

BAR BULLETIN

January 27, 2021 • Volume 60, No. 2



Love of the Organs by Virginia Hicks (see page 3)

Inside This Issue

Bernalillo County Metropolitan Court Announcement of Applicants.....	4
State Bar of New Mexico Licensing Certification and Fees Due by Feb. 1, 2021.....	5
Thank You State Bar of New Mexico Judicial Nominating Commission Appointees.....	6

From the New Mexico Court of Appeals

2020-NMCA-009: Sanchez v. Essentia Ins. Co.....	10
2020-NMCA-010: State v. Martinez.....	13
2020-NMCA-011: Tucson Elec. Power Co. v. N.M. Taxation and Revenue Dep't.....	15



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January 27, 2021 • Vol. 60, No. 2

Table of Contents

Notices 4
 Thank You State Bar of New Mexico Judicial Nominating Commission Appointees 6
 Calendar of Legal Education 7
 Court of Appeals Opinions List 9

From the New Mexico Court of Appeals

2020-NMCA-009: Sanchez v. Essentia Ins. Co. 10
 2020-NMCA-010: State v. Martinez 13
 2020-NMCA-011: Tucson Elec. Power Co. v. N.M. Taxation and Revenue Dep't 15

Advertising 18

Meetings

January

- 27**
Natural Resources, Energy and Environmental Law Section Board
 Noon, teleconference
- 28**
Elder Law Section Board
 Noon, teleconference
- 28**
Trial Practice Section Board
 Noon, teleconference
- 29**
Cannabis Law Section Board
 9 a.m., teleconference
- 29**
Immigration Law Section Board
 Noon, teleconference

February

- 2**
Health Law Section Board
 9 a.m., teleconference
- 3**
Employment and Labor Law Section Board
 Noon, teleconference
- 9**
Appellate Practice Section Board
 Noon, teleconference

Workshops and Legal Clinics

January

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

February

- 3**
Divorce Options Workshop
 6-8 p.m., Video Conference
 For more details and to register, call 505-797-6022
- 23**
Common Legal Issues for Senior Citizens Workshop
 11 a.m.-noon, Video Conference
 For more details and to register, call 505-797-6005

March

- 3**
Divorce Options Workshop
 6-8 p.m., Video Conference
 For more details and to register, call 505-797-6022
- 24**
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: Virigina Louise Hicks is a senior trial attorney with the Seventh Judicial District Attorney's office. She has been painting and drawing ever since she was a little girl. She really enjoys oil painting and does it in her free time, while supervising a law office and her two sons. She frequently uses photographs to capture the painting's essence. She has never been published or in an art show, but wanted to demonstrate to the members of the bar that attorneys have hidden talents. During the pandemic, painting has been therapeutic and a source of enjoyment for her.

Notices

COURT NEWS

New Mexico Supreme Court Rule-Making Activity

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

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m. Library Hours: Monday-Friday 8 a.m.-noon and 1 p.m.-5 p.m. For more information call: 505-827-4850, email: libref@nmcourts.gov or visit <https://lawlibrary.nmcourts.gov>.

Bernalillo County Metropolitan Court

Notice of Mass Case Reassignment

Bernalillo County Metropolitan Court Chief Judge Maria I. Dominguez announced the mass reassignment of cases in Division IV as a result of the 2020 General Election. Pursuant to Rule 23-109 NMRA, Chief Judge Dominguez announced that effective Jan. 11, all misdemeanor cases previously assigned to Judge Courtney B. Weeks will be reassigned to Judge David A. Murphy. Individual notices of reassignment will be mailed to the parties. Parties who have not yet exercised a peremptory excusal, pursuant to Supreme Court Rule 7-106 NMRA, will have 10 business days from Jan. 11 to excuse Judge Murphy in cases filed on or after Jan. 1.

Announcement of Applicants

Ten applications have been received in the Judicial Selection Office as of 5 p.m., Tuesday, Jan. 12, to fill the vacancy in the Bernalillo County Metropolitan Criminal Court due to the recent election of Judge Courtney Weeks to the Second Judicial Court, effective Jan. 1. The Bernalillo County Metropolitan Criminal Court Nominating Commission will convene beginning at 9 a.m. on Tuesday, Jan. 26 and will occur exclusively by Zoom. The commission meeting is open to the public, and anyone who wishes to make comments about any of the candidates will have an

Professionalism Tip

Judge's Preamble:

As a judge, I will strive to ensure that judicial proceedings are fair, efficient and conducive to the ascertainment of the truth. In order to carry out that responsibility, I will comply with the letter and spirit of the Code of Judicial Conduct, and I will ensure that judicial proceedings are conducted with fitting dignity and decorum.

opportunity to be heard. If you would like the Zoom invitation emailed to you, please contact Beverly Akin by email at akin@law.unm.edu. Alternatively, you may find the Zoom information for this hearing below: The names of the applicants in alphabetical order: **Tonie Jessica Abeyta, Aaron Christopher Baca, Steven Gary Diamond, Veronica Lee Hill, Kevin Ashley Marrow, Rebecca Obenshain O'Gawa, Carlos, Francisco Pacheco, Edmund E. Perea, Nina Aviva Safier and Joshua Jamison Sanchez.** Zoom information for this hearing below. Please change your Zoom screen name to your first and last name to be admitted.

Topic: Bernalillo County Metropolitan Criminal Court Nominating Commission
Time: Tuesday, Jan. 26, at 9 a.m.

Join Zoom Meeting

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

Meeting ID: 379 615 447

Password: 72146

Second Judicial District Court Notice To Attorneys:

Effective Jan. 1, 2021, all cases currently assigned to Judge Daniel Gallegos will be transferred to Judge Courtney B. Weeks, Division XV. Individual notices of reassignment will be sent out for all active cases. An email notification regarding the reassignment of inactive cases and probation violation cases will be sent to the Law Offices of the Public Defender, the District Attorney's Office and the private defense bar.

Notice To Attorneys

Pursuant to the Constitution of the State of New Mexico, Judge Daniel E. Ramczyk, Division VI, will be transferring from the Criminal Court to the Civil Court. Effective Jan. 19, 2021, Judge Ramczyk will be assigned cases previously assigned to Judge Carl J. Butkus, Division XVI. You will be afforded an opportunity to exercise a peremptory challenge of the newly appointed judicial officer in accordance with the local and Supreme Court rules of civil procedure that applies to district courts.

Second Judicial District Court Notice To Attorneys And Public

The Second Judicial District Court Children's Court Abuse and Neglect Brown Bag will be held virtually on Feb 19 at noon. Attorneys and practitioners working with families involved in child protective custody are welcome to attend and will be provided with login credentials prior to the meeting. Please call 841-7644 for more information and/or to be added to the invitation list.

Fifth Judicial District Court Notice of Mass Case Reassignment

Gov. Michelle Lujan Grisham has appointed Eileen P. Riordan to fill the judgeship vacancy in the Fifth Judicial District Court, Eddy County, Division I. Effective Dec. 30, 2021 a mass reassignment of cases occurred pursuant to Rule 23-109 and Rule 1-088.1, NMRA. Judge Eileen P. Riordan will be assigned all cases previously assigned to Judge Raymond L. Romero and/or Division I of Eddy County District Court.

Twelfth Judicial District Court Notice of Mass Reassignment

Effective Dec. 29, 2020, pursuant to Rules 23-109, 1-088.1, 5-106, NMRA, a mass reassignment of criminal cases assigned to the Honorable James W. Counts will be equitably reassigned to the Honorable Angie K. Schneider and the Honorable Steven E. Blankinship. A mass reassignment of civil cases assigned to the Honorable James W. Counts will be equitably reassigned to the Honorable Ellen R. Jessen and the Honorable Daniel A. Bryant. Further a mass reassignment of Lincoln County civil, domestic relations and probate/mental health cases assigned to the Honorable Daniel A. Bryant and the Honorable Ellen R. Jessen will be reassigned to the Honorable John P. Sugg. Pursuant to New Mexico Supreme Court Order 20-8500-042, Public Health Emergency Protocol 3(E), dated Dec. 14, 2020, the exercise of peremptory excusals under the Rules are suspended for any cases filed on or before Dec. 31, 2020.

STATE BAR NEWS

COVID-19 Pandemic Updates

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

State Bar Building

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

State Bar of New Mexico Licensing Certifications and Fees Due by Feb. 1, 2021

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

New Mexico Judges and Lawyers Assistance Program

We're now on Facebook! Search "New Mexico Judges and Lawyers Assistance Program" to see the latest research, stories, events and trainings on legal well-being!

Monday Night Support Group

- Feb. 1
- Feb. 8
- Feb. 15

This group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense

of belonging. We laugh, we cry, we BE together. Email Pam at pmoore@nmbar.org or Briggs Cheney at BCheney@DSCLAW.com and you will receive an email back with the Zoom link.

Employee Assistance Program Managing Stress Tool for Members

NMJLAP contracts with The Solutions Group, The State Bar's EAP service, to bring you the following: A variety of resources surrounding some of the complex issues we are facing today such as managing conversations when you disagree politically, dealing with challenging people during COVID, civil unrest, Zoom exhaustion and speaking up about physical distancing. All of these can be found under the 'Additional Resources' tab when selecting the EAP option on the Solutions Group Website. Webinars are FREE, and have a wide range of topics such as mindfulness during Covid-19, bias in the work-place, managing stress, and many more. The Solutions Group offers Work-Life Services. The Work-Life Services is a free, confidential access to professional consultants and online resources. All resources topics, webinars, and the Work-Life Service can be found at www.solutionsbiz.com The Solutions Group can help with any life situation. Call 505.254.3555, or 866-254-3555 to receive FOUR FREE counseling sessions. Every call is completely confidential and free!

UNM SCHOOL OF LAW Law Library Hours

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

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

— *Featured* —

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Learn more at landing.clio.com/nmbar.

Thank you,
State Bar of New Mexico
Judicial Nominating Commission Appointees

On behalf of the State Bar of New Mexico, 2020 President Ernestina R. Cruz would like to thank our appointments to Judicial Nominating Commissions. We are immensely grateful for your dedication and time.

Scott Aaron	Nelson J. Goodin	Trevor T. Moore
Jamie Allen	Kathryn Grusauskas	Alan Morel
Benjamin Allison	Mickey I. R. Gutierrez	Susana Macias Muñoz
JoAnne Angel	Kristin Harrington	H. Steven Murphy
Amanda Aragon	Scott Hatcher	Jerome O'Connell
Sarah Maestas Barnes	Todd Holmes	AnneMarie C. Peterson
Roberta Batley	Tandy Hunt	Allison P. Pieroni
Georgia Garman Berrenberg	Thomas Lynn Isaacson	Twila C. Quintana
Mitchel Burns	Danny Jarrett	Adriann Ragsdale
Jennifer Breakell	Jeffrey Jones	Lauren Riley
R. Brent Capshaw	Michael Keedy	Gary Risley
Allegra C. Carpenter	Samantha Kelly	Cody R. Rogers
Randy M. Castellano	Shay Kendricks	Chris Romero
Thomas Clear	Paul Kennedy	Mary Kay Root
Andrew J. (Drew) Cloutier	Dana M. Kyle	Jennifer Rozzoni
Kimberly Chavez Cook	Roxanne R. Lara	Christopher Saucedo
B.J. Crow	Gertrude Lee	Hal Stratton
Jerry Dixon	Dianna Luce	Christopher Sturgess
Mark Donatelli	David Lutz	Lisa Torracco
RoxeAnne Esquibel	Juan Marquez	Denise M. Torres
Raymond Etcitty	Leigh Messerer	Maris Veidemanis
Jack Fortner	Don Monnheim	David L. Waymire
John Fox	Larry J. Montano	



Legal Education

January

- | | | |
|---|--|--|
| <p>27 Trust and Estate Planning Issues in Divorce
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>28 Real Property Institute
4.7 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 Ethics and Client Money: Trust Funds, Expenses, Setoffs & More
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>28 Equity & Diversity in Law Practice: Best Practices for Law Firms
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 When One Isn't Enough: Attorney Ethics and the 2020 Election Lawsuits
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 Building Cross-Examination Skills with Practical Improv Techniques
1.5 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> |

February

- | | | |
|---|--|--|
| <p>1 WIND 2021 Conference
28.0 G
Live Webinar
CEU Institute
407-324-0500</p> | <p>12 The Ethics of Delegation
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 Drafting Employment Agreements for Commission-based Employees
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>3 Ethics: Practical and Budget-Friendly Cybersecurity for Lawyers
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>16 Estate Planning for Digital Assets
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 Risk Transfer and Additional Insured Endorsements
1.0 G
Live Webinar
CEU Institute
407-324-0500</p> |
| <p>4 PD Seminar: Thinking Like a Lawyer, But Writing for Your Reader
1.5 G
Live Webinar
Lewis Roca Rothgerber Christie LLP
602-262-5314</p> | <p>17 Safe Harbors and Calm Seas
2.0 EP
Live Webinar
CEU Institute
407-324-0500</p> | <p>18 Drafting Settlement Agreements in Civil Litigation
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>5 Ethics of Supervising Other Lawyers
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 Rock-n-Roll Law Intellectual Property/Copyright Series
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 Networking Professionally and Ethically
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> |

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

- | | | |
|---|---|--|
| <p>19 Lawyer Ethics and Texting
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>23 Drafting Guarantees in Real Estate Transactions
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>24 How to Fix a Broken Trust: Decanting, Reformation & Other Tools
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>22 How Ethics Rules Apply to Lawyers Outside of Law Practice
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>24 Do I have a Problem? the Law Profession's Struggle with Substance Abuse
1.0 EP
Live Webinar
Attorney Protective
attorneyprotective.com</p> | <p>25 LLC/Partnerships Interests: Collateral, Pledges, and Security Interests
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>22 Annual Norton Bankruptcy Institute
5.0 G, 2.0 EP
Live Webinar
Norton Institute On Bankruptcy Law
www.nortoninstitutes.org</p> | | <p>26 Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice & More
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |

March

- | | | |
|---|--|--|
| <p>2 Trust & Estate Planning for Religious and Philosophical Beliefs
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>16 Franchise Agreements: What You Need to Know Before Your Clients Signs, Part 1
1.0 G
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1.0 G
Teleseminar
Center for Legal Education of NMSBF
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| <p>4 Drafting Legal Holds in Civil Litigation
1.0 G
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www.nmbar.org</p> | <p>17 Franchise Agreements: What You Need to Know Before Your Clients Signs, Part 2
1.0 G
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1.0 G
Teleseminar
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www.nmbar.org</p> |
| <p>9 Drafting Sales Agreements: UCC Issues and More
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>22 Destination CLE 2020
1.0 G
Live Webinar
Destination CLEs
907-231-2111</p> | <p>30 Undue Influence and Duress in Estate Planning
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |

Opinions

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

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

Effective December 25, 2020

PUBLISHED OPINIONS

A-1-CA-36979	J Benavidez v. Western ABQ Land Holdings	Affirm	12/23/2020
A-1-CA-37434	M Fernandez v. Bernalillo County Board	Affirm	12/23/2020

UNPUBLISHED OPINIONS

A-1-CA-36530	State v. E Flores	Affirm	12/14/2020
A-1-CA-37759	R Cook v. R Wilson	Affirm/Reverse/Remand	12/14/2020
A-1-CA-37989	City of Farmington v. K Jensen	Reverse/Remand	12/14/2020
A-1-CA-38243	State v. J Espinoza	Reverse/Remand	12/14/2020
A-1-CA-38796	State v. T Manes	Affirm	12/15/2020
A-1-CA-37195	L Filippi v. D Wallin	Affirm/Reverse/Remand	12/16/2020
A-1-CA-38399	State v. M Torres	Reverse/Remand	12/17/2020
A-1-CA-39087	K Derrick v. R Chavez	Affirm	12/17/2020
A-1-CA-39101	A Marquez v. M Cordova	Affirm	12/17/2020
A-1-CA-38457	State v. J Horton	Affirm	12/21/2020
A-1-CA-38566	R Whatley v. Department of Corrections	Affirm	12/21/2020
A-1-CA-36509	State v. S Godkin	Affirm	12/22/2020
A-1-CA-38813	State v. N Calderon, Jr.	Affirm	12/22/2020
A-1-CA-38845	State v. T Chavez	Affirm	12/22/2020
A-1-CA-38911	S Neldon MD v. M Willard	Reverse	12/22/2020
A-1-CA-38142	Wilmington Savings Fund v. D Lucero	Affirm	12/23/2020
A-1-CA-38906	V Properties v. Rainbow USA	Affirm	12/23/2020

Effective January 1, 2021

UNPUBLISHED OPINIONS

A-1-CA-38574	State v. A Rodriguez	Affirm	12/29/2020
A-1-CA-39058	State v. I Chairez	Affirm	12/30/2020

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

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

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-009
No. A-1-CA-35894 (filed October 7, 2019)

MARTIN SANCHEZ, Individually and
as Personal Representative for the
ESTATE OF CLIFFORD SANCHEZ;
PHIL SANCHEZ; and STEVEN
SANCHEZ, Individually,
Plaintiffs-Appellants,
v.
ESSENTIA INSURANCE COMPANY;
and HAGERTY INSURANCE AGENCY,
LLC,
Defendants-Appellees,
and
JOSE LUJAN and GILBERT SANCHEZ,
Defendants,
and
CENTRAL MUTUAL INSURANCE
COMPANY,
Defendant-in-Intervention.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY

FRANCIS J. MATHEW, District Judge

Certiorari Denied, January 3, 2020, No. S-1-SC-37992.
Released for Publication February 11, 2020.

Atler Law Firm, P.C.
TIMOTHY J. ATLER
Albuquerque, NM

Cruz Law Office, LLC
ERNESTINA R. CRUZ
Taos, NM
Sanchez Law Firm
DENNIS T. SANCHEZ
Taos, NM
for Appellants

Rodey Dickason Sloan Akin & Robb
PA
JOCELYN DRENNAN
MARK MOWERY
Albuquerque, NM
for Appellee Hagerty Insurance
Agency, LLC
Modrall Sperling Roehl Harris &
Sisk PA
TIFFANY ROACH MARTIN
MICHELLE A. HERNANDEZ
Albuquerque, NM
for Appellee Essentia Insurance
Company

Opinion

Zachary A. Ives,, Judge.

{1} Plaintiffs Phil Sanchez (Phil), Steven Sanchez, and Martin Sanchez, individually and as the personal representative of the Estate of Clifford Sanchez, sued Defendants Essentia Insurance Company

and Hagerty Insurance Agency, LLC for denying uninsured and underinsured motorist (UM/UIM) coverage for the accidental death of Phil's son Clifford. The district court granted Defendants' motion for summary judgment, concluding that Phil had validly rejected UM/UIM coverage. On appeal, Plaintiffs argue, among other things, that Phil's rejection was not

valid because Defendants waited over seven months to incorporate the rejection into his insurance policy. Because we agree with Plaintiffs that Defendants' delay deprived Phil of a fair opportunity to reconsider his decision to reject coverage, we reverse without reaching Plaintiffs' other arguments.

BACKGROUND

{2} The pertinent facts are undisputed. On July 20, 2010, Phil and his son Philip visited Defendant Hagerty's website to purchase automobile insurance for Phil's classic cars, a 1964 Ford Galaxie and a 1956 Ford Truck. Philip was assisting Phil, who did not use a computer or the Internet and did not attend to his personal affairs or pay his own bills because of his age. Phil and Philip selected UM/UIM coverage in the amount of \$100,000 per person and \$300,000 per accident for bodily injury and \$10,000 per accident for property damage. The cost of this coverage was fourteen dollars per month.

{3} On August 14, 2010, Phil signed a new coverage selection form rejecting all UM/UIM coverage. More than seven months later, on March 25, 2011, Defendants sent Phil a policy declarations form, which stated that Phil had rejected UM/UIM coverage for bodily injury but had purchased such coverage for property damage. The declarations form did not specify either the levels of coverage available or the premiums associated with each level of coverage. Over the next six months, Defendants sent Phil various documents, including renewal offers and policy declarations forms, indicating that he had rejected UM/UIM bodily injury coverage.

{4} On October 12, 2011, Phil's son Clifford, an insured under Phil's policy, was killed in an accident during an elk hunting excursion in Taos County. After Defendants denied UM/UIM coverage for damages related to Clifford's death, Plaintiffs sued, asserting that the denial was improper. Defendants moved for summary judgment, arguing that Phil had validly rejected UM/UIM coverage. After full briefing and a hearing, the district court granted Defendants' summary judgment motion. Plaintiffs appeal.

DISCUSSION

{5} Plaintiffs argue that the district court entered summary judgment for Defendants based on a legal error. Specifically, Plaintiffs contend that Phil's rejection of UM/UIM coverage is invalid because Defendants deprived him of a fair opportunity to reconsider his decision to reject coverage by failing to provide him with a policy incorporating the rejection until over seven months after he had signed the rejection form. We agree.

{6} “Summary judgment is properly granted when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” *Arias v. Phoenix Indem. Ins. Co.*, 2009-NMCA-100, ¶ 6, 147 N.M. 14, 216 P.3d 264. We review the district court’s summary judgment ruling de novo. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280.

{7} NMSA 1978, Section 66-5-301 (1983) governs UM/UIM coverage in New Mexico. Subsections (A) and (B) of the statute require insurance companies to “include in automobile policies UM/UIM coverage ranging from the minimum statutory limits . . . up to the limits of liability coverage contained in a policy.” *Arias*, 2009-NMCA-100, ¶ 7 (citation omitted). The purpose of this requirement “is to put the insured in the same position he or she would have been in if the tortfeasor had liability coverage equal to the UM/UIM protection as provided by the insured’s policy.” *Id.* The requirement thus “embodies a strong public policy to expand insurance coverage and to protect individual members of the public against the hazard of culpable uninsured and underinsured motorists.” *Id.* (alteration, internal quotation marks, and citation omitted). Consistent with this public policy, Subsection (C) allows an insured to reject the UM/UIM coverage described in Subsections (A) and (B) only if the rejection “satisf[ies] the regulations promulgated by the superintendent of insurance.” *Arias*, 2009-NMCA-100, ¶ 8.

{8} Interpreting Section 66-5-301 and the applicable insurance regulations, our Supreme Court has held that a rejection of UM/UIM coverage is valid only if the insurer meets four “workable requirements” designed to ensure that rejections are the product of “realistically informed choice[s]” by insureds. *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 20, 149 N.M. 162, 245 P.3d 1214. The insurer must:

- (1) offer the insured UM/UIM coverage equal to his or her liability limits, (2) inform the insured about premium costs corresponding to the available levels of coverage, (3) obtain a written rejection of UM/UIM coverage equal to the liability limits, and (4) incorporate that rejection into the policy in a way that affords the insured a fair opportunity to reconsider the decision to reject[.]

Id. ¶ 22. If the insurer fails to comply with one or more of these requirements, the insured’s rejection of coverage is invalid, and “the policy will be reformed to provide UM/UIM coverage equal to the liability limits.” *Id.*

{9} At issue here is the fourth requirement. We must determine whether, as a matter of law, the undisputed facts established that

Defendants incorporated Phil’s rejection into the policy in a manner that “afford[ed] him] a fair opportunity to reconsider [his] decision to reject.” *Jordan*, 2010-NMSC-051, ¶ 22. Whether an insurer’s delayed incorporation may render a rejection invalid is a question of first impression in New Mexico.

{10} The incorporation requirement is based on Regulation 13.12.3.9 NMAC. *Jordan*, 2010-NMSC-051, ¶ 18. The regulation provides that “[t]he rejection of the provisions covering damage caused by an uninsured or unknown motor vehicle as required in writing by the provisions of Section 66-5-301 . . . must be endorsed, attached, stamped[,] or otherwise made a part of the policy of bodily injury and property damage insurance.” 13.12.3.9 NMAC. Our Supreme Court has explained how this regulation serves the purpose of ensuring that a rejection of UM/UIM coverage is knowingly and intelligently made:

The regulation that the rejection be made a part of the policy delivered to the insured quite apparently is to ensure that the insured has affirmative evidence of the extent of coverage. Upon further reflection, consultation with other individuals, or after merely having an opportunity to review one’s policy at home, an individual may well reconsider his or her rejection of uninsured motorist coverage. Providing affirmative evidence of the rejection of the coverage comports with a policy that any rejection of the coverage be knowingly and intelligently made. Any individual rejecting such coverage should remain well informed as to that decision.

Romero v. Dairyland Ins. Co., 1990-NMSC-111, ¶ 9, 111 N.M. 154, 803 P.2d 243; *accord Jordan*, 2010-NMSC-051, ¶ 18.

{11} In order to accomplish this purpose, New Mexico’s appellate courts strictly interpret and apply the incorporation requirement. See *Romero v. Progressive Nw. Ins. Co.*, 2010-NMCA-024, ¶ 32, 148 N.M. 97, 230 P.3d 844, *aff’d sub nom. Jordan*, 2010-NMSC-051; see also *id.* ¶¶ 27-39. For example, we have held that an insurer failed to satisfy this requirement when the language in a policy “conveyed conflicting information.” *Williams v. Farmers Ins. Co.*, 2009-NMCA-069, ¶ 20, 146 N.M. 515, 212 P.3d 403. Both our Supreme Court and this Court have concluded that rejections were invalid when insurers failed to physically attach rejections to the insurance policies provided to the insureds. *Romero*, 1990-NMSC-111, ¶¶ 17-18; *Arias*, 2009-NMCA-100, ¶¶ 1, 4, 12-13. And our

Supreme Court has invalidated a rejection when the insurer “[i]ncorporat[ed] an on-line application into an insurance policy via buried language toward the end of a generic forty-nine page policy.” *Jordan*, 2010-NMSC-051, ¶ 35. These precedents establish that an insurer’s choices regarding the language used to incorporate a rejection and the placement of that language may deprive an insured of a fair opportunity to reconsider the decision to reject coverage.

{12} The same deleterious consequence can flow from an insurer’s choice regarding the timing of the incorporation. New Mexico law seeks to protect the ability of insurance consumers to “knowingly and intelligently” make decisions about whether to purchase or reject UM/UIM coverage. *Romero*, 1990-NMSC-111, ¶ 9. The incorporation requirement cannot serve that purpose if an incorporation does not do what it is designed to do: provide the insured with a fair “opportunity . . . to fully reconsider any rejection of UM/[UIM] coverage.” *Arias*, 2009-NMCA-100, ¶ 13. An unreasonable delay between rejection and incorporation deprives the insured of that opportunity. Memory fades with the passage of time, and an initially clear recollection of the reasons for rejecting coverage may eventually be supplanted by a general sense that the insured must have had a good reason for choosing to do so. The longer the delay, the more likely it is that the insured will no longer be able to recall information—such as coverage options and their respective costs—pertinent to the decision to reject, and the more likely it is that the incorporation, rather than enabling reconsideration, will do nothing more than remind the insured of a decision that has already ossified.

{13} It follows that an insured will be able to reconsider the initial decision in a meaningful way only if the insured receives the policy incorporating the rejection promptly after deciding to reject UM/UIM coverage. Prompt incorporation allows the insured to “fully reconsider,” *id.* ¶ 13, the rejection at a time when the insured “remain[s] well informed as to that decision[.]” *Romero*, 1990-NMSC-111, ¶ 9, as well as to the considerations that produced it. By contrast, unreasonable delay defeats the purpose of the incorporation requirement: “afford[ing] the insured a fair opportunity to reconsider the decision to reject.” *Jordan*, 2010-NMSC-051, ¶ 22 (emphasis added).

{14} Defendants argue that the delayed incorporation should only render the rejection invalid during the seven months that passed between the rejection and the incorporation. Thus, Defendants contend, Phil’s rejection became valid when Defendants finally incorporated Phil’s rejection

into the policy, and, because that incorporation occurred before the accident that caused the death of Phil's son, Phil had no UM/UIM coverage at that time. We are not persuaded. Defendants fail to account for the need for the insured to have the decision to reject and the reasons for making that decision fresh in his or her mind at the time of incorporation. Under Defendants' approach, an insurer could transform a rejection that is invalid for an extended period of time into a valid rejection whenever the insurer decides to incorporate the rejection into the policy, no matter how long the delay and no matter the likely effect of that delay on the ability of a reasonable insured to "fully

reconsider," *Arias*, 2009-NMCA-100, ¶ 13.¹ New Mexico's UM/UIM legislation, regulation, and jurisprudence could not countenance such a holding, which would allow an insurer's delay to prevent an insured from knowingly and intelligently making the final decision about whether to reject coverage. That consequence would undermine the legislative purpose of including UM/UIM coverage in every policy absent a knowing and intelligent waiver. See *Romero*, 1990-NMSC-111, ¶ 9. {15} The delay between rejection and incorporation in this case deprived Phil of the fair opportunity to reconsider that New Mexico law guarantees to insureds. Seven months is too long a span of time

to expect an insured to remember the initial reasons for rejecting coverage, the available UM/UIM coverage options, and the premium amount for each option. We hold that Defendants' delay rendered Phil's rejection invalid.

CONCLUSION

{16} We reverse and remand for further proceedings consistent with this opinion.

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

WE CONCUR:

KRISTINA BOGARDUS, Judge
MICHAEL D. BUSTAMANTE, Judge
Pro Tempore

¹The shortcomings of Defendants' approach become apparent when we consider the hypothetical case of an insured who rejects UM/UIM coverage when purchasing a one-year insurance policy and an insurer that delays incorporating the insured's rejection into the policy until two days before the policy is set to lapse or be renewed. Then, the day after the incorporation, the insured is injured in an accident with an uninsured motorist. In such a case, Defendants' approach would require us to hold that the incorporation occurred "in a way that afford[ed] the insured a fair opportunity to reconsider the decision to reject," *Jordan*, 2010-NMSC-051, ¶ 22, even though the insured had just one day to do so, and even though that one day followed almost a year during which the insured lacked evidence of the decision to reject. That result cannot be reconciled with the policies underlying the law of UM/UIM coverage in New Mexico.

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-0010
No. A-1-CA-37236 (filed October 29, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ARTHUR MARTINEZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
DREW D. TATUM, District Judge

Certiorari Denied, January 8, 2020, No. S-1-SC-38029.
Released for Publication February 11, 2020.

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Opinion

Kristina Bogardus, Judge.

{1} Defendant Arthur Martinez appeals from the district court’s order denying his motion to dismiss. The central issue on appeal is whether Defendant’s two convictions entered by the magistrate court should stand, given a conflict between—on the one side, the jury foreperson’s announcement of guilt on both counts, the result of the jury poll generally affirming the jury foreperson’s announcement, and signed “guilty” verdict forms—and on the other side, signed “not guilty” verdict forms. Concluding that the inconsistency in the verdict forms was the product of a clerical error that the magistrate properly corrected and that Defendant was not exposed to double jeopardy, as argued, we affirm.

BACKGROUND

{2} Defendant was charged with two misdemeanor crimes: driving with a suspended license and driving without insurance. This appeal stems from an irregularity in Defendant’s trial, which was conducted in magistrate court.

{3} Because the magistrate court is not of record, knowledge of what happened at Defendant’s trial is limited; nevertheless,

both parties submit the following. After the jury deliberated, the jury foreperson announced that the jury found Defendant guilty on both counts. During the jury poll that followed the announcement, each juror assented to the verdict. Of note, however, the court did not poll the jurors specifically as to each count. The court then discharged the jury. After the jury left, the magistrate court noticed that the foreperson had signed both the “guilty” verdict form and the “not guilty” verdict form associated with each count. The court responded to the inconsistency by setting a hearing on the issue.

{4} The record provides additional information about what happened next. The magistrate court filed the “guilty” verdict forms with the clerk on the day of trial. The “not guilty” verdict forms were made part of the record with a note attached to each with the words “Foreperson signed in error.” It is not clear who wrote or attached the notes, nor when they were attached. Meanwhile, also on the day of trial, the court prepared a notice to send to the jury foreperson requiring his attendance at the hearing. The notice stated that the requirement to attend was “due to a clerical error with the [v]erdict paperwork at the trial[.]” At the conclusion of that hearing, which likewise was not recorded, the mag-

istrate court (1) found that the jury verdict was valid as announced; and (2) entered a judgment of guilt as to each count.

{5} Defendant then appealed the judgment to the district court and moved to dismiss the charges, alleging that his right to be free from double jeopardy was violated “by the . . . [m]agistrate [c]ourt’s decision to allow the verdict to stand.” Following a hearing on the matter, the district court entered an order denying Defendant’s motion; included in the order were factual findings. Defendant next entered into a conditional plea allowing him to seek relief from his convictions. Defendant now appeals the district court’s order.

DISCUSSION

{6} We first establish the standard we use to review the district court’s order. We review de novo the conclusions of law underlying the denial of Defendant’s motion to dismiss. See *State v. Baca*, 2015-NMSC-021, ¶ 25, 352 P.3d 1151. To the extent that those conclusions are based on the court’s findings stated in the order, we review the findings under a deferential substantial evidence standard. See *id.* Under that standard, “we will not weigh the evidence or substitute our judgment for that of the [district] court, and all reasonable inferences supporting the fact findings will be accepted even if some evidence may have supported a contrary finding.” *State v. Rodriguez*, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737 (citation omitted).

{7} The question before us is whether the district court erred in concluding that, based on what happened in magistrate court, the entry of Defendant’s convictions was proper. Defendant’s claims to the district court and now on appeal all arise from the fact that the “not guilty” verdict forms were signed. Defendant treats the signed forms as an acquittal and, in so doing, contends both that the magistrate court subjected him to double jeopardy by recording the guilty verdict and also that any retrial of the charges against him would constitute double jeopardy. In contrast, the State treats the signatures on the “not guilty” verdict forms as clerical error that the magistrate court was allowed to, and did, correct.

{8} We share the State’s view that the signing of the “not guilty” verdict forms was clerical error that the magistrate court could correct, and we disagree with Defendant that the signed “not guilty” verdict forms were tantamount to an acquittal giving rise to double jeopardy.

I. The Signed “Not Guilty” Verdict Forms Represented Clerical Error

{9} Defendant denies that the written verdicts resulted from clerical error and stresses that, instead, they were ambiguous.

We disagree. With two signed verdict forms for each charge, one “guilty” and one not, the occurrence of clerical error is plain, given the simple fact that one must be correct and the other incorrect. Furthermore, the problem with the written verdicts was not that either one contained internal ambiguity or vagueness needing clarification or interpretation, but rather that each one’s plain meaning contradicted the other’s. Compare *Di Palma v. Weinman*, 1911-NMSC-036, ¶ 15, 16 N.M. 302, 121 P. 38 (considering a written jury verdict assessing damages “at \$5,000, at 6 per cent. interest[.]” ambiguous in that it was unclear whether the interest was intended to be prejudgment or postjudgment interest), *aff’d sub nom. Weinman v. De Palma*, 232 U.S. 571 (1914), with *State v. Burghardt*, 435 N.W.2d 673, 675 (Neb. 1989) (commenting that the return of signed “guilty” and “not guilty” verdict forms for a single charge was indicative of inadvertence, not ambiguity). Hence, clerical error was present, and Defendant’s reliance on case law governing courts’ responses to “ambiguous” verdicts is generally misplaced.

{10} More apt to this situation is case law addressing inconsistency in expression and intention: cases in which the jury foreperson signed both the “guilty” and “not guilty” verdict forms, e.g., *Burghardt*, 435 N.W.2d at 675; cases in which the oral or written verdict did not reflect the jury’s actual finding, e.g., *Rodriguez*, 2006-NMSC-018, ¶ 2; see also, e.g., *United States v. Stauffer*, 922 F.2d 508, 511 (9th Cir. 1990); *United States v. Dotson*, 817 F.2d 1127, 1129 (5th Cir. 1987), *vacated in part on other grounds*, 821 F.2d 1034 (5th Cir. 1987) (per curiam); *United States v. Mears*, 614 F.2d 1175, 1179 (8th Cir. 1980); and cases in which a court’s oral pronouncement contradicted its written order, e.g., *Johnson v. Mabry*, 602 F.2d 167, 169 (8th Cir. 1979); *State v. Stejskal*, 2018-NMCA-045, ¶¶ 3-5, 421 P.3d 856. In such cases, courts have understood the inconsistencies as resulting from inadvertent error and have approved of juries’ and trial courts’ exercise of power to correct those errors. *Stauffer*, 922 F.2d at 514; *Dotson*, 817 F.2d at 1130; *Mears*, 614 F.2d at 1179; *Johnson*, 602 F.2d at 170; *Burghardt*, 435 N.W.2d at 675; *Rodriguez*, 2006-NMSC-018, ¶ 1; *Stejskal*, 2018-NMCA-045, ¶ 16.

{11} Rule 6-704(B) NMRA furnishes such power to magistrate courts. Specifically, Rule 6-704(B) provides that “[c]lerical mistakes in final orders or other parts of the file and errors therein arising from oversight or omission may be corrected by the magistrate at any time on the judge’s own initiative.” A court properly exercises this power when it takes some action relative to a verdict form to reflect the jury’s true intent. Cf. *Rodriguez*, 2006-NMSC-018, ¶ 1 (recognizing the district court’s power to correct a signed verdict form not reflective of the jury’s intent).

{12} We consider, then, whether the magis-

trate court’s act of recording the guilty verdict was reflective of the jury’s true intent. The district court found that the jury intended to return verdicts of guilt as to both charges against Defendant. In particular, the district court found that the magistrate judge announced the jury’s verdict of guilty on both counts and that the jury foreperson did the same. The district court concluded that there was “ample” evidence that the announcements were correct.

{13} We agree that there was ample evidence to support the conclusion that the jury found Defendant guilty on both counts. Most notably, the jury foreperson returned an oral verdict making that exact pronouncement. The jury heard it. When polled, not one juror registered dissent. The jury then heard the judge make the same pronouncement: guilty on both counts. No juror stayed after trial to inform any court official that what was spoken by both the jury foreperson and the judge inaccurately represented the jury’s verdict; that subsequent silence of the jury’s is telling. That is, it is reasonable to infer that—had the jury found Defendant not guilty on one of the counts, as Defendant contends is possible in light of the general polling approach taken—at least one of the jurors would have attempted to correct the prevailing understanding of guilt on both counts, either during polling or after trial. Cf. *State v. Holloway*, 1987-NMCA-090, ¶ 14, 106 N.M. 161, 740 P.2d 711 (noting that the purpose of a jury poll is “to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned and thus to enable the court and parties to ascertain for a certainty that each of the jurors approves of the verdict as returned” (emphasis added) (internal quotation marks and citation omitted)). Furthermore, the magistrate court found after the hearing it conducted that the oral verdict was valid; and shortly after trial, in its letter to the foreperson, characterized the extraneous signings as “clerical error.”

{14} In sum, we conclude that the signing of the “not guilty” verdict forms was clerical error, that Rule 6-704(B) empowered the magistrate court to correct the error, and that the court did so by entering the guilty verdict to reflect the jury’s true intent. Cf. *Rodriguez*, 2006-NMSC-018, ¶ 1.

II. Defendant’s Double Jeopardy Right Was Not Violated

{15} Defendant’s arguments concerning double jeopardy also fail. The double jeopardy protection, as relevant here, applies “against a second prosecution for the same offense after acquittal.” *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (internal quotation marks and citation omitted); *State v. Gallegos*, 2011-NMSC-027, ¶ 30, 149 N.M. 704, 254 P.3d 655 (internal quotation marks and citation omitted). That is, the double jeopardy issue would arise if

Defendant were acquitted, but he was not. See *DiFrancesco*, 449 U.S. at 129; *Gallegos*, 2011-NMSC-027, ¶ 30. The “not guilty” verdict forms signed by the jury foreperson were never effectuated: they were not announced in open court, made the subject of the jury poll, or entered as the judgment of the magistrate court. See, e.g., 3 Charles Alan Wright et al., *Federal Practice and Procedure* § 517 (4th ed. 2011) (observing that a verdict is valid when the result of jury deliberations is announced in open court and no juror registers dissent); 75B Am. Jur. 2d *Trial* § 1445 (2019) (observing that “it is the judgment of the court adopting the findings of the jury which breathes life and effectiveness into the jury’s verdict”); cf. Rule 6-610 NMRA (outlining the requirements governing the return of a verdict in magistrate court); Rule 6-701 NMRA (outlining the magistrate court’s role in effectuating a judgment of guilty or not guilty). To the contrary, the magistrate court filed the “guilty” verdict forms based on the foreperson’s announcement of the guilty verdicts in open court and the poll confirming the unanimity of the jury. After the hearing on the matter, the magistrate court found that Defendant’s convictions stood and entered judgment accordingly. Under these circumstances, the written not guilty verdicts cannot function as an acquittal that would expose Defendant to double jeopardy. See, e.g., *Blueford v. Arkansas*, 566 U.S. 599, 610 (2012) (holding that the defendant could be retried on charges for which the jury returned oral not guilty verdicts, but for which no formal acquittal was entered); *State v. Dorsey*, 706 S.W.2d 478, 481 (Mo. Ct. App. 1986) (rejecting, based on the trial court’s having not accepted the not guilty verdict returned by the jury, the argument that double jeopardy bars a new trial). Without an acquittal, Defendant faced no double jeopardy.

III. There Was No Fundamental Error

{16} Defendant further asserts that the magistrate court fundamentally erred by not treating the not guilty written verdict as controlling. Having established that the magistrate court did not err in recording the verdict of guilt, we need not consider this argument further, as there is no possibility that the court fundamentally erred. See *State v. Archunde*, 1978-NMCA-050, ¶ 3, 91 N.M. 682, 579 P.2d 808 (concluding that where there was no error, there was no fundamental error).

CONCLUSION

{17} We affirm.

{18} IT IS SO ORDERED.
KRISTINA BOGARDUS, Judge

WE CONCUR:
J. MILES HANISEE, Chief Judge
ZACHARY A. IVES, Judge

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-011
No. A-1-CA-35781 (filed November 4, 2019)

TUCSON ELECTRIC POWER CO.,
Petitioner-Appellant
v.
TAXATION AND REVENUE
DEPARTMENT OF THE STATE OF
NEW MEXICO,
Respondent-Appellee.

APPEAL FROM THE ADMINISTRATIVE HEARINGS OFFICE
MONICA ONTIVEROS, Hearings Officer

Released for Publication February 11, 2020.

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Taxpayer applied to the Department for a refund of \$434,860.92 for the tax period July 1, 2011, through December 31, 2011, based on its belief that its purchases of natural gas qualified for a deduction under the Gross Receipts and Compensating Tax Act (the Act), NMSA 1978, §§ 7-9-1 to -117 (1966, as amended through 2019). The Department denied Taxpayer's refund application, and Taxpayer filed an administrative protest.

{3} In its protest, Taxpayer argued that it was entitled to a refund "for compensating taxes paid in error . . . for purchases that are not subject to compensating tax" under the Act.¹ Taxpayer argued that its purchases of natural gas fell within Section 7-9-65 of the Act, which provides, inter alia, that "receipts from selling chemicals or reagents in lots in excess of eighteen tons . . . may be deducted from gross receipts."² Section 7-9-65. The Department responded that Section 7-9-65 is inapplicable to Taxpayer's purchases of natural gas for use in generating electricity and that Taxpayer had failed to clearly establish its entitlement to the deduction.

{4} Following a hearing, the AHO found that Taxpayer had "paid compensating tax on the purchase of natural gas during the tax period" from various companies, all of which the AHO found "have no nexus with New Mexico and are out-of-state companies." The AHO's analysis began with a discussion of the relationship between New Mexico's compensating tax and gross receipts tax and included a threshold determination that "[d]eductions that are applicable to the gross receipts tax may be used to determine whether compensating tax is due on a transaction." The AHO cited *Western Electric Co. v. New Mexico Bureau of Revenue*, 1976-NMCA-047, ¶ 14, 90 N.M. 164, 561 P.2d 26, for the proposition that "the [L]egislature intended to make our gross receipts tax and our compensating tax correlate[]: a [deduction] from the gross receipts tax must also be treated as a [deduction] from the compensating tax."³ The AHO nonetheless determined Taxpayer's transactions did not qualify for

Opinion

J. Miles Hanisee, Chief Judge.

{1} Tucson Electric Power Company (Taxpayer) appeals from the administrative hearing officer's (AHO) decision and order denying its protest of the New Mexico Taxation and Revenue Department's (the Department) denial of Taxpayer's

request for a tax refund. We affirm, but on a basis different than that relied on by the AHO.

BACKGROUND

{2} Taxpayer co-owns Luna Energy Facility, a power plant located near Deming, New Mexico. Taxpayer purchases natural gas from various third parties, including out-of-state vendors, for use in producing electricity at the plant. In December 2014

¹A "compensating tax" is the tax imposed on the value of tangible property purchased out of state and brought into New Mexico for use inside the state. Section 7-9-7(A)(2). It is designed "to prevent the importation of goods that would have been subject to gross receipts tax had they been produced or designed in New Mexico" and is considered a "complementary" tax to the gross receipts tax, which taxes in-state sales. *Dell Catalog Sales LP v. N.M. Taxation & Revenue Dep't*, 2009-NMCA-001, ¶¶ 53, 59, 145 N.M. 419, 199 P.3d 863.

²Although abandoned on appeal, Taxpayer alternatively argued that it was eligible to claim the deduction provided in Section 7-9-46(A) for "[r]eceipts from selling tangible personal property . . . if the sale is made to a person engaged in the business of manufacturing" and provided that the person "incorporate[s] the tangible personal property as an ingredient or component part of the product that the buyer is in the business of manufacturing." Id. The AHO found that the deduction provided by Section 7-9-46 "cannot apply" here because there was no evidence that the nontaxable transaction certificate required by Section 7-9-46 existed.

³Well after *Western Electric Co.*, 1976-NMCA-047, the Legislature amended Section 7-9-12 in 1984 to state "[e]xemptions from either the gross receipts tax or the compensating tax are not exemptions from both taxes unless explicitly stated otherwise by law." NMSA 1978, § 7-9-12 (1984) (emphasis added). While the case at bar does not require that we reconcile the conflict between *Western Electric Co.* and Section 7-9-12, we note the incompatibility of each approach with the other and the fact that the AHO's order referred exclusively to *Western Electric Co.* as applicable precedent.

the deduction because Taxpayer failed to present sufficient evidence that it purchased and received natural gas in “lots” greater than eighteen tons as required by Section 7-9-65. Ultimately concluding that Taxpayer had failed to meet its burden of establishing its right to the deduction, the AHO denied Taxpayer’s protest. Taxpayer appeals.

DISCUSSION

{5} On appeal, Taxpayer argues that the AHO made two errors of law: first, determining that “natural gas delivered by pipe to a power plant is not sold or delivered by ‘lots’ because gas is a ‘good’” and “‘goods’ and ‘lots’ are mutually-exclusive”; and second, that “the statute mandates that gas must be both sold and delivered in lots greater than [eighteen] tons to qualify for the deduction.” Taxpayer contends that the AHO’s ruling “flies in the face of the statute’s plain language.” The Department argues that the AHO’s “decision should be affirmed because the Legislature did not intend Section 7-9-65 to apply to the sale or use of natural gas” and that Taxpayer “failed to meet its burden to show that the natural gas it purchased was sold in lots of eighteen tons.” We agree that the statute’s plain language controls here, and that Section 7-9-65—permitting deduction for “receipts from selling chemicals or reagents in lots in excess of eighteen tons”—is inapplicable to receipts for natural gas, and that the AHO erred in applying it. Because Section 7-9-65 does not apply, we affirm denial of Taxpayer’s protest.

Standard of Review

{6} This Court will only set aside an AHO’s decision if the decision is: “(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with the law.” NMSA 1978, § 7-1-25(C) (2015); *Stockton v. N.M. Taxation & Revenue Dept.*, 2007-NMCA-071, ¶ 8, 141 N.M. 860, 161 P.3d 905. The issue presented requires us to interpret Section 7-9-65. We are not bound by the AHO’s interpretation as the interpretation of statutes presents a question of law that we review de novo. See *In re Final Order in Alta Vista Subdivision DP No. 1498 WQCC 07-11(A)*, 2011-NMCA-097, ¶¶ 1, 10, 150 N.M. 694, 265 P.3d 745 (“We are not bound by the [Water Quality Control] Commission’s interpretation of the statute, as this is a matter of law that we review de novo.”). We may affirm the AHO’s ruling on a ground not relied upon by the AHO if reliance on the new ground would not be unfair to Taxpayer. See *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 18, 146 N.M. 256, 208 P.3d 901 (“Even if the issue had not been preserved below, it is established law that our appellate courts

will affirm a district court’s decision if it is right for any reason, so long as the circumstances do not make it unfair to the appellant to affirm.”).

{7} In reviewing the AHO’s decision, we presume that the “assessment of taxes or demand for payment made by the [D]epartment is . . . correct.” NMSA 1978, Section 7-1-17(C) (2007). Moreover, we presume that all property bought by any person for delivery into New Mexico is subject to a compensating tax on the value of the property. Section 7-9-8. As such, “deductions are construed strictly against the taxpayer.” *TPL, Inc. v. N.M. Taxation & Revenue Dept.*, 2003-NMSC-007, ¶ 9, 133 N.M. 447, 64 P.3d 474. The taxpayer bears the burden of proving that it is eligible for the deduction. *Id.* ¶ 31.

Applicable Rules of Statutory Construction

{8} “The guiding principle in statutory construction requires that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.” *City of Santa Fe ex rel. Santa Fe Police Dept v. One (1) Black 2006 Jeep*, 2012-NMCA-027, ¶ 7, 286 P.3d 1223 (internal quotation marks and citation omitted). “In interpreting statutes, we seek to give effect to the Legislature’s intent, and in determining intent we look to the language used and consider the statute’s history and background.” *Valenzuela v. Snyder*, 2014-NMCA-061, ¶ 16, 326 P.3d 1120 (internal quotation marks and citation omitted). “[W]here the language of the legislative act is doubtful or an adherence to the literal use of words would lead to injustice, absurdity or contradiction, the statute will be construed according to its obvious spirit or reason, even though this requires the rejection of words or the substitution of others.” *N.M. Real Estate Comm’n v. Barger*, 2012-NMCA-081, ¶ 7, 284 P.3d 1112 (internal quotation marks and citation omitted). Moreover, “[w]e consider all parts of the statute together, reading the statute in its entirety and construing each part in connection with every other part to produce a harmonious whole.” *Dept of Game & Fish v. Rawlings*, 2019-NMCA-018, ¶ 6, 436 P.3d 741 (alterations, internal quotation marks, and citation omitted).

Taxpayer’s Purchases of Natural Gas Do Not Qualify for Section 7-9-65’s Deduction

{9} In full, the previous version of Section 7-9-65 provides:

Receipts from selling *chemicals or reagents* to any mining, milling or oil company for use in processing ores or oil in a mill, smelter or refinery or in acidizing oil wells, and receipts from selling *chemicals or reagents* in lots in excess

of eighteen tons may be deducted from gross receipts. Receipts from selling explosives, blasting powder or dynamite may not be deducted from gross receipts.

NMSA 1978, § 7-9-65 (1969) (emphasis added). The question, then, is whether natural gas is a category of chemical or reagent under the Act. “Chemical” as defined by the Department’s regulations is “a substance used for producing a chemical reaction.” 3.2.223.7(B) NMAC. Taxpayer argues that based on parties’ stipulations, and specifically the Department’s concession, the AHO correctly found that the natural gas purchased and used by Taxpayer was a “chemical” within the meaning of Section 7-9-65. Relying on the right-for-any-reason doctrine, the Department now contends—despite its past stipulation to the contrary—that the Legislature did not intend for the statutory deduction for chemicals or reagents to apply to natural gas.

{10} We apply the principles of statutory construction to determine whether Taxpayer’s receipts for the purchase of natural gas falls under “chemicals or reagents” in the statute. Section 7-9-65. At the outset, we note that while we generally look to parties’ stipulations with favor, “we [are] not . . . bound by parties’ stipulations [or the Department’s concessions] as to applicable law[.]” *Williams v. Mann*, 2017-NMCA-012, ¶ 30, 388 P.3d 295, because we must conduct our own analysis; and we also will not enforce stipulations if they are “unreasonable, . . . against good morals or sound public policy[.]” *S. Union Gas Co. v. Cantrell*, 1953-NMSC-092, ¶ 6, 57 N.M. 612, 261 P.2d 645 (internal quotation marks and citation omitted); *DeMichele v. N.M. Taxation & Revenue Dept.*, 2015-NMCA-095, ¶ 8, 356 P.3d 523 (“[T]his Court is not bound by the [s]tate’s concession.”). Here, the question of whether “natural gas” is a “chemical or reagent” is a question of law, which we review de novo and independent of the parties’ stipulation before the AHO that natural gas is used to produce a chemical reaction and therefore is a chemical for purposes of Section 7-9-65.

{11} First, because Taxpayer is claiming a tax deduction under Section 7-9-65, we must strictly construe the statute in favor of the Department and “the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer.” *Sec. Escrow Corp. v. N.M. Taxation & Revenue Dept.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540, 760 P.2d 1306. In light of this framework, we must determine whether the plain meaning of the statute clearly and unambiguously allows for a deduction for the receipts from the purchase of natural gas. We conclude that it does not.

{12} Second, we recently addressed, in a memorandum opinion, a markedly similar question regarding the applicability of Section 7-9-65 to the sale of coal. See *Peabody Coalsales Co. v. N.M. Taxation & Revenue Dep't*, No. A-1-CA-36632, mem. op. ¶ 8 (N.M. Ct. App. May 31, 2019) (non-precedential).⁴ In *Peabody Coalsales Co.*, we determined that the word “chemical” in Section 7-9-65 is ambiguous, and ultimately decided that in enacting the provision the Legislature did not intend to create a separate deduction for receipts from the sale of coal. *Peabody Coalsales Co.*, No. A-1-CA-36632, mem. op. ¶¶ 13, 15. We, therefore, denied the taxpayer’s claim that it was entitled to a tax deduction from gross receipts of its sale of coal to an Arizona power plant. *Peabody Coalsales Co.*, No. A-1-CA-36632, mem. op. ¶¶ 1-2. Applying the same rationale we applied in *Peabody Coalsales Co.* here, we similarly determine Section 7-9-65 to be ambiguous as to its applicability to natural gas and emphasize that both Section 7-9-65 and its corresponding regulations fail to mention the words “natural gas” or “fuels.” See *Peabody Coalsales Co.*, No. A-1-CA-36632, mem. op. ¶ 12. As with coal, had the Legislature intended to provide a deduction for receipts from the sale or use of natural gas, it could have specified the inclusion of natural gas within the statutory language establishing the deduction, as in the enactment of other legislation applicable to natural gas. See, e.g., NMSA 1978, § 7-29B-6 (1999) (discussing a tax incentive regime for the production of natural gas and crude oil).⁵ Where the Legislature has elected to extend a deduction, we must presume it did so intentionally. See *State v. Jade G.*, 2007-NMSC-010, ¶ 28, 141 N.M. 284, 154 P.3d 659; see also §§ 7-9-83(B), -84(B) (providing deductions from gross receipts and compensating tax, respectively, for jet fuel); §§ 7-9-101, -102 (providing deductions from gross receipts and compensating tax, respectively, for equipment for certain electric transmission or storage facilities); §§ 7-9-110.1, -110.2 (providing deductions

from gross receipts and compensating tax, respectively, for locomotive fuel). We are not at liberty to read into unspecific statutory language an exemption or a deduction that is not expressly provided for by statute. See *Sec. Escrow Corp.*, 1988-NMCA-068, ¶ 8. Such is precisely what Taxpayer seeks.

{13} Third, as further support for our conclusion we note that the Legislature has enacted other provisions that pertain to natural gas, such as the Oil and Gas Emergency School Tax Act (the Oil & Gas Tax), NMSA 1978, §§ 7-31-1 to -27 (1959, as amended through 2005). See § 7-31-4(A)(3) (levying a 4 percent tax on the taxable value of natural gas with limited exceptions); § 7-9-33(A) (providing that “receipts from the sale of products other than for subsequent resale in the ordinary course of business, for consumption outside the state, or for use as an ingredient or component part of a manufactured product are subject to the Gross Receipts and Compensating Tax Act as well as to the Oil & Gas [Tax]”). Notably under the Oil and Gas Tax, the Legislature expressly levies a gross receipts tax and compensating tax, with limited exemptions, on natural gas. See § 7-31-4(A)(3); § 7-9-33. Such express legislative action indicates the Legislature did not broadly intend for the Section 7-9-65 deduction to apply to receipts from natural gas sales. See *Valenzuela*, 2014-NMCA-061, ¶ 16 (noting that a statute’s history and background can aid in determining legislative intent).

{14} To reiterate: tax exemptions and deductions “are a matter of legislative grace and a way of achieving policy objectives” and are to be “construed against the taxpayer.” *Sutin, Thayer & Browne v. N.M. Taxation & Revenue Dep't*, 1985-NMCA-047, ¶ 17, 104 N.M. 633, 725 P.2d 833; *Murphy v. N.M. Taxation & Revenue Dep't*, 1979-NMCA-065, ¶ 20, 94 N.M. 90, 607 P.2d 628. It is the taxpayer’s burden to establish that it is entitled to the deduction. *TPL, Inc.*, 2003-NMSC-007, ¶ 31. Taxpayer has not met its burden to establish its entitlement here, and we will not construe

the word “chemical” in dicta to encompass natural gas. Since Taxpayer failed to satisfy the threshold question of whether natural gas is covered by the statute, and we conclude it is not, we decline to address the parties’ remaining arguments on appeal.

{15} Lastly, we observe that the Legislature further elaborated upon its intent as to this very topic by recently amending Section 7-9-65, effective July 1, 2019. The amendment qualified the deduction applicable to receipts from selling chemicals and reagents in excess of eighteen tons as “to any hard-rock mining or milling company for use in any combination of extracting, leaching, milling, smelting, refining or processing ore at a mine site[.]” *Id.* This clarification—which notably excluded natural gas—highlights that the Legislature does not intend to bestow a tax deduction to the sale of natural gas to power plants for the production of electricity, and thus such transactions do not fall within the purview of Section 7-9-65. While not dispositive as to prior transactions, the recent change clarifies current legislative intent in a manner that supports our analysis and conclusion herein.

{16} Because the right to claim a deduction for receipts from the sale and use of natural gas is not clearly and unambiguously expressed in, or even addressed by, Section 7-9-65, we conclude it is inapplicable to receipts from the sale and use of natural gas. Therefore, Taxpayer is not entitled to a deduction under Section 7-9-65.

CONCLUSION

{17} For the foregoing reasons, we affirm the AHO’s denial of Taxpayer’s protest.

{18} **IT IS SO ORDERED.**
J. MILES HANISEE, Chief Judge

WE CONCUR:
BRIANA H. ZAMORA, Judge
RICHARD C. BOSSON, Pro Tempore Judge

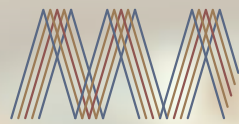
⁴Despite our citation and adherence to the rationale employed in *Peabody*, it continues to be the practice of this Court to only rely on published cases as precedent.

⁵In NMSA 1978, Section 7-29B-2(F) (1999), “natural gas” is defined as “any combustible vapor composed chiefly of hydrocarbons occurring naturally”—a term and definition notably more specific than that within Section 7-9-65.



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Cuddy & McCarthy, LLP Welcomes New Executive Director

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Matthews Fox, P.C. is a two-lawyer firm concentrating on education and administrative law. We seek a reliable, organized, detail-oriented person to administer our Santa Fe office on a part-time basis. Successful candidate must be skilled in Timeslips, QuickBooks, Microsoft Office 2013 (Word, Outlook, Excel), and Adobe Acrobat. Fundamental bookkeeping abilities required. Sense of humor and positive attitude a must! We offer competitive compensation and benefits. Email letter of interest and resume with references to sfox@matthewsfox.com, and include "Office Assistant" in the subject line.

Legal Assistant

Harvey & Foote Law Firm, a plaintiff's firm specializing in prosecuting cases involving nursing home abuse and neglect, is hiring a full-time legal assistant. Individual must have exceptional organizational skills, be able to multitask, and understand the importance of deadlines and collaborative teamwork. The ideal candidate will be proficient with Microsoft Outlook, Word and Excel. Bilingual preferred, but not required. Please send resume with salary requirements as well as references, as an attachment, to amanda@harveyfirm.com. Please include "Legal Assistant" in the subject line. No phone calls or walk-ins.

Paralegal

Rothstein Donatelli, LLP, is seeking a Paralegal with a minimum of 5 years' experience for its Santa Fe office. This person will work with attorneys in our civil rights, criminal defense, and Indian law practices. Qualified candidates must have working knowledge of state and federal district court civil and criminal rules and filing procedures, advanced computer skills in Windows, Word, Excel, PowerPoint, and Outlook, and proficiency with trial preparation, document and case management, calendaring, and online research. Please send cover letter and resume to info@rothsteinlaw.com.

UNM is seeking a Compliance Coordinator

Reporting to the Chief Compliance Officer coordinates investigations into allegations of compliance and ethics violations. Develops, implements, and evaluates compliance activities and initiatives involving multiple partners across the institution. Serves as the principal institutional official responsible for the administration of policies, procedures, data collection, and reporting to ensure compliance with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics. For details and application please see <https://unm.csod.com/ux/ats/careersite/18/home/requisition/14415?c=unm> JD or MA preferred. EEO Employer

Legal Secretary/Legal Assistant

Hinkle Shanor LLP is hiring a legal secretary/legal assistant for a busy medical malpractice defense group in its Santa Fe office. Applicants must have strong typing and computer skills. Experience in calendaring deadlines and court filings in all courts is required. Duties include reviewing, responding to and processing e-mails on a daily basis, reviewing correspondence and pleadings, keeping all files and filing up to date, scheduling depositions, management of electronic files and opening of new files. Familiarity with LMS time and billing software for time entry is a plus. Please send resume and letter of interest to gromero@hinklelawfirm.com.

Paralegal

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

Paralegal (Full-Time)

Hinkle Shanor LLP - Albuquerque, NM
 Busy law firm in need of a reliable Paralegal. The Paralegal will be in our medical malpractice defense department and will work directly with attorneys and assist in preparing cases, get involved in legal projects and research, and be responsible for maintaining case files. The ideal candidate will be organized, professional, responsible, thorough, have good time management skills, understand confidentiality requirements with knowledge of HIPAA compliance, and be committed to meeting our clients' needs. Candidates should: Have a minimum of 5 years of Paralegal experience; Have proficient communication skills both written and oral; Possess a High School Diploma (an Associate's Degree or higher is preferred). Outstanding benefits package includes: PTO; Paid Holidays; Medical Insurance (low deductibles); Life Insurance; 401K Matching. Salary range starts at \$50,000 and depends on experience. Interested applicants must send a cover letter with resume to apuckett@hinklelawfirm.com

Litigation Secretary – Albuquerque, New Mexico

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

Paralegal

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

Services

Legal Writing and Research Services

Please call; (575) 495-9076. Writing samples available upon request. Kenneth C. Detro LLC

Office Space

Sun Valley Executive Office Suites

Conveniently located in the North Valley with easy access to I-25, Paseo Del Norte, and Montano. Quick access to Downtown Courthouses. Our all-inclusive executive suites provide simplicity with short term and long-term lease options. Our fully furnished suites offer the best in class in amenities. We offer a move in ready exceptional suite ideal for a small law firm with a secretary station. Visit our website SunValleyABQ.com for more details or call Jaclyn Armijo at 505-343-2016.

Downtown Office Space For Lease:

1001 Luna Circle. Charming 1500 square ft. home converted to 4 offices, kitchenette and open reception/secretarial area with fireplace and wood floors. Walking distance from courthouses and government buildings. Free parking street-front and in a private lot in back. Security System. \$1500/mo. plus utilities. Call Ken @ 505-238-0324

Miscellaneous

Want To Purchase

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



Amber Macías-Mayo
Incoming Chair, Family Law Section

Who knew expert
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I aspire to lead an agile,
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Ian Bertschausen

David Link

Parnall Law Welcomes Two New Attorneys.



Greg Abel

Pete Grueninger

Una Campbell

Nick Trost

Aimee Whitsell

Mark Bennett

Madalyn Witz



The Parnall Law team, before COVID

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