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OCTOBER 14
Webinar:
Immigration Law: Economic Opportunities Through Entrepreneurship Regardless of Immigration Status
1.0 G
Noon – 1 p.m.
$49 Standard Fee

OCTOBER 15
Webcast:
2021 Procurement Code Institute
3.0 G, 1.5 EP
8 a.m. – 12:15 p.m.
$196 Standard Fee

OCTOBER 19
Teleseminar:
Drafting Special Needs Trusts for Vulnerable Clients
1.0 G
11 a.m. – Noon
$79 Standard Fee

OCTOBER 20
Webinar:
Whistleblowers Bring Medicaid Fraudsters to Justice
1.5 G
10 – 11:30 a.m.
$74 Standard Fee

OCTOBER 21
In-Person and Webcast:
2021 Solo and Small Firm Institute
4.0 G, 2.0 EP
8:45 a.m. – 4:30 p.m.
$282 Standard Fee

OCTOBER 25
Webinar:
Rural New Mexico, Agriculture, and International Trade
2.0 G
1 – 3 p.m.
$98 Standard Fee

OCTOBER 27
Webinar:
Recent Developments in International Trade Law – Opportunities for New Mexico’s Indian Country
3.0 G
9 a.m. – Noon
$147 Standard Fee

OCTOBER 28
Webinar:
Pay Equity and Gender: Women and Fair Pay in the Workplace
3.0 G
1 – 4:15 p.m.
$147 Standard Fee

NOVEMBER 2
Webinar:
The O.J. Simpson Trial: Attorney Blunders, Bungles and Bloopers – PLUS Amazing PowerPoint Trial Tips
3.0 G
11 a.m. – 2:15 p.m.
$179 Standard Fee

NOVEMBER 4
Webinar:
Copyright + Art: Told Through Colorful Stories and Original Artwork
2.0 G
11 a.m. – 1 p.m.
$139 Standard Fee

NOVEMBER 5
Webinar:
JLAP Well Talks - “What a Healthy Lawyer Looks Like”
2.0 EP
9 – 11 a.m.
$98 Standard Fee
Webinar:
60 Tips, Tricks, Apps & Websites in 60 Minutes
1.0 G
Noon – 1 p.m.
$49 Standard Fee

NOVEMBER 9
Webinar:
How To Make Cross-Examination An Open Book Exam at Trial and at In-Person or Online Depositions
1.5 G
11 a.m. – 12:30 p.m.
$129 Standard Fee

NOVEMBER 16
Webinar:
Strategies and Techniques for Rural Community Organizing and Legal Advocacy
1.5 G
1 – 2:30 p.m.
$74 Standard Fee

NOVEMBER 30
Webinar:
Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
1:30 – 2:30 p.m.
$55 Standard Fee

DECEMBER 6
Webinar:
Me Too: Sexism, Bias, and Sexual Misconduct in the Legal Profession
1.0 EP
11 a.m. - Noon
$89 Standard Fee

Register online at www.sbnm.org/CLE or call 505-797-6020

*In-person programs subject to current public health guidelines. Should changing guidance make meeting in-person not possible, registrants will be transferred to virtual format or given a refund. All visitors to the State Bar Center are encouraged to read the latest COVID information at the CDC website and take any actions to keep themselves and others comfortable and healthy as we continue to transition out of the pandemic. NOTE: Face masks must be worn at all times in the public areas of the building, regardless of vaccination status.
ALB Pain Management & Spine Care (APMSC) is dedicated to the diagnosis and treatment of pain conditions related to an automobile accident. APMSC specializes in interventional pain medicine and neurology. Our providers are dedicated to restoring the health and comfort of our patients. Our mission is to provide the best evidence-based treatment options in an environment where patients will experience first-class medical care with compassionate staff.

Letters of protection accepted.

4620 Jefferson Lane NE
Suites A & B
Albuquerque, NM 87109

Phone: (505) 800-7885
Fax: (505) 800-7677
info@albpainclinic.com
Meetings

October

13 Children’s Law Section Board
Noon, Children’s Court, Albuquerque

13 Tax Section Board
9 a.m., teleconference

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

15 Family Law Section Board
9 a.m., teleconference

19 Solo and Small Firm Section Board
10:30 a.m., State Bar Center

21 Public Law Section Board
Noon, Legislative Finance Committee, Santa Fe

Workshops and Legal Clinics

October

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

November

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

December

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

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

About Cover Image and Artist: Cassie Scott, born and raised in Tijeras, N.M., purchased her first digital camera while in high school in preparation for earning her degree in Media Arts at UNM. Throughout college, Scott dabbled in portrait photography after she realized that landscape photography was not her strong suit, nor did it interest her at the time. By the time Scott graduated with college, she decided that she would take her hobby more seriously and thus officially founded Cassie Scott Captures, LLC, in 2019. Scott, who works full-time as the communications coordinator for the State Bar of New Mexico, does portrait and wedding photography on weekends as her “side hustle.” When on trips out of state, Scott started the habit of bringing her camera along to photograph the stunning landscapes and applying her knowledge of editing and composition to discover that landscape photography may be just as rewarding and beautiful as portraiture.
**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 public. The Library has an extensive legal research collection of print and online resources. The 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.

**U.S. District Court for the District of New Mexico**

**Proposed Amendments to Local Rules of Criminal Procedure**

Proposed amendments to the Local Rules of Criminal Procedure of the U.S. District Court for the District of New Mexico are being considered. A “red-lined” version (with the addition of rule 44.2 Self-Representation and proposed amendments to Attachment 1: Standard Discovery Order) and a clean version of these proposed amendments are posted on the Court’s website at www.nmd.uscourts.gov. Members of the Bar may submit comments by email to clerkofcourt@nmd.uscourts.gov or by mail to U.S. District Court, Clerk’s Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, Attn: Cynthia Gonzales, no later than Oct. 30.

**Ninth Judicial District Court**

**Judicial Appointment and Notice of Mass Reassignment**

Governor Michelle Lujan Grisham has announced the appointment of Benjamin S. Cross of Clovis to fill the vacancy in Division I of the Ninth Judicial District Court. Effective Oct. 1, a mass reassignment of cases will occur. All cases previously assigned to District Judge Matthew E. Chandler, Division I, will be reassigned to District Judge Benjamin S. Cross, Division I. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Oct. 27 to challenge or excuse the judge pursuant to Rules 1-088.1 and 5-106.

**State Bar News**

**Board of Bar Commissioners Appointment to Client Protection Fund Commission**

The Board of Bar Commissioners will make one appointment to the Client Protection Fund Commission for a three-year term. To be eligible, you must be an active status member of the State Bar with a principal office in New Mexico. Members who would like to serve on the Commission should send a letter of interest and brief resume by Nov. 17 to bbcmath@nmbar.org.

**COVID-19 Pandemic Updates**

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

**Professionalism Tip**

**With respect to my clients:**

I will be loyal and committed to my client’s cause, and I will provide my client with objective and independent advice.

**Monday Night Attorney Support Group**

- Oct. 18 at 5:30 p.m.
- Oct. 25 at 5:30 p.m.
- Nov. 1 at 5:30 p.m.

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 Moore at pmoore@sbnm.org or Briggs Cheney at BCheney@DSCLAW.com and you will receive an email back with the Zoom link.

**NMJLAP Committee Meetings**

- Jan. 8 at 10 a.m.
- April 2 at 10 a.m.
- July 9 at 10 a.m.

The NMJLAP Committee was originally developed to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve professionally in the legal field. Over the years the NMJLAP Committee has expanded their scope to include issues of depression, anxiety and other mental and emotional disorders for members of the legal community. This committee continues to be of service to the New Mexico Judges and Lawyers Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

**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: FOUR FREE counseling sessions per issue, per year. This EAP service is designed to support you and your direct family members by offering free, confidential counseling services. Want to improve how you manage stress at home and at work? Visit https://mystress.tools.com/registration/tsg-nmsba, or visit the www.solutionsbiz.com. MyStressTools is an online suite of stress management and...
resilience-building resources that will help you improve your overall well-being, anytime and anywhere, from any device! The online suite is available at no cost to you and your family members. Tools include:

- **My Stress Profiler**: A confidential and personalized stress assessment that provides ongoing feedback and suggestions for improving your response to 10 categories of stress, including change, financial stress, stress symptoms, worry/fear and time pressure.
- **Podcasts and videos available on demand**: Featuring experts in the field, including Dan Goleman, Ph.D., emotional intelligence; Kristin Neff, Ph.D., self-compassion; and David Katz, M.D., stress, diet and emotional eating.
- **Webinars**: Covering a variety of topics including A Step Forward: Living Through and With the Grief Process, Creating a Mindfulness Practice, and Re-entering the Workforce.

Call 505-254-3555, 866-254-3555, or visit www.solutionsbiz.com to receive FOUR FREE counseling sessions, or to learn more about the additional resources available to you and your family from the Solutions Group. Every call is completely confidential and free.

**N.M. Well-Being Committee**

The N.M. Well-Being Committee was established in 2020 by the State Bar of New Mexico’s Board of Bar Commissioners. The N.M. Well-Being Committee is a standing committee of key stakeholders that encompass different areas of the legal community and cover state-wide locations. All members have a well-being focus and concern with respect to the N.M. legal community. It is this committee’s goal to examine and create initiatives centered on wellness.

### 2021 Campaign - What a Healthy Lawyer Looks Like

**N.M. Well-Being Committee Meetings**
- Nov. 30, at 1 p.m.

**Upcoming Legal Well-Being in Action Podcast Release Dates**
- Oct. 27th: Lawyering By Video Pt. 2
- Nov. 11th: Compassion Fatigue Pt. 2

**Defenders in Recovery!**

Defenders in Recovery meets every Wednesday night at 5:30 p.m. Our meeting schedule is as follows:
- 1st Wednesday of the month: AA meeting—discussion
- 2nd Wednesday of the month: NA Meeting—discussion
- 3rd Wednesday of the month—Book study. We will start on the AA Big Book and work our way through different AA and NA literature, including the Big Book, the Blue Book, Living Clean, 12x12, etc.
- 4th Wednesday of the month—Recovery Speaker and Monthly Birthday Celebration.

**UNM School of 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.
NEW MEXICO RENTERS, DO YOU NEED HELP PAYING YOUR RENT OR UTILITIES?

WE CAN HELP.

The state of New Mexico will grant **$170M of federal aid to New Mexicans for rental and utility assistance** to households experiencing financial hardship due to the COVID-19 outbreak.

**What is covered?**
Rent, utility bills (electric and gas), water and sewer, trash removal, and other expenses related to housing costs such as hotel/motel costs.

APPLY TODAY AT
RENTHELPNM.ORG OR CALL 1-833-485-1134
New Mexico lawyers now can earn CLE credits by weighing evidence rather than sitting passively through presentations, by serving on one-time panels of the New Mexico Medical Review Commission. Serving on panels also may count towards the pro bono requirements of Rule 16-601 NMRA.

Under Rule 18-204(C) NMRA, volunteer attorney panelists can earn one hour of self-study CLE credit for each panel they complete, up to four hours per compliance period. The panels of three lawyers and three health-care providers review medical malpractice claims against health care providers who are "qualified" under New Mexico’s Medical Malpractice Act, NMSA 1978, Sections 41-5-1 to -29 (1976). Panelists do not need any prior experience with medicine or medical malpractice claims and both active and inactive attorney members of the State Bar can serve as panelists.

Many panels last less than two hours, and very few last more than three. Currently all panel hearings are held via Zoom, and participants choose the panels for which they are available. Panelists are drawn from members of the State Bar’s Medical Review Committee; the procedures joining the committee and scheduling panelists as well as the rules of procedure for the New Mexico Medical Review Commission can be found at www.sbnm.org/Leadership/Committees/NM-Medical-Review-Committee.

Application for Family Law Initial Specialty/Exam Development Committee

As of Oct. 8, the State Bar of New Mexico will be accepting applications for the Initial Family Law Specialty/Exam Development Committee on behalf of the Legal Specialization Commission. The Committee comprises ten members who meet the minimum requirements, which can be found in the Legal Specialization Policies and Procedures.

Once available, the application will be posted online.

For the application and policies and procedures, visit www.sbnm.org/legalspecialization.

It will remain open until close of business Monday, Nov. 8.

Please contact Kate Kennedy at kKennedy@sbnm.org or 505-797-6059 with any questions.
Defenders in Recovery!
Recovery Meeting Available to All Legal Professionals!

Defenders in Recovery meets every Wednesday night at 5:30 p.m.
Our meeting schedule is as follows:

▶ First Wednesday of the month: AA meeting—discussion
▶ Second Wednesday of the month: NA Meeting—discussion
▶ Third Wednesday of the month: Book study—We will start on the AA Big Book and work our way through different AA and NA literature, including the Big Book, the Blue Book, Living Clean, 12x12, etc.
▶ Forth Wednesday of the month: Recovery Speaker and Monthly Birthday Celebration

These meetings are OPEN TO ALL who seek recovery. We are a group of defenders supporting each other, sharing in each other’s recovery. We are an anonymous group and not affiliated with any agency or business.

Anonymity is the foundation of all of our traditions. Who we see in this meeting, what we say in this meeting, stays in this meeting. For the meeting link, we can be reached at defendersinrecovery@gmail.com or Jen at 575-288-7958, Jaime at 505-225-9330, JJ at 307-321-4752.

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

Employee Assistance Program
Get help and support for yourself, your family and your employees. FREE service offered by NMJLAP.

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

To access this service call 855-231-7737 and identify with NMJLAP. All calls are CONFIDENTIAL. Brought to you by the New Mexico Judges and Lawyers Assistance Program www.sbnm.org
## Legal Education

### October

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
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<tr>
<td>13</td>
<td>Child Sex Abuse Cases: Pretrial Strategies and Proceeding to Trial</td>
<td>2.0 G</td>
<td>Live Webinar</td>
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<td>Drafting Arbitration Agreements in Business and Commercial Transactions</td>
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<td>20</td>
<td>Don't Hack your Way through Cybersecurity</td>
<td>1.0 G</td>
<td>Live Webinar</td>
<td>Albuquerque Bar Association</td>
<td><a href="mailto:dchavez@vancechavez.com">dchavez@vancechavez.com</a></td>
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<td>22</td>
<td>2021 Elder Law Institute</td>
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<td>Mediation Training</td>
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<td>Live Seminar</td>
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<td><a href="http://lawschool.unm.edu/cle/upcoming.html">lawschool.unm.edu/cle/upcoming.html</a></td>
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<td>Ethics of Identifying Your Client: It's Not Always Easy</td>
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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@sbnm.org. Include course title, credits, location/course type, course provider and registration instructions.
### Legal Education

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Opinion

C. Shannon Bacon, Justice.

[1] This appeal concerns the substantive conscionability of an arbitration agreement that exempted a nursing home’s likeliest claim from arbitration, but requires its residents to arbitrate their likeliest claims. We are presented with the question of what analysis a court should follow when a party seeks to make an evidentiary showing that an arbitration agreement with a facially one-sided provision—e.g., exclusion of a party’s likeliest claim from mandatory arbitration—is not unconscionable because it is reasonable and fair to except such a claim from arbitration.

[2] In 2012, the estate of Beverly Peavy filed a wrongful death lawsuit against several defendants, including The Rehabilitation Center of Albuquerque, LLC (Facility), a skilled nursing facility where Ms. Peavy was a resident. In response, the Facility filed a motion to compel arbitration, citing an arbitration agreement (Agreement) that was attendant to Ms. Peavy’s admission agreement to the facility. After a two-day evidentiary hearing, the district court concluded that the Agreement was substantively unconscionable because it forced residents to arbitrate their most likely and important claims, but allowed the Facility to litigate its most likely claims. This appeal followed and our Court of Appeals affirmed the district court’s ruling in a memorandum opinion. See Peavy v. Skilled Healthcare Grp., Inc., A-1-CA-35494, mem. op. ¶ 24 (N.M. Ct. App. Oct. 22, 2018) (non-precedential).

[3] Concluding that insufficient evidence was presented to justify the one-sidedness of the Agreement, we affirm the district court’s order denying the motion to compel arbitration.

I. FACTS AND PROCEEDINGS

[4] Ms. Peavy was a resident of the Facility from 2007 until her death in 2010. Ms. Peavy’s son, Plaintiff Keith Peavy, admitted Ms. Peavy to the Facility. Ms. Peavy’s admission agreement included Plaintiff entering into a seventy-eight page admission agreement on her mother’s behalf. The admission agreement included the Agreement currently at issue. Under the Agreement, the parties would first attempt to mediate a claim, then, if necessary, arbitrate the claim before a panel of three arbitrators. The Facility would pay mediators’ and arbitrators’ fees, and each side would bear their own attorneys’ fees.

[5] The Agreement specified that:

By signing this Arbitration Agreement, the Facility and the Resident relinquish their right to have any and all disputes associated with this Arbitration Agreement and the relationship created by the Admission Agreement and/or the provision of services under the Admission Agreement (including, without limitation, class action or similar proceedings; claims for negligent care or any other claims of inadequate care provide [sic] by the Facility; claims against the Facility or any of its employees, managers, or members) (each, a “Dispute” and, collectively, the “Disputes”), resolved through a lawsuit, namely by a judge, jury or appellate court, except to the extent that New Mexico law provides for judicial action in arbitration proceedings. The Agreement, however, provided the following exception: “This Arbitration Agreement shall not apply to either the Facility or the Resident in any disputes pertaining to collections or discharge of residents.”

[6] Ms. Peavy died in 2010. Plaintiff brought a wrongful death lawsuit against the Facility and several other defendants (collectively Defendants) alleging various causes of action arising out of Ms. Peavy’s...
relationship with the Facility. Relying on the Agreement, Defendants responded by filing a motion to dismiss or, alternatively, stay litigation and compel arbitration. Opposing arbitration, Plaintiff argued, inter alia, that the Agreement was substantively unconscionable and therefore unenforceable. The thrust of Plaintiff’s substantive unconscionability argument was that the Agreement was unconscionable because the exceptions to the Agreement—collections and discharge of residents—were claims most likely to be brought by the Facility, which rendered the Agreement unfairly one-sided. Defendants requested an evidentiary hearing in part to present evidence showing that the Agreement’s collections exception was not unfair or unreasonable. The district court granted Defendants’ request, and held a two-day evidentiary hearing (Hearing) addressing the conscionability of the Agreement.2

Regarding substantive unconscionability, the sole evidence offered by Defendants at the Hearing was the testimony of Kathy Correa, an administrator at the Facility. As will be discussed herein, Ms. Correa’s testimony was not reliable or persuasive. After the Hearing, the district court entered its findings of fact and conclusions of law. The district court found the Agreement to be substantively unconscionable because the Agreement exempted the Facility’s likeliest claim, collections disputes, while requiring its residents to arbitrate its likeliest disputes. The district court concluded that, “The evidence presented by [the Facility] as to the application of the Arbitration provision failed to rebut that the practical effect of the Agreement unreasonably favors the [Facility].” The district court further concluded that the Agreement was “ostensibly bilateral on its face” but substantively unconscionable because “it mandates arbitration of Plaintiff’s most important and most likely claims while exempting from arbitration the claims most likely to be brought by [the Facility] and, as such, is unfair and unreasonably one-sided.” Accordingly, the district court denied Defendants’ motion to compel arbitration.3

Defendants appealed the district court’s ruling. In a memorandum opinion, a Court of Appeals majority affirmed the district court’s denial of Defendants’ motion to compel arbitration. See Peavy, A-1-CA-35494, mem op. ¶ 24. The majority held that the Agreement was facially one-sided in that the collections exception was “for a claim most likely to be pursued by Defendants.” Id. ¶ 20. Additionally, the majority held that Defendants failed to present evidence sufficient to justify the one-sidedness of the Agreement. Id. A narrow dissent focused only on the evidence adduced at the Hearing, and argued that the evidence did not justify the Agreement’s one-sidedness. See id. ¶¶ 26-31 (Kiehne, J., dissenting).

II. STANDARD OF REVIEW

[9] “We apply a de novo standard of review to a district court’s denial of a motion to compel arbitration.” Cordova v. World Fin. Corp. of N.M., 2009-NMSC-021, ¶ 11, 146 N.M. 256, 208 P.3d 901. Questions regarding substantive unconscionability present questions of law that are also reviewed de novo. See id.

III. DISCUSSION

A. Substantive Unconscionability

[10] Unconscionability is an affirmative defense to contract enforcement. See Strausberg v. Laurel Healthcare Providers, LLC, 2013-NMSC-032, ¶ 3, 304 P.3d 409. “Unconscionability is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party.” Cordova, 2009-NMSC-021, ¶ 21. The party alleging unconscionability bears the burden of proving that a contract is unenforceable on that basis. See Strausberg, 2013-NMSC-032, ¶ 48. The burden of proving unconscionability, however, does not require an evidentiary showing. See Dalton v. Santander Consumer USA, Inc., 2016-NMSC-035, ¶ 7, 385 P.3d 619. In other words, the party bearing the burden of proving unconscionability does not have to make any “particular evidentiary showing,” but rather can persuade the factfinder “by analyzing the contract on its face.” Id. ¶ 8.

[11] Unconscionability can be analyzed from both the substantive perspective and the procedural perspective. See Fiser v. Dell Comput. Corp., 2008-NMSC-046, ¶ 20, 144 N.M. 464, 188 P.3d 1215. Although the presence of both forms of unconscionability increases the likelihood of a court invalidating the agreement, there is no requirement that both forms be present. See id. ¶ 22 (invalidating an arbitration clause based on substantive unconscionability alone). Procedural unconscionability considers the factual circumstances of a contract’s formation. See Cordova, 2009-NMSC-021, ¶ 23. “Substantive unconscionability concerns the legality and fairness of the contract terms themselves.” Id. ¶ 22. “The substantive analysis focuses on such issues as whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns.” Id. Substantively unconscionable contract provisions include provisions that unreasonably benefit one party over another. See id.; see also Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, ¶ 14, 133 N.M. 661, 68 P.3d 901 (concluding an arbitration provision was substantively unconscionable because it limited only one party’s ability to appeal arbitration awards).


1The Agreement excepts both collections disputes and disputes related to the discharge of residents. The discharge aspect of the Agreement is not at issue in this case, because federal law and state law require discharge-related issues to be handled in an administrative proceeding, which necessarily exempts such issues from arbitration. See 42 C.F.R. § 483.15 (2017); 8.354.2.10 NMAC (8/1/2014). The parties agree on this point. The Agreement’s discharge provision is not in controversy and not discussed here.

2At the Hearing, the parties put on evidence regarding both the procedural and substantive conscionability of the Agreement. The district court ultimately found that the Agreement was not procedurally unconscionable. The district court’s finding regarding the procedural conscionability of the Agreement was not appealed and is not an issue before us.
from arbitration any claim most likely to be pursued by the defendant drafter will void the arbitration clause as substantively unconscionable. . . . [C]ases should still be examined on a case-by-case basis.” Bargman, 2013-NMCA-006, ¶ 17. A one-sided arbitration agreement is not substantively unconscionable merely by way of its one-sidedness. Rather, our substantive unconscionability law requires a determination that the one-sidedness of an arbitration agreement is unfair and unreasonable. See Dalton, 2016-NMSC-035, ¶ 21 (“Gross unfairness is a bedrock principle of our unconscionability analysis.”); Cordova, 2009-NMSC-021, ¶ 32 (concluding an arbitration agreement was substantively unconscionable because it was unreasonably and unfairly one-sided).

B. The Substantive Unconscionability Analysis

[14] We address Defendants’ arguments that the district court and Court of Appeals applied the wrong analytical standard in concluding that the Agreement was substantively unconscionable. We conclude that the lower courts applied the correct analysis, and we take this opportunity to clarify the analysis a district court should engage in when analyzing the substantive unconscionability of an arbitration agreement.

1. The lower courts applied the correct analysis

[15] According to Defendants, New Mexico unconscionability case law sets forth the possibility that a defendant may present evidence showing that an arbitration exception is reasonable and fair despite that exception’s facial one-sidedness—that the arbitration exception is one-sided, but justifiably fair and reasonable in light of the evidence presented. Defendants rely on Bargman, 2013-NMCA-006, for this proposition. Defendants contend there is a contrasting analytical approach, derived from Ruppelt, 2013-NMCA-014, that holds that a defendant may present evidence rebutting the presumption of an arbitration agreement’s one-sidedness. The distinction between these two proposed approaches hinges on what the evidence must show: that an arbitration agreement’s one-sidedness is justified because it is reasonable and fair, or that an arbitration agreement is not actually one-sided. Defendants argue that both the district court and Court of Appeals applied the Ruppelt approach, instead of the Bargman approach, which was in error because Defendants presented evidence to show the reasonableness and fairness of the Agreement, not to rebut the presumed one-sidedness of the Agreement.

[16] To begin, we reject Defendants’ argument that Ruppelt sets forth any discernable analytical standard. Ruppelt’s unconscionability focus was whether the arbitration agreement in that case was facially one-sided. 2013-NMCA-014, ¶¶ 10-15. Ruppelt acknowledged the possibility that evidence could be offered in determining the conscionability of an arbitration agreement, but did not offer any analytical guidance because the defendants in that case expressly declined the Court of Appeals’ suggestion to remand the case for further evidentiary development. Id. ¶ 17.

[17] We do, however, agree that Bargman contemplates that a defendant drafter may present evidence justifying the facial one-sidedness of an arbitration agreement. In Bargman, our Court of Appeals was confronted with the substantive unconscionability of an arbitration agreement contained in a defendant nursing home’s admission agreement. 2013-NMCA-006, ¶ 1. That arbitration agreement exempted from arbitration disputes pertaining to collection. Id. ¶ 4. In evaluating this exception, the Court of Appeals stated that New Mexico conscionability case law does not “lay[ ] down a bright-line, inflexible rule that excepting from arbitration any claim most likely to be pursued by the defendant drafter will void the arbitration clause as substantively unconscionable. . . . [C]ases should still be examined on a case-by-case basis.” Id. ¶ 17. Applying this case-by-case approach, the Bargman court determined the arbitration agreement was facially one-sided, but remanded the case to the district court so that the defendant nursing home could present evidence “tending to show that the collections exclusion [was] not unreasonably or unfairly one-sided such that enforcement of it [would be] substantively unconscionable.” Id. ¶ 24.

[18] Bargman aptly pointed out that no New Mexico case has proposed a “bright-line, inflexible rule” that excepting a defendant drafter’s most likely claim from arbitration necessarily renders an arbitration agreement unconscionable. Id. ¶ 17. Instead, New Mexico unconscionability cases establish that an arbitration agreement is substantively unconscionable if its exemptions are unreasonably and unfairly one-sided. See, e.g., Dalton, 2016-NMSC-035, ¶ 21 (“We are not persuaded that allowing both parties in this case complete access to small claims proceedings, even if one party is substantially more likely to bring small claims actions, is at all unfair.” (emphasis added)); Rivera, 2011-NMSC-033, ¶ 54 (holding an arbitration agreement was unconscionable because it was unfairly one-sided); Cordova, 2009-NMSC-021, ¶ 32 (concluding that a loan company’s “arbitration scheme it imposed on its borrowers [was] so unfairly and unreasonably one-sided that it [was] substantively unconscionable” (emphasis added)); Figueroa, 2013-NMCA-077, ¶ 30 (“We refuse to enforce an agreement where the drafter unreasonably reserved the vast majority of his claims for the courts, while subjecting the weaker party to arbitration on essentially all of the claims that party is likely to bring.” (emphasis added)). Indeed, under New Mexico law, unfair and unreasonable one-sidedness renders a contract substantively unconscionable. See, e.g., Dalton, 2016-NMSC-035, ¶ 21 (“Gross unfairness is a bedrock principle of our unconscionability analysis.”); State ex rel. King v. B&B Inv. Grp., Inc., 2014-NMSC-024, ¶ 32, 329 P.3d 658 (holding signature loan contracts were substantively unconscionable because of their unfair and unreasonable interest rates).

[19] While no bright-line rule exists, New Mexico cases have consistently found arbitration agreements to be one-sided when the agreements exclude the drafting party’s likeliest claims from arbitration while subjecting the non-drafting party’s likeliest claims to arbitration. See, e.g., Rivera, 2011-NMSC-033, ¶ 54; Cordova, 2009-NMSC-021, ¶ 32; Ruppelt, 2013-NMCA-014, ¶ 18; Figueroa, 2013-NMCA-077, ¶ 30. These cases have focused on the facial one-sidedness of the arbitration agreements that is readily apparent from analyzing the language of the agreements. Evidence was not considered in any of these cases to show that the arbitration exceptions were not unreasonable or unfair. We conclude that under New Mexico unconscionability law a presumption of unfair and unreasonable one-sidedness arises when a drafting party excludes its likeliest claims from arbitration, while mandating the other party arbitrate its likeliest claims. This presumption stems from the lack of mutuality that correlates with overly one-sided contracts. See, e.g., New v. GameStop, Inc., 753 S.E.2d 62, 77 (W. Va. 2013) (recognizing that “in assessing substantive unconscionability, the paramount consideration is mutuality” (alteration, internal quotation marks, and citation omitted)); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 692 (Cal. 2000) (finding an arbitration agreement substantively unconscionable because the agreement’s one-sidedness created a lack of mutuality); Iwen v. U.S. W. Direct, 1999 MT 63, ¶ 32, 977 P.2d 989 (concluding an arbitration agreement lacked mutuality, and contained unreasonably one-sided arbitration exceptions, superseded on other grounds by Tedesco v. Home Sav. Bancorp, Inc., 2017 MT 304, ¶ 22, 407 P.3d 289. We emphasize, however, that this presumption may be overcome by an evidentiary showing that justifies the one-sidedness of the arbitration agreement. In other words, a defendant drafter may offer evidence showing that an arbitration agreement’s
exceptions are reasonable and fair, such that enforcement of the agreement is not substantively unconscionable. See Bargman, 2013-NMCA-006, ¶ 24.

[20] With this reasoning, we clarify the two-step analysis a court should apply when confronted with the substantive conscionability of an arbitration agreement. First, the court should analyze the arbitration agreement on its face. The court should look to the face of the arbitration agreement “to determine the ‘legality and fairness of the contract terms themselves’.” Dalton, 2016-NMSC-035, ¶ 8 (quoting Cordova, 2009-NMSC-021, ¶ 22). As noted above, an arbitration agreement is facially one-sided when it excludes the drafting party’s likeliest claim from arbitration, but requires the non-drafting party to arbitrate its likeliest claims.

[21] Second, if the court determines the arbitration agreement is facially one-sided, the court should allow the drafting party to present evidence that justifies the agreement is fair and reasonable, such that enforcement of the agreement would not be substantively unconscionable. See Bargman, 2013-NMCA-006, ¶ 24. The evidence need not show that the agreement is not one-sided, but rather must justify that the agreement’s exceptions are fair and reasonable. See Dalton, 2016-NMSC-035, ¶ 21 (emphasizing that fairness is the key consideration in the unconscionability analysis); Cordova, 2009-NMSC-021, ¶ 22 (“The substantive analysis focuses on such issues as whether the contract terms are commercially reasonable and fair[,]”).

[22] In the case at bar, both the Court of Appeals and the district court engaged in an analysis consistent with the approach clarified above. At the district court level, the court began its substantive unconscionability analysis by concluding that, on its face, the Agreement was one-sided because it exempted the Facility’s likeliest claim, but required its residents to arbitrate their claims. Next, the district court concluded that Defendants had failed to present evidence justifying the one-sidedness of the Agreement. These two conclusions by the district court demonstrated that it 1) analyzed the Agreement on its face, and 2) considered evidence of whether the Agreement’s one-sided exceptions were justified. Our Court of Appeals likewise engaged in the two-part analysis by first determining that the Agreement was facially one-sided, and then by next addressing “whether Defendants presented sufficient evidence to show why . . . the collections exclusion was not unfairly one-sided and was justified.” Peavy, A-1-CA-35494, mem op. ¶ 15.

2. Defendants misapply Dalton

[23] We reject Defendants’ attempt to draw analytical support from our opinion in Dalton. Dalton is decidedly distinguishable from the case at hand. In Dalton, this Court confronted an arbitration agreement that allowed either party to compel arbitration for any claim that exceeded the jurisdiction of small claims court ($10,000). 2016-NMSC-035, ¶ 1. This Court found that such an agreement was not “at all unfair,” even considering that the drafting party was “substantially more likely to bring small claims actions[.]” Id. ¶ 21. Our decision in Dalton was heavily grounded in the fact that the arbitration agreement in that case exempted any claim—not just specific claims—from mandatory arbitration as long as that claim did not exceed $10,000. Id. ¶ 22. Moreover, Dalton pointed out the unfairness of this $10,000 threshold, because it bilaterally allowed either party to avail itself of the benefits, economy, and efficiency of small claims court. Id. In the instant case, only a specific claim—the Facility’s likeliest—is exempted from arbitration. Additionally, unlike Dalton, no language exists in the Agreement that limits the extent of the Agreement’s exceptions.

[24] We disagree with Defendants that Dalton marks an analytical departure from New Mexico conscionability case law. Dalton reaffirmed, rather than departed from, existing substantive conscionability case law. Dalton did so by illustrating that a court should first look to an arbitration agreement on its face to determine if the agreement benefits the drafting party in a one-sided manner. See id. ¶ 8; accord Rivera, 2011-NMSC-033, ¶¶ 53-54 (determining an arbitration agreement was substantively unconscionable because it unreasonably benefited the drafting party by excluding its likeliest claims from mandatory arbitration); Cordova, 2009-NMSC-021, ¶ 25 (”Contract provisions that unreasonably benefit one party over another are substantively unconscionable.”). The Dalton Court was not tasked with considering evidence to justify a one-sided arbitration agreement. Nor was it necessary for the Court to consider evidence of justification, because the Court concluded that the arbitration agreement in that case was unambiguously beneficial to both parties. In other words, the Dalton Court did not have to consider evidence to justify the arbitration agreement’s “practical consequences” because the benefits to both parties to the agreement were facially apparent. See 2016-NMSC-035, ¶¶ 22-23. Evidence was not presented in Dalton because the arbitration agreement in that case was not one-sided. In light of the differences in the language of the arbitration agreement in Dalton and the Agreement in the case at bar, we fail to see what guidance Dalton offers to the case before us.

C. The Agreement is Substantively Unconscionable

[25] Having clarified the conscionability analysis to be applied to arbitration agreements, we turn now to the Agreement before us. We hold the Agreement is facially one-sided in that it excludes the Facility’s likeliest claim from mandatory arbitration, but requires its residents to arbitrate their likeliest claims. We conclude that Defendants did not justify this one-sidedness because they did not present evidence showing that the Agreement’s collections exception was reasonable and fair. We therefore hold that the Agreement is substantively unconscionable.

1. The Agreement is facially one-sided

[26] As set forth above, we begin by analyzing the Agreement on its face. Our Court of Appeals has confronted arbitration agreements with the exact same language as the Agreement currently before us. In those cases our Court of Appeals found the language of the arbitration agreement to be one-sided. See Bargman, 2013-NMCA-006, ¶¶ 1, 4; Ruppelt, 2013-NMCA-014, ¶¶ 1, 3; see also Figueroa, 2013-NMCA-077, ¶ 28 (addressing similar language to the Agreement). We see no reason to disagree here. Relying on this established case law, we hold that the Agreement is one-sided on its face because it exempts the Facility’s likeliest claim, but requires its residents to arbitrate their likeliest claims. We now turn to whether evidence presented at the district court justified the one-sidedness of the Agreement as fair and reasonable.

2. Defendants failed to justify the one-sidedness of the Agreement because the evidence did not show that the Agreement’s collections exception was fair and reasonable

[27] The district court specifically held the Hearing to address the conscionability of the Agreement, including determining whether the Agreement’s one-sidedness was fair and reasonable. Defendants presented the testimony of Ms. Correa at the Hearing in order to show the Agreement’s exceptions were fair and reasonable. Ms. Correa’s duties at the Facility included ensuring the Facility complied with its internal policies and procedures, monitoring the Facility’s accounts receivable, and pursuing informal collection efforts if
needed. Ms. Correa detailed the Facility’s collections policy, which included “aggressive collection efforts,” such as sending letters to residents threatening legal action, and ultimately allowed for the Facility to sue a resident. Ms. Correa further testified that: 1) in her experience the Facility had never sued a resident for a collections claim despite Facility policy and the Agreement allowing for such action; 2) the range of debt owed by a resident typically ranged from $1-$10,000, but in her experience the debt could exceed $10,000, even getting as high as $76,000; 3) she believed that it was not in the Facility’s best interest to sue residents over debts less than $10,000 because she believed it was not cost-effective; and 4) in her estimate the costs of arbitrating a collections claim under the Agreement’s arbitration scheme was not financially feasible due to the typically lower sums involved in resident collections actions. This evidence was not disputed.

[28] Defendants maintain that this evidence sufficiently shows that arbitrating collections claims would be cost-prohibitive, such that it is fair and reasonable to except those claims under the Agreement. We disagree. Ms. Correa’s testimony failed to quantify the costs associated with hiring arbitrators. Ms. Correa merely speculated as to the costs of arbitrating and litigating a collections action. Defendants could have, but did not, present evidence showing that the costs associated with arbitrating collections disputes were so cost-prohibitive that they warranted exception from arbitration. Even assuming arguing that it is fair and reasonable to avoid arbitrating collections claims because they involve lower sums of money, the Agreement would still fail because that same rationale would apply to any low-value claim, not just collections claims. Cf. Dalton, 2016-NMSC-035, ¶ 22 (concluding that an arbitration agreement was fair and reasonable because it excepted any claim under $10,000 from arbitration, thus avoiding the costs of arbitration for any claim involving lower sums of money). For example, if a resident had a breach of contract action against the Facility alleging damages under $10,000, the claim would be arbitrated and the Facility would bear the very same costs that Defendants deem prohibitive in collections actions. The evidence fails to justify why only collections actions, as opposed to any low-value claim, are excepted from the Agreement.

[29] We are unpersuaded that Ms. Correa’s testimony established that the Facility would not sue a resident in a collections action unless it was financially feasible to do so. We note that Ms. Correa lacked any capacity to speak on behalf of the Facility. At the Hearing, she was not tendered as a witness under Rule 1-030(B)(6) NMRA, and to the extent she could speak about the Facility’s policy, she clarified that the information she offered was her own “personal philosophy.” Moreover, Ms. Correa’s testimony fails to indicate at what monetary threshold the Facility would pursue a collections claim. The benefits of arbitration would certainly avail themselves when collections claims have higher value. High-value collections claims were not an unrealistic possibility to the Facility; Ms. Correa testified that it was not uncommon for a resident’s debt to exceed $10,000, and she personally knew of one resident whose debt was well over $75,000. Defendants failed to present evidence justifying why it would be reasonable and fair to except high-value collections claims from arbitration. Indeed, if we allowed the Facility to unjustifiably circumvent arbitrating high-value collection claims, we would be upholding a contract that disfavors arbitration. Such an action by this Court would be in conflict with our State’s strong public policy favoring resolution of disputes through arbitration. See Horne, 2013-NMSC-004, ¶ 16.

[30] Finally, we address the Court of Appeals’ dissent. In the dissent’s view, evidence presented by Defendants did not justify the Agreement’s collections exception. See Peavy, A-1-CA-35494, mem. op. ¶ 31 (Kiehne, J., dissenting). According to the dissent, the “practical effect” of the exception was null, since the Facility had never brought a collections claim against a resident, nor was it likely to do so.” Id. This reasoning is unavailing. The practical effect of the Agreement was to exclude the Facility’s likeliest claim from arbitration. See Bargman, 2013-NMCA-006, ¶ 19; Ruppelt, 2013-NMCA-014, ¶ 15. Defendants were afforded the opportunity to present evidence justifying the Agreement’s collections exception as reasonable and fair, but failed to do so. Moreover, although the Facility had not sued a resident in a collections action, that offers little import as to why the exception existed within the Agreement at all, or how that fact would indicate that the Facility would not sue a resident in the future. As the Court of Appeals’ majority pointed out, “we consider the mere fact that thus far it is too expensive for a facility to pursue [a collections claim] to be little assurance that one day it will not be.” Peavy, A-1-CA-35494, mem. op. ¶ 17.

IV. CONCLUSION

[31] Defendants failed to present evidence justifying the one-sidedness of the Agreement as fair and reasonable. Without this justification the Agreement is substantively unconscionable. For these reasons, and reasons discussed above, we affirm the district court’s order denying the motion to compel arbitration. We remand this matter to the district court for further proceedings consistent with this opinion.

[32] IT IS SO ORDERED.

C. SHANNON BACON, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
BARBARA J. VIGIL, Justice
DAVID K. THOMSON, Justice
JAROD K. HOFACKET, Judge
Sitting by designation
Opinion

Michael E. Vigil, Justice.

[1] A jury found Defendant guilty of one count of each of the following crimes: criminal sexual penetration (CSP) in the first degree in violation of NMSA 1978, Section 30-9-11(D)(2) (2009); kidnapping in the first degree in violation of NMSA 1978, Section 30-4-1 (2003); armed robbery in violation of NMSA 1978, Section 30-16-2 (1973); aggravated burglary in violation of NMSA 1978, Section 30-16-4(C) (1963); and criminal sexual contact (CSC) in violation of NMSA 1978, Section 30-9-12(C)(3) (2003). In addition, Defendant entered a no contest plea to being a felon in possession of a firearm in violation of NMSA 1978, Section 30-7-16 (2001, amended 2018, 2019), and admitted to being a habitual offender and subject to an enhanced sentence. Defendant was sentenced to the New Mexico Department of Corrections for a total of forty years and six months. Defendant appealed to the Court of Appeals. State v. Sena, 2018-NMCA-037, 419 P.3d 1240, cert. granted, 2018-NMCERT-___ (S-1-SC-36932, May 25, 2018).

[2] In the Court of Appeals, Defendant asserted the following errors: (1) the district court failed to grant a mistrial when Defendant did not testify, and the prosecutor in closing arguments argued that Defendant's demeanor during Victim's trial testimony was evidence of Defendant's guilt, (2) the instruction on kidnapping was erroneous in failing to require a finding that the restraint used during the kidnapping was not merely incidental to another crime, (3) Defendant's convictions of both aggravated burglary and CSP and CSC were double jeopardy violations, and (4) the State failed to present sufficient evidence to support the convictions of CSP and kidnapping, and (5) the district court abused its discretion by admitting the results of DNA testing into evidence. See id. ¶¶ 1, 7, 20, 26, 27, 32, 34, 51.

[3] In a formal opinion the Court of Appeals (1) rejected Defendant's argument that the district court erred in denying his motion for a mistrial, (2) held that the omission of incidental restraint in the instruction on kidnapping constituted fundamental error, and (3) held that Defendant's convictions of aggravated burglary, CSP, and CSC were double jeopardy violations. See id. ¶¶ 7-19, 20-25, 34-48. The Court of Appeals also determined that the State presented sufficient evidence to support the convictions of CSP and kidnapping and that the district court did not err in admitting the results of DNA testing into evidence. See id. ¶¶ 26-33, 49-55.

[4] We granted the petitions for certiorari filed by Defendant and the State to review the foregoing conclusions. We hold that the Court of Appeals (1) erred in affirming the district court order denying Defendant's motion for a mistrial, (2) erred in reversing Defendant's kidnapping conviction for fundamental error on grounds that the elements instruction did not address incidental restraint, (3) erred in concluding that Defendant's convictions for aggravated burglary, CSP, and CSC violated double jeopardy, and (4) correctly held that the State presented substantial evidence to support Defendant's convictions for CSP and kidnapping. Because we remand for a new trial, it is not necessary, and we decline to address, whether the district court erred in admitting the results of DNA testing into evidence.

A. BACKGROUND

[5] Victim, who lived alone and was in her seventies, awoke at 3:30 a.m. to Defendant's gloved hand over her mouth and a knife to her head. When Victim tried to scream, Defendant told her to stop and threatened to kill her. Defendant then ordered Victim out of bed and demanded she undress. As Victim undressed, Defendant asked Victim where her purse was, and Victim replied that it was in the closet. Defendant took Victim's wallet containing thirty dollars.

[6] Victim told Defendant that she needed to use the restroom. Defendant allowed Victim to go to the restroom while he watched and began masturbating. After she finished using the restroom, Defendant ordered Victim back to bed, telling her to lie face down on a pillow. Defendant got on top of Victim and penetrated Victim's vagina and anus with his penis. After a few minutes, Defendant instructed Victim to get on her knees and continued penetrating Victim's vagina and anus with his penis. Defendant then told Victim to turn over, at which point he began fondling Victim's breasts and digitally penetrating Victim's vagina.

[7] After the sexual assaults, Defendant asked Victim about a rifle leaning against the bedroom wall. Defendant proceeded to leave the bedroom, and after waiting a few minutes, Victim attempted to inch out of bed. Defendant, who was watching Victim from the living room, ordered Victim back into bed. After waiting awhile longer, Victim got out of bed and entered the living room where she found her front door wide open. Victim discovered that her wallet and rifle were missing, as were her cordless telephones from the living room and Victim's bedroom. Victim also noticed an open sliding window in the dining room. Victim closed the front door, locked it, and called police.
[8] Police arrived shortly thereafter, discovering shoe prints directly below the open sliding window. Police tracked the shoe prints to the residence of Defendant's stepmother and stepfather, where Defendant was hiding wearing socks but no shoes. Inside the residence, police collected a pair of sneakers consistent with the shoe print found at Victim's home. Police also followed tire tread tracks to a Honda parked outside the residence, which was identified as belonging to Defendant. After obtaining a search warrant for the Honda, police found leather gloves, a rifle, and a large knife. The gloves were consistent with the description that Victim provided. Victim also identified the rifle as the one stolen by Defendant and the knife as the one used during the incident.

[9] Following the incident, Victim was examined by a sexual assault nurse examiner (SAN). The examination revealed a half centimeter “open area” consistent with force on Victim's vagina. The SAN obtained various swabs from both Victim and Defendant for DNA testing, including a swab of Victim's left, upper thigh and a swab of Defendant's lower abdomen. No semen was detected on any of the swabs that were tested, but Victim's DNA was detected on Defendant's hands.

[10] We now address the issues raised by Defendant and the State in their respective petitions for certiorari.

B. DISCUSSION

1. The Prosecutor's Arguments During Closing Arguments

[11] The Court of Appeals held that “commenting on the demeanor of a non-testifying defendant is improper, as it is neither probative of innocence or guilt, nor is it evidence that an appellate court can properly review.” Serna, 2018-NMCA-037, ¶ 12. We agree with this holding. However, the Court of Appeals erred in concluding that the prosecutor's arguments in this case “did not invoke a distinct constitutional protection” and did not deprive Defendant of a fair trial. Id. ¶¶ 18, 19 (internal quotation marks and citation omitted). For the reasons that follow, we reverse and remand for a new trial.

[12] While the prosecutor was making her closing arguments, the following exchanges took place.

OPEN COURT
Prosecutor: Did you notice, also, ladies and gentlemen, when she [Victim] testified, that man [Defendant] wouldn't even look at her. He watched every other witness on the stand.
Defense Counsel: Objection, your honor. There's no evidence of that. May I approach the bench?

Prosecutor: Judge, this is . . . ( unintelligible)

SIDEBAR CONFERENCE
Defense Counsel: That's commenting on his silence. He's not testifying. What he did or didn't do is not in the record at all. We object and, strongly object to her reference of what's against his presumption of innocence. He didn't testify. There was absolutely no evidence. That's done to inflame. We move for a mistrial.
Prosecutor: Judge, that is not . . . (unintelligible)
Defense Counsel: No one testified to that.
Prosecutor: ( unintelligible)
Defense Counsel: No one testified to that.
Court: The jury's just going to have to rely on their own memories of what they observed. And she's not commenting on his silence, she's just commenting on what he did. So, objection is overruled.

OPEN COURT

Court: Objection is overruled. The jury will have to rely on their own memories as to what they observed ( unintelligible).

[13] Defendant contends that the Court of Appeals erred when it held that while the prosecutor's arguments were improper, they were not prejudicial. Defendant asserts that the district court erred because the prosecutor's arguments were not only improper but were prejudicial and contributed to Defendant's convictions.

[14] The State concedes that the prosecutor's arguments were improper because they "elevated [Defendant]'s courtroom demeanor to the status of evidence and encouraged the jury to treat it as evidence of guilt." However, the State contends the Court of Appeals correctly held that the comments were not prejudicial because "Defendant's right to have his guilt or innocence determined solely on the basis of the evidence introduced at trial" does not "transform any reference to matters not in evidence into a Fifth Amendment violation." (Internal quotation marks and citations omitted.) We disagree and reverse the Court of Appeals.

a. Standard of review

[15] We review a district court's denial of a motion for mistrial under an abuse of discretion standard. State v. Johnson, 2016-NMSC-016, ¶ 49, 148 N.M. 50, 229 P.3d 523. "We will find an abuse of discretion if a court's ruling is clearly untenable or contrary to logic and reason. Additionally, a court abuses its discretion if it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." Freeman v. Fairchild, 2018-NMSC-023, ¶ 29, 416 P.2d 264 (internal quotation marks and citations omitted). See also N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (stating that a decision premised on a misapprehension of the law may be characterized as an abuse of discretion). In addressing Defendant's arguments that raise questions of constitutional law, which we review de novo, see State v. DeGraff, 2006-NMSC-011, ¶ 6, 139 N.M. 211, 131 P.3d 61 (holding that this Court reviews questions of constitutional law de novo), we ask whether the district court applied the wrong legal standard in denying Defendant's motion for mistrial.

b. The prosecutor's arguments resulted in reversible error

[16] In State v. Sosa, we identified three factors to consider when reviewing error in closing arguments: “(1) whether the statement invokes some distinct constitutional protection; (2) whether the statement is isolated and brief, or repeated and pervasive; and (3) whether the statement is invited by the defense.” 2009-NMSC-056, ¶ 26, 147 N.M. 351, 223 P.3d 348.

[17] Considering the first factor, we are more likely to conclude that there is reversible error when the prosecutor's comments invoke "a distinct constitutional protection." Id. ¶ 27. The prosecutor's comments in this case implicated Defendant's Fifth Amendment right to silence and thus, invaded a "distinct constitutional protection."

[18] The Fifth Amendment to the United States Constitution establishes a sacerdotal constitutional right in its direction that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself[,]” U.S. Const. amend. V. The Bill of Rights of the New Mexico Constitution likewise directs, “No person shall be compelled to testify against himself in a criminal proceeding[.]” N.M. Const. art. II, § 15. When a prosecutor makes a comment that invites the jury to draw an adverse conclusion from a defendant's failure to testify, the defendant's Fifth Amendment privilege is violated. DeGraff, 2006-NMSC-011, ¶ 8 (citing Griffin v. California, 380 U.S. 609, 614 (1965)). Such remarks compromise a defendant's right to a fair trial and result

[19] Prosecutor comments on a defendant's right not to testify may be direct or indirect. *State v. Rice*, 573 S.W.3d 53, 75 (Mo. 2019) (en banc). A direct comment explicitly refers to the fact that the defendant did not testify, whereas an indirect comment is "one reasonably apt to direct the jury's attention to the defendant's failure to testify." *Id.* (internal quotation marks and citation omitted). Both direct and indirect comments on a defendant's failure to testify are forbidden. See *State v. Clark*, 1989-NMSC-010, ¶ 48, 108 N.M. 288, 777 P.2d 322, *disapproved of on other grounds by State v. Henderson*, 1990-NMSC-030, ¶ 38, 109 N.M. 655, 789 P.2d 603. Thus, all prosecutorial arguments drawing the jury's attention to the fact that it has not heard from the defendant during trial because the defendant has exercised his constitutional right not to testify are impermissible and violate the defendant's right against self-incrimination. *See Rice*, 573 S.W.3d 53, 74 (holding that once a defendant has invoked the right to remain silent, "any reference to [that] silence is improper" (emphasis in original)).

[20] In her closing argument, the prosecutor asked the jury, "Did you watch [Defendant] in the courtroom when [Victim] took the stand? He wouldn't even look at her. He looked at every other witness in the eye, but he wouldn't look at her." The argument had no purpose other than to invite the jury to draw an adverse conclusion from Defendant's failure to get on the stand and explain why he would not look at Victim as she testified. After Defendant objected, the jury heard the district court overrule the objection, which placed the "stamp of judicial approval" on the improper argument, further magnifying the prejudice. *See Boulden v. State*, 787 S.W.2d 150, 153 (Tex. Ct. App. 1990) (internal quotation marks and citation omitted)) ("[W]here a trial court overrules an objection to improper argument, it places the 'stamp of judicial approval' on the argument, magnifying the harm." (citation omitted)).

Having obtained the district court's stamp of judicial approval, the prosecutor compounded the prejudice by repeating the statement and adding, "And why wouldn't he look at her? Because he knew what he'd done. He knew what he did." We would be remiss if we did not add that the closing arguments were recorded and we have the benefit of knowing not only what words the prosecutor spoke but her tone as well. The prosecutor's accusatory tone was tantamount to pointing a finger at Defendant.

[21] "Closing argument is an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the States are bound." *Hughes v. State*, 437 A.2d 559, 568 (Del. 1981) (internal quotation marks and citation omitted). A prosecutor's arguments during summation regarding a nontestifying defendant's courtroom demeanor are irrelevant as it is not evidence that is in the record and therefore is beyond the scope of summation. *Id.* at 572. "Moreover, the practice is pregnant with potential prejudice. A guilty verdict must be based upon the evidence and the reasonable inferences therefrom, not on an irrational response which may be triggered if the prosecution unfairly strikes an emotion in the jury." *Id.*

[22] Reference to a nontestifying defendant's courtroom demeanor is not merely a reference to something not in evidence, it is an attack on a defendant's Fifth Amendment right not to testify. *United States v. Carroll*, 678 F.2d 1208, 1209 (4th Cir. 1982). In *United States v. Schuler*, 813 F.2d 978, 979 (9th Cir. 1987), the prosecutor commented that the defendant laughed as witnesses testified. The Schuler court determined that such comments by a prosecutor "tend to eviscerate the right to remain silent by forcing the defendant to take the stand in reaction to or in contemplation of the prosecutor's comments." *Id.* at 982. Even drawing subtle attention to a defendant's failure to testify is not permissible. *United States v. Rodriguez*, 627 F.2d 110, 112 (7th Cir. 1980). In Rodriguez, the prosecutor commented that the defendant was "very quiet at the end of counsel table." *Id.* at 111. The Rodriguez court counseled that "[i]t]he remarks, harmless or not, infringing upon such a basic and elementary constitutional underpinning of our justice system, simply should not occur." *Id.* at 113.

[23] *Dickinson v. State*, 685 S.W.2d 320 (Tex. Crim. App. 1984) (en banc), applied these principles. Commenting on the defendant's courtroom manner, the prosecutor stated, "And you know, another pretty important [piece of] evidence that you can consider is what you've observed in this courtroom. The demeanor in this courtroom of this man right here. You know, when [the complainant] was led into that courtroom she hid her face. She hid her face in shame." *Id.* at 325 (second alteration in original). The prosecutor added, "You haven't seen one iota of remorse, one iota of shame." *Id.* The *Dickinson* Court concluded that these were not comments on the defendant's demeanor but indirect comments on the defendant's failure to testify, characterizing the comments as a "transparent attempt to call the jury's attention to the appellant's invocation of his right to remain silent." *Id.* at 324-25.

[24] The principles were reiterated in *Coyle v. State*, 693 S.W.2d 743 (Tex. App. 1985), when the prosecutor stated, "I want to talk about what he [the defendant] looks like in the courtroom right now. You've looked at him throughout the trial and that's all I'm talking about, just his actions here in this courtroom while you've watched him." *Id.* at 743. Applying *Dickinson*, the Coyle Court held that the prosecutor's comments "amounted to directing the jury's attention to the failure of the appellant to testify." *Id.* at 744-45 (internal quotation marks and citation omitted).

[25] *Dickinson* and *Coyle* are highly persuasive. The prosecutor's arguments in this case were a direct comment on Defendant's exercise of his constitutional right not to testify and were highly improper. The prosecutor's arguments directly asked the jury to draw adverse conclusions from the fact that Defendant did not take the witness stand and explain himself. The district court applied an incorrect legal standard in construing the prosecutor's arguments as referring to Defendant's demeanor rather than his failure to testify.

[26] The second factor requires us to consider whether the prosecutor's comments were brief and isolated or repeated and pervasive. *Sosa*, 2009-NMSC-056, ¶ 29. The State asserts that while the argument was repeated, it was isolated and brief. It lasted twenty seconds within a twenty-minute closing argument, and it was not mentioned elsewhere at trial and was "certainly not pervasive." *Id.*

[27] We are not persuaded. After hearing the prosecutor's improper argument, the jury heard the district court overrule Defendant's objection to the argument. "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." *Griffin*, 380 U.S. at 614. The prosecutor then took advantage of the ruling and repeated and emblazoned his improper argument, giving it additional emphasis. We once again remind prosecutors of what we said over fifty years ago:

The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty . . . . When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be
heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty.

State v. Rowell, 1966-NMSC-231, ¶ 11, 77 N.M. 124, 419 P.2d 966 (quoting Miller v. Territory of Oklahoma, 149 P. 330, 339 (8th Cir. 1906)).

[28] Finally, we turn to the third factor—whether the error was invited by the defense. Sosa, 2009-NMSC-056, ¶ 26. The State does not argue, and we decline to conclude, that Defendant somehow “opened the door” to the prosecutor’s comments. All three Sosa factors support a conclusion of reversible error. We therefore proceed to the State’s argument that no prejudice resulted.

[29] In the case of a constitutional error, “it is harmless only if the challenger can prove there is no reasonable possibility that the error affected the verdict.” State v. Thomas, 2016-NMSC-024, ¶ 33, 376 P.3d 184 (quoting State v. Tollaho, 2012-NMSC-008, ¶ 25, 275 P.3d 110). “We must reverse a conviction if the erroneously admitted evidence might have contributed to it.” Thomas, 2016-NMSC-024, ¶ 33. “[T]he existence of other evidence to support the verdict does not cure a constitutional error when there is a reasonable possibility that the erroneously admitted evidence influenced the jury’s verdict.” Id. ¶ 34. Although Sosa directs a finding of reversible error when “the prosecutor’s comments materialized the trial or likely confused the jury by distorting the evidence,” Sosa, 2009-NMSC-056, ¶ 34, this case involves an intrusion on a “distinct constitutional protection.” Applying a higher standard to reverse in the context of constitutional error would be in direct conflict with our jurisprudence. Thus, we apply Sosa’s factors for guidance, but because we find constitutional error, we then apply a harmless error standard. The State has the burden to demonstrate that there was no reasonable possibility that the error affected the verdict.

[30] The State argues that the prosecutor did not explicitly mention Defendant’s failure to testify or ask the jury to draw an adverse conclusion from that fact because the arguments did not suggest that Defendant failed to come forward with evidence or to correct misstatements to police before or after arrest. We disagree and conclude that the State has failed to meet its burden in demonstrating that there was “no reasonable possibility” that the comment on Defendant’s right to silence affected the jury’s verdict. Therefore, we are left to presume the error indeed affected the verdict in this case and deprived Defendant of a fair trial.

[31] The prosecutor’s arguments violated Defendant’s Fifth and Fourteenth Amendment rights and deprived Defendant of a fair trial, resulting in reversible error. Prosecutors do not have license to make improper and prejudicial arguments with impunity. We reverse the Court of Appeals holding that Defendant received a fair trial, and we remand to the district court for a new trial.

2. Instruction on Kidnapping

[32] The Court of Appeals agreed with Defendant’s argument that it was fundamental error not to include the incidental restraint limitation to kidnapping described in State v. Trujillo; 2012-NMCA-112, ¶ 39, 289 P.3d 238 in the essential elements instruction on kidnapping. Sena, 2018-NMCA-037, ¶¶ 22-25. We disagree with the Court of Appeals, and we reverse on this issue as well. Although we would not ordinarily address an issue pertaining to an instruction after reversing all of a defendant’s convictions and remanding for a new trial, we do so in this case because the Court of Appeals reached a result we disagree with in a published, formal opinion.

[33] In Trujillo, the Court of Appeals held that “the Legislature did not intend to punish as kidnapping restraints that are merely incidental to another crime.” 2012-NMCA-112, ¶ 39. In agreeing with Defendant’s argument, the Court of Appeals reasoned that “omission of incidental restraint” from the instruction resulted in fundamental error in this case “as the jury could have convicted Defendant based upon a deficient understanding of the legal meaning of restraint as an essential element of kidnapping.” Sena, 2018-NMCA-037, ¶ 25. We disagree because Trujillo does not apply to the facts of the case before us.

a. Standard of review

[34] Our review is limited to determining whether the kidnapping instruction as given to the jury resulted in fundamental error because there was no objection to the instruction. See State v. Sandoval, 2011-NMSC-022, ¶ 13, 150 N.M. 224, 258 P.3d 1016 (stating that we review instructions for fundamental error instead of reversible error if the alleged error was not preserved in the district court). “The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice.” State v. Barber, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633. In reviewing a failure to instruct for fundamental error, we “determine whether a reasonable juror would have been confused or misdirected by the jury instruction.” Id. ¶ 19. “[J]uror confusion or misdirection may stem . . . from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law.” State v. Benally, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. In addition, “[f]undamental error occurs when jury instructions fail to inform the jurors that the State has the burden of proving an essential element of a crime and we are left with ‘no way of knowing’ whether the jury found that element beyond a reasonable doubt.” State v. Samora, 2016-NMSC-031, ¶ 29, 387 P.3d 230 (citation omitted).

b. Omission of the incidental restraint limitation to kidnapping in the elements instruction was not fundamental error

[35] We begin with the statutory elements of kidnapping. Pertinent to the case before us, Section 30-4-1(A)(4) defines kidnapping as “the unlawful . . . restraining . . . or confining of a person, by force [or] intimidation . . . with intent . . . to inflict . . . a sexual offense on the victim.” In accordance with UJI 14-403 NMRA (1997), the district court instructed the jury as follows:

For you to find [D]efendant guilty of kidnapping . . . the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime: 1. [D]efendant restrained or confined [Victim] by force or intimidation; 2. [D]efendant intended to inflict a sexual offense on [Victim]; 3. This happened in New Mexico on or about the 17th day of November, 2012.

This instruction correctly tracks the language of the statute, setting forth all the essential elements of kidnapping. Thus, the jury was properly instructed on every essential element of kidnapping. State v. Martinez-Rodriguez, 2001-NMSC-029, ¶ 38, 131 N.M. 47, 33 P.3d 267 (concluding that a kidnapping instruction which accurately tracked the language of the statute properly informed the jury of all the essential elements of the offense), abrogated on other grounds as recognized by State v. Forbes, 2005-NMSC-027, ¶ 6, 138 N.M. 264, 119 P.3d 144.

[36] In addition, the evidence fully supports the jury’s verdict finding Defendant guilty of kidnapping under the instruction. As already described above, the evidence was that at approximately 3:30 a.m., Victim was awakened with a gloved hand over her mouth and a knife to her head. When Victim tried to scream, Defendant told her to stop and threatened to kill her. Defendant then ordered Victim...
to get out of bed and demanded that she undress. While Victim was undressing, Defendant took Victim's wallet. Victim said she needed to use the restroom and was permitted to walk to the restroom with Defendant following closely behind. Defendant then masturbated while Victim used the restroom. At this point, the crime of kidnapping was complete. Defendant had restrained Victim with the intent of inflicting a sexual offense on Victim. See State v. McGuire, 1990-NMSC-067, ¶ 10, 110 N.M. 304, 795 P.2d 996 ("Once [the] defendant restrained the victim with the requisite intent to hold her for service against her will, he had committed the crime of kidnapping, although the kidnapping continued throughout the course of [the] defendant's other crimes."); see also State v. Jacobs, 2000-NMSC-026, ¶ 24, 129 N.M. 448, 10 P.3d 127 (the key finding is that the restraint element in kidnapping, separate from that involved in criminal sexual penetration, is to determine the point at which the physical association between the defendant and the victim was no longer voluntary.").

The question presented here is whether Trujillo, 2012-NMCA-112, alters the foregoing conclusions. In Trujillo, the victim and his wife were awakened at around 2:30 a.m. by two men holding flashlights, who had broken into the home armed with metal bars or wooden bats. Id. ¶ 2. When the defendant started hitting the victim with a metal bar, the victim fought back and gained the upper hand, and while the victim was on top of the defendant hitting him, the defendant restrained the victim and called to his accomplice for help. Id. ¶ 3. The accomplice started hitting the victim, allowing the defendant to get free, and the two assailants continued to beat the victim before leaving. Id. ¶ 3. The entire incident lasted two to four minutes. Id.

Convicted of both aggravated battery and kidnapping, in addition to other crimes, the defendant in Trujillo argued on appeal that "the Legislature did not intend to punish restraint incidental to an aggravated battery as kidnapping." Id. ¶ 6 (brackets omitted). In the factual context of the case, the Court of Appeals agreed with the defendant, concluding that "the restraint described by the testimony was a momentary grab in the middle of a fight as is a matter of law insufficient to support a conviction for kidnapping." Id. The Court of Appeals was able to make this determination as a matter of law, recognizing that in a different factual scenario, a jury question might be presented as to whether the restraint relied upon to support a conviction for kidnapping was merely incidental to another crime. See id. ¶ 42.

In the case before us, the Court of Appeals said that according to the evidence, Victim "was restrained both before and after the sexual offense occurred."

Under these circumstances, the Court of Appeals concluded that it was "for the jury to determine whether either or both of these restraints were slight, inconsequential, or incidental to the commission of the sexual offense." Sena, 2018-NMCA-037, ¶ 25. This conclusion was in error. Having already kidnapped Victim, Defendant then ordered Victim, who was still unclothed, to go back to the bed where he sexually assaulted her numerous times. Any restraint incidental to the sexual assaults was separate and distinct from the restraint that Defendant used to complete the kidnapping. These facts differ vastly from those in Trujillo and present no factual question for a jury to decide. See UJI 14-403, Use Note 8 (providing that the jury receives an instruction on incidental restraint "if the evidence raises a genuine issue of incidental conduct."). Trujillo is inapplicable to the facts in this case.

Trujillo was decided in 2012, before Defendant's trial in 2014. In partial response to Trujillo, UJI 14-403 was amended, but not until 2015. See UJI 14-403, Committee Commentary. Even if this version of the instruction had been in effect at the time of Defendant's trial, a finding consistent with UJI 14-403(4) on whether the restraint of Victim resulting in the kidnapping was "slight, inconsequential, or merely incidental" to the commission of another crime was not required in this case. Id. Submitting the question to the jury is only required "if the evidence raises a genuine issue of incidental conduct." UJI 14-403, Use Note 8. As we have already discussed, incidental restraint, as considered in Trujillo, was not at issue in this case.

The integrity of a criminal conviction in our judicial system requires a jury verdict to rest "on a legally adequate basis," and when it does not, the integrity of the judicial system is undermined, and fundamental error results. State v. Mascareñas, 2000-NMSC-017, ¶ 21, 129 N.M. 230, 4 P.3d 1221. Generally, therefore, "fundamental error occurs when the trial court fails to instruct the jury on an essential element." State v. Sutphin, 2007-NMSC-045, ¶ 16, 142 N.M. 191, 164 P.3d 72. In certain situations, a missing definitional instruction may be of "central importance to a fair trial" because without that instruction the jury verdict could be based on a deficient understanding of the legal meaning of an essential element. Barber, 2004-NMSC-019, ¶ 25. In other words, failing to instruct the jury on a definition or amplification of the elements of the crime may prevent the jury from making a "critical determination akin to a missing elements instruction."
is charged with multiple violations of a single statute based on a single course of conduct ("unit of prosecution" cases) and those cases in which a defendant is charged with violating different statutes in a single course of conduct ("double-description" cases). Swafford, 1991-NMSC-043, ¶¶ 8-9. {45} Defendant argues that his convictions of aggravated burglary, CSP, and CSC violate his Fifth Amendment protection against double jeopardy because they arise from a single course of conduct. This is therefore a double-description case. In Swafford, this Court established a two-part analysis for deciding whether the same offense was committed in double-description cases. Id. ¶ 25. The first part focuses on the conduct and asks "whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates [multiple] statutes." Id. If the question is answered in the affirmative, we proceed to the second part, which focuses on the statutes at issue to determine whether the legislature intended to create separately punishable offenses." Id. Double jeopardy protection prohibits multiple punishments in the same trial only when (1) the conduct is unitary and (2) it is determined that the Legislature did not intend multiple punishments. Id. ¶ 26. {46} We first determine whether Defendant's conduct was unitary. When "sufficient indicia of distinctness" separate the illegal acts, the conduct is not unitary, and a defendant does not face conviction and punishment for "the same factual event." Swafford, 1991-NMSC-043, ¶¶ 26-28. "Sufficient indicia of distinctness" are present when the illegal acts "are sufficiently separated by either time or space (in the sense of physical distance between the places where the acts occurred)[.]" Id. ¶ 28. If these considerations do not suffice to make the determination, "resort must be had to the quality and nature of the acts or to the objects and results involved." Id. Thus, in determining whether there are such sufficient indicia of distinctness, we have also looked to the elements of the charged offenses, the facts presented at trial, and the instructions given to the jury. Id. ¶ 27 ("The conduct question depends to a large degree on the elements of the charged offenses and the facts presented at trial."); DeGraff, 2006-NMSC-011, ¶¶ 28-30 (considering the statutory definition of the crime, the instructions given to the jury, and the evidence presented at trial). Unitary conduct is not present when one crime is completed before another is committed, or when the force used to commit a crime is separate from the force used to commit another crime. Id. ¶¶ 27, 30. {47} In State v. Foster, 1999-NMSC-007, ¶ 28, 126 N.M. 646, 974 P.2d 140, abrogated on other grounds by Kersey v. Hatch, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683, this Court held that because we cannot assume that jurors will know how to reach a verdict without violating the Double Jeopardy Clause, "we must presume that a conviction under a general verdict requires reversal if the jury is instructed on an alternative basis for the conviction that would result in double jeopardy, and the record does not disclose whether the jury relied on this legally inadequate alternative." This presumption is based on the holding of State v. Olguin, 1995-NMSC-077, ¶ 2, 120 N.M. 740, 906 P.2d 731, that "a conviction under a general verdict must be reversed if one of the alternative bases of conviction is legally inadequate.[]" The parties agree that Foster provides the analytical framework for determining whether Defendant's acts were unitary but disagree on what the proper result is under Foster. We therefore examine Foster in some detail. {48} In Foster, the Court considered in pertinent part whether convictions for first-degree felony murder, aggravated kidnapping, and armed robbery violated the Double Jeopardy Clause. 1999-NMSC-007, ¶ 1. The convictions resulted from the robbery and death of one victim. Id. ¶ 14. The victim was found in the den of her home on her stomach with a broken ashtray in front of her body and an electrical cord tied around her neck and ankles. Id. The ashtray was a heavy, faceted crystal ashtray with blood on it. Id. ¶ 19. There was a contusion around the victim's eye, several lacerations on her head, and a ligature mark on her neck. Id. ¶ 14. Deep lacerations found on the victim's head were caused by being hit with a heavy glass dish or ashtray, consistent with the broken ashtray at the scene. Id. The blows to the head could have rendered the victim unconscious. Id. ¶ 16. The bruising caused by the ligature was consistent with use of the extension cord and with the victim being alive when it was tightened around her neck. Id. ¶ 17. The chief medical investigator testified that the head injuries probably occurred first, rendering her unconscious, and that the victim was then tied up and strangled with the extension cord. Id. ¶ 18. {49} Regarding the convictions for armed robbery and aggravated kidnapping, the State argued that the conduct underlying those offenses and the conduct underlying the murder was not unitary. Id. ¶ 26. Specifically, the State argued that the conduct in committing aggravated kidnapping was not unitary because the jury could have found that the kidnapping was committed by gaining entry to the victim's house by deception, and the conduct in committing armed robbery was not unitary because the stolen items were located in a room separate from where the victim was murdered. Id. ¶ 26. This argument relied on "the assumption that, when the jury instructions provide alternative bases for a conviction and there is no indication of which alternative the jury relied upon in reaching a general verdict, we may affirm the conviction if at least one of the alternatives does not violate the Double Jeopardy Clause." Id. ¶ 26. This Court rejected making this assumption, and in fact, as we have already stated, made the opposite presumption: that the convictions were based on an alternative in the jury instructions that would result in double jeopardy. Id. ¶ 28. {50} Under that presumption, this Court in Foster assumed that the jury found that the aggravated kidnapping was committed by force. The instruction on the elements of aggravated kidnapping in Foster required the jury to find that the defendant acted with force or deception and inflicted great bodily harm on the victim. Id. ¶ 29. The defendant argued that the conduct was therefore unitary because the same force used to commit the kidnapping was also used to commit the killing. Id. ¶¶ 29-30. This Court, however, rejected the defendant's argument. The state's theory on the kidnapping was that the defendant held the victim to rob her and to this end knocked her unconscious with the glass ashtray. Id. ¶ 31. As she lay unconscious, the defendant tied the victim up and strangled her to death with the electrical cord tied around her neck and ankles. Id. In other words, force was used two separate times, once to kidnap the victim to rob her and once to kill her. This conclusion was possible because under the instructions, the jury was required to find that in committing the aggravated kidnapping, the defendant inflicted great bodily harm. Id. ¶ 33. Thus, the kidnapping was completed when the defendant hit the victim on the head with the ashtray, causing the victim great bodily harm. Id. ¶¶ 32-33. This Court concluded there was sufficient indicia of distinctness when the defendant used force to hit the victim on the head with the ashtray, which completed the crime of aggravated kidnapping, id. ¶¶ 32-33, and then separately used force to strangle the victim with an extension cord. Id. ¶ 34. {51} In Foster, this Court separately addressed the defendant's armed robbery conviction. Id. ¶ 36. The jury instruction on armed robbery also allowed the jury to reach a guilty verdict under various alternatives. Id. Because the record did not demonstrate which alternative the jury relied on, and because the jury was allowed to find that the defendant committed armed robbery "while armed with a ligature," which was the same extension cord that was used to commit the murder, this Court applied the presumption that
this was the alternative used by the jury. Id. ¶¶ 37-39. In addition, because the jury was allowed to find the defendant guilty of armed robbery by taking the victim’s “car keys and/or a 1985 Crown Victoria and/or U.S. currency” and the record did not demonstrate which alternative was selected by the jury, this Court presumed that the armed robbery conviction was based on the defendant’s taking of the property in closest proximity to the room where the victim was killed. Id. ¶ 36, 39. Applying the presumptions, the Foster court concluded that the defendant’s conviction and sentence for armed robbery resulted from unitary conduct and violated the Double Jeopardy Clause. Id. ¶¶ 37-39. Because the instruction allowed the jury to find that the defendant committed armed robbery while armed with a ligature, but also, that the murder was committed by use of a ligature, the Court determined that the conduct was unitary. Id. ¶¶ 38-39. The evidence presented at trial, the Court reasoned, did “not show a significant separation in time or physical distance between the armed robbery and the murder.” Id. ¶ 39. [52] Here, the applicable instruction on aggravated burglary required the jury, in pertinent part, to find that Defendant entered Victim’s dwelling without authorization and “was armed with a knife; OR . . . became armed with a firearm after entering; OR . . . touched or applied force to [Victim] in a rude or angry manner while entering or leaving, or while inside.” The applicable instruction on CSP required the jury, in pertinent part, to find that Defendant inserted his finger into Victim’s vagina and “used physical force or physical violence OR . . . used threats of physical force or physical violence against [Victim].” The instruction on CSC in turn required the jury, in pertinent part, to find that Defendant “touched or applied force” to Victim’s unclothed breast without Victim’s consent. There is no way to determine which alternative(s) the jury relied on in finding Defendant guilty of aggravated burglary, CSP, and CSC. [53] In arriving at its conclusion, the Court of Appeals applied the Foster presumption to assume not only that the jury relied on the battery alternative for each crime, but that the same conduct was also used to commit all three offenses. Sena, 2018-NMCA-037, ¶¶ 40-41. Having determined that Defendant’s conduct was unitary based on a misapplication of the Foster presumption, the Court of Appeals went on to rule that under the modified Blockburger analysis set forth in State v. Gutierrez, 2011-NMSC-024, ¶¶ 58-59, 150 N.M. 232, 258 P.3d 1024, the Legislature did not intend multiple punishments for these offenses, and held Defendant was subjected to multiple convictions for the same offense in violation of double jeopardy. Sena, 2018-NMCA-037, ¶¶ 42-45.1 [54] Because it is indeterminate upon which alternative the jury relied, like the Court of Appeals, we apply the Foster presumption and presume the jury relied on the battery alternative in convicting Defendant of aggravated burglary, CSP, and CSC. However, contrary to the Court of Appeals’ holding, Foster does not require a further presumption that the same conduct was then relied upon by the jury in convicting Defendant of each crime—particularly when the record indicates three distinct batteries were committed. Although the instructions allowed the jury to convict under the battery alternative for each crime, the Foster presumption is rebutted by evidence that each crime was completed before the other crime occurred. [55] A battery was used to commit aggravated burglary when Victim was awakened at 3:30 a.m. with Defendant’s gloved hand over her mouth and a knife to her head. After Victim got out of bed and was undressing as Defendant ordered, Defendant asked Victim where her purse was, and Victim replied that it was in the closet. Defendant took Victim’s wallet containing thirty dollars. Victim was then allowed to go to the restroom while Defendant watched and began masturbating. After Victim finished using the restroom, Defendant ordered Victim back to bed, telling her to lie face down on a pillow. Victim testified that Defendant then penetrated Victim’s vagina and anus with his penis. Defendant was not found guilty of these penetrations. However, Defendant then committed CSP and CSC by means of a second, and then a third battery when Defendant ordered Victim to turn over, and fondled Victim’s breasts and digitally penetrated Victim’s vagina. [56] We therefore conclude that the Court of Appeals erred in its application of the Foster presumption. Although the instructions permitted the jury to convict Defendant of aggravated burglary, CSP, and CSC under the same alternative, the evidence demonstrates that the crimes were committed by three separate, identifiable batteries separated by sufficient indicia of distinctness. Thus, Defendant’s conduct was not unitary. The initial battery and aggravated burglary were completed before the second battery and CSP, and these crimes were separated by both time and intervening events. See DeGraff, 2006-NMSC-011, ¶ 27 (“In our consideration of whether conduct is unitary, we have looked for an identifiable point at which one of the charged crimes had been completed and the other not yet committed.”). In addition, Defendant’s conduct in committing CSP and CSC was not unitary because the battery he used to commit the CSP was separate and distinct from the battery he used to commit CSC. [57] Having concluded that Defendant’s conduct in committing aggravated burglary, CSP, and CSC was not unitary, there was no double jeopardy violation. Swick, 2012-NMSC-018, ¶ 11. We therefore reverse the Court of Appeals’ conclusion that Defendant’s convictions for aggravated burglary, CSP, and CSC violate double jeopardy. Sufficiency of the Evidence [58] Having reviewed the record and the arguments of the parties, we affirm the Court of Appeals’ holding that the State presented sufficient evidence to support the convictions for CSP and kidnapping. See Sena, 2018-NMCA-037, ¶¶ 26-33, 49-55.

CONCLUSION [59] We reverse Defendant’s convictions and remand the case to the district court for a new trial consistent with this opinion.

[60] IT IS SO ORDERED.

MICHAEL E. VIGIL, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
BARBARA J. VIGIL, Justice
C. SHANNON BACON, Justice
DAVID K. THOMSON, Justice

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1In its application of the modified Blockburger test, the Court of Appeals reasoned: “Because the State failed to provide any legal theory of the crime, and we have found none in the record, we conclude that Defendant’s aggravated burglary conviction is subsumed by the CSP/CSC convictions[].” Sena, 2018-NMCA-037, ¶ 45. In light of our conclusion that Defendant’s conduct was not unitary, whether this is a correct application of the modified Blockburger test is not before us.
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PBWS Law Welcomes
Elizabeth A. Ashton, JD

Ms. Ashton, a former NM Assistant Attorney General, has joined our Albuquerque office. Ms. Ashton brings strong trial and Family law experience. In addition to Family law, she will be representing clients in the areas of Guardianship, Probate, and Estate Planning.

Ms. Ashton will be a valuable resource to the firm and our clients.

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2021 Attorney In Memoriam Recognition

The State Bar of New Mexico Senior Lawyers Division is honored to host the annual Attorney In Memoriam Ceremony. This event honors New Mexico attorneys who have passed away during the last year (November 2020 to present) to recognize their work in the legal community. If you know of someone who has passed and/or the family and friends of the deceased (November 2020 to present), please contact memberservices@sbnm.org.
Associate Attorney
Scott & Kienzle, P.A. is hiring an Associate Attorney (0 to 8 years experience). Practice areas include insurance defense, collections, creditor bankruptcy, and Indian law. Associate Attorney needed to undertake significant responsibility: opening a file, pretrial, trial, and appeal. Lateral hires welcome. Please email a letter of interest, salary range, and résumé to john@kienzlelaw.com.

Experienced Prosecutor
The 13th Judicial District Attorney’s Office has created a new position. We are looking for an experienced prosecutor who is self-motivated, can handle a smaller but complex case load covering different types of felony with little to no supervision. This position will carry cases in all three of our district offices so travel will be required. This position can be based in the county office of choice (Belen, Bernalillo or Grants). Schedule will be flexible but dependent upon scheduled court hearings. Salary commensurate with experience. Contact Krissy Fajardo kfajardo@da.state.nm.us for an application.

Trial Attorney
Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney’s Office, which includes Curry and Roosevelt counties. Employment will be based primarily in Curry County (Clovis). Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys’ Personnel & Compensation Plan and commensurate with experience and budget availability. Email resume, cover letter, and references to: Steve North, snorth@da.state.nm.us.

Visit the State Bar of New Mexico’s website
www.sbnm.org
Full-time Associate Attorney

Davis & Gilchrist, P.C. is an AV-rated boutique litigation and trial law firm focused on healthcare False Claims Act cases, physician privilege suspension cases, government whistleblowers, general employment, and legal malpractice cases, seeking a full time associate attorney to help with brief writing, discovery, depositions, and trials. We offer a work-life balanced approach to the practice of law. We do not have billable hour requirements. We do not track vacation or sick leave. We do require that our lawyers do excellent work in a timely fashion for our clients. We are looking for someone with 1-5 years of litigation experience, including taking and defending depositions, drafting and answering discovery, solid research and writing skills, ability to go with the flow, and a sense of humor. We offer a competitive salary with the potential for performance-based bonuses, health insurance, and a 401K plan. Learn more about us at www.davisgilchristlaw.com. Send resume and writing sample to lawfirm@davisgilchristlaw.com.

Associate General Counsel

This in-house counsel position in Albuquerque is responsible for providing legal knowledge, counsel, and advice in areas of major focus for Blue Cross and Blue Shield of New Mexico such as provider network, health care management, sales and marketing, and regulatory or compliance plan filings. With very limited supervision, the position will be responsible for various legal projects and issues which may include providing in-depth legal drafting, advice/counsel and support for negotiations and contracting with health care providers, utilization management activities, negotiations and contracting with insured and self-funded employer groups, and/or responses to, and management of, regulator filings or other concerns. This position will contribute to strategic direction and will handle complex legal matters and large projects. Apply to https://bit.ly/2WpKWYG. JOB REQUIREMENTS: Juris Doctor degree from ABA-accredited law school; License to practice law in New Mexico or willing and able to become licensed soon after hire; At least 8 years’ experience as an attorney-at-law; Excellent analytical, drafting, and problem-solving skills; Commitment to furnishing high quality and solutions-oriented legal services; Self-starter who thrives in fast-paced legal practice; Business and strategic acumen and commitment to business partnering; Clear and concise verbal and written communication skills; Interpersonal, negotiation, and diplomacy skills. PREFERRED JOB REQUIREMENTS: 3+ years’ recent experience in health care law and/or health insurance law; Experience furnishing legal support for health insurer operations; Experience working with health insurance regulators.

Office of the State Engineer, Advanced Attorneys

The Office of the State Engineer Litigation and Adjudication Program seeks to fill multiple Attorney III (Advanced) positions. The New Mexico State Engineer supervises the appropriation, measurement, and distribution of New Mexico’s surface water and groundwater. Experience with New Mexico water law is preferred but not required. The duties of each position vary but may include prosecution of water rights adjudication suits to determine the validity and elements of water rights in a particular stream system; administrative and district court litigation arising out of applications to appropriate water or change water rights; or negotiation or litigation to resolve the water rights claims of Indian Tribes, Pueblos, and Nations. These tasks involve providing legal advice, litigation (at all stages, from discovery to appeal), negotiation, mediation, and drafting of settlement agreements and State Engineer orders, guidelines, or regulations. OSE attorneys must work closely with experts such as engineers, hydrologists, historians, and hydrographic survey specialists. Please apply at https://careers.state.nm.us and search for Job Opening ID 118186. Please submit cover letter, resume and writing sample with your application.

Associate Attorneys

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

Experienced Trial Attorney

The Ninth Judicial District Attorney’s Office is seeking an experienced trial attorney for our Clovis office. Come join an office that is offering jury trial experience. In addition, we offer in depth mentoring and an excellent work environment. Salary commensurate with experience between $75k-90k per year. Send resume and references to Steve North, snorth@da.state.nm.us.

Associate Attorney position at Rebecca Kitson Law

Amazing bilingual advocate needed! We are seeking an Associate Attorney with passion and commitment to help immigrants in all areas of relief. Full-time, full benefits, position will be based out of our Albuquerque location. Can be admitted to practice in any state, but NM law license preferred. Must be fluent in Spanish. No experience necessary. Depending upon experience, duties will include case work, drafting appeals/motions, legal research, case opening, representing clients at hearings/USCIS interviews. Salary DOE. We are proud to be an inclusive, supportive firm for our staff and our clients. Salary DOE. Please email Resume, Letter of Intent, and Writing Sample to L. Becca Patterson, Assistant Office Manager at lp@rtkisontlaw.com. Full fluency in Spanish and English required. Law License required

Associate Attorney

Atkinson, Baker & Rodriguez, P.C. is an aggressive, successful Albuquerque-based complex civil commercial and tort litigation firm seeking an extremely hardworking and diligent associate attorney with great academic credentials. This is a terrific opportunity for the right lawyer, if you are interested in a long term future with this firm. Up to 3-5 years of experience is preferred. Send resumes, references, writing samples, and law school transcripts to Atkinson, Baker & Rodriguez, P.C., 201 Third Street NW, Suite 1850, Albuquerque, NM 87102 or e_info@abfirm.com. Please reference Attorney Recruiting.

Managing City Attorney

The City of Albuquerque Legal Department is hiring a Managing City Attorney for the Property and Finance Division. The work includes management, oversight and development of Assistant City Attorneys, paralegals and staff. Other duties include but are not limited to: contract drafting, review, analysis, and negotiations; drafting ordinances; regulatory law; Inspection of Public Records Act; procurement; public works and construction law; real property; municipal finance; risk management; advising City Council, boards and commissions; intergovernmental agreements; dispute resolution; municipal ordinance enforcement; condemnation; and civil litigation. Attention to timelines, detail and strong writing skills are essential. Five (5)+ years’ experience including (1)+ years of management experience is preferred. Applicants must be an active member of the State Bar of New Mexico, in good standing. Please apply on line at www.cabq.gov/jobs and include a resume and writing sample with your application.
Full-time and Part-time Attorney
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 confidential. Please send cover letter, resume, and a references to: jay@jaygoodman.com. All replies will be kept confidential.

Associate Attorney - Litigation
Sutin, Thayer & Browne is looking to hire a full-time associate with 2-8 years’ experience for our Litigation Group. The successful candidate must have excellent legal writing, research, and verbal communication skills. Competitive salary and full benefits package. Send letter of interest, resume, and writing sample to sorr@sutinfirm.com.

Eleventh Judicial District Attorney’s Office, Div II
The Eleventh Judicial District Attorney’s Office, Division II, Gallup, New Mexico is seeking qualified applicants for Trial Attorney. The Trial Attorney position requires advanced knowledge and experience in criminal prosecution, rules of evidence and rules of criminal procedure, trial skills, computer skills, ability to work effectively with other criminal justice agencies, ability to communicate effectively, ability to research/analyze information and situations. Applicants must hold a New Mexico State Bar license preferred. The McKinley County District Attorney’s Office provides a supportive and collegial work environment. Salary is negotiable. Submit a letter of interest and resume to District Attorney Bernadine Martin, Office of the District Attorney, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter to bmartin@da.state.nm.us. Position will remain opened until filled.

Excellent Criminal Defense Attorneys and Attorney Supervisors!
The New Mexico Law Offices of the Public Defender is excited to announce opportunities to join our team and be on the front lines of criminal justice reform. LOPD is growing our team with multiple job opportunities around our beautiful state. Duties include: conducting client and witness interviews, investigating cases, filing and litigating pretrial motions, trying cases and identifying appropriate sentencing alternatives for clients. What are we looking for? Attorneys committed to advocating on behalf of indigent clients. Attorneys interested in positively impacting the lives of clients through holistic representation. A passion for building and inspiring top-notch, high performing teams; A reform-minded Supervising Attorney to lead its Misdemeanor team in Santa Fe. The Supervising Attorney for the Santa Fe Magistrate Court works on the front lines for criminal justice reform; is a strong advocate for our clients; a mentor and role model for the attorneys, staff and law school graduates under their supervision. Don’t miss this chance to work for an organization that will allow you to achieve your goals. To find out more about this opportunity in Santa Fe and others around the state, and submit your application, go to: https://www.govemmentjobs.com/careers/lopdnm

State of New Mexico – General Counsel
The State of New Mexico seeks to hire General Counsel for the Office of Children, Youth & Families Department (CYFD), the Department of Public Education (PED), the Department of Game and Fish (DGF), the Regulation & Licensing Division (RLD), New Mexico Livestock Board (NMLB) and Expo New Mexico. Minimum qualifications include a Juris Doctorate degree from an accredited school of law, admission to the New Mexico Bar, and five (5) years of relevant experience in the practice of law. Salary will be determined commensurate with experience. Please submit a cover letter, resume and references to donna.herrera@state.nm.us. The State of New Mexico is an Equal Opportunity Employer.

Lead Trial Lawyer
Zinda Law Group is a rapidly growing, elite personal injury law firm based in Texas with offices and cases across the nation. We handle complex cases and maintain a small docket, enabling us to best serve our clients. Our trial attorneys pride themselves on their skills, compassion, and commitment to helping those in need. At Zinda Law Group, we do things differently. We are innovative, use cutting edge technology, and have a start-up mentality. Our firm is a member of the Inc. 5000 and was named one of the top Firms in the Austin area for 2020 by Austin Monthly Magazine. We are looking for an ambitious and passionate Lead Trial Lawyer to join our growing team in New Mexico. As a Lead Trial Lawyer, you will work alongside a dynamic and experienced team of Attorneys across the nation in Texas, Colorado, New Mexico, and Florida. A typical day for a Litigation Attorney at Zinda Law Group involves client communication, taking and defending depositions, research and drafting, leading mediations, developing case strategies, and/or arguing in court. Our Trial Lawyers handle cases from intake through settlement or jury verdict. Our core principles are: 1. Excellence Always; 2. Only the Best; 3. Failure is Not an Option; 4. We All Take Out the Trash; 5. Run the Firm Like a Business. Qualifications and Experience: 1-3+ years of experience practicing personal injury or civil litigation; Licensed and in good standing with the New Mexico State Bar; Spanish bilingual a plus; Experience drafting and responding to motions; Substantial knowledge of Rules of Civil Procedure and Rules of Evidence. Compensation and Benefits: $125,000 - $250,000 base salary; Uncapped quarterly bonuses; Contingency fee referral bonus opportunities; Medical, vision, and dental insurance; Paid time off and paid holidays; IRA Plan with company contribution match; Paid parental leave; Flexibility to work remotely; Opportunities to grow as a professional and advance in the company; Ongoing training and mentoring from our outstanding team. To apply, please submit a resume and cover letter through the link below: https://zdfirm.bamboohr.com/jobs/view.php?id=433

Attorneys
Madison, Mroz, Steinman, Kenny & Olexy, P.A., an AV-rated civil litigation firm, seeks two attorneys, one with zero to three years’ experience, and one with four to six years’ experience, to join our practice. We offer a collegial environment with mentorship and opportunity to grow within the profession. Salary is competitive and commensurate with experience, along with excellent benefits. All inquiries are kept confidential. Please forward CVs to: Hiring Director, P.O. Box 25467, Albuquerque, NM 87102.
Assistant City Attorney Positions
The City of Albuquerque Legal Department is hiring for various Assistant City Attorney positions. The Legal Department’s team of attorneys provides a broad range of legal services to the City, as well as represent the City in legal proceedings before state, federal and administrative bodies. The legal services provided may include, but will not be limited to, legal research, drafting legal opinions, reviewing and drafting policies, ordinances, and executive/administrative instructions, reviewing and negotiating contracts, litigating matters, and providing general advice and counsel on day-to-day operations. Attention to detail and strong writing and interpersonal skills are essential. Preferences include: Five (5)+ years’ experience as licensed attorney; experience with government agencies, government compliance, real estate, contracts, and policy writing. Candidates must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Current open positions include: Assistant City Attorney - APD Compliance; Assistant City Attorney - Office of Civil Rights; Assistant City Attorney – Environmental Health; Assistant City Attorney – Employment/Labor. For more information or to apply please go to www.cabq.gov/jobs. Please include a resume and writing sample with your application.

Legal Assistant
Rodey’s Santa Fe office is accepting resumes for a legal assistant position. Candidate must have excellent organizational skills; demonstrate initiative, resourcefulness, and flexibility, be detail-oriented and able to work in a fast-paced, multi-task legal environment with ability to assess priorities. Responsible for calendaring all deadlines. Must have a high school diploma, or equivalent, and a minimum of three (3) years’ experience as a legal assistant, proficient with Microsoft Office products and have excellent typing skills. Paralegal skills a plus. Firm offers comprehensive benefits package and competitive salary. Please send resume to jobs@rodey.com with “Legal Assistant – Santa Fe” in the subject line, or mail to Human Resources Manager, PO Box 1888, Albuquerque, NM 87103.

Public Finance Paralegal
Sutin, Thayer & Browne is looking to hire a full-time Public Finance Paralegal. Please visit our website for full job description, https://sutinfirm.com/our-firm/careers/. Competitive salary and full benefits package. Send resume to sor@sutinfirm.com.

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.

Public Defender – Pueblo of Santa Ana
The Pueblo of Santa Ana is accepting contractual bids for the position of the Public Defender (32 hour a week). Please see the RFP for the position at https://santaana-nsn.gov/tribalcourt-front-page/. The bid process will close on October 15, 2021.

Part-Time Paralegal
The New Mexico Center on Law and Poverty is hiring a part-time Paralegal to advance litigation and advocacy with legal research, case development and investigation, client communication, preparation and organization of documents, and legal filing. Required: Strong commitment to social, racial, and economic justice, excellent research skills, good communicator, organized with attention to detail, and college degree with paralegal certification or equivalent experience. Apply in confidence by emailing a resume and cover letter to contact@nmpovertylaw.org.

Paralegal Or Legal Assistant
We are seeking a paralegal or legal assistant to work in a small firm with a litigation and trial practice. We have 3 attorneys and 3-4 full-time staff. Our practice is exclusively personal injury work. The position is based in Santa Fe and we prefer someone who lives in town and does not have to commute. Please submit all inquiries to Lee@huntlaw.com. We offer competitive pay, generous bonuses, 401K and profit sharing. We do not currently offer medical insurance.
Legal Assistant
5+ years’ experience in civil litigation. Extensive experience with practice management, calendaring, word processing, state and federal court filings required. Must be highly organized and detail oriented with good customer service and multi-tasking skills. Position needs include support for multiple attorneys producing a high volume of work in a fast-paced office. Please send your resume to humanresources@cplawnm.com.

Paralegal/Legal Assistant
Well established Santa Fe personal injury law firm is in search of an experienced paralegal/legal assistant. Candidate should be honest, highly motivated, detail oriented, organized, proficient with computers & excellent writing skills. Duties include requesting and reviewing medical records and bills, meeting with clients, opening claims with insurance companies and preparing demand packages. We offer a very competitive salary, a retirement plan funded by the firm, full health insurance benefits, paid vacation and sick leave, bonuses and opportunities to move up. We are a very busy law firm and are looking for an exceptional assistant who can work efficiently. Please submit your resume to personalinjury2020@gmail.com.

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For Sale
Retired Albuquerque attorney wants to sell five black four drawer legal size file cabinets. $50 each. Must pick up. Call Bob (505)822-9052.

For Sale - NM Statutes Annotated
West’s NM Statutes Annotated- Supplemented to 2019. $300 or best offer. You pick up. 575-644-5165.

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@sbnm.org

The publication schedule can be found at www.sbnm.org.
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