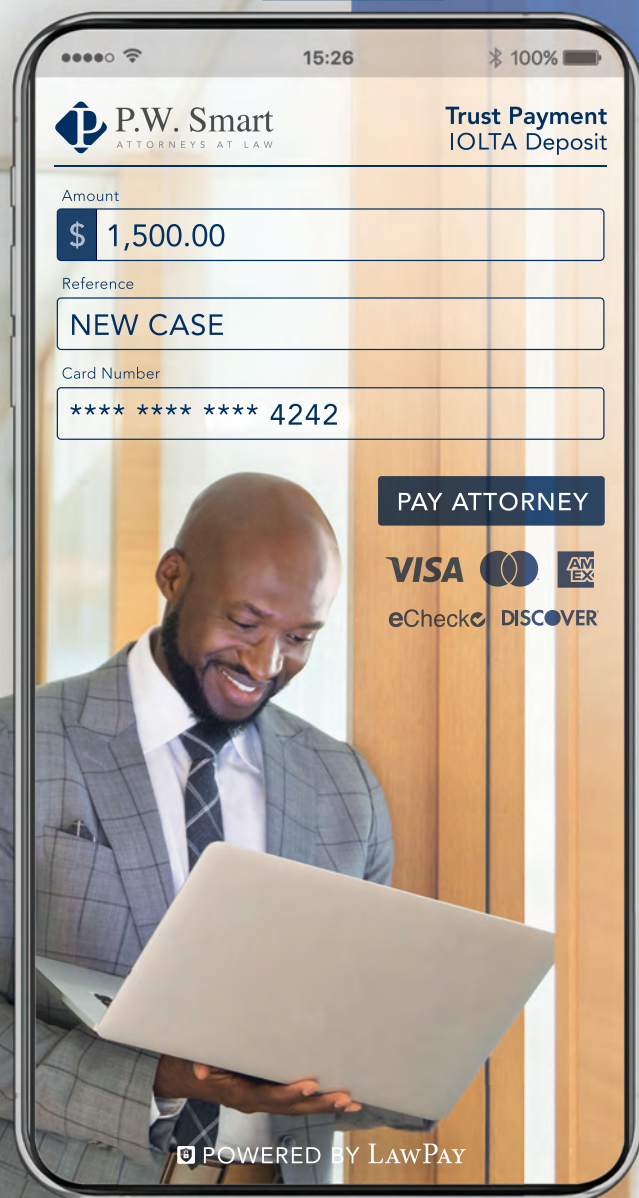
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