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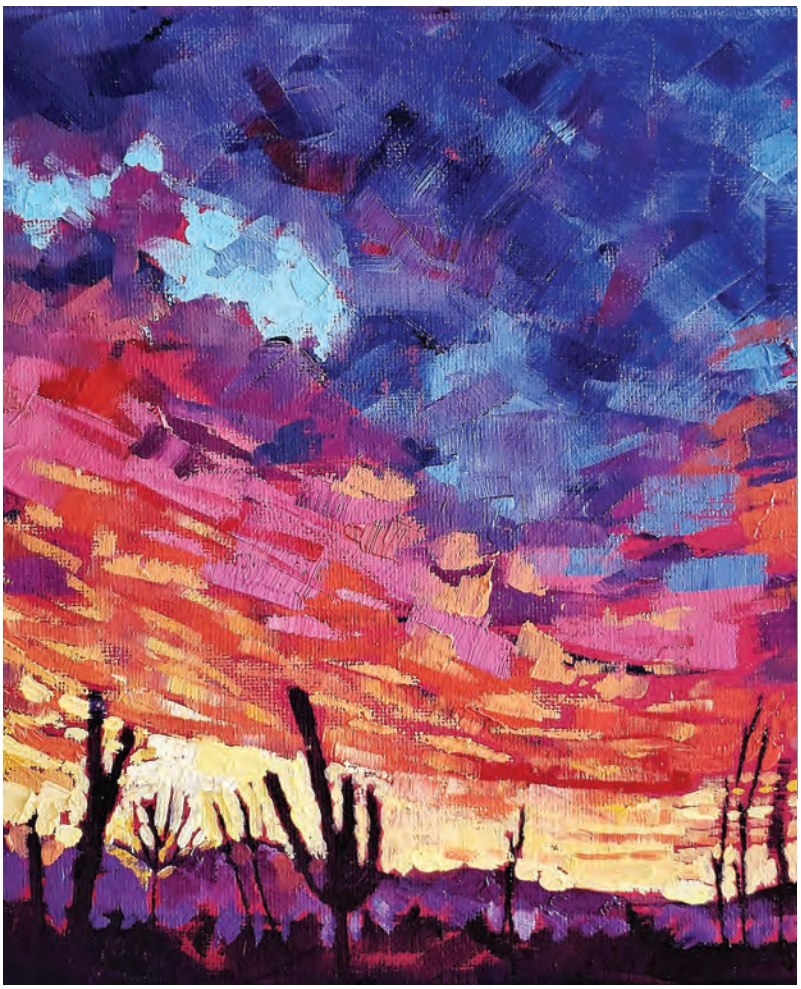

New Mexico Sky, by Bhavna Misra

Bhavna Misra Art Studio and Gallery

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STATE BAR of NEW MEXICO

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For more details and to register, call 505-797-6094

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For more details and to register, call 505-797-6022

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

August

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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: Bhavna is a San Francisco based fine artist. She observes life closely and interprets it into her drawings and paintings in her signature realistic-infused-with-expressionistic, full-color-palette style that incorporates bold strokes and rich marks to convey rhythm and emotion in her work. The colors as seen though the planar positioning, relative interplay, and curiosity of unseen are guided to delight and hold the interest to explore more. She likes to surround herself with nature, beauty, and positivity that brings out the motivation to create harmonious, colorful compositions that aim to delight and inspire the sense of calm, cheer, and joy in the viewer. About eight years ago, Misra quit her 9-to-5 job and returned to doing art full time. She now regularly displays her work at various exhibitions and shows. She works as an art contractor for the Alameda County Library System and owns Bhavna Misra Art Studio and Gallery.

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

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

Supreme Court Law Library

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

Announcement of Vacancy

A vacancy on the Supreme Court will exist as of Aug. 1 due to the retirementsof the Honorable Supreme Court Chief Justice Judith K. Nakamura, effective July 31. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the court. Sergio Pareja, chair of the Supreme Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php, or emailed to you by contacting the Judicial Selection Office at akin@law.unm.edu. The deadline for applications has been set for June 26 by 5 p.m. Applications received after that time will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The New Mexico Supreme Court Judicial Nominating Commission will convene beginning at 9 a.m. on July 9 and will occur exclusively by Zoom. The Commission meeting is open to the public, and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard. If you would like the Zoom invitation emailed to you, please contact Beverly Akin by email at akin@law.unm.edu. Alternatively, you may find the Zoom information for this hearing below:
Topic: New Mexico Supreme Court Judicial Nominating Commission Meeting
Time: July 9 at 9 a.m.
Join Zoom Meeting:
https://unm.zoom.us/j/379615447?pwd=M3lSVGxuSEkrSjd4cExlVXYwK3MzQT09
Meeting ID: 379 615 447
Password: 72146

Professionalism Tip

With respect to the courts and other tribunals:

I will voluntarily exchange information and work on a plan for discovery as early as possible.

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 (video-conferencing 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 or refer to the individual announcements or visit lawschool.unm.edu/judsel/index.html.

New Mexico Court of Appeals Nominating Commission

Meeting Date Change Announcement

The meeting of the New Mexico Court of Appeals Nominating Commission, which had been scheduled for 9 a.m. on June 29 has been rescheduled to begin at 9 a.m. on June 18. It will occur exclusively by Zoom. Vice Dean Camille Cary, who will be serving as acting dean of UNM School of Law that week due to a necessary unavailability of Dean Pareja, will chair and preside over the New Mexico Court of Appeals Nominating Commission meeting. 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. Alternatively, you may find the Zoom information for this hearing below:
Topic: NM Court of Appeals Judicial Nominating Commission
Time: June 18, 9 a.m. Mountain Time (US and Canada)
Join Zoom Meeting:
https://unm.zoom.us/j/97810986796
Meeting ID: 978 1098 6796
Password: 707616

Applicant Announcement

Ten applications were received in the Judicial Selection Office, for the Judicial Vacancy in the New Mexico Court 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, 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 9:00 a.m. on June 18, 2020, 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. If you would like the Zoom invitation emailed to you, please contact Beverly Akin by email at akin@law.unm.edu. Alternatively, you may find the Zoom information for this hearing below:
Topic: NM Court of Appeals Judicial Nominating Commission
Time: June 18, 9 a.m. Mountain Time (US and Canada)
Join Zoom Meeting
https://unm.zoom.us/j/97810986796
Meeting ID: 978 1098 6796
Password: 707616

The Board Governing the Recording of Judicial Proceedings
A Board of the Supreme Court of New Mexico

Expired Court Reporter Certifications

The following list includes the names and certification numbers of those court reporters whose New Mexico certifications expired as of Dec. 31, 2019.

Name	CCR CCM No.	City, State
Coffelt Shepherd, Kristie L.	523	Santa Rosa, Ca.
Dockstader, Brynn E.	525	Tucson, Az.
Jasper, Robin L.	526	Peoria, Az.
Lusk Hufstetler, Martha	525	Marietta, Ga.
O'Bryan, Carol	186	Gillette, Wy.
Ottmar, Julie	527	Phoenix, Az.
Sing, Ningay N.	510	Auburn, Ca.
Slone, Stephanie	505	Santa Fe, NM
Sperry, Susan	514	Santa Fe, NM
Wolfe-Power, Shelby	126	El Paso, Tx.

First Judicial District Court
Candidate Announcement

The First Judicial District Court Nominating Commission convened on June 2 via zoom in Albuquerque and completed its evaluation of seven applications for the First Judicial District Court due to the creation of the additional judgeships by the legislature. The commission recommends the following candidates to Governor Michelle Lujan Grisham: **Kathleen McGarry Ellenwood, Michael R. Jones and Pierre Luc Levy.**

Third Judicial District Court
Candidates Announcement

The Third Judicial District Court Nominating Commission convened on June 10 via Zoom and completed its evaluation of the nine applicants for the vacancy on the Third Judicial District Court due to the creation of an additional Judgeship by the Legislature. The commission recommends the following four candidates (in alphabetical order) to Governor Michelle Lujan Grisham: **Heather Chavez, Casey Fitch, Richard Jacquez and Jeanne H. Quintero.**

Eleventh Judicial District Court
Appointment of Judge Pederson

Governor Michelle Lujan-Grisham has appointed Robert David Pederson to the Eleventh Judicial District Court, Division V, located in Gallup. Judge Pederson fills the vacancy created by the retirement of the Honorable Lyndy Bennett. Parties to cases assigned to Judge Pederson have have been individually notified.

Twelfth Judicial District Court
Candidates Announcement

The Twelfth Judicial District Court Nominating Commission convened on June 11 via Zoom and completed its evaluation of the four applicants for the vacancy on the Twelfth Judicial District Court due to the creation of an additional Judgeship by the Legislature. The commission recommends the following two candidates (in alphabetical order) to Governor Michelle Lujan Grisham: **David Louis Ceballes, II and Ellen Rattigan Jessen.**

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 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.

Reopening of Building

The State Bar of New Mexico is reopening to members and the public on June 29; availability is limited pursuant to the current State Health Orders. To book a meeting, please contact us at 505-797-6000 or sbnm@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 elaird@nmbar.org. Apply by June 30.

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 29
- July 6
- July 13

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 or Briggs Cheney at 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.

Cannabis Law Board

Letter to Governor

The Cannabis Law Board sent a letter to the governor of New Mexico on May 29 urging her to add a proposal to legalize, regulate, and tax recreational or adult-use Cannabis to the agenda of the special session in June. In accordance with Section 11.7(b)(2) of the State Bar of New Mexico bylaws, State Bar practice sections are permitted to lobby for or against legislation within the field of legal expertise of the section. Following the bylaws, the Board circulated the letter to section members for two weeks for comments and questions. At the conclusion to the two weeks, the Board unanimously voted to proceed with distributing the letter. As stated in their letter, this position is put forth by the Cannabis Law Section of the State Bar; however, this position is neither endorsed nor approved by the State Bar of New Mexico.

UNM School of Law

Law Library Hours Spring 2020

Through May 16

Building and Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	Closed.

Reference

Monday–Friday	9 a.m.–6 p.m.

Other Bars

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 or 505-842-6626. Checks may be mailed to PO Box 40, Albuquerque, NM 87103.

NEW MEXICO ATTORNEYS

In Memoriam Ceremony

Member Services Can Benefit from Your Help

The State Bar of New Mexico Senior Lawyers Division is honored to annually host the Attorney In Memoriam Ceremony. This event will honor New Mexico attorneys who have passed away during the last year (November 2019 to present) to recognize their work in the legal community. The ceremony is also accompanied with a presentation of scholarships to deserving third-year law students of the University of New Mexico School of Law. The State Bar of New Mexico Senior Lawyers Division would like to invite the family and friends of the attorneys to attend the reception where the scholarships will be presented to the students in honor of our deceased colleagues.

If you know of someone who has passed and/or the family and friends of the deceased (November 2019 to present), please contact Member Services at memberservices@nmbar.org or visit the www.nmbar.org/sld for additional information.

Save the date for the ceremony!

All are welcome to attend.
Tuesday, Nov. 17 • 5:30–7:30 p.m.
State Bar of New Mexico or via virtual presentation
5121 Masthead St. NE, Albuquerque, NM 87109

STATE BAR of NEW MEXICO

The Rodey Law Firm has achieved top ranking in *Chambers USA–America's Leading Lawyers for Business-2020.* Rodey received *Chambers*' highest ranking in the following areas of law: Corporate/Commercial; Labor & Employment; Litlitigation: General Commercial; and Real Estate. *Chambers* bases its rankings on technical legal ability, professional conduct, client service, commercial awareness/astuteness, diligence, commitment, and other qualities most valued by the client. *Chambers* honored these Rodey lawyers with its highest designation of "Leaders in Their Field" based on their experience and expertise: Mark K. Adams - Environment, Natural Resources & Regulated Industries; Water Law, Rick Beitler - Litigation: Medical Malpractice & Insurance Defense, Perry E. Bendicksen III – Corporate/Commercial, David P. Buchholtz – Corporate/Commercial, David W. Bunting – Litigation: General Commercial, Jeffrey Croasdell – Litigation: General Commercial, Nelson Franse - Litigation: General Commercial; Medical Malpractice & Insurance Defense, Catherine T. Goldberg - Real Estate, Scott D. Gordon - Labor & Employment Bruce Hall - Litigation: General Commercial, Justin A. Horwitz - Corporate/Commercial, Jeffrey L. Lowry – Labor & Employment Donald B. Monnheimer - Corporate/Commercial, Sunny J. Nixon - Environment, Natural Resources & Regulated Industries: Water Law, Edward Ricco - Litigation: General Commercial, Debora E. Ramirez – Real Estate, John P. Salazar - Real Estate, Andrew G. Schultz - Litigation: General Commercial, Charles A. Seibert – Real Estate, Tracy Sprouls - Corporate/Commercial: Tax, Thomas L. Stahl - Labor & Employment and Charles J. Vigil – Labor & Employment.

Benchmark Litigation-The Definitive Guide to America's Leading Litigation Firms and Attorneys has named Rodey lawyer **Krystle Thomas** to its list of the nation's most accomplished legal partners age 40 or under. Through a process of peer review and case examination, the list was compiled over a process of many months to honor the achievements of young up-and-coming attorneys. A director in Rodey's Albuquerque office, Thomas focuses her practice on employment law and professional liability defense.

Keleher & McLeod, one of the leading law firms in New Mexico, has added three attorneys – Ann Conway (left), Cassandra Malone (middle) and Kathryn Schroeder (right). Conway represents clients in areas of government relations and lobbying, fidelity and surety law, construction litigation, insurance law and insurance bad faith litigation, and mediation and arbitration. Conway has represented clients in the New Mexico Legislature and before state and federal agencies for 35 years. Conway has represented individuals, construction companies, financial institutions, insurance companies and trade associations in direct actions, class actions, and as Amicus Curie in trial and appellate courts. Conway also serves as a court-appointed and private mediator and arbitrator in civil and construction cases. She received her law degree from Notre Dame Law School in 1984. Malone's practice is primarily comprised of litigation in New Mexico state and federal courts. Her areas of expertise include real estate and business matters, contract disputes, insurance coverage issues, employment issues, medical malpractice and personal injury claims. She also appears in both administrative proceedings and state court regarding water rights issues. She obtained her law degree, cum laude, from the University of New Mexico in 2008. Schroeder represents a variety of clients in commercial and real estate transactional matters and civil and commercial litigation. Prior to joining Keleher & McLeod, Schroeder practiced in the areas of environmental and energy law. She received her law degree from Temple University in 2014. For more information, go to Keleher-Law.com

David Carlson Smith, attorney, writer, musician, publisher, photographer, passed away on Thursday, April 27, 2017. He is survived by his wife Patricia, his sons Carl and David and his daughter Amber Adams. Born in Amarillo, Texas in 1942, David grew up there with his mother Ophelia (Felix) Smith and his father Carl M. Smith, an independent oil and gas operator. After graduation from the Berkshire School, Sheffield, Massachusetts, David went to Yale College, where he received a Bachelor of Arts degree in English in 1964. He lived in Spain, where he wrote a novel, The Vandals, about coming of age in Texas and studied flamenco guitar with Triguito and Aurelio Garci. He later studied with Pedro Cort,s in New York and Carlos Lomas in Santa Fe. For several years, David played bass with The Blues Arrows, fronted by the artist Paul Shapiro on vocals and harmonica. The Blues Arrows opened for blues legend Junior Wells. David's CD "Flamenco Blues" was in the recording phase at the time of his death. David received his J.D. from Temple University School of Law and was admitted to the Supreme Court of the Commonwealth of Pennsylvania, after which he served as treasurer for a technical education company. He began his representation of artist, as publisher and lawyer. His artist clients included Tom Palmore, James Havard, Earl Biss, Bob Wade, Bruce LaFountain, Craig Varjabedian, Tim Fitzharris, Thomas Vorce, Doug Coffin and Judy Chicago. A contributing editor of The American Poetry Review, David accomplished his first translation of Trilce, a book of 64 poems by the Peruvian poet, C,sar Vallejo, written in 1922; 24 of which were inserted as a special supplement to the first issue of the APR. Prior to David's translation, Trilce was known as "the untranslatable book" because of its cryptic style of invented words, twisted syntax and double meanings. David's translation was published with illustrations by Tom Palmore by Grossman/Viking in New York in 1973. David also translated Amerika Amerikka Amerikkka by the Chilean novelist Fernando Alegr¡a and published by the University of Texas Press. Various translations by David of Pablo Neruda and Nicanor Parra also appeared in the APR. After moving to New Mexico in 1978, David worked at his limited edition lithographic publishing entity Park Row Editions and was admitted to the New Mexico state and federal bar associations. David was an avid golfer, skier, fly-fisherman and scuba diver. He served on the boards of several non-profits, including The Southwestern Association for Indian Arts and New Mexico Experimental Glass Workshops. He published an ebook Shadow Works of Thomas Vorce through his publishing company Pixwest. He will be missed by his many friends and his family.

Stephen Farris attained a Bachelor's and Master's Degree in Geology from New Mexico State University and a Juris Doctorate from the University of New Mexico. He was a practicing geologist and had great knowledge and understanding of the geology of New Mexico from his education and life experience in the family uranium mining in the Grants area as a child, and later exploring for mineral resources himself. He became a member of the State Bar of New Mexico in 1990 and spent most of his career working at the New Mexico Office of the Attorney General, where he worked for three of New Mexico's attorneys generals. He was the head of the NMAG's water law division. Prior to his position as the assistant attorney general, Stephen was counsel for the New Mexico State Engineer and the Interstate Stream Commission. He represented the State of New Mexico in water law cases that were both legally and scientifically complex. Stephen was a respected professional in every aspect. His technical background as a former geologist provided the foundation for his well-known expertise in water law. As a native son of New Mexico, Stephen served as a lead attorney representing the Office of the New Mexico Attorney General's Office in the protection of our limited water resources. He provided steadfast and wise counsel in state and federal courts, and always did so with integrity, in a courteous manner and always with a measure of good humor. The respect for his legal knowledge was captured in his co-authorship of an interstate river compact template that has been applied on a national and international level. Stephen's entire career was in service to the State of New Mexico and its citizens. Stephen retired as Chief Water Counsel and Director of the Water, Environment and Utility Division of the New Mexico Attorney General's Office. Stephen was a talented storyteller. He used stories as a vehicle to impart information as he presented a position to state or federal legislative committees or to a court. His stories held his audience, conveying the wisdom of his position without their knowledge of the persuasion that they had undergone. Adversaries would nod in agreement and stumble to advocate the contrary. His storytelling gift may have been a product of his consummate reading. No genre was unexplored. His knowledge of Shakespeare bordered on eidetic and he had no reservations relating the Bard to his professional and everyday life. Stephen was born on June 1, 1955 in Gallup, New Mexico. He passed away on May 28, 2020 in the loving care of the staff of Lovelace Medical Center in Albuquerque. Stephen was preceded in death by his parents Quimby (Tink) and Nelle and his brother Bradford. He is survived by his spouse, John Quinn Pate and his sister Carole Jean Farris, countless friends and colleagues, and as he was a member of one of New Mexico's heritage families, numerous relatives across the country.

Beloved husband, father, and grandfather, and lifelong resident of Albuquerque, **Bernard Paul "Bernie" Metzgar**, died May 13 at age 83. He is survived by his spouse, Mary Metzgar of Albuquerque; and two of his three children, Paul Metzgar Sr. of Albuquerque, and Karen Deane of Santa Monica, CA. Bernie is also survived by his brother, Joseph Metzgar of San Francisco, CA. Bernie's six grandchildren and their spouses will miss him dearly, Shauna Gomez (Jake), Paul Metzgar Jr. (Elizabeth), Rochelle Trujeque (Simon), "Katie" Reimann (Geoffrey), Anthony "Andy" David Metzgar (Adri), Rikki Lynn (Oscar). Bernie's eleven great-grandchildren will miss him tremendously along with many nieces and nephews. Bernie was preceded in death by his son, Robert Metzgar; and his brothers and sisters, AD "Tony" Metzgar, Johnny Martinez Metzgar, Mary Edith Metzgar, Lucy Bernstein and Carmen Nordsiek. Bernie was a graduate of St. Mary's High School, UNM, and Georgetown University Law Center. He was a United States Air Force veteran and an avid lifelong Lobo fan. Bernie practiced law in New Mexico for 53 years, first with Lamb, Metzgar, Lines & Dahl, and most recently with Crowley & Gribble. Bernie was a staff attorney and board member of Legal Aid Society of Albuquerque for many years, and enjoyed his twenty-plus years association with SSCAFCA.

Legal Education

June

24 **One Simple Step, 100% Better Contract**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Indian Law: The Multidisciplinary Practice (2019)**
5.0 G, 1.0 EP
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

29 **Law Practice for Sale: Ethical Strategies for Sellers and Buyers**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

30 **Ethics: Practical and Budget-Friendly Cybersecurity for Lawyers**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

30 **Mindfulness Based Stress Reduction for Lawyers**
1.5 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

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1.0 G
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Center for Legal Education of NMSBF
www.nmbar.org

9 **Drafting Employment Agreements, Part 1**
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Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Drafting Employment Agreements, Part 2**
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Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Special Needs Trusts**
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Live Seminar
NBI INC
www.nbi-sems.com

15 **A Lawyer's Guide to Office 365**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

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5.5 G, 1.2 EP
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Center for Legal Education of NMSBF
www.nmbar.org

17 **2020 Family and Medical Leave Update**
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Center for Legal Education of NMSBF
www.nmbar.org

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Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Animal Law Institute: The Law and Ethics of Wild Animals in Captivity (2019)**
5.3 G, 1.0 EP
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

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

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

28 **Lawyer Ethics and Disputes with Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
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30 **Charitable Giving Planning in Trusts and Estates, Part 1**
1.0 G
Teleseminar
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31 **Charitable Giving Planning in Trusts and Estates, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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31 **Reefer Madness Part Deux: Chronic Issues in New Mexico Cannabis Law (2019)**
4.4 G, 1.0 EP
Live Replay Webcast
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August

7 **"Boilplate" Provisions in Contracts: Overlooked Traps in Every Agreement**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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7 **Basics of Trust Accounting: How to Comply with Disciplinary Rule 17-204 NMRA**
1.0 EP
Live Replay Webcast
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7 **Mediating the Political Divide**
2.0 EP
Live Replay Webcast
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7 **Deal or No Deal: Ethics at Trial (2019 Annual Meeting)**
1.0 EP
Live Replay Webcast
Center for Legal Education of NMSBF
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13 **Lawyers Ethics in Real Estate Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Reps and Warranties in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Electric Power in the Southwest**
10.7 G, 1.0 EP
Live Seminar
Law Seminars International
www.lawseminars.com

20 **Natural Resource Damages**
9.2 G
Live Seminar
Law Seminars International
www.lawseminars.com

24 **2020 Trust Litigation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **The Intersection of Accounting and Litigation: How to Explain a Financial Story to a Judge and Jury**
5.0 G, 1.6 EP
Live Webinar
Center for Legal Education of NMSBF
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Opinions

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

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

Effective May 29, 2020

PUBLISHED OPINIONS

A-1-CA-36748	State v. D Paul	Affirm/Remand	05/28/2020
A-1-CA-36096	State v. D Gutierrez	Affirm/Reverse/Remand	05/29/2020
A-1-CA-37270	State v. F Estevez	Affirm/Reverse/Remand	05/29/2020
A-1-CA-37585	State v. C Johnston	Affirm/Reverse/Remand	05/29/2020
A-1-CA-38283	State v. D Padilla	Affirm	05/29/2020

UNPUBLISHED OPINIONS

A-1-CA-36618	State v. J Sanchez	Affirm	05/26/2020
A-1-CA-38011	A Gallegos v. K Gallegos	Affirm	05/26/2020
A-1-CA-38094	L Chavez v. C Castleberry	Affirm	05/27/2020
A-1-CA-38235	J Downs v. Progressive Northern Ins Co.	Affirm	05/27/2020
A-1-CA-36447	State v. T Hedges	Reverse/Remand	05/28/2020
A-1-CA-37509	State v. G Lock	Affirm	05/29/2020

Effective June 5, 2020

PUBLISHED OPINIONS

A-1-CA-36474	T Young v. Gila Regional	Affirm/Reverse/Remand	06/04/2020

UNPUBLISHED OPINIONS

A-1-CA-38107	State v. J Mud	Affirm	06/02/2020
A-1-CA-36883	City of Albuquerque v. G Pena-Kues	Affirm	06/04/2020
A-1-CA-37140	V Martinez v. Chevron Mining INC.	Affirm	06/04/2020

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
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Effective May 21, 2020:
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CLERK'S CERTIFICATE OF WITHDRAWAL

Effective May 21, 2020:
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1505 Cornell Drive, NE
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CLERK'S CERTIFICATE OF CHANGE TO IN-ACTIVE STATUS AND CHANGE OF ADDRESS

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CLERK'S CERTIFICATE OF CHANGE TO IN-ACTIVE STATUS AND CHANGE OF ADDRESS

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Effective February 1, 2020:
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CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUSAND CHANGE OF ADDRESS

Effective April 30, 2020:
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From the New Mexico Supreme Court

Opinion Number: 2019-NMSC-019
No: S-1-SC-36696 (filed October 31, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MATTHEW SLOAN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
LISA B. RILEY, District Judge

Released for Publication December 17, 2019.

Law Offices of Adrianne R. Turner
ADRIANNE R. TURNER
Albuquerque, NM
for Appellant

HECTOR H. BALDERAS,
Attorney General
WALTER M. HART, III,
Assistant Attorney General
Santa Fe, NM
for Appellee

Opinion

David K. Thomson, Justice.

{1} This Court's dispositional order reversed Defendant Matthew Sloan's conviction at his first trial based on faulty jury instructions. *See State v. Sloan*, S-1-SC-34858, ¶ 13, dispositional order (June 23, 2016) (nonprecedential). Defendant now appeals his convictions for burglary and felony murder after a second jury trial. At the second trial, the State presented evidence that Defendant, armed with a rifle and accompanied by two other men, broke into the victim's house to retrieve drugs or money from the victim and that Defendant shot and killed the victim during the burglary. On appeal, Defendant argues that (1) the district court denied him his right to be present and to confront witnesses against him by failing to determine whether he made a valid waiver of his right to be present at three pretrial hearings, (2) he received ineffective assistance from his trial counsel, and (3) the district court committed reversible error by declining to instruct the jury on voluntary manslaughter as a lesser included offense. For the reasons that follow, we affirm Defendant's convictions.

BACKGROUND

{2} Defendant drove from Carlsbad to the victim's house in Artesia with two accomplices, Donald Ybarra (Duck) and Senovio Mendoza (Hoss), to obtain drugs or money to buy drugs from the victim, who ostensibly owed Hoss. Defendant habitually used methamphetamines and testified that he had been using for multiple days at the time the three left for Artesia and that they all smoked methamphetamines throughout the trip.

{3} When the three men first arrived at the victim's house, no one came to the door. They drove around Artesia and made other stops before returning to the victim's house a second time. That time Hoss knocked on and kicked the door while Defendant and Duck waited in the truck. Hoss returned to the truck and told them the victim said to come back later.

{4} The three men then drove to Walmart where they bought beanies that Duck modified to mask their faces. When they returned to the victim's house a third time and Hoss still could not get the victim to open the door, they put the masks on and approached the house. Defendant was armed with a rifle.

{5} Hoss kicked in the door to the victim's house, and Defendant entered the house yelling "Pecos Valley Drug Task Force." Defendant located the victim, pointed the rifle, and yelled, "Get on the floor"! Meanwhile Hoss searched the house. During the robbery, Defendant shot the kneeling victim in his upper-left forehead near the hairline from approximately three feet away, killing him. The three men left the house after the shooting but returned later to retrieve a flashlight. At his second jury trial, Defendant was convicted of and sentenced for felony murder and tampering with evidence. He appeals his convictions. We discuss additional facts relevant to the issues Defendant raises on appeal in context as needed.

DISCUSSION

A. Rights to Presence and Confrontation

{6} Defendant remained incarcerated prior to trial and was not transported to any of the three pretrial hearings. He argues that he was denied his right to be present and his right to confront the witnesses against him at critical stages of trial during the three pretrial hearings. These hearings involved prosecution motions-in-limine including a motion to qualify an expert witness, a scheduling conference during which counsel and the district court considered whether the judge had a conflict of interest, and a motion to exclude testimony of Defendant's sister. Contrary to Rule 5-612(B)(2) NMRA, the record for each of these hearings lacks a written waiver of Defendant's appearance executed by Defendant and approved by defense counsel and the district court. Instead, defense counsel orally waived Defendant's appearance at each hearing.

{7} Only the hearing concerning qualification of the expert witness warrants substantive legal analysis. We conclude that Defendant was not denied his right to be present or his right to confront the witnesses against him.

1. Standard of review

{8} Whether a defendant's constitutional right was violated is a question of law that this Court reviews de novo. *See State v. Montoya*, 2014-NMSC-032, ¶ 16, 333 P.3d 935; *see also State v. Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d 830 ("'We review [questions] of statutory and constitutional interpretation de novo.'" (alteration in original) (quoting *State v. Ordunez*, 2012-NMSC-024, ¶ 6, 283 P.3d 282)).

2. Defendant's right to be present

{9} "There is no dispute that a criminal defendant charged with a felony has a constitutional right to be present and to have the assistance of an attorney at all critical stages of a trial." *State v. Padilla*, 2002-NMSC-016, ¶ 11, 132 N.M. 247, 46 P.3d 1247 (citing U.S. Const. amends. VI (guaranteeing an accused "the right . . . to be confronted with the witnesses against him"), XIV (guaranteeing protection of rights by "due process of law"); N.M. Const. art. II, § 14 (guaranteeing an accused the right of a defense "in person" and the right of confrontation)); *see also*

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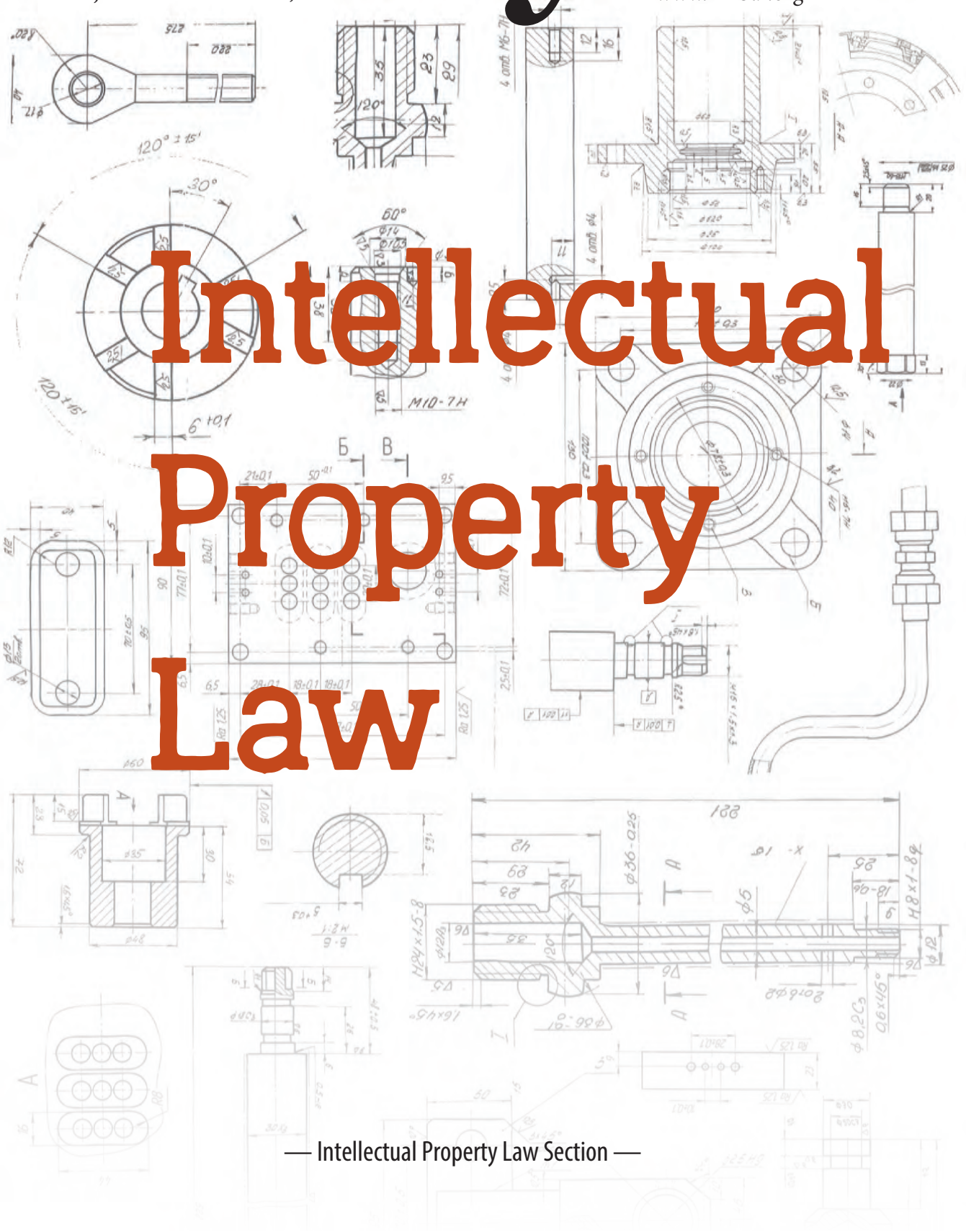

Intellectual Property Law

— Intellectual Property Law Section —

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©opyright trolls are amuck.
Here are some tips for how to defend against them.

By Justin Muehlmeyer

I answer the phone. It is a potential client who received a letter from an attorney representing a photographer. The letter demands $8,000 for copyright infringement. The caller downloaded a photo. He thought the photo was free. He had typed "free picture of Albuquerque skyline" into Google. The photo did not have a copyright notice or any indication anyone owned it. The caller used it on the "Contact Us" page on the website for his new home-based business. Few visited that page since the website went live two months ago. After receiving the demand letter, the caller took the photo off his website and informed the photographer's attorney. But the attorney still wanted payment. The caller wants to know what to do and how much will it cost. This is when the caller realizes it is in his financial interest to either agree to the settlement or negotiate a lower but still costly amount without hiring an attorney, the settlement offer being priced just low enough that it is less expensive for the caller to pay up than it is to hire a lawyer.

I've received a dozen calls with the same story. All came from small businesses or non-profits who had received letters from the same attorney on behalf of the same photographer demanding $5,000 to $15,000. These accused infringers are caught in a net of entrepreneurial attorneys who have mastered the art of monetizing claims of copyright infringement on a mass scale. The "artists" they represent, while real people with real but generic art, are disseminating their "art" over the internet in ways designed to encourage infringement. Investigation on PACER reveals hundreds of cases filed by one plaintiff, none decided on the merits. Clearly the legal strategy is a business of obtaining quick settlements from thousands of unrepresented parties who are lured into infringement.

These are "copyright trolls," who "try to extract rents from market participants who must choose between the cost of settlement and the costs and risks of litigation."[1] What can you do as an attorney to defend against these? Congress in the Copyright Act limited the relief a copyright owner can obtain in such circumstances. There are legitimate bases for challenging the trolls' conduct. Here are five key points to help accused infringers understand their rights.

1. Confirm that the accused infringer actually committed the infringement.

Copyright trolls often accuse the wrong person of infringement.[2] Confirm that your client was actually responsible for using the work and that the work is owned by the copyright claimant. The claimant's allegation should be accurate down to the precise file name for the work.

The client may not have committed the infringement personally. It may have been the client's web designer. This does not necessarily insulate your client from copyright infringement liability as a business may be liable for infringement committed by its independent contractors. If there was a written agreement with the independent contractor, there may be an indemnification clause making the independent contractor responsible. Because most targets of copyright trolls are early-stage small businesses who have either created the website themselves or had the kid down the street create the website, this may not be an option for your client.

2. Confirm that the alleged infringed work is actually covered by the asserted copyright registration.

A copyright registration for a work is needed to sue someone for copyright infringement. Trolls are playing a numbers game, inevitably leading to mistakes where they make claims on works not actually registered. Make the accuser show the work at issue was actually filed as part of the deposit with the Copyright Office as part of the copyright registration claimed. If the asserted work

is not included, the accuser can't bring suit until the work is registered.[3] Failure to register may be fatal to a claim of statutory damages and attorney's fees, without which a claimant has no incentive to bring a case.

3. The troll relies on statutory damages. Strive for the statutory minimum.

Almost every target of a troll will say they didn't know they were infringing or thought the work was free. But copyright infringement is a strict liability offense. Even if your client did not know what they did was wrong or had no ill-intent, they are still liable as an infringer. The circumstances of how the client accessed the work and what the client understood can make the difference between a case that will settle as a minor annoyance and one that creates financial setback affecting the survival of the business.

An infringer is liable for either (1) the copyright owner's actual damages and any additional profits of the infringer or (2) statutory damages.[4] In most troll cases, the defendant did not use the work to make money off of the work itself, but simply used it for some purpose irrelevant to what they are selling, like the caller's use of a photo on a website. In such cases, there are little actual damages, the actual damages being at most the license fee for a single digital image. The trolls instead rely on statutory damages.

A copyright owner may choose to recover statutory damages "in a sum of not less than $750 or more than $30,000 as the court considers just." Where the infringement is "willful," statutory damages may be up to $150,000. But if the infringement was "innocent," that is, the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," the court in may reduce damages to $200.

A client may insist she is an innocent infringer and should pay nothing. The client should be educated that the innocent infringement defense is not a shield to liability, but only is an argument for a reduction in the damage award. Just because there was no copyright notice does not mean a use was "innocent." Courts have declined to consider an infringer "innocent" for purposes of statutory damages when the defendant could have learned about the copyright through basic online research. Yet it is always worth exploring the circumstances under which the accused used the work. An educated assertion of innocent infringement in settlement negotiations can set a strong theme to a case, making it less lucrative. It also can make a strong impression on the federal judge trying to get this small-potatoes case off the docket. Trolls target those who won't put up much of a fight, such as small businesses or individuals. The infringer's lack of business sophistication, the absence of a copyright notice, and the way the infringed work was disseminated by the owner, can make your client an "innocent" infringer for purposes of statutory

continued on page 10

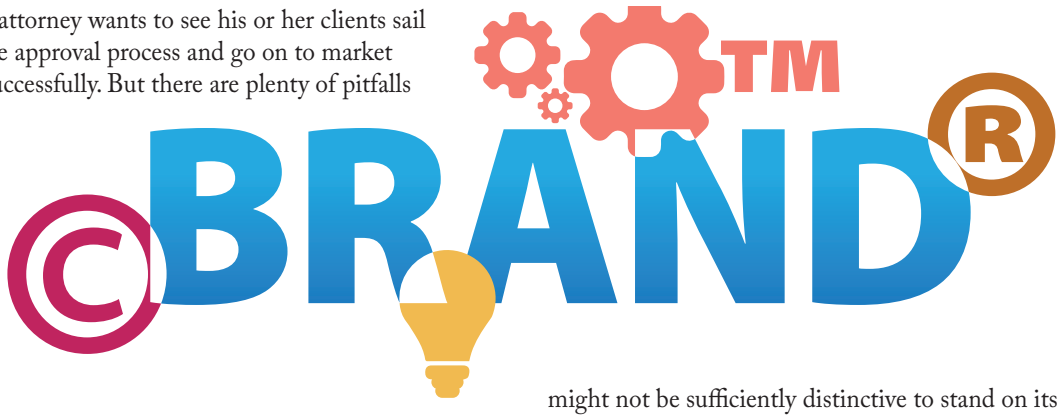
Merely Descriptive and Deceptively Misdescriptive Marks:

Limiting Client Self Destruction and Adverse Rulings

By Jeffrey H. Albright

Introduction

A trademark attorney wants to see his or her clients sail through the approval process and go on to market products successfully. But there are plenty of pitfalls that can beset trademarks. For example, marks that are "merely descriptive" of a client's goods or services may be refused by the U.S. Patent and Trademark Office ("USPTO") or may not be eligible for registration in the Principal Register, the primary trademark repository.[1] But what does that really mean? How can the business transaction or trademark attorney assist her client in overcoming the "merely descriptive" hurdle? Alternatively, how can an attorney steer clear of a finding by the Trademark Trial and Appeals Board ("TTAB") that the mark is misleading, or "deceptively misdescriptive?" Through examples and case law, this article describes the legal distinctions between those terms. It also provides practitioners and clients with some recommendations to balance market "branding" with trademarks that are uniquely associated with their goods and services.



Defining the Terms

A mark is merely descriptive if the mark immediately conveys the ingredients, qualities, or characteristics of the goods or services with which it is used. For example, "rich and creamy" would not be registerable for ice cream. That phrase merely describes the quality or nature of the goods.[2]

In determining whether a mark is merely descriptive, distinctions are drawn between a mark which is: (1) generic, (2) descriptive, (3) suggestive, (4) arbitrary or (5) fanciful. These categories provide increasing distinctiveness of a mark and hence increasing likelihood that a proposed trademark will be registerable. As a simple example, if farmer Pat has a pear orchard and he attempts to trademark "Pat's Pears," that mark will be generic—it merely describes exactly the product. However, if Pat decides to build computers and she calls it "Pears," that would be considered fanciful and highly likely to be approved as a trademark. No one would confuse pears (the fruit) with pears (the computers). Descriptive marks fall in between generic and fanciful, which makes their registration challenging.

Generally, marks are considered merely descriptive if they: (1) describe the color of the goods; (2) use laudatory words such as "best," "superior," "American"; or (3) use phrases or a slogan that merely extoll the service, such as "best gas station in town." While the term, phrase, or slogan might not be generic, the mark might not be sufficiently distinctive to stand on its own since other gas stations might make similar claims. Terms can also become descriptive over time, such as "virtual" in connection with goods and services offered over the internet.[3]

"Design" marks, where there is a combination of both a name or slogan and a design or logo, might not be considered merely descriptive and may be registerable. In such a situation, the resulting design mark will only protect against the copying of the mark as a whole, including the design or stylized mark. The USPTO examining attorney will usually require a disclaimer of any trademark of the words other than how they are used in the mark.

A descriptive mark that falls short of the requirements for registration on the Principal Register but is still "capable of distinguishing the applicant's goods or services . . . may be registered on the Supplemental Register. The test is not whether the mark is already distinctive of the applicant's goods, but whether it is capable of becoming so."[4] A descriptive term may be trademarked and registerable on the Principal Register if it has acquired secondary meaning. Secondary meaning occurs if the relevant public (those generally involved with goods and services associated with the term) perceives the term or mark as a trademark rather than a mere description of the goods and services. This is sometimes referred to as acquired distinctiveness. Provided that the mark is not generic, it can be registered on the Supplemental Register.

Unregistrable Components and Attempted Disclaimers

Estate of P.D. Beckwith, Inc. v. Commissioner of Pats.[5] dealt with disclaiming marks that were merely descriptive or generic. In 1962, there was an amendment made to the federal Lanham Act of 1946 ("Trademark Act")[6] that changed "unregistrable matter" to "an unregistrable component." Most commonly, an unregistrable component of a registerable mark is: (1) the name of the goods or services (think generic); (2) other matter that does not indicate source; (3) matter that is merely descriptive (think back to the

earlier mentioned 'rich and creamy' example for ice cream) or is deceptively misdescriptive of the goods or services; or (4) matter that is primarily geographically descriptive of the goods or services.

Practitioners will frequently attempt to disclaim an unregistrable component of a mark. However, disclaiming an unregistrable component will not cure the deficiency and will not make it registrable. American Speech-Language-Hearing Association v. National Hearing Aid Society[7] is illustrative. In that proceeding, the applicant falsely implied that the user of the mark was a certified audiologist. The applicant attempted to disclaim that it was making any proprietary right to the disclaimed words. The TTAB determined: "While the disclaimer is appropriate to indicate that respondent claims no proprietary right in the disclaimed words, the disclaimer does not affect the question whether the disclaimed matter deceives the public, since one cannot avoid the Trademark Act Section 2(a) deceptiveness prohibition by disclaiming deceptive matter apart from the mark as a whole."

This case is an excellent example of the Trademark Act's provisions under Section 2(a) to protect the public from registration of a mark which will act to deceive the public. It also highlights the provisions of Section 2(e)(1) that prohibit registration of designations that are deceptively misdescriptive of the goods or services.

Deceptively Misdescriptive and Deceptive Marks
Two provisions of the Trademark Act prevent registration of a mark on the Principal Register if a mark is deceptively misdescriptive (unless it has acquired distinctiveness). Section 2(a) of the Act bars registration on the Principal or the Supplemental Register of a deceptive mark. Each of these situations places the practitioner in very different positions before the USPTO and understanding the differences is crucial to protecting the interests on one's clients.

A mark is misdescriptive if it falsely indicates an ingredient, quality, characteristic, function or feature of the goods or services with which it is used. As with generic and descriptive marks, the fact that a term is misspelled or is in a foreign language does not affect the determination of whether or not the mark is misdescriptive. *In re Organik Technologies, Inc.*[8] is illustrative. In determining that the mark of ORGANIK by the applicant was deceptive, the TTAB determined, ". . . when applied to applicant's goods as presently identified, applicant's mark, ORGANIK, which is the phonetic equivalent of the term 'organic,' is deceptive because it is misdescriptive of 100% cotton textiles or articles of clothing that are neither from an organically grown plant nor free of chemical processing or treatment."

Marks are deceptively misdescriptive when a prospective purchaser is likely to believe that the misdescription actually describes the goods or services. These are barred from registration on the Principal Register unless there is a showing of acquired distinctiveness. The marks are eligible for registration on the Supplemental Register.

However, when a misdescriptive mark does not deceive the public, the USPTO reaches the conclusion that the public is not harmed by the registration. Therefore, a mark that is merely misdescriptive may proceed to registration without requiring proof of secondary meaning, barring any other reasons for disapproval by the USPTO trademark examiner. The determining factor is whether persons who encounter the mark are likely to believe the misrepresentation.

On the other hand, marks are simply deceptive if they are likely to affect the decision to purchase the goods or services. The Trademark Act bars registration of deceptive marks on both the Principal Register and the Supplemental Register. Neither a disclaimer of the deceptive matter nor a claim that it has acquired distinctiveness can overcome a USPTO refusal. If the relevant public is not aware of the meaning of a term, but a small group of people with particular knowledge of the subject matter is familiar with the term and it is deceptive, the term and mark are unregistrable.

Denim: Deceptive, but not Deceptively Misdescriptive
In a recent opinion that is not precedent of the TTAB, QVC, Inc. sought registration on the Principal Register of the mark "DENIM & CO"[9] for women's clothing that included shirts, dresses, skirts, tops, bottoms, sweaters, shorts, pants, jackets, leggings, and t-shirts, some made in whole or substantial part of denim and others made of non-denim materials. The application included a disclaimer of DENIM only as to "women's clothing, namely shirts, dresses, skirts, tops, bottoms, sweaters, shorts . . . ."

The USPTO examining attorney partially refused registration of the Applicant's mark under Trademark Act Section 2(a) as deceptive when used for the identified clothing "made of materials other than denim," and alternatively under Section 2(e)(1) as deceptively misdescriptive when used for the same goods.

On appeal, the TTAB determined that evidence showed a motivation by consumers to purchase denim in particular, at least in part because it is considered a strong and durable yet comfortable and stylish fabric. In that sense, the term was misdescriptive, but not deceptively so, as it was broadly applied to all of the clothes.

With respect to deceptiveness, the TTAB determined that there was an attempt to deceive and that the partial refusal to register DENIM & CO for Applicant's identified non-denim clothing was appropriate. It is unclear whether an appeal of the TTAB decision is forthcoming.

Lessons Learned for the Small Business and Legal Practitioners
While most practitioners understand the distinctions of various categories of trademarks, the distinctions between misdescriptive and deceptive trademarks is less well understood. Even without an opposition challenge to a registration, misdescriptive marks and deceptive trademarks (intentional or otherwise) can mean lengthy delays, increased legal fees associated with amendments at the USPTO and potential appeals at the TTAB. They can also result in lengthy delays in establishing a mark that will provide a brand

for the goods or services. Following are some recommendations for preventing misdescriptive or deceptive trademarks:

1. Discuss with your client the scope of goods and services. Attempt to convince your client not to include more classes of goods and services than are realistic and not to embellish the goods and services with characteristics that are simply overstated
2. If your client has already hired a marketing person or a "brand ambassador," ensure that all of you are on the same page. The branding of a product often results in "modifications" to either the mark, the nature of the goods or services, or changes in the classification as products might expand (or contract).
3. Encourage your clients to come up with a mark, logo, or combined mark that is arbitrary or fanciful to avoid having to deal with a registration that ends up as a merely descriptive mark.
4. If your client has a mark (common law or already designed) that is merely descriptive, attempt to ensure it is not misdescriptive.
5. A misdescriptive, mark might still be registrable, as long as it is not deceptive.
6. A misdescriptive mark may still obtain secondary meaning and may be eligible for registration on the Supplemental Register.

Keep in mind that at the end of the day, the mark is your client's. Make a conscious effort not to get involved in selecting or suggesting marks to your client, but be conscious of the hurdles posed by descriptive marks, misdescriptive marks and deceptive marks.

Endnotes

[1] See 15 U.S.C. § 1052 (e)(1); T.M.E.P. § 1209.01 (b).

[2] See also. The Hoover Co. v. Royal Appliance Mfg. Co., 57 U,S.P.Q.2d 1720 (Fed. Cir.2001) (the term "Number One in Floor Care" is a generally laudatory phrase and merely descriptive).

[3] *See, In re Styleclick.com Inc.*, 58 U.S.P.Q.2d 1523 (TTAB 2001).

[4] *See In re Bush Bros. Co.,* 12 U.S.P.Q.2d 1058, 1059 (Fed. Cir. 1989).

[5] 252 U.S. 538 (1920)

[6] 15 U.S.C. § 1052

[7] 224 USPQ 798, 808 (TTAB 1984)

[8] 41 U.S.P.Q.2d 1690 (TTAB 1997)

[9] *In re QVC, Inc.* USPTO TTAB – Serial No. 86670074 – January 21, 2020

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Hummingbird Nectar and ALBUQUERQUE'S ANALOGOUS ART HERO

By Kevin Soules

"That doesn't have anything to do with my invention." This is a sentiment I hear often from patent applicants. The patent prosecution journey can be trying for inventors, in large part, because of the difficulty navigating the obviousness requirement for patentability. The obviousness standard is deceptively simple:

> A patent for a claimed invention may not be obtained … if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious … to a person having ordinary skill in the art to which the claimed invention pertains.

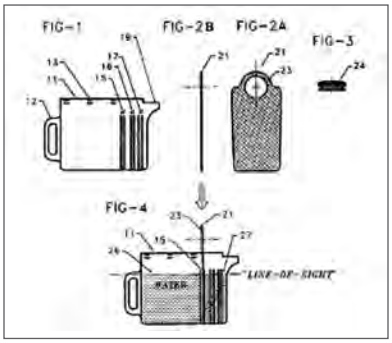
35 U.S.C. § 103.

The rationale for this standard is equally simple. If the improvement in an invention is obvious, there is no need to reward its disclosure with a patent. Any skilled artisan could easily make the same improvement (after all, it's obvious). But what counts as an obvious improvement? Swapping a bolt for a screw, in an otherwise identical invention, is undoubtedly obvious, but most patent applications include new features where the line between obviousness and inventive step is much less clear.

Take, for example, the patent application of Arnold Klein (U.S. Patent Serial No.: 10/200,747). A resident of Albuquerque's east mountain suburbs, Klein developed a "nectar mixing device" for measuring and mixing sugar and water into nectar for bird feeders. Klein's claim number 21 lays out the invention as follows:

> 21. A convenience nectar mixing device for use in preparation of sugar-water nectar for feeding hummingbirds, orioles or butterflies, said device comprising:
>
> a container that is adapted to receive water,
>
> receiving means fixed to said container, and
>
> a divider movably held by said receiving means for forming a compartment within said container,
>
> wherein said compartment has a volume that is proportionately less than a volume of said container, by a ratio established for the formulation of sugar-water nectar for hummingbirds, orioles or butterflies,
>
> wherein said compartment is adapted to receive sugar, and wherein removal of said divider from said receiving means allows mixing of said sugar and water to occur to provide said sugar-water nectar.

The invention is simple but useful. It turns out different bird species prefer nectar with different sugar concentrations. In order to ease the task of preparing a properly proportioned nectar, Klein created a nectar-mixing device that can be preset for varying species. It is a measuring cup-shaped dispenser that has three sets of slots (one set for hummingbirds, one set for orioles, and one set for butterflies) and a divider that can be inserted into any of the sets of slots. The divider separates the dispenser into an area for sugar and another area for water. Each of the slots defines a different ratio of water to sugar. Thus, if hummingbird nectar is on the menu, the divider can be inserted into the hummingbird slot, the slot with the largest ratio of sugar to water. (It turns out hummingbirds have a bit of a sweet tooth). With the sugar and water filled in their respective areas, the divider can be removed and the solution mixed together to create properly proportioned hummingbird nectar.



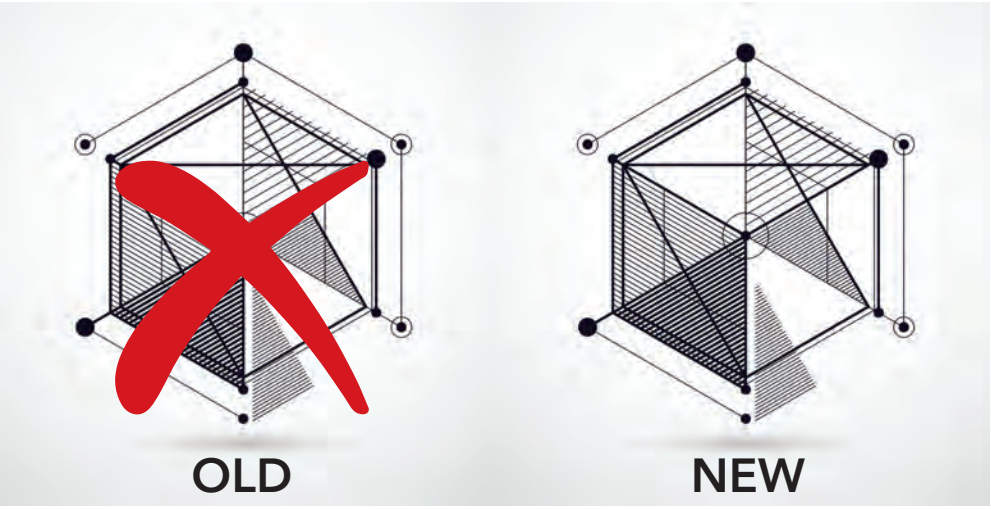
Figures 1-4 from Klein's Patent Application

The genius here is in the simplicity, as is so often the case with inventions.

After successfully overcoming a series of novelty rejections, Klein's application was eventually, finally rejected as being obvious. The claim was found obvious in five separate rejections, with each rejection citing a different prior art reference. I can imagine Klein's frustration was based on the common theme, "that doesn't have anything to do with my invention." It turns out he was right.

Three of the five references described containers or drawers for solid objects, like nails or cards. Each of these containers included adjustable dividers. The other two references described plasma and hair dye containers respectively. Each was configured to hold liquids separately, but not to adjust the ratio of the resulting mixture. Given Klein's admission that preferred nectar ratios were known to avian aficionados, the rejections were premised on the logic that it would be obvious

to arrive at the claimed mixing device given the cited solutions for dividing containers and the admittedly preferable sugar to water ratios for nectar.



After years prosecuting the application with the help of counsel, Klein's resources were tapped and he was forced to continue *pro se*. Even basic patent prosecution is beyond the skill of most inventors. Klein was also faced with the even more daunting task of preparing a compelling appeal to the Board of Patent Appeals and Interferences (BPAI). The procedural requirements alone for submitting a pro se appeal brief are complex, and Klein admits that at this stage, he considered abandoning the cause. Klein's wife, Ms. Bonnie Stepleton, worked tirelessly, researching the procedural requirements and making phone calls to the Patent Office to determine all the nuances for submitting a pro se Appeal. Klein credits her effort as saving the case. In a series of incredibly well drafted pro se filings, Klein argued that the cited references were not analogous art.

The Manual of Patent Examining procedure (MPEP) explains that "[i]n order for a reference to be proper for use in an obviousness rejection under 35 U.S.C. § 103, the reference must be analogous art to the claimed invention." MPEP 2141.01(a). While this mandate seems a ready arrow in the patent prosecution quiver, it had become mostly a formality in the wake of the decision in KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398 (2007). KSR is treated as having expanded the breadth of what counts as analogous art dramatically. This is punctuated by patent examiner practices, which seem to have essentially abandoned any inquiry into whether a reference is analogous art.

The KSR decision casts a long shadow, so it is not surprising that the BPAI affirmed the examiner's obviousness rejection. It's worth noting that the BPAI affirmance came in March 2010, more than seven-and-a-half years after Klein's application was originally filed in 2002. Undeterred, Klein appealed the BPAI's decision to the Federal Circuit. His position was that the citations provided by the patent office were not analogous art because they were not directed to the same field of invention, nor were they directed to a solution of the problem addressed by Klein's invention; simply put, they didn't have anything to do with Klein's invention.

At this point, Klein's case was taken up by counsel. While Klein's tireless efforts set the stage for his appeal, his case was undoubtedly buoyed by representation before the Federal Circuit. Nevertheless, Klein's dogged defense of his patent application ultimately gifted us all a useful patent prosecution tool.

In its decision, the Federal Circuit indicated a two-part analysis to determine if a reference is analogous art. The first inquiry is whether the art is from the same field of endeavor (irrespective of the problem addressed). If the art is not from the same field of endeavor, the test moves to the second inquiry—whether the references were reasonably pertinent to the problems addressed by the application.

The court's analysis focused on the second inquiry, after quickly establishing the references were not from the same field of endeavor. The Federal Circuit found that the first three references could only be used to separate solid objects, not liquids. The Court also found that the remaining two references could be used to mix liquids, but only in a single fixed ratio. As such, the Federal Circuit concluded that the BPAI errored in its conclusion that the references were analogous art.

After almost 10 years of prosecution, Klein's application was issued as U.S. Patent 8,147,119 in April 2012. If you ask Klein about the case, he will tell you the monetary fruits of his labor have been modest. But from a wider perspective, Klein has established himself as our own local patent prosecution hero. His efforts resulted in a precedent-setting decision that has provided a viable line of argument for overcoming prior art rejections based on references that seem to lack any relation to the claim at issue. This is perhaps best memorialized by a memorandum dated July 26, 2011 from the Acting Associate Commissioner for Patent Examination Policy, Robert Bahr, to the Patent Examining Corps at the U.S. Patent Office. In the Memorandum, Bahr explains:

> A recent decision from the U.S. Court of Appeals for the Federal Circuit, *In re Klein*, F.3d , 98 USPQ2d 1991 (Fed. Cir. June 2011), is instructive as to the "reasonably pertinent" prong for determining whether a reference is analogous art. In determining whether a reference is reasonably pertinent, an examiner should consider the problem faced by the inventor, as reflected—either explicitly or implicitly—in the specification. In order to support a determination that a reference is reasonably pertinent, it may be appropriate to include a statement of the examiner's understanding of the problem. The

question of whether a reference is reasonably pertinent often turns on how the problem to be solved is perceived. If the problem to be solved is viewed in a narrow or constrained way, and such a view is not consistent with the specification, the scope of available prior art may be inappropriately limited. It may be necessary for the examiner to explain why an inventor seeking to solve the identified problem would have looked to the reference in an attempt to find a solution to the problem.

Memorandum from Robert W. Bahr, Acting Associate Commissioner for Patent Examination Policy, to Patenting Examining Corps. (July 26, 2011) ("Subject: Analogous Art for Obviousness Rejections"), https://www.uspto.gov/sites/default/files/patents/law/exam/analogous_art.pdf. We have Arnold Klein to thank for that.

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Copyright Trolls Are Amuck

continued from page 4

damages. Since the minimum for statutory damages is only $750, the client should not lose sleep over prevailing on an innocent infringement defense.

Trolls allege the infringement was "willful" so they can claim infringers may be liable for up to $150,000. While that's true, a finding of willful infringement does not require the court to award statutory damages any higher than the $750 minimum. If the facts are like those of the caller, no one should be worried that a court would grant anything close to $150,000. A finding of willfulness requires the defendant (1) was actually aware of the infringing activity or (2) acted with reckless disregard or willful blindness. Where an infringer in good faith believed their use to be free, courts have held the infringement is not "willful."[5]

4. In copyright infringement actions, attorney's fees may be granted to the "prevailing party", but courts have refused to grant attorney's fees to trolls.

The biggest risk to a defendant sued for copyright infringement is the Court may grant the plaintiff costs and attorney's fees under the Copyright Act. The risk of being assessed attorney's fees is real to any person at risk of being found to be an infringer, even if the infringer had good reason to think their use of the copyrighted work was "free." This risk should be emphasized to the client early, particularly if a lawsuit has already been filed. The Act does not require a court to award fees. The Supreme Court has ruled the Copyright Act's provision for attorney's fees is not an "automatic" grant because "a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright."[6]

Courts often refuse to grant trolls their attorney's fees for many good reasons. The troll's conduct should be investigated to uncover questionable business practices, e.g. identifying the number of pending cases the troll has, reviewing orders issued in the troll's cases to find reprimands or unfavorable statements by the court, understanding the way the artist disseminates their artwork, and interviewing attorneys who have defending clients against the troll.

5. Settle quick and fast.

No one wants to litigate these low-value cases. The troll has a business to run and needs to exceed his costs in pursuing the case against your client. The defense attorney's goal is to reduce the amount the infringer pays. It is in everybody's interest to settle quick and fast. These cases typically settle for $1,000 to $8,000. It is my firm's experience that, even after a complaint is filed, the troll is likely to settle for significantly less than the initial demand. This is particularly true when the defendant can show the court the plaintiff's modus operandi and the innocence of the defendant. Clients like the caller should be told that they are probably not walking away without paying something but that the troll's demands will likely be reduced dramatically.

The bottom line with these cases is tell your client not to panic, push back against the trolls, and educate your clients.

Justin Muehlmeyer is a registered patent attorney practicing all aspects of intellectual property at Peacock Law, PC. He serves on the board of the Intellectual Property Law Section and directs its annual pro bono intellectual property clinic.

Endnotes

[1] *Design Basics, LLC v. Lexington Homes, Inc.,* 858 F.3d 1093, 1097 (7th Cir. 2017).

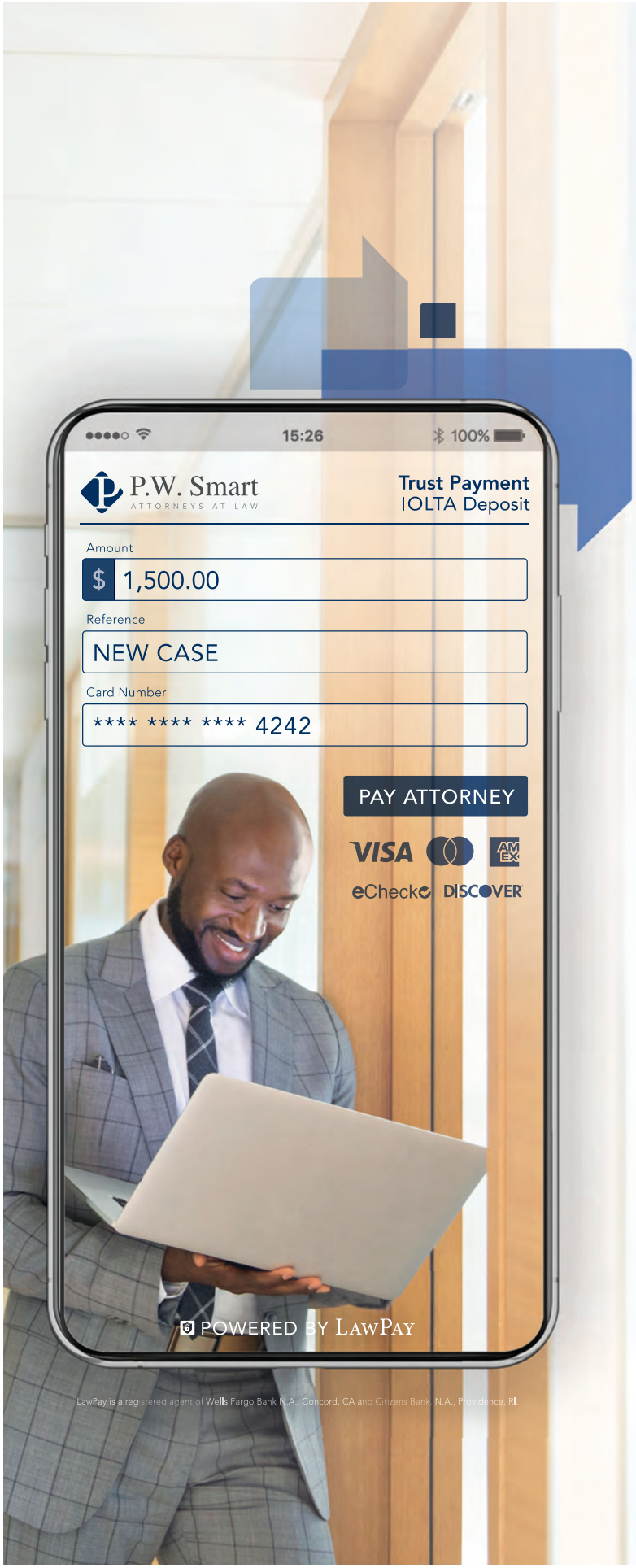
[2] *See* Matthew Sag & Jake Haskell, Defense Against the Dark Arts of Copyright Trolling, 103 Iowa Law Review 571 (2018).

[3] *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com*, LLC, 139 S. Ct. 881, 892 (2019).

[4] 17 U.S.C. § 504.

[5] E.g., *Reed v. Ezelle Inv. Props., Inc.,* 353 F.Supp.3d 1025, 1036 (D. Ore. 2018).

[6] *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 526–27 (1994).



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State v. Corriz, 1974-NMSC-043, ¶ 5, 86 N.M. 246, 522 P.2d 793 (observing that it "is the defendant's right to be present in the courtroom at every stage of the trial" but that this right "is not an absolute right"). A defendant bears the burden of proving that a particular stage of a criminal proceeding is "critical," which triggers the constitutional right to be present at that stage. *See State v. Torres*, 2018-NMSC-013, ¶ 68, 413 P.3d 467 (citing *Kentucky v. Stincer*, 482 U.S. 730, 747 (1987)).

{10} *Torres* relies on *Stincer* concerning what makes a hearing a critical stage of the proceeding. *Stincer* reasoned that critical stages of a criminal proceeding include any stage in which the defendant's "'presence has a relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the charge.'" 482 U.S. at 745 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1, 2 n.1, 3 (1964)); *accord State v. Acuna*, 1967-NMSC-090, ¶ 10, 78 N.M. 119, 428 P.2d 658 ("To constitute a critical stage of a criminal proceeding, the particular proceeding or act in question must be one at which, or in connection with which, the accused's constitutionally protected rights may be lost or adversely affected."). Therefore, a particular stage of a criminal proceeding may be critical if "the defendant's presence at the proceeding would [contribute] to the defendant's opportunity to defend himself against the charges," *Stincer*, 482 U.S at 744 n.17, such that "a fair and just hearing would be thwarted by his absence," *Snyder*, 291 U.S. at 108. If a particular stage of a criminal proceeding is critical, then the Due Process Clause of the Fourteenth Amendment confers upon the defendant the right to be present at that stage in the proceeding. *See Stincer*, 482 U.S. at 745 ("[E]ven in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the ful[l] ness of his opportunity to defend against the charge.'" (citation omitted)).

{11} Nevertheless, Defendants may waive their right of presence either personally or through counsel. *See Hovey v. State*, 1986-NMSC-069, ¶ 17, 104 N.M. 667, 726 P.2d 344 ("[E]ven constitutional rights[] may be waived."). Waiver of this constitutional right through counsel generally requires the defendant's express consent, "unless the defendant voluntarily elects to absent himself, or is excluded from the courtroom by reason of 'disruptive, contumacious, or stubbornly defiant' conduct." *Id.* ¶ 24 (Walters, J., specially concurring) (citation omitted).

{12} Rule 5-612 incorporates a defendant's constitutional right to be present at all critical stages of trial into the New Mexico Rules of Criminal Procedure by prescribing when New Mexico requires the defendant's presence, when and how the defendant may waive that requirement, and perhaps most significant to this case, when New Mexico does not require the defendant's presence. *See* Rule 5-612; *see also State v. Clements*, 1988-NMCA-094, ¶ 12, 108 N.M. 13, 765 P.2d 1195 ("A defendant's right to be present during all stages of a criminal trial has its genesis in the sixth amendment's confrontation clause and the fourteenth amendment's due process clause. This right has been incorporated into [Rule 5-612(A) NMRA (1986)]."). Rule 5-612(A) provides that "the defendant shall be present at all proceedings, including the arraignment, all hearings and conferences, argument, the jury trial and during all communications between the court and the trial jury." Notwithstanding the breadth of Rule 5-612(A), Rule 5-612(D) specifies certain situations in which the defendant's presence is not required, including proceedings that involve "only a conference or hearing upon a question of law."

{13} Because the right to be present is protected by the Fourteenth Amendment and incorporated into our rules of criminal procedure, our analysis of this issue is twofold. First, we must determine whether each of the following three pretrial hearings was a "critical" stage of Defendant's criminal proceeding. If any of the three hearings was a critical stage of Defendant's criminal proceeding, then Defendant had a due process right to be present at that hearing. Second, we must determine whether any of the three pretrial hearings involved "only a conference or hearing upon a question of law" because our rules of criminal procedure do not require Defendant to be present at such a conference or hearing. If a hearing was not a critical stage and our rules did not require Defendant's presence, his right to be present was not violated.

{14} Defendant urges us to reverse his conviction, citing *State v. McDuffie*, 1987-NMCA-077, ¶ 10, 106 N.M. 120, 739 P.2d 989, for the broad proposition that he has a constitutional right to be present at all pretrial hearings "where testimony is to be taken." Defendant maintains that he did not waive that right. The State argues that Defendant's presence was not required at these noncritical stages of the proceedings and that if he was entitled to be present he waived his right to appear. The State also appears to argue that because Defendant waived his appearance through his counsel, this Court should determine that Defendant failed to preserve for appeal the issue of his right to be present. *But see* Rule 12-321(B)(2)(d) NMRA (stating that a party may "for the first time on appeal" raise an issue concerning a fundamental right); *see also State v. Gomez*, 1997-NMSC-006, ¶ 31 n.4, 122 N.M. 777, 932 P.2d 1 ("Even if [Defendant]'s contentions before the trial court had failed to preserve the . . . constitutional claim, we could nevertheless consider it because [confrontation] is a fundamental right.").

{15} For reasons discussed next, we conclude that Defendant did not have the right to be present at any of the three pretrial hearings under the Fourteenth Amendment nor did Rule 5-612 require Defendant's presence.

a. Motion in limine to allow expert testimony

{16} Defendant argues that he had the right to be present at a pretrial hearing in which the State sought to admit Detective Rodriguez as an expert witness in blood spatter analysis and to prohibit the defense from discussing the definition of "reasonable doubt" at trial.[1] Defense counsel appeared telephonically and stated, "I'd like to waive [Defendant]'s appearance at this. This is merely an administrative proceeding to clean up some housekeeping matters." The State indicated that it "anticipated potentially putting on testimony" concerning admission of the blood spatter analyst as an expert witness, and defense counsel reiterated that he waived Defendant's appearance. The blood spatter analyst testified generally about his education, experience, and qualifications but did not testify concerning the facts or substance of the case. The district court qualified the blood spatter analyst as an expert witness for trial subject to the State laying an adequate foundation.

{17} *Stincer* provides that a critical stage of a proceeding is one in which a defendant's presence contributes to "the defendant's opportunity to defend himself against the charges" and thereby increases "the fairness of the proceeding." *See* 482 U.S. at 744 n.17, 745. *Stincer*'s facts and procedural posture are instructive on this issue. In *Stincer*, the defendant was excluded from an in-chambers hearing to determine whether two child witnesses were competent to testify. *Id.* at 732-33. The defendant's counsel was present at the hearing and had an opportunity to cross-examine the two child

[1]The district court allowed a brief discussion of the State's motion concerning reasonable doubt before ruling that there would be no discussion at trial "about what reasonable doubt is other than the definition in the UJI [14-5060 NMRA]" and that the court would "instruct the jury about [the UJI]."

witnesses. *Id*. at 733-34. The questions posed to the child witnesses in that hearing "were directed solely to each child's ability to recollect and narrate facts, to her ability to distinguish between truth and falsehood, and to her sense of moral obligation to tell the truth." *Id*. at 746. The child witnesses were not asked about the substance of the testimony they would give at trial. *Id*. at 733, 745-46. The district court found that both child witnesses were competent to testify. *Id*. at 733. After trial, the defendant appealed his conviction, arguing that his exclusion from the competency hearing violated his due process rights under the Fourteenth Amendment.[2] *See id*. at 735. *Stincer* affirmed the conviction because no evidence supported a conclusion that the defendant's "presence at the competency hearing . . . would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify." *Id*. at 747. Further, evidence did not support a conclusion that his presence would have increased the fairness of the proceeding by, for example, "assist[ing] either his counsel or the judge in asking questions that would have resulted in a more assured determination of competency." *Id*. Therefore the competency hearing in *Stincer* was not a critical stage of the criminal proceeding, and the defendant did not have a due process right to be present. *See id*. at 745-46.

{18} In this case, the hearing on whether to qualify the blood spatter analyst as an expert witness is analogous to the competency hearing in *Stincer* because both hearings were intended to determine whether prosecution witnesses could testify against the defendant at trial and neither hearing addressed the substance of that testimony. In this case, the district court heard testimony concerning the qualifications and background of the blood spatter analyst and made a preliminary determination that his testimony would be admissible at trial as expert testimony. *See* Rule 11-104(A) NMRA ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible."); *see also State v. Downey*, 2008-NMSC-061, ¶ 25, 145 N.M. 232, 195 P.3d 1244 (describing the district court's gatekeeper role in qualifying an expert to ensure that admitted evidence is relevant and reliable); *State v. Fry*, 2006-NMSC-001, ¶¶ 54-57, 138 N.M. 700, 126 P.3d 516 (holding that the district court's qualification of an expert to provide an opinion on blood spatter analysis was proper). There is no evidence in this case that Defendant's presence would have increased the fairness of the pretrial hearing.

{19} At trial, Defendant heard testimony of the blood spatter analyst concerning both his qualifications and his expert opinion, consistent with Rule 11-104(A), and also had the opportunity to confront and cross-examine the blood spatter analyst. There is no indication that Defendant's presence at the pretrial hearing would have strengthened his counsel's challenge to the blood spatter analyst's qualifications or would have otherwise resulted in a more assured determination of whether the analyst could testify as an expert witness.

{20} We conclude that Defendant did not have a right to be present at a hearing on an affirmative motion in limine to establish the qualifications of an expert who was later subject to cross-examination at trial on the same qualifications. This pretrial hearing was not a critical stage of Defendant's criminal proceeding, and due process did not afford him the right to be present.

{21} Contrary to our conclusion, Defendant relies on an overly broad reading of *McDuffie*, 1987-NMCA-077, to argue that the hearing to qualify the blood spatter analyst as an expert was a critical stage simply because the expert testified. In *McDuffie*, the Court of Appeals held that a specific suppression hearing was an essential and critical part of the proceedings and accordingly that the defendant's appearance at that hearing was essential. *See id.* ¶ 9. In reaching this holding, the Court of Appeals concluded that "a defendant has a right to be present at a suppression hearing where testimony is to be taken." *Id.* ¶ 10. Defendant contends that this language in *McDuffie* establishes a per se right to be present whenever testimony is taken.

{22} Defendant's argument ignores the essential holding in *McDuffie*, which is consistent with United States Supreme Court case law. *See id.* ¶¶ 9, 12 (concluding that defense counsel could not waive a defendant's appearance where defense counsel had not spoken to the defendant *and* where the hearing constituted the "defendant's only realistic chance of prevailing"). *McDuffie* affirms that the Sixth and Fourteenth Amendments to the United States Constitution extend the right to be present "to all hearings that are an essential part of the trial—i.e., to all proceedings at which the defendant's presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *McDuffie*, 1987-NMCA-077, ¶ 9 (internal quotation marks and citation omitted). However, the broad declaration "that a defendant has a right to be present at a suppression hearing where testimony is to be taken," *McDuffie*, 1987-NMCA-077, ¶ 10, fails to make clear that the right is circumscribed: The subject matter of the testimony identifies whether the hearing constitutes a critical stage of trial, as discussed below.

{23} In analyzing a defendant's right to be present at a critical stage of trial, *McDuffie* cites four federal cases. *See id.* ¶ 10. Those cases distinguish suppression hearings that do not take testimony related to a defendant's guilt or innocence from suppression hearings that concern evidentiary facts about the commission of a crime or a defendant's guilt or innocence. *Compare United States v. Bell*, 464 F.2d 667, 671 (2nd Cir. 1972) (determining that a defendant's right to be present was not violated where the trial court took evidence concerning confidential federal profiling for threat reduction in air transportation but where witness testimony "bore no relationship at all to the question of [the defendant]'s guilt or innocence of the crime charged"), *and United States v. Gradsky*, 434 F.2d 880, 883 (5th Cir. 1970) (determining that an evidentiary hearing was not a critical stage where the issue "was not one of guilt or innocence but . . . whether the evidence leading to the appellants' convictions was tainted"), *with United States v. Hurse*, 477 F.2d 31, 32-33 (8th Cir. 1973) (per curiam) (determining that a supplemental evidentiary hearing was a critical stage where the evidence taken concerned the existence of probable cause for the search, which was related to the question of the defendant's guilt or innocence of the crime), *and United States v. Dalli*, 424 F.2d 45, 48 (2nd Cir. 1970) (determining that a defendant voluntarily waived the right to be present at a hearing where the evidence taken concerned the existence of probable cause for arrest, which was related to the question of the defendant's guilt or innocence of the crime). These federal cases are consistent with *Snyder* and *Stincer* because they affirm that "critical" stages of criminal proceedings are stages in which defendants' presence increases their ability to defend themselves on questions of their guilt or innocence. *McDuffie* affirms our conclusion that Defendant did not have a due process right to be present because the testimony concerned the blood spatter analyst's qualifications, not evidentiary facts related to Defendant's guilt or innocence.

{24} We next turn to Rule 5-612 to determine whether it required Defendant's presence at the pretrial hearing to consider qualifications of the blood spatter analyst. Although Rule 5-612(A) requires a defendant to be present at "all proceedings . . . [and] all hearings and conferences," Rule 5-612(D)(3) states that a defendant's presence is "[n]ot [r]equired" at proceedings

[2]The Stincer defendant also argued on appeal that he was deprived of his rights under the Confrontation Clause of the Sixth Amendment. See Stincer, 482 U.S. at 735. Defendant makes a similar argument, which this opinion addresses later.

that involve "only a conference or hearing upon a question of law." We note equivalence between the federal procedural rule and the New Mexico procedural rule that govern when a defendant's presence is not required. *Compare* Fed. R. Crim. P. 43(b)(3) ("A defendant need not be present . . . [when t]he proceeding involves only a conference or hearing on a question of law."), *with* Rule 5-612(D)(3) (same).

{25} Under Fed. R. Crim. P. 43, defendants "must be present" at all stages of a criminal proceeding in which their presence, as a practical matter, would aid their counsel in presenting their defense. *See United States v. Reyes*, 764 F.3d 1184, 1191-92 (9th Cir. 2014) ("We held that Rule 43 did not mandate the defendant's presence because his presence would have contributed nothing substantial to his opportunity to defend since the matters discussed predominantly involved questions of law." (internal quotation marks and citations omitted)); *see also United States v. Gonzales-Flores*, 701 F.3d 112, 118 (4th Cir. 2012) ("[T]he whole point of the right to be present (in both its constitutional and statutory dimensions) is to permit the defendant to contribute in some meaningful way to the fair and accurate resolution of the proceedings against him."); *United States v. Jones*, 674 F.3d 88, 94 (1st Cir. 2012) (providing that the rationale for the Rule 43 "explicit exception for 'a conference or hearing on a question of law'" is "that a defendant's presence on a legal issue . . . is not going to aid the defense counsel in making such arguments" (citation omitted)). We note the similarity in effect between the analysis under Rule 43 (and, by extension, Rule 5-612) and the foregoing analysis under the Fourteenth Amendment. Concerning the pretrial hearing to qualify the blood spatter analyst, Defendant did not have a right under the Fourteenth Amendment to be present at a hearing unrelated to his guilt or innocence, and Rule 5-612 did not require Defendant's presence at this hearing concerned only with a question of law.

b. Scheduling conference

{26} Defendant contends that he had a right to be present at a scheduling conference on December 5, 2016, in which the parties and the district court discussed scheduling matters and a possible conflict that might "disqualify the [c]ourt." During that conference, neither party took issue with the judge's unspecified potential conflict of interest. Defense counsel stated on the record, "My client . . . has authorized me to waive his appearance for today's hearing."

{27} This scheduling conference was not a critical stage of Defendant's criminal proceeding. The judge's potential conflict of interest was an uncontested issue, and the scheduling conference did not provide an opportunity for either party to address the charges against Defendant. *See Stincer*, 482 U.S. at 745 (providing that a defendant has a constitutional right to be present when the defendant's presence "'has a relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the charge.'" (citation omitted)); *accord Torres*, 2018-NMSC-013, ¶ 68. Defendant thus did not have the constitutional right to be present at the scheduling conference. *See Stincer*, 482 U.S. at 745. Additionally, because Rule 5-612(D)(3) provides that defendants "need not be present . . . when the proceeding involves only a conference," Defendant's presence was also not required at the scheduling conference under our rules of criminal procedure.

c. Hearing to limit testimony of Defendant's sister

{28} Finally, Defendant takes issue with the fact that he was not present at the September 15, 2017, hearing that determined the scope of his sister's testimony. Three days before the jury trial began, the district court addressed the State's motion to exclude (on evidentiary grounds) the testimony of Defendant's sister, Kelly Rickert, regarding the background, character, and state of mind of Defendant. Defense counsel again waived Defendant's appearance. Without hearing testimony, the district court addressed the straightforward legal question, whether the trial testimony of Defendant's sister could include the term *duress* in relation to Defendant. The district court did not exclude Ms. Rickert's testimony but properly limited it to relevant evidence.

{29} This pretrial hearing on September 15, 2017, was not a critical stage of trial because the district court was enforcing a well-accepted principle of law concerning limiting the scope of witness testimony about a defendant's character or state of mind. *See, e.g.*, Rule 11-404 NMRA (prescribing limitations on the admissibility of character evidence). Accordingly, because the hearing afforded no "opportunity to defend against the charge," Defendant did not have a right under the Fourteenth Amendment to be present at this hearing. *See Stincer*, 482 U.S. at 745 (internal quotation marks and citation omitted); *accord Torres*, 2018-NMSC-013, ¶ 68. Similarly, our rules of criminal procedure did not require Defendant to be present because the hearing concerned only a question of law. *See* Rule 5-612(D)(3) ("A defendant need not be present . . . when the proceeding involves only a conference or hearing upon a question of law.").

3. Defendant's confrontation clause claim

{30} Concerning Defendant's argument that his absence from the pretrial hearings denied his right to confrontation, "[t]he United States Supreme Court consistently has interpreted confrontation as a right that attaches at the criminal trial, and not before." *State v. Lopez*, 2013-NMSC-047, ¶ 9, 314 P.3d 236. This Court has also observed that "a defendant's right to confront witnesses against him is primarily a trial right, not a pretrial right." *State v. Rivera*, 2008-NMSC-056, ¶¶ 1, 12-14, 144 N.M. 836, 192 P.3d 1213. In addition, because Defendant confronted and cross-examined the blood spatter analyst at trial, his confrontation challenge fails. *See Stincer*, 482 U.S. at 740 (observing that where a defendant has the opportunity for a full and effective cross-examination at the time of trial, the defendant's inability to cross-examine prior statements is not "of crucial significance" (internal quotation marks and citation omitted)).

{31} We conclude that Defendant did not have a right to be present at any of the three pretrial hearings at issue. He was not denied due process or an opportunity to confront the State's witnesses against him pursuant to the Sixth and Fourteenth Amendments, and he was not required to be present under the New Mexico Rules of Criminal Procedure.

B. Ineffective Assistance of Counsel

{32} Defendant next argues his defense counsel was ineffective because (1) Defendant did not authorize defense counsel to waive his appearance at the pretrial hearings; (2) defense counsel failed to successfully challenge the admission of (a) the expert opinion regarding blood spatter, (b) the recorded conversation between Defendant and Hoss, whose previous trial was connected to the same murder, and (c) Defendant's recorded statement to officers; and (3) defense counsel failed to fully develop Defendant's "intoxication defense."

1. Standard of review

{33} "'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.'" *Lytle v. Jordan*, 2001NMSC-016, ¶ 25, 130 N.M. 198, 22 P.3d 666 (omissions in original) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). This Court has referred "to the two prongs of this test as the reasonableness prong and the prejudice prong." *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 17, 130 N.M. 179, 21 P.3d 1032. "Effective assistance of counsel is presumed unless a defendant 'demonstrates both that counsel was not reasonably competent and that counsel's incompetence caused the defendant prejudice.'" *State v. Sanchez*, 1995-NMSC-053, ¶ 20, 120 N.M. 247,

901 P.2d 178 (citation omitted); *State v. Astorga*, 2015-NMSC-007, ¶ 17, 343 P.3d 1245 (providing that unless a defendant establishes a prima facie case of ineffective assistance of counsel on direct appeal, "we presume that counsel's performance was reasonable").

{34} "An error is found if the attorney's conduct fell below that of a reasonably competent attorney." *State v. Grogan*, 2007-NMSC-039, ¶ 11, 142 N.M. 107, 163 P.3d 494 (internal quotation marks and citation omitted). "When reviewing a claim of ineffective assistance of counsel, we do not second-guess defense counsel's trial strategy and tactics." *Sanchez*, 1995-NMSC-053, ¶ 20. "Further, an assertion of prejudice is not sufficient to demonstrate that a choice caused actual prejudice." *Id.* And an appellate court may dispose of an ineffective assistance of counsel claim based wholly on the lack of prejudice to simplify the disposition. *Lukens v. Franco*, 2019-NMSC-002, ¶ 19, 433 P.3d 288.

{35} This Court has expressed a preference to remand ineffective assistance of counsel claims to the district court for an evidentiary hearing and habeas corpus proceedings "because the record before the trial court may not adequately document the sort of evidence essential to a determination of trial counsel's effectiveness." *See Grogan*, 2007-NMSC-039, ¶ 9 (internal quotation marks and citation omitted).

2. Waiver without authorization

{36} Based on our previous determinations that Defendant's constitutional rights were not violated and that Defendant's presence was not required as provided under Rule 5-612(D)(3), Defendant has not stated a prima facie claim for ineffective assistance of counsel pursuant to an alleged waiver without authorization.

{37} The law does not require that a defendant "be present in court in order to waive his right to be present," and counsel may validly waive the right if authorized. *Hovey*, 1986-NMSC-069, ¶¶ 17-18 ("The validity of the waiver may be established through the defense counsel, the defendant, or both.").

{38} But Defendant asserts that he did not authorize defense counsel to waive his appearance and therefore that defense counsel provided ineffective representation when he waived Defendant's appearance. Insofar as Defendant's assertion could give rise to a viable ineffective assistance of counsel claim based on additional evidence, we note that the additional evidence would likely come from privileged communications between Defendant and defense counsel. *See* Rule 11-503 NMRA (providing a privilege for attorney-client communications and a presumption that an attorney has authority to claim the privilege "only on behalf of the client" and "absent evidence to the contrary").

{39} Such communications are not part of the record before this Court. *Cf. State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61 ("If facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition . . . ."); *see also State v. Telles*, 1999-NMCA-013, ¶ 25, 126 N.M. 593, 973 P.2d 845 ("This Court cannot evaluate matters outside of the record."). We do not comment here on the merit of any claim Defendant may make as part of a habeas corpus proceeding.

3. Failure to challenge the admission of evidence

{40} Defendant also asserts his defense counsel was ineffective because counsel failed to have some of the evidence against Defendant excluded from trial. Defendant argues that defense counsel objected "pro forma" but "failed to meaningfully challenge . . . expert blood spatter opinion testimony." Defendant then argues that defense counsel should have objected to the admission of a voice recording that was not authenticated. Finally, Defendant argues that defense counsel should have requested a hearing before admission to determine the voluntariness of Defendant's video-recorded statements to police.

{41} Typically, tactics determine the tenacity and manner with which trial counsel fights the admissibility of evidence. *See State v. Singleton*, 2001-NMCA-054, ¶ 13, 130 N.M. 583, 28 P.3d 1124 (observing that strategic and tactical decisions include "'what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced'" (citation omitted)). In this context, Defendant must establish that no reasonably competent attorney would have abandoned objecting further in order to satisfy the reasonableness prong. *Cf. Patterson*, 2001-NMSC-013, ¶ 19 (observing that "to satisfy the reasonableness prong . . . , [a defendant] must establish that the facts support the motion to suppress and that a reasonably competent attorney could not have decided that such a motion was unwarranted").

Objection to the expert's qualification

{42} A "trial judge has wide discretion to determine whether a witness is qualified to give testimony as an expert, and no set criteria can be laid down to test [such] qualifications." *State v. McDonald*, 1998-NMSC-034, ¶ 19, 126 N.M. 44, 966 P.2d 752 (internal quotation marks and citations omitted). Appellate courts review the qualification of an expert for an abuse of discretion. *See id.* "If there are reasons both for and against a court's decision, there is no abuse of discretion." *State v. Smith*, 2016-NMSC-007, ¶ 27, 367 P.3d 420.

{43} Defendant argues that blood spatter analysis is more subjective than scientific but that the evidence in this case was "purported to be based in science by an appropriate expert" who nevertheless had limited experience as an expert in this area. Defendant calls these "clear reasons" why defense counsel should have more vehemently opposed qualification of this expert and admission of his testimony. This Court observed in *Fry*, 2006-NMSC-001, ¶¶ 54-57, that because blood spatter analysis is a field "based on well established scientific principles, and is capable of producing opinions based on reasonable probability rather than speculation or conjecture," an expert may be properly qualified to provide opinion testimony.

{44} The blood spatter analyst[3] testified before the jury, first about his qualifications and then concerning his opinion on the victim's position when he was shot: whether he was "standing up" and "where he fell" and "where [his] knees [we]re in relation to where his head [wa]s." The "jury was free to weigh every aspect of the [analyst's] qualifications and was free to disregard [his opinion] entirely." *McDonald*, 1998-NMSC-034, ¶ 21. A "'perceived deficiency'" in education or experience "'is relevant to the weight [of the evidence] and not to [its] admissibility.'" *Id.* (quoting *State v. Hernandez*, 1993-NMSC-007, ¶ 61, 115 N.M. 6, 846 P.2d 312).

{45} Because Defendant's argument appears to go to the weight of the evidence and not to its admissibility, and because Defendant did not provide additional evidence to contradict the blood spatter testimony, a reasonably competent attorney could have decided that further objection was unwarranted.

b. Objection to the authentication of the voice recording

{46} Defendant argues that defense counsel should have objected to and insisted on authentication of the voice recording pursuant to Rule 11-901(A) NMRA, which requires "evidence sufficient to support a finding that the [recording] is what the [State] claims it is." Defendant thus implies that the authentication did not meet "the low threshold for admissibility established by Rule 11-901(B)(5)." *State v. Loza*, 2016-NMCA-088, ¶ 22, 382 P.3d 963 (observing that *State v. Padilla*, 1982-NMCA-100, ¶ 5, 98 N.M. 349, 648 P.2d 807, favorably discussed a federal case "in which the testifying witness heard the appellant's voice on only two other occasions").

[3]We note that a different district court judge had previously qualified this blood spatter analyst in a companion case.

{47} Officer Bryan Burns testified that he collected a "mini-recorder" from Hoss when Hoss was arrested at A1 Best Bonds in Carlsbad. Officer Burns was familiar with both Hoss and Defendant and recognized their voices in the conversation on Hoss's recorder.

{48} Defendant also complains that the authentication was insufficient to establish that the recording was "a true and complete recording of the conversation." Rule 11-901 does not require proof that a recorded conversation is "true and complete." It appears that Defendant's argument conflates Rule 11-901 with Rule 11-106 NMRA (permitting a party to introduce "any other part [of a recorded statement introduced by an opposing party] that in fairness ought to be considered at the same time").

{49} Considering the applicable authentication threshold and the fact that at least part of Defendant's argument appears to go to the weight of the evidence and not its admissibility, a reasonably competent attorney could have decided that further objection was unwarranted.

c. Failure to move for suppression of Defendant's statement to the police

{50} Defendant argues that defense counsel should have requested "a hearing to determine the voluntariness of [his] interrogation [by] police officers before it was admitted into evidence and played for the jury." Defendant asserts that he had been using methamphetamine continuously for days when police interrogated him and therefore that it was unreasonable for defense counsel to waive his right to require proof of voluntariness by failing to raise the issue. *See State v. Swavola*, 1992-NMCA-089, ¶ 18, 114 N.M. 472, 840 P.2d 1238 (acknowledging that the prosecution has the burden of proof if voluntariness is contested and that failure of defense counsel to move for suppression "forfeited [the defendant's] right to have the State prove voluntariness").

{51} Although a waiver analysis may consider intoxication, the "state of intoxication does not automatically render a statement involuntary." *United States v. Smith*, 606 F.3d 1270, 1276 (10th Cir. 2010) (internal quotation marks and citation omitted); *accord State v. Young*, 1994-NMCA-061, ¶ 14, 117 N.M. 688, 875 P.2d 1119 ("[V]oluntary intoxication is relevant to determining whether a waiver was knowing and intelligent."); *see also United States v. Burson*, 531 F.3d 1254, 1258 (10th Cir. 2008) (observing that "[t]he mere fact of drug or alcohol use will not suffice" to negate a knowing and intelligent waiver).

{52} On appeal, Defendant does not point to any evidence in the record—such as in the video recording of his interview by the police—to demonstrate that he was substantially impaired, or extremely intoxicated to the point that he could not knowingly and intelligently waive his rights. *See Burson*, 531 F.3d at 1258 ("The defendant must produce evidence showing his condition was such that it rose to the level of substantial impairment."); *see also State v. Bramlett*, 1980-NMCA-042, ¶¶ 20-22, 94 N.M. 263, 609 P.2d 345 (holding that "extreme intoxication" was not consistent with a valid waiver), *overruled on other grounds by Armijo v. State ex rel. Transp. Dep't*, 1987-NMCA-052, ¶ 8, 105 N.M. 771, 737 P.2d 552. In addition, like the defendant in *Swavola*, Defendant ignores the possible benefit to the defense of his recorded statements, such as those expressing remorse or explaining that the killing was accidental. *See* 1992-NMCA-089, ¶ 19.

{53} A reasonably competent attorney could have decided that moving the district court to suppress the evidence was ill-advised.

4. Failure to further develop the intoxication defense

{54} Defendant did not deny shooting the victim but argued that he did so "based o[n] duress and/or intoxication." Defendant states that the failure to further develop the intoxication defense "clearly prejudiced" him. Defendant testified about his methamphetamine use and the effects methamphetamine had on him personally. Appellate defense counsel appears to hypothesize "addiction as a defense" by identifying the postulation with the "voluntary intoxication defense," based in part on a law review article by Meredith Cusick.[4]

{55} Defendant also suggests that not requesting an intoxication jury instruction negating the knowledge element for breaking and entering was unreasonable, citing *State v. Contreras*, 2007-NMCA-119, ¶ 17, 142 N.M. 518, 167 P.3d 966. *Contreras* requires including a knowledge element in the jury instruction for breaking and entering. *See id.* But Defendant admitted at trial that he knew he did not have permission to go into the victim's house and that they entered after Hoss kicked in the door.

{56} Defendant cites Cusick, *supra*, and argues that "[a]n expert would have been able to explain the physiological impact of meth intoxication and, more specifically, could have countered the State's argument that because [Defendant] was able to drive, walk, and talk, he must have been able to form the intent necessary for the predicate felonies." Defendant's argument is tantamount to an argument that the failure to call an expert witness was per se ineffective assistance of counsel, but "this Court has expressly rejected the contention that the failure to introduce the testimony of an expert witness constitutes ineffective assistance of counsel per se." *Lytle*, 2001-NMSC-016, ¶ 44 (citing *State v. Vigil*, 1990-NMSC-066, ¶¶ 17-19, 110 N.M. 254, 794 P.2d 728 (acknowledging that an expert "may be necessary to dispel common misconceptions" that a jury might harbor but reasoning that the decision to use the expert in that case could have been strategic, toward promoting an alternative theory of defense), and *State v. Chamberlain*, 1991-NMSC-094, ¶¶ 45-46, 112 N.M. 723, 819 P.2d 673 (concluding that the failure to hire an expert was a matter of trial strategy)).

{57} An expert may be able to dispel common juror misconceptions and to help a jury understand the physiological and cognitive effects of methamphetamine, including how it relates to the ability to form the requisite intent. However, defense counsel may have determined that using an expert to argue for the application of a novel and unprecedented legal theory, an "addiction defense," was inconsistent with the *voluntary* intoxication defense. Defense counsel may have also determined that other pragmatic problems discouraged the hiring of an expert. *See* Cusick, *supra* at 2441-44 (discussing concerns about confusion in presenting neuroscience evidence to juries, noting the lack of consensus on whether and how such evidence should be used in a determination of culpability).

{58} Based on the above, it appears possible that a reasonably competent attorney could have decided that trying to obtain expert testimony was unwarranted or unwise in this case. Defendant's argument

[4]"Methamphetamine addiction results in catastrophic brain damage to critical neural circuits and structures. . . . This may suggest that addiction, particularly to methamphetamine, should be handled in a different manner than intoxication in the mens rea analysis." Meredith Cusick, Note, Mens Rea and Methamphetamine: High Time for a Modern Doctrine Acknowledging the Neuroscience of Addiction, 85 Fordham L. Rev. 2417, 2434 (2017). Ms. Cusick argues for development of a new "doctrine of addiction," separate from a voluntary intoxication defense, based in part on distinguishing between "acute intoxication and addiction." See id. at 2434-49. An argument for a new doctrine does not support a claim for ineffective assistance of counsel due to the inability to develop a defense based on a proposed doctrine.

that his trial counsel failed to further develop an intoxication defense is insufficient to support a claim for ineffective assistance of counsel.

C. The District Court's Refusal to Instruct the Jury on the Lesser Included Offense of Voluntary Manslaughter

{59} Defendant argues that it was reversible error for the district court to refuse to instruct the jury on the lesser included offense of voluntary manslaughter. Defendant requested a jury instruction on voluntary manslaughter, based on the theory that he was under duress from one of his accomplices and that the accomplice was the source of the provocation that caused him to kill the victim. The general defense theory was that Defendant was a weak-willed drug addict—manipulated by Hoss through implied threat, based on the reputation of the manipulator, and by intimidation.

{60} "The propriety of denying a jury instruction is a mixed question of law and fact that we review de novo." *State v. Gaines*, 2001-NMSC-036, ¶ 4, 131 N.M. 347, 36 P.3d 438.

{61} "A defendant is entitled to an instruction on a theory of the case where the evidence supports the theory." *State v. Salazar*, 1997-NMSC-044, ¶ 50, 123 N.M. 778, 945 P.2d 996. "It is settled law that the victim [of voluntary manslaughter] must be the source of the provocation." *State v Munoz*, 1992-NMCA-004, ¶ 12, 113 N.M. 489, 827 P.2d 1303 (citing *State v. Manus*, 1979-NMSC-035, ¶ 16, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, ¶¶ 9-10, 98 N.M. 786, 653 P.2d 162). The proper inquiry is whether sufficient evidence was introduced to support a determination that the "[v]ictim individually provoked [the d]efendant." *State v. Jim*, 2014-NMCA-089, ¶ 15, 332 P.3d 870 (citing *Manus*, 1979-NMSC-035, ¶ 16). "[T]o receive a jury instruction on a lesser included offense, there must be evidence that the lesser offense is the highest degree of crime committed." *Salazar*, 1997-NMSC-044, ¶ 50.

{62} Defendant argued below, and on appeal, that the source of the provocation was his accomplice, not the victim. A third party, such as an accomplice, cannot properly support a provocation defense under New Mexico law, and thus there was no evidence of provocation that could reduce the charge of murder to manslaughter. *See, e.g.*, *Jim*, 2014-NMCA-089, ¶ 15. Defendant was not entitled to the requested instruction, and the district court properly denied his request.

CONCLUSION

{63} For the foregoing reasons, we affirm Defendant's convictions.

{64} IT IS SO ORDERED.
DAVID K. THOMSON, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Justice
BARBARA J. VIGIL, Justice
MICHAEL E. VIGIL, Justice
C. SHANNON BACON, Justice

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Robles, Rael & Anaya, P.C. is looking for an attorney with experience (3-5 years) in civil litigation. The successful candidate should have excellent communication skills (written and oral), be a self-starter who takes ownership of executing tasks, has an ability to manage and prioritize assigned case-load and is an effective team player. We offer a competitive compensation and benefits package, 401k plan, professional development, CLE credits and more. We also offer a defined bonus incentive program. Please submit resume and writing sample to chelsea@roblesrael.com.

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The Thirteenth Judicial District Attorney's Office is seeking entry level as well as experienced trial attorneys. Positions available in Sandoval, Valencia, and Cibola Counties, where you will enjoy the convenience of working near a metropolitan area while gaining valuable trial experience in a smaller office, which provides the opportunity to advance more quickly than is afforded in larger offices. Salary commensurate with experience. Contact Krissy Saavedra kfajardo@da.state.nm.us or 505-771-7400 for an application. Apply as soon as possible. These positions will fill up fast!

Attorney Position

Small, collegial Santa Fe, New Mexico firm seeks motivated attorney to become part of busy real estate, business and litigation practice. Looking for attorney with 2–7 years' experience, and strong research, writing and people skills. Excellent opportunity to join a well-established practice as well as to build and develop your own areas of interest. Salary commensurate with experience. Please send resume, references and short writing sample to: Hays & Friedman, P.A., 530-B Harkle Road, Santa Fe, New Mexico 87505, or submit information to ameliam@haysfriedmanlaw.com. All inquires will be kept confidential.

Associate Attorney

Scott & Kienzle, P.A. is hiring an Associate Attorney (0 to 10 years experience). Practice areas include insurance defense, subrogation, collections, creditor bankruptcy, and Indian law. Associate Attorney needed to undertake significant responsibility: opening a file, pretrial, trial, and appeal. Lateral hires welcome. Please email a letter of interest, salary range, and résumé to paul@kienzlelaw.com.

Attorney
New Mexico Legal Aid seeks an attorney for Native American, Domestic Violence and general poverty law work in Gallup. See our website for the full job description. www.NewMexicoLegalAid.org

Litigation Attorney
Cordell & Cordell, P.C., a domestic litigation firm with over 100 offices across 37 states, is currently seeking an experienced litigation attorney for an immediate opening in its offices in Albuquerque and Santa Fe, NM. The candidate must be licensed to practice law in the state of New Mexico, have minimum of 3 years of litigation experience with 1st chair family law preferred. The position offers a significant signing bonus, 100% employer paid premiums including medical, dental, short-term disability, long-term disability, and life insurance, as well as 401K and wellness plan. This is a wonderful opportunity to be part of a growing firm with offices throughout the United States. To be considered for this opportunity please email your resume with cover letter indicating which office(s) you are interested in to Hamilton Hinton at hhinton@cordelllaw.com

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

Attorney
New Mexico Legal Aid seeks an attorney for its Roswell office. See our website for the full job description. www.NewMexicoLegalAid.org

Associates
Robles Rael & Anaya, P.C. is seeking associates with a minimum of 3 years experience in the area of civil rights and/or local government law. A judicial clerkship will be considered in lieu of experience. Applicant must be motivated and have strong research and writing skills. Associates will have a great opportunity to gain courtroom experience and/or appear before local governing bodies. Competitive salary, benefits, 401k and bonus plan. Inquiries will be kept confidential. Please e-mail a letter of interest and resume to chelsea@roblesrael.com.

Attorney – Patient's Compensation Fund
Office of Superintendent of Insurance is seeking a Senior Attorney who will provide high level, complex legal advice to the Superintendent of Insurance and the Patient's Compensation Fund staff. This position requires thorough knowledge of the Medical Malpractice Act and the Administrative Procedures Act and significant insurance regulatory and litigation experience. Applicant must have at least five (5) years of experience. Medical malpractice law, insurance law, administrative law, and/or civil litigation experience preferred. Salary DOE w/benefits. This position will be based in Albuquerque. For more information and to apply please visit: https://careers.share.state.nm.us/psp/hprdcg/EMPLOYEE/HRMS/c/HRS_HRAM_FL.HRS_CG_SEARCH_FL.GBL?Page=HRS_APP_JBPST_FL&Action=U&SiteId=1&FOCUS=Applicant&JobOpeningId=112193&PostingSeq=1

Attorney
New Mexico Legal Aid seeks a Managing Attorney for its Santa Fe office. See our website for the full job description. www.NewMexicoLegalAid.org

Assistant City Attorney
The City of Albuquerque Legal Department is hiring an Assistant City Attorney position in the Property and Finance division of the City Attorney's Office. The position will administer the traffic arraignment program, approximately 20 hours per week, 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.

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.

Divorce Attorney
We are happy to announce that we are expanding our divorce and family law practice in Las Cruces. Lead by attorney Amy Bailey, New Mexico Legal Group has become well established within the local Las Cruces legal community and Courts. We are now looking for another highly motivated, entrepreneurial minded, fun, smart, down to earth divorce attorney to join our team. This is a unique opportunity to be involved in creating the very culture and financial rewards that you have always wanted in a law firm. We practice at the highest levels in our field, with independence and cutting edge practice and marketing strategies. The firm offers excellent pay (100k+), health, disability, life and vision insurance, an automatic 3% contribution to 401(k) and future profit sharing. This position is best filled by an attorney who wants to help build something extraordinary. This will be a drama free environment filled with other team members who want to experience something other than your run of the mill divorce firm. Qualified candidates should send a resume and cover letter to dcrum@newmexicolegalgroup.com. In addition to your professional experience, your letter should talk about who you are as a person and what makes you perfect for this position (this is the most important document you will submit). All inquiries are completely confidential.

Managing Attorney
New Mexico Legal Aid seeks a Managing Attorney for its Native American Program. See our website for the full job description. www.NewMexicoLegalAid.org

Position Announcement Assistant Federal Public Defender - Albuquerque 2020-06

The Federal Public Defender for the District of New Mexico is seeking a full time, experienced trial attorney for the main office in Albuquerque. More than one position may be filled from this posting. Federal salary and benefits apply. Applicant must have three years minimum criminal law trial experience, be team-oriented, exhibit strong writing skills as well as a commitment to criminal defense for all individuals, including those who may be facing the death penalty. Spanish fluency preferred. Writing ability, federal court, and immigration law experience will be given preference. Membership in the New Mexico Bar is required within the first year of employment. The private practice of law is prohibited. Selected applicant will be subject to a background investigation. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C. ' 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. In one PDF document, please submit a statement of interest and detailed resume of experience, including trial and appellate work, with three references to: Stephen P. McCue, Federal Public Defender, FDNM-HR@fd.org. Reference 2020-06 in the subject. Writing samples will be required only from those selected for interview. Applications must be received by July 24, 2020. Position will remain open until filled and is subject to the availability of funding. No phone calls please. Submissions not following this format will not be considered. Only those selected for interview will be contacted.

Legal Assistant

Solo practitioner seeking an experienced, professional, full-time legal assistant. Practice limited to probate litigation, elder law, guardianships, and a few plaintiff's personal injury cases. The ideal candidate will have experience with MS Office, QuickBooks, Odyssey, and legal billing software. The ideal candidate will possess above-average writing and speaking skills. Duties will include reception, answering multiple telephone lines, scheduling appointments, filing, client billing, bookkeeping, and general office administrative duties. Position offers a very pleasant working environment. Salary $15-$18 hour commensurate with experience. Please send a cover letter and resume to nicole@benhancocklaw.com.

Digital Marketing Coordinator

The State Bar of New Mexico seeks outgoing, detail oriented applicants to join our team as a full-time Digital Marketing Coordinator. This position works closely with the staff members of the State Bar and Bar Foundation to communicate its programs and services. The position reports to the Director of Communications and Member Services and works as part of the Communications and Member Services Department and IT staff. The person in this position will perform daily tasks including website maintenance, social media marketing, and email marketing and will oversee programs associated to those tasks. $17-18/hour, depending on experience and qualifications. Qualified applicants should submit a resume, cover letter and an example of a marketing campaign they have created. EOE. For full details and instructions on how to apply visit https://www.nmbar.org/NmbarDocs/AboutUs/Careers/DMC2020.pdf

PT/FT Legal Assistant

Small law office affiliated with CA law firm seeking PT/FT Legal assistant for the Santa Fe office. Duties will include assistance with admin, organize and review documents and pleadings, research, and some secretarial responsibilities. Salary based on experience. Start date asap. Please email your resume to mroberts@mzclaw.com

Office Space

For Sale - Office Building

Tired of the Big City? Recently retired attorney has for sale office building, furniture, etc. In Socorro, New Mexico. Email: gerbrachtlaw@gmail.com

620 Roma N.W.

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

Oso Del Rio

Beautiful Rio Grande Boulevard office for 4-6 lawyers & staff. 3707 sq. ft. available for lease July 1, 2020. Call David Martinez 343-1776; davidm@osolawfirm.com

Office Space in Ideal Location

2,500 sq. ft. office space, located on 4th St between Candelaria and Menaul, close to Downtown Courthouses. It is an ideal legal setting, with approximately eight individual offices, waiting area and conference room. There is a full kitchen for staff, adequate parking and security. Space is shared with a local IT firm. For more information, call Mollie Gunkel at 505-504-0025.

Excellent NE Heights Location, Sedona Pointe Business Complex

Executive office suites conveniently located near Paseo del Norte and Louisiana. Our suites provide easy access and ample parking for tenants and clients. We provide the services you need for a low monthly cost. Our services include professional reception, phone, mail/package handling and high-speed internet. We also provide conference rooms, notary services, 24-hour building access, utilities and janitorial services. Please visit our website, sampropertiesnm.com, or call us at 505-308-8662.

Office Space

Approximately 1950 square feet in beautiful building at 1201 Lomas NW. Ample parking, walk to courthouses. Large conference room, four private offices, kitchen-file room, two bathrooms, CAT5 cabling, newly renovated. Call Robert Gorman 243-5442, or email rdgorman@rdgormanlaw.com.

Miscellaneous

Want To Purchase

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

Search for Last Will and Testament

We are searching for the Last Will and Testament of Martin A. Panozzo, Sr. If you have either the original or a copy, please contact Rio Rancho Law Offices, at (505) 892-2200.

For Sale Furniture

Solid oak conference table 4x10 with 8 custom wheeled tilted chairs was 5000 now 3000. Two mahogany bookshelves 750 each. Executive 7 drawer mahogany desk 1250. delconroylaw@gmail.com

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Reconstruction of accounting records for probate and other litigated matters	Investigating allegations of fraud, embezzlement or financial discrepancies	Appointed or agreed-upon Neutral expert	Public speaking
Pre-litigation case analysis, discovery assistance and analysis of financial records	Investigation of securities fraud cases	Testifying expert	CPE professional training for CPAs, CFEs and other professionals
Partnership dissolution and other business disputes	Investigating allegations of discrimination, harassment or hostile work environment	Consulting expert a non-testifying expert as a strategic member of your legal team	CLE training for lawyers and legal professionals
Complex and high net-worth divorce cases & collaborative divorce	Investigations into allegations of retaliation and whistleblower *Qui Tam* cases	Accounting and professional malpractice cases	Certified training for law enforcement
Kovel accounting and assistance with tax controversy cases	Employment and policy investigations	Calculation of actual and/or intended loss for sentencing	eLearning for professionals
Source of funds/income analysis for attorney to determine your risk of fee claw-back	Accounting or professional malpractice investigations	Calculation of restitution and damages	eLearning - AML/Title 31 training for gaming employees
Assisting attorneys with IOLTA trust accounting issues	Preparing of proof of loss for insurance claims due to employee theft or fraud	Expert consulting and testimony in police procedures, practices and misconduct cases	Management consulting, performance improvement evaluations, and econometric studies
	Asset tracing in complex, high-value cases	Consulting and expert testimony in police oversight cases	Fraud risk assessment studies
	Tracing of funds in white collar cases		Fraud prevention studies
			Training for boards and commissions