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Bar Bulletin

December 23, 2020 • Volume 59, No. 24

Rio Chama River by Jessica Rodarte (see page 3) www.jessica-rodarte.pixels.com

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Advertising 30

Meetings

January

6
Employment and Labor Law Section Board
Noon, teleconference

8
Prosecutors Law Section Board
Noon, teleconference

12
Appellate Practice Section Board
Noon, teleconference

12
Bankruptcy Law Section Board
Noon, teleconference

12
Health Law Section Board
9 a.m., teleconference

13
Animal Law Section Board
11:30 a.m., teleconference

13
Business Law Section Board
4 p.m., teleconference

13
Tax Law Section Board
9 a.m., teleconference

Workshops and Legal Clinics

January

14
Common Legal Issues for Senior Citizens Workshop
11 a.m.-noon, Video Conference
For more details and to register, call 505-797-6005

27
Consumer Debt/Bankruptcy Workshop
6-8 p.m., Video Conference
For more details and to register, call 505-797-6094

February

3
Divorce Options Workshop
6-8 p.m., Video Conference
For more details and to register, call 505-797-6022

23
Common Legal Issues for Senior Citizens Workshop
11 a.m.-noon, Video Conference
For more details and to register, call 505-797-6005

About Cover Image and Artist: A native daughter of northern New Mexico, Jessica Rodarte grew up in the ancient landscape of a deep-rooted community on her family's ranch in the Sangre de Cristo mountains where she traces her ancestry for generations. Jessica has always had a passion for the still image and decided seven years ago to take up photography as an avocation. Though she works full time much of her free time is devoted to her photographic endeavors. Her cross-cultural upbringing has provided her a unique visual dialogue that she brings to the landscape photographs she creates. Her ability to capture the beauty of nature, combined with her love for New Mexico and the outdoors, is revealed in every image she captures. Jessica has been a working professional for the past 23 years, while also raising her daughters with her husband of 24 years.

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 or visit https://lawlibrary.nmcourts.gov.

New Mexico Supreme Court

Candidate Announcement

The New Mexico Supreme Court Judicial Nominating Commission convened on Nov. 19 via Zoom, and completed its evaluation of the seven candidates for the one vacancy on the New Mexico Supreme Court due to the retirement of the Honorable Supreme Court Justice Judith K. Nakamura, effective Dec. 1. The Commission recommends the following candidates to Governor Michelle Lujan Grisham: **Judge James Waylon Counts, Judge Jennifer Ellen DeLaney, Judge Julie J. Vargas** and **Judge Briana Hope Zamora**.

Second Judicial District Criminal Court

Announcement Of Applicants

Eighteen applications have been received in the Judicial Selection Office as of 5 p.m., Nov. 30 to fill the four vacancies on the Second Judicial District Criminal Court which will exist as of Jan. 1, 2021, due to the retirement of Judge Charles Brown and Judge Carl Butkus, effective Dec. 31, 2020, and due to the outcome of the retention vote with respect to Judge Christina Argyres and Judge Jacqueline Flores and because Judge Daniel Ramczyk is transferring to the Civil Division.

Inquiries regarding additional details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. Because Inquiries regarding more specific details of this judicial vacancy should be directed to the chief judge or the administrator of the court. Given the large number of applicants, the interviewing process will be extended to a day and a half. Specifically, it is anticipated that it will last all day Monday, Dec. 14 (9 a.m. to 5:15 p.m.) and approximately half a day on Tuesday, Dec. 15. The end time on Dec. 15 will depend on the duration of deliberations. The Second Judicial District Criminal Court Nominating Commission will convene beginning at 9 a.m. on Monday, Dec. 14 and then reconvene at 9 am on Tuesday, Dec. 15. 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. Alternatively, you may find the Zoom information for this hearing below. The names of the applicants in alphabetical order: **Britt Marie Baca-Miller, Steven Gary Diamond, Asra Imtiaz Elliot, Judge Jacqueline Dolores Flores, Bruce Crawford Fox, Michael Philip Fricke, Jason Robert Greenlee, Twila A. Hoon, Jennifer Kathleen Theodosia Johnson, Anthony Wade Long, Allison Martinez, Megan Kathleen Mitsunaga, Joseph Anthony Montano, Rose Osborne, Brian Anthony Pori, Mark Anthony Ramsey, Jeres Santiago Real** and **Jennifer J. Wernersbach.** When signing into Zoom please use your full name.

Topic: Second Judicial District Court – Criminal Judicial Nominating Commission Meeting
Time: Monday, Dec. 14, at 9 a.m.
Tuesday, Dec. 15, 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 Children's Court

Announcement Of Applicants

Fifteen applications have been received in the Judicial Selection Office as of 5 p.m., Tuesday, Dec. 1, to fill the two vacancies on the Second Judicial District Court – Children's Court due to the retirement of Judge Cristina T. Jaramillo and Judge John J. Romero Jr. effective Dec. 31. The Second Judicial District Court – Children's Court Nominating Commission will convene beginning at 9 a.m. on Thursday, Dec. 17 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. Alternatively, you may find the Zoom information for this hearing below:

The names of the applicants in alphabetical order: **Angelica Anaya Allen, Catherine Begaye, Cassandra Brulotte, Deborah Gray, Twila A Hoon, J.K. Theodosia Johnson, Jennifer Rose Kletter, Jane Laflin, Tony Long, Allison Martinez, Mari Martinez, Bridget McKenney, Brian Pori, Mark A. Ramsey** and **Alma Cristina Roberson**. Zoom information for this hearing below. Please change your Zoom screen name to your first and last name to be admitted.

Topic: Second Judicial District Court – Children's Judicial Nominating Commission Meeting
Time: Thursday, 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

Candidate Announcement

The Fourth Judicial District Court Judicial Nominating Commission convened on Thursday, Dec. 3 via Zoom, and completed its evaluation of the two candidates for the one vacancy on the Fourth Judicial District Court. The commission recommends the following candidate to Governor Michelle Lujan Grisham. The name of the applicant: **Judge Floripa "Flora" Gallegos.**

Twelfth Judicial District Court

Candidate Announcement

The Twelfth Judicial District Court Judicial Nominating Commission convened on Nov. 25 via Zoom, and completed its evaluation of the two candidates for the

Professionalism Tip

With respect to the public and to other persons involved in the legal system:
I will respect and protect the image of the legal profession, and will be respectful of the content of my advertisements or other public communications.

one vacancy on the Twelfth Judicial District Court due to the retirement of the Honorable James Waylon Counts, effective Nov. 1. The Commission recommends the following candidates to Governor Michelle Lujan Grisham: **Ellen Rattigan Jessen** and **Matthew Russell Wade**

Bernalillo County Metropolitan Criminal Court

Announcement Of Vacancy

Due to the recent election of Judge Courtney Weaks to the Second Judicial Court, there will be a vacancy in the Bernalillo County Metropolitan Court - Criminal effective Jan. 1, 202l. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Sergio Pareja, chair of the Bernalillo County Metropolitan 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. The deadline for applications has been set for Tuesday, Jan. 12, 2021, by 5 p.m. All applications and letters of references are to be emailed to akin@law.unm.edu. Applications received after 5 pm will not be considered. The Judicial Nominating Commission will meet at 9 a.m. on Tuesday, Jan. 26, 2021, 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. Alternatively, you may find the Zoom information for this hearing below: Please change your zoom screen to your first, last name and title to be admitted.

Topic: Bernalillo County Metropolitan Court Nominating Commission Meeting
Time: Tuesday, Jan. 26, 2021 at a.m.
Join Zoom Meeting
https://unm.zoom.us/j/379615447?pwd=M3lSVGxuSEkrSjd4cExlVXYwK3MzQT09
Meeting ID: 379 615 447
Password: 72146

Notice of Mass Case Reassignment

Chief Judge Maria I. Dominguez announced the mass reassignment of cases in Division IV as a result of the 2020 General Election. Pursuant to Rule 23-109 NMRA, Chief Judge Dominguez announced that effective Jan. 11, 2021, all misdemeanor cases previously assigned to Judge Courtney B. Weaks will be reassigned to Judge David A. Murphy. Individual notices of reassignment will be mailed to the parties. Pursuant to New Mexico Supreme Court Order 20-8500-0025, peremptory excusals have been temporarily suspended during the COVID-19 Public Health Emergency.

State Bar News

COVID-19 Pandemic Updates

The State Bar of New Mexico is committed to helping New Mexico lawyers respond optimally to the developing COVID-19 coronavirus situation. Visit www.nmbar.org/covid-19 for a compilation of resources from national and local health agencies, canceled events and frequently asked questions. This page will be updated regularly during this rapidly evolving situation. Please check back often for the latest information from the State Bar of New Mexico. If you have additional questions or suggestions about the State Bar's response to the coronavirus situation, please email Executive Director Richard Spinello at rspinello@nmbar.org.

State Bar Building

The State Bar Center is closed until further notice and State Bar staff are working remotely. If documents need to be dropped off or picked up, front desk hours are Monday, Wednesday, and Friday from 9-10 a.m. Please call 505-797-6000 or email sbnm@nmbar.org beforehand, or for more information.

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.

Minimum Continuing Legal Education

Compliance Deadline Approaching

Dec. 31, 2020 is the last day to complete 2020 Minimum Continuing Legal

Education requirements. For a list of upcoming MCLE approved courses, visit www.nmbar.org/MCLE. Contact MCLE with questions at 505-797-6054 or mcle@nmbar.org.

State Bar of New Mexico

Licensing Certifications and Fees Due by Feb. 1, 2021

Submit by Feb. 1, 2021, to avoid late fees. To complete your annual licensing certifications and pay your fees by credit card, visit www.nmbar.org/licenserenewal. To request a PDF copy of the license renewal form or for questions regarding your renewal, email license@nmbar.org. For technical support, email techsupport@nmbar.org.

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 by Jan. 15 COB.

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

- Dec. 28
- Jan. 4
- Jan. 11

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

Solo and Small Firm Section

January Virtual Lunch Presentation: Keeping Up with the Pandemic Developments

Dr. Greg Mertz, a UNMH doctor who specializes in vaccines and antivirals with an emphasis on clinical trials, will lead a timely presentation and discussion, joined by Robert McNeill, an Albuquerque attorney who previously served as state health and environmental secretary and established the state's epidemiological office. Please join the virtual lunch on Tuesday, Jan. 19 at noon. All State Bar members, State Bar staff, and their guests are welcome to attend. RSVP to member services at 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 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.

THANK You

The State Bar of New Mexico would like to express its appreciation and gratitude to the following attorneys that participate in the **CONSUMER DEBT BANKRUPTCY WORKSHOP**. Thank you for your professionalism, time and service to the community in New Mexico.

Ron Holmes	Don Provencio	Matthew Gandert
Mike Daniels	Wayne McCook	Leslie Maxwell
Arun Melwani	Mike Lash	Erik Thunberg

THANK You

The State Bar of New Mexico would like to express its appreciation and gratitude to the following attorneys that participate in the **DIVORCE OPTIONS WORKSHOP.** Thank you for your professionalism, time and service to the community in New Mexico.

Gretchen Walther	Maria Montoya-Chavez
Tiffany Oliver Leigh	Martha Kaser
Meredith Johnstone	Lucy Sinkular
Linda Helen Bennett	Allison Pieroni

A Message from State Bar President Ernestina R. Cruz

Dear Members of the State Bar of New Mexico,

Soon my tenure as President of the State Bar of New Mexico will come to a close. Due to the pandemic, it was not the year any of us planned. However, I am humbled by how our bench and bar managed what has been a most challenging situation. I would like to share with you, the Members of the State Bar of New Mexico, some of our accomplishments.

State Bar Governance and Operations

This year has seen a flurry of activity with bar governance. Members of the Board of Bar Commissioners and State Bar staff did our level best to be of service to the public and our members. At the start of the pandemic, State Bar staff quickly transitioned to remote operations ensuring that our members and the public had continued access to our services. Generally speaking, the State Bar faced little disruption to daily activities. Though access to the State Bar Center has fluctuated based on executive orders, we have still been able to provide meeting areas for those needing space for mediations and other critical meetings. The State Bar's professional staff have been able to accomplish almost all of their usual work. Similarly, the Board of Bar Commissioners, practice sections, committees, and divisions have all kept busy with regular programing – although much of it looked different.

I want to thank State Bar staff for their work this year. It has been difficult in so many ways, but they rose to the occasion and made sure that the day-to-day operations of the State Bar were not interrupted. Executive Director Richard Spinello and his team worked tirelessly and we are grateful for their efforts!

Access to Justice Initiatives

In January, we highlighted Access to Justice at the State Legislature during "ATJ Day" and hope to continue similar programming in the future. Over the summer, the BBC voted to name the "Access to Justice" boardroom, a new space at the State Bar Center. The hope is to dedicate the boardroom in 2021 where special recognition will be given to Justice Petra Maes and Judge Sarah Singleton, past Co-Chairs of the Access to Justice Commission. In addition, we continue to offer support to the Access to Justice Commission and we look forward to providing assistance in implementing the Access to Justice Commission's *Justice for All* plan.

The need for *pro bono* legal services in 2021 will be significant. New Mexicans, like others throughout the country, have been adversely impacted by the financial strains associated with the pandemic. In a recent report prepared for the National Council of State Housing Agencies, it is predicted that "between 9.7 million and 14.2 million renter households in the United States may be unable to pay rent and [are] at risk of eviction."[1] As such, the State Bar will offer the New Mexico Supreme Court, Justice Shannon Bacon (who leads ATJ related initiatives), and the Access to Justice Commission steady support in their efforts to address the impending civil legal service crisis. When the moratorium on evictions and foreclosures is lifted, the floodgates will open. As a profession, we need to prepare ourselves to be of service and offer our talents and expertise to help those who are in most need.

Member Benefits and Annual Meeting

Early in the pandemic, State Bar staff wisely decided to provide free access to our On-Demand Self-Study CLE library for members. We also offered CLE programming at no cost during our virtual Annual Meeting. These opportunities have been widely embraced by members of the State Bar and has spurred conversation with the BBC about offering similar opportunities in coming years.

President Cruz addresses 1,100 virtual attendees during the 2020 Annual Meeting and Member Appreciation Event.

With regard to the Annual Meeting, I am thankful for Chief Justice Michael Vigil's participation in presenting the Opening Remarks at the virtual event. More than 1,100 members attended. The only other time we have had such high attendance at an event was in 2016 when the late Justice Ruth Bader Ginsburg

honored us as keynote speaker. Next year's Annual Meeting is scheduled for Oct. 8. Staff is planning for a virtual event and we hope that we will be able to offer in-person programming. More information will be forthcoming in 2021. While we had to cancel our plans for joint programming with Judicial Conclave, we look forward to revisiting that effort in 2022.

At our June meeting, the BBC voted to realign our BBC Districts in order to foster greater representation for our members both in New Mexico and out-of-state. The newly created districts will be filled in 2021 and we look forward to working with the new BBC members.

The State Bar has expanded our communications effort having launched a podcast titled "SBNM is Hear." Podcast episodes have highlighted various topics including alternative dispute resolution, judicial clerkships, cultivating a solo/small firm practice, young lawyers, and well-being. In addition, you can view various programs on YouTube, including a virtual forum for candidates who ran for the New Mexico Court of Appeals and New Mexico Supreme Court, the Senior Lawyers Division Oral History Project, legal help videos for the public, and more.

Allison Block-Chavez (2020 YLD chair), Carla Martinez (2020 State Bar President-Elect), Aja Brooks (2020 Bar Foundation President), Tina Cruz (2020 State Bar President), Carolyn Wolf (2020 Secretary-Treasurer), and Shasta Inman (2020 YLD Chair-Elect). Not Pictured: Yolanda Hernandez, Chair of the Paralegals Division and Mariah McKay, Vice-Chair of the Young Lawyers Division.

Diversity Initiatives

The mission of the State Bar is to be a united and inclusive organization serving the legal profession and the public. In addition to navigating the uncertain times associated with the COVID-19 pandemic, the year became even more complex in light of concerns regarding racial justice which were highlighted at both national and local levels. BBC Commissioner Aja Brooks undertook an effort to lead the State Bar in developing CLE programming to address the issue and I was thankful for the opportunity to support Commissioner Brooks in her efforts.

The State Bar has long monitored issues of equity and inclusion within our profession. This year we published the fourth decennial Status of Minority Attorneys in New Mexico Report, undertaken by the Committee on Diversity in the Legal Profession. This year's work represents the first-ever joint effort by the Committee on Diversity and the Committee on Women and the Legal Profession. Their respective reports include thoughtful recommendations which the BBC and staff will be closely examining to ensure the recommendations proposed by both committees are brought to fruition.

Additionally, the Committee on Diversity has been busy with their regular programming which addresses inclusion and diversity. Their successful Arturo Jaramillo Summer Law Clerk Program has provided diverse law students with employment opportunities in our state for well over 20 years. This year, they championed a Judicial Clerkship Program along with the New Mexico Supreme Court and Young Lawyers Division. Justice David Thomson advocated for this program and has been a steady source of support as we have planned to welcome the inaugural cohort in 2021.

The collective efforts undertaken this year highlight that diversity and inclusion must remain at the forefront. Our profession benefits from consistent and focused attention on these topics. I encourage all future bar leaders to make initiatives regarding diversity and inclusion a priority!

I would also like to bring special attention to the fact that this year the State Bar, State Bar Foundation, Young Lawyers Division and Paralegal Division celebrated a first since the State Bar's establishment in 1886. The leaders of each organization were women. Strong and thoughtful female leaders who navigated their organizations in an unprecedented year. While there is still plenty to be done to make the profession more equitable, we should be sure to celebrate and recognize the efforts of these talented women!

Association Management System and Website

We have long recognized the need for the State Bar to continue to improve in the area of technology. All year, staff has been working diligently on the transition to a new association management system (AMS) and website. Both will debut early next year and will provide a much needed face-lift and improved use experience.

Well-Being

This year highlighted the importance of resiliency and well-being. Our Judges and Lawyers Assistance Program has grown this year, providing new programming and education to help us maintain our emotional, mental and physical well-being. The inaugural Standing Committee on Well-Being has been particularly active in developing initiatives which will continue to bring light to an area which our profession has neglected for far too long. These initiatives will continue to be cultivated in 2021 with special attention given to various sub-groups including law students, attorneys, and the judiciary. I am particularly thankful for Senior Justice Barbara Vigil's efforts to collaborate with the Committee on the judiciary's well-being programs.

Looking Forward

As the pandemic begins to show signs of waning, there are certain aspects of this existence which we should carry forward. This year has highlighted the importance of demonstrating concern and compassion for others. Going forward, I hope we will all continue to be mindful of our individual roles in advancing professionalism and civility, which should always be prioritized in our profession.

We have all learned to navigate virtual platforms and the use of technology. Though in-person meetings and events will likely return as the preferred method for engaging with others in the profession, the State Bar will strive to include a virtual component to all meetings and events moving forward. I hope members, both in-state and out-of-state, will avail themselves of these opportunities because your voice and participation in our State Bar is needed and valued.

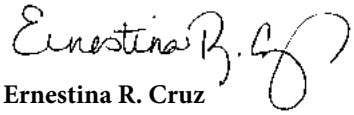
2021 Officer Swearing In Ceremony on Dec. 9, 2020 via Zoom.

Next year the State Bar will be led by President Carla Martinez. Carla represents the very best of what one would expect in a State Bar President. She will lead with a steady and thoughtful approach. I look forward to seeing what she will accomplish while guiding the State Bar in 2021. The other members of the Leadership Team include President-Elect Carolyn Wolf and Secretary/Treasurer Ben Sherman. During the virtual Swearing-In Ceremony before the New Mexico Supreme Court, which was held on Dec. 9, 2020, they each spoke with such grace regarding why they have chosen to serve our legal community and the public as bar leaders. I have come to know these individuals well over the years and hold them in the highest regard. The future of the State Bar is bright because of their willingness to give of their time and share their talents. I wish them the absolute best in 2021!

While this is not the State Bar's first experience with a global pandemic, I can say that the BBC and State Bar staff worked diligently to ensure that we were of service to you, the members. At the conclusion of the Spanish Flu, in August 1919, then President of the "New Mexico Bar Association," William G. Haydon, wrote to the membership noting "this has not been an eventful year in the work of the association, but I wish you to believe it has not been due to indifference on my part." Living in a much different era, with far greater resources, we were able to better navigate a year which was impacted by a pandemic. Like President Haydon, I "wish you" to know that it has been a humbling experience to be of service as your President for 2020!

May you all enjoy a prosperous, happy, and healthy New Year!

Warmest Regards,



Ernestina R. Cruz
President, State Bar of New Mexico

Endnotes

[1] "Analysis of Current and Expected Rental Shortfall and Potential Evictions in the U.S.," September 25, 2020, at page 5.

A Message from State Bar Executive Director Richard B. Spinello

As we emerge it will be a brand new world...

Since 1886 our New Mexico Bar has charted a path through history, from the territorial days and the codification of New Mexico law handed down from European powers and local traditions and customs, to Statehood and a modernized practice, including a new reliance on technology and communication. Assisting New Mexico attorneys in the "*science of jurisprudence*[1]" as our founders saw it, and connecting the public in New Mexico to our system of Justice is the consistent thread through our Bar's history.

Our State Bar, the collective effort of attorneys who help maintain and support the legal system in New Mexico, will be called on once again to chart the next course in New Mexico legal history as we emerge from this pandemic. As with any new exploration, it should be met with a great desire to improve and uplift our members and profession, along with a fair amount of caution and thoughtfulness, as we venture out into a new unknown. Our job is to create something that we can be proud of as we look back on this time and that will take ALL of us.

Belonging to the Legal Profession...

The mission of the State Bar of New Mexico is to be a united and inclusive organization serving the legal profession and the public. To that end, one of our main goals is to promote active engagement in the profession by both active and inactive members of the bar. At the start of our journey as attorneys, we raised our hand and took an oath making a series of promises, several of which are impossible to keep as an individual. Without the collective effort of the State Bar, some of our promises would go unfulfilled. In the challenging months and years to come, now more than ever, we need both our active and inactive members to engage and help fulfill those promises.

Active members of the bar have been adapting to a changing legal practice for many years now and this is only going to accelerate as the after-effects of the global pandemic are realized. While we do not know "what we do not know" the future of the practice of law in New Mexico is being transformed. How we respond and what our priorities will be can shape that future for both individual attorneys, the legal profession as a whole and our collective responsibilities. How has the pandemic affected our clients? How do they prioritize their legal needs in a post-pandemic world? How has the increased reliance on technology affected our law office operations and how we practice law? Have our expectations changed on what can and cannot be accomplished remotely? In the cloud? By telecommuting? By our staff? What will be our "new normal"?

Inactive members[2] are members of the State Bar, and while they are not actively practicing law, there are many ways that they can participate in the profession. This is a call for them to continue bar service as we embark on this next chapter of our collective journey. Inactive members can participate in the legal profession by sharing their knowledge and expertise, while relieved of many of the technical requirements of the active membership. The State Bar has many ways for inactive members to share their knowledge. They can:

- Participate as members of sections, committees and divisions;
- Serve as liaisons to other groups;
- Be appointed to voluntary positions by the State Bar and the New Mexico Supreme Court;
- Speak at continuing legal education classes; and
- Be granted special permission to participate in the emeritus pro bono program (see Rule 24-111 NMRA).

As this list illustrates, there are numerous opportunities for inactive members to stay connected to the legal profession. This participation will add to our success as a profession in the years to come.

The State Bar's role post-pandemic must focus on key priority areas in order to be the most effective organization for our members and, while we do not yet have a clear picture of all the legal needs of the future, we know that our focus in the near-term must be increasing the following competencies:

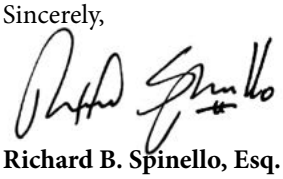
- Operating a financially stable and responsible organization;
- Increasing direct and indirect value of membership in key areas including attorney well-being, law practice management, technology, and relevant, cost-effective continuing legal education;
- Providing a modern communication network for the profession in New Mexico;
- Building a statewide response to the challenges that the profession will face.

Like many other states, the work of the organized Bar in managing the legal profession in New Mexico is carried out by a number of responsible entities such as the State Bar of New Mexico, the New Mexico Board of Bar Examiners, and the Disciplinary Board, all working together and overseen by the New Mexico Supreme Court. As an integrated Bar[3], a condition of being licensed to practice law in New Mexico is being a member of the State Bar. This collective effort fulfills the promise each attorney made when they took the attorney oath to comply with the rules of professional conduct and became, "*an officer of the legal system and a public citizen having special responsibility for the quality of justice*"[4]. As a part of a multi-year strategic plan the State Bar has recently prioritized membership outreach, rural outreach, lawyer well-being, statewide communication, and technology improvements as a roadmap for the future.

Let's get started together...

The final two acts a prospective candidate to our bar undertakes in order to become a full member of the legal profession in New Mexico, is to sign the roll of attorneys which date back to those territorial days and swear the attorney oath binding the rules of Professional Conduct that has as among its promises, "*a duty to assist in the betterment of the legal profession and the public*"[5]. The State Bar will continue to rely on those promises, as well as the generosity of your time and the enthusiasm of both our active and inactive members, to help us with this extraordinary mission in these extraordinary and unprecedented times. Let's get started together…

Sincerely,



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

Endnotes

[1] New Mexico Bar Association Constitution, January 18, 1886.

[2] See Rule 17-202(D) NMRA, Inactive Attorneys

[3] The State Bar of New Mexico was originally organized as a voluntary territorial bar in 1886. A 1925 State Statute made the State Bar a mandatory, integrated bar and is now currently authorized by Supreme Court Rule 24-101 NMRA.

[4] Rules of Professional Conduct, Preamble – A Lawyer's Responsibilities.

[5] Ibid.

Legal Education

December

23 **Drafting Client Engagement Letters in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **The World Has Changed. Let's Sort it Out**
3.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Naked and Afraid: A Legal Survival Skills Program**
2.0 G, 1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Advanced Google Search for Lawyers**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
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29 **Social Media as Investigative Research and Evidence**
1.0 G
Live Replay Webinar
Center for Legal Education of NMSBF
www.nmbar.org

30 **Lawyer Ethics of Email**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **"When there are Nine" Sexual Bias in the Legal Profession**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

30 **The Ethics of Social Media Research**
1.5 EP
Live Replay Webinar
Center for Legal Education of NMSBF
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Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location/course type, course provider and registration instructions.

Opinions

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

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

Effective November 27, 2020

PUBLISHED OPINIONS

A-1-CA-37466	**Director of Labor Relations v. NM Leisure Inc.**	**Affirm/Remand**	**11/23/2020**

UNPUBLISHED OPINIONS

A-1-CA-37930	Deutsche Bank Trust v. N Duran	Affirm	11/23/2020
A-1-CA-37612	State v. L Word	Affirm	11/25/2020
A-1-CA-38163	State v. A Clark	Affirm	11/25/2020

Effective December 4, 2020

PUBLISHED OPINIONS

A-1-CA-34190	**State v. M Yancey**	**Reverse/Remand**	**12/01/2020**
A-1-CA-34191	**State v. M Yancey**	**Reverse/Remand**	**12/01/2020**
A-1-CA-34192	**State v. M Yancey**	**Reverse/Remand**	**12/01/2020**

UNPUBLISHED OPINIONS

A-1-CA-37651	D Shaykin v. Progressive	Affirm	11/30/2020
A-1-CA-38065	Wells Fargo v. R Baclawski	Affirm	11/30/2020
A-1-CA-37748	State v. J M Gallegos	Affirm	12/01/2020
A-1-CA-38795	State v. P Martinez	Affirm	12/01/2020
A-1-CA-36581	Bank of America v. K Ung	Affirm	12/02/2020
A-1-CA-38670	Deborah S. v. Cara S.	Affirm	12/02/2020
A-1-CA-36828	J Aguilar v. Roosevelt County Board	Reverse	12/03/2020
A-1-CA-36961	T Tapia v. J Padilla Sr.	Affirm/Reverse/Remand	12/03/2020
A-1-CA-38949	State v. E Bradley	Affirm	12/03/2020
A-1-CA-39139	G Welch v. ABQ Roof Systems	Affirm	12/03/2020

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

From the New Mexico Supreme Court

Opinion Number: 2020-NMSC-003
No: S-1-SC-37594 (filed December 19, 2019)

IN THE MATTER OF
RAFAEL PADILLA
An Attorney Suspended from the
Practice of Law Before the Courts
of the State of New Mexico

Released for Publication February 11, 2020.

CHRISTINE E. LONG
Albuquerque, NM
for Disciplinary Board

RAFAEL PADILLA
Albuquerque, NM
Respondent

Opinion

Barbara J. Vigil, Justice.

{1} With this opinion, we address the failure of Rafael Padilla to competently and diligently defend his client against various criminal charges in violation of the New Mexico Rules of Professional Conduct, Rules 16-100 to -805 NMRA. The Court was presented with this case upon the recommendation of the Disciplinary Board (the Board) to sustain charges and impose discipline based on the Board's conclusion that Padilla violated Rules 16-101 (competence), 16-103 (diligence), and 16-804(D) (engaging in the administration of justice). The Board recommended an indefinite suspension of Padilla for a period of no less than one year.

{2} The Court adopted the Board's findings of fact following oral argument in this matter. Upon review, we adopt the Board's conclusions of law in their entirety. Modifying the Board's recommended discipline, we indefinitely suspended Padilla from the practice of law for no less than one year, subject to partial deferment and conditions on his reinstatement as explained in this opinion and in our order of July 9, 2019. Though Padilla has fully admitted the facts underlying his misconduct and has taken significant remedial measures to improve his practice, we must impose discipline to avoid reoccurrence of his grave errors.

I. BACKGROUND

{3} Padilla has been licensed to practice law in New Mexico for thirty-six years. He has a prior disciplinary offense for violating the rules of trust accounting. Padilla's private practice in Albuquerque focuses primarily on criminal defense. Beginning in 2013, Padilla defended Dennis Samuel Miera (Defendant) against charges of criminal sexual penetration of a minor, criminal sexual contact of a minor, and bribery of a witness. *State v. Miera*, 2018-NMCA-020, ¶¶ 1-2, 413 P.3d 491. A jury found Defendant guilty of all counts charged following a trial in December 2014, during which Padilla committed several serious errors. *Id.* ¶¶ 3-4, 46. Defendant appealed his convictions claiming ineffective assistance of counsel and seeking a new trial based largely on Padilla's failures at his first trial. *Id.* ¶ 1. The Court of Appeals granted a new trial, concluding that Defendant had made a prima facie showing of ineffective assistance of counsel and that cumulative error had denied him a fair trial. *Id.* ¶¶ 44, 46, 50. Defendant was incarcerated for approximately three years before his conviction was reversed and his case remanded for a new trial.

{4} Following the Court of Appeals' opinion detailing Padilla's deficiencies in representing Defendant, the Board initiated an investigation and ultimately charged Padilla with professional misconduct in August 2018. Padilla did not contest the Board's charges and admitted all factual allegations contained in the specification of charges.

{5} Padilla failed to provide competent and diligent representation to Defendant in four instances. First, he failed to acquaint himself with the relevant law and to take the steps necessary to meaningfully oppose the State's impeachment of Defendant using a psychological evaluation prepared for purposes of plea negotiations. *Id.* ¶¶ 6-12. Second, Padilla failed to investigate potentially exculpatory evidence that the alleged victim had accused her stepfather of similar abuse and then recanted her allegations. *Id.* ¶¶ 19-22, 34-36. Third, Padilla elicited testimony from an investigating officer regarding Defendant's sexual desires and failed to cure the officer's improper and unsupported characterization of Defendant as a "sexual deviant." *Id.* ¶ 37. Fourth and finally, Padilla failed to adequately investigate and research the admissibility of a report by the Children, Youth and Families Department (CYFD)—a report that he could have used to question the alleged victim's credibility. *Id.* ¶¶ 38-39. Thus, Padilla was not able to introduce the report or successfully move its admission, in whole or in part. *Id.* We describe each instance of misconduct in turn.

A. Psychological Evaluation

{6} As part of plea negotiations, Defendant completed a psychological evaluation that was documented for use in determining his sentence. *Id.* ¶ 6. Defendant's responses in the evaluation essentially amounted to an admission that he engaged in improper sexual contact with the alleged victim. *See id.* ¶ 11. The evaluation also contained a statement that Defendant "continued to keep the [alleged victim and her brother] overnight through the time of the alleged event," a fact which Defendant disputed at trial.

{7} The psychological evaluation was given to the State before trial. *Id.* ¶ 6. The State did not attempt to introduce the evaluation in its case in chief. *See Miera*, 2018-NMCA-020, ¶¶ 8, 14 ("Rule 11-410(A)(5) NMRA prohibits 'a statement made during plea discussions' from being admitted against the defendant where the discussions did not ultimately result in a guilty plea."). Instead, the State notified the district court and Padilla that it planned to use the evaluation to impeach Defendant should he testify in his own defense. *Id.* ¶ 8. The State cited *State v. Watkins*, 1979-NMCA-003, 92 N.M. 470, 590 P.2d 169, to support its position that the evaluation was admissible impeachment evidence. *Miera*, 2018-NMCA-020, ¶ 8. Padilla responded that he had not seen the evaluation and was not previously made aware that the State intended to introduce it to impeach Defendant. *Id.* The State replied that it had discussed the evaluation "a number of times" with Padilla before the trial.

{8} The district court recessed to allow the parties "to gather written authorities for use or nonuse of the material." *Id.* ¶ 9 (internal quotation marks omitted). When the district court reconvened, Padilla was

unable to offer any authority to support the exclusion of the psychological evaluation for impeachment purposes, conceding that the holding of *Watkins* permitted the State to use the evidence to impeach Defendant. *Miera*, 2018-NMCA-020, ¶ 9. This response demonstrates Padilla's lack of competence in this area of our evidentiary rules and case law. As we will explain, the State's reliance on *Watkins* is misplaced, and our precedent interpreting Rule 11-410 clearly prohibits the use of statements made during plea negotiations for impeachment purposes.

{9} Before making its ruling, the district court asked Padilla to confirm that he did not locate any authority to rebut the State's argument that the evaluation could be used to impeach Defendant's testimony. *Miera*, 2018-NMCA-020, ¶ 9. Padilla confirmed that he did not and added that he "had very little knowledge of this report, and he certainly didn't have a copy of it." *Id.* (alteration and internal quotation marks omitted). The district court ruled that the State could use the evaluation to impeach Defendant but offered to instruct the jury that it could "only use the evaluation for purposes of credibility and impeachment." *Id.* (alteration and internal quotation marks omitted). Padilla never requested this limiting instruction, even after the State used the evaluation to elicit damaging admissions from Defendant on cross-examination. *Id.* ¶¶ 9, 11.

{10} Defendant testified at trial that he did not recall keeping the alleged victim and her brother overnight at the time of the alleged abuse and had never admitted that he abused the alleged victim. *Id.* ¶¶ 10-11. The State attempted to refresh Defendant's memory, giving him the documentation of the psychological evaluation to review. The State then used the evaluation to impeach Defendant's testimony by asking Defendant how he responded to certain statements in the evaluation. *Id.* For example, the State asked, "Did you respond in the affirmative or otherwise indicate that you made a mistake which you regret?" and "Did you respond in the affirmative or otherwise indicate that you slipped one time?" *Id.* ¶ 11. Defendant answered yes to each of the State's questions consistent with the documentation of the psychological evaluation. *Id.*

B. Similar Recanted Allegations

{11} Defendant filed a motion for new trial based on newly discovered evidence after his appellate counsel learned that the alleged victim had also accused her stepfather of sexual abuse. *Id.* ¶ 19. The alleged victim later recanted her allegations against her stepfather, and the State voluntarily dismissed the charges against him. *Id.* In his motion for new trial, Defendant argued that the alleged victim's recantation was important impeachment evidence that the State failed to disclose. *Id.*

{12} The district court denied Defendant's motion after hearing testimony from Padilla and Jacob Payne, the prosecutor in Defendant's case and the dismissed case against the stepfather, as well as from Defendant's first trial attorney. *Id.* ¶¶ 20-23. Padilla testified that he had no memory of the State informing him of the case against the stepfather, but he admitted that Defendant had provided him "limited" information that the stepfather was suspected of abusing the alleged victim. *Id.* ¶ 21 (alteration and internal quotation marks omitted). Even armed with that information, Padilla did not remember questioning the alleged victim about "lying or being molested by [her stepfather]." *Id.*

{13} Payne, on the other hand, testified that he had "a specific memory" of discussing the case against the stepfather and its ultimate dismissal with Padilla. *Id.* ¶ 22. Payne admitted, however, that he did not have a written record that he had informed Padilla of the alleged victim's recantation of her accusation against her stepfather. *Id.* Because Padilla's memory was "attenuated and conditional" while Payne's memory was detailed and specific, the district court concluded that Padilla "was aware of the . . . case [against the stepfather], the nolle [prosequi], and the recantation." *Id.* ¶ 23 (second alteration in original) (internal quotation marks omitted).

{14} The Court of Appeals affirmed the district court's denial of Defendant's motion for a new trial, concluding that the district court's ruling was supported by sufficient evidence that Padilla knew about the case against the stepfather and the recantation before the conclusion of Defendant's trial. *Id.* ¶¶ 26-27. In fact, the stepfather's case was discussed at Defendant's trial. *Id.* ¶ 26. Before Defendant commenced his case in chief, the State reported to the district court that it had dropped the charges against the stepfather. *Id.* The Court of Appeals noted that "Padilla expressed no surprise and made no indication that he was previously unaware of this information" during this discussion at trial. *Id.*

{15} In the end, Padilla failed to investigate the case against the stepfather on Defendant's behalf. Padilla admitted at the hearing on Defendant's motion for new trial that evidence of the alleged victim's recantation of her allegations against her stepfather "would have changed the course of the trial." *Id.* ¶ 36 (internal quotation marks omitted). As the Court of Appeals stated,

> [Padilla] admitted he had received information from [Defendant] that [the stepfather] had gotten in some trouble because of his behavior toward [the alleged victim] but failed to investigate that information. Undoubtedly, allegations of sexual molestation of the victim by another individual around the same time period raise questions about the identity of the actual perpetrator of the molestation. . . . [I]n a trial involving allegations of sexual abuse, there can be little more probative evidence than that which suggests the possibility that the allegations made by the alleged victim are false; and, evidence of the falsity of prior similar allegations are significant indicia of innocence that any effective attorney knows to pursue.

Id. ¶¶ 35-36. Padilla's failure to investigate the case against the alleged victim's stepfather demonstrates his lack of competence and diligence in representing Defendant.

C. "Sexual Deviant" Testimony

{16} During Padilla's cross-examination of an investigating officer in Defendant's case, Padilla elicited testimony regarding Defendant's sexual desires. *See id.* ¶ 37. Padilla asked what had led the officer to arrest Defendant. *Id.* The officer replied that he made the arrest based in part on knowledge of Defendant's "sexual desires, [which] all fits in with the sexual deviant nature of the individual." *Id.* (internal quotation marks omitted). Padilla then asked which of Defendant's "sexual desires" the officer used to support his arrest of Defendant.

{17} The State objected to the testimony, likely based on concern that the officer's characterization of Defendant would result in reversible error. *Id.* The State explained that the officer's statement went "to essentially irrelevant consensual sex acts between two adults that don't really bear on this particular issue at all." *Id.* (internal quotation marks omitted). The State's objection was sustained and Padilla withdrew his question during a bench conference, but Padilla did not request that the officer's statement be stricken from the record or limited in any way. *Id.* That Padilla pursued this tactically risky line of questioning and then failed to move to strike, limit, or otherwise cure the officer's unsupported and improper characterization of Defendant is additional evidence of Padilla's lack of competence.

D. CYFD Report

{18} Around the time of the purported sexual abuse in Defendant's case, the alleged victim claimed that her mother and stepfather had physically abused her, prompting a CYFD investigation. *Id.* ¶ 38. The allegations of physical abuse were found to be unsubstantiated in a report

produced by CYFD. *Id.* Padilla sought to admit this report twice but was denied each time by the district court, in part because Padilla failed to produce a witness who could authenticate the report.

{19} After the district court's first denial of Padilla's request and during a break in trial, Padilla read in the report that the alleged victim had stated that "she had never experienced bad touch." *Id.* ¶ 39 (internal quotation marks omitted). It would appear that Padilla had not read this portion of the report prior to the break in trial. *Id.* Padilla again requested to use the report to attack the alleged victim's credibility but was unable to provide any authority to support the report's admission, and the request was again denied. *Id.* Padilla failed to take the necessary steps to properly introduce this crucial piece of evidence with foundational support, further demonstrating his lack of competence and diligence in preparation for trial.

II. DISCUSSION

{20} The Board adopted the hearing committee's findings of fact and conclusions of law that Padilla violated Rules 16-101, -103, and -804(D). In reviewing the disciplinary proceedings, we view the evidence in the light most favorable to the Board's findings of fact. *In re Dixon*, 2019-NMSC-006, ¶ 5, 435 P.3d 80. "We review the Board's conclusions of law de novo." *Id.* ¶ 19. Accordingly, we adopt the Board's findings of fact and conclusions of law in their entirety. Padilla's misconduct evinces a lack of competence and diligence that is prejudicial to the administration of justice.

A. Competence and Diligence

{21} Rule 16-101 mandates that lawyers "provide competent representation" to their clients. "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 16-101. Thorough preparation "includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." Rule 16-101 Comm. commentary [6]. Padilla violated Rule 16-101 when he failed to thoroughly prepare for Defendant's trial, resulting in several key legal errors before the district court.

{22} Rule 16-103 requires that lawyers "act with reasonable diligence and promptness in representing a client." This means that lawyers must "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and must "act with commitment and dedication to the interests of the client . . . with zeal in advocacy upon the client's behalf." Rule 16-103 Comm. commentary [1]. Padilla violated Rule 16-103 when he failed to investigate evidence crucial to the defense and failed to apprise himself of the substantive and procedural law so that he could properly introduce and move the admission of such evidence, which might have led to an acquittal.

{23} We address Padilla's lack of competence and diligence as a failure to apprise himself of the law, a failure to investigate, and a failure to meet the professional standards expected of attorneys in this state.

1. Duty to apprise oneself of the law

{24} Attorneys have a duty to apprise themselves of the current state of applicable legal standards pertinent to a given case. "No lawyer should approach any task without knowledge of the applicable statutes, court rules, and case law." *In re Neal*, 2001-NMSC-007, ¶ 21, 130 N.M. 139, 20 P.3d 121. Padilla should have known that Rule 11-410 barred the admission of Defendant's statements in a psychological evaluation prepared for use in plea negotiations. Had Padilla performed a perfunctory review of Rule 11-410 and its related precedent, he would have discovered *State v. Trujillo*, 1980-NMSC-004, 93 N.M. 724, 605 P.2d 232. *See Miera*, 2018-NMCA-020, ¶ 32. The Court in *Trujillo* expressly stated that Rule 410 (the precursor to Rule 11-410) barred impeachment of a witness with statements made in plea negotiations. *See* 1980-NMSC-004, ¶¶ 18-19. This rule is "directly contradictory" to the State's argument at Defendant's trial. *Miera*, 2018-NMCA-020, ¶ 32.

{25} Not only did Padilla fail to cite the appropriate case law that would have blocked the State's use of the psychological evaluation for impeachment purposes, he also failed to challenge the State's improper reliance on *Watkins* even after the district court recessed to permit counsel to research the evaluation's admissibility. *Miera*, 2018-NMCA-020, ¶ 9. There are crucial differences between the presentation of evidence in *Watkins* and in Defendant's trial. In *Watkins*, the defendant introduced recorded conversations in his case in chief, conversations which the State later used to impeach the defendant's testimony. 1979-NMCA-003, ¶ 17. The Court of Appeals in *Watkins* concluded that "[h]aving interjected the tapes into the trial for his own purposes, [the] defendant cannot properly complain of the prosecutor's use of the tapes, on cross-examination, to attack the credibility of [the] defendant's trial testimony." *Id.* ¶ 21.

{26} In contrast to the defendant's actions in *Watkins*, Defendant did not seek to admit the psychological evaluation in his case in chief. Despite this critical distinction, Padilla conceded that the holding of *Watkins* permitted the State to impeach Defendant with statements made in pursuit of plea negotiations. *Miera*, 2018-NMCA-020, ¶ 9. We agree with the Court of Appeals that Padilla completely failed "to apprise himself of the law governing the use of information gathered during plea negotiations for impeachment," *id.* ¶ 33, in violation of Rule 16-101.

{27} Furthermore, the record shows that Padilla had knowledge of the psychological evaluation before trial yet failed to challenge it on Defendant's behalf armed with the applicable law to prevent its admission. Once the evaluation was improperly used to impeach Defendant, Padilla did nothing to limit its impact on the jury, even when prompted to request a limiting instruction by the district court. This demonstrates Padilla's lack of diligence in violation of Rule 16-103.

2. Duty to investigate

{28} The provision of competent and diligent representation also includes a duty to investigate the factual and legal bases of a client's case or defense. *See In re Reid*, 1993-NMSC-055, ¶ 12, 116 N.M. 38, 859 P.2d 1065. "Courts may find counsel's performance deficient where he fails to investigate a significant issue raised by the client." *Miera*, 2018-NMCA-020, ¶ 34 (alteration, internal quotation marks, and citation omitted). Padilla lacked competence and diligence when he failed to investigate the allegations underlying the charges against the alleged victim's stepfather and the report compiled by CYFD.

{29} Padilla took no action as a result of learning potentially exculpatory information regarding the stepfather's relationship with the alleged victim. A thorough investigation into the case against the stepfather would have revealed the alleged victim's recantation. We agree with the Court of Appeals that Padilla's "fail[ure] to pursue a specific lead given to him by [Defendant] that either suggested [the stepfather] as an alternate perpetrator or called into question [the alleged victim's] credibility" clearly demonstrates Padilla's lack of competence and diligence. *Id.* ¶ 40.

{30} Padilla also failed to investigate the circumstances surrounding the abuse documented in the CYFD report. Only during the trial did Padilla discover that the alleged victim had stated that she had never experienced "bad touch." All indications are that Padilla did not even read the complete report prior to trial. Had he done so, he could have called the necessary witness to authenticate the CYFD report and testify to its contents, thereby allowing Padilla to properly introduce the report and move its admission into evidence. His failure to provide such a witness and his failure to thoroughly gather and review evidence prior to trial shows a lack of competence and diligence.

3. Public confidence in attorney competence

{31} Finally, attorneys must demonstrate to the public that they are "worthy of confidence" in their professionalism, knowledge, and skills. *See In re Quintana*, 1985-NMSC-101, ¶ 8, 103 N.M. 458, 709 P.2d 180. In Defendant's trial for sex crimes against a child, Padilla's elicitation of officer testimony regarding Defendant's sexual desires calls into question whether he has the knowledge and skills required of a competent criminal defense attorney. As the Court of Appeals observed, "one must question the wisdom of pursuing a line of questioning so objectionable that the State intervenes in an attempt to save its case from reversal on appeal." *Miera*, 2018-NMCA-020, ¶ 37. We agree. Padilla's pursuit of this testimony and subsequent failure to move the district court to strike it from the record following the State's sustained objection reveals Padilla's lack of competence.

{32} For the foregoing reasons, we conclude that Padilla violated Rules 16-101 and -103 in his representation of Defendant.

B. Conduct Prejudicial to the Administration of Justice

{33} "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice[.]" Rule 16-804(D). "Lawyers are subject to discipline when they violate . . . the Rules of Professional Conduct." Rule 16-804 Comm. commentary [1]. Padilla violated Rules 16-101 and -103 repeatedly in the course of his substandard representation of Defendant. As a result, the Court of Appeals concluded that Defendant was denied a fair trial. We cannot turn a blind eye to egregious attorney misconduct that rises to such a level as to deprive a client of due process under the law. Therefore, we conclude that Padilla's misconduct was prejudicial to the administration of justice in violation of Rule 16-804(D), and we impose discipline accordingly. "The purpose of attorney discipline is not solely to protect clients from being harmed by their attorneys, but also to protect the profession and the administration of justice." *In re Cox*, 1994-NMSC-054, ¶ 8, 117 N.M. 575, 874 P.2d 783.

C. Discipline

{34} Suspension is the appropriate sanction when an attorney repeatedly demonstrates a lack of competence and diligence, resulting in injury to the attorney's client. *See In re Salazar*, 2019-NMSC-010, ¶ 34, 443 P.3d 555; *see also* Am. Bar Ass'n, *Annotated Standards for Imposing Lawyer Sanctions*, Standard 4.42(b) (2015) ("Suspension is generally appropriate when . . . a lawyer engages in a pattern of neglect caus[ing] injury or potential injury to a client."). "While an isolated instance of failure to . . . act diligently, or provide competent representation may not necessarily warrant the filing of formal charges of professional misconduct, a pattern of such behavior that is negligent or unreasonable will not only constitute misconduct but will also result in the imposition of discipline." *In re Romero*, 2001-NMSC-008, ¶ 8, 130 N.M. 190, 22 P.3d 215 (internal quotation marks and citation omitted).

{35} Padilla's recurrent failure to provide Defendant with competent and diligent representation deprived his client of a fair trial. *See Miera*, 2018-NMCA-020, ¶ 1. Accordingly, we indefinitely suspended Padilla for a period of no less than one year, effective August 8, 2019, in accordance with Rule 17-206(A)(3) NMRA. Padilla's suspension is partially deferred as follows. Padilla shall be suspended for six months and must comply with Rule 17-212 NMRA. At the conclusion of his six-month suspension on February 10, 2020, Padilla will be automatically reinstated to supervised probationary status pursuant to Rule 17-206(B)(1) for the remainder of his indefinite suspension period.

{36} This supervised probationary period shall serve as an opportunity for Padilla to mitigate the causes that led to this disciplinary proceeding. To that end, Padilla shall (1) meet with retired judge Hon. Frank Gentry on a regular basis in an effort to improve Padilla's criminal law practice, (2) have cocounsel on all felony cases, (3) maintain adequate support staff, (4) complete fifteen hours of continuing legal education in criminal law and evidence in addition to the five hours of continuing legal education in criminal law recommended by the Board, and (5) undergo a psychological assessment at his own expense.

{37} At the conclusion of Padilla's six-month supervised probationary period, Padilla shall petition for reinstatement in accordance with Rule 17-214(B)(2) NMRA. This petition shall include Judge Gentry's independent analysis of Padilla's progress during the course of his supervised probation. The petition must also demonstrate compliance with the conditions of reinstatement enumerated in our order of July 9, 2019, and in this opinion. We encourage Padilla to fastidiously pursue the conditions of his reinstatement as a petition once denied may not again be filed "prior to the expiration of a twelve (12) month period[.]" Rule 17-214(B)(2).

{38} In modifying the Board's recommended discipline and imposing this partially deferred indefinite suspension, we consider the numerous mitigating factors found by the Board. We commend Padilla for taking swift action to reimburse Defendant, his former client, for the full amount paid for the representation and to implement measures to improve his practice. We appreciate Padilla's cooperation in these disciplinary proceedings and note his substantial remorse for his misconduct.

III. CONCLUSION

{39} We adopt the Board's findings of fact and conclusions of law in their entirety. We indefinitely suspend Padilla from the practice of law for no less than one year, subject to partial deferment and probationary requirements as set forth in this opinion and in our order of July 9, 2019.

{40} IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:
MICHAEL E. VIGIL, Justice
C. SHANNON BACON, Justice
DAVID K. THOMSON, Justice

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-006
No. A-1-CA-34744 (filed December 21, 2018)

LASEN, INC., and LASEN ALPIS, LLC,
Plaintiffs-Appellees,
v.
BORIS TADJIKOV,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
MANUEL I. ARRIETA, District Judge

Certiorari Denied, January 7, 2020, No. S-1-SC-37720.
Released for Publication February 11, 2020.

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Opinion

Emil J. Kiehne, Judge.

{1} Defendant Boris Tadjikov, Ph.D. appeals from a judgment awarding damages to his former employer, Plaintiff Lasen, Inc. and its subsidiary, Lasen ALPIS, LLC (collectively, "Lasen"), arising out of their lawsuit against him for breach of contract, breach of the duty of good faith and fair dealing, misappropriation of trade secrets, and for injunctive relief. After a bench trial, the district court found that Tadjikov had not misappropriated Lasen's trade secrets, but that he had breached his employment agreement with, and his fiduciary duty to Lasen by wrongfully retaining intellectual property and trade secrets that belonged to Lasen (consisting of software source codes and related materials that Lasen used to operate its equipment), and also found that injunctive relief was proper. The district court entered a judgment awarding damages and a permanent injunction requiring Tadjikov to return any Lasen materials in his possession and preventing him from using or disclosing to others any of Lasen's trade secrets or confidential information.

{2} On appeal, Tadjikov raises numerous claims, including legal challenges to the breach of fiduciary duty and breach of contract claims, challenges to the district court's findings of fact, and factual and legal challenges to the award of damages. He also claims that the grant of permanent injunctive relief was improper. Finally, he claims that Lasen is not entitled to attorney's fees.

{3} We reverse the district court's entry of a permanent injunction against Tadjikov to the extent that it prevents him from disseminating Lasen's confidential information, because his employment contract only prohibited him from doing so for a five-year period that expired in April 2014. We affirm the rest of the permanent injunction. We affirm the remainder of the judgment due to Tadjikov's wholesale failure to establish that he preserved his claims for appeal.

BACKGROUND

{4} Lasen is engaged in the business of detecting methane gas leaks in natural gas pipelines, which it does using a well-known technology called "light detection and ranging" or "laser imaging detection and ranging" (LIDAR). Lasen asserts that its business is unique because it is able to mount the LIDAR equipment onto a helicopter, and, thanks to its own proprietary technology, it can inspect pipelines more quickly and accurately than its competitors.

{5} Lasen employed Tadjikov in 2004 as a research scientist. Tadjikov signed an employment agreement with Lasen, in which he agreed that "he [would] not, both during the term of his employment with [Lasen] and afterwards for a period of five (5) years from the date of termination disclose . . . [Lasen's] confidential or proprietary information to anyone." The agreement also stated that "[a]ny intellectual property right that might accrue to . . . Tadjikov during his employment with [Lasen], or which he might thereafter have a right to due to ideas developed or explored while he was so employed, are hereby assigned to [Lasen]. . . . Tadjikov agrees that he will sign such documents as may be necessary to transfer such rights." During the course of his employment, Tadjikov became a minority shareholder in Lasen.

{6} Though the parties disagree about whether Tadjikov's position officially included software engineering as part of his job, it is undisputed that Tadjikov wrote the source code needed to update and repair the three devices that Lasen uses to conduct its business (known as LIDAR 4, LIDAR 5 and LIDAR 6). Source code is defined as "[t]he non-machine language used by a computer programmer to create a program." *Black's Law Dictionary* 1610 (10th ed. 2014). It can be edited by a computer programmer. Tadjikov never received any formal training as a computer programmer, but taught himself how to code in the Delphi programming language, a language intended to be easy to use, but which is now essentially obsolete.

{7} Once a programmer completes the source code for a program, the programmer will use two software components that work together, a "compiler" and one or more "libraries," to convert the source code into an "executable file" or "object code." The resulting executable file is expressed in binary code comprised entirely of ones and zeroes, which a computer then uses to run the program. Programmers generally cannot read or edit an executable file. Compilers and libraries are available from third-party vendors under a variety of licensing agreements. It is virtually impossible to "decompile" an executable file and turn it back into source code. Lasen therefore needed the source code to update or modify the LIDAR units.

{8} The parties' dispute stems from Lasen's termination of Tadjikov's employment in

April 2009. Lasen sued Tadjikov fifteen months later, alleging that he violated the New Mexico Uniform Trade Secrets Act (the Act), NMSA 1978, §§ 57-3A-1 through -7 (1989), and that he breached his employment agreement, his duty of good faith and fair dealing to Lasen, and his fiduciary duty to Lasen by misappropriating the source codes he wrote for LIDARs 4, 5 and 6.

{9} According to Lasen, Tadjikov returned to Lasen's office the day after his termination to retrieve his personal items. But Tadjikov instead took property and information that belonged to Lasen, including the source code that he had written for LIDARs 4, 5 and 6, and he failed to provide Lasen with a complete copy of the source code. Lasen presented evidence that during his employment, Tadjikov wrote the source code on his personal hard drive, but did not allow other employees or shareholders access to it. After his termination, Tadjikov refused to give Lasen the portable hard drive on which he wrote the source code, and that as he was leaving, he told shareholders and employees of Lasen that it would cost half a million dollars to get rid of him. Lasen presented evidence that Tadjikov deleted portions of the source code in Lasen's possession, and that he failed to leave any sort of documentation to allow subsequent software engineers to understand and modify his source code, making it impossible for Lasen to upgrade and update the LIDARs. Lasen also presented testimony that Tadjikov tied the source code to specific serial numbers in the hardware of the LIDARs, making it impossible to transfer the programs to another hard drive, or to replace the equipment within the LIDARs without updating the source code, but did not tell anyone else he had done that. Moreover, Lasen offered proof that when Tadjikov returned two lab books that he used to document his work with the company, they were missing at least 70-80 pages of information.

{10} Lasen's witnesses testified that Tadjikov failed to leave the libraries and compilers necessary to successfully run the source code, nor did Tadjikov indicate through documentation which libraries were needed to run the source code. Lasen also contended that Tadjikov attempted to use its trade secrets when seeking employment with a company that was in discussions to buy Lasen. Tadjikov offered to build a methane gas leak detection system for that company, and Lasen alleged that Tadjikov had suggested to the company that it could hire him to build a new system rather than purchase Lasen. Additionally, Lasen provided evidence that Tadjikov had withheld source code from previous employers, relying on the testimony of Dr. Gary Eiceman, a professor at New Mexico State University who used to supervise Tadjikov, that when Tadjikov left Dr. Eiceman's laboratory, he refused to provide him with source code he had developed for the laboratory, arguing that it was his property.

{11} Tadjikov denied these accusations. He testified that he provided a CD containing a copy of the source code to his direct supervisor, Dr. Egor Degtiarev, and to the former CEO of Lasen, Inc., Bob Reich. He further testified that he had placed copies of the source code directly onto the LIDAR units until he was instructed by Mr. Reich to delete it from the units for security purposes. Tadjikov contended that he used his own personal academic version of the libraries and compilers to create a prototype of the software, which he obtained during his time as an assistant professor at New Mexico State University, and that he had provided a copy of the libraries and compliers to Lasen. Tadjikov argued that Lasen failed to purchase a commercial license for the libraries and compliers, and was operating the LIDAR units illegally due to the lack of proper software licensing.

{12} Litigation on the case continued for several years, and by the time of trial, the parties had stipulated that the source codes were trade secrets, and that they belonged to Lasen. The parties also stipulated that no single CD could possibly contain the entirety of the source codes, libraries, and compilers because of the limited storage capacity of CDs at the time. After a four-day bench trial, the district court issued findings of fact and conclusions of law in which it generally accepted Lasen's version of the facts. It concluded that Tadjikov had breached both his employment agreement with, and his fiduciary duty to, Lasen, by wrongfully retaining Lasen's source code, and that he did so with the intent to use the source codes for his own financial gain or for some other improper motive, such as retaliating against Lasen for terminating him. The district court, however, found that Tadjikov had not committed any actual misappropriation of trade secrets under the Act because he did not actually disclose them to a third party or put them to commercial use. As a result of Tadjikov's wrongful retention of the source code, the district court concluded that the following damages were appropriate: $170,000 for the 3,293 hours expended by Lasen to repair the LIDAR units as a result of not having the source codes; $395,000 for the value of LIDAR 6, which had to be decommissioned, minus its salvage value; disgorgement of one year of Tadjikov's salary ($72,000) for breach of the employment agreement and breach of fiduciary duty; and $100,000 in punitive damages. The district court reserved its decision about whether Lasen was entitled to attorney's fees to a later date.

{13} The district court later entered judgment against Tadjikov in accord with its findings and conclusions on Lasen's damages claims, and also entered judgment that Lasen was entitled to recover attorney's fees, while reserving the amount of those fees to a future hearing. The record on appeal, however, does not contain any order actually awarding attorney's fees to Lasen. The district court entered a permanent injunction prohibiting Tadjikov from disseminating, misappropriating, or retaining any trade secret of Lasen, and ordered Tadjikov to return any source code for LIDARs 4, 5, and 6 that Tadjikov has, or ever finds or creates. Tadjikov now appeals.

DISCUSSION

I. Tadjikov has failed to demonstrate that he preserved the majority of his claims, and we therefore decline to review them

{14} Tadjikov's brief in chief raises numerous, complex, and sometimes novel claims, arguing that the district court erred: (1) by finding that he breached a fiduciary duty as either an employee or a shareholder, where he owed no such duty since he was a minority shareholder in Lasen, did not occupy any position of managerial authority, and did not benefit from the source codes that he wrongfully retained; (2) by imposing on Tadjikov an obligation to provide Lasen with a copy of the source codes and related materials, thereby improperly rewriting Tadjikov's at-will employment contract with Lasen to add terms that the parties never bargained for; (3) by awarding consequential damages that were unsupported by any evidence that the parties contemplated those damages at the time of contracting; (4) by entering self-contradictory findings of fact and conclusions of law that do not support the judgment; (5) by awarding damages against Tadjikov that are barred by the economic loss doctrine; (6) by awarding damages that amount to a double recovery in some instances; (7) by awarding damages that are arbitrary, based on an improper measure of damages, or unsupported by substantial evidence; (8) by ordering Tadjikov to disgorge an amount equal to one year of his salary at Lasen, although the award was unsupported by evidence that he derived any financial benefit from his retention of Lasen's source code; and (9) by entering judgment in favor of Lasen on its claim for attorney's fees, because the employment agreement did not provide for them, and because Lasen was not entitled to fees under the Act.

{15} Tadjikov must show that he preserved these claims for appellate review before we will address them. *See* Rule 12-

321(A) NMRA. "To preserve an issue for review on appeal, it must appear that [the] appellant fairly invoked a ruling of the [district] court on the same grounds argued in the appellate court." *Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 24, 314 P.3d 688 (internal quotation marks and citation omitted). "The primary purposes for the preservation rule are: (1) to specifically alert the district court to a claim of error so that any mistake can be corrected at that time, (2) to allow the opposing party a fair opportunity to respond to the claim of error and to show why the [district] court should rule against that claim, and (3) to create a record sufficient to allow this Court to make an informed decision regarding the contested issue." *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 56, 146 N.M. 853, 215 P.3d 791.

{16} An important provision of the Rules of Appellate Procedure helps this Court to determine whether an appellant's claims have been preserved. Rule 12-318(A)(4) NMRA requires an appellant's brief in chief to include, with respect to each claim raised on appeal, "a statement explaining how the issue was preserved in the court below, with citations to authorities, record proper, transcript of proceedings, or exhibits relied on." Preservation statements help New Mexico's appellate courts to more efficiently and effectively perform their function, not only to determine whether a particular claim has been preserved, but also to understand the context in which the claim arose and the reasoning underlying the district court's decision. And, in a time of scarce judicial resources and a heavy docket, preservation statements help our appellate courts to work more efficiently. The importance of adequate preservation statements is underscored by our Supreme Court's declaration that an appellant's failure to include an adequate one may, by itself, justify an appellate court in declining to review a claim. *See Glaser v. LeBus*, 2012-NMSC-012, ¶ 13, 276 P.3d 959 (stating that where a party fails to comply with requirement to demonstrate where a claim was preserved, an appellate court may decline to review that claim).

{17} Tadjikov's brief in chief includes several nearly-identical preservation statements that purport to describe how his claims were preserved. These cite Tadjikov's statement of the case in the pre-trial order, his proposed findings of fact and conclusions of law, and a post-trial brief as evidence that he preserved his claims. Given the novelty and complexity of his claims, we were interested in how they had developed and what the district court had said about them. But when we reviewed the documents that Tadjikov cited, we could find no reference to any claim or argument remotely similar to the ones that he raises now. Tadjikov's statement of the case in the pretrial order did state generally that Lasen's entitlement to damages was an issue to be determined at trial, and in his post-trial proposed findings of fact and conclusions of law, he asserted that Lasen was not entitled to damages because he did not misappropriate any trade secrets or breach any of his duties to Lasen, but these general statements were woefully insufficient to preserve the detailed and specific attacks on the damages awards that he now raises in this appeal. *See Crutchfield v. N.M. Dep't of Taxation and Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 ("[O]n appeal, the party must specifically point out where, in the record, the party invoked the court's ruling on the issue. Absent that citation to the record or any obvious preservation, we will not consider the issue.").

{18} Tadjikov's preservation statements also assert that he raised his claims "in arguments to the [d]istrict [c]ourt, and testimony and evidence elicited" during two pre-trial hearings, and during the four-day bench trial. Although Rule 12-318(A)(4) required the preservation statements to include "citations to . . . [the] record proper, transcript of proceedings, or exhibits relied on[,]" Tadjikov has failed to cite the pages of these transcripts where he preserved his claims. By failing to include specific citations, Tadjikov invites this Court to review hundreds of pages of argument and testimony (the four-day trial transcript alone is 939 pages long) to figure out whether his claims were preserved. We may decline to review Tadjikov's claims on this ground alone. *See In re Norwest Bank of N.M., N.A.*, 2003-NMCA-128, ¶ 30, 134 N.M. 516, 80 P.3d 98 (stating that this Court will not search transcripts for evidence of preservation where the appellant refers generally to the transcripts, but fails to provide specific page numbers). Nevertheless, although not obligated to do so, we have reviewed these transcripts, and cannot find any reference to the claims that Tadjikov now presses on appeal.

{19} We conclude that Tadjikov's brief in chief has failed to establish that he preserved the above-listed claims, as required by Rule 12-318(A)(4), and we therefore decline to review them. We rely on this rule although Lasen did not point out Tadjikov's failure to follow it, much less his actual failure to preserve his claims, because failure to comply with the Rule has obstructed our ability to conduct appropriate appellate review.

II. Tadjikov's challenges to the permanent injunction

{20} Tadjikov objects to the district court's entry of a permanent injunction against him on three grounds. First, he argues that the evidence was insufficient to demonstrate a "threatened misappropriation" of trade secrets, as required to support an injunction under the Act. Second, he argues that the injunction is improper because it is unlimited in time; that is, the injunction permanently precludes him from ever disclosing Lasen's trade secrets or confidential information even though the parties' employment contract only imposed a five-year post-termination period of confidentiality on Tadjikov. Finally, Tadjikov argues that injunctive relief was improper because Lasen had an adequate remedy at law. The first claim lacks merit and Tadjikov has failed to demonstrate how he preserved the third claim, but we conclude that the second claim is meritorious to the extent that it imposes an obligation of confidentiality on Tadjikov that is unlimited in time.

{21} "[I]njunctions are harsh and drastic remedies which should issue only in extreme cases of pressing necessity and only where there is [a showing of irreparable injury for which there is] no adequate and complete remedy at law." *Luginbuhl v. City of Gallup*, 2013-NMCA-053, ¶ 31, 302 P.3d 751 (internal quotation marks and citation omitted). We review a district court's decision to issue a permanent injunction for an abuse of discretion. *See Insure N.M., LLC v. McGonigle*, 2000-NMCA-018, ¶ 7, 128 N.M. 611, 995 P.2d 1053 ("The granting of an injunction is an equitable remedy, and whether to grant equitable relief lies within the sound discretion of the trial court."). "[T]he trial court abuses discretion when it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." *Aragon v. Brown*, 2003-NMCA-126, ¶ 9, 134 N.M. 459, 78 P.3d 913. To the extent that this case requires us to interpret the Act, statutory interpretation is a question of law which we review de novo. *State ex rel. Children, Youth & Families Dep't. v. Maurice H.*, 2014-NMSC-034, ¶ 65, 335 P.3d 746.

A. Lasen proved the existence of "threatened appropriation" sufficient to support an injunction against Tadjikov

{22} The Act provides that "[a]ctual or threatened misappropriation [of a trade secret] may be enjoined." NMSA 1978, § 57-3A-3(A) (1989). Tadjikov argues that the permanent injunction was improper. First, he argues that the injunction is not based on any actual misappropriation of a trade secret because the district court rejected Lasen's misappropriation claim. Second, Tadjikov argues that evidence was insufficient to support the district court's finding that threatened misappropriation existed, because he never made any threat to disclose Lasen's trade secrets to a third

party.

{23} We agree with Tadjikov that the permanent injunction is not based on any actual misappropriation of a trade secret. The district court found that Tadjikov "did not misappropriate Lasen's trade secrets in that he did not receive some sort of unfair trade advantage, nor did he disclose them to a third person or otherwise place the information to commercial use," and concluded that "[t]he evidence at trial did not place Lasen's misappropriation claims within the coverage of the . . . Act." But the district court also found that "the evidence is sufficient to require a need for continued injunctive relief under Section 57-3A-3." Lasen does not appear to dispute Tadjikov's argument that the injunction does not rest on any actual misappropriation under the Act.

{24} Accordingly, we turn to consider whether sufficient evidence of "threatened misappropriation" existed to support entry of the injunction. Tadjikov, quoting *Black's Law Dictionary* 1030 (6th ed. 1991), argues that the word "threat" should be defined as "[a] communicated intent to inflect physical or other harm on any person or property." And because Lasen offered no evidence that he ever communicated any such threat, Tadjikov argues that there was no "threatened misappropriation" under the Act. Lasen does not respond to Tadjikov's interpretation of the Act.

{25} Despite Lasen's failure to help us on this point, we conclude that Tadjikov's interpretation of "threatened misappropriation" is too narrow. First, the plain meaning of the word "threat" is broader than Tadjikov admits. To be sure, the term includes the communication of an explicit intent to harm, but it is also defined as "[a] n indication of approaching menace; the suggestion of an impending detriment," and as "[a] person or thing that might well cause harm." *Black's Law Dictionary* 1708-09 (10th ed. 2014). Second, other courts have not limited the term to situations in which a defendant explicitly threatens to disclose trade secrets to others. Thus, for example, under California law, "[t]hreatened misappropriation may be demonstrated by showing either that the defendant possesses trade secrets and has misused or disclosed those secrets in the past, that the defendant intends to misuse or disclose those secrets, or that the defendant possesses trade secrets and wrongfully refuses to return them after a demand for return is made." *Clorox Co. v. S.C. Johnson & Son, Inc.*, 627 F. Supp. 2d 954, 968-69 (E.D. Wis. 2009). Without attempting to set forth a comprehensive definition of "threatened misappropriation," we agree that it occurs when a defendant possesses trade secrets and wrongfully refuses to return them to the owner. This makes sense, because where a defendant has trade secrets and wrongfully refuses to return them to their owner, it is reasonable to infer that the defendant may intend to use them in a way that harms the owner, and reasonable to protect the trade secret owner against that risk.

{26} Here there was ample evidence that Tadjikov possessed Lasen's trade secrets and wrongfully refused to return them after Lasen demanded their return. The district court found that Tadjikov "wrongfully failed to provide Lasen with the programming environment in which he created the source code;" that he "took possession of source codes, lab books and trade secrets of Lasen in defiance of the Lasen's rights with intent to deprive and negate Lasen of its lawful property, and further wrongfully retained such property following multiple demands for their return[;]" and "engaged in this conduct so as to ensure Lasen would be without copies of the source code so as to impair and impede Lasen's ability to repair, modify or improve the LIDAR units which [Tadjikov] had developed and upon which Lasen commercially relied on." Tadjikov does not challenge these findings of fact, and accordingly we deem them conclusive. *See* Rule 12-318(A)(4) (stating that the argument in an appellant's brief in chief "shall set forth a specific attack on any finding, or the finding shall be deemed conclusive"). We therefore hold that the evidence was sufficient to support the district court's conclusion that Tadjikov's "threatened misappropriation" of Lasen's trade secrets supported a grant of injunctive relief under the Act.

B. The injunction is improperly unlimited in time

{27} Tadjikov next argues that the permanent injunction violates the Act because it imposes obligations on him to protect Lasen's trade secrets that are unlimited in time, even though the parties themselves agreed that a five-year period post-termination was appropriate. We agree with Tadjikov that the injunction should not have extended his obligation not to disclose Lasen's trade secrets and confidential information beyond the time that Lasen itself agreed was proper.

{28} The Act places a temporal limit on injunctive relief by stating that "[u]pon application to the court, an injunction shall be terminated when the trade secret has ceased to exist but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation." Section 57-3A-3(A). Here, Tadjikov's employment agreement states that "[Tadjikov] will not, both during the term of his employment with Lasen and afterwards for a period of five (5) years from the date of termination disclose [Lasen's] confidential or proprietary information to anyone. Confidential and proprietary information includes any information that is not generally known and which is, or which may be, useful in the operation of [Lasen] or which may be beneficial to anyone in competition with Lasen. Such information includes, but is not limited to, information concerning projects being worked on or contemplated by Lasen, technical information, and information concerning the commercialization of Lasen's products and Lasen's financial affairs." This obligation included Lasen's trade secrets, which by definition are not generally known. *See* § 57-3A-2(D)(1) (defining "trade secret" as "information . . . that: (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use[.]").

{29} Accordingly, because Lasen terminated Tadjikov's employment in April 2009, his contractual obligation not to disclose Lasen's trade secrets or confidential information only extended through April 2014. The district court's injunction, however, was entered in April 2015 and imposed a non-disclosure obligation on Tadjikov without any temporal limit. While Section 57-3A-3(A) allows an injunction to continue "for an additional reasonable period of time in order to eliminate commercial advantage" even after a trade secret no longer exists, Lasen itself agreed, in its employment agreement with Tadjikov, that a post-termination period of five years was reasonable. In its answer brief, Lasen does not respond to Tadjikov's argument that the injunction's unlimited time period is improper, much less offer any attempt to justify it. Moreover, the district court acknowledged at the hearing on the motion for reconsideration that the technology at issue "was already obsolete or becoming obsolete. So in essence, it's really an injunction on obsolete technology or equipment." We therefore conclude that it was improper for the district court to issue an injunction that protected Lasen's trade secrets from disclosure beyond the five years that Lasen contracted for. *See In re N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 41, 140 N.M. 879, 149 P.3d 976 ("We will not rewrite a contract to create an agreement for the benefit of one of the parties that, in hindsight, would have been wiser." (alteration, internal quotation marks, and citation omitted)).

{30} We do, however, affirm the district court's injunction to the extent that it requires Tadjikov to turn over to Lasen any copies of the source code in his possession,

or which he "may ever discover or create," including "any reasonable facsimile of such source code[.]" The parties agreed that the source code was Lasen's property. The district court found that Tadjikov wrongfully retained "the intellectual property rights and trade secrets which he had created and assigned to Lasen in accordance with their employment agreement." The district court further found that his retention of the source code made it difficult for Lasen to modify or repair the LIDAR units on which its business relies. Tadjikov does not challenge these factual findings on appeal. We conclude that even if the source code no longer constituted a trade secret, and although Tadjikov no longer has an obligation to keep it confidential, it is still Lasen's property, and Lasen is entitled to its return. Accordingly, we hold that it was reasonable for the district court to order Tadjikov to return to Lasen any source code in his possession or that he might obtain possession of in the future.

{31} We reverse the district court's order issuing a permanent injunction against Tadjikov only to the extent it prevents him from disseminating source code to third parties in the future. The portion of the injunction as it relates to Tadjikov's wrongful retention of the source code is affirmed.

C. We decline to address Tadjikov's argument that the injunction was improper because Lasen had an adequate remedy at law

{32} Tadjikov argues that the permanent injunction was improper because Lasen had an adequate remedy at law. As discussed above, we have reviewed the documents and transcripts that Tadjikov cited in his preservation statements contained in his brief in chief. We can find no reference to any argument that the permanent injunction should not have been granted because Lasen had an adequate remedy at law. Accordingly, we decline to review this claim due to Tadjikov's failure to demonstrate how and when it was preserved, as required by Rule 12-318(A)(4).

III. Lasen's request for appellate attorney's fees is unsupported

{33} In the concluding paragraph of its answer brief, Lasen asks this Court to award it attorney's fees for this appeal. Rule 12-403(B)(3) NMRA allows this Court to award "reasonable attorney fees for services rendered on appeal in causes where the award of attorney fees is permitted by law." Lasen, however, does not identify the legal basis on which it asks for attorney's fees, and therefore we conclude that this request lacks merit.

CONCLUSION

{34} We reverse the district court's imposition of a permanent injunction against Tadjikov to the extent that it requires him to maintain the confidentiality of Lasen's trade secrets in perpetuity. We affirm the judgment and permanent injunction in all other respects. Lasen's request for appellate attorney's fees is denied.

{35} IT IS SO ORDERED.
EMIL J. KIEHNE, Judge

WE CONCUR:
JULIE J. VARGAS, Judge
DANIEL J. GALLEGOS, Judge

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-007
No. A-1-CA-36391 (filed August 12, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MARCOS FIGUEROA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SIERRA COUNTY
MATTHEW G. REYNOLDS, District Judge

Certiorari Denied, November 19, 2019, S-1-SC-37904.
Released for Publication February 11, 2020.

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Opinion

Zachary A. Ives, Judge.

{1} A jury convicted Marcos Figueroa (Defendant) of two counts of criminal sexual penetration of a minor (CSPM) in the second degree (CSPM-II) perpetrated against a child between the ages of thirteen and eighteen through force or coercion contrary to NMSA 1978, Section 30-9-11(E)(1) (2009). On appeal, Defendant argues that (1) the use of an inapplicable jury instruction was fundamental error; (2) insufficient evidence supports his conviction; and (3) the district court incorrectly credited only the portion of Defendant's pretrial release that he spent under house arrest towards his sentence. We reverse Defendant's convictions, remand for a new trial, and affirm the district court's order regarding credit for time spent on pretrial release.

BACKGROUND

{2} The State charged Defendant by criminal information with four counts of CSPM-II committed against his underage son, G.F., and two counts of CSPM-II committed against his underage stepson, A.C. At trial, all of these charges were dismissed save two—Counts 4 and 5, which related to G.F. and were identical except for the charged timeframe. They alleged:

> That between June 01, 2014[,] and July 01, 2014, [for Count 4, and September 01, 2014, and October 7, 2014, for Count 5, D]efendant did cause [G.F.] to engage in sexual intercourse/anal intercour se/cunnilingus/fellatio, and [G.F.] was at least thirteen but less than eighteen years of age, a second degree felony for a sexual offense against a child[.]

The amended information alleged that this conduct violated Section 30-9-11(E)(1), which proscribes CSPM perpetrated "by the use of force or coercion on a child thirteen to eighteen years of age[.]"

{3} G.F. provided the only testimony at trial regarding the two incidents on which Counts 4 and 5 were based. The substance of his testimony was as follows:

> STATE: [B]etween June 1 of 2014 and July 1 of 2014, what did your father do to you when you say he molested you?
> G.F.: I woke up in the living room upstairs, I can't remember if I was in the recliner with it opened and laying down or if I had two of the recliners next to each other and I was laying across that, but I was upstairs laying in those, and I woke up, but he didn't know I did, to my pants pulled down, and he was doing oral.
> STATE: He was performing oral sex?
> G.F.: Yes.
> STATE: When you say oral sex . . . what was he doing exactly?
> G.F.: He had his mouth on my penis.
> STATE: Did he ever know you woke up?
> G.F.: Not that I know.
> STATE: And did he say anything about it?
> G.F.: No.
> . . . .
> STATE: Had you ever told him "don't do that"?
> G.F.: No.
> STATE: Did he ever say anything to you when he did this?
> G.F.: He did not.

G.F. testified that he was sixteen years old at the time of trial, making him either thirteen or fourteen at the time this abuse occurred.

{4} The parties discussed jury instructions with the district court following the close of evidence. The court expressed some confusion as to the applicable instructions and noted that it had been presented with alternative theories of the case, one of which involved the use of "physical force," *see* NMSA 1978, § 30-9-10(A)(1) (2005). In response, the State disavowed any reliance on a "physical force" theory of CSPM-II. Instead, the prosecutor informed the court, the State's "theory of the case [was] that Defendant, by reason of his relationship [with G.F.], was able to exercise undue influence over [G.F.] and used his position to coerce him to submit to the act." The prosecutor asserted that that theory was supported by the trial evidence "because that's what the testimony [was,]" summarizing the State's position as "[t]he child woke up, [Defendant] was there, the child continued to lie there because . . . it was his dad doing it."

{5} Defendant did not object to instructions based on a "position of authority" theory, and the district court consequently instructed the jury on the elements of "position of authority" CSPM-II. The jury found Defendant guilty of both counts under the given instructions. Defendant appeals.

DISCUSSION

I. Fundamental Error Occurred Because the Jury Convicted Defendant Under an Invalid Legal Theory

{6} Defendant contends that we must reverse his conviction because it was error for the district court to instruct the

jury on "position of authority" CSPM-II. Defendant failed to preserve this claim of error at trial, and we therefore review only for fundamental error. *State v. Stevens*, 2014-NMSC-011, ¶ 42, 323 P.3d 901. Under fundamental error review, we first determine "whether a reasonable juror would have been confused or misdirected by the [given] instruction." *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (internal quotation marks and citation omitted). Confusion or misdirection may result from instructions that are "facially contradictory or ambiguous," as well as those that, "through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *Id.* "If . . . a reasonable juror would have been confused or misdirected, then we review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the defendant's conviction was the result of a plain miscarriage of justice." *State v. Candelaria*, 2019-NMSC-004, ¶ 31, 434 P.3d 297 (internal quotation marks and citation omitted). To the extent that our analysis involves issues of statutory interpretation, our review is de novo. *State v. Arvizo*, 2018-NMSC-026, ¶ 13, 417 P.3d 384.

{7} The instructions the district court gave informed the jury that, "to find [D]efendant guilty of criminal sexual penetration of a child [thirteen] to [eighteen] by use of coercion by a person in a position of authority[,]" it had to find beyond a reasonable doubt:

> 1. [D]efendant caused [G.F.] to engage in fellatio;
> 2. [G.F.] was at least [thirteen] but less than [eighteen] years old;
> 3. [D]efendant was a person who by reason of his relationship to [G.F.] was able to exercise undue influence over [G.F.] and used his position of authority to coerce him to submit to the act;
> 4. This happened in New Mexico on or between June 1, 2014, and July 1, 2014[, for Count 4, and on or between September 1, 2014, and October 7, 2014, for Count 5].

These instructions were modelled on an inapplicable uniform jury instruction, UJI 14-945 NMRA. Its use note states that the instruction "is only to be used in cases based on crimes that occurred before the [Legislature's] 2007 amendment [of Section 30-9-11]."

{8} Before the amendment, Section 30-9-11(D)(1) (2003) classified as CSPM-II all CSPM perpetrated "on a child thirteen to eighteen years of age when the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit[.]" As of July 1, 2007, however, Section 30-9-11 no longer contains any reference to "position of authority" CSPM. Instead, Section 30-9-11(E)(1) now provides that all CSPM perpetrated "by the use of force or coercion on a child thirteen to eighteen years of age" is CSPM-II. Because the law in effect at the time a criminal offense is committed is controlling, *State v. Lucero*, 2007-NMSC-041, ¶ 14, 142 N.M. 102, 163 P.3d 489, the current version of Section 30-9-11 was the statute applicable to the charges Defendant faced, and the district court erred by instructing the jury on "position of authority" CSPM-II.

{9} The State argues that we should not reverse because the given "position of authority" instructions required the jury to find that Defendant "coerce[d]" G.F. and therefore contained every essential element of "force or coercion" CSPM-II. We disagree.[1] The plain language of our sex offense statutes and precedent interpreting those statutes demonstrate that the given instructions would have confused or misled a reasonable juror because they omitted the essential element of "force or coercion" and included the legally irrelevant elements of "position of authority" CSPM-II.

{10} "[F]orce or coercion," as that phrase is used in Section 30-9-11, has five alternative definitions:

> (1) the use of physical force or physical violence;
> (2) the use of threats to use physical violence or physical force against the victim or another when the victim believes that there is a present ability to execute the threats;
> (3) the use of threats, including threats of physical punishment, kidnapping, extortion or retaliation directed against the victim or another when the victim believes that there is an ability to execute the threats;
> (4) the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim is unconscious, asleep or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act; or
> (5) the perpetration of criminal sexual penetration or criminal sexual contact by a psychotherapist on his patient, with or without the patient's consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy.

NMSA 1978, § 30-9-10(A) (2005). These statutory definitions control; a jury may only find "force or coercion" when the State proves one or more of them. The ordinary meaning of "coerce" therefore has no bearing on whether CSPM has been perpetrated through "force or coercion" insofar as it encompasses a range of conduct broader than those definitions.

{11} Moreover, "coerc[ion]" did not appear as an isolated element in the given instructions. Instead, those instructions informed the jury that it could convict Defendant only if it found that he had committed the CSPM by "us[ing] his position of authority to coerce [G.F.] to submit to the [fellatio]." The word "coerc[ion]" in that context has an entirely different meaning than "force or coercion":

> Coercion [under a "position of authority" theory] occurs when a defendant occupies a position which enables that person to exercise undue influence over the victim and that influence [is] the means of compelling submission to the contact. Such coercion might take many forms but is less overtly threatening than physical force or threats. Undue influence results from moral, social, or domestic force exerted upon a party, so as to control the free action of his or her will.

State v. Gardner, 2003-NMCA-107, ¶ 22, 134 N.M. 294, 76 P.3d 47 (internal quotation marks and citations omitted, alteration and omission incorporated); *see Arvizo*, 2018-NMSC-026, ¶ 21 ("A person in a position of authority does not have to use threats or physical force to coerce a child to submit to sexual contact. A child can be coerced through subtle social or domestic pressure on the part of the perpetrator[.]" (citation omitted)); *see also* UJI 14-945 comm. cmt. ("Only one instruction was prepared for this method of committing the crime of criminal sexual

[1]We reached the opposite conclusion in *State v. Sarabia*, No. 31,155, mem. op., 2014 WL 5865104 (N.M. Ct. App. Oct. 6, 2014) (non-precedential). In that case, we held that a given "position of authority" instruction contained the element of "force or coercion" because the given instruction required the jury to find that the defendant "coerced" the victim. *Id.* ¶¶ 30-31. We disapprove of that reasoning for the reasons discussed in the text.

penetration because the term 'force or coercion' has no application.").[2] None of the statutory definitions set out in Section 30-9-10 permit a finding of "force or coercion" upon proof that a defendant has used "undue influence"—i.e. "moral, social, or domestic force[,]" *Gardner*, 2003-NMCA-107, ¶ 22 (internal quotation marks and citation omitted)—to perpetrate CSPM, and the jury's finding here that Defendant "coerce[d]" G.F. thus cannot support Defendant's conviction for CSPM-II.

{12} Because the given instructions would have confused or misdirected a reasonable juror, we must determine whether Defendant's conviction was "the result of a plain miscarriage of justice." *Candelaria*, 2019-NMSC-004, ¶ 31 (internal quotation marks and citation omitted). The State asserts that no miscarriage of justice occurred because "the evidence that G.F. was asleep would . . . have established the essential element of force or coercion under the updated UJI." In essence, the State contends that this Court should affirm Defendant's conviction for the nonexistent crime of "position of authority" CSPM-II because the evidence at trial established one of the actual statutory definitions of "force or coercion"—"the perpetration of criminal sexual penetration . . . when the perpetrator knows or has reason to know that the victim is . . . asleep[.]" Section 30-9-10(A)(4). We disagree.

{13} The doctrine of fundamental error requires us to reverse a criminal conviction when "an error implicate[s] a fundamental unfairness within the system that would undermine judicial integrity if left unchecked." *State v. Barber*, 2004-NMSC-019, ¶ 18, 135 N.M. 621, 92 P.3d 633 (internal quotation marks and citation omitted). It is fundamentally unfair, and thus per se fundamental error, to convict a criminal defendant of a nonexistent crime, regardless of whether the evidence would have been sufficient to prove a crime that the law does recognize. *See Campos v. Bravo*, 2007-NMSC-021, ¶¶ 19-21, 141 N.M. 801, 161 P.3d 846 (holding that a conviction must be reversed when the jury returns a general verdict after being instructed on alternative valid and invalid bases of conviction and the reviewing court cannot conclude beyond a reasonable doubt that the jury chose the valid basis); *State v. Maestas*, 2007-NMSC-001, ¶ 9, 140 N.M. 836, 149 P.3d 933 ("It is fundamental error to convict a defendant of a crime that does not exist.").

{14} A conviction for "position of authority" CSPM-II based on conduct occurring after the 2007 amendment of Section 30-9-11 is a legal nullity. We could not uphold Defendant's conviction if the jury had returned a general verdict of guilty after being instructed on both "position of authority" CSPM and the "sleeping victim" method of committing CSPM-II that the State now asserts was indisputably established. *See Campos*, 2007-NMSC-021, ¶ 19. It would be absurd for us to do so where the only possible basis for the jury's verdict was legally inadequate. It was a miscarriage of justice to convict Defendant of "position of authority" CSPM-II because that crime did not exist at the time the CSPM at issue was alleged to have occurred. Defendant's conviction was therefore "fundamentally unfair notwithstanding [his] apparent guilt[,]" *Barber*, 2004-NMSC-019, ¶ 17, and we must reverse his conviction.[3]

{15} Moreover, we would be compelled to reverse even if our fundamental error doctrine allowed us to conclude that the evidence and verdict indisputably establish Defendant's guilt under the State's newly-discovered sleeping victim theory. The constitutional guarantees of notice, N.M. Const. art. II, § 14, and due process, U.S. Const. amend. XIV, § 1; N.M. Const. art. II, § 18, both prohibit this Court from affirming a criminal conviction under a legal theory different than that on which the case was tried. An appellate court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury[.]" *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *accord McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991) ("Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury."); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("[I]t is certain that [the defendants] were not tried for or found guilty of [the charge under which the appellate court upheld their conviction]. It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."); *see, e.g.*, *Commonwealth v. Mills*, 764 N.E.2d 854, 864-65 (2002) (reversing a larceny conviction where the jury had been instructed on the elements of traditional larceny but the evidence at trial would have supported a conviction only on a theory of larceny by false pretenses).

{16} The given instructions informed the jury that it could only find Defendant guilty under a "position of authority" theory, and the jury did so. This Court cannot retroactively alter the basis for that verdict, applying the evidence adduced under a "position of authority" theory at trial to a "sleeping victim" theory that Defendant was not tried on and the jury never considered. *See State v. Villa*, 2004-NMSC-031, ¶¶ 12-13, 136 N.M. 367, 98 P.3d 1017 ("[G]iving [the d]efendant notice of the lesser-included offenses *after conviction* hardly provides [the d]efendant with adequate notice of those charges. . . . [And e]ven if we were to conclude that [the d]efendant had adequate notice of lesser-included offenses, we would still face the problem of convicting [the d]efendant on appeal of a charge he did not in fact defend at trial."); *State v. Loveless*, 1935-NMSC-023, 39 N.M. 142, 42 P.2d 211; *cf. State v. McGee*, 2002-NMCA-090, ¶ 18, 132 N.M. 537, 51 P.3d 1191 ("Adequate notice of charges is a principle precious to any system of ordered liberty which we will not dilute with a harmless error review."); *State v. Armijo*, 1977-NMCA-070, ¶ 24, 90 N.M. 614, 566 P.2d 1152 (rejecting as "no more than speculation" the state's argument "that the defense would not have been different if the defen[dant] had been given notice"). The State chose to put Defendant on trial for a crime that did not exist when Defendant was alleged to have committed it. Now, it is bound by the

[2]Both *Gardner* and *Arvizo* interpreted NMSA 1978, Section 30-9-13, which criminalizes sexual contact of a minor (CSCM), rather than Section 30-9-11, the CSPM statute. The language used for the "position of authority" method of commission in the CSCM statute is substantively identical to the formulation of that method as it existed in the CSPM statute prior to 2007. *Compare* § 30-9-13(B)(2)(a), (C)(2)(a) (2003), *with* § 30-9-11(D)(1) (2003).

[3] Defendant also asserts that fundamental error resulted from the given instructions' omission of the element of unlawfulness. *See generally* § 30-9-11(A) ("Criminal sexual penetration is the *unlawful* and intentional causing of a person to engage in . . . fellatio[.]" (emphasis added)). That assertion lacks merit. Use Note 1 to UJI 14-132 NMRA, the uniform instruction on the unlawfulness element, provides that the district court is to instruct the jury on unlawfulness only when "an issue is raised as to the lawfulness of the defendant's act." There was no issue here. In reaching its verdict, the jury found beyond a reasonable doubt that Defendant had performed fellatio on his underage son. None of the evidence tended to show any circumstance under which Defendant's actions could have been lawful, and we cannot imagine any such circumstance. Omission of the unlawfulness element was not fundamental error because there was no suggestion that the charged sex acts, "if they occurred, were other than unlawful[.]" *State v. Orosco*, 1992-NMSC-006, ¶ 9, 113 N.M. 780, 833 P.2d 1146; *see Stevens*, 2014-NMSC-011, ¶ 46.

consequences of that choice: remand and, as discussed below, a new trial. *Cf. Villa*, 2004-NMSC-031, ¶ 14 ("[Both the state and the defense] should be liable for the risks of their respective trial strategies.").

II. Double Jeopardy Does Not Bar Retrial

{17} Because Defendant's convictions must be reversed, we next determine whether the State may retry Defendant for CSPM-II. Retrial is not barred if sufficient evidence was introduced at trial to support a conviction under the erroneous given instructions. *State v. Luna*, 2018-NMCA-025, ¶ 27, ___ P.3d ___, *cert. denied*, 2018-NMCERT-___ (No. S-1-SC-36896, Mar. 16, 2018); *State v. Rosaire*, 1996-NMCA-115, ¶ 20, 123 N.M. 250, 939 P.2d 597. "[T]he test to determine the sufficiency of the evidence . . . is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. "[W]e must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.3d 409 (internal quotation marks and citation omitted).

{18} There was substantial evidence of Defendant's guilt under the given instructions. G.F. testified that Defendant had put "his mouth [on G.F.'s] penis" within both relevant timeframes, during which G.F. was thirteen or fourteen years old. The evidence established that Defendant was G.F.'s father, placing him in a position of authority over G.F. as a matter of law.[4] *See* § 30-9-10(E). From G.F.'s testimony, the jury could reasonably have concluded (as the State posited) that G.F. had been coerced into lying still while Defendant perpetrated the fellatio, a symptom of the undue influence that Defendant's position as G.F.'s father enabled him to exercise. Further, coercion in the "position of authority" context "can be inferred [from] a child's reluctance or fear to report the sexual [abuse]." *Arvizo*, 2018-NMSC-026, ¶ 21. At trial, G.F. indicated that he had initially been reluctant to disclose what Defendant had done to him because he did not know how people would react and worried that people would "think about [him] differently" if he disclosed the abuse. Based on this evidence, a reasonable jury could have found that Defendant used his position of authority to coerce G.F. to submit to fellatio on both charged occasions. Double jeopardy thus does not bar Defendant's retrial.

III. The District Court Correctly Calculated Presentence Confinement Credit

{19} Finally, we address Defendant's argument that he is entitled to additional days of credit for time spent on conditions of pretrial release prior to his conviction. Defendant was arrested and taken into custody on the charges at issue on May 7, 2015. He was released into his wife's custody and placed on house arrest on May 29, 2015, on conditions of release that required him to wear an ankle monitor and enroll in an electronic monitoring program (EMP). On September 18, 2015, the district court entered an order freeing Defendant from house arrest and leaving Defendant on conditions of release that required him:

> not to possess firearms or dangerous weapons;
> not to possess or consume alcohol or enter liquor establishments;
> not to possess or use any narcotic drugs without a valid prescription[;]
> not to violate any federal, state[,] or local criminal law;
> to notify the court of any change of address;
> not to leave . . . [the] State of New Mexico without prior permission of the [c]ourt;
> to maintain contact with [his] attorney;
> to avoid all contact with the alleged victim or anyone who [might] testify in [the] case;
> [to] submit to random UA (urine test[s]) or breathalyzer test[s], [as well as those] by any law enforcement personnel with reasonable suspicion[; and]
> no[t to] driv[e] a motor vehicle without a valid driver[']s license and valid insurance.

The conditions further required Defendant to continue wearing an ankle monitor and prohibited him from having "unsupervised contact with children under the age of [eighteen] except [for] his own."

{20} On December 4, 2015, the district court again modified Defendant's conditions of release, adding two further conditions: (1) a curfew between the hours of 10 p.m. and 7 a.m. and (2) an order prohibiting Defendant from going onto the grounds of G.F.'s former school. Defendant remained on release subject to these conditions until he was convicted and remanded into custody on December 14, 2016.

{21} Prior to sentencing, Defendant and the State submitted briefs with differing calculations of presentence confinement credit. Defendant asserted that he was entitled to credit for 663 days, the entire time between his initial arrest and the date of his conviction. The State, on the other hand, asserted that Defendant was entitled to credit for only 205 days, reflecting the time Defendant had spent incarcerated and, in accordance with *State v. Guillen*, 2001-NMCA-079, ¶ 10, 130 N.M. 803, 32 P.3d 812, and *State v. Duhon*, 2005-NMCA-120, 138 N.M. 466, 122 P.3d 50, on house arrest. The district court entered a judgment and sentence on April 14, 2017, that credited Defendant with 205 days of presentence confinement and additional time spent incarcerated prior to sentencing.

{22} Defendant asserts that the district court erred by failing to give him credit for (1) the entire time following his release from house arrest on September 18, 2015, until his conviction; or (2) the time between the district court's December 4, 2015, modification of Defendant's conditions and his conviction. We disagree. Because we conclude that the more onerous conditions of the December 4, 2015, order are insufficiently restrictive to qualify for credit, we do not separately address Defendant's claim that credit should apply from September 18, 2015.

{23} NMSA 1978, Section 31-20-12 (1977) provides that "[a] person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent in presentence confinement against any sentence finally imposed for that offense." *See generally State v. Ramzy*, 1982-NMCA-113, ¶ 8, 98 N.M. 436, 649 P.2d 504 ("The language of the statute is mandatory."). Because we must interpret Section 31-20-12 to determine whether Defendant qualifies for presentence confinement credit, our review of the district court's calculation of credit is de novo. *State v. Romero*, 2002-NMCA-106, ¶ 6, 132 N.M. 745, 55 P.3d 441.

{24} In interpreting Section 31-20-12, we aim to provide "a clear guide that does not require fact intensive inquiries into

[4]While Defendant's status as G.F.'s father should technically be irrelevant to our analysis because of the language of the erroneous instruction, neither party disputes that Defendant occupied a position that enabled him to exercise undue influence over G.F., and an abundance of evidence would have allowed the jury to reach that conclusion. We are satisfied that none of the "rare circumstances in which a parent . . . is not able to exercise authority over [his or her] child," *State v. Erwin*, 2016-NMCA-032, ¶ 9, 367 P.3d 905, are present here, and we therefore find it unnecessary to discuss evidence pertinent to other positions of authority that the jury may have found Defendant occupied.

whether specific conditions of release subject a defendant to jail-type confinement[,]" *Guillen*, 2001-NMCA-079, ¶ 6, without "foreclos[ing] the exercise of reasonable flexibility by sentencing courts through the adoption of too bright a line." *State v. Fellhauer*, 1997-NMCA-064, ¶ 16, 123 N.M. 476, 943 P.2d 123. We determine whether Defendant was "held in official confinement" by applying the two-pronged *Fellhauer* test:

> Section 31-20-12 applies to time spent outside a jail, prison or other adult or juvenile correctional facility when (1) a court has entered an order releasing the defendant from a facility but has imposed limitations on the defendant's freedom of movement, OR the defendant is in the actual or constructive custody of state or local law enforcement or correctional officers; and (2) the defendant is punishable for a crime of escape if there is an unauthorized departure from the place of confinement or other non-compliance with the court's order.

Fellhauer, 1997-NMCA-064, ¶ 17.

{25} Defendant asserts, and the State does not dispute, that the second prong of *Fellhauer* was met because Defendant would have been subject to a charge of escape under NMSA 1978, Section 30-22-8.1 (1999), had he violated his conditions of release.[5] So the only issue before us is whether Defendant was subject to "limitations on [his] freedom of movement" within the meaning of the first prong. We agree with the State that Defendant's pretrial release did not satisfy that prong because the conditions of his release were "[in]sufficiently restrictive." *Guillen*, 2001-NMCA-079, ¶ 7.

{26} Defendant relies on *Guillen* and the decision of the Court of Appeals of Maryland in *Dedo v. State*, 680 A.2d 464 (Md. 1996), to support his contention that the conditions of his release following the December 4, 2015, modification were sufficiently restrictive to qualify for credit. In *Guillen*, we noted that *Fellhauer* had approvingly cited *Dedo* and observed that it "appears that the defendant in *Dedo* was not under total house arrest, but was subject to a curfew."[6] *Guillen*, 2001-NMCA-079, ¶ 10 (citing *Dedo*, 680 A.2d at 469-70). Defendant seizes on this observation and asserts he is entitled to credit because the conditions of his release were "substantially the same" as the conditions at issue in *Dedo*. We disagree. *Dedo* is, of course, not binding on this Court. Moreover, rather than supporting Defendant's proposed holding, *Guillen* indicates that time spent subject to a curfew is not "official confinement" under our statute, regardless of participation in an EMP program. 2001-NMCA-079, ¶ 9.

{27} The defendant in *Guillen* had been released from jail subject to conditions that required him to participate in an EMP and to "remain at his home at all times except to attend alcohol counseling, work, or religious services." *Id.* ¶ 2 (internal quotation marks omitted). On appeal, we framed the issue before us as "whether the . . . conditions of release were sufficiently restrictive" to satisfy the first prong of *Fellhauer*. *Guillen*, 2001-NMCA-079, ¶ 7. Answering this question in the affirmative, we relied on our statement in *Fellhauer* that a "release order modeled after [the forms found in] Rules 9-302 [NMRA] and 9-303 [NMRA at the time] would normally not be sufficient to earn the credit." *Guillen*, 2001-NMCA-079, ¶ 9 (quoting *Fellhauer*, 1997-NMCA-064, ¶ 18). Because one of the standard conditions in those forms was a condition requiring a defendant "not to leave [the defendant's] residence between the hours of ____ (p.m.) and ____ (a.m.) without prior permission of the court[,]" we concluded "that a curfew, without more, is an insufficient restriction on movement to entitle a defendant to presentence credit."[7] *Id.* ¶ 9. We reasoned, however, that "house arrest is substantially more onerous than a curfew[,]" noting that the defendant had not been "allowed to leave home except for specified events" and that the defendant's compliance with his conditions of release had been continuously monitored by corrections officers. *Id.* We therefore held:

> that any defendant charged with a felony who is released (1) under conditions of house arrest that require the defendant to remain at home except to attend specified events such as treatment, work, or school and (2) pursuant to a community custody release program that holds the defendant liable to a charge of escape under Section 30-22-8.1, is entitled to presentence confinement credit for the time spent in the program.

Id. ¶ 11.

{28} Defendant contends that when "the freedom of movement of a presumptively innocent citizen is limited or curtailed in any way, upon threat of incarceration in the event of violation of terms or conditions, that should be sufficient to require credit for time served in an electronic monitoring or community custody program." But that contention cannot be reconciled with the reasoning of either *Guillen* or *Fellhauer* itself.

{29} When we decided *Fellhauer*, it was unclear whether *house arrest* could ever qualify for presentence confinement credit. 1997-NMCA-064, ¶ 2. The defendant there challenged the district court's denial of credit for time he had spent under house arrest on conditions of release that required him to stay at home except for medical treatment and attorney visits, and his appeal thus squarely raised that issue. *Id.* After concluding that there was no plain meaning of "official confinement" that determined whether house arrest would qualify, we turned to the text of similar statutes and our case law interpreting Section 31-20-12, neither of which provided "specific guidance" regarding the "extent" or "type of limitation of freedom necessary to find confinement outside a place of incarceration." *Fellhauer*, 1997-NMCA-064, ¶¶ 6-7. Moving on to the statute's purpose, we noted that Section 31-20-12 was intended "to give some relief to persons who, because of an inability to obtain bail, are held in custody." *Fellhauer*, 1997-NMCA-064, ¶ 8 (quoting *State v. Howard*, 1989-NMCA-029, ¶ 11, 108 N.M. 560, 775 P.2d 762). We found that purpose "of little value" to our analysis, however, because the

[5]Section 30-22-8.1, enacted after *Fellhauer* was decided, criminalizes escape from "community custody release programs," including EMPs and "community tracking program[s.]" *See generally Duhon*, 2005-NMCA-120, ¶¶ 6-13 (holding that the "escape charge" prong of the *Fellhauer* test had been satisfied because the defendant was subject to prosecution for escape under Section 30-22-8.1 while on house arrest pursuant to an EMP); *State v. Martinez*, 1998-NMCA-047, ¶ 8, 125 N.M. 83, 957 P.2d 68.

[6]"[A]ppears" was an apt word choice. Although *Dedo* twice references a provision in the defendant's home detention contract stating that "any unexcused or unexplained absence during curfew hours [would] be considered an escape[,]" the opinion never makes clear what those hours were and repeatedly refers to the defendant's "home detention." *Dedo*, 680 A.2d at 466 (brackets and internal quotation marks omitted). *Fellhauer* itself nowhere mentions the curfew provision, alluding instead to the defendant's "home detention" in its discussion of *Dedo*. 1997-NMCA-064, ¶¶ 12-13.

[7]Although Rules 9-302 and 9-303 have been amended since our decisions in *Fellhauer* and *Guillen*—most notably in 2017, when amendments "completely rewrote [both] form[s,]" as their annotations note—Rule 9-303 still contains a virtually identical curfew provision.

defendant was not "in jail" while on house arrest, and granting credit would thus have advanced Section 31-20-12's purpose "only to the extent that the lack of bail resulted in significantly more onerous conditions of release." *Fellhauer*, 1997-NMCA-064, ¶ 8. And that, we reasoned, was the "basic question" raised by the defendant's appeal: "whether the conditions placed on [the d] efendant when he was . . . on house arrest were sufficiently onerous to be deemed official confinement." *Id.* To answer that question, we drew heavily on out-of-state cases analyzing comparable statutes. *See id.* ¶¶ 9-17. We noted that most out-of-state cases had "contrast[ed] the conditions encountered by [a d]efendant in jail with the normal experience of house arrest or home detention and conclude[d] that the latter is simply not restrictive enough to qualify for credit." *Id.* ¶ 11. On the other hand, those cases that had reached a contrary decision had "undertake[n] essentially the same analysis but . . . conclude[d] that . . . the conditions imposed were sufficiently onerous to earn the credit." *Id.* ¶ 12. We found the latter category of cases persuasive in reaching our holding. *See id.* ¶¶ 13, 17.

{30} As its reasoning makes clear, *Fellhauer* based its formulation of its namesake test on an assessment of when conditions of release become so restrictive as to subject a defendant to conditions *approaching those experienced by people who are incarcerated*. Its first prong thus asks a similar question, rather than asking whether a defendant has been subjected to a restriction on movement in the abstract sense as Defendant contends.

{31} Viewed through that lens, the conditions of Defendant's release were an insufficient limitation on his freedom of movement for him to qualify for credit under *Fellhauer*. Defendant was free to move throughout the state during non-curfew hours, answerable to no one for his whereabouts during that time; as long as he stayed away from G.F.'s former school and returned to his residence by 10 p.m., he could go wherever he liked. Defendant did not have to ask the court or the staff of the EMP program for permission to leave his home. Nor was his freedom of movement subject to the availability of a third-party custodian whose constant supervision was a condition of Defendant's release. *Cf. State v. Frost*, 2003-NMCA-002, ¶ 3, 133 N.M. 45, 60 P.3d 492 (stating that the defendant had been released on conditions that required him to "reside with his daughter . . . and be supervised by either of his two daughters at all times"). And he was not restricted to specific activities or events when he did leave. *Cf. Guillen*, 2001-NMCA-079, ¶ 9 ("[T]he defendant[was] not allowed to leave home except for specified events[, and his] compliance with the conditions of release [was] monitored by correctional officers through [an EMP]."). While the condition that he remain in New Mexico and avoid one location within the state may have been burdensome, such a condition is simply not restrictive enough to qualify for credit. Confinement to the State of New Mexico is hardly comparable to the severe curtailment of liberty experienced by people who are incarcerated.

{32} Defendant argues that the conditions requiring him to avoid unsupervised contact with minors and to submit to random urinalysis weigh in favor of an award of credit. We disagree. Defendant's first argument is based on his assertion that the no-unsupervised-contact condition was "a significant imposition" because he "owned a small business and pastored a church." Were we to assess Defendant's conditions of release in light of his activities as a business owner and pastor, we would be engaging in precisely the kind of "fact intensive inquir[y] into whether specific conditions of release subject a defendant to jail-type confinement" that we have previously counseled against. *Guillen*, 2001-NMCA-079, ¶ 6. Moreover, we do not believe that a roving ban on contact with a class of or specific individuals of this kind is a "limitation[] on the defendant's freedom of movement." *Fellhauer*, 1997-NMCA-064, ¶ 17; *cf. id.* (announcing the inquiry under the second prong, in relevant part, as whether the defendant is "punishable for a crime of escape for unauthorized departure from *the place of confinement*" (emphasis added)). As to Defendant's second argument, we fail to see how the random urinalysis condition restricted Defendant's freedom of movement even in combination with the other conditions of release. The condition required only that Defendant "submit to random [urinalysis] . . . [or urinalysis] by any law enforcement personnel with reasonable suspicion." Defendant does not argue or cite any record evidence that suggests that the condition was applied in such a way that it constrained his movements. This Court is under no obligation to review an unsupported or undeveloped argument, *see Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076, and we decline to do so here.

{33} We hold that a conventional curfew,[8] even when combined with other, de minimis restrictions on a defendant's freedom of movement like a statewide travel condition,[9] is insufficiently onerous to constitute a limitation on movement under the first *Fellhauer* prong. The district court thus correctly determined that Defendant was not entitled to credit for the time that he spent on conditions of release between September 18, 2015, and December 15, 2016.

CONCLUSION

{34} We reverse Defendant's convictions and remand for a new trial. We affirm the district court's order regarding credit for time spent on pretrial release.

{35} IT IS SO ORDERED.
ZACHARY A. IVES, Judge

WE CONCUR:
LINDA M. VANZI, Judge
JULIE J. VARGAS, Judge

[8]By "conventional," we mean a curfew as it is normally understood—a requirement that the defendant stay within his residence or other place of confinement within reasonable specified hours, usually at night.

[9]We do not imply that a statewide travel restriction is a de minimis imposition on a defendant's freedom of movement outside of the narrow context we are faced with here. Our task is to determine when limitations on movement are sufficiently restrictive to come within the ambit of Section 31-20-12, an issue entirely unrelated to the question of whether a district court should impose a statewide or similar travel restriction in the first place.

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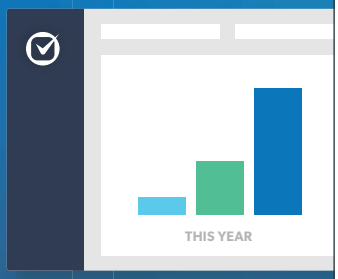

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The City of Santa Fe seeks legal counsel in the area of Health Law to update the City's HIPAA and HITECH policies; answer related questions and provide training on HIPAA, HITECH, and other health law matters, for impacted City staff. Interested counsel should submit a resume and letter of interest to asalazar@santafenm.gov by December 31, 2020.

Attorney

Conklin, Woodcock & Ziegler, P.C. is seeking a full-time experienced attorney with at least three years litigation experience for an associate position with prospects of becoming a shareholder. We are a well-respected eight-attorney civil defense firm that practices in among other areas: labor and employment, construction, personal injury, medical malpractice, commercial litigation, civil rights, professional liability, insurance defense and insurance coverage. We are looking for a team player with a solid work record and a strong work ethic. Our firm is AV-rated by Martindale-Hubbell. Excellent pay and benefits. All replies will be kept confidential. Interested individuals should e-mail a letter of interest and resumes to: jobs@conklinfirm.com.

Full-Time and Part-Time Attorneys

Jay Goodman and Associates Law Firm, PC is seeking one full-time and one part-time attorney, licensed/good standing in NM with at least 3 years of experience in Family Law, Probate, and Civil Litigation. If you are looking for meaningful professional opportunities that provide a healthy balance between your personal and work life, JGA is a great choice. If you are seeking an attorney position at a firm that is committed to your standard of living, and professional development, JGA can provide excellent upward mobile opportunities commensurate with your hopes and ideals. As we are committed to your health, safety, and security during the current health crisis, our offices are fully integrated with cloud based resources and remote access is available during the current Corona Virus Pandemic. Office space and conference facilities are also available at our Albuquerque and Santa Fe Offices. Our ideal candidate must be able to thrive in dynamic team based environment, be highly organized/reliable, possess good judgement/people/communication skills, and have consistent time management abilities. Compensation DOE. We are an equal opportunity employer and do not tolerate discrimination against anyone. All replies will be maintained as confidential. Please send cover letter, resume, and a references to: jay@jaygoodman.com. All replies will be kept confidential.

Trial, Senior Trial, and Deputy District Attorney (Colfax/Union Counties)

The 8th Judicial District Attorney Office is accepting applications for a full-time Trial Attorney, a Senior Trial Attorney, and a Deputy District Attorney. Requirements: Trial Attorney: Attorney licensed to practice law in New Mexico plus a minimum of two (2) years relevant prosecution experience. Senior Trial Attorney: Attorney licensed to practice law in New Mexico plus a minimum of five (5) years relevant prosecution experience. Deputy District Attorney: Attorney licensed to practice law in New Mexico plus a minimum of eight (8) years relevant prosecution experience and someone who is contemplated to be a career prosecutor capable of providing management for an office division or bureau. Work performed: Incumbent will prosecute all cases, including high level and high profile cases. As experience allows, applicants should possess expertise in one or more areas of criminal prosecution; lead special prosecutions assigned by the District Attorney; supervises and mentors other attorneys and staff. Applicant may alternatively be a division/bureau head in a main or satellite office who handles cases as well as substantial administrative duties and tasks. Can act on behalf of the District Attorney as directed. Salary will be based upon experience, position applied for, and the current District Attorney Personnel and Compensation Plan. $60,000 to $90,000. Please submit resumes/letters of interest to Suzanne Valerio, District Office Manager by mail to 105 Albright Street Suite L, Taos, NM 87571 or by email to svalerio@da.state.nm.us no later than January 4, 2021.

Paralegal

Civil litigation firm seeking Paralegal 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, and online research, is technologically adept and familiar with use of electronic databases and legal-use software. Qualified candidates must be organized and detail-oriented, with excellent computer and word processing skills and the ability to multi-task and work independently. Salary commensurate with experience. Please send resume with references and a writing sample to paralegal3.bleuslaw@gmail.com

Litigation Secretary – Albuquerque, New Mexico

The Albuquerque office of Lewis Brisbois Bisgaard & Smith LLP is seeking a Litigation Secretary with 3+ years' experience in the various areas of insurance defense. This full-time position requires knowledge of State and Federal court procedures, court rules, e-filing procedures, and docketing. Experience working with insurance companies is always a plus. ATTRIBUTES: Self-starter who can work with little supervision, be extremely organized and very detail oriented; Ability to multi-task effectively and prioritize incoming work to meet deadlines; Demonstrate a professional demeanor and customer service approach during busy times. TECHNICAL QUALIFICATIONS: Advanced computer skills with Windows, Word, Excel, PowerPoint, and Outlook; Proficient with document management software, docketing and records management systems. Contact: Please email your cover letter and resume to phxrecruiter@LewisBrisbois.com and include "Albuquerque Litigation Secretary" in the subject line. Lewis Brisbois offers a compensation and benefits package including health, dental and vision insurance, vacation and sick leave, 401k and more!

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.

Office Space

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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

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Miscellaneous

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

2021 *Bar Bulletin* Publishing and Submission Schedule

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

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

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

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

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