

# BAR BULLETIN

July 22, 2020 • Volume 59, No. 14



*Early Bird No Worm*, by Gwen Wilemon

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Employment and Labor Law

SAVE THE DATE!

# 2020

## Annual Meeting and Member Appreciation Event

**Friday, Sept. 25**  
**Virtual event • FREE**

The State Bar of New Mexico is pleased to announce our 2020 Annual Meeting and Member Appreciation Event. The event will be held virtually and will be free to all members. It will offer at least four hours of CLE credit.

**CLE Topics:**

Access to Justice Issues in the Era of COVID-19  
Presentation on the 2019 Survey of Diversity in the Legal Profession  
Wellness and Civility  
Updates from the Supreme Court in the Time of COVID-19

**Plus:**

Remarks from President Tina Cruz and the Chief Justice of the Supreme Court  
Annual Awards Presentation

Sponsorship opportunities are available!

[www.nmbar.org/annualmeeting](http://www.nmbar.org/annualmeeting)





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## Meetings

### July

**22**  
**Natural Resources, Energy and Environmental Law Section Board**  
Noon, teleconference

**23**  
**Elder Law Section Board**  
Noon, teleconference

**24**  
**Immigration Law Section Board**  
Noon, teleconference

**28**  
**Intellectual Property Law Section Board**  
Noon, teleconference

**30**  
**Trial Practice Section Board**  
Noon, teleconference

**31**  
**Cannabis Law Section Board**  
9 a.m., teleconference

### August

**4**  
**Health Law Section Board**  
9 a.m., teleconference

## Workshops and Legal Clinics

### July

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

### August

**5**  
**Divorce Options Workshop**  
6-8 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

### September

**2**  
**Divorce Options Workshop**  
6-8 p.m., Video Conference  
For more details and to register, call  
505-797-6022

**About Cover Image and Artist:** Although she had been sketching and drawing her whole life, it wasn't until she became an adult that she began exploring color through acrylics, oils, pastels and watercolor. Since then, Wileman has studied under several artists including Fred Miller, Bud Edmonson, Clive Tyler, Albert Handel and Lorenzo Chavez among others. Gwen's work has hung in the Summer and Dean Gallery in Albuquerque, the Wilder Nightingale Fine Art Gallery in Taos, Purple Sage Galeria in Old Town Albuquerque, and El Zocalo in Las Vegas, N.M., Masterworks, Miniatures, the Pastel Society of NM Small Works, PSNM National Pastel Show, and IAPS Show (International Association of Pastel Societies) and has received awards for watercolor, miniatures and pastels. Wilemon is a member of the Pastel Society of New Mexico, the Plein Air Painters of New Mexico and is a member of the Camino Real 8, a group of artists in central New Mexico. She is currently represented by El Zocalo Gallery in Las Vegas, N.M.

# Notices

## COURT NEWS

### New Mexico Supreme Court Rule-Making Activity

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

### Supreme Court Law Library

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

### Retirement Postponement

New Mexico Supreme Court Chief Justice Judith K. Nakamura's retirement has been postponed. In light of Justice Nakamura's announcement regarding the postponement of her retirement, the Supreme Court Judicial Nominating Commission hearing that had been scheduled for July 9 is hereby postponed until further notice.

### First Judicial District Court Judge Appointment

On July 1, Governor Michelle Lujan Grisham appointed Kathleen McGarry Ellenwood to the bench of the First Judicial District Court as the newly-created Division X Judge. Effective July 15, a mass reassignment of cases will occur pursuant to NMSC Rule 23-109, the Chief Judge Rule. Division X of the First Judicial District Court will maintain a Docket consisting of Civil Cases and State Habeas cases, both civil and criminal. Since this is a newly created position, the civil docket will be created with a percentage of cases from the civil cases pending in Divisions I, II, VI and IX. Effective Monday, July 27, a mass reassignment of the Juvenile Delinquency Docket previously assigned to Chief Judge Mary Marlowe Sommer in Division VIII will occur pursuant to NMSC Rule 23-109, the Chief Judge Rule, and be assigned to Judge T. Glenn

## Professionalism Tip

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

When hearings or depositions are cancelled, I will notify opposing counsel, necessary parties, and the court (or other tribunal) as early as possible.

Ellington, Division VII. At that same time a mass reassignment of the Abuse and Neglect Cases previously assigned to Judge T. Glenn Ellington, Division VII will be transferred to Judge Kathleen McGarry Ellenwood, Division X. Pursuant to Supreme Court Order No. 20-8500-025, "In the Matter of the Safe and Effective Administration of the New Mexico Judiciary During the COVID-19 Public Health Emergency," Emergency Court Protocol No. 3 (E), "the temporary suspension of the exercise of peremptory excusals shall remain in place," therefore no peremptory excusal of Judge McGarry or Judge Ellington will take place.

### 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 2020 Annual Meeting Resolutions and Motions

Resolutions and motions will be heard at 8 a.m. on Friday, Sept. 25, 2020, at the opening of the State Bar of New Mexico 2020 Annual Meeting and Member Appreciation Event. To be presented for consideration, resolutions or motions must be submitted in writing by August 25 to Executive Director Richard Spinello,

PO Box 92860, Albuquerque, NM 87199; fax to 505-828-3765; or email [rspinello@nmbar.org](mailto:rspinello@nmbar.org).

### 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](http://www.nmbar.org/covid-19) for a compilation of resources from national and local health agencies, canceled events and frequently asked questions. This page will be updated regularly during this rapidly evolving situation. Please check back often for the latest information from the State Bar of New Mexico. If you have additional questions or suggestions about the State Bar's response to the coronavirus situation, please email Executive Director Richard Spinello at [rspinello@nmbar.org](mailto:rspinello@nmbar.org).

### Reopening of Building

The State Bar of New Mexico has reopened to members and the public. Availability is limited pursuant to the current State health orders. To book a room, call 505-797-6000 or email [sbnm@nmbar.org](mailto:sbnm@nmbar.org).

### Board of Bar Commissioners Meeting Summary

The Board of Bar Commissioners for the State Bar and the N.M. State Bar Foundation met virtually on June 19, with certain members of Senior Staff participating from the State Bar Center in Albuquerque. Action taken at the meeting follows:

- Approved the Feb. 7 meeting minutes as submitted;
- Accepted the April 2020 State Bar and N.M. State Bar Foundation financials;
- Accepted the 2019 Combined Financial Audit for the State Bar and the Bar Foundation;
- Accepted the State Bar and Bar Foundation 2019 Financial Dashboards;
- Received the Client Protection Fund, Access to Justice and Judges and Lawyers Assistance Program 2019 First Quarter 2020 financials;

*Notices continued on page 8.*



# REMOTE ORAL ARGUMENTS:

## Things To Think About



*By Justice David K. Thomson*

Coping with the COVID-19 pandemic has required all of us to be flexible and get creative in finding ways to maintain business as usual. Many people are working and schooling from home, and opting to video call loved ones instead of visiting them in person. Nearly all businesses now offer curbside delivery, and we are all suddenly used to wearing our masks and keeping a distance. We're all quickly becoming accustomed to a new way of doing things. The judiciary has quickly adapted its procedures to fit the needs of this time.

Courts all around the country are now conducting hearings over video conference. At the New Mexico Supreme Court, we have always required in-person attendance for oral arguments. However,

when it was no longer safe to do so because of the coronavirus, we adjusted. This Court has held numerous remote oral arguments where attorneys appear over video conference to present their case. This public health crisis has taught us to appreciate how technology allows the judicial branch to continue functioning as normally as possible despite these uncertain times.

It's not ideal, but we've been able to make it work. Still, interacting over video has its drawbacks, and judges and attorneys alike are learning as we go about how to make court proceedings held over video as smooth, simple, and professional as possible.

In May, the Appellate Law Conference of the ABA sponsored a CLE entitled "Appellate Advocacy in the Age of COVID-19" to discuss the current style of courtroom proceedings and best practices during this time. I led the panel of judges and attorneys<sup>1</sup> in answering questions that participants posted in real time using the online chat feature. Below are some of the highlights from that discussion, and some specific guidance for the New Mexico Bar.

**Q: What should litigants think about when it comes to appearing in front of a judge over video?**

**A:** As much as possible, lawyers should treat these matters in the same way that they would treat in-person appearances. Even if the hearing or argument is over video, a judge may notice some of the same things that would be taboo in a courtroom. Pay attention to the small stuff. For example, stand up when it is appropriate to do so, wear professional courtroom attire, and do not eat in front of the camera.

**Q: Do judges foresee video arguments becoming a permanent option for court proceedings that will be available after the pandemic has subsided?**

**A:** In the long run, it is unlikely that video arguments will replace in-person arguments. However, now that more courts are better equipped to hold hearings over video, it will probably remain an option for emergency circumstances or in other instances where a litigant cannot be physically present.

**Q: How has the United States Supreme Court's experience with audio-only remote arguments inform how the panel views the issue of remote oral arguments?**

**A:** The Supreme Court conducted one of its first oral arguments via phone conference on the same day we held this panel. The United States Supreme Court has been successful at conducting remote oral arguments over the phone. This success is due to its very orderly way of conducting arguments. The Chief Justice allows each Justice to ask questions one at a time in order of seniority. The attorneys then have a fixed amount of time to respond to each question, and the time limit is strictly enforced. The orderliness of the arguments seems to have mitigated, at least to a degree, the inherently choppy nature of remote proceedings and the trouble of attorneys talking over the Justices.

**Q: Do appellate courts allow attorneys more time to make their arguments when oral arguments are held over video?**

**A:** Because of technical issues such as time delay or WIFI connectivity problems, most courts are allowing attorneys more time to make and finish their arguments.

**Q: Will remote proceedings be made available to the public?**

**A:** Remote oral arguments should always accommodate the public and the press. It is up to each court to make sure the public can access court proceedings. Courthouses should remain open to the public unless it is simply not safe. Public access might also mean streaming oral argument, or posting the audio from a hearing on the court's website.

**When it comes to remote arguments in the New Mexico Supreme Court, here are some key tips for attorneys:**

1. Prior to argument, make sure you have all the platform and login information from the court.
2. Ask what the court's backup plan is should the WIFI go out. For instance, is there a number you should call if you get cut-off?
3. Be intentional about where you place your camera. Think about your background and the lighting in your room. Use a podium if you can. Remember we can see every facial expression, if you are not talking moot your microphone.
4. Silence your cell phone.
5. Time yourself. Don't rely on the court to give you countdown signals. Set a timer or have someone with you during your argument that can let you know when you're almost out of time.
6. Be even more concise than you would be if you were at the court in person. Be especially concise in answering questions.
7. At the beginning of your argument, give a roadmap identifying your major points and then address them right away.
8. Moot your argument. Because you need to address the key issues right away, a good moot of your argument is even more important than if you were arguing in the courtroom. That moot should focus on identifying the major questions the judges will likely ask.
9. Try to avoid reading your argument or moving around at the podium or your desk. If there is a lag or the video and audio is degrading the faster you talk and the more you move the worse it gets.
10. Remember you are still in Court, so act like it.

I hope this information is helpful to those participate in remote arguments. Be safe.  
Justice Thomson

*Justice David K. Thomson took the oath of office on Feb. 4, 2019, following his appointment by the Governor to the New Mexico Supreme Court. Since 2015, Justice Thomson had been serving Santa Fe, Rio Arriba, and Los Alamos counties as a state trial judge in the First Judicial District Court. Justice Thomson was born and raised in Santa Fe. He has an undergraduate degree in economics and government from Wesleyan University in Middletown Conn. He worked for U.S. Sen. Jeff Bingaman before attending the University of Denver Sturm College of Law and graduating in 1998.*

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Endnotes

<sup>1</sup> Judge Albert Diaz (United States Court of Appeals for the Fourth Circuit), Justice Eva Guzman (Texas Supreme Court), Jeffrey C. Gerish, Jim Hivner (Clerk of the Appellate Courts in Tennessee), and Andrew C. Simpson all participated in the panel.



**Luis G. Carrasco** has been elected to the Board of Directors of Southwest Care Center. Carrasco is a director in the Rodey Law Firm. He practices in the areas of public finance, real estate, administrative law and government relations and other transactional matters. Prior to joining Rodey, Carrasco served as an assistant attorney general in the New Mexico Attorney General's Office. In that capacity, he served as counsel to the State Board of Finance,

the Construction Industries Commission and the Human Rights Commission, among others. Southwest Care Center consists of a team of experienced doctors, advanced-practice clinicians, nurses, pharmacists, behavioral health professionals and other support staff committed to treatment of the whole person.

Taos attorney **Frank E. (Dirk) Murchison** has been named to Southwest Super Lawyers 2020, Best Lawyers in America 2020 and National Association of Distinguished Neutrals 2020 in the areas of mediation and arbitration

## In Memoriam

www.nmbar.org

**Kathleen Anne Ellsworth** died on May 31 at 73 years old. Kathleen had cancer three years ago and successfully treated it. Unfortunately, the cancer returned. When it was diagnosed Kathleen had only a few weeks to live. She chose to spend her remaining time at home in Ojo Caliente. Kathleen spent the early part of her life in California, owning and running a gourmet restaurant in Los Angeles, living on Mulholland Drive, and enjoying every minute of a charmed life full of horses and traveling. Kathleen had a private practice initially in Espanola and more recently in Santa Fe. She had worked as a special prosecutor at Child Support Enforcement and had a contract with the First Judicial District for mediating foreclosure cases. Kathleen loved animals and always had horses and dogs. There will be no public service but Kathleen's friends will continue to remember her bright smile and cheerful mood.

**Richard B. "Dick" Addis**, born April 9, 1929, of Albuquerque, passed away Aug. 5, 2018, at the age of 89. He will be deeply missed. He was preceded in death by sister Mignone Maxwell and brother, Raymond Addis. He came here to make a difference in the world, and he did. He told his daughter and son "He hated to leave everyone, but it was time. He had done it all". Dick was born in Columbus, Ohio to Wilbur Jennings and Leila Olive Addis. He graduated from Portsmouth High School, and served proudly in the United States Marine Corps from August 1945 until the end of World War II, and again in Korea from 1950 to 1953, ultimately earning the rank of Sergeant. Once a Marine always a Marine. Semper Fi. Dick graduated from Law School at Ohio State University in 1956. He was active in the United States District Court (northern district) Ohio 1957, New Mexico 1963, United States District Court New Mexico 1963, Laguna Pueblo Tribal Court (New Mexico) 1986. He was also Co-developer The Woodlands Subdivision, Albuquerque; co-owner Cerro Del Oro Mine, Valencia County, since 1977; Member of New Mexico Bar Association and Ohio Bar Association. In 1963, the family moved to Albuquerque, where he worked for the firm of Douglas Schall, before setting up a private law practice. He was a supportive dad, and an amazing uncle to his nieces and nephews. He did it all, private pilot, owner of an alfalfa farm, scuba diver, co-owner of many mining properties and a member of the Elks Club for many years. He was an avid skier until the age of 80. His favorite place was sitting on the banks of the Ohio River with his

family. He leaves Chris Addis, his former wife and good friend, his sister Maxine Adams and her husband Bill, and their two children. He also leaves his two children Jackie Addis and her husband John Renna of Tijeras, and Bart Addis and his wife Darlene Chisholm of Belmont, Mass., four grandchildren Nathan Clark, Carl Renna, Grant Addis and Clark Addis, nieces, nephews and, other family and friends.

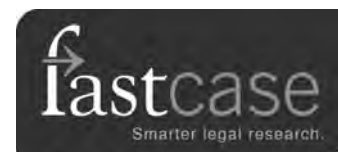
**Judge Roger Copple (ret.)** passed away June 13 at St. Vincent Hospital from complications following surgery. He was born in Hickman Mills, Miss., Dec. 26, 1934 to C.A. (Bud) Copple and Becky Swaney Copple. After many moves to various parts of the west the Copple family settled in Roswell where his father was president of Malco Products, Inc. for 21 years. Rodger graduated from Roswell High School in 1952. He attended the University of Colorado and the University of New Mexico where he met Patricia Golightly. They were married in 1954. He received his Bachelor of Science Degree in 1956. He earned his bachelor of laws degree at Southern Methodist University School of Law in Dallas (Honor Society) in 1959. Roger was a member of the Jennings, Christy and Copple Law Firm in Roswell for 15 years before moving to Santa Fe in 1974. About seven years later Roger opened his Santa Fe Law office in 1981. In 1987 he was appointed to the District Bench by Governor Garrey Carruthers and attended the National Judicial College in Reno, NV. After his time on the bench in Santa Fe, Roger and Patricia moved to Albuquerque where he became an assistant United States attorney dealing in criminal cases and property forfeitures. In retirement he was on the Fee Arbitration Panel and the Commission of Professionalism for the State Bar of NM; Disciplinary Board for the Supreme Court of NM; arbitrator and member of the American Arbitration Association. In Santa Fe he held many civic/municipal/club offices and positions: bank board director, president of Chavez County Bar Association; Roswell city commissioner. He was a former member of the Santa Fe Rotary Club. He was preceded in death by his parents and Brother Riley Copple. He is survived by Patricia his wife of 66 years; son Bruce and wife Jeannie of Grand Junction, Colo.; son Brian and grandson Brett of Austin; Brother Brian Copple and wife Pat of Dallas; nephews a niece, grandnieces and grandnephew. Roger will be remembered as a kind and loving man to his family and friends and will be greatly missed by all who knew him.

*Continued from page 4.*

- Approved applying for PPP Loans for the State Bar and the N.M. State Bar Foundation;
- Approved a resolution to Amend the State Bar Cafeteria Plan to Allow Reimbursement for Over-the-Counter Medications;
- Elected Carla C. Martinez as President, Carolyn A. Wolf as President-Elect and Benjamin I. Sherman as Secretary-Treasurer of the State Bar for 2021;
- Received an update on the 2020 licensing renewals; per requirements of the applicable rule, there were 42 names sent to the Court for non-payment of licensing fees and 88 names sent for MCLE non-compliance;
- Approved the creation of a separate board for the Bar Foundation composed of a majority of Board of Bar Commissioners members and that all members be appointed by the Board; the Policy and Bylaws Committee will revise the bylaws regarding the composition of the new board;
- Approved reimbursement by the State Bar for the free CLEs provided by the Bar Foundation to members as a member benefit during the pandemic; a plan will be developed for the Board's consideration;
- Approved the creation of a "rainy day" fund and a reserve fund for improvements to the State Bar Center;
- Approved the creation of a special committee on sections and their role in the State Bar;
- Appointed Mark A. Filosa to the Judicial Standards Commission for a four-year term;
- Approved sunsetting the Criminal Law Section due to inactivity and refunding the section members' dues for 2020;
- Received a report and recommendations on the Supreme Court Complex and Commercial Litigation Task Force for a Pilot Program;
- Received a report on the Supreme Court Temporary Alternative Practice Working Group;
- Received a report on the Minorities in the Profession Decennial Survey from the organization that performed the survey and reports from the Committee on Diversity in the Legal Profession and Committee on Women and the Legal Profession;
- Appointed Judge Linda M. Vanzi to the Client Protection Fund Commission for the remainder of an unexpired term through Dec. 31, 2021;
- Ratified action taken by the Executive Committee between the February and June Board meetings, including: cancellation of April Board meeting and the State Bar's Annual Meeting scheduled for June 18-20; appointment of Michael Eshleman to the Sixth Bar Commissioner District; appointment of Mitchell Mender to the Fifth Bar Commissioner District; appointment of Roberta S. Batley to the ABA House of Delegates; appointment of Paul Spruhan to the New Mexico Legal Aid Board; and approval of MCLE waiver requests;
- Reported on plans for the one-day Annual Meeting and Member Appreciation Event on Sept. 25 which will be free to all members; a detailed schedule and registration will be available soon;
- Received the ATJ Fund Grant Commission report on the grants awarded to the legal service providers;
- Received the Annual Awards Committee report and recommendations for the 2020 award recipients; an awards video on the recipients will be shown during the Annual Meeting and Member Appreciation Event on Sept. 25;
- Approved naming the new conference room at the State Bar Center, which was formerly the print shop annex, the "Access to Justice Boardroom";
- Received the Regulatory Committee report and approved the creation of a Legal Specialization Commission to provide oversight and development of the program with Family Law being the first specialty area;
- Received a Member Services Committee report and approved redistricting the bar commissioner districts to overlap with the judicial districts; the committee will discuss out-of-state member outreach and engagement and bring a recommendation to the Board;
- Received a Statewide/Rural Outreach Committee report;
- Received an update on the Association Management Software; a contract was entered into with Euclid and implementation began on June 8; the business system evaluation and design phase are in process and the launch date will be Jan. 2021;
- Received a request to designate a space in the Bar Center for litigants and denied the request due to COVID related concerns and limited staffing during the phased re-opening and will look into creating a designated space for public education regarding the legal system and

— *Featured* —

## Member Benefit



Fastcase is a free member service that includes cases, statutes, regulations, court rules and constitutions.

This service is available through [www.nmbar.org](http://www.nmbar.org). Fastcase also offers free live training webinars. Visit [www.fastcase.com/webinars](http://www.fastcase.com/webinars) to view current offerings. Reference attorneys will provide assistance from 8 a.m. to 8 p.m. ET, Monday–Friday.

Customer service can be reached at 866-773-2782 or [support@fastcase.com](mailto:support@fastcase.com). For more information, contact Christopher Lopez, [clopez@nmbar.org](mailto:clopez@nmbar.org) or 505-797-6018.

access to justice;

- Received a report from the executive director which included an update on the integrated state bars nationally;
- Denied the Solo and Small Firm Section's request to become a division of the State Bar and will create a committee to develop the Professional Practice Program, which will include a representative from the Solo and Small Firm Section; and
- Provided the Bar Center reopening plan; the Bar Center reopened on June 29 to members, with certain restrictions, pursuant to the current State Health Order and the CDC guidelines.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the Sept. 24 meeting.

## 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

- July 27
- August 3
- August 10

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 N.M. 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 Solu-

tions Group, the State Bar's FREE EAP, can help. Call 866-254-3555 to receive FOUR FREE counseling sessions per issue, per year! Every call is completely confidential and free. For more information, <https://www.nmbar.org/jlap> or <https://www.solutionsbiz.com/Pages/default.aspx>.

## UNM SCHOOL OF LAW Law Library Hours Spring 2020

Through May 16

### Building and Circulation

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

### Reference

Monday–Friday	9 a.m.–6 p.m.
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## eNews

# Get Your Business Noticed!

Advertise in our email newsletter,  
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# Legal Education

## July

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|---|---|---|
| <p>23    <b>Stuck in Neutral: Ethical Concerns for the Attorney as Arbitrator or Mediator</b><br/>1.5 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>              | <p>28    <b>Lawyer Ethics and Disputes with Clients</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                 | <p>31    <b>Charitable Giving Planning in Trusts and Estates, Part 2</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                                   |
| <p>23    <b>Animal Law Institute: The Law and Ethics of Wild Animals in Captivity (2019)</b><br/>5.3 G, 1.0 EP<br/>Live Replay Webcast<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p>30    <b>Charitable Giving Planning in Trusts and Estates, Part 1</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p>31    <b>Reefer Madness Part Deux: Chronic Issues in New Mexico Cannabis Law (2019)</b><br/>4.4 G, 1.0 EP<br/>Live Replay Webcast<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> |

## August

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| <p>7    <b>“Boilplate” Provisions in Contracts: Overlooked Traps in Every Agreement</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                    | <p>7    <b>Deal or No Deal: Ethics at Trial (2019 Annual Meeting)</b><br/>1.0 EP<br/>Live Replay Webcast<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p>17    <b>Reps and Warranties in Business Transactions</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                |
| <p>7    <b>Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204 NMRA</b><br/>1.0 EP<br/>Live Replay Webcast<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p>13    <b>Lawyers Ethics in Real Estate Practice</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                        | <p>17    <b>Electric Power in the Southwest</b><br/>10.7 G, 1.0 EP<br/>Live Seminar<br/>Law Seminars International<br/><a href="http://www.lawseminars.com">www.lawseminars.com</a></p>                |
| <p>7    <b>Mediating the Political Divide (2019)</b><br/>2.0 EP<br/>Live Replay Webcast<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  | <p>14    <b>Mindfulness Based Stress Reduction for Lawyers</b><br/>1.5 EP<br/>Live Replay Webcast<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>        | <p>19    <b>A Lawyer’s Guide to PDFs (Acrobat or PowerPDF for Lawyers)</b><br/>1.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> |
|   |   | <p>20    <b>Natural Resource Damages</b><br/>9.2 G<br/>Live Seminar<br/>Law Seminars International<br/><a href="http://www.lawseminars.com">www.lawseminars.com</a></p>                                |

### Notice of Possible Event Cancellations or Changes:

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

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

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|---|---|---|
| <p><b>20</b>    <b>13th Annual Legal Service Providers Conference</b><br/>10.0 G, 2.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>21</b>    <b>13th Annual Legal Service Providers Conference</b><br/>10.0 G, 2.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>24</b>    <b>2020 Trust Litigation Update</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   |
|   |   | <p><b>27</b>    <b>The Intersection of Accounting and Litigation: How to Explain a Financial Story to a Judge and Jury</b><br/>5.0 G, 1.6 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |

## September

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| <p><b>1</b>    <b>Choice of Entity for Nonprofits &amp; Obtaining Tax Exempt Status, Part 1</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>15</b>    <b>Income and Fiduciary Tax Issues for Trust and Estate Planners, Part 1</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>17</b>    <b>Real Estate Finance: Trends and Best Practices, Part 1</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>            |
| <p><b>2</b>    <b>Choice of Entity for Nonprofits &amp; Obtaining Tax Exempt Status, Part 2</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>16</b>    <b>Income and Fiduciary Tax Issues for Trust and Estate Planners, Part 2</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>17</b>    <b>Do You Have Your Emotions or Do They Have You?</b><br/>1.5 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                  |
|   | <p><b>16</b>    <b>Word Master Class on Formatting Complex Pleadings</b><br/>1.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                    | <p><b>18</b>    <b>Real Estate Finance: Trends and Best Practices, Part 2</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>            |
|   |  | <p><b>30</b>    <b>How to Practice Series: Adult Guardianship (2020)</b><br/>3.0 G, 3.0 EP<br/>Live Replay Webcast<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |

# 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 June 26, 2020

### UNPUBLISHED OPINIONS

A-1-CA-37360	State v. J Duran	Reverse/Remand	06/22/2020
A-1-CA-38638	City of Roswell v. J Monafo	Dismiss	06/22/2020
A-1-CA-38637	City of Roswell v. J Monafo	Dismiss	06/23/2020
A-1-CA-36527	A Martin v. Risk Management	Affirm/Reverse/Remand	06/24/2020

## Effective July 3, 2020

### PUBLISHED OPINIONS

A-1-CA-37640	State v. W Ramey	Reverse/Remand	06/29/2020
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### UNPUBLISHED OPINIONS

A-1-CA-36589	C Sanchez v. Graceland NM LLC	Affirm/Remand	06/29/2020
A-1-CA-37139	State v. D Lewis	Affirm	06/29/2020
A-1-CA-37201	In the Matter of D Meilach	Affirm	06/29/2020
A-1-CA-36706	State v. L Aguilar	Affirm	06/30/2020
A-1-CA-37253	State v. M Springer	Affirm	06/30/2020
A-1-CA-38079	B Cepelak v. D Gibson	Affirm	06/30/2020
A-1-CA-38141	State v. E Acuna	Affirm	06/30/2020
A-1-CA-38305	State v. B Dean	Affirm	06/30/2020
A-1-CA-38424	CYFD v. Arsenio B.	Affirm	06/30/2020
A-1-CA-37941	State v. D Dominguez	Affirm	07/01/2020
A-1-CA-38367	State v. A Aberle	Affirm	07/01/2020
A-1-CA-37701	State v. F Gonzales	Affirm	07/02/2020
A-1-CA-38300	City of Roswell v. H Faulkner	Affirm	07/02/2020
A-1-CA-38388	P. Griffith v. H Malik	Affirm	07/02/2020
A-1-CA-38520	S Montoya v. NM Taxation & Revenue	Affirm	07/02/2020
A-1-CA-38563	State v. D Boris	Affirm	07/02/2020
A-1-CA-38599	R West v. Bernalillo County Board	Affirm	07/02/2020

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

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



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From the Clerk of the New Mexico Supreme Court

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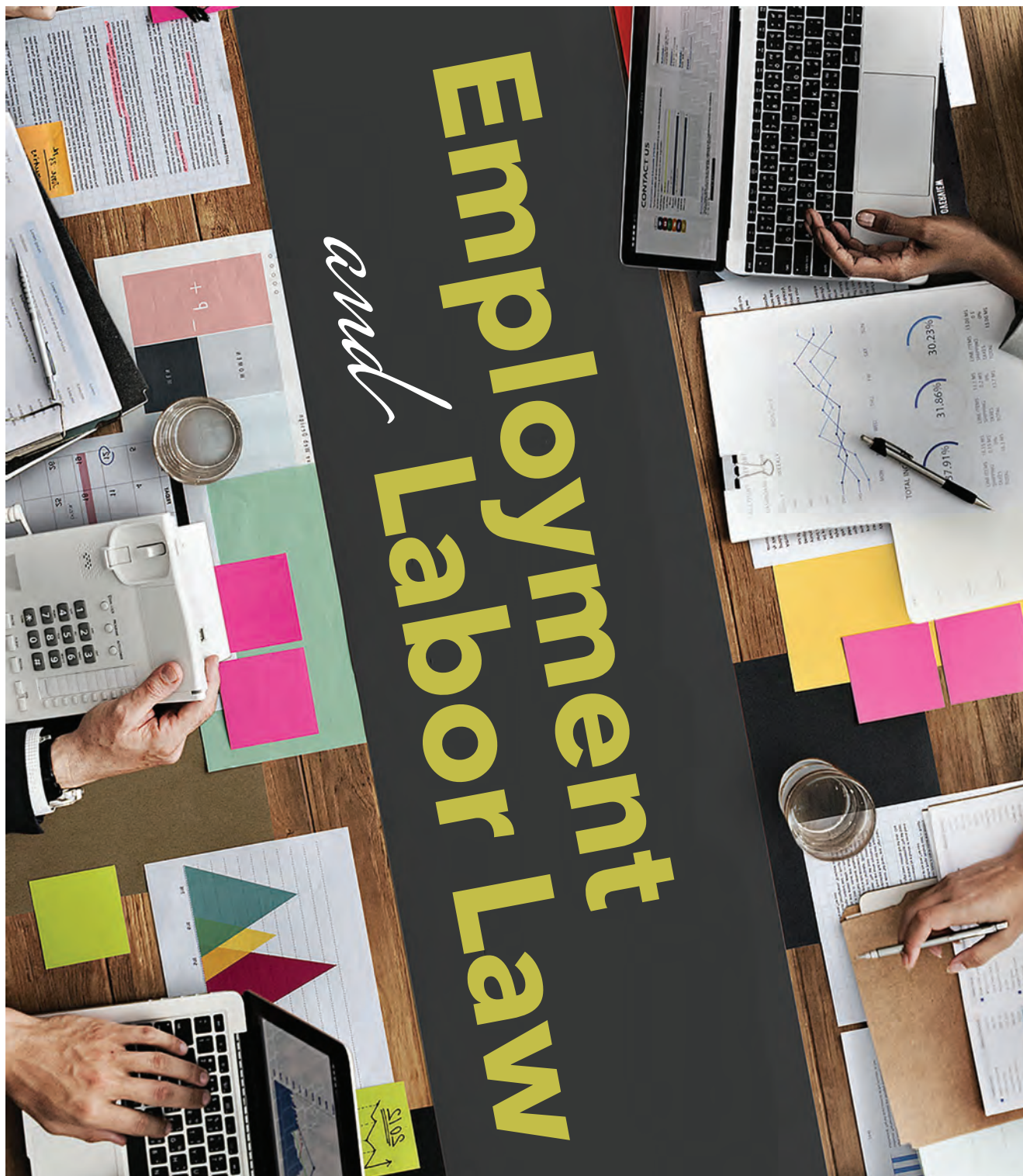
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# Embracing Effective Transition Plans *for* Transgender Employees

By Victor P. Montoya

## Introduction

What happens when a transgender employee decides to transition in the workplace? The term “transition” identifies the process of a transgender individual electing to live as the gender with which they identify, not their birth gender. This means the individual is living as their true gender and should not be confused with the employee becoming a different gender. As part of their transition process, some individuals undergo medical procedures and hormone therapy. But medical treatment can be cost prohibitive to some individuals, and others cannot pursue a medical course of treatment due to their health. An employee’s decision to transition is a life-changing personal decision which can affect all aspects of their life, including their employment.

Many employers will not have had prior experience with supporting a transgender employee with their transition. Further, many employees may not have previously interacted with a transgender individual and may be uncomfortable or anxious about how to interact with them. Employers may assume that older workers may be less accepting of LGBTQ co-workers than younger employees. However, a recent Harris Poll conducted on behalf of GLADD revealed that the number of young Americans aged 18-34 years of age who reported being comfortable with LGBTQ people dropped for the second year in a row – from 53% to 45%. Further, only 18% of respondents reported knowing a transgender employee.<sup>1</sup> Employers therefore must prepare to support and educate its workforce when an employee elects to transition in the workplace.

## Facts About Transgender Employees

A 2016 Williams Institute study estimated that 1.4 million individuals identify as transgender in the U.S.<sup>2</sup> That study also reveals that New Mexico ranks number three in the U.S. based on the estimated percentage of its adult residents who identify as transgender.<sup>3</sup> The majority of New Mexico’s transgender residents also are 25-64 years of age.<sup>4</sup> Transgender individuals therefore are a notable component of New Mexico’s available adult workforce.

“Transgender individuals have a ‘gender identity’— a ‘deeply felt, inherent sense’ of their gender—that is not aligned with the sex assigned to them at birth.”<sup>5</sup> The term “transgender” includes not only individuals who have transitioned medically to align their gender with their physical presentation, but also those who have not or will not transition medically, as well as other non-binary



or gender-expansive individuals who do not identify as male or female.<sup>6</sup> “Gender identity is distinct from and does not predict sexual orientation; transgender people, like cisgender people, may identify as heterosexual, gay, lesbian, bisexual, or asexual.”<sup>7</sup> “[G]ender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics.”<sup>8</sup>

Transgender people often suffer from gender dysphoria, a medical condition, that is exacerbated by employment discrimination.<sup>9</sup> The American Psychiatric Association defines “gender dysphoria” as “a conflict between a person’s physical or assigned gender and the gender with which he/she/they identify. People with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender.”<sup>10</sup> “If untreated, gender dysphoria can cause debilitating distress, depression, impairment of function, self-mutilation to alter one’s genitals or secondary sex characteristics, other self-injurious behaviors, and suicide.”<sup>11</sup>

It is estimated that between 67% and 78% of transgender employees are subjected to workplace harassment or mistreatment.<sup>12</sup> In order to avoid discrimination and mistreatment in the workplace, 75% of transgender employees hide their gender identity, delay their medical treatment or transition, or resign from their employment.<sup>13</sup> Unemployment of transgender individuals is nearly triple that of the adult population at large, and their poverty rate

is nearly double.<sup>14</sup> “This widespread discrimination tangibly and adversely affects the mental and physical health of transgender adults by (1) frustrating treatment protocols for gender dysphoria; and (2) exacerbating the severe health consequences of living with the perceived stigma of being transgender.”<sup>15</sup> Workplace discrimination also interferes with the normal workplace interactions of transgender individuals, given that adults spend a great deal of their time and social interactions in the workplace.<sup>16</sup>

### Transgender Employees and the Law

Title VII of the Civil Rights Act of 1964 (“Title VII”) provides that it is an unlawful employment practice to discriminate against an individual on the basis of their sex.<sup>17</sup> U.S.’ Equal Employment Opportunity Commission asserts that discrimination against an individual due to their gender identity, including transgender status, or because of their sexual orientation violates Title VII because it is discrimination due to their sex.<sup>18</sup> The current U.S.’ Department of Justice takes a contrary position, and asserts that gender identity, including discrimination against transgender individuals, is not protected under Title VII.<sup>19</sup> The EEOC and DOJ recently asserted these contrary positions before the U.S. Supreme Court in *R.G. & G.R. Harris Funeral Homes v. EEOC*. The issues submitted to the Court were whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.<sup>20</sup> In a decision issued on June 15, 2020, the U.S. Supreme Court resolved this dispute and held that an employer who fires an individual merely for being gay or transgender violates Title VII.<sup>21</sup>

Employers in New Mexico also must comply with the protections against discrimination provided by the New Mexico Human Rights Act (“HRA”).<sup>22</sup> The HRA specifically prohibits discriminatory employment practices based upon an individual’s sexual orientation and gender identity. Further, the HRA provides a specific definition for “gender identity” which includes “a person’s self-perception, or perception of that person by another, of the person’s identity as a male or female based upon the person’s appearance, behavior or physical characteristics that are in accord with or opposed to the person’s physical anatomy, chromosomal sex or sex at birth.”<sup>23</sup> Employers therefore must take care to comply with both federal and New Mexico law when a transgender employee approaches them to advise that they will be transitioning in the workplace.

### Embracing Effective Transition Plans

When an employee advises their employer that they are transitioning in the workplace, the employer should take immediate and affirmative steps to develop an effective transition plan for the employee so it may manage the process, ensure the employee’s safety, avoid discriminatory conduct, and educate its employees.

#### ► The First Steps:

- Reassure the employee that the company will support them during their transition.
- If you have a human resources department, get them involved without delay.
- Thank the employee for sharing their transition plan with you.
- Confirm that the company maintains a discrimination free and safe workplace.

- Identify the company representative who will serve as the main contact person for the employee and to whom they can bring their concerns and any requests for accommodations.
- Schedule sufficient time to meet to discuss the employee’s transition, their requested accommodations, and the timing of any disclosures. Be sure to include necessary parties in the meeting, such as the employee’s manager.
- Ensure that employees involved in the transition plan keep information confidential consistent with the plan and the employer’s obligations to protect the employee’s medical information.

#### ► The Planning Meeting:

- Discuss the employee’s timeline for transition frankly and openly.
- Ask the employee if they require any accommodations and, if so, what those accommodations may be.
- Determine who should be notified of the employee’s transition (managers, co-workers, customers, third-party vendors).
- Ask the employee if they have selected a name and what gender pronouns they want to use.
- Inquire when the employee wants management to inform co-workers and others of the employee’s transition and how they want that information relayed.
- Consider if it may be appropriate to include a personal message from the employee as part of any announcement.
- Determine when the employee wants co-workers to begin using their selected name and pronouns.
- Inquire when the employee will begin to dress consistent with their gender identity.
- Confirm that necessary work identification, e-mail, and internal documentation will be changed consistent with the transition plan to reflect the employee’s name and gender identity, and confirm that some documentation, including payroll records and insurance, may not be changed without a legal change of name.
- Review the company dress code applicable to the employee’s gender identity with the employee and answer any questions they may have.
- Jointly discuss bathroom access with the employee and establish if they want to use one specific to their gender or a unisex, single-occupant bathroom, if available, and include changing room or locker room use when those facilities are present.
- Advise employee of any company resources available to assist them during their transition, such as employee assistance plans, affinity or diversity groups, and company insurance or leave representatives.
- Discuss with employee how they should address misgendering by their co-workers during the early stages of transition, and what to do if misgendering persists.
- Discourage employee from discussing medical procedures related to their transition or condition with their co-workers in order to maintain the confidentiality of their medical information.
- Advise employee that any requested changes to the plan must be made in writing and that employer will respond to the request in writing within a reasonable time after receipt.
- Advise employee that failure to comply with the agreed upon transition plan may result in corrective action.
- Confirm the agreed upon transition plan in writing, review it with the employee and have them sign it.

► **Education Once a Transition Plan is Established:**

- Advise co-workers of the timeline for the employee's transition, including when the employee will begin to use their new name, dress according to their gender identity, and begin using the appropriate bathroom, changing room, or locker room facilities.
- Inform co-workers of the transitioning employee's preferred pronouns.
- Explain to employees that failure to respect the employee's transition by refusing to use their preferred name and pronouns is not acceptable and is a form of unlawful discrimination.
- If an employee asserts concerns due to their religious beliefs, advise that employee that the employer provides equal treatment to all employees irrespective of their religious beliefs and consistent with its nondiscrimination policy.
- Consider coordinating the employee's transition plan with mandatory diversity and nondiscrimination training, including gender identity issues.
- Identify the person to whom employees may bring any questions or concerns regarding the transition plan or related issues.
- Ensure that employees remain aware of how customers, third-party vendors, and other outside parties interact with the transitioning employee and that they know how to report any improper conduct.
- Address any concerns from customers, third-party vendors and others by asserting the company's commitment to diversity and nondiscrimination. If any of these parties ask that they not be required to interact with the transitioning employee, you should reject their request even if there is a risk of no longer doing business with those individuals. Discrimination in any form should not be tolerated.
- Consider holding a voluntary education session with or making contact information available for a LGBTQ resource group where employees may ask questions about the transgender experience. This may help avoid informal discussions in the workplace that may make some employees uncomfortable or result in unintended discrimination or microaggression directed at a transgender employee.
- Most importantly, foster an atmosphere of respect in the workplace for all employees by consistently disseminating and enforcing your nondiscrimination policies.

## **A Glimpse Into the Future of Transgender Individuals in the Workplace**

In July 2017, California instituted new regulations to its Fair Employment and Housing Act ("FEHA") to protect transgender expression and identity in the workplace.<sup>24</sup> The new regulations provide a glimpse into the future and may serve as helpful guidelines to employers when crafting effective transition plans for transgendered employees. Generally, the new regulations prohibit discrimination against an individual who is transitioning, has transitioned, or is perceived to be transitioning. Under these new regulations, employers must:

- abide by the employee's stated preferred gender, name, and/or pronoun, including gender-neutral pronouns;
- not discriminate against an applicant based on their failure to designate male or female on an application form;
- recruit individuals of both sexes for all jobs unless based upon a permissible defense;
- use an employee's gender or legal name as indicated on a government-issued identification document only if necessary to

meet a legally mandated obligation, otherwise an employer must use the employee's preferred gender identity and name;

- permit employees to perform jobs or duties that correspond to their gender expression or identity, regardless of their assigned sex at birth.

Further, an employer only is permitted to discuss an employee's sex, gender, gender identity, or gender expression when an employee initiates communications regarding their working conditions. An employer's bona fide occupational qualification ("BFOQ") defense to a discrimination claim also is limited in several ways. Significantly, a BFOQ defense may not be based upon a customer's preference for employees of one sex, the necessity of providing separate facilities for one sex, the fact that an individual is transgender or gender non-conforming, that the individual's sex at birth is different than the sex required for the job, or that traditionally members of one sex have been hired to perform a particular type of job. Further, an employer's BFOQ defense may only be based upon personal privacy considerations were: the job requires an individual to observe others in a state of nudity or conduct body searches; and, based on prevailing social standards, it would be offensive to have an individual of a different sex present; and it is detrimental to the mental or physical welfare of those being observed or searched to have an individual of a different sex present. The new regulations also place an affirmative duty on employers to assign job duties and make reasonable accommodations to minimize the number of jobs for which sex is a BFOQ.

The California regulations also provide requirements for bathroom and other facilities, including locker rooms, applicable to transitioning employees.

- Employers shall permit employees to use facilities that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth.
- Employers and other covered entities with single-occupancy facilities under their control shall use gender-neutral signage for those facilities, such as "Restroom," "Unisex," "Gender Neutral," "All Gender Restroom," etc.
- To respect the privacy interests of all employees, employers shall provide feasible alternatives such as locking toilet stalls, staggered schedules for showering, shower curtains, or other feasible methods of ensuring privacy. However, an employer or other covered entity may not require an employee to use a particular facility.
- Employees shall not be required to undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to utilize facilities designated for use by a particular gender.
- However, employers are permitted to make a reasonable and confidential inquiry of an employee for the sole purpose of ensuring access to comparable, safe, and adequate multi-user facilities.

Finally, the FEHA regulations make it unlawful to impose upon an applicant or employee any physical appearance, grooming or dress standard which is inconsistent with an individual's gender identity or gender expression. The California regulations reveal that they are intended to eliminate improper sex stereotyping and workplace

*continued on page 11*



# WAGE THEFT IN NEW MEXICO:

## Opportunities for Firms to Create Wins for Workers

*Richard L. Branch, J.D. and Deborah L. Williamson, Ph. D.*

In 1991, I found myself in an unenviable position: Recently graduated from law school and having passed the bar, I was jobless. Unsure about what I wanted to do with my life—as 24-year-olds frequently are—I’d eschewed recruitment rituals that most law students undergo, save for interviewing for a couple government and legal services jobs that didn’t pan out. I considered returning to journalism, my first love, but a recession and looming student loan payments nixed that option. Desperate, I carpet-bombed practitioners with resumes and writing samples, eventually finding research and writing work with an attorney who strung me along for months and refused to pay me for my services. He never returned my calls inquiring about payment. I found more reliable employment several months later and moved on with my life, taking a loss on what I was owed. At the time I didn’t understand that my experience had a name: wage theft. Decades of practicing employment law have convinced me that unfair employment practices such as this are all too common in the American workplace, fueled by the deep economic disparity that exists between employers and workers. Now it’s my job to enforce New Mexico’s laws regulating the payment of wages by suing employers who seek to skirt these laws.

I litigate and manage cases as a staff attorney for the Labor Relations Division of the New Mexico Department of Workforce Solutions. I’ve done much of this work alongside Deborah Williamson, who until recently was the NMDWS’s Director of Labor Relations. We have seen a *potpourri* of ploys that, either by design or impact, avoid the worker protections enacted by New Mexico’s Legislature and local jurisdictions. Such violations can include failing to pay overtime, failing to pay the minimum wage, skimming tips from individuals making \$2.35 an hour, working employees off the clock, taking improper payroll deductions, and misclassifying workers as independent contractors. While it’s tempting to write off such abuses as the sporadic misdeeds of a few bad actors, the numbers suggest a more widespread problem.

The U.S. Department of Labor’s Wage and Hour Division alone collected \$322 million in back wages from errant employers throughout the U.S. in fiscal year 2019, closing out a five-year period in which \$1.4 billion was recouped on behalf of more than 1.3 million workers.<sup>1</sup> The WHD found that employees were owed an average of \$1,025 in back wages. This represents three whole paychecks for your average maid/housekeeper, 2.3 paychecks for



your average security guard and 3.1 paychecks for your average retail cashier. It also equates to more than four weeks’ worth of groceries, an entire month’s rent, more than three months of utilities and more than a month of childcare.

In New Mexico, the number of wage complaints filed with the LRD has shown a steady increase in recent years, with LRD collecting \$322,994 in the first five months of 2020. With co-enforcement from the U.S. Department of Labor’s regional office in Albuquerque and the use of certified contract mediators, LRD management anticipates additional wins for workers in short order. Still, the state’s system for combating wage theft is overwhelmed, with a backlog of 1,939 unresolved complaints pending as of January.<sup>2</sup> Investigations are frequently complex and intensive for each constituent’s claim, with many lasting several months if not years, and such volume indicates that a significant number of working people regularly experience difficulties getting paid in full and on time.

Among the statutes the LRD enforces is the Wage Payment Act.<sup>3</sup> The WPA regulates when and how employers must pay their employees, requiring prompt payment of wages every 15 days or more frequently; requiring payment of the agreed upon wage rate in full; prohibiting unlawful and unauthorized payroll deductions; and mandating that employers pay employees all final wages due within specified timeframes following job separation. It also requires employers to keep true and accurate time and pay records, maintain those records for a specified period of time, and cooperate with LRD when it investigates wage complaints.

Additionally, the Minimum Wage Act<sup>4</sup> establishes a base minimum wage rate applicable statewide, although local home-rule jurisdic-



tions such as the cities of Albuquerque, Santa Fe and Las Cruces may and have set higher minimum wage rates.<sup>5</sup> The MWA also requires employers to pay workers at time-and-one-half their normal hourly rate for all hours worked over 40 in a week; pay tipped employees a statewide tipped minimum wage; and pay secondary students at least \$8.50 per hour. Employers are prohibited from keeping employee tips except in furtherance of a valid tip pool among “wait staff,” and from retaliating against workers asserting any rights under the MWA. Finally, each employer is required to post a summary of employee rights under the MWA in a conspicuous location of the workplace.

Both the WPA and MWA contemplate workers enforcing their rights through private actions or by assigning their rights of action to the LRD for prosecution. The state’s district attorneys must prosecute, both civilly and criminally, all cases LRD refers to them and must assist LRD in the prosecution of violations of the wage statutes. Employers adjudicated to have violated the MWA are liable not only for any back wages found to be due but also for treble damages and interest, reasonable attorney fees, and costs of the action. Employers who fail to pay all wages conceded due by the deadlines set in the WPA upon a worker’s separation can be assessed damages equal to what the worker would have earned working his or her regular weekly schedule, up to a maximum of 60 days. These liquidated damages—intended to discourage employers from flouting our wage statutes—can quickly add up and multiply the amount employers owe affected workers.

The Legislature did not specify a requisite mental state on the part of noncompliant employers when it crafted the wage statutes. Therefore, liquidated damages are payable regardless of whether a violation is willful or not. Additionally, any violation of either the WPA or MWA constitutes a misdemeanor and can be prosecuted as such. When LRD works in partnership with district attorneys, this option is always on the table and may be exercised depending on the egregiousness of an employer’s conduct. Fines and penalties are a distinct possibility. The MWA also provides for more than just monetary relief. Courts can order “appropriate injunctive relief, including requiring an employer to post in the place of business a notice describing violations by the employer as found by the court or a copy of a cease and desist order applicable to the employer.” If these things do not sufficiently dissuade employers from engaging in illegal pay practices, there is another strong disincentive: individual liability.

Ordinarily, individual owners and managers of corporate entities are shielded from liability for a business’s debts. However, an individual can be held personally liable as an “employer” for paying employees’ unpaid wages and damages if that individual exercises sufficient control over employees and their working conditions.<sup>6</sup> Case law supports individual liability for wage debts based on four factors, including whether the individual had the power to hire and fire employees; supervised and controlled employee work schedules and conditions of employment; determined the rate and method of payment; and/or maintained employment records.<sup>7</sup> Accordingly, LRD directs its enforcement efforts at both corporations and individuals, joining as defendants any and all individuals who satisfy this balancing test. This means that even where a company is insolvent, LRD may still attach personal assets of the company’s owners to satisfy judgments. Attorneys representing employers would do well to

counsel clients as to the exposure that owners may face as individuals when it comes to wage debts.

While the LRD and the state’s district attorneys have primary enforcement authority with respect to our wage statutes, this authority is by no means exclusive. The WPA and MWA also provide for private rights of action, though perhaps the private bar might not find such cases enticing due to the perception of no financial payoff. This is unfortunate because LRD’s current case backlog makes it hard to enforce the state’s wage laws quickly enough to enable many wage theft victims to make their rent, pay for childcare, or even buy food. District attorneys also face resource limitations that force them to prioritize prosecution of murders, rapes, and other violent crimes. Yet wage theft cases need not fall through the cracks. The LRD encourages partnerships or co-enforcement opportunities not only with government and community social service agencies, but all competent attorneys interested in helping affected workers. Where unlawful wage practices of a single employer or group of employers impact numerous workers, class certification under Rule 1-023 NMRA is available. The MWA’s allowance of attorney fees and costs means that litigation in this field can yield significant dividends to attorneys willing to see these cases through to the end.

The ultimate goal of any robust multi-faceted enforcement system is deterrence of the kind of wage-payment practices I experienced as a new attorney. Along with vigorous enforcement, LRD seeks to further its deterrence goal by educating employers who sincerely want to comply with the law by offering informational webinars on wage-payment obligations, giving targeted presentations to specific worker, employer or industry groups upon request, and making our Investigations Manual available to the public online at <https://www.dws.state.nm.us/Labor-Relations/Labor-Information/Wage-and-Hour>. Together, we can ensure that wage theft is not another stifling economic problem with which New Mexico must contend. ■

## Endnotes

<sup>1</sup> U.S. Department of Labor: “Wage and Hour Division Data,” Wage and Hour Division Website, available at, <https://www.dol.gov/agencies/whd/data> (last visited March 8, 2020).

<sup>2</sup> McKay, Dan. NM faces backlog of wage claims. *Albuquerque Journal*, available at, <https://www.abqjournal.com/1412441/nm-faces-backlog-of-wage-claims.html>, (2020, January 22).

<sup>3</sup> NMSA 1978, §§ 50-4-1 through 50-4-18.

<sup>4</sup> NMSA 1978, §§ 50-4-19 through 50-4-30.

<sup>5</sup> § 50-4-29; *New Mexicans for Free Enterprise v. City of Santa Fe*, 2006-NMCA-007, ¶ 44, 138 N.M. 785, 802, 126 P.3d 1149, 1166 (“Minimum wage policymaking is within the scope of municipal power unless the legislature clearly intends to remove it or when there is a conflict between an ordinance and general state law”).

<sup>6</sup> *Perez v. ZL Rest. Corp.*, 81 F.Supp. 3d 1062, 1070 (D.N.M. 2014).

<sup>7</sup> *Id.*; see also 29 C.F.R. Part 791.2(a)(1) (same balancing test used to determine when a person is an employee’s “joint employer” under the Fair Labor Standards Act).

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# Considering Everything at Once: Navigating the WCA, FMLA, and ADA

By Jacqueline Kafka, Samantha Adams and Alana De Young

When an employee is injured at work, employers often find themselves bewildered by the interplay between the Worker's Compensation Act, the Family Medical Leave Act, and the Americans with Disabilities Act. Broadly speaking, employees injured at work are generally entitled to monetary benefits and reasonable accommodations allowing them to continue to work under the WCA; may be eligible for 12 weeks of unpaid leave for a serious health condition under the FMLA; and may need reasonable accommodations for impairments that limit one or more major life activity under the ADA. Adding to the confusion, an employee may be eligible for all of these benefits at the same time.

Many employers analyze the specific requirements under the WCA and the FMLA, both of which are very technical in nature and have strict deadlines, but fail to consider the potential overlap among the WCA, the FMLA, *and* the ADA. For example, employers that approve an employee's FMLA leave often forget that leave afforded an employee as an ADA accommodation may also count toward, and overlap with, FMLA leave. Similarly, when it comes to making reasonable accommodations for an employee who returns to work, many employers incorrectly believe an employee must be fully recovered from an injury. This is incorrect, however, because the WCA, FMLA, and ADA all require different levels of documentation demonstrating an employee is able to return to work, even if not fully healed from an injury. This article explores two hypothetical situations employers may face when an employee is injured at work, and then explains both the employees' rights and the employers' respective responsibilities under the WCA, FMLA, and ADA.

## Hypothetical 1: Sarah's Back Injury

Sarah is a delivery person for Delivery Express, a national company with its principle place of business in New Mexico. The Delivery Express New Mexico location includes a home office as well as a shipment, processing, and delivery center. Delivery Express employs 95 total employees in New Mexico, with employees in Albuquerque, Rio Rancho, Santa Fe, and Las Cruces.

Sarah picks up packages every morning from Delivery Express, many of which weigh more than 20 pounds, and delivers the pack-



ages around town. On Tuesday, Sarah clocked in at 8 a.m., picked up her packages, and headed out to her first delivery. On her way to the delivery, Sarah was involved in a serious car accident and suffered a major back injury.

Due to her back injury, Sarah now cannot sit the long hours required to drive a truck without enduring a lot of pain. Her doctor allows Sarah to return to work but prohibits Sarah from sitting for long periods or lifting anything over 10 pounds. Because Sarah can stand as needed and is not required to lift items weighing more than 10 pounds, Delivery Express allows Sarah to work as a receptionist when Sarah returns to work, but the receptionist position pays less than a delivery driver and Sarah's pay is reduced accordingly.

Sarah's doctor now recommends restorative surgery for Sarah's back. Sarah requests leave for the surgery and the accompanying recovery period. After the surgery and Sarah's return to work, she requests and takes additional time off to attend physical therapy appointments. A few months later, Sarah's doctor determines she is fully recovered. However, although her doctor certifies that Sarah can return to work as a delivery person without risk of reinjuring her back, her doctor diagnoses Sarah with a permanent partial impairment. Thereafter, Sarah applies for, and is again hired as, a delivery person with Delivery Express..

### 1. Sarah's eligibility for WCA benefits and FMLA leave.

Sarah is likely eligible for some workers' compensation benefits because her employer has at least 3 employees and she was injured

while at work. Indeed, Sarah was in route to her first delivery for Delivery Express when the accident occurred. Therefore, Sarah was injured “on the job.” To receive workers’ compensation benefits, pursuant to WCA requirements, Sarah must provide Delivery Express notice of the injury within 15 days of the accident.

Sarah may also be eligible to take FMLA leave if: her employer employs more than 50 employees within a 75 mile radius; Sarah has been employed by Delivery Express for at least 12 months; and Sarah has worked at least 1,250 hours for Delivery Express over the previous 12-month period. The FMLA allows an eligible employee to take leave for continuing medical treatment as well as recovery time absences that result from multiple treatments, such as surgery or physical therapy. Sarah’s back injury constitutes a serious health condition under the FMLA, and Sarah requested time off for her restorative surgery and physical therapy appointments. Accordingly, following Sarah’s injury, Delivery Express is required to allow Sarah to use FMLA leave if she is eligible and if she has not already used all of the 12 weeks of FMLA time she is allotted each year of employment after her first year.

Is Sarah eligible for ADA accommodations? While Delivery Express is clearly subject to the ADA requirements because it employs 15 employees, it is less clear whether Sarah has suffered a permanent disability that impairs one or more life activities. While it seems her abilities to speak, work, and care for herself are only impacted on a temporary basis, the ADA Amendments Act of 2008 provides that a temporary impairment *might* trigger a right to an accommodation that would allow Sarah to perform her job as an unimpaired person would, but only if the impairment is “sufficiently severe.” The inquiry is very fact-specific and should be considered carefully under the ADAAA’s broad reach. Here, the facts are not specific enough for us to know definitively whether the ADA requires accommodation.

## **2. Sarah will receive monetary benefits under the WCA and unpaid leave under the FMLA.**

After the accident and before surgery, Sarah is likely entitled to temporary partial disability benefits under the WCA. When Sarah first returns to work with restrictions, she cannot resume her job as a delivery person because her doctor’s restrictions prevent her from sitting for extended periods of time and lifting packages weighing over 10 pounds. Because Sarah could only work as a receptionist at a reduced wage rather than as a truck driver for her full wages, Sarah is likely entitled to temporary partial disability benefits.

Sarah will also likely receive partial permanent disability benefits even after Sarah’s doctor has determined she is fully recovered because Sarah has been diagnosed with a permanent partial impairment with the benefit amount determined by a statutory formula.

Because Sarah was eligible to take leave under the FMLA, Delivery Express likely will be required to make use of this unpaid “job protection” leave, but is not required to pay Sarah while she is on leave. Notably, employers often overlook the fact that any overtime Sarah does *not* work during her FMLA leave *could also count* toward her 12 weeks of FMLA leave.

Delivery Express must also provide Sarah the same job or an equivalent job (the same benefits, pay, and employment terms) upon her return to work from FMLA “job protection” leave. Here, because

Sarah ultimately returned to work as a delivery person, Delivery Express has complied the FMLA.

## **3. Delivery Express must try to find Sarah a job that accommodates her injury during her recovery under the WCA and must provide her FMLA leave if she gives reasonable notice.**

Under the WCA, when Sarah first returns to work, Delivery Express is also required to try to place her in a job that complies with the restrictions imposed by her doctor, that is, a job where Sarah is not required to sit for long periods of time or lift anything over 10 pounds. Thus, so long as Sarah is allowed to stand at reception and does not have to lift items that weigh over 10 pounds, she likely has been afforded the proper accommodations under the WCA. Importantly, Delivery Express is permitted to (and does) allow Sarah to return to work before reaching maximum medical improvement.

Under the WCA, an employer must rehire an employee that applies for the same pre-injury job, or a modified job that is similar to the pre-injury job, so long as (1) the employee’s treating doctor certifies the employee can return to the work without risk of re-injury; and (2) the employee applies for an available job. Here, Delivery Express properly rehired Sarah as a delivery person/truck driver after Sarah’s doctor certified that Sarah could return work as a truck driver without risk of reinjuring her back. These circumstances likely demonstrate Delivery Express’s compliance.

Under the FMLA, Sarah must provide Delivery Express *timely* notice of her need to take time off for her restorative surgery *and* the accompanying recovery time *and* her need for time to engage in physical therapy. So long as Sarah provides notice for all three of these needs for leave within a reasonable time, and so long as Sarah has not already used all her FMLA leave, Delivery Express likely must accommodate Sarah’s FMLA leave requests.

## **Hypothetical 2: Jack Smith’s Broken Hip**

Jack is a retail worker for Shiny Trinkets in Santa Fe, New Mexico and has been one of two full-time employees for the past 15 years. He and his co-worker do everything for the shop to help the elderly owners, who also work at the shop. Jack is a “jack of all trades” and handles all of the accounting and payroll functions for the shop. At one point about five years ago, Jack was so enthusiastic about his Human Resources duties that he copied and pasted the “employment manual” from Target® verbatim and slapped on a Shiny Trinkets cover. Jack was so excited about his project that he had everyone in the shop sign an acknowledgment of receiving the manual. No one has looked at it since.

Jack walks to work every morning. On Sunday morning, while on his way to work, Jack slipped and fell on some ice a block away from Shiny Trinkets, breaking his hip in the process. Consequently, Jack took time off for hip surgery and the associated 10-week recovery period.

Even after the surgery, Jack now has a limp and is unable to walk without a cane. Jack tries to return to work but has a difficult time walking or standing around Shiny Trinkets. In an effort to improve his hip pain, Jack takes more time off for physical therapy appointments. The physical therapy helps but does not fully rehabilitate Jack. Jack now walks with a permanent limp and has difficulty



standing for extended periods of time. Jack continues to work at Shiny Trinkets, but asks for a chair to sit in periodically during his shifts.

### **1. Jack's eligibility for FMLA leave and ADA accommodations.**

Jack's broken hip likely constitutes a serious health condition under the FMLA, but because he works for a small specialty shop, his employer may not be a "covered employer" with 50 employees or more within a 75 mile radius. If Shiny Trinkets *were* such a "covered employer," however, Jack may be entitled to FMLA because he has been working for Shiny Trinkets for much more than the 12 month required for FMLA eligibility and he has worked at least 1,250 hours during the immediately-previous 12-month period. As such, if Shiny Trinkets were a "covered employer," Jack could take leave for both his surgery *and* the 10-week recovery period without fear of losing his job. Again, if his employer were "covered," Jack may also take intermittent leave for his physical therapy appointments *provided* he still has some of the 12-week FLMA leave bank remaining for the year.

Jack's limp and inability to stand for extended periods of time likely constitutes a "qualified disability" under the ADA. Accordingly, Jack *could* request accommodations for the disability and Shiny Trinkets may have to provide one or more reasonable accommodations, *but only if* Shiny Trinkets employs more than 15 employees.

The WCA may also provide benefits to Jack if Shiny Trinkets' owners are also considered employees of the business because the WCA applies to employers with *more than three* employees. Jack likely is not eligible for workers' compensation benefits because he was injured *on his way* to work before his shift began, not while "on the job."

### **2. If Jack is afforded FMLA leave, he may have to provide a certification demonstrating his need for the leave.**

Although Shiny Trinkets has at most four employees under the facts of Jack's scenario, and would not ordinarily be required to provide statutory FMLA leave to an employee, Jack could nonetheless be entitled to FMLA leave from Shiny Trinkets if the employment manual he copied from Target® provides for the same. Employers should be careful not to make promises of benefits they are neither required, nor able to, honor because a court might find the promise constitutes a contract and thus, the employer is bound to uphold the same.

Assuming the employment manual promises FMLA leave, Shiny Trinkets may have to accommodate Jack's request for leave for the surgery, recovery time, and physical therapy if Jack provides reasonable notice of his need to take time off and he has not already used all of his FMLA leave before this request. If FMLA leave applies here, Shiny Trinkets is required to offer Jack the same or equivalent job, even for the Human Resources position, upon his return to work after the surgery. Because Shiny Trinkets allowed Jack to return to work as a retail worker and "jack of all trades" after his surgery and physical therapy appointments, Shiny Trinkets has probably complied with the FMLA by holding his job for him.

Shiny Trinkets can request a certification that demonstrates Jack's need to take FMLA leave for his surgery, the associated recovery time, and physical therapy appointments, and Jack must provide such certification. If Shiny Trinkets has questions about the certification, Shiny Trinkets may contact Jack's doctor to verify the information in the certification so long the person making the call is not Jack's direct

supervisor due to HIPAA and human resources concerns. Shiny Trinkets must be careful, however, not to request *additional* information from Jack's doctor.

### **3. Shiny Trinkets must provide a reasonable ADA accommodation for Jack if doing so does not impose an undue hardship on Shiny Trinkets.**

Although we already determined Shiny Trinkets has at most four employees, and would not ordinarily be required to provide ADA accommodations to an employee, Jack could nonetheless be entitled to the same if the employment manual confers ADA protections and constitutes a contractual promise to Jack. In that event, Shiny Trinkets may have to accommodate Jack's request to sit in a chair during his shifts. An employer's obligation to provide a reasonable ADA accommodation may be triggered simply by such a request from an employee. Thus, if a court were to determine the employment manual constitutes a contract extending ADA protection to Jack, Jack's request for a chair initiates Shiny Trinkets' obligation under the ADA to, at a minimum, engage in a discussion with Jack regarding the request.

Even if Shiny Trinkets is subject to the ADA, it must provide an accommodation to Jack *only* if the accommodation is reasonable and does not pose an undue hardship on Shiny Trinkets. If providing a chair for Jack to sit in periodically during his shifts will result in significant difficulty or expense to Shiny Trinkets, then Shiny Trinkets does not have to provide the accommodation. Courts are more likely to find undue hardships exist for small businesses like Shiny Trinkets, rather than big business because courts often consider a business's size and resources when determining whether an accommodation is reasonable or constitutes an undue hardship. Thus, Shiny Trinkets needs to consider whether providing Jack a chair and Jack periodically sitting during his shifts will result in an undue hardship to Shiny Trinkets. (Most courts would not consider providing a chair under these facts to be an unreasonable accommodation *or* undue hardship).

If Shiny Trinkets must extend ADA protection to Jack, it can also require proof that Jack is fit to return to work by asking for a fitness-for-duty certification from Jack. Jack is required to provide the fitness-for-duty certification at his own cost. Of note, Shiny Trinkets may only ask for the fitness-for-duty certification if it has a uniform practice of requesting fitness-for-duty certifications from all retail workers following a serious injury; it cannot require the certification only from Jack.

## **In Conclusion**

While at first blush it may seem obvious that an employee is entitled to either WCA benefits *or* FMLA leave *or* an ADA accommodation, employers should be aware that all three statutes may be triggered by a single injury. Taking the time to analyze how the WCA, FMLA, or ADA may interact to protect an employee is crucial in providing employees the proper benefits and accommodations under New Mexico and federal law. Moreover, employers should be very conscientious about how their verbal or written policies/practices may modify their obligations under these (and other employment-related) statutes. ■

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## Embracing Effective Transition Plans for Transgender Employees *continued from page 5*

discrimination. Employers therefore may wish to review the regulations and consider whether their own policies and jobs descriptions are based upon actual business necessity, or if they improperly perpetuate discriminatory gender roles or stereotypes.

### Best practice for employers

- ▶ Have an open door policy so employees are comfortable with approaching management to discuss their transition.
- ▶ Be proactive when an employee reveals they are undergoing transition to address their concerns, craft an effective transition plan, and properly disseminate it to employees.
- ▶ Update your anti-discrimination policies to include gender expression and identity.
- ▶ Ensure that gender expression and identity issues are included in your discrimination and harassment training.
- ▶ Provide appropriate bathroom and other facilities for employees with proper signage.
- ▶ Review dress codes to ensure that they are not based on gender stereotypes and are consistent with business necessity.
- ▶ Consider coordinating mandatory nondiscrimination training for all employees with an employee's transition plan, when appropriate.
- ▶ Confirm that employees are aware of available company resources to assist them with any transition, benefits, and discrimination concerns.
- ▶ Ensure confidentiality of employee information, including any medical information related to the transition of transgendered employees.
- ▶ Review job descriptions to ensure they do not improperly distinguish between female and male employees, and remove those distinctions or ensure there is an available BFOQ defense for potential claims.
- ▶ Review your health benefits to ensure that coverage is not excluded for transgender employees or employee dependents.

### Endnotes

<sup>1</sup> GLADD.org, Accelerating Acceptance 2019, Executive Summary, Conducted by the Harris Poll, <https://www.glaad.org/sites/default/files/Accelerating%20Acceptance%202019> (last visited June 2, 2020).

<sup>2</sup> The Williams Institute, *How Many Adults Identify as Transgender in the U.S.?* (June 2016).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Brief for the American Medical Association as Amicus Curiae, p. 6, *R.G. & G.R. Harris Funder Homes v. EEOC*, U.S. 18-107, at p. 4 (2019) (the "AMA Brief").

<sup>6</sup> HRC.org, <https://www.hrc.org/resources/reporting-about-transgender-people-read-this> (last visited June 2, 2020) (HRC.org).

<sup>7</sup> AMA Brief, at p. 6.

<sup>8</sup> *Id.*, at p. 8.

<sup>9</sup> *Id.*, at pp. 3-4.

<sup>10</sup> Psychiatry.org, Help with Gender Dysphoria, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited June 2, 2020).

<sup>11</sup> AMA Brief, at p. 12.

<sup>12</sup> *Id.*, at p. 19.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, at p. 20.

<sup>17</sup> 42 U.S.C. 2000e-2(a) (1991).

<sup>18</sup> EEOC.gov, <https://www.eeoc.gov/laws/types/sex.cfm> (last visited June 2, 2020).

<sup>19</sup> U.S. Dep't of Justice, *Memorandum for Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, dated October 4, 2017.

<sup>20</sup> 139 S. Ct. 1599 (2019).

<sup>21</sup> *Bostock v. Clayton County Ga.*, No. 17-1618, slip opinion at pp. 4-33 (U.S. June 15, 2020) (together with No. 17-1623, *Altitude Express, Inc., et al. v. Zarda et al.*, as Co-Independent Executors of the Estate of Zarda, on certiorari to the U.S. Court of Appeals for the Second Circuit, and No. 18-107, *R. G. & G. R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission et al.*, on certiorari to the U.S. Court of Appeals for the Sixth Circuit).

<sup>22</sup> NMSA 1978, § 28-1-1, et seq. (2019).

<sup>23</sup> NMSA 1978, § 28-1-2(Q) (2007).

<sup>24</sup> CAL. CODE REGS. §§ 11030-34 (2017).

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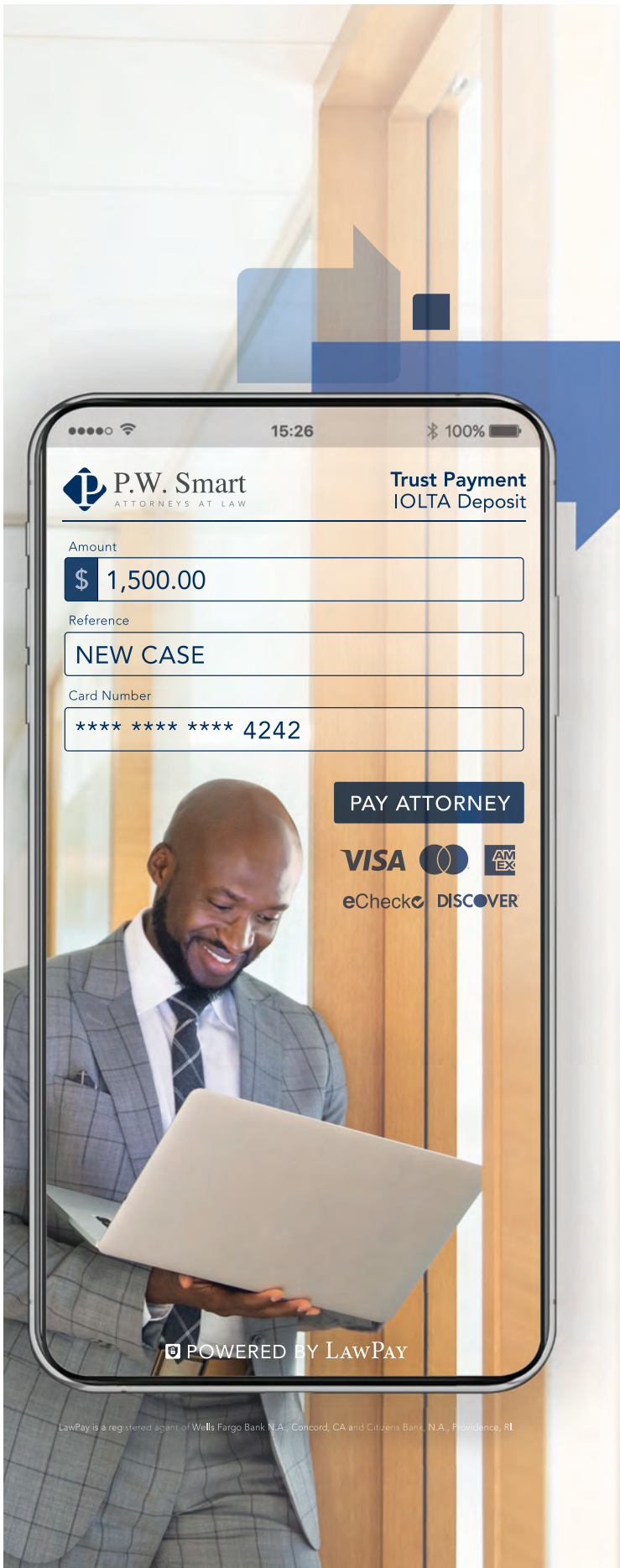
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From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Supreme Court

**Opinion Number: 2019-NMSC-021**

No: S-1-SC-37201 (filed November 14, 2019)

GANDYDANCER, LLC,  
Plaintiff-Respondent,  
v.

ROCK HOUSE CGM, LLC,  
AND KARL G. PERGOLA,  
Defendants-Petitioners.

**ORIGINAL PROCEEDING ON CERTIORARI**

CLAY CAMPBELL, District Judge

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## Opinion

**David K. Thomson, Justice**

{1} The district court certified for interlocutory review whether the New Mexico Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -26 (1967, as amended 2019), supports a cause of action for competitive injury. The Court of Appeals accepted interlocutory review and held that a business may sue for competitive injury based on a plain reading of the UPA. *Gandydancer, LLC v. Rock House CGM, LLC*, 2018NMCA-064, ¶ 1, 429 P.3d 338. We reverse because the Legislature excluded competitive injury from the causes of action permitted under that statute. We further observe that *Gandydancer* relied upon dicta in *Page & Wirtz Construction Co. v. Solomon*, 1990-NMSC-063, ¶ 22, 110 N.M. 206, 794 P.2d 349. Therefore, we formally disavow reliance on *Page & Wirtz* or prior New Mexico case law that conflicts with this opinion.

### I. BACKGROUND

{2} GandyDancer, LLC, and Rock House CGM, LLC, are business competitors, and both provide railway construction and repair services to BNSF Railway Company. BNSF awarded contracts to Rock House to provide goods and services in New Mexico.

{3} GandyDancer filed a complaint with the New Mexico Construction Industries Division (CID) in 2015 that alleged Rock House violated the Construction Industries Licensing Act (CILA), NMSA 1978, §§ 60-13-1 to -59 (1967, as amended through 2013), by performing unlicensed construction work in New Mexico. CID is the state agency charged with investigating violations and prosecuting actions to enforce CILA. *See* § 60-13-9(G) (providing that CID “shall . . . employ such personnel as the division deems necessary for the exclusive purpose of investigating violations of [CILA]”). CID and Rock House entered into a stipulated settlement agreement resolving the alleged licensing violations.

{4} GandyDancer thereafter filed a complaint in district court against Rock House. The complaint alleges theories of competitive injury, including a claim that Rock House engaged in unfair methods of competition to obtain contracts with BNSF contrary to the UPA. GandyDancer alleges that Rock House’s acts amount to an “unfair or deceptive trade practice” under Section 57-12-2(D) of the UPA, because:

[Rock House] knowingly made false and misleading statements to GandyDancer employees that [Rock House] solicited and to BNSF by failing to disclose that: (i) [Rock House] did not have the

necessary experience or licenses to provide railroad contracting services; (ii) [Rock House was] not authorized by the State of New Mexico to provide such services; (iii) [Rock House was] able to provide lower bids and non-bid time and material rates because they failed to comply with New Mexico’s contractor licensing laws, Department of Transportation registration and tax regulations, Federal Rail Safety Administration safety regulations, and other violations set forth above and to be proved at trial and, thus did not incur any expenses related to such compliance; and (iv) [Rock House was] at risk of being enjoined by the State of New Mexico for contracting without a license and that such an injunction would cause work at BNSF’s project to stop.

GandyDancer seeks damages under the UPA on a theory that had Rock House disclosed its licensure status, BNSF would have awarded GandyDancer the contracts. We note that BNSF is the consumer of services in this case but is not a party and has not asserted any claims in this action.

{5} Rock House filed a motion to dismiss the complaint, arguing in part that the UPA did not provide a competitor standing to sue. In other words, Rock House argued that the UPA does not create a cause of action for competitive injury. The district court denied Rock House’s motion to dismiss the UPA claim and certified the question, “whether the [UPA] affords private-party standing to business competitors who are both sellers of services, or only to buyers of goods and services,” for interlocutory review. The Court of Appeals accepted review, affirmed the district court, and held that “a business may sue a competitor under the UPA only if the conduct alleged involves consumer protection concerns or trade practices addressed to the market generally.” *Gandydancer*, 2018NMCA-064, ¶ 1.

### II. DISCUSSION

#### A. Standard of Review

{6} This Court reviews de novo whether a plaintiff has a cause of action or standing to sue under the UPA. *See San Juan Agric. Water Users Ass’n v. KNME-TV*, 2011-NMSC-011, ¶ 8, 150 N.M. 64, 257 P.3d 884 (observing that a cause of action or standing created by statute is a question of law).

#### B. The Legislature Limited the Right to Pursue a Cause of Action Under the UPA

{7} In general, standing in New Mexico courts “is not derived from the state constitution, and is not jurisdictional.” *Deutsche Bank Nat’l Trust Co. v. Johnston*, 2016-NMSC-013, ¶ 11, 369 P.3d 1046 (internal quotation marks and citation omitted). However, “[w]here the Legislature has granted specific persons a cause of action by statute, the statute governs who has standing to sue.” *San Juan Agric. Water Users*, 2011-NMSC-011, ¶ 8 (citing *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 9 n.1, 144 N.M. 471, 188 P.3d 1222). “Standing then becomes a jurisdictional prerequisite to an action” because standing is interwoven with subject matter jurisdiction. *Deutsche Bank*, 2016-NMSC-013, ¶ 11 (internal quotation marks and citation omitted).

{8} GandyDancer and Rock House argue over whether the UPA contemplates *competitor standing*. However, a more precise framing of the issue is whether the UPA creates a cause of action to recover lost profits damages from a competitor. “A cause of action is defined as an ‘aggregate of operative facts which give rise to a right enforceable in the courts.’” *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 11, 121 N.M. 764, 918 P.2d 350 (citation omitted). This Court has determined that there is no significant difference between having standing to sue and having a cause of action under the UPA. *Id.* ¶¶ 10-12. So whether this Court discusses it as a cause of action or standing, “both doctrines allow plaintiffs to enforce a right in the courts.” *Id.* ¶ 11. A plaintiff must demonstrate that “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute.” *Id.* (internal quotation marks and citation omitted).

{9} GandyDancer argues that the cause of action created by the UPA should be broadly construed because there is no explicit “statement of legislative purpose” in the UPA, and therefore that the Legislature intended the UPA to police the marketplace against unfair trade practices generally, *not only* for the protection of consumers. GandyDancer further argues that this Court should overrule all precedent construing the purpose of the UPA to be the protection of innocent consumers, because “we don’t need to protect a consumer” so long as the UPA protects the market.

{10} Although the Court of Appeals did not go as far as GandyDancer urged, it nonetheless construed the UPA to permit competitor standing so long as the competitor alleges a loss of money or property resultant from any unlawful act “involv[ing] consumer protection concerns or trade practices addressed to the market generally.” *Gandydancer*,

2018-NMCA-064, ¶ 20. We respectfully disagree. The historical amendments to the UPA limited the zone of interest protected. Harmonizing the UPA with its foundational principle and existing law allows only one conclusion: Currently, the UPA does not provide a cause of action for competitive injury claims.

### 1. The statutory text and a preliminary construction

{11} The Legislature created a private cause, for “[a]ny person who suffers any loss of money or property . . . as a result of any employment by another person of a method, act or practice declared unlawful by the [UPA, to] bring an action to recover actual damages . . . .” Section 57-12-10(B). Concerning the specific acts prohibited, the UPA declares that “[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful.” Section 57-12-3. The UPA defines an “unfair or deceptive trade practice” as

an act specifically declared unlawful pursuant to the Unfair Practices Act, a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by a person in the regular course of the person’s trade or commerce, that may, tends to or does deceive or mislead any person . . . .”

Section 57-12-2(D). The definition of unfair or deceptive trade practices includes a nonexhaustive list of nineteen such acts. *See id.*

{12} “[P]erson” is defined as “natural persons, corporations, trusts, partnerships, associations, cooperative associations, clubs, companies, firms, joint ventures or syndicates[.]” Section 57-12-2(A). The Court of Appeals focused on the fact that GandyDancer fits the UPA definition of a person and concluded that under the broad language of the subsection establishing private remedies, GandyDancer could bring an action to recover any loss it experienced resultant from any unlawful method, act, or practice. *See Gandydancer*, 2018-NMCA-064, ¶ 20; *see also* § 57-12-10(B).

{13} Although a court begins its analysis “by looking at the language of the statute itself[.]” courts must “exercise caution in applying the plain meaning rule.” *State v. Smith*, 2004-NMSC-032, ¶ 9, 136 N.M. 372, 98 P.3d 1022. “Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differ-

ences of opinion concerning the statute’s meaning.” *Id.* (quoting *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346, 871 P.2d 1352). “In addition to looking at the statutory language, ‘we also consider the history and background of the statute.’” *Id.* ¶ 10 (quoting *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939).

{14} The plain meaning rule must yield when “equity, legislative history, or other sources” demonstrate that applying the plain meaning would result in a construction “contrary to the spirit of the statute.” *See id.* ¶¶ 9-10. “The law of statutory construction presumes that when the legislature amends a statute, it intends to change the existing law.” *Wasko v. N.M. Dep’t of Labor Employment*, 1994-NMSC-076, ¶ 9, 118 N.M. 82, 879 P.2d 83. This is key to our analysis because the Legislature amended the UPA to alter the specific acts prohibited. *See* 1971 N.M. Laws, ch. 240 (amending four sections of the original UPA and enacting a new section). We now turn to the statutory history of the UPA.

### 2. Statutory history of the UPA concerning competitive claims

{15} “The [UPA was] modeled after the Uniform Deceptive Trade Practices Act (Uniform Act).” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 12, 112 N.M. 97, 811 P.2d 1308. *Stevenson* affirmed that the UPA “lends the protection of its broad application to innocent consumers.” *Id.* (internal quotation marks and citation omitted). The Uniform Act proposed “a private remedy to persons likely to suffer pecuniary harm for conduct involving either misleading identification of business or goods or false or deceptive advertising.” *Id.* The creation of a private right of action does not automatically confer standing on all plaintiffs; courts must utilize the traditional tools of statutory interpretation, including the zone of interest protected, to determine whether the cause of action confers a right for a particular plaintiff to pursue a particular claim. *See Key*, 1996-NMSC-038, ¶ 11.

{16} The concept of the zone of interest is a tool of statutory construction and a requirement of general application. *See Key*, 1996-NMSC-038, ¶¶ 11, 14, 29-35 (applying the zone of interest to a statutorily created cause of action). The zone of interest applies to all statutorily created causes of action and limits who may assert a statutorily created cause of action, and we presume the Legislature legislates consistent with this background limitation and consistent with our current jurisprudence. *See id.*; *see also State v. Chavez*, 2008-NMSC-001, ¶ 21, 143 N.M. 205, 174 P.3d 988 (“This Court presumes that the Legislature is aware of existing case law and acts with knowledge of it.”).



The zone of interest protected “may be apparent from the face of the statute or constitution, but more often than not the legislative history must be examined, a difficult or impossible task in New Mexico.” *De Vargas Sav. & Loan Ass’n of Santa Fe v. Campbell*, 1975-NMSC-026, ¶ 13, 87 N.M. 469, 535 P.2d 1320. Thus, “we must look to the Legislature’s intent as expressed in the [UPA] or other relevant authority” to determine whether GandyDancer has a cause of action under the UPA. *Key*, 1996-NMSC-038, ¶ 11.

{17} As the Court of Appeals has previously recognized, we agree that “[e]ven where a party demonstrates [injury], standing may be denied if the interest the complainant seeks to protect is not within the ‘zone of interests’ protected or regulated by the statute or constitutional provision the party is relying upon. The concepts of injury and zone of interest are thus intertwined.” *City of Sunland Park v. Santa Teresa Services Co.*, 2003-NMCA-106, ¶ 40, 134 N.M. 243, 75 P.3d 843. The statute must provide protection against the injury alleged. *Id.* ¶ 41. And the identification of the interests protected by the statute allows a court to determine whether a plaintiff has demonstrated that the asserted interests fall within the zone of interest protected. *Id.* ¶ 42.

{18} Although we acknowledge that the broad language of the UPA suggests that any person meeting the minimum requirement of injury may bring a claim (no matter the type or how remote) the zone of interest bars such an expansive construction of Section 57-12-10(B). See *Key*, 1996-NMSC-038, ¶¶ 29-35 (holding that injury alone is not sufficient to confer standing or a cause of action if the interests a plaintiff seeks to protect lie outside the zone of interests protected by statute). The result in this case does not turn on whether GandyDancer is a person under the act, which by definition GandyDancer is. See § 57-12-2(A). Instead, the result turns on whether the Legislature intended the UPA to provide a competitor with a remedy for competitive injury. Stated another way, the result turns on whether the UPA protects GandyDancer’s interest. We conclude that it does not.

{19} In its original form, the UPA was titled, “an act relating to unfair trade practices and consumer protection; making unfair methods of competition and unfair or deceptive acts or practices unlawful . . . and providing penalties.” 1967 N.M. Laws, ch. 268. As originally enacted, the UPA defined and made unlawful “[u]nfair methods of competition.” See 1967 N.M. Laws, ch. 268, § 2 (defining “[u]nfair methods of competition”) and § 3 (declaring unfair methods of competition unlawful). The United States Supreme Court has observed

that historically, “Although ‘unfair competition’ was a ‘plastic’ concept at common law . . . it was understood to be concerned with injuries to business reputation and present and future sales.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131 (2014) (citation omitted). However, in 1971, the Legislature removed “unfair methods of competition” from the text of the UPA, including its removal from the declaration of unlawful acts. See 1971 N.M. Laws, ch. 240, §§ 1, 2.

{20} It logically follows that by removing the phrase “unfair methods of competition” from both the title and the definition section and from the declaration of unlawfulness, the Legislature intended to remove competitive injury claims from the protected zone of interest. Compare S.B. 233, 28th Leg., 1st Sess. (N.M. 1967) (including “unfair methods of competition” in the title and text of the UPA), and 1967 N.M. Laws, ch. 268, with S.B. 145, 30th Leg., 1st Sess. (N.M. 1971) (removing “unfair methods of competition” from the title and text of the UPA), and 1971 N.M. Laws, ch. 240). The alteration evinces an intent to limit the zone of interest protected from unfair trade practices by the UPA to consumers, not competitors. See *Benavidez v. Sierra Blanca Motors*, 1996-NMSC-045, ¶ 18, 122 N.M. 209, 922 P.2d 1205 (“We also presume that the Legislature intends to change existing law when it enacts a new statute”). We recognize that the zone of interest concept embraced by *Key* observes that a plaintiff only needs to show that the plaintiff is arguably within the zone of interest protected. There is no requirement that evidence in the form of statutory language must establish that the Legislature included or excluded the particular plaintiff from the statute’s protection. However, and especially considering the legislative history in this case, the statutory language is one of the most obvious and compelling factors.

{21} Despite the broad language of Section 57-12-10(B), the UPA limits who may bring a cause of action because it links the right to bring a cause of action to prohibited conduct and defines unlawful conduct in specific terms. See § 57-12-3 (“Unfair or deceptive and unconscionable trade practices . . . are unlawful.”); § 57-12-2(D) (defining “unfair or deceptive trade practice”); cf. *Key*, 1996-NMSC-038, ¶ 16 (holding that the New Mexico Motor Vehicle Dealers Franchising Act, NMSA 1978, §§ 57-161 to -16 (1995), “links standing to forbidden conduct and articulates forbidden conduct in specific terms” thus limiting the zone of interest protected).

{22} GandyDancer argues that the phrase “unfair methods of competition” was superfluous and that its removal is therefore immaterial to the analysis. We disagree

because construing “unfair methods of competition” to have been superfluous and its removal immaterial would require this Court to ignore the historical context wherein the Legislature enacted the UPA. See *Katz v. N.M. Dep’t of Human Servs.*, 1981-NMSC-012, ¶ 18, 95 N.M. 530, 624 P.2d 39 (“A statute must be construed so that no part of the statute is rendered surplusage or superfluous.”); see also Norman J. Singer & Shambie Singer, *Sutherland Statutory Constr.*, § 46.6, 238-47, 245 n.2, 247 n.3 (7th ed. 2014) (“Courts construe a statute to give effect to all its provisions, so that no part is inoperative or superfluous . . .”). We decline to construe the prior inclusion of unfair methods of competition in the UPA to have been superfluous. This Court applies the principles of statutory construction to give effect to every phrase unless there is an obvious mistake or error. *Fowler v. Vista Care*, 2014-NMSC-019, ¶ 7, 329 P.3d 630 (stating that this Court “will not read any provision of the statute in a way that would render another provision of the statute ‘null or superfluous’” (quoting *Rivera*, 2004-NMSC-001, ¶ 18)); see also *Sutherland Statutory Constr.*, *supra*, § 46.6, 256-59, 259 n.6 (“Courts assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally.”)

{23} Although *Gandydancer*, 2018-NMCA-064, ¶ 24, posited that permitting standing to pursue competitive injury could tangentially benefit consumers, such a construction of public policy does not appear to be supported by the statutory history. It is within the purview of the Legislature to expand the zone of interest protected by the UPA to include competitor suits for competitive injury if that is a policy that the Legislature decides to pursue, but this Court should refrain from creating policy. See *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343, 961 P.2d 768 (“[I]t is the particular domain of the legislature, as the voice of the people, to make public policy.” (quoting *Torres v. State*, 1995-NMSC-025, ¶ 10, 119 N.M. 609, 894 P.2d 386)). Mindful of that guiding principle, this Court will not expand the zone of interest protected by UPA after it has been limited by the Legislature.

### 3. The UPA Should Not Be Construed in a Manner That Ultimately Undermines Consumer Protection

{24} With consumer interests in mind, we again observe that this Court has directed New Mexico courts to “ensure that the Unfair Practices Act lends the protection of its broad application to innocent consumers.” *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 48, 329 P.3d 658 (internal quotation marks and citation

omitted). The Legislature intended the UPA to serve as remedial legislation for consumer protection, and “we interpret the provisions of this Act liberally to facilitate and accomplish its purposes and intent.” *Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 30, 147 N.M. 583, 227 P.3d 73 (internal quotation marks and citations omitted). *Gandydancer*, 2018-NMCA-064, ¶ 24, observed that “New Mexico recognizes a strong public policy against unlicensed contractors.” (citations omitted) (reasoning however that “[t]he licensure requirements of CILA clearly implicate consumer protection concerns and trade practices addressed to the market generally such that . . . a competitor [plaintiff] who is able to show that it suffered a loss of money or property as a result of the [defendant’s] misrepresentation” of licensure to a consumer is entitled to assert a cause of action under the UPA). We respectfully disagree with the reasoning.

{25} Although the UPA and CILA both implicate consumer protection concerns, the acts implement their respective policies through different methodologies: CILA permits consumers to withhold or recoup payments from unlicensed contractors while the UPA provides consumers with a cause of action for damages, including treble damages. *Compare* § 60-13-30(A) (prohibiting unlicensed contractors from bringing an action for the collection of compensation “for the performance of any act for which a license is required”), and *Mascarenas v. Jaramillo*, 1991-NMSC-014, ¶¶ 10-16, 111 N.M. 410, 806 P.2d 59 (holding that under CILA a consumer may withhold payments from and bring an action to recover payments made to unlicensed contractors), with § 57-12-10(B) (establishing a cause of action for damages resultant from an act the UPA has “declared unlawful”). Notwithstanding that the UPA *does not* declare competitive injury unlawful, *GandyDancer’s* reasoning suggests an extreme position that a competitor claim asserted pursuant to the UPA could take priority over a consumer claim under CILA.

{26} For example, employing the remedies available under CILA, BNSF could assert a claim for all payments made to Rock House for work performed by Rock House while unlicensed. See *Mascarenas*, 1991-NMSC-014, ¶ 16 (reversing an award of partial refund with instructions to award a full refund to a consumer who made payments to an unlicensed contractor). However, if the UPA permits a competing contractor to recover loss profits damages as *GandyDancer* suggests, such recovery could effectively displace a consumer’s remedies. For example, if *GandyDancer* were allowed to recover damages under the UPA, and such recovery totaled all of the

Rock House assets such that Rock House was rendered bankrupt or judgment proof, the consumer, in this case BNSF, could be effectively precluded from recovering damages under CILA.

{27} Stated more generally, the UPA could be used in a manner that thwarts its primary purpose of protecting innocent consumers if competitors are allowed to assert a competitive injury claim under the UPA and thereby displace a consumer’s remedies under CILA. We must avoid construing the UPA and CILA in a manner that would result in conflict because “[w]e are charged with the responsibility of construing statutes harmoniously when possible.” *State ex rel. Brandenburg v. Sanchez*, 2014-NMSC-022, ¶ 11, 329 P.3d 654; *accord Luboyeski v. Hill*, 1994-NMSC-032, ¶ 10, 117 N.M. 380, 872 P.2d 353 (“Whenever possible, we must read different legislative enactments as harmonious instead of as contradicting one another.”).

{28} The Court of Appeals analysis does not account for such a result and thus sows potential conflict between CILA and the UPA. “If statutes appear to conflict, they must be construed, if possible, to give effect to each.” NMSA 1978, § 12-2A-10(A) (1997). We likewise presume that the Legislature is aware of New Mexico case law construing the purpose of the UPA as protecting innocent consumers. See *Chavez*, 2008-NMSC-001, ¶ 21 (“The Legislature’s continuing silence [since the 1971 amendments] on the issue [of UPA focus on consumer protection] is further evidence that it was both aware of and approved of the existing case law.”). We therefore presume that the Legislature is mindful of the tension between the UPA and CILA and has limited the zone of interest protected under the UPA to harmonize the acts in advancement of the public policy of protecting innocent consumers, and we decline to expand the zone of interest under the UPA without express direction from the Legislature.

#### **C. Prior New Mexico Case Law Does Not Establish That the UPA Created a Cause of Action for Competitive Injury**

{29} New Mexico cases have historically interpreted the UPA to focus exclusively on consumer protection, protecting “innocent consumers.” *B & B Inv. Grp.*, 2014-NMSC-024, ¶ 48, (“It is the task of the courts to ensure that the [UPA] lends the protection of its broad application to innocent consumers.” (internal quotation marks and citation omitted)). Although the general intent of the UPA is clear, as federal cases from the District of New Mexico have acknowledged, no prior New Mexico case has specifically addressed whether the UPA supports a cause of action for competitive injury. See e.g., *First*

*Nat’l Bancorp Inc. v. Alley*, 76 F. Supp. 3d 1261, 1266 (D.N.M. 2014) (observing that prior New Mexico case law does not analyze the question of “competitor standing”); *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1177 (D.N.M. 2013) (observing that “there is no controlling authority” from New Mexico appellate courts construing a cause of action for “business competitor standing” under the UPA and proposing to certify the question to this Court). We take this opportunity to clarify that the existing New Mexico case law cited by the parties to support their positions is not applicable to the question before the Court. Further, we reject the use of dicta in *Page & Wirtz*, 1990-NMSC-063, ¶ 22, as authority to support the position that the UPA permits a cause of action for competitive injury.

{30} We begin with the applicability of *Santa Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A., Inc.*, 2005-NMCA-051, 137 N.M. 524, 113 P.3d 347, from which both parties argue in support of their respective positions. *Santa Fe Custom Shutters* did not address whether the Legislature created a cause of action for competitive injury under the UPA. Instead, *Santa Fe Custom Shutters* determined that a seller of custom windows could not assert a claim against a buyer who agreed to purchase windows. *Id.* ¶ 17 (“Consistent with its purpose as consumer protection legislation, the UPA gives standing only to buyers of goods and services.” (citation omitted)). In this instance, as competitors neither *GandyDancer* nor *Rock House* is in the position of being a buyer or a seller to the other, and therefore *Santa Fe Custom Shutters* is not applicable.

{31} The parties likewise argue the applicability of *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, 142 N.M. 437, 166 P.3d 1091. *GandyDancer* argues that *Lohman* supports the determination of legislative intent to establish a competitive cause of action, and *Rock House* argues the opposite. *Gandydancer* concluded that *Lohman* supported a competitive injury claim in the UPA because “both the plain language of the act and the underlying policies suggest that a commercial transaction between a claimant and a defendant need not be alleged in order to sustain a UPA claim.” 2018-NMCA-064, ¶ 13 (quoting *Lohman*, 2007-NMCA-100, ¶ 33).

{32} Deriving a competitive injury cause of action from the language of *Lohman* ignores the context of that case. *Lohman* is inapposite. It analyzed “whether a false or deceptive statement, made by a manufacturer and its testing laboratory to a dealer or distributor, for the purpose of facilitating sales of a product to consumers at large, should fall within the scope of the UPA.” *Lohman*, 2007-NMCA-100,

¶ 25. In allowing a consumer claim to move forward, the Court of Appeals held that the UPA does not necessarily require a direct transaction between the consumer and a defendant that supplied parts incorporated in the goods purchased when the defendant's "misrepresentations . . . bear on downstream sales." *Id.* ¶¶ 25-26, 29-30. {33} In *Hicks v. Eller*, the Court of Appeals clarified that although *Lohman* does not require a transaction between a claimant and a defendant, *Lohman* does stand for the proposition that the plaintiff must have sought or acquired goods or services and the defendant must have provided goods or services." *Hicks v. Eller*, 2012-NMCA-061, ¶ 20, 280 P.3d 304. *Hicks* addressed whether a seller of goods could bring an action against a buyer under the UPA, albeit under slightly different circumstances from *Santa Fe Custom Shutters*. See *Hicks*, 2012-NMCA-061, ¶¶ 12. {34} *Eller* was an art appraiser who purchased two paintings from *Hicks*, the seller, which *Eller* thereafter sold for a significant profit to an art dealer (and where the paintings were ultimately sold at auction for a much greater amount than even *Eller* received). *Id.* ¶¶ 8-9. *Hicks* simply clarified the *Lohman* holding that a direct transaction was not required but provided no supporting authority for the argument that the UPA establishes a cause of action for competitive injury. See *Hicks*, 2012-NMCA-061, ¶¶ 20-21. {35} Finally, the thrust of *GandyDancer's* argument rests upon dicta from *Page & Wirtz*, where this Court speculated that the broad language of Section 57-12-10(B) could theoretically include damages "suffered either by a consumer of goods or services, or the commercial competitor of an enterprise engaged in deceptive trade practices." *Page & Wirtz*, 1990-NMSC-063, ¶ 22. However, *Page & Wirtz* did not address competitive injury. {36} Instead, *Page & Wirtz* held that the restaurant owner, the buyer of services, was only entitled to treble the statutorily set amount recoverable against a contractor under the UPA because the buyer did not prove actual damages. *Page & Wirtz*, 1990-NMSC-063, ¶¶ 17, 20-23; see also § 57-12-10(B) (providing for "an action to recover actual damages or the sum of one hundred dollars (\$100), whichever is greater"). In a hypothetical discussion of remedies authorized under the UPA, *Page & Wirtz* theorized that the plain language of the statute could be broad enough to contemplate the possibility of a competitor's cause of action for damages or injunctive relief, but that dicta was both unnecessary

to the holding and unsupported by analysis. *Id.* ¶¶ 21-22. To the extent the statement stands as an expression of New Mexico law that the UPA authorizes such a claim, we disavow the statement.

#### **D. The Case Law from Other States Interpreting Other State Law Is Unpersuasive**

{37} *Gandydancer* relies on case law from other state and federal courts to support its conclusion that the UPA creates a cause of action for competitive injury. See 2018-NMCA-064, ¶¶ 18-19. The Court of Appeals reasoned that its conclusion was supported because "courts in other jurisdictions have also used legislative intent paired with statutory interpretation principles, including the liberal construction of remedial statutes, to interpret statutory language authorizing any person to bring a state consumer protection claim." *Id.* ¶ 18 (internal quotation marks and citation omitted).

{38} We agree that it is appropriate to "look for guidance in analogous law in other states or the federal system" if New Mexico case law does not answer the question presented. See *Wills v. Bd. of Regents of Univ. of N.M.*, 2015-NMCA-105, ¶ 19, 357 P.3d 453 (internal quotation marks and citation omitted). However, interpretations of the laws of other jurisdictions provide guidance only if the analogous law is substantially similar to the UPA. Respectfully, *Gandydancer* relies predominantly on jurisdictions analyzing statutes not substantially similar to the UPA, with different statutory language and a different statutory history as we note next. Such interpretations are not binding on this Court. See *Security Ins. Co. of Hartford v. Chapman*, 1975-NMSC-052, ¶ 19, 88 N.M. 292, 540 P.2d 222 ("Of course, the decisions of other states, if any, which have statutory provisions comparable to ours, with which we are here concerned, are persuasive but not binding.").

{39} Insofar as *Gandydancer* relied on case law from other states interpreting statutes that include anticompetitive provisions, those cases are unpersuasive because the Legislature removed such provisions from the UPA. For example, *Eder Brothers, Inc. v. Wine Merchants of Connecticut, Inc.*, 880 A.2d 138, 149 (Conn. 2005), based its decision on language in the Connecticut Unfair Trade Practices Act: "[N]o person shall engage in *unfair methods of competition* and unfair or deceptive acts or practices in the conduct of any trade or commerce." (emphasis added) (quoting Conn. Gen. Stat. § 42-110b(a) (1976)). *Southern Service Corp. v. Excel Building Services,*

*Inc.*, 617 F. Supp. 2d 1097, 1099-1100 (D. Nev. 2007), focused on language from the Nevada Unfair Trade Practices Act (NUTA). NUTA importantly provided, "Evidence that a person has engaged in a deceptive trade practice is *prima facie* evidence of intent to injure *competitors* and to destroy or substantially lessen *competition*." *Id.* (emphasis added) (quoting Nev. Rev. Stat. § 598.0953(1) (2007, amended 2017)). *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 546 N.E.2d 33, 39-41 (Ill. App. Ct. 1989), analyzed an Illinois statute which declared, as unlawful, "[u]nfair methods of competition . . . including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact . . ." (emphasis added) (quoting 815 Ill. Comp. Stat. 505/2 (1973)). These statutes specifically refer to unfair methods of competition or competitive injury. The New Mexico Legislature has taken the deliberative action to exclude those references from the UPA.

{40} *Gandydancer* cites one case that construed statutes that do not specifically use the term "unfair methods of competition." See *John Labatt Ltd. v. Molson Breweries*, 853 F. Supp. 965, 969-970 (E.D. Mich. 1994). However, in that case, the federal district court construed the Michigan Consumer Protection Act (MCPA) to permit competitor standing in an unfair competition claim by applying reasoning from other federal courts and not from Michigan appellate courts. *Labatt*, 853 F. Supp. at 967-70. *Labatt* also lacks a thorough analysis concerning the statutory history and development of the MCPA.

{41} In light of the unique statutory history of the UPA, we conclude that the case law from other states on which the Court of Appeals relied is unpersuasive.

### **III. CONCLUSION**

{42} Based on the foregoing, we reverse the Court of Appeals and remand to the district court for dismissal of the UPA claim and for further proceedings consistent with this opinion.

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

**DAVID K. THOMSON, Justice**

**WE CONCUR:**

**JUDITH K. NAKAMURA, Chief Justice**

**BARBARA J. VIGIL, Justice**

**MICHAEL E. VIGIL, Justice**

**C. SHANNON BACON, Justice**





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## Classified

### Positions

#### 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, pre-trial, trial, and appeal. Lateral hires welcome. Please email a letter of interest, salary range, and résumé to paul@kienzlelaw.com.

#### Associate Attorney

Stiff, Keith & Garcia is a successful and growing law firm representing national clients, looking for an experienced lawyer to work in the areas of insurance defense and civil litigation. Flexible work environment available. We are looking for an attorney who can handle complex litigation with minimal supervision. We are a congenial and professional firm. Excellent benefits and salary. Great working environment with opportunity for advancement. Send resume to resume01@swcp.com

#### 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 ameliham@haysfriedmanlaw.com. All inquiries will be kept confidential.

#### 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

#### Multiple Trial Attorney Positions Available in the Albuquerque Area

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!



### 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.

### Senior Trial Attorney

The 13th Judicial District Attorney's Office is accepting resumes for an experienced Senior Trial Attorney. This position requires substantial knowledge in the areas of criminal prosecution, rules of criminal procedure and requires handling complex felony litigation. Six years as a practicing attorney in criminal law with significant trial experience is required. Salary is commensurate with experience. Send resumes to Krissy Fajardo, Program Specialist, P.O. Box 1750, Bernalillo, NM 87004, or via E-Mail to: kfajardo@da.state.nm.us. Deadline for submission of resumes: Open until filled.

### Litigation Attorney

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.

### 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

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

### Associate General Counsel

Reporting to the Senior Vice President and General Counsel, this in-house position provides legal advice and assistance on complex and routine legal matters, primarily related to litigation, but also including matters of health law, involving Presbyterian Healthcare Services (PHS) and Presbyterian Health Plan. Litigation matters may include Federal and State law. AA/EOE/VET/DISABLED. To Apply: [www.phs.org/careers](http://www.phs.org/careers) (requisition ID 2020-15126)

### Personal Injury Attorney

Get paid more for your great work. Make a difference in the lives of others. Salary plus incentives paid twice a month. Great benefits. Outstanding office team culture. Learn more at [www.HurtCallBert.com/attorneycareers](http://www.HurtCallBert.com/attorneycareers). Or apply by email to Bert@ParnallLaw.com and write "Apples" in the subject line.

### Civil Litigation Attorney

Busy business law firm looking to hire an experienced Civil Litigation Attorney. Slingshot, LLC is the parent company of Law 4 Small Business and Business Law Southwest. Our law firms are some of the fastest growing legal practices in New Mexico. We are currently searching for an experienced Civil Litigation Attorney who enjoys collaboration, innovation, and teamwork. While the position is focused primarily on litigation, experience in, and ability/desire to handle, business related transactional matters is preferred. The right candidate will have 5 years of civil litigation experience, familiarity with business law, including business related transactional matters, the ability to thrive in a "paperless office," and will have a friendly and warm attitude with clients, and a willingness and ability to take on all aspects of litigation – simple and complex. This position offers 401k, health, dental, vision, life insurance, disability insurance, a generous paid time off plan, a unique bonus structure and a great working environment. To be considered, please send cover letter, resume and references to vanesa@slingshot.law.

### Associate Attorneys

Mynatt Martínez Springer P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking associate attorneys with 0-5 years of experience to join our team. Duties would include providing legal analysis and advice, preparing court pleadings and filings, performing legal research, conducting pretrial discovery, preparing for and attending administrative and judicial hearings, civil jury trials and appeals. The firm's practice areas include insurance defense, civil rights defense, commercial litigation, real property, contracts, and governmental law. Successful candidates will have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. Salary commensurate with experience, and benefits. Please send your cover letter, resume, law school transcript, writing sample, and references to [rd@mmslawpc.com](mailto:rd@mmslawpc.com).

### Staff Attorney Position

Staff attorney position available with busy state government agency. Objective, technical writing and legal research required. No litigation. Salary DOE, with state benefits. Email resume, cover letter and writing sample, by August 12, to [attyapps2020@gmail.com](mailto:attyapps2020@gmail.com).

### Associate Attorney

Chapman and Priest, P.C. seeks an associate attorney to assist with increasing litigation case load. Candidate should have 3-10 years civil defense litigation experience, good research and writing skills, as well as excellent oral speaking ability. More experienced candidates will be considered. Candidate must be self-starter and have excellent organizational and time management skills. Trial experience a plus. Please send resume, references, writing sample and salary requirements to [Humanresources@cplawnm.com](mailto:Humanresources@cplawnm.com).

### Assistant City Attorney

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

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

### Hearing Officer

Serving as an independent officer under supervision of the President of the University of New Mexico, ensures compliance with federal and state laws, as well as University policies and procedures, in the adjudication of cases related to personnel issues, student conduct violations, allegations of discrimination, Title IX violations, and other related matters. Directs and coordinates the resolution of complex cases, trains hearing personnel, drafts reports and responses, and renders decisions as a representative of the institution. Provides insights to University leaders and campus partners on opportunities to enhance institutional policies, processes, and procedures. Juris Doctorate; at least 5 years of experience directly related to the duties and responsibilities specified. See job posting at [Jobs.unm.edu](http://Jobs.unm.edu). The University of New Mexico is an affirmative action, equal opportunity employer.

### Assistant City Attorney

The City of Albuquerque Legal Department is hiring an Assistant City Attorney for the Compliance Division to act primarily as General Counsel for the Albuquerque Police Department. The Legal Department's team of attorneys provides a broad range of general counsel legal services to the Mayor's Office, City Council, the Albuquerque Police Department, various City departments, boards, commissions, and agencies. The legal services provided by the division includes, but are not limited to, drafting legal opinions and memoranda, reviewing and drafting policies, ordinances, and executive/administrative instructions, reviewing, drafting, and negotiating contracts, providing counsel on Inspection of Public Records Act requests and other open government issues, providing advice on City ordinances and State/Federal statutes and regulations, and providing general advice and counsel on day-to-day operations. Attention to detail, ability to multitask and strong writing skills are essential. Preferences include: Five (5)+ years' experience; experience representing law enforcement agencies; criminal legal experience; policy writing; and experience addressing evidentiary issues. Candidates must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Please submit resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or [amaragon@cabq.gov](mailto:amaragon@cabq.gov).

### Request For Mediators

The New Mexico Public Education Department (NMPED), Division of Vocation Rehabilitation, is seeking mediators to resolve disputes between the Agency and applicants/recipients of vocational rehabilitation services under the Federal Rehabilitation Act of 1973, 29 U.S.C. 701 et seq., as amended through Public Law 114-95. Contracts will be awarded in one-year terms, with the option to extend in one-year increments for three additional years. Applicants must be experienced mediators. Knowledge of laws applicable to persons with disabilities and/or vocational rehabilitation laws is preferred. The Request for Applications for Mediators is available on the New Mexico Division of Vocational Rehabilitation's website at <http://www.dvr.state.nm.us/>. Prospective Offerors with questions should contact Joseph "Joby" Padilla at [joseph.padilla@state.nm.us](mailto:joseph.padilla@state.nm.us). The deadline to submit applications is August 5, 2020.

### Assistant City Attorney

The City of Albuquerque Legal Department is hiring an Assistant City Attorney for the Municipal Affairs Division. This attorney will serve as general counsel to the City's Environmental Health Department ("EHD") regarding Air Quality issues throughout Bernalillo County including at federal and state facilities. This attorney will provide a broad range of legal services to EHD including, but not limited to, administrative enforcement actions, litigation and appeals, stationary source permits and "fugitive dust" permits, air quality monitoring and quality assurance, guidance regarding EPA grants, control strategies, work with EHD teams to develop new or amended regulations to be proposed to the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board"), attend and represent EHD staff at rulemaking and adjudicatory hearings, review and draft intergovernmental agreements regarding air quality issues, review and draft legislation regarding air quality. Attention to detail and strong writing skills are essential. Preferences include: Five (5)+ years' experience in Environmental or Air Quality law and a scientific or technical background. Candidate must be an active member of the State Bar of New Mexico in good standing, or be able to become licensed in New Mexico within 3 months of hire. Salary will be based upon experience. Please submit resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or [amaragon@cabq.gov](mailto:amaragon@cabq.gov).

### Paralegal

The Los Alamos National Laboratory, Office of General Counsel, is seeking a Paralegal to specialize in the fields of the Freedom of Information Act and Privacy. This position will support supervising attorneys in providing prompt, thorough, and quality responses to Freedom of Information Act requests made to the National Nuclear Security Administration for Laboratory records. The candidate will also support response to privacy issues and assist with compliance with the Laboratory's privacy requirements. Responsibilities will include: conducting custodian interviews; collecting, compiling and analyzing data and documents; reviewing documents utilizing electronic discovery software and tools; compliance with the Laboratory's information security requirements; and preparation of clear and concise written work products such as correspondence, instructions, and responses to information requests. Please view the LANL website at <https://lanl.jobs> for the full advertisement and how to apply: IRC80313.

### Legal Assistant/Paralegal in Los Lunas – 3-5 years Experience

Well established Plaintiff personal injury law firm seeks full-time litigation paralegal with three to five years litigation experience in state and federal court. Bilingual English and Spanish a plus. Candidates with prior personal injury experience have preference. Responsibilities include drafting discovery and pleadings, answering discovery, meeting with clients, requesting and reviewing medical records and bills. E-filing in state and federal court, drafting letters, calendaring, answering phone calls, and providing administrative support to lawyer. Must be able to multi-task. Salary is dependent upon experience. Candidates must have an exceptional work ethic, show attention to detail and be self-starters. Send your resume to debbie@davidcchavez.com

### Billing And Accounts Payable Position

Small practitioner law office is seeking a part-time billing and accounts payable professional to handle all client invoicing and accounting for the firm. Candidates must have experience with e-billing (including using multiple online billing platforms) and know basic accounting functions. Good organizational and analytical skills required, and familiarity with task code billing terms. Experience with QuickBooks and Practice Panther a plus. Applicants may submit their resumes by e-mail at AE@Jalblaw.com

### Paralegal

Robles, Rael & Anaya, P.C. is seeking an experienced paralegal for its civil defense and local government practice. Practice involves complex litigation, civil rights defense, and general civil representation. Ideal candidate will have 3-5 years' experience in the field of civil litigation. Competitive salary and benefits. Inquiries will be kept confidential. Please e-mail a letter of interest and resume to chelsea@roblesrael.com.

### 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@benhancoklaw.com.

## Services

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## Office Space

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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

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Beautiful office with separate reception area, private bathroom, large storage closet, and parking. Just blocks away from the courthouses on Lomas. Conference room and kitchen area upstairs. Furnishings available. Contact Kim at baiamonte4301@gmail.com 505-331-3044

### 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

## Miscellaneous

### Want To Purchase

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

### 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

### Water Rights for Sale

28.7 acre feet of pre1907 water rights and 38 surface acres of irrigable land near the Rio Grande is far south Albuquerque. Zoned A-1. Water rights are subject to approval of the State Engineer of an Application to Change an Existing Water Right. \$35,000.00 per acre. Water rights are available separately. Surface also has MRGCD rights. Call Jim Wybil or Kieth Meyer, Maestas and Ward, 505-878-0001.

### Search for Will

Searching for Last Will and Testament of Reyes (Rick) M. Montoya of Santa Fe, New Mexico. Please contact attorney Ralph M. Montez at (505)984-3004.

## 2020 Bar Bulletin Publishing and Submission Schedule

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

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

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

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



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## EPISODE 1

### **Personal Inventory: COVID – A Forced Life Transition for Some**

*Pamela Moore and Tenessa Eakins,  
State Bar Judges and Lawyers Assistance Program;  
Morgan Pettit (moderator), State Member Services Coordinator*

We will be discussing how COVID-19 has impacted the professional and/or personal identity of attorneys, judges, and other legal professionals. Specifically we will be discussing life transitions due to COVID19. Many of us, if not all, have had to change the way we function in our day to day lives recently. Some of us are grieving the loss of the way life was, what we deemed “normal”. Others may be grieving the loss of a loved one, a business, a relationship, or a personal or professional role before the pandemic hit.

Listen at [www.nmbar.org/podcast](http://www.nmbar.org/podcast)

