

# BAR BULLETIN

November 25, 2020 • Volume 59, No. 22



*Chaos* by Mark Yale Harris (see page 3)

[www.markyaleharris.com](http://www.markyaleharris.com)

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Tuesday, December 1 • 1–2 p.m.

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### **Zoom Training for Lawyers and Using it Securely**

Wednesday, December 2 • 11–Noon

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Monday, December 7 • 1–2 p.m.

1.0 G

\$49 Standard Fee

### **Discovery Hidden and Undocumented Google Search Secrets**

Tuesday, December 8 • 11–Noon

1.0 G

\$89 Standard Fee

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Tuesday, December 8 • 1–2 p.m.

1.0 G

\$49 Standard Fee

## Upcoming Teleseminars

### **Ethics for Business Lawyers**

Monday, November 30 • 11 a.m.–Noon

1.0 EP

\$79 Standard Fee

### **Business Divorce, Part 1**

Tuesday, December 1 • 11 a.m.–Noon

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## Meetings

### December

- 1**  
**Health Law Section Board**  
 9 a.m., teleconference
- 2**  
**Employment and Labor Law Section Board**  
 Noon, teleconference
- 8**  
**Appellate Practice Section Board**  
 Noon, teleconference
- 8**  
**Bankruptcy Law Section Board**  
 Noon, teleconference
- 9**  
**Business Law Section Board**  
 4 p.m., teleconference
- 9**  
**Children's Law Section Board**  
 Noon, teleconference
- 9**  
**Tax Section Board**  
 9 a.m., teleconference
- 11**  
**Prosecutors Section Board**  
 Noon, teleconference

## Workshops and Legal Clinics

### December

- 2**  
**Divorce Options Workshop**  
 6-8 p.m., Video Conference  
 For more details and to register, call  
 505-797-6022
- 9**  
**Consumer Debt/Bankruptcy Workshop**  
 6-8 p.m., Video Conference  
 For more details and to register, call  
 505-797-6094

**About Cover Image and Artist:** Born in Buffalo, New York, Mark Yale Harris spent his childhood enthralled in a world of drawing and painting. Though honored for his creative endeavors, he was encouraged to pursue a more conventional career. After finding conventional success, the artistic passion that existed just beneath the surface was able to present itself. Harris began sculpting, and has since created an evolving body of work in stone and bronze, now featured in public collections, museums and galleries worldwide, including: Hilton Hotels; Royal Academy of London; Marin MOCA; Four Seasons Hotels and the Open Air Museum - Ube, Japan.

# 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. Library Hours: Monday-Friday 8 a.m.-noon and 1 p.m.-5 p.m. For more information call: 505-827-4850, email: [libref@nmcourts.gov](mailto:libref@nmcourts.gov) or visit <https://lawlibrary.nmcourts.gov>.

### U.S. District Court for the District of New Mexico Court Closure

The U.S. District Court for the District of New Mexico will be closed Nov. 26-27, in observance of Thanksgiving. Court will resume on Monday, Nov. 30. After-hours access to CM/ECF will remain available as regularly scheduled. Stay current with the United States District Court for the District of New Mexico by visiting the Court's website at: [www.nmd.uscourts.gov](http://www.nmd.uscourts.gov).

### Second Judicial District Court - Criminal Announcement of Vacancies

Four vacancies on the Second Judicial District Court will exist as of January 1, 2021, due to the retirement of Judge Charles Brown and Judge Carl Butkus, effective December 31, 2020, and due to the outcome of the retention vote with respect to Judge Christina Argyres and Judge Jacqueline Flores. Inquiries regarding additional details or assignment of this judicial vacancy should be directed to the Chief Judge or the Administrator of the court. Because Judge Daniel Ramczyk is transferring to the Civil Division, all four vacancies will be in the Criminal Division. Sergio Pareja, chair of the Supreme Court Judicial Nominating Commission, invites applications for these four positions from lawyers who meet the statutory qualifications

## Professionalism Tip

**With respect to the public and to other persons involved in the legal system:**  
I will willingly participate in the disciplinary process.

in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: <https://lawschool.unm.edu/judsel/application.html> or emailed to you by contacting the Judicial Selection Office at [akin@law.unm.edu](mailto:akin@law.unm.edu). The deadline for applications has been set for Nov. 30, by 5 p.m. All applications and letters of references are to be emailed to [akin@law.unm.edu](mailto:akin@law.unm.edu). Applications received after 5 p.m. will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Second Judicial District-Criminal Division Judicial Nominating Commission will convene beginning at 9 a.m. on Monday, Dec. 14, and the meeting will occur exclusively by Zoom. The Commission meeting is open to the public, and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard. If you would like the Zoom invitation emailed to you, please contact Beverly Akin by email at [akin@law.unm.edu](mailto:akin@law.unm.edu). Alternatively, you may find the Zoom information for this hearing below:  
Topic: Second Judicial District Court – Criminal Judicial Nominating Commission Meeting  
Time: Dec. 14 at 9 a.m.  
Join Zoom Meeting  
<https://unm.zoom.us/j/379615447?pwd=M3lSVGxuSEkrSjd4cExlVXYwK3MzQT09>  
Meeting ID: 379 615 447  
Password: 72146

### Second Judicial District Court – Children's Court Announcement of Vacancies

Two vacancies on the Second Judicial District Court – Children's Court will exist as of Jan. 1, 2021, due to the retirement of Judge Cristina T. Jaramillo and Judge John J. Romero Jr. effective Dec. 31. Inquiries regarding additional details or assignment of this judicial vacancy should be directed to the chief judge or the Administrator of the court. Sergio Pareja, chair of the Second Judicial District Court – Children's Court Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial

Selection website: <https://lawschool.unm.edu/judsel/application.html> or emailed to you by contacting the Judicial Selection Office at [akin@law.unm.edu](mailto:akin@law.unm.edu). The deadline for applications has been set for Dec. 1, by 5 p.m. All applications and letters of references are to be emailed to [akin@law.unm.edu](mailto:akin@law.unm.edu). Applications received after 5 p.m. will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Second Judicial District Court – Children's Court will convene beginning at 9 a.m. on Dec. 17, and will occur exclusively by Zoom. The Commission meeting is open to the public, and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard. If you would like the Zoom invitation emailed to you, please contact Beverly Akin by email at [akin@law.unm.edu](mailto:akin@law.unm.edu). Alternatively, you may find the Zoom information for this hearing below:

Topic: Second Judicial District Court – Children's Judicial Nominating Commission Meeting  
Time: Dec. 17 at 9 a.m.  
Join Zoom Meeting  
<https://unm.zoom.us/j/379615447?pwd=M3lSVGxuSEkrSjd4cExlVXYwK3MzQT09>  
Meeting ID: 379 615 447  
Password: 72146

### Fourth Judicial District Court Announcement of Applicants

Two applications have been received in the Judicial Selection Office as of 5 p.m., Nov. 3, to fill the position in the Fourth Judicial District Court, currently occupied by Judge Flora Gallegos. Inquiries regarding more specific details of this judicial vacancy should be directed to the chief judge or the administrator of the court. The Fourth Judicial District Court Nominating Commission will convene beginning at 9 a.m. on Dec. 3, and will occur exclusively by Zoom. The commission meeting is open to the public, and anyone who wishes to make comments about any of the candidates will have an opportunity to be heard. If you would like the Zoom invitation emailed to you, please contact Beverly



Akin by email at [akin@law.unm.edu](mailto:akin@law.unm.edu). Alternatively, you may find the Zoom information for this hearing below. The names of the applicants in alphabetical order: Richard D. Flores and Judge Floripa "Flora" Gallegos.

When signing into Zoom please use your full name.

Topic: Fourth Judicial District Court Nominating Commission Meeting

Time: Dec. 3 at 9 am

Join Zoom Meeting

<https://unm.zoom.us/j/379615447?pwd=M3lSVGxuSEkrSjd4cExlVXYwK3MzQT09>

Meeting ID: 379 615 447

Password: 72146

### **Fifth Judicial District Court Candidate Announcement**

The Fifth Judicial District Judicial Nominating Commission convened on Nov. 12 via Zoom, and completed its evaluation of the four candidates for the one vacancy on the Fifth Judicial District Court. The commission recommends the following candidates to Governor Michelle Lujan Grisham: **Denise A. Madrid Boyea** and **Eileen P. Riordan**.

### **Twelfth Judicial District Court Announcement of Vacancy**

A vacancy on the Twelfth Judicial District Court will exist on Nov. 2. Due to the retirement of the Honorable James Waylon Counts, effective Nov. 1. Inquiries regarding more specific details of this judicial vacancy should be directed to the chief judge or the administrator of the court. Sergio Pareja, chair of the Supreme Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: <https://lawschool.unm.edu/judsel/application.html> or emailed to you by contacting the Judicial Selection Office at [akin@law.unm.edu](mailto:akin@law.unm.edu). The deadline for applications has been set for Tuesday, Nov. 17, by 5 p.m. All applications and letters of references are to be emailed to [akin@law.unm.edu](mailto:akin@law.unm.edu). Applications received after 5 p.m. will not be considered. The Judicial Nominating Commission will meet at 9 a.m. on Wednesday, Nov. 25, and will occur exclusively by Zoom. The Commission meeting is open to the public, and anyone who wishes to be heard

about any of the candidates will have an opportunity to be heard. If you would like the Zoom invitation emailed to you, please contact Beverly Akin by email at [akin@law.unm.edu](mailto:akin@law.unm.edu). Alternatively, you may find the Zoom information for this hearing below:

Topic: Twelfth Judicial District Judicial Nominating Commission Meeting

Time: Nov. 25 at 9 a.m.

Join Zoom Meeting

<https://unm.zoom.us/j/379615447?pwd=M3lSVGxuSEkrSjd4cExlVXYwK3MzQT09>

Meeting ID: 379 615 447

Password: 72146

### **STATE BAR NEWS COVID-19 Pandemic Updates**

The State Bar of New Mexico is committed to helping New Mexico lawyers respond optimally to the developing COVID-19 coronavirus situation. Visit [www.nmbar.org/covid-19](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).

### **Board of Bar Commissioners 2020 Election Results**

The nomination period has ended for the 2020 election for the Board of Bar Commissioners and there were no contested districts. The following individuals have been elected by acclamation to three-year terms: Elizabeth J. Travis in the First Judicial District; Aja N. Brooks in the Second Judicial District; Robert Lara in the Third and Sixth Judicial Districts, Mitchell Mender in the Ninth and Tenth Judicial Districts, and Erinna M. "Erin" Atkins in the Twelfth Judicial District. No nomination petitions were received for a vacancy in the Second Judicial District, two vacancies in the Seventh and Thirteenth Judicial Districts, or the Out-of-State District position. A notice for those vacancies is included in this Bar Bulletin and the Board will make those appointments at their Feb. 5 meeting.

— *Featured* —

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### **Commissioner Vacancies in the Second, Seventh and Thirteenth Judicial Districts and Out-of-State District**

Rule 24-101 (C) and (D) NMRA have been amended by the Supreme Court to reflect that the Bar Commissioner Districts shall follow the established State Judicial Districts. On Jan. 1, there will be four vacancies on the Board of Bar Commissioners as follows: One vacancy in the Second Judicial District, two vacancies in the Seventh and Thirteenth Judicial Districts, and one vacancy for an Out-of-State District position. The appointments will be made by the Board of Bar Commissioners at the Feb. 5 meeting to fill the vacancies until the next regular election of Commissioners, and the terms will run through Dec. 31, 2021. Active status members with a principal place of practice (address of record) in the Districts with vacancies are eligible to apply. The remainder of the 2021 Board meetings are scheduled for: April 16, June 11, Oct. 7, and Dec. 8 or 9 (TBD); depending on the COVID-19 situation, at least a couple of the meetings may be held virtually. Members interested in serving on the board should submit a letter of interest and resume to [sbnm@nmbar.org](mailto:sbnm@nmbar.org) by Jan. 15 COB.

## New Mexico Legal Aid

The Board of Bar Commissioners will make four appointments to the New Mexico Legal Aid Board for three-year terms, with two members from the First and Second Congressional Districts and one member of and recommended by the Indian Law Section. Active status members admitted to practice in New Mexico interested in serving on the Board should send a letter of interest and brief resume by Nov. 25 to Kris Becker at [sbnm@nmbar.org](mailto:sbnm@nmbar.org).

## New Mexico Access to Justice Commission

The Board of Bar Commissioners will make two appointments to the N.M. Access to Justice Commission for three-year terms. The Commission is dedicated to expanding and improving civil legal assistance by increasing pro bono and other support to indigent people in New Mexico. Active status attorneys in New Mexico interested in serving on the Commission should send a letter of interest and brief resume by Nov. 25 to Kris Becker at [sbnm@nmbar.org](mailto:sbnm@nmbar.org).

## State Bar of New Mexico Access to Justice Fund Grant Commission

The Board of Bar Commissioners will one appointment to the State Bar of New Mexico ATJ Fund Grant Commission for a three-year term. The ATJ Fund Grant Commission solicits and reviews grant applications and awards grants to civil legal services organizations consistent with the State Plan for the Provision of Civil Legal Services to Low Income New Mexicans. Active status attorneys in New Mexico, not affiliated with a civil legal service organization which would be eligible for grant funding from the ATJ Fund, interested in serving on the Commission should send a letter of interest and brief resume by Nov. 25 to Kris Becker at [sbnm@nmbar.org](mailto:sbnm@nmbar.org).

## Appointments to Newly Created New Mexico State Bar Foundation Board

The Board of Bar Commissioners of the State Bar of New Mexico will appoint four directors to the newly created New Mexico State Bar Foundation Board, three of which shall be active members of the State Bar and one member of the public who is a non-attorney. The term of the at-large directors shall be established by

lot at the first meeting of the new board, with one director having a term of one year, one director having a term of two years, and two directors each having a term of three years. Thereafter, the term of office of at-large directors shall be three years. The New Mexico State Bar Foundation is the charitable arm of the State Bar of New Mexico representing the legal community's commitment to serving the people of New Mexico and the profession. The goals of the Foundation are to: enhance access to legal services for underserved populations; promote innovation in the delivery of legal services; and provide legal education to members and the public. Members interested in serving on the Board should submit a letter of interest and a resume to [sbnm@nmbar.org](mailto:sbnm@nmbar.org) by Nov. 25.

## 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

- Nov. 30
- Dec. 7
- Dec. 14

This group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Email Pam at [pmoore@nmbar.org](mailto:pmoore@nmbar.org) or Briggs Cheney at [BCheney@DSCLAW.com](mailto:BCheney@DSCLAW.com) and you will receive an email back with the Zoom link.

## Employee Assistance Program Managing Stress Tool for Members

NMJLAP contracts with The Solutions Group, The State Bar's EAP service, to bring you the following: A variety of resources surrounding some of the complex issues we are facing today such as managing conversations when you disagree politically, dealing with challenging people during COVID, civil unrest, Zoom exhaustion and speaking up about physical distancing. All of these can be

found under the 'Additional Resources' tab when selecting the EAP option on the Solutions Group Website. Webinars are FREE, and have a wide range of topics such as mindfulness during Covid-19, bias in the work-place, managing stress, and many more. The Solutions Group offers Work-Life Services. The Work-Life Services is a free, confidential access to professional consultants and online resources. All resources topics, webinars, and the Work-Life Service can be found at [www.solutionsbiz.com](http://www.solutionsbiz.com) The Solutions Group can help with any life situation. Call 505.254.3555, or 866-254-3555 to receive FOUR FREE counseling sessions. Every call is completely confidential and free!

## State Bar Sections and Divisions Sections' Annual Meeting of Membership

The sections of the Bar have begun holding annual meetings for their respective membership. You may find your section's annual meeting date either through an eBlast announcement or through the weekly eNews. Although this year has posed many challenges for us all, all of the voluntary groups have stayed active and continue to give back to their members and community at large. Learn of their accomplishments and what plans they have for next year. For further information, email Member Services at [memberservices@nmbar.org](mailto:memberservices@nmbar.org).

## UNM SCHOOL OF LAW Law Library Hours

Due to COVID-19, UNM School of Law is currently closed to the general public. The building remains open to students, faculty, and staff, and limited in-person classes are in session. All other classes are being taught remotely. The law library is functioning under limited operations, and the facility is closed to the general public until further notice.

Reference services are available remotely Monday through Friday, from 9 a.m.-6 p.m. via email at [UNMLawLibref@gmail.com](mailto:UNMLawLibref@gmail.com) or voicemail at 505-277-0935. The Law Library's document delivery policy requires specific citation or document titles. Please visit our Library Guide outlining our Limited Operation Policies at: <https://libguides.law.unm.edu/limitedops>.

# REPORT BY DISCIPLINARY COUNSEL DISCIPLINARY QUARTERLY REPORT

Reporting Period: July 1, 2020 – September 30, 2020

## Final Decisions

Final Decisions of the NM Supreme Court ..... 0

## Summary Suspensions

Total number of attorneys summarily suspended ..... 0

## Administrative Suspensions

Total number of attorneys administratively suspended..... 1

*Matter of Jon Charles Fredlund, Esq.* (Supreme Court No. S-1-SC-38454) New Mexico Supreme Court entered an order administratively suspending Respondent from the practice of law for failure to cooperate.

## Disability Inactive Status

Total number of attorneys removed from disability inactive states ..... 0

## Charges Filed

Charges were filed against an attorney for allegedly failing to pursue a client’s legal matter. Attorney assigned the legal matter to an associate attorney of the firm, who left the employment of the firm. The attorney failed to represent the client properly; failed to act with reasonable diligence and promptness; failed to communicate with the client and engaged in conduct prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent and diligent representation; failing to hold funds separate from his own funds and keep complete records of said funds; failing to deposit client’s retainer in a trust account, failing to render a full accounting of funds upon request of client; and engaging in conduct prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation; failing to act with reasonable diligence and promptness; failing to expedite litigation consistent with the interests of client; failing to obey an obligation of the tribunal; and engaging in conduct prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent and diligent representation; failing to withdraw from representation when circumstances required it, failing to take reasonable steps to protect clients’ interest upon termination of representation; practicing law in New Mexico when prohibited from doing so; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent and diligent representation, failing to communicate; failing to deposit client funds into a trust account and failing to keep complete records; and engaging in conduct prejudicial to the administration of justice.

## Injunctive Relief

Total number of injunctions prohibiting the unauthorized practice of law ..... 0

## Reciprocal Discipline

Total number of attorneys reciprocally disciplined ..... 0

## Reinstatement from Probation

Petitions for reinstatement filed ..... 1

## Formal Reprimands

Total number of attorneys formally reprimanded ..... 2

## Informal Admonitions

Total number of attorneys admonished ..... 3

## Letters of Caution

Total number of attorneys cautioned ..... 4

Attorneys were cautioned for the following conduct: (1) lack of competence; (2) breach of client confidence; (3) improper withdrawal (3) prosecutorial misconduct, and (4) conduct with unrepresented party.

### Complaints Received

Allegations.....	No. of Complaints
Trust Account Violations .....	2
Conflict of Interest .....	14
Neglect and/or Incompetence .....	65
Misrepresentation or Fraud .....	30
Relationship with Client or Court .....	4
Fees.....	3
Improper Communications.....	1
Criminal Activity .....	0
Personal Behavior .....	6
Other.....	30
Total number of complaints received .....	155

# Opinions

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

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

## Effective October 30, 2020

### UNPUBLISHED OPINIONS

A-1-CA-37122	In the Matter of the Protest of CIBL, Inc. & Subsidiaries	Reverse/Remand	10/26/2020
A-1-CA-38180	State v. W Johnston	Affirm	10/26/2020
A-1-CA-38229	City of Roswell v. F Lucero	Affirm	10/27/2020
A-1-CA-38545	State v. J Zapata-Beltran	Affirm	10/27/2020
A-1-CA-36786	State v. J Sanchez	Affirm	10/28/2020
A-1-CA-37634	S Brake v. S Brake	Affirm	10/28/2020
A-1-CA-38281	R Chafi o v. RMS Foods	Affirm	10/29/2020
A-1-CA-38451	State v. R Caro	Affirm	10/29/2020

## Effective November 6, 2020

### UNPUBLISHED OPINIONS

A-1-CA-38880	State v. T Willyard	Affirm	11/02/2020
A-1-CA-38843	State v. C Navarro	Affirm	11/03/2020
A-1-CA-39145	CYFD v. Jennifer K	Affirm	11/03/2020
A-1-CA-38741	CYFD v. Katrina B.	Affirm	11/05/2020

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

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





Bardacke Allison LLP is pleased to announce that **Breanna Contreras** has become a partner of the Firm. She graduated from Notre Dame Law School in 2013 and has been an associate of the firm since its founding in 2015. She has a business administration degree from UNM. Contreras handles commercial and intellectual property litigation, as well as copyright and trademark protection, licensing, and enforcement for clients throughout the United States and overseas. She has experience with contested proceedings before the trademark trial and appeal board, and assists firm clients in entertainment, fashion and media transactions. She is actively involved in her community. Contreras serves on the board of the Catholic Foundation of the Archdiocese of Santa Fe, the Intellectual Property Law Section of the State Bar of New Mexico, and the State's Young Lawyers Division. She has taught Legal and Business Issues in the Arts as an adjunct faculty member of the Santa Fe Community College.



*Southwest SuperLawyers* named **Cristina A. Mulcahy** a "Rising Star" in the areas of energy & natural resources and environmental litigation for the second year in a row. Mulcahy is licensed in both New Mexico and Texas, and is an associate with Stein & Brockmann, PA. She principally represents clients in all facets of water rights matters including litigation; administrative proceedings; and water planning for municipal and industrial clients, as well as safe drinking water act and clean water act compliance. Mulcahy also regularly advises clients on emerging legal issues related to produced water in New Mexico and Texas.



*U.S. News and World Report* and *The Best Lawyers in America* have once again named **Rodey Law Firm** one of the best law firms in New Mexico. Rodey is included and recognized in the Best Law Firms list for professional excellence and persistently impressive ratings from clients and peers. Achieving a ranking signals a unique combination of quality law practice and breadth of legal expertise. Rodey received the highest possible ranking in over 48 areas of law. Consistently recognized for excellence in business law and litigation, Rodey is a full-service law firm with office in Albuquerque and Santa Fe, serving clients in New Mexico and across the nation since 1883.

**Jay F. Stein and James C. Brockmann** of Stein & Brockmann, P.A., have been named to Best Lawyers in America in the field of water law for 2021."



The New Mexico Defense Lawyers Association named **Kathleen Wilson, Esq.**, the 2020 Outstanding Civil Defense Lawyer. Wilson is a Partner at Hinkle Shanor, LLP and is the managing partner of the Firm's Albuquerque office. She is a former president of the New Mexico Defense Lawyers Association and of the New Mexico Chapter of the American Board of Trial Advocates. Wilson obtained her juris doctorate from UNM in 1997. Her practice is primarily devoted to defending healthcare liability cases in litigation and at trial. Wilson defends medical negligence cases for hospitals and healthcare providers, healthcare providers in professional board proceedings and clients in premises liability and product liability cases. She is grateful to have litigated cases for 23 years in New Mexico.



Twelfth Judicial District **Judge James Waylon Counts**, has retired effective Nov. 1. Governor King appointed Counts to fill a vacancy in 1994 and then he was appointed again by Governor Johnson in 1999. In addition to a full docket as a general jurisdiction judge, he served two terms as chief judge, he has been the water law judge, he created and presided over an adult drug court, and he created and chaired the 12th Judicial District Pro Bono Committee. In 2006, the New Mexico Bar Association recognized Judge Counts with its Outstanding Judicial Service award. In 2019, the 12th Judicial District Bar Association awarded him its Lifetime Achievement Award. Judge Counts is married to Irene Mirabal-Counts, who herself served as Magistrate Judge in 2016. He has two sons, one a detective with the Las Cruces Police Department and another who is pursuing farming with his wife, an elementary school teacher, after retiring from the Las Cruces Police Department. Judge Counts has six grandchildren ages 2 to 19 years old.

**Pregenzer, Baysinger, Wideman & Sale, P.C.**, is pleased to announce the firm was recently selected by U.S. News & World Report for inclusion in the 11th edition of *Best Lawyers®* for a Tier 1 ranking for elder law.

*U.S. News Best Lawyers®* named **Sutin, Thyer & Browne** a top firm in 16 areas of law in Albuquerque and Santa Fe. Six of these ranked practices achieved Tier 1 status, indicating the firm is considered to be the best in the city in these practice areas. According to U.S. News & World Report, the firm's rankings "reflect the highest level of respect a firm can earn among other leading lawyers and clients."

It is with heartfelt sadness that the family of **Gloria Whitney Crane**, 73, Albuquerque, announces her passing due to natural causes, in her home, on Aug. 6. Gloria was born in SombreretÁllo, Sabinas Hidalgo, Nuevo LeÁn, Mexico on March 7, 1947 and was raised in Chicago. She served in the U.S. Air Force and graduated from UNM School of Law in 1983. Gloria was a former city attorney for Rio Rancho and a former assistant state's attorney in Santa Fe. She was also formerly employed by PNM and practiced law in Albuquerque and surrounding areas. Gloria was an animal lover, devoted to her former pet dogs and parrots. She was kind, generous and will be lovingly remembered by her family and friends. The family wishes to thank the dear friends and neighbors of River Walk Apartments for their caring kindness and support. She is survived by Leonardo Garza (brother); Irene (Gilberto) Flores (sister); Ericka Garza (niece); Diana (Gerardo Gomez) Garza (niece); Leticia (Michael) Hill (niece); Ricardo Flores (nephew); Joshua Cano (grand-nephew); Salem (John Rutheford) Garza (grand-niece); Anthony Hill (grand-nephew); Micaela Hill (grand-niece); and Axel James Rutheford (great grand-nephew); Sarah Smith (very dear friend); and Leonel Zea (very dear friend). She is preceded in death by Florentino Garza (father); Gregoria Garza (mother); Sindulfo Garza (brother); Margarito Garza (brother); Virginia Garza (sister-in-law); and Rebeca Garza (sister-in-law).

**Anthony Frank Avallone**, 93, passed away on June 24 at La Posada/Mesilla Valley Hospice. Anthony was born and raised in Mt. Vernon, N.Y., the son of Frank and Mary (Annechiarico) Avallone. At the age of 17 he enlisted in the U.S. Army and spent a little more than three years there before he was discharged. He liked to tell the story about how he was able to go to law school at one of the most prestigious colleges in the country, Columbia University, even though he had no money and no undergraduate degree. He was truly grateful to the government for his education because the GI bill paid his tuition! He was also a spiritual man and he acknowledged that his education was only one of the many blessings in his life that he received from almighty God. He began his law practice in Rockland County, N.Y. However, in 1967, because of health issues, he moved the family to Las Cruces. He opened Law Systems of Las Cruces and practiced law in Las Cruces until his retirement in 1999. He truly enjoyed the practice of law and one of his significant accomplishments was the brief he drafted that was used to repeal the red-light camera law. He also enjoyed gardening and every year his vegetable garden would produce more than he could use so he would take the surplus to the soup kitchen. He was an architect and designed several houses over the years that he built for his family. He was a carpenter and took a lot of pride in the furniture he made for himself as well as for his children. He was a very generous man and donated regularly to many organizations locally and around the country. More recently, he had the opportunity last fall to travel with his son Michael to Washington, D.C. on the honor flight for veterans. He really enjoyed that trip and made many friends. He is survived by his children, Mary E. Apodaca (Las Cruces), Elizabeth A. Smith (Lamy, NM), Claire M. Avallone (T or C, NM), Frank P. Avallone (Silver City, NM), Anthony V. Avallone (Alto, NM), Michael A. Avallone (Las Cruces), and 19 grandchildren. He was preceded in death by his wife of 66 years, Edith M. (Tese) Avallone; his son, Joseph D. Avallone; and his daughter, Camille P. Avallone.

**Christin Kathleen Kennedy** died on Aug. 19 at the age of 45. She was the oldest daughter of Paul and Pamela Kennedy, born Oct. 21, 1974 in Washington, D.C. Though she loved the east coast, she was a native New Mexican living the majority of her life in Albuquerque. Chris graduated from Albuquerque Academy in 1993 as an Academic All-American. In 1997 she earned her undergraduate degree from the School of Foreign Services at Georgetown University, and, shortly thereafter, her JD from UNM School of Law. Christin enjoyed swimming, running and competing in many marathons and triathlons. She relished being an aunt to her nieces and nephews and took great joy in her dogs, Buddy and Dos. Chris was proud to be the eldest daughter and the eldest granddaughter. Her time spent with her grandparents and many aunts and uncles were her best memories. She cherished her visits to Australia, Philadelphia, the Grand Canyon, Disneyland, Chile and Florence, in addition to the many family weddings filling her childhood with endless adventures. She was loved by so many who miss her terribly. Christin is survived by her parents, Paul and Pamela Kennedy, her sisters Megan Borrego and Kate Kennedy, both her grandmothers, Eileen Kennedy and Kathleen Miller, her 25 aunts and uncles, 53 cousins, and five nieces and nephews. She is preceded in death by her two Grandfathers, John Kennedy and Charles Miller, her godfather and uncle Edward Kennedy, and her uncles Leo Kennedy and Lee Miller.

**Clayton Fisher Childs**, husband, "Dad", "Poppy", brother, cousin and friend to SO many, died Aug. 23 just shy of his 74th birthday. He fought courageously for almost three years against an awful cancer called multiple myeloma. We had never heard of MM when he was diagnosed but two stem cell transplants, a stroke, two heart attacks and countless chemotherapies later, he STILL survived to live another day. He was a strong man that gave to so many unconditionally, asked for little and died by my side, my forever love. I will miss him every day. He is survived by his wife of more than 31 years Robbie Childs, three "children" and 12 grandchildren all of Albuquerque, all of whom loved him and will miss him dearly. He also had an extended family of sisters, brothers, nieces and nephews, cousins and long-time friends he always considered family. Clay made friends easily and kept them for life, it was just a gift he had. Clay graduated from Sandia High School, went to UNM putting himself through law school driving semi-trucks. He did a stint in the Army, was an avid racket-ball player for many years and a practicing attorney for more than 40 years. He loved to fish and he LOVED his dogs and Jasmine the cat. He is preceded in death by his mother Jean Chisholm, father Richard "Arnie" Childs, brother Richard "Dick" Childs and brother Mark Childs.

**Ann Marie Dumas** passed away in her Peralta home in the early morning hours of October 2, 2020, after suffering from numerous progressive lung conditions over the last several years. Ann was the first child of Robert John and Janet Marie Wirth, and was born, raised, and lived in New Mexico her entire life. She attended West Mesa High School, New Mexico State University, University of Albuquerque, and the University of New Mexico School of Law. She served as a nurse for many years, being the first in the state to receive the designation of Critical Care Certified RN. Thereafter, she attended law school, and earned a prestigious federal court clerkship with Judge Edwin L. Mechem, who was both a mentor and lifelong friend. If you knew her, you knew her laugh, which could be heard across a room and was unmistakably Ann. She loved to grow things—flowers, fruit, vegetables, which provided countless meals for families and friends and earned hundreds of blue ribbons at the New Mexico State Fair. She loved her time in the Jemez Mountains, especially on Wirth Hill, where many treasured family times were had. She loved being a mom, making and adopting kids as often as possible, and serving as a neighborhood mom to even more. She was a hippie, a farmer, a metal detectorist, a crafter, a canner, a grannie, and a loyal and generous friend. She was preceded in death by her parents, three of her children (Tina Marie Dumas, Paul Robert Rene Dumas, and Roger Thomas Dumas), and the love of her life/father of her children, Gerard Paul (“Jerry”) Dumas. She is survived by her children: Jenny Dumas (Quinn Kirby), John Dumas (Audrey), Carol Cazé (Roberto), Michael Dumas (Ruthie), Gerard Paul (“Jerry”) Dumas Jr., sister Debra Wirth-Schnieder (Ken), treasured cousin/brother Mike Wirth, eight grandchildren (Harlan, Riley, Henry, Oliva, Lumi, Azelyn, Ember, and Ivy), dear friends/adopted family members Sara & Gene Heaslet, Pam and Dave Thomas, Barbara de Weever & William McKinstry, Alonzo (“Gabe”) Abeyta, and many more. Ann loved to host a harvest party when the corn came in, and a Christmas Party in December, where she reconnected with friends from all stages of life. While we are saddened not to see you all and to share our grief and memories with you at this time, we look forward to a time when we can gather in celebration of her life. We plan to have a big Ann Dumas-style party when it is safe to so. We will share food, memories, and do some planting in her honor, an idea she loved.

**Carolyn Sue Fudge**, 65, passed away Aug. 31. She was born Jan. 21, 1955 to Duane and Lavonne Fudge in Newman Grove, N.E. She is survived by sister Jacqueline Young, son Wes Bowen, and daughter Erin Bowen. After completing her Juris Doctorate in Nebraska, Carolyn practiced law in New Mexico, retiring as an Assistant City Attorney from the City of Albuquerque. She was an active member of the church, where she loved to sing in the choir and helped feed the homeless with Grace Meals. She was also a member of PEO, serving as president of her chapter and supporting their educational programs. Her happiness was contagious. Whether she was enjoying the lake with her friends in Tennessee, spending time in Las Vegas with her family, walking her dog, Love, or on her mission to visit every national park, she was able to live life to the fullest. She was a blessing to everyone who knew her, with her quick wit, her kindness, and her generosity.

**William Howard Parsons, Jr.**, Oct. 23, 1945 - Aug. 28, 2019 renowned tax attorney, died at 73. William “Bill” H. Parsons, Jr., an astute business and tax attorney/Director with Ireland Stapleton Pryor and Pascoe, PC in Denver, Colorado, died on August 28, 2019 from complications of infection. He was 73 years old. Bill attended the University of New Mexico receiving a B.A. in 1967 and his J.D. from the University of New Mexico Law School in 1970. He was licensed as an attorney in New Mexico, Texas and Colorado. From 1970-1974, Bill was an attorney for the Office of the Chief Counsel of the Internal Revenue Service in Washington, D.C. Moving into private practice in 1975, Bill practiced law briefly in Dallas with Jenkins and Gilchrist then moved to Colorado where he has practiced law since 1977 with a specialization in transactional, sophisticated federal and state tax planning and audit defense. In the 1990s, Bill performed as the National Chairman of Common Cause for twelve years and for 42 years was on the Board of the Colorado Common Cause. He was a member of Leadership Denver associated with the Denver Chamber of Commerce and was the former Tax Committee Chair of the National Association of Public Pension Plan Attorneys. He is survived by his wife of 30 years, Mev Parsons and his three children, Meredith Parsons, Michael Parsons, and Kristin Parsons, and two stepdaughters, Amy Sreenen and Katie Sova. In addition, Bill is survived by 8 grandchildren as well as his sister, Cindy Parsons and her children. Bill was known for his gregarious personality, shrewd sense of humor, love of sports, knowledge of sports statistics, general appreciation of a great time and donut day at the office. Above all, we will remember him for his gift of storytelling and delivering a spot on joke. At any given time, he would break into a song and story to entertain us all. His work was an immense source of strength and pride. He worked right up until a couple of months prior to his passing.

# Legal Education

## November

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|----|--|----|---|
| 30 | <b>Get Focused! Time &amp; Distraction Management + Digital Detox</b><br>1.0 G<br>Live Webinar<br>Center for Legal Education of NMSBF<br>www.nmbar.org | 30 | <b>Ethics for Business Lawyers</b><br>1.0 EP<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org |
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## December

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|---|---|---|--|----|---|
| 1 | <b>Business Divorce, Part 1</b><br>1.0 G<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org                                 | 4 | <b>Trust and Estate Planning for Family Businesses, Part 2</b><br>1.0 G<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org                   | 8  | <b>Discover Hidden and Undocumented Google Search Secrets</b><br>1.0 G<br>Live Webinar<br>Center for Legal Education of NMSBF<br>www.nmbar.org              |
| 1 | <b>How to Better Manage Your Workload: Email Management</b><br>1.0 G<br>Live Webinar<br>Center for Legal Education of NMSBF<br>www.nmbar.org    | 4 | <b>Hot Topics in the Legal Community</b><br>4.8 G, 1.5 EP<br>Live Webinar<br>Center for Legal Education of NMSBF<br>www.nmbar.org                                | 8  | <b>Get Organized! Fight the Paper – Organize your Digital Matter File!</b><br>1.0 G<br>Live Webinar<br>Center for Legal Education of NMSBF<br>www.nmbar.org |
| 2 | <b>Zoom Training for Lawyers and Using It Securely</b><br>1.0 EP<br>Live Replay Webinar<br>Center for Legal Education of NMSBF<br>www.nmbar.org | 7 | <b>How to Better Manage Your Workload: Task, Goal &amp; Deadline Management</b><br>1.0 G<br>Live Webinar<br>Center for Legal Education of NMSBF<br>www.nmbar.org | 8  | <b>Percentage Rent Leases in Commercial Real Estate</b><br>1.0 G<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org                     |
| 2 | <b>Business Divorce, Part 2</b><br>1.0 G<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org                                 | 7 | <b>Text Messages &amp; Litigation: Discovery and Evidentiary Issues</b><br>1.0 G<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org          | 10 | <b>Guarantees in Real Estate Transactions</b><br>1.0 G<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org                               |
| 3 | <b>Trust and Estate Planning for Family Businesses, Part 1</b><br>1.0 G<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org  | 7 | <b>Basic Practical Regulatory Training for the Gas Industry</b><br>26.7 G<br>Webcast<br>NMSU Center For Public Utilities<br>www.business.nmsu.edu                |    |   |

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.



<p>11 <b>Employee v. Independent Contractors: Tax and Employment Law Considerations</b> 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>15 <b>2020 Mock Meeting of the Ethics Advisory Board</b> 2.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>23 <b>Drafting Client Engagement Letters in Trust and Estate Planning</b> 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p>
<p>11 <b>GREAT Adverse Depositions: Principles &amp; Principal Technique</b> 2.0 G Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>16 <b>Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204</b> 1.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>28 <b>The World Has Changed. Let's Sort it Out</b> 3.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p>
<p>11 <b>2020 Intellectual Property Law Institute</b> 5.0 G Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>16 <b>Trust and Estate Planning for Pets</b> 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>28 <b>Naked and Afraid: A Legal Survival Skills Program</b> 2.0 G, 1.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p>
<p>14 <b>Bridge the Gap Mentorship Program (Government Attorneys)</b> 3.5 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>16 <b>PowerPoint Power Hour</b> 1.0 G Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>29 <b>Advanced Google Search for Lawyers</b> 1.0 G Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p>
<p>14 <b>Bridge the Gap Mentorship Program (Civil Attorneys, DAs/PDs)</b> 3.5 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>17 <b>Twenty-six Ethical Tips from Hollywood Movies</b> 2.0 EP Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>29 <b>Social Media as Investigative Research and Evidence</b> 1.0 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p>
<p>15 <b>Keeping Your Tail Covered: Tips on Maintaining Malpractice Coverage When Changing Jobs, Going into Government Work, or Retiring</b> 2.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>18 <b>2020 Natural Resources, Energy and Environmental Law CLE</b> 4.0 G, 1.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>30 <b>Lawyer Ethics of Email</b> 1.0 EP Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p>
<p>15 <b>Ethics and Virtual Law Offices</b> 1.0 EP Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>22 <b>Gain the Edge! Negotiation Strategies for Lawyers</b> 5.0 G, 1.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p>	<p>30 <b>"When there are Nine" Sexual Bias in the Legal Profession</b> 1.0 G Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p>
		<p>30 <b>The Ethics of Social Media Research</b> 1.5 EP Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p>

# Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

**Opinion Number: 2020-NMCA-005**  
No. A-1-CA-35962 (filed October 22, 2019)

**STATE OF NEW MEXICO,**  
Plaintiff Appellee,  
v.  
**THOMAS STEVENSON,**  
Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**  
BRIANA H. ZAMORA, District Judge

Certiorari Denied, December 26, 2019, No. S-1-SC-38015.  
Released for Publication January 21, 2020.

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## Opinion

### Julie J. Vargas, Judge.

{1} Defendant appeals his convictions for shooting at a motor vehicle (great bodily harm), in violation of NMSA 1978, Section 30-3-8(B) (1993), and aggravated assault with a deadly weapon, in violation of NMSA 1978, Section 30-3-2(A) (1963). He raises four main arguments on appeal, as discussed below. After careful consideration of Defendant's issues, we affirm.

#### I. BACKGROUND

{2} This case arises out of a violent confrontation between Defendant Thomas Stevenson (Defendant), Codefendant Oshay Toney (Codefendant), and Marvin Ellis (Victim). During the confrontation more than twenty shots were fired into the vehicle (SUV) Victim was driving, with both Defendant and Codefendant firing multiple shots. Defendant claimed he fired in defense of himself or others, and raised both of those doctrines as defenses at trial. He provided evidence that the SUV was driving forward when he fired at it, that he thought it had run over someone, and that it was headed toward a house that was sheltering several children. The State introduced contrary evidence indicating that the SUV was

backing out of the driveway when the shooting started and was therefore not threatening Defendant or anyone else. The jury rejected Defendant's version of the events and convicted him of felony murder, voluntary manslaughter, shooting at a motor vehicle resulting in great bodily harm, and aggravated assault with a deadly weapon. The latter conviction was based on the fact that the owner of the SUV was in the passenger seat at the time the shooting began. Subsequently, the district court vacated the felony murder and voluntary manslaughter convictions on legal grounds not relevant to this opinion. Further facts will be provided as they are relevant to each issue discussed below.

#### II. DISCUSSION

##### A. Best-Evidence Rule

{3} The State presented testimony from Victim's nephew (Nephew) about certain text messages he had seen on Victim's phone on the day of the incident. Nephew was able to identify the sender of the text messages as Defendant, and the messages (at least one of them) were threatening in tone. Defendant objected to admission of Nephew's testimony, arguing that the best evidence rule required the State to introduce the messages themselves, not second-hand testimony from a person who had merely read the messages.

{4} Text messages are "writings" for purposes of the best-evidence rule and, absent an applicable exception, the original text messages or authorized duplicates of the same must be produced at trial. See *State v. Hanson*, 2015-NMCA-057, ¶¶ 67, 348 P.3d 1070. In *Hanson* we also recognized that an exception to the rule, for lost or destroyed evidence, could be applicable if a proper foundation was laid. See *id.* ¶ 13. In order to establish such a foundation, we held, the state must establish that it engaged in a diligent effort to obtain the originals of the writings at issue. *Id.* The State attempted to make that showing in this case by offering the testimony of Detective Leah Acata, the case agent working this homicide case.

{5} Detective Acata testified on voir dire that (1) she obtained Victim's cell phone from the owner of the SUV, Victim's girlfriend (Girlfriend), who was present in the SUV when the shooting began; (2) she obtained a warrant authorizing her to access the contents of the phone and took the phone to the New Mexico Regional Computer Forensic Laboratory (RCFL), which is affiliated with the Federal Bureau of Investigation (FBI); (3) at the RCFL Detective Acata used the "Cellebrite" system at a kiosk to attempt to access the phone's contents, but was unable to get past the phone's "swipe passcode"; (4) she had previously used the same program and RCFL's kiosks hundreds of times to access phones, but as to Victim's phone the system was unable to get past the swipe passcode; (5) she contacted different members of Victim's family to see if any of them knew the swipe passcode that would grant her access to the phone, or, in the alternative, Victim's email address and PIN for the phone, to no avail; (6) she then left the phone with RCFL and submitted a service request asking RCFL personnel to access the phone, but was notified that RCFL was also unable to unlock the phone; (7) Detective Jeremy Guilmette from RCFL informed her that a program had not yet been written that could unlock the particular model of phone owned by Victim, given Victim's use of a swipe passcode instead of a numeric passcode; and (8) the phone was returned to Detective Acata by RCFL. Detective Acata reiterated several times that without a passcode, access to the phone's contents, including the text messages in question, could not be achieved.

{6} In response to Detective Acata's voir dire testimony, Defendant did not present any evidence contradicting the information she provided concerning swipe passcodes and the ability to unlock

Victim's phone. Counsel for Codefendant did point out that Detective Acata did not send the phone to "Quantico" (a reference to the FBI's central forensics laboratory) for processing. However, Detective Acata testified on redirect that it was her understanding that Quantico would not be able to access the phone unless a program had been written to do so, and no evidence was presented indicating that Quantico would have had any more success accessing the phone than did RCFL. Similarly, Codefendant raised the possibility that the necessary information to access the phone could have been obtained from Victim's phone carrier. But Detective Acata testified that such an effort would not have been successful, and no evidence contradicting this assertion was provided to the district court.

{7} Having considered the foregoing evidence, the district court found that the State had met its burden under *Hanson* to show that it made a diligent effort to obtain the original text messages. See 2015-NMCA-057, ¶ 13. The court also found that the inaccessibility of the messages was the equivalent of having the messages be physically lost or destroyed, for purposes of the best-evidence rule. Therefore, the court allowed Nephew to testify about the text messages he had seen on Victim's phone.

{8} In reviewing this issue, we note first that Defendant does not challenge the district court's determination that the inaccessibility of the text messages was the functional equivalent of the loss or destruction of those messages. We therefore need not decide that legal question in this opinion. With respect to the merits of the "diligent efforts" question, the applicable standard for our review is abuse of discretion. See *id.* ¶ 5. Given the evidence of the efforts made by Detective Acata to unlock Victim's phone, as well as the lack of any evidence indicating that additional efforts may have been successful, the district court's decision that the State had made diligent efforts to obtain the original text messages was not "clearly against the logic and effect of the facts and circumstances of the case." See *id.* (stating abuse of discretion standard). We affirm the district court's decision as to this issue.

#### **B. Possible Extraneous Information Reaching the Jury**

{9} Almost three months after the trial was concluded, the district court received an email from the jury foreman, stating in pertinent part as follows:

I was the foreman for the jury in the Thomas Stevenson and Oshay Toney case. I have been wondering about something since we sat on the case and the latest gun violence makes me ask the ques-

tion. Why were the individuals not charged with possession of a firearm as a felon and conceal carry as a felon? Is that included in the charge of committing the crime with a gun? Also it was mentioned that the weapons were "enhanced" so why was the use of a silencer not part of the charges?

{10} The district court notified the parties about the email, and Defendant subsequently filed a motion requesting an evidentiary hearing, claiming that the email indicated extraneous information may have reached the jury during the trial. Defendant asked that the district court issue a subpoena to the jury foreman, directing the foreman to appear for a hearing at which he could be questioned about any extraneous information. The district court denied the motion.

{11} Following a jury trial, jurors are forbidden from testifying about any part of the deliberation process or from providing a statement to the court about that process, subject to three exceptions: a juror may testify about whether (a) extraneous prejudicial information was improperly brought to the jury's attention; (b) an outside influence was improperly brought to bear on any juror; or (c) a mistake was made in entering the verdict on the verdict form. Rule 11-606(B) NMRA. Where a party files a motion for new trial based on the possibility that extraneous information reached the jury, the party "must make a preliminary showing that he or she has competent evidence that material extraneous to the trial actually reached the jury." *State v. Mann*, 2002-NMSC-001, ¶ 19, 131 N.M. 459, 39 P.3d 124 (alteration, internal quotation marks, and citation omitted). Although Defendant did not file a motion for a new trial, but instead filed a motion to force the juror to testify concerning the extraneous-information question, we see no reason to depart from the requirement of a preliminary showing of competent evidence before forcing a juror to testify under oath.

{12} Defendant points to the jury foreman's email and suggests that it indicates a possibility that extraneous information reached the jury. The district court rejected this interpretation of the email, and we do as well. The fact that both Defendant and Codefendant had prior felony convictions was revealed by each while each was testifying. There is no suggestion that either weapon used in the shooting had a silencer attached, and this portion of the email is more probably a result of confusion caused by the phrase "firearm enhancement" that was part of the charges read to the jury at the beginning of trial. To the extent Defendant argues that the email exhibits some knowledge of the judicial system

and felon-in-possession issues, jurors are allowed to use knowledge they already possess in deciding a case, and this is not an indication that impermissible extraneous information reached the jury during trial. See *id.* ¶¶ 27-28. The district court did not abuse its discretion in holding that the juror's email did not provide a basis to force the juror to attend a hearing and testify under oath concerning the source of his knowledge about criminal law and procedure.

#### **C. Purported Brady Violation**

{13} At trial, Girlfriend testified favorably for the State, including testimony that she did not hear Victim threaten Defendant, that Victim did not have a gun in his hand when he was shot, and that the SUV was backing out of the driveway and had exited it when the shooting began. After Girlfriend testified, but before the trial ended, Girlfriend was arrested and charged with a number of counts of fraud arising out of her employment. Defendant learned of the arrest after trial and filed a motion for new trial raising the State's failure to disclose the arrest as one of the grounds for the motion.

{14} On appeal Defendant contends the prosecutor committed a *Brady* violation by failing to disclose the investigation and arrest of one of the State's most important witnesses. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring prosecution to disclose evidence in its possession that could be favorable to a defendant); *Case v. Hatch*, 2008-NMSC-024, ¶¶ 44-47, 144 N.M. 20, 183 P.3d 905 (discussing standards applicable to a *Brady* claim in New Mexico). Defendant maintains the information about the investigation and arrest would have been valuable impeachment material. Material bearing on a witness's credibility, and thus useful for purposes of impeachment, is governed by the disclosure requirements of *Brady* and its progeny. See *Case*, 2008-NMSC-024, ¶¶ 50, 53; see also *United States v. Bagley*, 473 U.S. 667, 678-83 (1985).

{15} We decline to address Defendant's *Brady* argument because it was not preserved below. Defendant argues that he preserved the issue in his motion for new trial. That motion, however, fails to mention *Brady* or any other case discussing the requirements of the *Brady* doctrine. More importantly, the motion did not discuss or even mention any of the doctrinal bases for the *Brady* requirements, such as due process or prosecutorial misconduct. See, e.g., *Case*, 2008-NMSC-024, ¶¶ 44, 47; *State v. Balenquah*, 2009-NMCA-055, ¶ 11, 146 N.M. 267, 208 P.3d 912. Furthermore, neither the State nor the district court understood Defendant to be raising a *Brady* issue. Instead, the State's response addressed Defendant's claim as a matter of



newly-discovered evidence and Defendant did not file a reply brief clarifying that he was raising a *Brady* issue. Ultimately, the district court decided the motion relying on newly discovered evidence principles.

{16} We acknowledge that the nomenclature used in a motion is not controlling and that legal citations contained in a motion are not determinative of the issue being raised. See, e.g., *State v. Paiz*, 2011-NMSC-008, ¶ 31, 149 N.M. 412, 249 P.3d 1235. Instead, we look to the substance of the motion to determine the actual issue raised. *Id.* The motion for new trial filed in this case did not in any way alert the district court to the potential *Brady* issue or provide it with a fair opportunity to rule on a *Brady* issue. See Rule 12-321(A) NMRA (“To preserve an issue for review, it must appear that a ruling or decision by the [district] court was fairly invoked.”). The motion did not claim that the prosecutor herself knew of the investigation or of Girlfriend’s arrest. Nor did it even allege that the prosecution team was aware of the investigation or Girlfriend’s arrest. See *Case*, 2008-NMSC-024, ¶ 46 (explaining that “the ‘prosecution’ for *Brady* purposes encompasses not only the individual prosecutor handling the case, but extends to the prosecutor’s entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of the case” (alteration, internal quotation marks, and citation omitted)); see also *Smith v. Sec’y of N.M. Dep’t of Corr.*, 50 F.3d 801, 824, 831-32 (10th Cir. 1995) (discussing a prosecution team theory and imputation of knowledge to the prosecutor). The factual allegations of Defendant’s motion were limited to assertions that Albuquerque Police Department (APD) officers prepared the complaint and the arrest warrant issued against Girlfriend, and subsequently arrested Girlfriend and that Detective Acata, an employee of APD, sat at counsel table with the prosecutors at Defendant’s trial.

{17} Defendant’s assertion that one APD officer, who was not “involved in investigative aspects of the case,” investigated and arrested Girlfriend for alleged offenses completely distinct from the case in which she testified, is simply insufficient to alert anyone to a potential *Brady* issue. See, e.g., *Case*, 2008-NMSC-024, ¶ 46 (alteration, internal quotation marks, and citation omitted); see also *Smith*, 50 F.3d at 824 (stating that for *Brady* purposes, knowledge of arms of the state “involved in investigative aspects of a particular criminal venture” is imputed to the prosecutor). Defendant’s motion seemingly seeks to impose some sort of strict liability upon the State for a discovery violation—Defendant asserted that APD possessed the information about Girlfriend’s arrest, that

Detective Acata sat at the counsel table with the prosecutors, and that the State failed to disclose the arrest, thus violating LR2-400(D)(1), (3) NMRA (2016), as well as Rule 5-501(A)(3) NMRA. That, though, is not the same as a *Brady* violation and nothing in the motion was sufficient to raise an allegation of a *Brady* violation. In sum, merely alleging that possible impeachment information, entirely unconnected to the case at hand, was possessed by a law enforcement officer who also had no connection to the case at hand, does not implicate *Brady* to a sufficient extent to preserve such an argument for appeal. We therefore will not address the *Brady* argument brought for the first time on appeal. See *Paiz*, 2011-NMSC-008, ¶ 33 (“On appeal we only consider issues raised in the [district] court unless the issues involve matters of jurisdictional or fundamental error.”).

{18} Although Defendant has argued the merits of the *Brady* issue and has not asked us to address it as a matter of fundamental error, our Supreme Court has indicated (albeit in an unpublished decision) that an improperly preserved *Brady* issue should be analyzed for fundamental error. See *State v. Gardner*, No. S-1-SC-35981, dec. ¶ 30 (N.M. Sup. Ct. Mar. 8, 2018) (non-precedential); see also *State v. Trujillo*, 2002-NMSC-005, ¶ 52, 131 N.M. 709, 42 P.3d 814 (stating that when an issue of prosecutorial misconduct has not been properly preserved by a timely objection at trial, we have discretion to review the claim on appeal for fundamental error). We find no fundamental error occurred. To establish a *Brady* violation a defendant must show three things: “(1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material to the defense.” *Case*, 2008-NMSC-024, ¶ 44 (internal quotation marks and citation omitted). As we have alluded to above, Defendant’s submission to the district court did not raise a viable question as to the first prong of the test—whether the prosecution suppressed the evidence. Absent information indicating a member of the prosecution team, as opposed to an unidentified APD officer, possessed the information, knowledge of that information cannot be imputed to the prosecutor and, therefore, no prosecutorial suppression occurred.

{19} While the failure to satisfy the first *Brady* requirement alone would justify a refusal to find fundamental error here, we note also that the lack of information about Girlfriend’s investigation and arrest did not prevent Defendant from vigorously challenging her credibility at trial. Defendant was able to elicit evidence that Girlfriend had given different versions of the incident at different times, including

information as critical as who fired the first shots, Defendant or Codefendant. There was also evidence that Girlfriend told different versions of the events to her own daughter, and then denied at trial that she had even spoken to her daughter about the shooting. Girlfriend’s daughter also testified that she knows her mother lies. Significantly, Girlfriend was also forced to admit that she found a gun on the floor of the SUV after the shooting, and instead of giving it to the police, she attempted to hide it by tossing it into some bushes. She also testified on cross-examination that during an interview with Detective Acata she repeatedly denied removing the gun from the SUV until she was confronted with the possibility that DNA testing would be done on the gun. The fact that the arrest information was not the only source of impeachment material regarding Girlfriend, and that Defendant was able to cast considerable doubt on her credibility without that information, is a factor weighing against a finding of *Brady* materiality with respect to that information. See, e.g., *Case*, 2008-NMSC-024, ¶ 54 (discussing materiality of suppressed information, noting that the witness’s credibility had already been aggressively attacked, and concluding that cumulative evidence is not material for purposes of *Brady*). Given the facts that Defendant did not show the prosecution suppressed the information, and that the materiality of that information is at best minimal, fundamental error was not present here. Cf. *State v. Barber*, 2004-NMSC-019, ¶ 17, 135 N.M. 621, 92 P.3d 633 (providing that fundamental error occurs in “cases in which a mistake in the process makes a conviction fundamentally unfair”).

{20} In addition to the *Brady* argument, Defendant references the Rules of Criminal Procedure as part of his presentation on this issue. His argument consisted of five sentences in his brief in chief, pointing out that Defendant had filed a demand for all discovery required by *Brady* and Rules 5-501, 5-503, and 5-505 NMRA, including potential impeachment evidence; that the State had a continuing duty to disclose newly discovered evidence under Rule 5-505(A); and that the State was therefore required to disclose the filing of the criminal complaint against Girlfriend, the issuance of the arrest warrant, and the arrest. Defendant did not develop any type of argument about why the State would be responsible under the rules for disclosing evidence of which the prosecution team was unaware, nor cite any authority beyond the bare language of the rules that would explain why the discovery rules were applicable and were violated under the circumstances of this case. We will not address an undeveloped argument or



perform Defendant's research for him. See *State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining that appellate courts are under no obligation to review unclear or undeveloped arguments); *State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254 (reminding counsel that the appellate courts are not required to do their research). We therefore do not address the question of whether a violation of the Rules of Criminal Procedure occurred under the particular circumstances of this case.

**D. Evidence of Prior Violent Conduct**  
 {21} As part of his self-defense and defense-of-others claims, Defendant proposed to introduce evidence of specific violent conduct engaged in by Victim in the past. This evidence included a twenty-five-year-old murder conviction; another alleged murder for which Victim had not been charged; an alleged rape of a male inmate while Victim was incarcerated; alleged rapes of several women occurring since 2015, when Victim was released from prison; and the fact that Victim referred to himself, or was known as, "Hit Man" or "the Don." The State objected and argued that if Defendant was allowed to introduce evidence of specific prior violent acts by Victim, the State would be allowed to respond by presenting evidence of Defendant's own prior violent acts. The State relied on Rule 11-404(A)(2)(b)(ii) NMRA as the basis of its argument, and presented a litany of prior violent acts by Defendant, including prior convictions, charged conduct that did not lead to convictions, and uncharged conduct, that the State wanted to present to the jury at trial.

{22} At a pretrial hearing the district court appeared to accept the State's argument, with the proviso that the "more prejudicial than probative" balancing provisions of Rule 11-403 NMRA would apply to any prior conduct evidence that either side attempted to introduce. The district court specifically reserved ruling as to any particular piece of evidence concerning prior violent conduct and required the parties to submit written filings explaining the evidence each side proposed to present so the court could properly apply the Rule 11-403 balancing test to each such piece of evidence. In sum, at the hearing the district court made no definitive ruling about what prior violent conduct evidence would be allowed at trial, from either side.

{23} On appeal Defendant argues that the State's and the district court's interpretation of Rule 11-404(A)(2)(b)(ii) is erroneous and application of that interpretation was reversible error. It is well established that a defendant claiming self-defense or defense of others, as did Defendant here, may present evidence of specific prior violent acts by the victim, if the defendant

was aware of those prior acts at the time of the incident in question. See *State v. Maples*, 2013-NMCA-052, ¶¶ 14, 18, 300 P.3d 749. The purpose of allowing such evidence is to permit the defendant to establish his or her "subjective apprehension of the victim[.]" which caused the defendant to act reasonably to prevent the victim from causing harm. *Id.* ¶ 18. It is also well established that Rule 11-403's balancing test applies to prior violent acts evidence, such that a defendant may not be permitted to submit to the jury evidence of each and every violent act allegedly committed by the victim in the past. See, e.g., *State v. Baca*, 1992-NMSC-055, ¶ 5, 114 N.M. 668, 845 P.2d 762 (holding that the district court "retains the discretion to exclude specific instances of the victim's conduct if the evidence is substantially more confusing, cumulative, or prejudicial than probative). Admission of prior violent conduct evidence is within the district court's discretion, and exclusion of some instances of the victim's prior conduct will constitute an abuse of discretion only if the defendant was prevented from proving an element of his defense. See *id.* ¶ 9. In particular, where the evidence is cumulative, no abuse of discretion is committed if the evidence is excluded. See *id.* ¶ 11. Thus, Defendant is correct that he was entitled to introduce at least some evidence of Victim's prior violent acts, as long as Defendant was aware of those acts at the time of the shooting.

{24} It also seems apparent that Defendant's interpretation of Rule 11-404(A)(2)(b)(ii) is correct, and the district court's tentative acceptance of the State's interpretation was not. Neither the parties nor this Court has been able to locate published cases discussing this provision of the rules. However, our Supreme Court, in an unpublished decision, addressed the very issue raised by the parties in this case. *State v. Ramirez*, No. S-1-SC-34576, dec., (N.M. Sup. Ct. Dec. 1, 2016) (non-precedential). *Ramirez*, like this case, was a self-defense case. See *id.* ¶ 59. At trial the state was allowed to present evidence of a prior violent incident during which the defendant had head-butted a police officer. *Id.* ¶ 55. Our Supreme Court held that this was error, stating as follows: "While it is correct that the defendant who offers evidence of a victim's pertinent character trait (e.g., violence) opens the door to allow the prosecution to offer evidence of the defendant's same character trait, under Rules 11-404(A)(2)(b) and 11-404(A)(2)(b)(ii) . . . , the evidence that is admitted *may only be reputation or character evidence*, unless the character trait is an essential element of the crime charged." *Ramirez*, No. S-1-SC-34576, dec. ¶ 59 (emphasis added). The Court went on to point out

that introducing evidence of a defendant's past acts of violence does not prove an essential element of the crime charged because violence is not a specific element of murder or self-defense. *Id.* Finally, the Court noted that it appeared that the evidence of the defendant's prior violent act was offered only to show the defendant's propensity for violence, which is impermissible. See *id.* Therefore, *Ramirez* held in essence that only reputation or opinion evidence should have been admitted under Rule 11-404(A)(2)(b)(ii). See *Ramirez*, No. S-1-SC-34576, dec. ¶ 59.

{25} Of course, as an unpublished opinion, *Ramirez* is not binding precedent, and we discuss it only for its persuasive value. See Rule 12-405(A) NMRA. We note first that Rule 11-404(A)(2)(b)(ii) is modeled after the federal version of that rule. Rule 11-404 comm. cmt. (discussing 2012 amendment). When the federal version of Rule 11-404(A)(2)(b)(ii) was added to Fed. R. Evid. 404, the Federal Rules Advisory Committee discussed the purpose of the amendment and then made the following statement: "By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion." Fed. R. Evid. 404 advisory comm. notes. Since the federal rule is similar to our own, the advisory committee's discussion of the federal rule is persuasive authority for interpreting our own version. See *State v. Lopez*, 1997-NMCA-075, ¶ 10, 123 N.M. 599, 943 P.2d 1052 (stating the same proposition with respect to federal case law and legislative history). The federal version of the rule does not allow proof of character by way of prior violent acts, but only by reputation or opinion evidence, which is exactly what *Ramirez* held.

{26} In addition, the discussion in *Ramirez* comports with the purposes of our evidentiary rules concerning prior conduct by parties. As *Ramirez* implies, admission of evidence of prior conduct is severely limited because in many cases the only purpose for offering such evidence is to establish a propensity by a party to act in a certain way. See *Ramirez*, No. S-1-SC-34576, dec. ¶ 59 ("It seems that the information of [the d]efendant head-butting an officer is being used only to show [the d]efendant's propensity for violence"). The case before us clearly illustrates the issue. Defendant sought to introduce evidence of Victim's prior violent acts for a permissible purpose, to show he was afraid of Victim. See *Maples*, 2013-NMCA-052, ¶ 18. In response, the State offered no permissible purpose for allowing evidence of Defendant's prior violent conduct, relying solely on the language of the rule. And as Defendant argued below and argues on appeal, Defendant's violent history has no relevance to the is-

sues in this case, other than as impermissible propensity evidence tending to show Defendant did not act in self-defense or in defense of others. Adopting the State's interpretation of the provision would, in self-defense cases, essentially abrogate the evidentiary rules' forceful limitation of prior conduct evidence to a few permissible purposes, and would allow the State to introduce such highly prejudicial evidence against a defendant simply because the defendant attempted to prove his defense by showing he was aware of the victim's history of violent acts. We reject such an interpretation and instead adopt the one set out in *Ramirez*: under Rule 11-404(A)(2)(b)(ii), the evidence that the state may responsibly introduce is limited to reputation or opinion evidence in most instances, unless the defendant's character trait is an essential element of the crime charged.

{27} The fact that the State's interpretation of Rule 11-404(A)(2)(b)(ii) and the district court's apparent acceptance of that interpretation was wrong, does not end our inquiry. We must still decide whether Defendant established that he was prejudiced as a result. See *State v. Fernandez*, 1994-NMCA-056, ¶ 13, 117 N.M. 673, 875 P.2d 1104 ("In the absence of prejudice, there is no reversible error."). Defendant argues that the district court's action "gutted [Defendant's] ability to support his self-defense and defense of another claims." We have difficulty with this assertion, however, because Defendant was allowed to introduce some evidence of Victim's prior violent conduct, and the State was allowed to introduce almost no evidence of Defendant's own violent conduct except that which had resulted in convictions. Defendant testified that he knew of Victim's prior murder conviction and felt threatened as a result. He was also allowed to call Victim "Hit" or "Hit Man" on the stand several times, mentioning that the nickname also made him feel threatened. Though cross-examination of Girlfriend, Defendant was allowed to present evidence that Victim had four other felony convictions since 2008, in addition to the murder conviction about which Defendant testified.

{28} In response to this "prior violent conduct" evidence concerning Victim, the State was not allowed to delve into any of the many instances of Defendant's prior charged or uncharged conduct that the State had originally proposed to explore. Instead, the district court limited the State to eliciting evidence of Defendant's prior felony convictions.

{29} On appeal Defendant has not argued that any of the evidence concerning his prior convictions was wrongly admitted.

Instead, he argues that he was inhibited from even attempting to introduce evidence about Victim's prior violent acts, such as the alleged rape of an inmate or the alleged rapes of women since 2015, due to the district court's apparent acceptance of the State's position regarding Rule 11-404(A)(2)(b)(ii). We point out that Defendant was not inhibited from presenting all of the prior violent conduct evidence for which he sought admission, as we have discussed above.

{30} In addition, Defendant did not preserve this "inhibition" argument below. As we noted above, at the pretrial hearing the district court made no definitive ruling as to what evidence would be permitted and what would not. At trial, the district court reiterated that it was reserving ruling on the evidence of prior violent conduct, as to both Victim and Defendant. Defendant did subsequently state that he did not plan on "going into" the alleged prison rapes or other alleged rapes, but he did not explain why. Defendant never made a request to have the district court make a final determination about what evidence would be permitted and what would not, or how the State might be permitted to retaliate if he introduced other evidence of prior violent acts by Victim. He also did not attempt to introduce additional evidence of prior violent conduct by Victim. By failing to do so, he gave the district court no opportunity to apply Rule 11-403 to any other evidence he might have wanted to offer, or to address his concerns about the alleged inhibitory effect of the court's interpretation of Rule 11-404(A)(2)(b)(ii). It is axiomatic that the district court cannot be expected to rule on matters that are not presented to it for decision, and we will not reverse the court on grounds not presented to that court. See *State v. Montoya*, 2015-NMSC-010, ¶ 45, 345 P.3d 1056 ("In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the [district] court of the nature of the claimed error and invokes an intelligent ruling thereon." (internal quotation marks and citation omitted)).

{31} In the end, Defendant attempted to introduce only two instances of prior violent conduct by Victim that he knew about at the time of the shooting: Victim's murder conviction, and Victim's "Hit Man" nickname. The district court allowed him to testify about both, and as we have discussed, did not allow the State to introduce its own violent-conduct evidence in response. To the extent he now argues that he was sub silentio inhibited from attempting to present evidence of additional prior violent acts, that is not a question we can review without a record supporting it. See *State v. Hunter*, 2001-NMCA-078, ¶ 18,

131 N.M. 76, 33 P.3d 296 ("Matters not of record present no issue for review."). We therefore hold that any prejudice Defendant may have suffered as a result of the district court's erroneous interpretation of Rule 11-404(A)(2)(b)(ii) is not of record and cannot be the basis for reversal.

{32} A review of the evidence introduced at trial, which is all we can consider at this point, shows that the district court was appropriately cautious about admitting evidence of prior violent conduct as to both Victim and Defendant, given the restrictions of Rule 11-403. The district court specifically stated that it wanted to avoid "mini[ ]trial[s]" on extraneous matters. Although the district court appears to have misconstrued Rule 11-404(A)(2)(b)(ii), when put to the test and presented with the actual evidence that Defendant and the State wanted to introduce, the court rejected most of the evidence proffered by the State and admitted only evidence that was admissible under other rules or for other reasons. No error has been claimed as to the specific pieces of evidence that were presented to the district court for a decision as to admissibility. As to other rulings that the district court could have been, but was not, asked to make, we will not speculate.

{33} As a final note, when a victim's prior violent acts are excluded by the district court, the main issue on appeal is whether a defendant was deprived of the opportunity to present his defense. See *State v. Armendariz*, 2006-NMSC-036, ¶¶ 14, 18, 140 N.M. 182, 141 P.3d 526, *overruled on other grounds by State v. Swick*, 2012-NMSC-018, ¶ 31, 279 P.3d 747. That did not happen here. Defendant was allowed to present evidence that he feared Victim, and to show that he had reason to do so given Victim's violent history. Defendant also testified about the specific facts surrounding the shooting that caused him to flee at the SUV—that he thought the SUV may have run over a person and that it was driving toward a house containing a number of children. Defendant therefore had an adequate opportunity to present his claims of self-defense and defense of others, and we will not reverse the district court on this issue.

### III. CONCLUSION

{34} Based on the foregoing, we affirm Defendant's convictions.

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

**WE CONCUR:**

**J. MILES HANISSEE, Chief Judge**  
**KRISTINA BOGARDUS, Judge**



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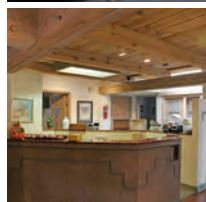
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### Town Attorney

The Town of Silver City, New Mexico is seeking applicants for the position of Town Attorney. The position calls for an attorney with at least five years of experience in government practice. The applicant must demonstrate working knowledge of administrative, criminal and corporate law. The position will involve dealing with legal concerns associated with city planning, personnel and labor management, law enforcement, public works, water and the broad range of legal issues encountered by the several other departments of the Town. The Town Attorney will provide legal support to the Town Council, Town Manager and to the Town staff, and must be familiar with New Mexico law. Applicants must be proficient in drafting ordinances and interpreting existing local, state and federal law as they apply to New Mexico municipalities. The Town Attorney must possess excellent writing and communication skills and will often be called to issue legal opinions and memoranda of interpretation. It is intended that the successful applicant will interact with attorneys from other public entities and must have the ability to work cooperatively. The Town Attorney will also act as legal counsel for the Town's Planning and Zoning Commission, and the Town's various other committees and commissions. The attorney will work closely with Executive Department staff and is expected to be knowledgeable of personnel and union issues. It is the continuing commitment of the Town to be pro-active in educating its officers and staff so as to minimize exposure to litigation and liabilities occasioned by error or misapprehensions. The Town subscribes to the practice of "preventative law" and is seeking an attorney who is amicable to that philosophy with the skill to implement it. The Town Attorney will be an in-house employee, with access to the generous benefits offered by the Town. Salary will be negotiable based upon experience and skills level. Recognizing the importance of growing relationships, the successful applicant will need to be a resident of Grant County within three months of appointment. The position is open for application and will close December 04, 2020. Please direct inquiries to 575-534-6359 or [personnelofficer@silvercitynm.gov](mailto:personnelofficer@silvercitynm.gov). For complete copy of job description and instructions on submittal of application, go to [www.townofsilvercity.org](http://www.townofsilvercity.org).

### Lawyer Position

Guebert Gentile & Piazza P.C. seeks an attorney with up to five years' experience and the desire to work in tort and insurance litigation. If interested, please send resume and recent writing sample to: Hiring Partner, Guebert Bruckner Gentile P.C., P.O. Box 93880, Albuquerque, NM 87199-3880, [advice1@guebertlaw.com](mailto:advice1@guebertlaw.com). All replies are kept confidential. No telephone calls please.

### Attorney

Jarmie & Rogers, P.C., is hiring an attorney with 2+ years of civil litigation experience to work with us in our busy practice. The position requires strong oral advocacy abilities, including the ability to argue complex motions in state and federal court. Experience taking and defending depositions is preferred, as is experience in employment litigation. Candidates located in either Albuquerque or Las Cruces will be considered. We offer a competitive salary and benefits package, along with significant potential for professional growth. For more information about our firm, please visit our website, [www.jarmielaw.com](http://www.jarmielaw.com). Please submit resumes to [ereeves@jarmielaw.com](mailto:ereeves@jarmielaw.com).

### Commercial Liability Defense, Coverage Litigation Attorney P/T maybe F/T"

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

### Litigation Associate

Mann Morrow, PLLC, a growing litigation firm with offices in Las Cruces, NM and El Paso, TX, seeks a litigation associate attorney to join our Las Cruces team. The ideal candidate will have up to five years experience, and be a team player with excellent communication (written and oral) and legal research skills, a strong work ethic, and a willingness to learn. The firm offers a competitive salary and benefits package, including health insurance and 401K. License to practice law in New Mexico required. Please send letter of interest, resume, references and writing sample to [christina.munoz@mannmorrow.com](mailto:christina.munoz@mannmorrow.com). All responses are confidential.

### Deputy Director of Policy

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

### Chief Deputy District Attorney Deputy District Attorney Senior Trial Attorney

The Third Judicial District Attorney's Office in Las Cruces is looking for: Chief Deputy District Attorney, Deputy District Attorney, Senior Trial Attorney. Trial Attorney (This is a grant funded position through HIDTA and the position is contingent on continued funds from the grantor). Please see the full position descriptions on our website <http://donaana-countyda.com/>. Interviews will be conducted by the District Attorney Incumbent for 2021. Submit Resume to Whitney Safranek, Human Resources Administrator at [wsafranek@da.state.nm.us](mailto:wsafranek@da.state.nm.us).

### Trial Attorneys

The Ninth Judicial District Attorney's Office is seeking entry level and experienced trial attorneys for our Clovis office. Come join an office that is offering immediate jury trial experience, during the COVID-19 crisis, in a jury trial test jurisdiction. In addition, we offer in depth mentoring and an excellent work environment. Salary commensurate with experience starting at \$54,308/yr. Send resume and references to Steve North, [snorth@da.state.nm.us](mailto:snorth@da.state.nm.us).

### Managing Attorney

The Law Offices of the Public Defender has a great opportunity for the right attorney! Are you the one? This person can step immediately into a Managing Attorney position in the Hobbs, New Mexico, LOPD office. In addition to supervising the office, the Managing Attorney will carry a caseload and provide professional level services representing juvenile and adult indigent clients, handle highly complex appeals or serve as lead counsel for serious violent felony or appeals and other highly complex litigation cases. For more information and to apply for this position, go to <https://www.governmentjobs.com/careers/lopdnm>.

### Multiple Positions

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 Fajardo [kfajardo@da.state.nm.us](mailto:kfajardo@da.state.nm.us) or 505-771-7400 for an application. Apply as soon as possible. These positions will fill up fast!

### Attorneys – 3 – 5 Years Licensed

Walsh Gallegos Treviño Russo & Kyle PC is a law firm devoted to serving public education. Since 1983, we have worked in partnership with leaders in public education, and we strive to make a difference in the boardroom, the courtroom, and most importantly, the classroom. Our Albuquerque office is currently seeking an attorney(s) licensed 3 – 5 years in New Mexico to help us continue our work. The position involves the representation of public school districts and other educational institutions and governmental entities in the areas of facilities and business transactions, real estate, and employment, including civil litigation in these areas. Attention to detail and excellent research and writing skills are required. Public speaking experience, strong interpersonal skills, litigation experience, and experience with school districts or other governmental entities is preferred. In addition to fulltime positions, the firm will consider candidates seeking contract or short term assignments with the possibility of developing into a full time position. Please send resume and writing sample to [jobs@wabsa.com](mailto:jobs@wabsa.com). Because we sometimes have openings in multiple offices, please indicate the city in the subject line of your email.

### Litigation Attorney

With 53 offices and over 1,600 attorneys, Lewis Brisbois is one of the largest and most prestigious law firms in the nation. Our Albuquerque office is seeking associates with a minimum of three years litigation defense experience. Candidates must have credentials from ABA approved law school, be actively licensed by the New Mexico state bar, and have excellent writing skills. Duties include but are not limited to independently managing a litigation caseload from beginning to end, communicating with clients and providing timely reporting, appearing at depositions and various court appearances and working closely with other attorneys and Partners on matters. Please submit your resume along with a cover letter and two writing samples to [phxrecruiter@lewisbrisbois.com](mailto:phxrecruiter@lewisbrisbois.com) and indicate "New Mexico Litigation Attorney Position". All resumes will remain confidential.

### 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](mailto:e_info@abrfirm.com). Please reference Attorney Recruiting.

### Assistant City Attorney

The City of Albuquerque Legal Department is hiring an Assistant City Attorney for the Litigation Division. The department's team of attorneys represent the City in litigation matters in New Mexico State and Federal Courts, including trials and appeals, and provide legal advice and guidance to City departments. Attention to detail and strong writing skills are essential. Three (3)+ years' experience is preferred, with additional preference for civil defense litigation experience, and must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Please apply on line at [www.cabq.gov/jobs](http://www.cabq.gov/jobs)

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Contact Marcia Ulibarri,  
at 505-797-6058 or email [mulibarri@nmbar.org](mailto:mulibarri@nmbar.org)



### 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 apply on line at [www.cabq.gov/jobs](http://www.cabq.gov/jobs) and include a resume and writing sample with your application.

### 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](mailto:hhinton@cordelllaw.com)

### Workers' Compensation Chief General Counsel (Exempt position)

The New Mexico Workers' Compensation Administration is seeking to fill its Chief General Counsel position. The Chief General Counsel represents WCA in all legal matters and manages the Office of General Counsel. The position also supervises the Bureau Chiefs of the Enforcement and Compliance bureaus and the Uninsured Employers Fund. Duties include but are not limited to: providing advanced legal counsel to the agency Director and executive staff. The position requires a broad range of legal experience including administrative law, legislative process, New Mexico Inspection of Public Records Act (IPRA), labor and employment law, procurement, contracts and Workers' Compensation law. The position is located in Albuquerque, New Mexico. Current New Mexico licensure is required. Please send resume and cover letter to WCA Deputy Director of Support Services, Leigh Martinez at [Leigh.Martinez@state.nm.us](mailto:Leigh.Martinez@state.nm.us).

### Assistant City Attorney

Assistant City Attorney position available with the City of Albuquerque with a main focus on assisting the City of Albuquerque and the Albuquerque Police Department in achieving operational compliance with the Court Approved Settlement Agreement (CASA). The attorney will provide oral and written legal advice, recommendations, and opinions to a variety of levels of Department personnel and City staff on matters regarding the operations and performance of APD. The attorney will regularly interact with and attend meetings with: the parties and monitor; the Civilian Police Oversight Agency and its Board; community policing councils; amici; other stakeholders and members of the community. Applicant must be admitted to the practice of law in New Mexico and be an active member of the Bar in good standing. Preferred qualifications include: knowledge of state and federal laws regarding constitutional policing and police practices; experience in the practice of local or state government; strong organization skills; strong legal research and writing skills; experience in project development and management; experience in business letter writing; and supervisory experience. Experience in report and proposal preparations, developing curricula, and application of adult educational principles is a plus. Salary will be based upon experience and the City of Albuquerque Attorney's Personnel and Compensation Plan with a City of Albuquerque Benefits package. Please apply on line at [www.cabq.gov/jobs](http://www.cabq.gov/jobs)

### Energy, Minerals and Natural Resources Department seeks general counsel

The Energy, Minerals and Natural Resources Department (EMNRD) is looking to fill the position of General Counsel. This position reports to the Cabinet Secretary of EMNRD and supervises and manages the legal personnel and activities across all EMNRD divisions. The General Counsel is a member of the agency's senior staff, regularly coordinating with others in the Office of the Secretary, EMNRD division directors, and legal counsel in other state agencies. The Energy, Minerals and Natural Resources Department strives to become a national model for an energy and natural resources agency with deep policy expertise, transparent processes, and a cohesive mission that balances conservation and development. EMNRD contains six divisions: Energy Conservation and Management, Forestry, State Parks, Oil Conservation, Mining and Minerals, and Administrative Services. The ideal candidate has a J.D. degree, legal experience related to natural resources and administrative law, ability to collaborate and manage a team efficiently, a demonstrated ability to review and revise legislation and amendments, and is an active member of the New Mexico bar. The full job description can be found here. To apply, applicants must submit a resume and cover letter that highlights interest in the position and addresses in detail how they meet the qualifications. Applicants must also submit a short (no more than 10 pages) writing sample that includes legal analysis, which should be exclusively the applicant's work. Additionally, applicants must provide at least three references with contact information. Please submit complete applications via email to Lois C. Pedro at [loisc.pedro@state.nm.us](mailto:loisc.pedro@state.nm.us). Please clearly identify in the subject line the position to which you are applying.

### Associate Attorney

Hatcher Law Group, P.A. seeks an associate attorney preferably with three or more years of legal experience for our downtown Santa Fe office. We are looking for an individual motivated to excel at the practice of law in a litigation-focused practice. Hatcher Law Group defends individuals, state and local governments and institutional clients in the areas of insurance defense, coverage, workers compensation, employment and civil rights. We offer a great work environment, competitive salary and opportunities for future growth. Send your cover letter, resume and a writing sample via email to [juliez@hatcherlawgroupnm.com](mailto:juliez@hatcherlawgroupnm.com).



**Bilingual Associate Attorney**

Bilingual Immigration Associate Attorney. Noble & Vrapı, P.A. is hiring for a full time bilingual (English-Spanish) associate attorney to work in our Santa Fe office in matters of family immigration and humanitarian visas. This position requires someone who cares for the community we serve, has good attention to detail, and excellent organizational skills. The associate will handle family visas, humanitarian visas, and removal defense caseload with efficiency and quality in a team composed of other attorneys and paralegals. No prior immigration experience required. New graduates are welcome to apply. Must be licensed in any jurisdiction in the United States. Will consider recent graduates who have not yet taken the bar exam. Our philosophy is to hire the best people and pay at the top of the market, including a full benefit package. To apply, email resume to careers@noblevrapi.com.

**Attorney**

RMH Lawyers, PA seeks an associate attorney to join our firm, focusing on business advice and transactions, commercial litigation, and employment law. Although we would welcome a candidate with experience in these areas, we will also consider recent law school graduates who are motivated and sincerely interested in learning to practice business law. We are a Martindale AV-rated firm, and we provide sophisticated services to a long-term client base. Our preferred candidate will have excellent academic credentials, strong research and writing skills, and an enthusiastic attitude. We offer a competitive salary and benefits package, as well as a collegial work environment. Interested parties should submit a resume and letter of interest to [offmgr@rmhlawyers.com](mailto:offmgr@rmhlawyers.com). All inquiries will be held in strictest confidence.

**Paralegal**

The City of Albuquerque Legal Department is seeking a Paralegal to assist an assigned attorney or attorneys in performing substantive administrative legal work from time of inception through resolution and perform a variety of paralegal duties, including, but not limited to, performing legal research, managing legal documents, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings, setting up and maintaining a calendar with deadlines, and other matters as assigned. Excellent organization skills and the ability to multitask are necessary. Must be a team player with the willingness and ability to share responsibilities or work independently. Starting salary is \$20.69 per hour during an initial, proscribed probationary period. Upon successful completion of the proscribed probationary period, the salary will increase to \$21.71 per hour. Competitive benefits provided and available on first day of employment. Please apply at <https://www.governmentjobs.com/careers/cabq>.

**Legal Assistant**

Plaintiff’s PI firm seeking FT legal assistant with experience in e-filing (State and Federal); transcribing dictation; organization of medical records & bills; calendaring; and excellent computer skills. Salary DOE; health insurance and other benefits. Please send resume to [ncwagner@duhigglaw.com](mailto:ncwagner@duhigglaw.com). Please include “Legal Assistant” in the subject line.

**Legal Assistant**

Legal Assistant with minimum of 3- 5 years’ experience, including current working knowledge of State and Federal District Court rules and filing procedures, trial preparation, document and case management, calendaring, online research, is technologically adept and familiar with use of electronic databases and legal-use software. Seeking organized and detail-oriented professional with excellent computer and word processing skills for established commercial civil litigation firm. Email resumes to [e\\_info@abrfirm.com](mailto:e_info@abrfirm.com) or Fax to 505-764-8374.

**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.**

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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](mailto:mulibarri@nmbar.org)**

The publication schedule can be found at  
**[www.nmbar.org/BarBulletin](http://www.nmbar.org/BarBulletin).**

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## Office Space

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### Office for Rent

820 Second Street NW, office for rent, two blocks from courthouses, all amenities including copier, fax, telephone system, conference room, high-speed internet, phone service, receptionist, call Ramona at 243-7170

### Lawyer-Owned Office Building in Old Town (Albuquerque)

SEEKING NEW TENANT IN JANUARY, 2021. Two lawyers retiring at year-end have office space in their Old Town Law Office building in Albuquerque. 2,700 sft., including 3 lawyer offices, 2 conference rooms and open area for staff. \$16.00 psf, plus utilities. Includes parking. See www.oldtownlawoffice.com for more information. Or email Jason Kent (jkent@nmlex.com) or Murray Thayer (mthayer@swcp.com).

### Office Condo For Sale

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### Office Space

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

## Miscellaneous

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