

BAR BULLETIN

March 10, 2021 • Volume 60, No. 5



Seascape by Dean Loumbas (see page 3)

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CLE programming from the Center for Legal Education

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

Upcoming Webinars



MARCH 12

Replay: Family Law Institute: Parenting Plans for Young Children (2020)

2.0 G

9–11 a.m.

\$98 Standard Fee

Counseling the Client Regarding Form I-9 Compliance and Discrimination

1.5 G

11 a.m.–12:30 p.m.

\$99 Standard Fee

Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204

1.0 EP

Noon–1 p.m.

\$55 Standard Fee

Replay: How to Better Manage Your Workload: Email Management (2020)

1.0 G

1:30–2:30 p.m.

\$49 Standard Fee

MARCH 18

Replay: Housing Discrimination in the LGBTQ+ Community (2020)

1.0 G

Noon–1 p.m.

\$49 Standard Fee

MARCH 19

Replay: Family Law Institute: Help, My Client is Making Me Crazy! (2020)

2.0 G

9–11 a.m.

\$98 Standard Fee

Changing Minds Inside and Out of the Courtroom

1.0 EP

11 a.m.–Noon

\$89 Standard Fee

Replay: How to Better Manage Your Workload: Task, Goal & Deadline Management (2020)

1.0 G

1:30–2:30 p.m.

\$49 Standard Fee

Upcoming Teleseminars



MARCH 16

Franchise Agreements: What You Need to Know Before Your Client Signs, Part 1

1.0 G

11 a.m.–Noon

\$79 Standard Fee

MARCH 17

Franchise Agreements: What You Need to Know Before Your Client Signs, Part 2

1.0 G

11 a.m.–Noon

\$79 Standard Fee



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Meetings

March

| | |
|--|--|
| 10 | |
| Animal Law Section Board | |
| 11:30 a.m., teleconference | |
| 10 | |
| Children's Law Section Board | |
| Noon, teleconference | |
| 10 | |
| Tax Section Board | |
| 9 a.m., teleconference | |
| 11 | |
| Business Law Section Board | |
| 4 p.m., teleconference | |
| 12 | |
| Prosecutors Section Board | |
| Noon, teleconference | |
| 16 | |
| Solo and Small Firm Section Board | |
| 10:30 a.m., teleconference | |
| 18 | |
| Public Law Section Board | |
| Noon, teleconference | |

Workshops and Legal Clinics

March

| | |
|---|--|
| 24 | |
| Consumer Debt/Bankruptcy Workshop | |
| 6-8 p.m., Video Conference | |
| For more details and to register, call | |
| 505-797-6094 | |
| 30 | |
| Common Legal Issues for Senior Citizens Workshop | |
| 11 a.m.-noon, Video Conference | |
| For more details and to register, call | |
| 505-797-6005 | |

April

| | |
|---|--|
| 27 | |
| Common Legal Issues for Senior Citizens Workshop | |
| 11 a.m.-noon, Video Conference | |
| For more details and to register, call | |
| 505-797-6005 | |
| 28 | |
| 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: Dean Loumbas is a speech-language pathologist residing and working in San Francisco, Calif. His paintings have been accepted and shown in regional, national, and international juried exhibitions as well as in juried museum shows. Loumbas's paintings have been published as cover art for the *Journal of Pediatric and Adolescent Medicine*, the *Journal of Academic Medicine*, and the *Journal of Speech-Language Pathology*. His current work redefines the solid form by presenting geometric shapes in close relationships which create horizons and abstract 'landscapes' that takes the viewer on multiple journeys through numerous visual and spatial transformations.

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>.

U.S. District Court for the District of New Mexico Notice to Federal Bench & Bar Association Members

Effective Feb. 16, the attorney admission process will be completed online through PACER.gov. To request admission to practice in the District of New Mexico, you must first have an upgraded or individual PACER account. Instructions for petitioning to practice in the District of New Mexico are available on the "Attorney Admissions" page on the Court's website at <https://www.nmd.uscourts.gov/admissions>.

Judicial Nominating Commission New Mexico Court of Appeals Candidate Announcement

The New Mexico Court of Appeals Judicial Nominating Commission convened on Wednesday, Feb. 17 via Zoom, and completed its evaluation of the eleven candidates for the one vacancy on due to the resignation of Honorable Judge Julie Vargas effective Jan. 23. The commission recommends the following candidates to Gov. Michelle Lujan Grisham: **Aletheia V.P. Allen, Gerald Edward Baca, Nicholas Mark Sydow and Katherine Anne Wray.**

Professionalism Tip

With respect to parties, lawyers, jurors, and witnesses:

I will be punctual in convening all hearings, meetings and conferences.

Administrative Hearings Office

Free Online Zoom Trainings

The Administrative Hearings Office will be conducting free online Zoom trainings covering all aspects of hearings pursuant to the Implied Consent Act. The trainings are for all hearing participants, including attorneys and law enforcement officers, across New Mexico who attend ICA License Revocation/MVD hearings. In addition to hearing directly from the hearing officers that conduct these hearings, training participants will also hear insights from an experienced law enforcement officer and an experienced defense attorney about the hearing process. For participant scheduling convenience, we are offering three opportunities to attend the training: Friday, March 26 from 1 to 4 p.m.; Monday, April 26 from 1 to 4 p.m.; or on Friday, May 21 from 1 to 4 p.m. To attend one of these trainings (you only need to attend one, so pick the time most convenient to you), pre-register by sending an email to Scheduling.Unit@state.nm.us stating your role in the hearing process, how many Implied Consent Act license revocation hearings you have participated in, and which date you wish to attend.

First Judicial District Court New Rio Arriba Magistrate Court Telephone Numbers

Effective Monday, March 1, the Rio Arriba County Magistrate Court in Espanola and Chama will have new telephone numbers. The new numbers are listed here: Espanola: New main line 505-984-3955, fax is unchanged: 505-753-4802. Chama: new main line 505-984-3975, fax is unchanged: 575-756-2477.

Second Judicial District Court Notice To Attorneys

Effective Feb. 8, four new judges joined the Criminal Division of the Second Judicial District Court. Judge Bruce Fox will be assigned to Division X. Judge Jennifer J. Wernersbach was assigned to Division XVI. Judge Britt Marie Baca-Miller was assigned to Division XX. Judge Joseph

Anthony Montano was assigned to Division XXVI. Individual notices of judge reassignment will be sent to private attorneys in active cases; a list of active case reassignments will be emailed to the Law Offices of the Public Defender, the District Attorney's Office, and the Attorney General's Office in lieu of individual notices of reassignment. 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, the Attorney General's Office, and the private defense bar. You will be afforded an opportunity to exercise a peremptory challenge of the newly appointed judicial officer in accordance with the Rules of Criminal Procedure, NMRA 5-106 and Second Judicial District Court Local Rule 2-308 (Case Management Order) for all cases filed on or after Jan. 1, in accordance with New Mexico Supreme Court Order No. 20-8500-042, Emergency Court Protocol 3(E).

Notice of Mass Reassignment

Pursuant to the Constitution of the State of New Mexico, Judge Alma Cristina Roberson has been appointed to Division VII of the Second Judicial District Court by Gov. Michelle Lujan Grisham. Effective Feb. 8, Judge Alma Cristina Roberson will be assigned Children's Court cases previously assigned to Judge John J. Romero, Division VII. You will be afforded an opportunity to exercise a peremptory challenge of the newly appointed judicial officer in accordance with the Children's Court Rules of Procedure, NMRA 10-162 for all cases filed on or after Jan. 1, 2021, in accordance with New Mexico Supreme Court Order No. 20-8500-042, Emergency Court Protocol 3(E).

Notice of Mass Reassignment:

Pursuant to the Constitution of the State of New Mexico, Judge Catherine A. Begaye has been appointed to Division VIII of the Second Judicial District Court by Gov. Michelle Lujan Grisham. Effective Feb. 1, Judge Catherine A. Begaye will be assigned Children's Court cases previously assigned to Judge Cristina T. Jaramillo,

Division VIII. You will be afforded an opportunity to exercise a peremptory challenge of the newly appointed judicial officer in accordance with the Children's Court Rules of Procedure, NMRA 10-162 for all cases filed on or after Jan. 1, in accordance with New Mexico Supreme Court Order No. 20-8500-042, Emergency Court Protocol 3(E).

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 were 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 were 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 were 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.

This notice of mass reassignment does not enlarge the period of time to file a peremptory excusal in individual cases where a notice of reassignment had previously been served on the parties by the clerk and the parties failed to timely file a peremptory excusal within ten 10 days as provided in Rule 1-088.1(C)(2). Further, 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.

Board of Bar Commissioners Appointment to New Mexico Legal Aid Board

The Board of Bar Commissioners will make one appointment from the First Congressional District to the New Mexico Legal Aid Board for a three-year term. The NMLA Board is responsible to see that the organization faithfully pursues its mission and to provide policy and fiduciary governance of the organization. Active status members in the First Congressional District admitted to practice in New Mexico who wish to serve on the Board should send a letter of interest and brief resume by March 29 to sbnm@nmbar.org.

Appointment to DNA – People's Legal Services, Inc.

The Board of Bar Commissioners will make one appointment to the DNA – People's Legal Services, Inc., Board for a four-year term. Active status attorneys in New Mexico who wish to serve on the board should send a letter of interest and brief resume by March 29 to sbnm@nmbar.org.

Appointment of Young Lawyer Delegate to ABA House of Delegates

The Board of Bar Commissioners will make one appointment of a young lawyer delegate to the American Bar Association House of Delegates for a two-year term, which will begin at the conclusion of the 2021 ABA Annual Meeting in Aug. 2021 and expire at the conclusion of the 2023 ABA Annual Meeting. The delegate must be willing to attend ABA mid-year and annual meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar; however, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. Members wishing to serve as the young lawyer

— *Featured* —

Member Benefit

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LawPay is proud to be the preferred payment solution of more than 50,000 lawyers. LawPay is designed specifically for the legal industry. LawPay provides attorneys with a simple, secure way to accept online credit card and eCheck payments in their practice.

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866-376-0950 or visit
www.lawpay.com/nmbar.

delegate to the HOD must have been admitted to his or her first bar within the last five years or be less than 36 years old at the beginning of the term; be an ABA member in good standing throughout the tenure as a delegate; and report to the New Mexico YLD Board during the YLD Board's scheduled board meetings throughout the tenure as a delegate. Qualified candidates should send a letter of interest and brief resume by March 29 to sbnm@nmbar.org.

Access to Justice Fund Grant Commission

2021-22 Grant Process Now Open

The State Bar of New Mexico Access to Justice Fund Grant Commission now seeks grant applications from nonprofit organizations that provide civil legal services to low income New Mexicans within the scope of the State Plan. Upon review of the applications, the Grant Commission will make the final decision regarding applicants to be awarded grants and the amount of each grant. Approximately \$700,000 is to be disbursed. The Request for Proposals can be found at nmbar.org/atjfundgrant. Contact Vannessa Sanchez at vsanchez@nmbar.org with any questions.

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

- March 15
- March 22
- March 29

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@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!

The Board Governing the Recording of Judicial Proceedings A Board of the Supreme Court of New Mexico

Expired Court Reporter Certifications

The following list includes the names and certification numbers of those court reporters whose New Mexico certifications expired as of Dec. 31, 2020.

| Name | CCR CCM No. | City, State |
|---------------------|-------------|----------------------|
| Sigrid Chavez | 33 | Corrales, NM |
| Maureen Costello | 220 | Glorietta, NM |
| Esther Van Blarcom | 502 | Midland, Texas |
| Edith Flores | 208 | Santa Fe, NM |
| Danielle C. Griffin | 518 | Phoenix, Ariz. |
| Deborah Kaye Luse | 531 | Roswell, NM |
| Lynn Ann McKittrick | 532 | San Antonio, NM |
| Lorraine Milligan | 260 | Sun City West, Ariz. |
| Deborah O'Bine | 63 | Santa Fe, NM |
| Darrell Roberts | 84 | Tularosa, NM |

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 voice-mail 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>.

OTHER BARS

American Bar Association Commission on Domestic & Sexual Violence

The ABA Commission on Domestic & Sexual Violence provides training and technical assistance to civil litigators representing domestic violence victims & survivors. Our trainings range from webinars to intensive multi-day trial skills and custody litigation institutes (currently virtual). The support we provide includes:

- One-on-one consultation from an ABA Commission on Domestic & Sexual Violence staff attorney;
- Research assistance;
- Referrals and/or connections to experts;
- Accessibility audit of legal service organizations' intake and outreach.

The ABA Commission on Domestic & Sexual Violence also provides support and materials to legal professionals in response to the current online, remote practice reality, such as our free tip sheets for attorneys, and for clients and witnesses, on preparing for a virtual court hearing. For more information and to request copies of our publications, visit our website at <http://ambar.org/cdsv>

Legal Education

March

- | | | |
|--|---|---|
| <p>10 Top 10 Music Copyright Cases of All Time 1.0 G Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>12 Counseling the Client Regarding Form I-9 Compliance and Discrimination 1.5 G Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>19 Family Law Institute: Help, My Client Is Making Me Crazy! (2020) 2.0 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>10 Bridge the Gap Mentorship Program CLE For Government Attorneys 3.5 G Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>12 Touhy Regulations: Subpoena of Testimony and Materials from Federal Employees 1.0 G Live Webinar Administrative Office Of The District Attorneys www.nmdas.com</p> | <p>19 How to Better Manage Your Workload: Task, Goal & Deadline Management (2020) 1.0 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>11 Bridge the Gap Mentorship Program CLE For Civil Attorneys and DA/PDs 3.5 G Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>12-14 Taking and Defending Depositions 31.0 G, 4.5 EP Live Webinar UNM School of Law 505-277-0609</p> | <p>19 Changing Minds Inside and Out of the Courtroom 1.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>12 Get Focused! Time & Distraction Management + Digital Detox (2020) 2.0 G Live Replay Webinar 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 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>12 How to Better Manage Your Workload: Email Management (2020) 1.0 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>17 Franchise Agreements: What You Need to Know Before Your Clients Signs, Part 2 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>23 Mother Nature & Leases: Drafting Issues to Protect Against Storm & Other Damage 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>12 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204 1.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>18 Housing Discrimination in the LGBTQ+ Community (2020) 1.0 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>24 How Mindfulness Can Help You Avoid Legal Burnout, Continue to Competently Perform Legal Services, and Remain Ethically Compliant 1.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>12 Family Law Institute: Help, My Client Is Making Me Crazy! (2020) 2.0 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | | <p>25 Ethics for Transactional Lawyers 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>25 Nonprofits and Commercial Real Estate 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>26 Get Organized! Fight the Paper – Organize your Digital Matter File! (2020) 1.0 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>30 Undue Influence and Duress in Estate Planning 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>26 Family Law Institute: Mandatory CYFD Report and Other Hot Topics in Ethics (2020) 2.0 EP Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>26 Staying Out of the News: How To Avoid Making the Techno-Ethical Mistakes 1.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>30 Avoiding Malpractice and Staying Ethically Compliant: The Good, The Bad And The Ugly Of Legal Technology 1.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>26-28 Taking and Defending Depositions 31.0 G, 4.5 EP Live Webinar UNM School of Law 505-277-0609</p> | | |

April

- | | | |
|--|---|--|
| <p>1 Due Diligence in Business Transactions 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>8-9 Family Law Institute (Spring Edition) 8.0 G Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>16 Deepfakes Audios and Videos: What Lawyers Need to Know 1.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>6 Appraisals in Commercial Real Estate Finance & Development 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>9 Bad Review? Bad Response? Bad Idea! Ethically Managing Your Online Reputation 1.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>16 Family Law Institute: Unsubstantiated Allegations of Abuse (2020) 2.0 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>7 Domestic Asset Protection Strategies for Trust and Estate Planners 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>13 Immigration Law Institute: Housing & Rental Assistance (2020) 1.0 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>23 Family Law Institute: The 50/50 Presumption and Parenting Plans in Special Circumstances (2020) 2.0 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>6 Google v. Oracle and Its Implications (2020) 1.0 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>14 E-Discovery for Small Cases 1.0 EP Live Webinar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>30 Family Law Institute: Assessing and Understanding Children's Preferences (2020) 2.0 G Live Replay Webinar Center for Legal Education of NMSBF www.nmbar.org</p> |

One Year Later and Looking Forward

Considering How the COVID-19 Pandemic Has Affected New Mexico's Bench & Bar



It is hard to believe we have been living with the challenges that have been brought on by the pandemic for over a year. On March 11, 2020, the State of New Mexico reported its first presumptive positive case of COVID-19 and the Gov. Michelle Lujan Grisham subsequently issued a public health order limiting activity within the state to help reduce the spread of the virus. Many law firms, nonprofits and government entities had to quickly pivot their operations, which included many shifting to a remote working model.

Though we do not know the total number of State Bar members who have contracted the virus, we can expect that many members and their families have been significantly impacted by COVID-19. I invite each of you to take a moment to remember those who have been affected or lost their lives due to this dreadful virus.

Although we will be happy to leave the woes of the pandemic behind, there have been some positive lessons to carry forward. Well-being has always been an important topic and with the emergence of COVID-19, the State Bar took a leadership role regarding well-being and the impacts of COVID-19. For example, the Judges and Lawyers Assistance Program and the newly created Well-Being Committee have and are providing helpful programming related to well-being and COVID-19. In addition, the two groups are focused on long-term initiatives related to judicial and attorney well-being. Furthermore, our Employee Assistance Program continues to be free to all members, their families, and their staff.

Additionally, with many discussions happening remotely, we are able to connect more readily with our members who live in the more rural and outlying parts of the state. Many of us continue to prefer in-person events to virtual ones, but undoubtedly providing virtual programming increases accessibility. As a result, the State Bar will continue to explore opportunities for virtual events even beyond the pandemic.

Though the State Bar Center has experienced closures throughout the year, we hope to welcome you back later this year. It has been an unusual and challenging time, but I am proud of the State Bar of New Mexico and the legal community's ability to persevere in the face of adversity. I wish each of you and your loved ones health and happiness.

Warmest Regards,

A handwritten signature in black ink that reads "Carla C. Martinez". The signature is fluid and cursive, with a large loop at the end.

Carla C. Martinez
President, State Bar of New Mexico



Justice Prevails in a Pandemic

Justice C. Shannon Bacon

Member of the Supreme Court's Covid-19 Emergency Response Team



It is difficult to believe that a year ago, on March 11, 2020, New Mexico identified our first cases of COVID-19, and the Governor declared a public health emergency. In the looming shadow cast by COVID-19, the New Mexico Judiciary had to determine how we would meet our constitutional obligations to the public without sacrificing public safety.

The Judiciary expended substantial money, time, and resources to ensure that we kept the wheels of justice moving with appropriate and necessary precautions for protecting every person who entered our courthouses.

The courts never shut their doors to those who were injured, businesses in dispute, people experiencing domestic violence, those at risk of losing their housing, or the accused waiting for their day in court.

To accomplish the seeming herculean task of safely staying open and available to the public, the courts implemented strict Covid-19 safety protocols, such as masks, social distancing, reconfigured courtrooms, detailed operational plans, plexiglass, copious supplies of hand sanitizer, frequent cleaning, video conferences for most court proceedings, electronic filing for all case types and for all parties including the self-represented, travel protocols for employees, and screening protocols for everyone entering the courthouse. These measures are the most conservative restrictions in the state and have placed a tremendous burden on the members of the Judiciary and on their families.

Through all of this, the real heroes are our court employees and judges across the state who have conducted jury trials, hundreds of thousands of remote hearings, and thousands of bench trials, and been accessible to the public in order to fulfill their constitutional duties to administer justice. I, and my colleagues, are incredibly proud of this effort. We know the sacrifices of our employees and judges are and continue to be immeasurable. For that, we thank them.



LEGAL SPECIALIZATION COMMISSIONERS

The State Bar of New Mexico's newly formed Legal Specialization Commission will lead and develop the new Legal Specialization Program in New Mexico.



BOBBIE BATLEY

Bobbie Batley is the owner of Batley Family Law, a small firm dedicated only to the practice of high quality family law. She is a fellow of the American Academy of Matrimonial Lawyers, a diplomate with the American College of Family Trial Lawyers, a fellow of the International Academy of Family Lawyers, and a trained collaborative family law attorney. Batley is a former chair of the American Bar Association Family Law Section and continues to serve the Section as the chair of strategic planning. Currently, Batley represents the State Bar of New Mexico in the ABA House of Delegates. She also sits on the advisory board of the Honoring Families Initiative of the Institute for the Advancement of the American

Legal System. Batley embraces her cases with a thoughtful passion for each client's individual needs and concerns. Batley's commitment to families is evident not only in her case work, but also in the time she spends working with organizations and within the court system to decrease the animosity in family law and find solutions for families in transition. Batley works with her clients and forensic experts and accountants to find creative solutions in cases involving a business.



JIM FITTING

Jim Fitting graduated from Michigan State University in Divisional Social Science in 1960 and received his Ph.D. in anthropology from the University of Michigan in 1964. After a decade of university teaching, he joined the state of Michigan where he worked in intergovernmental relations and special projects planning. This led to a series of positions in both corporate and project management with such firms as the Gilbert/Commonwealth, Science Applications and Amex systems Inc.

In his forties, he returned to school for an M.B.A. (1984) and J.D. (1987). He was admitted to the State Bar of California in 1987 and practiced business and commercial law. He was admitted to the State Bar of Arizona and State Bar of New Mexico in 1996. He retired from practice in California in 1998 to join the Navajo Nation Department of Justice and the Navajo Nation Bar Association. He served as the assistant attorney general in charge of the economic and community development units of the department until his retirement in 2006. He has been in private practice in Albuquerque since that time, first as of counsel with several Indian Law firms and has had his own practice since 2013. His has been a New Mexico-certified federal Indian law specialist since 2006.

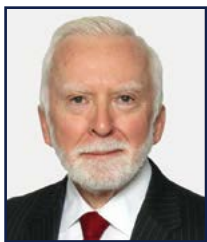


KYLE S. HARWOOD

Kyle S. Harwood is an attorney and water resources professional who, prior to becoming a partner at Egolf + Ferlic + Harwood, LLC, was owner of Harwood Consulting, PC which provided legal and interdisciplinary water resource consulting services through New Mexico.

Harwood has advised clients on land and water law regulation and policy issues throughout New Mexico. He litigates these issues in courts throughout the state, and also drafts regulations and policy for clients. He has authored numerous articles on water resource issues and lectured on land use and water law. Harwood represents public, private and nonprofit clients, as well as governmental clients, in water and natural resource issues, including special master assignments and expert witness services.

Harwood received recognition as a State Bar of New Mexico board-certified specialist in natural resource law – water law in 2013. Harwood was certified as an instructor for the New Mexico Real Estate Commission in 2012 and has taught classes in water law to hundreds of real estate professionals. Harwood is a former board member and chair of the State Bar of New Mexico Natural Resources, Environment and Energy Law section.



DAVID JONES

Licensed in Texas, Oklahoma, Missouri and New Mexico, David Jones has represented numerous insurers in contract and extra-contractual litigation. Jones is a seasoned litigator who has represented insurers, commercial clients, and individuals in state and federal courts throughout the nation. His advocacy skills as a trial stretch beyond the courtroom, including appeals, appraisals, and mediations. Jones has tried jury trials to conclusion in areas as diverse as extra-contractual liability, products, medical and attorney malpractice and contract disputes

For approximately 25 years David was certified as a Specialist in Civil Trial Law and Personal Injury Law under the highly distinguished Texas Board of Legal Specialization. Since he maintains certification in Civil Trial Law Mr. Jones has mentored a number of attorneys who have sought, and achieved, certification in one or the other of these specialties. Though he currently resides in San Antonio, close to his grandchildren, he eagerly awaits the day when Santa Fe can be his primary residence.



TWILA B. LARKIN

Twila Larkin is one of New Mexico's premier and most highly regarded divorce and family law attorneys. Practicing at New Mexico Legal Group, P.C. she has guided thousands of individuals and families to the successful resolution of challenging disputes. Graduating Magna Cum Laude with a Bachelor of Science from Texas Tech University and Summa Cum Laude with her Juris Doctorate from University of New Mexico Law School in 1996, Twila has been immersed in the legal community since 1999 when she was certified as a family law specialist by the New Mexico Supreme Court program.

She's gone on to be a member of the New Mexico Board of Legal Specialization from 2002-2005, the American Bar Association's Standing Committee on Specialization from 2006-2009, member of the American Academy of Matrimonial Lawyers since 2006 and currently elected to her second term of the Mountain States Chapter Delegate to the Board of Governors, and Southwest Superlawyer since 2009. She has taught numerous CLEs and written many articles, including the Spousal Support Chapter in the New Mexico Judge's Handbook in 2011. Twila is proud to help the residents of New Mexico.



MARK D. STANDRIDGE

Mark Standridge is a private practitioner focusing on appellate defense work in civil rights, tort, and personal injury cases, including cases pending in the United States Supreme Court. Standridge is a past chair of the State Bar of New Mexico Appellate Practice section and is a member of the New Mexico Supreme Court's Appellate Rules Committee. Standridge also serves as amicus chair for the New Mexico Defense Lawyers Association, and was recently appointed to the board of directors of the New Mexico Center for Civic Values.



VICKIE R. WILCOX

Vickie Wilcox has been a trust and estate planning attorney in Albuquerque for more than 25 years. She is an American College of Trust and Estate Counsel fellow and is also a fellow of the American Bar Foundation. She is honored to have been appointed by the Supreme Court of New Mexico to serve on the state Disciplinary Board.

Wilcox practices in the areas of estate planning, tax law, probate, estate and trust administration, charitable giving, business planning, and business succession planning. She speaks both locally and outside of New Mexico to financial advisors, attorneys, accountants, and others on tax and estate planning, business planning, charitable giving, planning related to qualified retirement benefits, and legal ethics. Wilcox & Myers, P.C. hosts an annual seminar on current legal topics attended by more than 150 top legal and financial advisors in the community.

2020

SECTION ANNUAL RECOGNITION AWARDS

▶ INDIAN LAW ATTORNEY ACHIEVEMENT AWARD

Richard Hughes, *Rothstein Donatelli LLP*

“Richard Hughes has been at the forefront of Indian law for decades and has been involved in numerous, consequential matters and cases, and has made significant contributions to the community. Most recently, Hughes secured a major victory for pueblo water rights. He represents Santa Ana Pueblo, one of three pueblo intervenors in a general stream adjudication of the *Rio Jemez-styled United States v. Absousleman*, No. 83-cv-1041 (D.N.M). Hughes also made significant contributions to the community, giving presentations at numerous CLE programs and writing articles on various Indian law topics. Hughes is a stellar lawyer with a deep commitment to advancing the rights of Indian tribes and the lives of Indian people.” – *D. Connolly, Rothstein Donatelli LLP*

▶ PROSECUTOR REGIONAL ATTORNEYS OF THE YEAR



Anastasia Martin for Northern New Mexico

“As chief deputy DA in Rio Arriba County, Martin leads a team of prosecutors and staff in handling a high-volume docket, and Martin leads from the front. In addition to all of her management duties, she took two high-profile violent offenders to trial during the COVID-19 pandemic and convicted both.” – *Blake F. Nichols, First Judicial District Attorney's Office*

Caitlin L. Dillon for Central New Mexico

“Prosecutors typically dislike prosecuting cases involving child sexual exploitative material. The cases are technologically complex and the subject matter is repulsive; however, Dillon strives to educate judges that these cases involve real-life victims from around the globe. Similarly, she also has taken the lead in cases involving complex human-trafficking operations and related victim-intensive sex crimes.

Dillon is an asset to the Office of the Attorney General. She is a stellar courtroom attorney and a rock upon which victims and witnesses often rely. She is truly deserving of public recognition.” – *Office of the Attorney General Representatives*



Jessica A. Perez for Central New Mexico

“Perez has been with our office for a little over two years now and through her time here, she has been continuously involved in community service activities and she continues to do so to this day.

On the local level, she has participated in activities involving our local DV shelter Haven House, she has also volunteered at a local Gene Franchini New Mexico High School Trial Competition as a scoring Judge, which this will be her second-year volunteering as a judge. Nationally, Perez takes part in the American Bar Association Young Lawyer's Division as a delegate for the state of New Mexico at ABA YLD Assembly Meetings. This year, she was selected from a group of candidates to be an American Bar Association YLD Scholar.

Perez is always happy to take part in community events and happily represents prosecutors and the 13th Judicial District with pride both within our state and nationally with the American Bar Association. – *A. Garrote, 13th Judicial District Attorney's Office*

► PROSECUTOR OF THE YEAR

John P. Sugg for Prosecutor of the Year

“Under Sugg’s leadership, the 12th judicial district completed the first COVID jury trial in the state. He also prosecuted the first murder trial under COVID as well, obtaining a conviction on all counts in August. To date, nearly 30 jury trials have been completed in the district which exceeds any other district in the state. Without Sugg’s insisting on victim’s rights, this might have never occurred for these families.

Sugg has been an inspiration to many of us because of his tenacity and his insistent to do the right thing, even when it might ruffle the feathers of a few. Our Association, our profession and all of our colleagues should give thanks to Sugg for his tireless work as a prosecutor but we will lose him at the end of 2020 and we all wanted to recognize what he has done.” – Scot Key, Twelfth Judicial District

► NREEL ATTORNEYS OF THE YEAR AWARD



Charles Noble, Noble Law Office

“Though he retired several months ago, for most of the past decade Charles Noble has worked as counsel for CCAE, which is a coalition of organizations dedicated to protecting the environment in an economically responsible manner. He has practiced law in these areas for decades and has always dedicated his expertise to advancing the public good. Noble’s word is his bond and all who have worked with him respect his ability and integrity. He is a pleasure to work with: thoughtful, funny, knowledgeable, and skilled. He is a public servant in the highest sense of the word.” – S. Michel, Western Resource Advocates

Jeffrey Wechsler, Montgomery & Andrews PA

“Jeff Wechsler has been practicing for more than 15 years. His substantive knowledge and expertise in water, environmental and natural resources law and public utility regulation in combination with his litigation experience translates to exceptional legal services to clients. Wechsler is held in high regard by all whom he encounters, whether partner, opponent, client, or judge for his professionalism, ethical conduct, and collegiality within the NREEL practice and legal community.” – J. Brent Moore, Montgomery & Andrews PA

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Opinions

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

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
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Effective February 12, 2021

PUBLISHED OPINIONS

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| A-1-CA-35715 | State v. D Prieto-Lozoya | Reverse/Remand | 02/11/2021 |
| A-1-CA-37113 | NM-Emerald v. Interstate Development | Affirm | 02/11/2021 |

UNPUBLISHED OPINIONS

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| A-1-CA-37241 | State v. C Heh | Affirm | 02/08/2021 |
| A-1-CA-37414 | A Seager v. NM Department of Public Safety | Affirm | 02/08/2021 |
| A-1-CA-38200 | A Tapia v. J Tapia | Affirm | 02/08/2021 |
| A-1-CA-38909 | CYFD v. Garrett R | Affirm | 02/08/2021 |
| A-1-CA-39005 | ABQ Injury Clinic v. A Archuleta | Affirm | 02/08/2021 |
| A-1-CA-39126 | CYFD v. Martin L | Affirm | 02/08/2021 |
| A-1-CA-33109 | A McGregor v. Platinum Bank | Affirm | 02/09/2021 |
| A-1-CA-37586 | State v. T Romero | Affirm | 02/09/2021 |
| A-1-CA-37770 | State v. C Chandler | Affirm | 02/09/2021 |
| A-1-CA-38103 | S Russell v. V Kinney | Affirm | 02/09/2021 |
| A-1-CA-38198 | M Greenham v. S Greenham Rodriguez | Affirm/Reverse | 02/09/2021 |
| A-1-CA-38887 | State v. S Hamblin | Affirm | 02/09/2021 |
| A-1-CA-37017 | State v. A Lucero | Affirm | 02/10/2021 |
| A-1-CA-38362 | State v. Santiago V | Affirm | 02/10/2021 |
| A-1-CA-39242 | In the Matter of Petition for Expungement for B Rodke | Affirm | 02/10/2021 |
| A-1-CA-39227 | B Brooks v. R Diaz-Villalpando | Affirm | 02/11/2021 |
| A-1-CA-39241 | In the Matter of Petition of Expungement for B Rodke | Affirm | 02/11/2021 |

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Opinions

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Effective February 19, 2021

PUBLISHED OPINIONS

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| A-1-CA-37320 | State v. C Williams | Affirm/Reverse/Remand | 02/15/2021 |
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UNPUBLISHED OPINIONS

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| A-1-CA-39176 | R Morales v. F Clark | Affirm | 02/15/2021 |
| A-1-CA-37590 | State v. M Keaton | Affirm | 02/16/2021 |
| A-1-CA-38969 | Z Marin Sr. v. Z Marin Jr. | Affirm | 02/16/2021 |
| A-1-CA-38067 | State v. K Arington-Martinez | Affirm | 02/18/2021 |
| A-1-CA-38425 | State v. E Arnaudville | Affirm | 02/18/2021 |
| A-1-CA-38500 | CYFD v. Elvia D. | Affirm | 02/18/2021 |
| A-1-CA-38603 | CYFD v. Brandon E. | Affirm | 02/18/2021 |

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From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-014

No. A-1-CA-35951 (filed September 16, 2019)

NEW MEXICO FOUNDATION
FOR OPEN GOVERNMENT; THE
ALBUQUERQUE JOURNAL; and
THE SANTA FE NEW MEXICAN,

Petitioners-Appellees,

v.

CORIZON HEALTH, a foreign
corporation,
Respondent-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

RAYMOND Z. ORTIZ, District Judge

Certiorari Denied, December 16, 2019, No. S-1-SC-37951.

Released for Publication April 7, 2020.

DANIEL YOHALEM
Santa Fe, NM
KATHERINE MURRAY
Santa Fe, NM
for Appellees

Holland & Hart LLP
LARRY J. MONTAÑO
CHARLIE S. BASER
Santa Fe, NM
for Appellant

Opinion

J. Miles Hanisee, Judge.

{1} Corizon Health (Respondent) appeals the district court's orders granting Petitioners' the Santa Fe New Mexican, Albuquerque Journal, and New Mexico Foundation for Open Government (collectively, Petitioners) verified petition for alternative writ of mandamus (Petition); and ensuing motion for attorney fees. Concluding the district court properly determined that Respondent's settlement agreement documents were public records subject to the Inspection of Public Records Act (IPRA) and acted within its discretion in awarding attorney fees to Petitioners, we affirm.

BACKGROUND

{2} Respondent is a private prison medical services provider that provides contracted healthcare services throughout the United States. In a series of contracts with the New Mexico Corrections Department (NMCD), Respondent committed to provide healthcare services in certain

New Mexico correctional and detention centers from 2007 to 2016, most recently under a Professional Services Agreement (the Contract) from June 2012 through May 2016. Respondent stopped providing medical care services for NMCD after the Contract ended. As a result of the medical care Respondent provided during the course of the Contract, certain inmates filed civil claims against Respondent alleging instances of improper care and/or sexual assault. Respondent negotiated and settled at least fifty-nine such civil claims.

IPRA Requests

{3} In May and June 2016 Petitioners separately submitted written IPRA requests to NMCD requesting to inspect and copy all settlement documents involving Respondent in its role as medical services contractor for NMCD. NMCD responded to each and stated it had no responsive documents in its possession. NMCD explained that under the Contract, Respondent defends and indemnifies NMCD regarding "all lawsuits alleging improper or unconstitutional medical care" of inmates, and that even

if NMCD or a state employee had been named as a defendant in error in a lawsuit involving medical care provided to inmates, the state entity or actor would be dismissed from the lawsuit before it settled, thereby removing NMCD from the settlement process. NMCD stated that "[Respondent] alone pays all settlement amounts, pays its own attorneys to settle or try the case, and pays the inmate's attorney fees and any judgments or verdicts entered in these cases." As such, NMCD explained that Respondent is the custodian of the settlement agreements involving medical care of inmates during the time period when Respondent and NMCD were under contract. NMCD's responses also provided each Petitioner with Respondent's contact information, instructed Petitioners to contact Respondent, and forwarded a copy of each Petitioner's request to Respondent. Each Petitioner then sent written IPRA requests to Respondent requesting the same information previously requested of NMCD.

{4} In response, Respondent sent all three Petitioners a table listing settlement amounts from each settlement and the correctional facility involved. Respondent also initially agreed to produce the settlement agreements if given an additional two weeks to redact the names of the plaintiffs from the documents. Petitioners agreed to the extension, however on that same day, Respondent sent each Petitioner a letter refusing to produce any of the settlement agreements, stating "it is [Respondent's] position that IPRA does not compel production of this information. Further, the confidentiality agreements executed by the parties prohibit[] disclosure of the requested information."

Issuance of Writ of Mandamus

{5} On July 18, 2016, Petitioners filed their Petition in the district court. Contained within were supportive facts and argument regarding Petitioner's assertions that Respondent was a private entity acting on behalf of a public body, thereby subjecting it to IPRA, and that the settlements resulted from Respondent's provision of medical treatment to or attendant abuse of state prison inmates. Eight days later, the district court preliminarily issued an alternative writ of mandamus, ordering Respondent to "[c]omply with your mandatory, non-discretionary duty to produce the settlement agreements requested by Petitioners" and "[p]ay Petitioners' reasonable attorney[] fees and costs for litigating this action" or "[s]how cause as to why this [preliminary] writ should not be made

permanent.”¹ Respondent filed its answer to the Petition ten days after the court-mandated deadline to either produce the settlement agreements or show cause. Primarily, Respondent stated it lacked sufficient information to properly respond to a significant number of Petitioners’ factual assertions. While Respondent admitted that it was under contract with NMCD to provide inmate medical services in New Mexico correctional facilities and that it was paid \$37 million a year to do so, it nevertheless argued that the Petition should not be granted and that the settlement agreements are not subject to IPRA because they (1) are private contracts between Respondent and private persons which require confidentiality pursuant to clauses in the agreements; and (2) are not a component of the public function Respondent contracted to perform for the State. Notably, Respondent’s answer made no mention of mandamus as an inappropriate vehicle to enforce disclosure of the settlement agreements under IPRA.

{6} At a merits hearing on August 16, 2016, Petitioners argued IPRA’s applicability based upon Respondent’s provision of services that constitute a public function under *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶¶ 13-14, 287 P.3d 364 (enumerating factors by which the public nature of a private entity’s provision of services is assessed in determining if the private entity is subject to IPRA). Petitioners entered portions of the Contract into evidence to show that Respondent provided medical services in an “intertwined fashion” with NMCD, “side by side,” and in a manner that required “constant feedback” and repeated approval by NMCD. Petitioners argued that NMCD supplied medical equipment, maintained extensive control over Respondent, and approved Respondent’s staffing decisions. Petitioners explain that Respondent performed a governmental function that NMCD would otherwise have performed itself, and argued that even if Respondent had settlement autonomy in the context of civil lawsuits, such alone did not recharacterize Respondent’s central function from that of a public entity subject to IPRA.

{7} Respondent agreed that it stood “in[] the shoes of the [S]tate [by] providing [medical] services to inmates, [and that] documents related to providing those

services are subject to IPRA[,]” but argued that the settlement agreements are not subject to production under IPRA “simply because [Respondent] operates a medical facility within our [S]tate’s prisons” and that to conclude otherwise would subject “all of [Respondent’s] business records” to IPRA disclosure. Respondent also argued that additional information—beyond identification of the correctional facilities and settlement amounts already set forth in its previously produced spreadsheet—was outside the responsive scope of IPRA. {8} At the end of the hearing, the district court granted the Petition, and on September 6, 2016, issued its final order granting writ of mandamus (Writ). It found that Respondent “was performing a public function and acting on behalf of the [NMCD] in providing medical services to New Mexico inmates and is therefore subject to IPRA[.]” Specifically, the court found “six of the nine *Toomey* factors weigh in favor of applying IPRA to Respondent,” including: (1) the 37 million-a-year of public funds paid to Respondent by NMCD; (2) for services provided on publically owned property; (3) the availability of which were an integral part of NMCD’s medical decision making process; (4) regarding a governmental function; (5) over which NMCD had contractual control; (6) under a contract benefitting NMCD and New Mexico inmates. Applying these findings, the district court concluded that the “settlement agreements related to [Respondent’s] performance of this public function are public records subject to disclosure under IPRA[.]” reasoning that “[Respondent] cannot contract away the public’s right to IPRA disclosure through various contractual provisions in the settlement agreements themselves and such provisions are void as against public policy . . . [Respondent] operating in settlement agreements th[r]ough an insurance company does not otherwise eviscerate the requirements of IPRA.”

{9} The Writ thus ordered Respondent to produce the settlement agreements, redacted in accordance with the exemplar settlement agreement containing redactions initially agreed upon by the parties. The district court further instructed Petitioners to submit their motion for fees, including supporting affidavits and invoices. At Respondent’s request, the district court

stayed the Writ “pending exhaustion of [Respondent’s] avenues of appellate review [under] Rule 1-062(C) NMRA.”

Attorney Fees

{10} On September 19, 2016, Petitioners filed their motion for attorney fees and costs (Motion), but neglected to seek Respondent’s position before filing. The Motion included the lodestar calculation of attorney fees for the two attorneys for Petitioners, Daniel Yohalem and Katherine Murray, amounts of past attorney fees awarded to both, a supporting affidavit from an expert on the market value of attorney fees in New Mexico, and additional supportive documentation including resumes and timesheets. Yohalem and Murray sought fees at \$400 and \$225 an hour, respectively. Yohalem additionally stated that his requested hourly rate was based “in part on the contingent nature of [his] representation of Petitioners.”

{11} Opposing the Motion, Respondent made three arguments. First, that Yohalem should not be awarded fees at a higher rate as a consequence of an underlying fee arrangement. Respondent stated that New Mexico case law discussing the reasonableness of attorney fees in IPRA cases expressly omits three factors from Rule 16-105 NMRA, including “whether the fee is fixed or contingent.” Second, that Petitioners’ attorney fee request is not reasonable given “the time and labor required” and “the novelty and difficulty of the questions involved and skill required” in litigating the case. Respondent reasoned that the hours Petitioners’ counsel expended on the case were unreasonable given their vast experience in IPRA litigation. Third, that Petitioners failed to seek Respondent’s position on the motion for attorney fees, thereby depriving Respondent of the opportunity to discuss and agree upon a “reasonable amount of attorney[] fees.” Accordingly, Respondent requested that Petitioners not be awarded their fees for the preparation of the attorney fee briefing.

{12} At a February 13, 2017 hearing on the Motion, the district court found that the hourly rates sought by Petitioners’ counsel were reasonable in light of the difficulty of the case, the risks involved, and the rates of lawyers with comparable experience. In its ensuing written findings of fact and conclusions of law granting the Motion, the court also found that Respondent “presented

¹Counsel for inmate plaintiffs named in the settlements at issue in the writ filed a motion of interested persons to be heard on this matter and corresponding position statement. Counsel then appeared at the hearing on the writ and argued that the settlement agreements should not be produced because “[p]ublic disclosure in this case would create an opportunity for [the plaintiffs] to be harassed [and] exploited.” After the peremptory writ was granted following the hearing, counsel collaborated with Petitioners and Respondent to establish an exemplar agreement for purposes of redacting the settlement agreements if Respondent’s appeal was unsuccessful. Upon entry of the enduring district court order establishing the redacted exemplar settlement agreement, the interested persons did not further object to production of the settlement agreements. For that reason, we assume that the interested persons were satisfied with the protection provided by the agreed upon redactions and will not address their involvement in this case to any extent further in this opinion.

no evidence whatsoever to challenge the [requested] hourly rates.” It concluded that Petitioners did not seek fees increased to reflect the contingent nature of their work and stated “this [c]ourt has not awarded any enhancement[,]” but that such would be permissible based upon “the contingent nature of their fee arrangement in this case . . . under prevailing New Mexico precedent.” The district court lastly concluded that Petitioners should not be penalized for failing to confer with Respondent prior to filing their motion on fees because the motion for fees was a motion that by its nature could be deemed opposed “in the context of the instant case.”

{13} Respondent separately and timely appealed both the district court’s issuance of the Writ and its ensuing award of attorney fees. Both appeals are now consolidated and resolved by this opinion.

DISCUSSION

{14} On appeal, Respondent contends that the district court’s issuance of the Writ in this circumstance was an improper use of mandamus proceedings because the facts before the district court were insufficient to establish that the settlement agreements were public records under IPRA and because the Petition presents an unsettled question of law. Respondent also argues the district court abused its discretion in its award of attorney fees to Petitioner’s counsel.

Standard of Review

{15} “We generally review the granting or denial of a writ of mandamus under an abuse of discretion standard.” *Alarcon v. Albuquerque Pub. Sch. Bd. of Educ.*, 2018-NMCA-021, ¶ 26, 413 P.3d 507, cert. denied, ___NMCERT___ (No. S-1-SC-36811, Jan. 23, 2018). Given that mandamus is proper only in circumstances where there exists a legal duty to act, we must also interpret statutory provisions of IPRA to ascertain whether the settlement agreements at issue are public records. Thus, our review is de novo. See *id.*; *Cox v. N.M. Dep’t of Pub. Safety*, 2010-NMCA-096, ¶ 4, 148 N.M. 934, 242 P.3d 501 (“The meaning of language used in a statute is a question of law that we review de novo.” (internal quotation marks and citation omitted)). “In discerning the Legislature’s intent, we are aided by classic canons of statutory construction, and we look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended.” *City of Albuquerque v. Montoya*, 2012-NMSC-007, ¶ 12, 274 P.3d 108 (alteration, internal quotation marks, and citation omitted). In so doing, we “take care to avoid adopting a construction that would render the statute’s application absurd or unreasonable or lead to injustice or contradiction.” *Alarcon*, 2018-NMCA-021,

¶ 5 (internal quotation marks and citation omitted). IPRA must be construed in light of its purpose and statutory provisions under IPRA “should be interpreted to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished.” *San Juan Agric. Water Users Ass’n v. KNME-TV*, 2011-NMSC-011, ¶ 14, 150 N.M. 64, 257 P.3d 884 (internal quotation marks and citation omitted). Lastly, an “[a]ward of attorney fees rests in the discretion of the trial court and this [C]ourt will not alter the fee award absent an abuse of discretion.” *Lenz v. Chalamidas*, 1991-NMSC-099, ¶ 2, 113 N.M. 17, 821 P.2d 355.

Third-Party Settlement Agreements Resulting From Medical Care Provided Under a Contract With the State Are Public Documents Subject to Disclosure Under IPRA

{16} IPRA declares it “to be the public policy of this state[] that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees[.]” NMSA 1978, Section 14-2-5 (1993); *Pacheco v. Hudson*, 2018-NMSC-022, ¶ 23, 415 P.3d 505, and that “such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees[.]” Section 14-2-5. “Every person has a right to inspect public records of this state except” when a public record falls into an enumerated exception. NMSA 1978, Section 14-2-1(A) (2019). IPRA defines public records as:

all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained[.]

NMSA 1978, Section 14-2-6(G) (2013).

{17} “[U]nder IPRA, public records are ‘broadly defined.’” *Edenburn v. N.M. Dep’t of Health*, 2013-NMCA-045, ¶ 17, 299 P.3d 424. Here, we construe IPRA in light of its language and purpose to ascertain whether the Legislature intended for settlement agreements, entered into by third-party entities and arising from the third-party’s performance of the public function, to be public documents available under IPRA. We must determine if such settlement agreements were “used, created, received, maintained or held by or on behalf of [the NMCD,] and relate to public business[.]” Section 14-2-6(G). We recognized some absence of clarity on this issue in *Toomey* in which we observed:

The ‘on behalf of’ language, however, is not defined, and the statute does not indicate whether every purportedly public document created or held by a private entity comes within the ambit of IPRA or whether there are any limitations to production of requested records. See *Merriam-Webster’s Collegiate Dictionary* 103 (10th ed. 1996) (defining “on behalf of” as “in the interest of” or “as a representative of”). The Legislature has offered no guidance on the issue.

Toomey, 2012-NMCA-104, ¶ 10.

{18} Nonetheless, in this inquiry we are guided by IPRA itself, as well as cases interpreting it. First, we rely on the language of Section 14-2-6(G) insofar as the settlement agreements were plainly created and maintained in relation to a public business, here, the medical care and personal safety of the inmates held by the NMCD. See *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (stating the “plain language of a statute is the primary indicator of legislative intent” (internal quotation marks and citation omitted)). Despite the fact, as *Toomey* states, that the applicable provision does not expressly list items suited to IPRA disclosure, we cannot envision, nor does Respondent cogently point us toward an alternative conclusion regarding records of this nature—involving civil compensation based upon flawed medical care or sexual abuse in New Mexico prisons. See 2012-NMCA-10, ¶ 10. To reiterate, Respondent was acting on behalf of the NMCD by providing medical services to inmates at New Mexico detention facilities. The settlement agreements were created as a result of Respondent’s public function acting on behalf of NMCD as they involve alleged mistreatment of inmates while in the custody of the State of New Mexico. We view Section 14-2-6(G) to plainly guide our determination that the settlement agreements are public records subject to production under IPRA.

{19} Second, we are guided by IPRA’s stated purpose that “all persons are entitled to the greatest possible information regarding the affairs of government.” Section 14-2-5. And while we “utilize a flexible approach that favors access to records even when held by a private entity[.]” *Toomey*, 2012-NMCA-104, ¶ 26, the foundational objectives of IPRA are to “provide access to public information and thereby encourage accountability in public officials and employees.” *Bd. of Comm’rs of Doña Ana Cty. v. Las Cruces Sun-News*, 2003-NMCA-102, ¶¶ 17, 29, 134 N.M. 283, 76 P.3d 36, overruled on other grounds by *Republican Party of N.M. v. N.M. Taxation & Revenue*

Dep't, 2012-NMSC-026, ¶ 16, 283 P.3d 853 (eliminating any reliance on the “rule of reason” exception to IPRA). “People have a right to know that the people they entrust with the affairs of government are honestly, faithfully and competently performing their function as public servants.” *Id.* ¶ 29 (internal quotation marks and citation omitted). Allowing private entities who contract with a public entity “to circumvent a citizen’s right of access to records by contracting” with a public entity to provide a public function “would thwart the very purpose of IPRA and mark a significant departure from New Mexico’s presumption of openness at the heart of our access law.” *Toomey*, 2012-NMCA-104, ¶ 26 (holding recordings of city meetings to be disclosed under IPRA).

{20} Third, this Court previously determined that settlement agreements resulting from civil inmate claims against a county detention center involving allegations of sexual abuse by county detention officers *were* public records subject to disclosure under IPRA. In *Board of Commissioners of Doña Ana County*, we held that the Doña Ana County’s denial of Las Cruces Sun-News’ IPRA request for documents related to settlements Doña Ana County reached on behalf of Doña Ana County Detention Center was unreasonable and in violation of IPRA. 2003-NMCA-102, ¶¶ 3, 41. Doña Ana County acknowledged that it was required to release the requested documents under IPRA, however, it argued that the documents fell under certain IPRA exceptions and that the documents should not be disclosed due to public policy reasons. *Id.* ¶¶ 3, 27. Even though *Board of Commissioners of Doña Ana County* involved IPRA requests for documents directly from a public entity instead of from a private entity under contract with a public agency, this Court nonetheless held that settlement agreements resulting from civil lawsuits by inmates alleging mistreatment while in custody were public records subject to IPRA. *Id.* ¶ 41.

{21} Given the foregoing, and having concluded above there is no distinction between Respondent and a public entity concerning the issues here, the settlement agreements entered into by Respondent are public re-

cords under Section 14-2-6. Information about the mistreatment and abuse of New Mexico inmates as raised in the civil claims is exactly the type of public information that IPRA contemplates must be disclosed to the public in order to hold its government accountable. Regardless of whether Respondent was a third-party private entity, the settlement agreements at issue arose from allegations resulting from Respondent’s performance of a public function—providing medical care to inmates—and as such, the settlement agreements resulted from the medical care provided to New Mexico inmates while under contract with the State.

Sufficient Evidence Existed in the Record to Support Issuance of the Writ

{22} In light of our holding that the settlement agreements are subject to disclosure under IPRA, we next address Respondent’s argument that there was insufficient evidence in the record in this instance for the district court to grant the Writ. Respondent alleges (1) the facts alleged in the Petition were not sufficient; (2) Respondent’s denial of facts asserted in the Petition showed deficient facts; and (3) the district court improperly failed to conduct an in camera review of the settlement agreements to determine if they involved public business. We are unpersuaded. Respondent itself denoted by list those settlements between Respondent and inmates at New Mexico correctional facilities that are responsive to Petitioners’ IPRA requests when it produced a chart listing the settlement amounts and the facilities where the plaintiff inmates were held. Respondent admitted it was under contract with NMCD to provide onsite medical services for inmates in various New Mexico correctional facilities and the settlement documents at issue “are the result of settlement of allegations concerning sexual assault[,]” and “the settlement agreement [r]eleasors are prior and in most cases, current correctional facility inmates.” Additionally, Respondent conceded that “many aspects of [its] provision of services to [NMCD] are subject to [IPRA] because [it] does perform a public function when it provides medical services. Thus, despite Respondents arguments, we conclude there was sufficient evidence in the record for the district court to find that the settlement agreements were public records.

{23} Respondent also argues that the district court’s failure to review the settlement agreements in camera before granting the Writ was an abuse of discretion. While courts may utilize in camera review of documents in determining a question of responsiveness to an IPRA request, it is not required in every circumstance. *See ACLU of N.M. v. Duran*, 2016-NMCA-063, ¶ 45, 392 P.3d 181 (stating that “[w]here appropriate, courts should conduct an in camera review of the documents at issue” when determining if documents are responsive or if privilege applies under IPRA). In this circumstance, in camera review was not required given the facts already in the record and given this Court’s holding in *Board of Commissioners of Doña Ana County* that settlement agreements resulting from civil claims based on criminal sexual acts by county detention officers against inmates were subject to production under IPRA. Accordingly, the district court did not abuse its discretion by determining the settlement agreements in this case were subject to production under IPRA without an in camera review.

Use of Mandamus Was Proper to Require Respondent to Produce Public Records Pursuant to IPRA Requests

{24} Citing *Brantley Farms v. Carlsbad Irrigation District*, 1998-NMCA-023, 124 N.M. 698, 954 P.2d 763, Respondent belatedly argues on appeal that the district court’s grant of mandamus relief was impermissible because no record “clear[ly] and undisputed[ly] established” that the facts and conditions provided in the statute exist²² as it is not a matter of settled law that the settlement agreements are public records subject to IPRA and instead poses a fact intensive inquiry ill-suited for resolution by writ of mandamus. Respondent’s argument is made despite the fact that trial counsel in district court was perfectly content to contest the case in a mandamus proceeding without once questioning the propriety of that remedy. Although we could discard Respondent’s newfound argument on preservation grounds, given the importance of procedural as well as substantive clarity in the context of IPRA, we reach its merits nonetheless.

{25} Respondent is correct that “[m]andamus lies only to force a clear legal right against one having a clear legal duty to

²²Respondent’s argument regarding the propriety of mandamus proceedings in this case is presented for the first time on appeal. *See Woolwine v. Furr’s, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717 (“To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the [district] court on the same grounds argued in the appellate court.”); *see also Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 56, 146 N.M. 853, 215 P.3d 791 (stating the primary purposes for the preservation rule as “(1) to specifically alert the district court to a claim of error so that any mistake can be corrected at that time, (2) to allow the opposing party a fair opportunity to respond to the claim of error and to show why the court should rule against that claim, and (3) to create a record sufficient to allow this Court to make an informed decision regarding the contested issue.”). Nonetheless, Rule 12-321 NMRA permits an appellate court to consider unpreserved issues if such pertain to a matter of general public interest. Given the importance of IPRA’s role in providing the public with access to information about its government, and because the question of law presented has been fully briefed by both parties and is a matter of general public interest, we resolve the issue on the merits.

perform an act and where there is no other plain, speedy and adequate remedy in the ordinary course of law.” *Brantley Farms*, 1998-NMCA-023, ¶ 16. In the event that common law is here not enough, within IPRA itself Section 14-2-12(B) states “[a] district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of [IPRA].” Only in its reply brief does Respondent concede that mandamus relief is available under IPRA, but contends that it is inappropriate in the instant case because this situation does not require “extraordinary remedy” contemplated by mandamus. Arguing that mandamus is but one remedy available to petitioners seeking to enforce IPRA requests, and citing NMSA 1978, Section 44-2-5 (1884) (providing that a writ of mandamus will not issue in a case where a different adequate remedy is available), Respondent seeks reversal of the Writ. Respondent also cites the district court’s description of the settlement agreements issue as “novel and complex,” despite that language referring only to the difficulty of the case in relation to the amount of attorney fees sought by Petitioners, as proof that mandamus was improperly granted on unsettled law. We are not persuaded.

{26} We conclude that under IPRA, as Respondents concede, Petitioners have a clear legal right of enforcement against Respondent, and Respondent has a clear legal duty to provide public records to Petitioners under Section 14-2-12. *See* § 14-2-5 (providing that allowing public to inspect public records pursuant to IPRA is a routine duty of public officers and employees). This is plain because Respondent acted on behalf of a public entity by providing medical care to inmates at various New Mexico correctional and detention facilities. Thus, the overarching legal duty of Respondent and the underpinning legal right of Petitioners here is established. Combined with the facts that the Legislature’s express inclusion of mandamus proceedings as one tool by which IPRA may be enforced, and that the question of law centers around specific and similar known documents, we conclude there to be no error in Petitioners’ and the district court’s employment of mandamus proceedings in this case. Indeed, the Writ itself demonstrates that the district court considered both the nature of Respondent’s public responsibilities along with the nature of the disputed documents and arrived at its conclusion both cautiously and under the appropriate criteria associated with

mandamus proceedings. Coupled with our conclusions that third-party settlement agreements resulting from the provision of medical care to New Mexico inmates provided under a contract with the State are subject to disclosure under IPRA, and that the record in this case was sufficient to qualify the agreements at issue as public documents, we affirm the Writ in its entirety.

Attorney Fees Were Properly Awarded By the District Court

{27} “A factual determination by the district court that an IPRA fee request is reasonable when weighed against the results obtained in the litigation will be disturbed only when the award is contrary to logic and reason.” *ACLU of N.M.*, 2016-NMCA-063, ¶ 41 (internal quotation marks and citation omitted). The district court here concluded “that Petitioners’ attorneys did not seek an enhancement of their hourly rates for the work performed in this case[,]” and also concluded that the award was “reasonable in light of the difficulty of the case, certainly the risk involved, and the rates of lawyers with comparable experience.” Respondent argues that the district court abused its discretion in awarding Yohalem’s fees at \$400 an hour because the award rested “on contradictory conclusions that were not supported by substantial evidence[.]” Specifically, Respondent argued that the district court “concluded that [c]ounsel did not seek a contingency premium, and that no such premium was awarded . . . [y]et elsewhere in its oral ruling, the district court held that [c]ounsel’s requested rate was justified by the contingent nature of his representation of Petitioners.” Respondent reasoned that awarding an enhancement for attorney fees under IPRA was improper because the factors to be assessed in determining reasonableness suggest that the court may not consider contingency fees.

{28} The only evidence presented by Respondent to prove that the attorney fee award was bolstered with an enhancement is Petitioners’ assertion in their Motion that counsel’s “hourly rate is based in part on the contingent nature of [his] representation of Petitioners.” But the district court stated that no enhancement was included in its award, and we have no evidentiary basis to conclude otherwise. Thus, the district court did not abuse its discretion by awarding the \$400 an hour attorney fee because there was substantial evidence to support such an award and because the district court properly concluded that contingency fees were not a part of the attorney fee award. The district court’s

findings, including its thorough analysis and weighing of factors, explain its conclusion that Petitioners’ requested attorney fees were proper. The court considered Yohalem’s and Murray’s years of experience and record of fee awards, as well as expert Mr. Davis’s un rebutted declaration explaining market rates in the relevant jurisdiction in its determination. The district court found,

[w]hile the rates for Mr. Yohalem and Ms. Murray are toward the high end of the market range for comparable attorneys doing comparable work in this geographic market, these rates are reasonable, appropriate and within the range for the work performed in this case; further, these rates were not rebutted with any contrary evidence by Respondent. The rates are especially justified in light of the attorneys’ skill and experience and the successful outcome of this novel and complex case. The hourly rates and hours worked approved herein do not include any enhancement.

The district court’s attorney fee award was supported by substantial evidence and Respondent has failed to show how the fee award is contrary to logic and reason. {29} Respondent also argues that the district court abused its discretion by not finding the fee award was improper because Petitioners failed to seek Respondent’s concurrence before filing the Motion. Rule 1-007.1 NMRA requires a movant to consult with opposing counsel to determine if a motion is opposed. The district court excused Petitioners’ failure in this regard because, as was demonstrated at the hearing on attorney fees, the Motion was observably contested by Respondent.³ We do not consider the district court’s excusal of Petitioners’ failure to seek Respondent’s position on the Motion to have been an abuse of discretion.

CONCLUSION

{30} For the foregoing reasons, we affirm the district court’s orders granting writ of mandamus and awarding attorney fees to Petitioners.

J. MILES HANISEE, Judge

WE CONCUR:
LINDA M. VANZI, Judge
RICHARD C. BOSSON,
Judge Pro Tempore

³We remind Respondent that it was provided a similar courtesy when the district court excused it from filing its answer to the Petition ten days late earlier in the district court proceedings and the district court considered the merits of Respondent’s answer even though it was untimely filed.

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-015

No. A-1-CA-35211 (filed November 5, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.

WALLACE G. CARSON,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

JUDITH K. NAKAMURA, District Judge

Certiorari Denied, February 6, 2020, No. S-1-SC-38128.

Released for Publication April 7, 2020.

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Opinion

J. Miles Hanisee, Chief Judge.

{1} A jury convicted Defendant Wallace G. Carson of two counts of human trafficking, pursuant to NMSA 1978, Section 30-52-1(A)(1) (2008), one count of human trafficking of a minor, pursuant to Section 30-52-1(A)(2), two counts of promoting prostitution, pursuant to NMSA 1978, Section 30-9-4 (1981), two counts of accepting earnings of a prostitute, pursuant to NMSA 1978, Section 30-9-4.1 (1981), and kidnapping, pursuant to NMSA 1978, Section 30-4-1 (2003). On appeal, Defendant argues that (1) the district court erred in admitting testimony regarding Defendant's uncharged acts in Texas; (2) his convictions for two counts of human trafficking related to the same victim violate double jeopardy; (3) the State presented insufficient evidence to support his kidnapping conviction; and (4) the district court failed to instruct the jury on the knowledge requirement for human trafficking of a minor. With the exception of one count of human trafficking, which we reverse on double jeopardy grounds, we affirm.

I. BACKGROUND

{2} Defendant's trial focused upon events that took place in Texas and New Mexico at different times. As such, we set forth the relevant factual background concerning incidents in each state separately.

A. Texas Incidents

{3} A woman by the name of Jordann D., also known as Stormy (Stormy), met Defendant while working at a strip club in San Antonio, Texas in October 2011. Defendant introduced himself as "D.G." and told Stormy it stood for "Da Greatest" as well as "D.G.P." which stood for "Da Greatest Pimp." Stormy was impressed that Defendant was well dressed and drove a Jaguar. He told her he worked for an escort company and that it was legal employment, not prostitution. Stormy believed the escort services would only involve spending time with clients without sex. Defendant told Stormy she could make good money as an escort in College Station, Texas, and that if she agreed to go with him, he would buy her heroin, which she started using regularly after meeting Defendant.

{4} Defendant, with the help of Stormy and others, commonly used the website "Backpage.com" to post escort local ads in different cities to which they would

travel, using such language as "hot, sexy, and ready" and "[s]e[x]y & [r]e[a]dy 2 p[l]ay." During Defendant's trial, the State introduced sixteen such Backpage.com ads, four of which were posted for Albuquerque. Before they arrived in College Station, Defendant arranged for such an ad about Stormy to be posted. Stormy answered calls related to that and other such ads, adhering to a "call module" that Defendant scripted to specify what she should say to potential clients.

{5} Stormy learned that the escort services involved sex during the first few "in-calls" (when a client comes to the hotel for sex in exchange for money) in College Station, which took place while Defendant waited outside the room. She then asked to return home to San Antonio, to which Defendant responded, "Bitch, you're not going anywhere. I'm a pimp." Stormy testified that Defendant put his hand around her throat, then threw her in the shower and beat her, leaving the television volume turned up so no one could hear her screaming. After the incident, Stormy testified that, although she still wanted to go home, she did not ask again because she was afraid of again being beaten. She continued having sex with clients for money in College Station, afterward handing all her earnings to Defendant. By then, in addition to having no money, Stormy did not have her identification because Defendant had taken it from her.

{6} Following a trip to Dallas for Thanksgiving, during which Defendant forced Stormy to perform fellatio on him and suggested he might force her to do so on his brother, as well, Stormy convinced Defendant that they should return to San Antonio. By then, she was withdrawing from heroin and suffering from anxiety, prompting Defendant to give her Xanax. On Christmas Eve 2011, Defendant also took Xanax and passed out, and Stormy escaped to meet her boyfriend. She then began to make escort appointments herself in San Antonio, keeping the money she made and avoiding heroin use.

{7} Not long after escaping from Defendant, Stormy received a "suspicious" call for a \$400 appointment at a motel in a "shady" area of San Antonio. When Stormy entered the room, Defendant jumped out of the shower, banged her head against the mirror, hit her, and forced her to his car. Defendant then forced her to lay down in the backseat the entire way to Dallas. Stormy was scared that Defendant would make her shoot up heroin when they arrived, but instead, Stormy convinced Defendant to allow her to leave Dallas the next day. She did so claiming

that her family may have alerted the police to her absence since she had not visited them at Christmas.

{8} About a year later, in December 2012, Stormy encountered Defendant on a street in San Antonio. At the time, she was again addicted to heroin, and Defendant said he could provide her all the heroin she wanted. She began working for Defendant again as an “escort,” posting Backpage.com ads in different Texas cities.

B. New Mexico Incidents

{9} In January 2013, Defendant and Stormy came to New Mexico, and Defendant directed Stormy to recruit Tiffany G., a woman he had observed at the Greyhound Station in Albuquerque. Defendant had by then trained Stormy to “get girls, and post the ads, make sure everything was going smoothly,” and Stormy’s job was to make it seem like “a real good deal” to work in the escort business. At that time, Stormy was using heroin daily, was often sick, and Defendant used her addiction to control her. Tiffany was also a heroin user, and Stormy lured her with the promise of “scor[ing]” heroin if she joined Defendant’s escort business. During that first trip in Albuquerque, at Defendant’s direction Stormy posted Backpage.com ads and had many in-calls at the Days Inn on Tramway and I-40 as well as several out-calls (where she went to a client’s house), for which Defendant collected the money. After Tiffany joined Defendant’s escort operation, she, Defendant, and Stormy traveled to Texas, and returned to New Mexico in early February.

{10} On this second trip to New Mexico, Tiffany, Stormy, and Defendant stayed in Room 118 at the Days Inn at Hotel Circle in Albuquerque. There, Stormy and Tiffany had several “in-calls” and “out-calls” throughout the day, sometimes working through the night. If the in-call was for only one of them, the other would wait in the bathroom.

{11} On February 20, 2013, Defendant directed Stormy to recruit another woman, R.R., who was only seventeen years old, at the Albuquerque bus station. Defendant targeted “weak links” or “young girls that . . . don’t know exactly what . . . they’re getting themselves into” for Stormy to recruit. At the station, Stormy invited R.R. “to smoke some weed and drink and just chill” in Defendant’s Cadillac while she waited for her bus. R.R. agreed, and was startled when Defendant and his nephew jumped into the front seat of the car and drove them to Days Inn. Defendant whispered to Stormy when they arrived at the hotel, “[y]ou know what you need to do[,]” which meant to her that she must convince R.R. to join Defendant’s escort business. Defendant also sent Stormy texts that stated, “[l]ock [R.R.] up for our family”

and “[m]ake sure she don’t go nowhere.” Stormy lied to R.R. that having sex with clients was not required because Stormy knew R.R. “would [not] agree to just having sex for money straight up.”

{12} Stormy knew first she had to take R.R.’s purse away, “because it makes [girls] not want to leave if they don’t have their ID.” Then, she loosened R.R. up with drinks and marijuana and encouraged R.R. to shower and change her clothes, while Defendant went out to purchase an alluring outfit for her. Stormy then told R.R., “You can’t go anywhere because [Defendant] is going to kill me if I let anything happen to you.” R.R. testified that she was scared, never left alone, and that she did not try to leave because she did not know what they would do to her. When Defendant returned to Room 118 with Tiffany, Stormy gave R.R. purple lingerie Defendant bought for her to wear, and he took photos of them.

{13} Soon thereafter, they went to the Isleta Hard Rock Resort & Casino for a client call, and Defendant collected a thousand dollars from the client. There, R.R. had sex with the client while Stormy checked in on them from the bathroom, criticizing R.R. for throwing in “extras” (different sexual positions) without collecting more money. Stormy stated R.R. appeared drunk during the encounter, and notified Defendant by text that R.R. behaved childishly during an ensuing dinner with the client. Following dinner, Stormy and Tiffany agreed to have sex with the client’s brother for \$800 and left R.R. with the client. R.R. then convinced the client to help her escape, and when Stormy and Tiffany returned to collect R.R., the client hid R.R. in the adjoining room he purchased, and said that R.R. had left. R.R. did not leave that night because she was afraid that Defendant and Stormy would catch her in the lobby. That night, Defendant found R.R.’s ID in her purse and learned she was only seventeen.

{14} Two days later, on February 22, 2013, Stormy and Defendant were arrested in Albuquerque during a sting operation. While in jail, Stormy called Defendant for bail and food money, and also asked him to bail out Cordelia C., a friend she made in jail. Stormy told Cordelia that Defendant could bail her out if she worked for him.

C. Post-Arrest Events

{15} Cordelia planned to run away to her friend’s house after she was bonded out of jail, but Defendant, himself by then released, was waiting for her when the prison transport dropped her off in downtown Albuquerque. As had Stormy, similarly Cordelia testified Defendant bought her “sexy clothes” and heroin and drove her to a hotel in Tyler, Texas. Defendant posted ads on Backpage.com before they arrived, and Cordelia had sex with

clients, for which Defendant collected the money. She wanted to escape but either “there was nowhere to run” or Defendant was nearby. She testified that she feared for her life because Defendant regularly physically abused her for being a “heroin junkie” or not making the beds correctly, and once Defendant choked her until his nephew stopped him. Ultimately, a client helped Cordelia escape from Defendant and she returned to Albuquerque.

D. Trial Proceedings

{16} Defendant was indicted in April 2013 on several charges and again in December 2013 on another set of charges. In January 2014, the district court consolidated the cases for trial. Prior to trial, the State filed a notice of intent to introduce evidence derived from events in Texas under Rule 11-404(B)(2) NMRA and a brief in support. Defendant objected, arguing evidence of uncharged acts in Texas would be highly prejudicial, but following a hearing on the matter, the district court ruled in favor of the State. At trial, Stormy, R.R., and Cordelia testified, and Stormy was granted use immunity for her testimony. Defendant again raised objections regarding the introduction of evidence relating to events in Texas, but the district court adhered to its earlier determination, explaining that the evidence was relevant to Defendant’s intent and that its probative value was not outweighed by unfair prejudice. The district court also provided two limiting instructions to the jury as to the proper use of the evidence.

{17} Ultimately, Defendant was found guilty of two counts of human trafficking as to Stormy, one count of human trafficking as to R.R., a minor, two counts of promoting prostitution, two counts of accepting earnings of a prostitute, and kidnapping. After the guilty verdict, the district court sentenced Defendant to fifty-four years in prison, including a twenty-four-year enhancement under the habitual offender statute. Defendant appeals from the judgment, sentence and commitment entered on December 14, 2015, claiming error under Rule 11-404 and Rule 11-403 NMRA, a double jeopardy violation, insufficiency of evidence for the kidnapping charge, and instructional error for the human trafficking of a minor charge.

II. DISCUSSION

A. The Trial Court Did Not Abuse Its Discretion in Admitting Testimony Regarding Defendant’s Uncharged Acts in Texas

{18} Defendant argues that the district court erred in admitting testimony relating to Defendant’s uncharged bad acts in Texas, contending that the evidence was inadmissible as propensity evidence under Rule 11-404 and unfairly prejudicial under Rule 11-403. We disagree.

Standard of Review

{19} We review Defendant's assertions of error regarding the admissibility of evidence for an abuse of discretion. *See State v. Bailey*, 2017-NMSC-001, ¶ 12, 386 P.3d 1007. A district court abuses its discretion when it rules in a manner "clearly against the logic and effect of the facts and circumstances of the case" and its ruling is "clearly untenable or not justified by reason." *State v. Otto*, 2007-NMSC-012, ¶ 9, 141 N.M. 443, 157 P.3d 8 (internal quotation marks and citation omitted). "All relevant evidence is generally admissible, unless otherwise provided by law[.]" *State v. Balderama*, 2004-NMSC-008, ¶ 23, 135 N.M. 329, 88 P.3d 845. "Any doubt whether the evidence is relevant should be resolved in favor of admissibility." *Id.*

{20} Rule 11-404(B)(1) instructs that "[e]vidence of a crime, wrong, or other act is [in]admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, the other-act evidence may be permitted for other purposes "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Rule 11-404(B)(2). "Rule 11-404(B) is a rule of inclusion, not exclusion, providing for the admission of all evidence of other acts that are relevant to an issue in trial, other than the general propensity to commit the crime charged." *Bailey*, 2017-NMSC-001, ¶ 14 (alteration, internal quotation marks, and citation omitted). Evidence of a prior bad act is admissible "if it bears on a matter in issue, such as intent, in a way that does not merely show propensity." *State v. Sarracino*, 1998-NMSC-022, ¶ 22, 125 N.M. 511, 964 P.2d 72 (internal quotation marks and citation omitted).

{21} However, when evidence is admissible under Rule 11-404, the district court must additionally determine "the probative value of the evidence outweighs the risk of unfair prejudice, pursuant to Rule 11-403." *Otto*, 2007-NMSC-012, ¶ 10. The rule provides that the court may preclude evidence if "its probative value is substantially outweighed" by the risk of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 11-403. In other words, the Rule 11-404(B) "other" purpose should be weighed against the jury's inclination to use the evidence improperly. *State v. Ruiz*, 1995-NMCA-007, ¶ 12, 119 N.M. 515, 892 P.2d 962. The unfair prejudice balancing is incredibly fact-sensitive and thus, "much leeway is given [to district] judges who must fairly weigh probative value against probable dangers." *Bailey*, 2017-NMSC-001, ¶ 16 (internal quotation marks and

citation omitted). "Rule 11-403 does not guard against *any* prejudice whatsoever, but only against *unfair* prejudice." *Bailey*, 2017-NMSC-001, ¶ 16 (emphasis added). **Evidence of Uncharged Acts in Texas Was Admissible Under Rule 11-404(B)** {22} In this case, Defendant's intent was an element of the charged human trafficking offenses. The jury was instructed that the State's burden of proof required that it demonstrate Defendant "intended or knew that force, fraud or coercion would be used to subject" victims to commercial sexual activity. Defendant argues that the evidence of the uncharged acts in Texas was improper propensity evidence and the State failed to articulate the purpose for such detailed testimony on events in Texas. Defendant highlights several instances of the evidence as improper and highly prejudicial propensity evidence: (1) Stormy's testimony about three uncharged Texas incidents with Defendant involving physical abuse, sexual assault, and her recapture after escaping; (2) Cordelia's testimony about similar physical abuse, confinement, and prostitution in Texas; (3) exhibits of Backpage.com ads in Texas; and (4) references to Tiffany who did not testify at trial. Defendant also contends Stormy's lengthy testimony at trial was wrongly focused on her state of mind and vulnerabilities, rather than Defendant's intent. For the reasons we explained below, we are unpersuaded.

{23} First, the State properly notified Defendant under 11-404(B) that it planned to present evidence of other acts relevant to Defendant's intent and knowledge and articulated the purpose for the evidence as "Defendant's modus [operandi] and common plan or scheme." *See* Rule 11-404(B) (2)(a); *State v. Lucero*, 1992-NMCA-107, ¶ 10, 114 N.M. 489, 840 P.2d 1255 (stating that under Rule 11-404(B) "counsel [should] identify the consequential fact to which the proffered evidence of other acts is directed"). Although Defendant opposed the motion, arguing that the uncharged acts evidence was "minimally probative" and designed to prejudice the jury against Defendant, the district court agreed with the State that the evidence was relevant to Defendant's intent, demonstrating a common scheme and plan and the impact on Stormy if she did not comply.

{24} Second, under Rule 11-404(B) and our case law, the issue before us is whether the uncharged acts in Texas were, in fact, relevant to the material issue of Defendant's intent. *See Bailey*, 2017-NMSC-001, ¶ 13. We agree with the district court that they were. The evidence of the uncharged acts in Texas, Defendant's abusive conduct, was directly relevant to his intent to use force, fraud, or coercion to subject Stormy and R.R. to commercial sexual

activity. *See id.* ¶¶ 10, 22 (affirming evidence of other acts in another county as relevant to the defendant's intent under New Mexico's inclusionary view of Rule 11-404(B)(2)); *Otto*, 2007-NMSC-012, ¶ 13 (holding that the evidence of uncharged acts in Colorado was relevant to the defendant's intent and not committed accidentally or by mistake). Defendant argues that neither *Otto* nor *Bailey* should control our review because those cases involved only one victim, whereas here there are multiple victims; however, we find our New Mexico Supreme Court's Rule 11-404(B) reasoning to be both relevant and applicable.

{25} Specifically, Defendant's intent was shown by Defendant's modus operandi and common plan or scheme—that is, his pattern of recruiting and subjecting victims to commercial sexual activity. *See State v. Durant*, 2000-NMCA-066, ¶ 15, 129 N.M. 345, 7 P.3d 495 ("Intent can rarely be proved directly and often is proved by circumstantial evidence."). The uncharged acts evidence laid out of common pattern of gaining young women's trust, at times using Stormy as bait, by promoting the money-making potential in "escorting," then supplying controlled substances, controlling victims through addiction, physical abuse and threats of physical abuse, and ultimately coercing them to engage in commercial sexual activity for Defendant's profit. The district court also aptly noted that Defendant's arguments placed his intent directly at issue because his defense theory claimed Stormy was the key actor in the recruitment scheme and that it was not his plan or intent to force victims to engage in commercial sexual activity. Indeed, defense counsel informed the district court that the "entire defense" was that Defendant was not a pimp and that "the primary person involved was [Stormy], who had determined 'how to run everything.'" To rebut this defense, the State had the right to present evidence that Defendant's actions were in fact intentional, part of *his* common scheme. *See Otto*, 2007-NMSC-012, ¶ 11. Though Defendant claims that the evidence relies on a propensity inference, under Rule 11-404(B), the key inquiry is whether there is a legitimate purpose for the evidence. *See State v. Bailey (Bailey II)*, 2015-NMCA-102, ¶ 18, 357 P.3d 423; *see also State v. Kerby*, 2007-NMSC-014, ¶ 26, 141 N.M. 413, 156 P.3d 704 (holding that evidence was admissible to show that the defendant touched the victim with sexual intent and not propensity evidence because the defendant's state of mind was directly at issue). We conclude that the evidence was introduced for a proper purpose.

{26} Third, as in *Otto* and *Bailey II*, the district court gave limiting instructions to the jury as to the proper use of the evidence of uncharged acts in Texas and regarding Stormy's testimony:

The [S]tate must prove to you beyond a reasonable doubt that the elements of the crimes [Defendant] is charged with occurred in New Mexico. The [e]vidence that is being presented of events that occurred in [Texas] is being offered only so that you can understand the state of mind of the witness.

See *Otto*, 2007-NMSC-012, ¶ 4; *Bailey II*, 2015-NMCA-102, ¶ 25. The court also gave a similar instruction during Cordelia's testimony, modifying the last sentence to read: "The evidence that is being presented of events that occurred in [Texas] is only being allowed to address any issues regarding [D]efendant's intent and motive." (Emphasis added.) Given that there were no charges related to Cordelia, the district court also specified in the second instruction that "[t]his evidence cannot be used for any other purpose." We presume that the jury followed the court's instructions. *Otto*, 2007-NMSC-012, ¶ 17. Therefore, we hold that the district court did not abuse its discretion by allowing evidence of the uncharged acts in Texas past the threshold of Rule 11-404(B), and the evidence was relevant to a material issue of Defendant's intent regarding the charged acts. We now evaluate the admission of the evidence under Rule 11-403.

Rule 11-403 Did Not Preclude Evidence of Uncharged Acts in Texas

{27} Next, pursuant to Rule 11-403, we consider the balance between the probative value and the unfair prejudice of the evidence admitted under Rule 11-404(B) (2). Defendant argues that the evidence of uncharged acts in Texas is highly prejudicial, cumulative, and minimally probative, contrary to the district court's conclusion. We agree with the district court.

{28} As stated above, we review a district court's balancing of probative value against unfair prejudice for abuse of discretion. *Otto*, 2007-NMSC-012, ¶ 14. Also, given the fact-driven nature of the legal determination, "much leeway is given [to] trial judges who must fairly weigh probative value against probable dangers." *Bailey*, 2017-NMSC-001, ¶ 16 (internal quotation marks and citation omitted). Here, the evidence was particularly probative to show Defendant's contested intent. Without the evidence of the uncharged similar acts, the jury, for example, would more likely have (1) questioned Stormy's credibility regarding the circumstances of her presence with Defendant, and (2) believed that Defendant and Stormy acted collabora-

tively while in New Mexico. Based solely on Defendant's activities in New Mexico, limited evidence existed to rebut these potential inferences, and as noted earlier, intent is circumstantial, and one of the ways to establish Defendant's intent to coerce these women to engage in commercial sexual activity was to outline—based on similar act evidence—a common plan or scheme and coercive pattern of abuse. See *Durant*, 2000-NMCA-066, ¶ 15 ("Intent can rarely be proved directly and often is proved by circumstantial evidence."). As the district court stated, "the fact that [Defendant] did it in Texas doesn't mean that he intended it in New Mexico, but it serves as the background for his intent." Moreover, as to Cordelia's testimony in particular, the district court found the evidence to be highly probative of Defendant's intent, especially since direct evidence is rare. Moreover, the district court did not find Cordelia's testimony of recruitment and abuse to be too remote in time since they were within a week of the charged offenses. We agree.

{29} To reiterate, Rule 11-403 does not guard against any prejudice, but only against unfair prejudice. See *Otto*, 2007-NMSC-012, ¶ 16. Evidence is not unfairly prejudicial purely because it inculcates Defendant; instead, unfair prejudice occurs when the evidence only goes to character or propensity. See *Ruiz*, 1995-NMCA-007, ¶ 12. In the present case, the uncharged acts evidence was properly admitted to show Defendant's intent, and we cannot say that the district court abused its discretion in admitting the evidence of uncharged acts under Rule 11-403.

B. Defendant's Conviction for Two Counts of Human Trafficking Violates Double Jeopardy

{30} Defendant argues that his right to be free from double jeopardy was violated because he was convicted of two counts of human trafficking of Stormy. We agree and vacate one of the convictions.

{31} The Federal and New Mexico Constitutions guard against double jeopardy violations, guaranteeing that no person shall be "twice put in jeopardy" for the same offense. U.S. Const. amend. V; N.M. Const. art. II, § 15. "A double jeopardy challenge is a constitutional question of law which we review de novo." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747. "[D]ouble jeopardy protects against both successive prosecutions and multiple punishments for the same offense." *State v. Contreras*, 2007-NMCA-045, ¶ 19, 141 N.M. 434, 156 P.3d 725 (internal quotation marks and citation omitted). This appeal involves the latter type—multiple punishments for the same offense, specifically a "unit of prosecution" claim, where Defendant argues he has been charged with

multiple violations of a single statute based on a single course of conduct. See *State v. Gwynne*, 2018-NMCA-033, ¶¶ 9-10, 417 P.3d 1157, cert. denied, 2018-NM-CERT— (No. S-1-SC-36926, Apr. 10, 2018).

{32} "Unit of prosecution cases are subject to a two-step analysis that courts utilize to discern legislative intent. The relevant inquiry in a unit of prosecution case is whether the Legislature intended punishment for the entire course of conduct or for each discrete act." *State v. Bernard*, 2015-NMCA-089, ¶ 17, 355 P.3d 831 (alterations, internal quotation marks, and citations omitted). Defendant asserts the Legislature intended that punishment for violating the human trafficking statute, Section 30-52-1, to be for the entire course of conduct, here, "one count per victim," not one count for each separate instance.

{33} In our analysis, we first determine "whether the Legislature has defined the unit of prosecution." *Swick*, 2012-NMSC-018, ¶ 33. If it is defined, our inquiry is complete. *Id.* However, if the language is ambiguous, we review "whether a defendant's acts are separated by sufficient 'indicia of distinctness' to justify multiple punishments under the same statute." *Bernard*, 2015-NMCA-089, ¶ 17 (internal quotation marks and citation omitted). "If there is not sufficient indicia of distinctness to separate the defendant's acts, we apply the rule of lenity to our interpretation of the statute . . . [which] requires that we interpret the statute in the defendant's favor by invoking the presumption that the Legislature did not intend to create separately punishable offenses." *Id.* (internal quotation marks and citations omitted).

{34} The Legislature does not specify a unit of prosecution in the human trafficking statute, Section 30-52-1; therefore, the pertinent inquiry is whether Defendant's actions have a "sufficient indicia of distinctness" to permit multiple punishments. The *Herron* six-factor test, developed in a sexual assault case and applied in various contexts, evaluates whether a defendant's actions are sufficiently distinct, considering the "(1) temporal proximity of the acts; (2) location of the victim(s) during each act; (3) existence of an intervening event; (4) sequencing of acts; (5) defendant's intent as evidenced by his conduct and utterances; and (6) the number of victims." *Bernard*, 2015-NMCA-089, ¶ 23 (internal quotation marks and citation omitted); accord *Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624; see, e.g., *State v. Bernal*, 2006-NMSC-050, ¶¶ 20-21, 140 N.M. 644, 146 P.3d 289 (applying the *Herron* test to multiple convictions for attempted robbery); *State v. Boergadine*, 2005-NMCA-028, ¶ 21, 137 N.M. 92, 107 P.3d 532 (applying the *Herron* test to multiple convictions for fraud);

State v. Barr, 1999-NMCA-081, ¶¶ 16-23, 127 N.M. 504, 984 P.2d 185 (applying the *Herron* test to multiple convictions of contributing to the delinquency of a minor); *State v. Handa*, 1995-NMCA-042, ¶¶ 19-27, 120 N.M. 38, 897 P.2d 225 (applying the *Herron* test to multiple convictions for assault). No single factor provides a clear remedy. *Boergadine*, 2005-NMCA-028, ¶ 21. “We may also consider whether [the d]efendant’s acts were performed independently of the other acts in an entirely different manner, or whether such acts were of a different nature.” *Id.* (internal quotation marks and citations omitted).

{35} Applying the principles of the *Herron* line of cases to the human trafficking statute, we examine any distinctness factors applicable under the facts of this case. Initially, we observe that no New Mexico case has applied the *Herron* distinctiveness analysis to the human trafficking statute. The relevant portion of Section 30-52-1(A) (1) reads as follows:

A. Human trafficking consists of a person knowingly:

(1) recruiting, soliciting, enticing, transporting or obtaining by any means another person with the intent or knowledge that force, fraud or coercion will be used to subject the person to labor, services or commercial sexual activity[.]

{36} Defendant was convicted of two counts of human trafficking involving the same victim, Stormy, between January 24, 2013, and February 7, 2013, during their first trip to Albuquerque, and again between February 17, 2013, and February 22, 2013, during their second trip to Albuquerque. We first address the fifth and sixth *Herron* factors—Defendant’s intent, as evidenced by his conduct and utterances, and the number of victims—which weigh heavily against upholding Defendant’s convictions for two counts of human trafficking of Stormy. *See Herron*, 1991-NMSC-012, ¶ 15. Considering the fifth factor, Defendant’s intent and course of action was unchanged during the entire human trafficking scheme between January and February 2013 in New Mexico, despite the short trip to Texas in between. In *Boergadine*, we upheld separate convictions against a defendant when there was a “separate intent to defraud” between each of the charged acts as evidenced by “cash payments for different purposes . . . accompanied by [separate] assurances and justifications[.]” 2005-NMCA-028, ¶ 25. But the trial evidence here evinces no separate intent on the part of Defendant and no material change to the nature of the human trafficking crime that took place during the three-and-a-half week period of time encompassed by the charged counts. Rather,

throughout this time, Defendant’s intent remained consistent as best displayed by his standard *modus operandi*—he directed Stormy to post Backpage.com ads; Stormy (and Tiffany, for whom the State did not charge Defendant with human trafficking) engaged in in-calls at the hotel as well as out-calls at clients’ homes, and Defendant collected the proceeds. There was no notable deviation in the nature of Defendant’s “escorting” business nor did any meaningfully distinct activity take place that bears the capacity to separate the collective human trafficking activities in Albuquerque.

{37} Consistent with his “one count per victim” argument, Defendant claims that once Stormy was enticed or recruited and working with him, he could not recommit the offense. We disagree with such a categorical proclamation, noting that Stormy parted ways with Defendant twice, and after both occasions he recruited her again—once forcibly. But these occasions are not relevant to our *Herron* analysis because Defendant’s recommitment of the offense in that manner did not take place in New Mexico, nor was there an intervening “rerecruitment” incident between the two counts against Defendant. We emphasize there may be occasions when a defendant recommit human trafficking, even with the same victim, but conclude that on this trial record there was no shift in Defendant’s intent nor did his acts meaningfully differ between the last week of January 2013 and the first week of February 2013. {38} Considering the sixth factor, the charged counts only contemplate one victim during the course of conduct for trafficking we are considering in this case. *Herron* indicated “multiple victims will likely give rise to multiple offenses[.]” 1991-NMSC-012, ¶ 15. But here, Stormy is the only named victim in each count at issue. Therefore, this factor supports reversing one of the convictions because Defendant’s actions vis-à-vis Stormy were insufficiently distinct to support multiple counts.

{39} *Boergadine* states that the second and fourth *Herron* factors—the location of the victim and sequencing of the acts—“are more tailored to sex offenses, emphasizing that movement or repositioning of the victim between penetrations and the sequence in which different orifices were penetrated tends to establish separate offenses.” *Boergadine*, 2005-NMCA-028, ¶ 23 (alteration, internal quotation marks, and citation omitted). In our case, the human trafficking statute proscribes the activities of “recruiting, soliciting, enticing, transporting or obtaining” and “subject[ing] a person to . . . commercial sexual activity[.]” and not the ancillary sexual offense itself. *See* § 30-52-1(A)(1). As such, similar

to *Boergadine*’s reasoning, the second and fourth factors are less salient to our analysis here. 2005-NMCA-028, ¶ 23.

{40} As well, the first and third *Herron* factors—the temporal proximity of the acts and the existence of an intervening event—do not alter our analysis to the extent necessary to affirm. As to the first, the temporal proximity of the acts, we reiterate that Defendant’s overarching scheme of “escorting” the victims was consistent across cities. While there was a ten-day interval between the first and second trip to Albuquerque, in the broader scheme of Defendant’s human trafficking activity of Stormy in both Texas and New Mexico, the temporal proximity of the charged acts is fairly close. In cases where we have held shorter time intervals to be a determinative factor, either the statute, the defendant’s intent, or the distinct nature of the activity itself also supported separate charges, unlike in this case. *See Gwynne*, 2018-NMCA-033, ¶ 13 (upholding two counts of manufacturing child pornography based on separate acts of manufacture eight days apart); *Boergadine*, 2005-NMCA-028, ¶¶ 22, 25 (affirming three separate fraud convictions for false payment requests six days and two months apart since each payment was also for a different purpose with distinct assurances and justifications); *State v. Borja-Guzman*, 1996-NMCA-025, ¶ 21, 121 N.M. 401, 912 P.2d 277 (imposing separate punishments for transactions several hours apart because the relevant statute and the defendant’s intent also supported treating each act of distribution as a separate charge).

{41} Finally, with regard to the third factor—the existence of an intervening event—it is undisputed there was an intervening event between the two trips to Albuquerque. Defendant, Stormy, and Tiffany left New Mexico to visit Texas and returned to New Mexico ten days later. Each discrete act by Defendant—departing New Mexico, traveling to Texas, and returning to New Mexico ten days later—lends support to the distinct nature of the trafficking activity between the first and second trips to Albuquerque. However, this factor alone, with no change to Defendant’s intent or to the nature of his human trafficking activity, cannot be determinative. *See Boergadine*, 2005-NMCA-028, ¶¶ 21, 25. {42} Accordingly, based on our assessment of the *Herron* factors, we conclude that Defendant’s acts were not sufficiently distinct to support two separate counts of human trafficking for the same victim and thus, the rule of lenity applies and we interpret the statute in Defendant’s favor to conclude that the Legislature did not intend separately punishable offenses. *Bernard*, 2015-NMCA-089, ¶ 17 (“If there is not sufficient indicia of distinctness to

separate the defendant's acts, we apply the rule of lenity[,] . . . invoking the presumption that the Legislature did not intend to create separately punishable offenses.") (citation omitted). We therefore reverse one of Defendant's two convictions for human trafficking of Stormy.

C. Defendant's Kidnapping

Conviction Was Supported by Sufficient Evidence

{43} Defendant argues that the State failed to present sufficient evidence to sustain his kidnapping conviction. We disagree.

{44} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *Gwynne*, 2018-NMCA-033, ¶ 49 (internal quotation marks and citation omitted). Evidence is viewed in the "light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *Id.* (internal quotation marks and citation omitted). "We disregard all evidence and inferences that support a different result." *State v. Telles*, 2019-NMCA-039, ¶ 16, 446 P.3d 1194, cert. denied, 2019-NM-CERT-___ (No. S-1-SC-37652, May 15, 2019). The ultimate question is "whether a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction." *State v. Granillo*, 2016-NMCA-094, ¶ 10, 384 P.3d 1121 (emphasis, internal quotation marks, and citation omitted). "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883.

{45} Per its instructions, to convict Defendant of kidnapping R.R., the jury had to find that he "confined or transported [her] by deception" and "intended to hold [R.R.] against [her] will for the purpose of making [her] do something." Defendant broadly contends that there was insufficient evidence for the kidnapping charge because the State failed to prove confinement, deception, or that Defendant intended to do anything against R.R.'s will. We are not persuaded.

Defendant Confined or Transported R.R. by Deception

{46} Defendant claims that there was insufficient evidence to establish that he confined or transported R.R. by deception. However, the evidence Defendant identifies as insufficient could also be viewed by a rational jury to support a guilty verdict, and we resolve all reasonable inferences in favor of the verdict and disregard inferences that support a different result. See *Telles*, 2019-NMCA-

039, ¶ 16; *Gwynne*, 2018-NMCA-033, ¶ 49. Defendant contends that R.R. could have left and that there is no evidence that she tried or wanted to leave, but the State presented substantial testimonial evidence that R.R. was not free to leave and that Defendant trained Stormy to make girls stay by stealing their IDs. Indeed, R.R. ultimately sought assistance from a client so that she could leave, and explained why she had not previously, stating, "I was really scared. I didn't know these men. I didn't know what they were capable of. I didn't know if they would hurt me . . . I just stayed calm and just did what I had to do . . . I was never once alone." A rational juror could interpret R.R.'s testimony as circumstantial proof of confinement. See *Granillo*, 2016-NMCA-094, ¶ 10.

{47} Even if there was no confinement, a reasonable jury could find that Defendant transported R.R. by deception, sufficient to convict Defendant of kidnapping R.R. Defendant argues that while he did transport R.R., he did not transport her "by deception," contending that R.R. was not misled by Stormy's invitation to smoke marijuana nor Stormy's reassurance that R.R. would be returned to the bus station. Defendant asserts that it was while they smoked marijuana that Stormy asked R.R. if she wanted to be an escort, and R.R. willingly agreed. At worst, Defendant claims the acts are recruitment, not kidnapping by deception. However, Defendant fails to acknowledge the substantial evidence that the State presented to establish methods Defendant employed to recruit "weak links" like R.R., including using Stormy to recruit as he had done on previous occasions.

{48} Stormy testified that Defendant specifically instructed her to "go talk to [R.R.]" at the bus station. Then, Stormy invited R.R. to "smoke some weed and drink and just chill until [her] bus comes[.]" to which R.R. agreed. However, "as soon as [the girls] jumped in the [empty] car," Defendant and his nephew jumped in and drove them to the hotel. R.R. was visibly uncomfortable and indicated her disapproval, stating "I don't know if this is a good idea. I've got to catch my bus." The abrupt action of jumping in the car and driving R.R. away from the bus station while Stormy assured her she could make her bus could support a finding by a rational jury that Defendant "transport[ed] by deception." See *State v. Laguna*, 1999-NMCA-152, ¶ 13, 128 N.M. 345, 992 P.2d 896 ("[K]idnapping can occur when an association begins voluntarily but where the . . . real purpose is something other than the reason the victim voluntarily associated with the defendant.").

{49} Stormy also testified that upon arrival at the hotel, Defendant whispered in her ear, "[y]ou know what you need to do,"

which meant "[she] had to make it seem like it was a really good deal that [R.R.] was getting herself into." Also from Defendant's direction, Stormy inferred that she needed to take away R.R.'s identification. Taken as a whole, contrary to Defendant's contentions, a reasonable jury could find transportation or confinement by deception in Defendant's "recruitment" activity. **Defendant's Intent to Hold R.R.**

Against Her Will

{50} Defendant argues the State failed to establish his intent to hold R.R. against her will or even that he knew R.R. was held against her will, pointing to cases requiring "clear confinement" to find such intent. "Intent may be proved by inference from the surrounding facts and circumstances[.]" *State v. Muniz*, 1990-NMCA-105, ¶ 3, 110 N.M. 799, 800 P.2d 734. For example, Defendant argues his texts admitted into evidence were ambiguous because slang terms and expressions like "lock her up" or "[d]on't leave the new girl by herself, alone, with no one" do not establish confinement. Instead, he argues "lock her up" was more similar to "lock down"—to convince R.R. to work for him. However, a rational jury could interpret the texts literally and properly find them to be sufficient evidence of confinement. Again, Defendant also discounts the testimonial evidence the State presented to establish his intent. Stormy testified that after she took R.R.'s purse away from her, Stormy told R.R., "You can't go anywhere because [Defendant] is going to kill me if I let anything happen to you." As stated, R.R. expressed that she was scared and was never left alone. Moreover, R.R. explained, "[she] didn't want to take pictures [in lingerie] and "[she] wanted to leave so bad." While Defendant may disagree with the version of events the testimony presented, questions as to witness credibility or the weight of the evidence are left to the jury. See *State v. Godoy*, 2012-NMCA-084, ¶ 18, 284 P.3d 410; *State v. Estrada*, 2001-NMCA-034, ¶ 40, 130 N.M. 358, 24 P.3d 793.

{51} Viewing the evidence in a light most favorable to the verdict, a reasonable jury could find Defendant's intent to hold R.R. against her will based on the trial evidence.

D. The Jury Instruction Regarding the Human Trafficking of a Minor Charge Was Proper

{52} Defendant argues that the district court improperly instructed the jury on the human trafficking of R.R. by failing to include the requirement that Defendant knew R.R. was under eighteen. We disagree.

{53} "The propriety of jury instructions given or denied is a mixed question of law and fact. Mixed questions of law and fact are reviewed de novo." *State v. Salazar*,

1997-NMSC-044, ¶ 49, 123 N.M. 778, 945 P.2d 996. Specifically, in reviewing for instructional error, “we seek to determine whether a reasonable juror would have been confused or misdirected by the jury instruction.” *State v. Luna*, 2018-NMCA-025, ¶ 19, ___ P.3d ___ (internal quotation marks and citation omitted), *cert. denied*, 2018-NMCERT-___ (No. S-1-SC-36896, Mar. 16, 2018). “Juror 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.” *Id.* (internal quotation marks and citation omitted). {54} In this case, the district court instructed the jury as follows with respect to the human trafficking of R.R.:

For you to find . . . Defendant guilty of human trafficking as charged in Count VII, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [D]efendant knowingly recruited, enticed, transported or obtaining by any means another person, [R.R.]; and
2. [R.R.] was under the age of eighteen years; and
3. [D]efendant intended or knew that [R.R.] would be caused to engage in commercial sexual activity; and

4. This happened in New Mexico on or between February 20, 2013 and February 21, 2013.

{55} Defendant claims there was instructional error based on the plain language of Section 30-52-1(A)(2). The relevant portion of the statute reads:

A. Human trafficking consists of a person *knowingly*:

. . . .

(2) recruiting, soliciting, enticing, transporting or obtaining by any means a person under the age of eighteen years with the intent or knowledge that the person will be caused to engage in commercial sexual activity[.]

Section 30-52-1(A)(2) (emphasis added). The district court relied on comparable federal cases in determining “knowingly” describes the action of “recruiting, soliciting, enticing, transporting or obtaining,” not the age requirement. Defendant, however, argues “knowingly” also modifies the age requirement, and contends the “different grammatical construction” of the New Mexico statute compared to federal law requires a different interpretation.

{56} This Court recently addressed the precise issue Defendant raises and ultimately, agreed with the district court’s interpretation of the statute. *See State v. Jackson*, 2018-NMCA-066, ¶ 8, 429 P.3d 674, *cert. denied*, 2018-NMCERT-___ (No. S-1-SC-37267, Oct. 15, 2018). There,

after careful consideration of the legislative intent, the plain language of the statute, as well as the underlying state policies which grant special protection to minors, “we declin[ed] to expand the ‘knowingly’ requirement . . . to a person under the age of eighteen.” *Id.* (internal quotation marks omitted); *see id.* (holding that “[t]he intentional exploitation of a person under the age of eighteen for commercial sexual activity amounts to a violation of Section 30-52-1(A)(2), regardless of a defendant’s actual awareness of that person’s age”). Therefore, we similarly conclude in the present case that the State was not required to prove Defendant knew R.R.’s age as an element of the offense, and that there was no instructional error. *See Jackson*, 2018-NMCA-066, ¶ 12.

III. CONCLUSION

{57} For the reasons set forth above, the rulings of the district court are affirmed in part and reversed in part. We remand to the district court with instructions to vacate the conviction for one count of human trafficking and to resentence accordingly.

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

J. MILES HANISEE, Chief Judge

WE CONCUR:

KRISTINA BOGARDUS, Judge
ZACHARY A. IVES, Judge

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-016
No. A-1-CA-36905 (filed December 9, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
WARREN BRAND FRANKLIN
a/k/a WARREN B. FRANKLIN,
Defendant-Appellant.

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

Released for Publication April 7, 2020.

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Gary C. Mitchell, P.C.
GARY C. MITCHELL
Ruidoso, NM
for Appellant

Jennifer L. Attrep, Judge.

{1} Defendant appeals his conviction for driving under the influence of intoxicating liquor or drugs (DUI), contrary to NMSA 1978, Section 66-8-102(A) (2010, amended 2016), raising, among other issues, the voluntariness of his consent to a blood draw in light of the United States Supreme Court's decision in *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160 (2016). *Birchfield* held that a blood draw was not a valid search incident to a DUI arrest and motorists cannot be said to impliedly consent to such a search "on pain of committing a criminal offense." *Id.* at 2184-86. As for a motorist who consents to a blood test after threat of heightened criminal penalties—commonplace in many states' implied consent laws at the time—the Supreme Court held that the voluntariness of such consent must be determined from the totality of the circumstances, including the inaccurate threat. *Id.* at 2186.

{2} In light of *Birchfield*, our courts have held that "[i]mplied consent laws can no longer provide that a driver impliedly consents to a blood draw" and a defendant can no longer be subjected to criminal

penalties for refusing to submit to a warrantless blood draw. *State v. Vargas*, 2017-NMSC-029, ¶ 22, 404 P.3d 416; *see also State v. Storey*, 2018-NMCA-009, ¶ 1, 410 P.3d 256. In this case, Defendant did not refuse but instead consented to the requested blood test. Our courts have yet to analyze *Birchfield* under such circumstances, and we thus take this opportunity to formally adopt the portion of *Birchfield* that addresses these circumstances. The district court below failed to properly consider and apply *Birchfield* in denying Defendant's motion to suppress his blood evidence. We thus reverse and remand for the district court to redetermine its ruling in light of *Birchfield* and this opinion and for any further proceedings consistent therewith. As for Defendant's remaining arguments, we conclude they are without merit.

BACKGROUND

{3} The following facts were established at trial. Defendant was involved in an accident with another vehicle while driving his truck one afternoon in Curry County, New Mexico. Defendant was driving a dually-trailer combination and slowed to make a left turn when another driver operating a tractor-trailer attempted to pass him in

the left lane. The tractor-trailer struck the driver's side of Defendant's truck and Defendant was ejected from his truck. Both drivers sustained injuries; Defendant suffered a broken back, ribs, and lacerations. The first law enforcement officer who responded to the scene of the accident discovered a pack of beer in Defendant's truck—one bottle was open, four were unopened, and several were unaccounted for. Defendant testified that the beers were in the truck from the day before, he had not drunk any while driving, and he had not drunk anything within an hour-and-a-half before the accident. Defendant, however, admitted he had a beer or two with lunch earlier that day.

{4} Defendant was initially transported by ambulance from the scene of the accident to a hospital in Clovis for treatment for his injuries before being airlifted to a hospital in Lubbock, Texas. Deputy Antonio Salazar, of the Curry County Sheriff's Office, was present at the Clovis hospital. Pursuant to the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2019), Deputy Salazar advised Defendant that his consent for a breath or blood test was being requested and that Deputy Salazar was choosing a blood test. Deputy Salazar testified that he read Defendant an implied consent advisory from a card. The parties dispute whether Deputy Salazar advised Defendant that his failure to consent could cause Defendant to face enhanced criminal penalties, as provided in Section 66-8-102(D)(3) and (E). At first, Deputy Salazar testified that he read the enhanced penalties from the card, but then on redirect was more equivocal. Defendant testified that, while being treated at the hospital, Deputy Salazar asked for a blood test and then read the implied consent advisory. Defendant stated that he initially refused the blood test and requested a breath test; however, Deputy Salazar told him that he did not have a breathalyzer available and that a blood test was "the only thing that they could do." Defendant testified that he submitted to the blood test after Deputy Salazar threatened him with enhanced criminal penalties.

{5} Deputy Salazar oversaw the administration of the blood draw and provided to the blood drawer a kit approved by the Scientific Laboratory Division of the Department of Health (SLD). Deputy Salazar testified that he witnessed a nurse or technician employed by the hospital draw Defendant's blood and ensured the kit would be submitted to SLD. Steve Schenick, the SLD analyst who analyzed Defendant's blood sample, was certified

by the district court as an expert in drug analysis. Mr. Schenick testified that the result of the blood test was a blood alcohol content (BAC) of .08 grams of alcohol per 100 milliliters of blood. The State did not seek to admit the blood test report or related documents.

{6} The State initially filed charges against Defendant in magistrate court. A jury was selected and a trial date was set approximately three weeks later. Before the trial commenced and prior to swearing in the jury, the State moved to dismiss the matter without prejudice, over Defendant's objection. The State thereafter refiled the case in district court. In the district court, Defendant filed a combined motion to dismiss and motion to suppress. In support of his motion to dismiss, Defendant argued that the proceedings in district court violated his right to be free from double jeopardy since a jury had been selected in magistrate court. In support of his motion to suppress, Defendant argued that the blood test results should be suppressed pursuant to *Birchfield*.

{7} At the suppression hearing, the district court took no evidence. Defendant argued for suppression based on the premise that the officer threatened Defendant with criminal penalties to obtain his consent to a blood test and that this violated *Birchfield*. The State responded that the penalty portion of the implied consent advisory was not read, and, regardless of whether *Birchfield* applies, exigent circumstances justified the warrantless search. The district court took the matter under advisement and then issued a written order denying the motion without explanation. Defense counsel renewed the motion to suppress at the beginning of the trial and prior to any evidence being taken. The district court again denied the motion, explaining only that, based on current New Mexico case law, the court could not grant the motion. The matter proceeded to a bench trial, and, based on the evidence outlined above, Defendant was convicted of DUI.

DISCUSSION

{8} Defendant argues the district court erred in denying his motion to suppress because, under *Birchfield*, his consent to the blood test was not voluntary. Defendant additionally contends that the State failed to lay a proper foundation for the admission of testimony regarding the blood draw, the State violated his right to confrontation, and the State failed to establish a nexus between BAC and time

of driving. Defendant finally asserts the district court erred in denying his motion to dismiss on double jeopardy grounds. We reverse and remand based on Defendant's *Birchfield* argument. We reject Defendant's remaining claims of error.

I. Harmless Error

{9} Since the vast majority of Defendant's claims of error relate to the admission of the blood test results, as an initial matter, we dispose of the State's contention that even if the blood test results were admitted in error, such error was harmless. The State maintains the admission of the blood test results was harmless because ample evidence supported the finding that Defendant drove impaired, and the district court need not have relied on the testimony concerning the blood test results in finding Defendant guilty of DUI. As support for its position, the State cites *State v. Hernandez*, 1999-NMCA-105, 127 N.M. 769, 987 P.2d 1156, where we stated "the erroneous admission of evidence in a bench trial is harmless unless it appears that the judge must have relied upon the improper evidence in rendering a decision." *Id.* ¶ 22.

{10} Although Defendant was convicted under the "impaired to the slightest degree" standard, rather than a per se standard of DUI, see § 66-8-102(A), (C)(1), we previously have held that BAC remains relevant in cases where DUI is based on a defendant's impairment to the slightest degree. See, e.g., *State v. Garnenez*, 2015-NMCA-022, ¶ 34, 344 P.3d 1054 ("BAC results are relevant under the [impaired] to the slightest degree theory to show that a defendant had alcohol in his or her system and, regardless of the numerical BAC, tended to show that the defendant's poor driving was a result of drinking liquor." (alterations, omission, internal quotation marks, and citation omitted)). In the present case, there is no indication that the district court did not consider testimony concerning the blood test results. To the contrary, when announcing its verdict, the district court expressly stated the blood test results of .08 were "concerning." In addition, two of the State's witnesses, Deputy Salazar and Mr. Schenick, testified in detail regarding the process to obtain a blood test, procedures for analyzing the sample, and the blood test results. Under these circumstances, it is not possible to conclude the district court did not rely on the blood test results. See *Hernandez*, 1999-NMCA-105, ¶¶ 22-23. Accordingly, any error that may exist with respect to the admission of the blood test results was not harmless.

II. *Birchfield* and Warrantless Blood Tests

{11} Relying on *Birchfield*, Defendant argues that individuals can no longer be deemed to have consented to a blood test "on pain of committing a criminal offense," and that the implied consent advisory Deputy Salazar read to Defendant was unconstitutional because it informed Defendant of the possibility for enhanced criminal penalties if he refused to consent to a blood test. 136 S. Ct. at 2186. Defendant therefore asserts that, because his consent to the blood test was premised on an inaccurate threat of heightened criminal penalties for refusal, the consent was not voluntary. The State argues there was no error under *Birchfield* because Defendant consented to the blood test without threat of heightened criminal penalties, and, in any event, exigent circumstances permitted taking Defendant's blood without a warrant.

{12} As explained later, we do not delve into the factual disputes inherent in the parties' arguments. We instead limit our inquiry to a legal matter—the validity of a search premised on a motorist's consent to a blood test on threat of criminal penalty in light of *Birchfield*—which we conduct de novo. See *State v. Vargas*, 2017-NMSC-029, ¶ 16, 404 P.3d 416 (reviewing a defendant's Fourth Amendment argument founded on *Birchfield* de novo).¹ In *Birchfield*, the United States Supreme Court held that a warrantless breath test may lawfully be administered upon arrest for drunk driving, but "the search incident to arrest doctrine does not justify the warrantless taking of a blood sample." 136 S. Ct. at 2185. The Court then analyzed whether implied consent laws that impose criminal penalties on a refusal to submit to such a test could provide a legal basis for obtaining a warrantless blood sample. *Id.* at 2185-86. Answering in the negative, the Court "conclude[d] that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

{13} Our Supreme Court subsequently has recognized that "*Birchfield* prohibits punishment under implied consent laws based on an arrestee's refusal to consent to and submit to a warrantless blood test." *Vargas*, 2017-NMSC-029, ¶ 3. Further, "[i]mplied consent laws can no longer provide that a driver impliedly consents to a blood draw." *Id.* ¶ 22. Thus, the law in New Mexico is clear that warrantless blood draws are not permitted in the absence of

¹In addition to making a search and seizure argument, Defendant invokes the due process clause. Defendant, however, does not develop his due process argument and we decline to consider it further. See *State v. Duttie*, 2017-NMCA-001, ¶ 15, 387 P.3d 885 ("For this Court to rule on an inadequately briefed constitutional issue would essentially require it to do the work on behalf of [the defendant.]; see also *State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031, 1037 (explaining that appellate courts do not review unclear or undeveloped arguments)."

either (1) valid consent or (2) probable cause to require the blood test in addition to exigent circumstances. *See id.* ¶¶ 1, 3, 19 (holding that “when a subject does not consent to such a search, officers must obtain a warrant or establish probable cause and exigent circumstances to justify a warrantless search”); *see also Gallegos v. Vernier*, 2019-NMCA-020, ¶ 25, ___ P.3d ___ (“A warrantless blood test, performed without consent, is presumptively unreasonable unless the state actors involved had probable cause and exigent circumstances sufficient to justify it” (alteration, internal quotation marks, and citation omitted)), *cert. denied*, 2019-NMCERT-___ (No. S-1-SC-37431, Feb. 18, 2019).

{14} In the present case, it is undisputed that Defendant’s blood was drawn without a warrant. The State nevertheless argues that the blood draw withstands constitutional scrutiny because Defendant validly consented to the blood test or, alternatively, exigent circumstances combined with probable cause existed.

A. Consent

{15} Since *Birchfield*, our courts have not yet had the opportunity to examine a case where, as here, a defendant consents to a blood test, but argues the consent was not voluntary because it was given only in response to inaccurate threats of heightened criminal penalties for refusal. *Birchfield* involved three consolidated matters, one of which addressed the scenario at issue in this case. In pertinent part, petitioner Beylund submitted to a blood test after police told him that the law required his submission. 136 S. Ct. at 2186. The arresting officer read Beylund an implied consent advisory, which informed him that refusing a blood test was itself a crime. *Id.* at 2172. Beylund argued his consent was coerced by this warning. *Id.* The Supreme Court noted that the state supreme court’s determination that Beylund voluntarily consented to the test was based “on the erroneous assumption that the [s]tate could permissibly compel both blood and breath tests.” *Id.* at 2186. Following its conclusion that the law cannot impose criminal penalties for the refusal to submit to a blood test, the Supreme Court remanded for consideration, based on the totality of the circumstances, of whether Beylund’s consent was voluntary “given the partial inaccuracy of the officer’s advisory.” *Id.* (citing *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973)).

{16} In New Mexico, we likewise examine the totality of the circumstances to determine whether a defendant’s consent is voluntary. *See State v. Davis*, 2013-NMSC-028, ¶ 13, 304 P.3d 10 (“The [s]tate has the burden of proving that, under the totality of the circumstances, consent to search was given freely and voluntarily.” (citing

Schneekloth, 412 U.S. at 227)). Our courts have been clear that “[t]he voluntariness of consent is a factual question” for the district court. *Id.*; *see also Gallegos*, 2019-NMCA-020, ¶ 23 (“[W]hether [the motorist] consented to the blood draw is a question of fact that must be determined by the district court in the first instance.”); *State v. Flores*, 1996-NMCA-059, ¶ 20, 122 N.M. 84, 920 P.2d 1038 (“The voluntariness of a consent to search is initially a question of fact for the trial court.”). We thus hold that when a defendant raises *Birchfield*, asserting his or her consent to a blood test was involuntary due to a partially inaccurate advisory, the district court must assess the voluntariness of the consent in light of the totality of the circumstances, including the improper implied consent advisory. 136 S. Ct. at 2186.

{17} In this case, the district court twice summarily denied Defendant’s motion to suppress without taking any evidence, apparently believing *Birchfield* simply did not apply. As a result, not only did the district court make no findings regarding the issue of voluntariness, but it made no findings regarding the preliminary matter of whether Deputy Salazar informed Defendant that he faced heightened criminal penalties should he refuse a blood draw. The parties on appeal dispute whether the trial testimony demonstrates this fact and urge us to rule accordingly. We decline to do so because our role is not to find facts the district court neglected to make in the first instance. And while we often rely on presumptions in resolving factual disputes in our review of suppression rulings, *see State v. Chacon*, 2018-NMCA-065, ¶ 19, 429 P.3d 347 (“[W]hen the evidence is conflicting, we indulge in all reasonable presumptions in favor of the district court’s ruling, disregarding all evidence and inferences to the contrary, and when evidence is uncontradicted, we presume the district court believed the uncontradicted evidence, unless it indicates to the contrary on the record.”), *cert. denied*, 2018-NMCERT-___ (No. S-1-SC-37232, Oct. 11, 2018), we decline to do so in this instance—where the district court did not consider any evidence and appears to have ruled on purely legal grounds.

{18} We thus remand to the district court. *See State v. Paul T.*, 1999-NMSC-037, ¶ 29, 128 N.M. 360, 993 P.2d 74 (remanding to the district court to determine voluntariness where the district court did not previously base its suppression ruling on consent). The district court should determine whether the criminal penalty portion of the implied consent advisory was read to Defendant prior to his consent. *See State v. Baldonado*, 1992-NMCA-140, ¶ 11, 115 N.M. 106, 847 P.2d 751 (remanding to the district court for redetermination of sup-

pression motion where it was unknown what facts the district court found). And, if so, the district court should determine whether Defendant’s consent, under the totality of the circumstances, was voluntary “given the partial inaccuracy of the officer’s advisory.” *Birchfield*, 136 S. Ct. at 2186; *see also Davis*, 2013-NMSC-028, ¶ 10 (“The voluntariness of consent is a factual question in which the trial court must weigh the evidence and decide if it is sufficient to clearly and convincingly establish that the consent was voluntary.” (internal quotation marks and citation omitted)).

B. Exigent Circumstances

{19} With regard to the State’s additional argument that probable cause to require the blood test, combined with exigent circumstances, justified the warrantless blood draw, we again are unable to discern from the district court’s ruling whether it considered the applicability of this exception to the warrant requirement. Indeed, nothing in the district court’s written order or later oral denial indicates a resolution of this question. Much like the voluntariness of consent, the question of exigency heavily depends on the particular facts and circumstances of a case. *See Gallegos*, 2019-NMCA-020, ¶ 25 (providing that “[i]n the context of exigent circumstances that would support a warrantless blood draw in a case involving suspected [DUI], there are no categorical rules—such as the dissipation of blood-alcohol evidence—establishing per se exigency” and that “such cases require a finely tuned approach and demand that the courts evaluate each case of alleged exigency based on its own facts and circumstances” (alterations, internal quotation marks, and citation omitted)).

{20} We therefore leave it to the district court on remand to determine, as necessary, whether exigent circumstances and probable cause justified the warrantless blood draw. *See id.* If the district court determines either (1) Defendant validly consented to the blood draw, or (2) probable cause combined with exigent circumstances were present, the warrantless blood draw would be justified. *See Birchfield*, 136 S. Ct. at 2186 (leaving open the possibility that the petitioner’s valid consent would justify a warrantless blood draw); *Vargas*, 2017-NMSC-029, ¶ 19 (“[W]hen a subject does not consent to [a blood draw], officers must obtain a warrant or establish probable cause and exigent circumstances to justify a warrantless search”). Otherwise, the blood evidence must be suppressed.

III. Defendant’s Other Objections to the Blood Test

{21} Although we reverse and remand on the *Birchfield* issue, in the event the district court determines, on remand, that Defendant’s consent to the blood test was valid or there existed probable cause and

exigent circumstances otherwise justifying the blood draw, the evidence will not be suppressed. We therefore address Defendant's remaining arguments concerning the blood test.

A. Foundation

{22} Defendant argues that the evidence was insufficient to establish his blood was drawn by an authorized individual, as required by NMSA 1978, Section 66-8-103 (1978), the individual who performed the blood draw was required to testify, and the district court erred in admitting testimony concerning the blood test and blood results over his evidentiary objections. "We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse." *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72.

{23} Section 66-8-103 mandates that "[o]nly a physician, licensed professional or practical nurse or laboratory technician or technologist employed by a hospital or physician shall withdraw blood from any person in the performance of a blood-alcohol test." See § 66-8-109(A) ("Only the persons authorized by Section 66-8-103 . . . shall withdraw blood from any person for the purpose of determining its alcohol or drug content."). The State bears the burden of proving Defendant's blood was drawn by an authorized individual. *State v. Garcia*, 2016-NMCA-044, ¶ 23, 370 P.3d 791.

{24} Defendant claims that the individual who performed the blood draw was required to testify. This, however, is not a requirement under the law. To the contrary, we previously have held testimony similar to that elicited here is sufficient to demonstrate "the propriety of the blood draw and the qualification of the blood drawer." See *State v. Nez*, 2010-NMCA-092, ¶¶ 13-14, 148 N.M. 914, 242 P.3d 481. In *Nez*, an officer who witnessed the blood draw testified he observed a nurse draw the defendant's blood using a SLD-approved kit. *Id.* ¶ 13. We held that the officer's testimony concerning the blood drawer's identity and qualifications and the manner in which the blood was drawn was sufficient to satisfy the state's foundational burden and to establish the qualifications of the blood drawer. *Id.* ¶ 14.

{25} Similarly here, Deputy Salazar, who was present at the hospital during the blood draw, testified that he provided hospital staff a blood draw kit approved by SLD, ensured the person who drew Defendant's blood was certified by the hospital to draw blood, and saw the blood draw performed by a person he knew was either a technician or a certified nurse employed by the hospital. After the blood draw, Deputy Salazar ensured the vials were sealed, initialed them, filled out and

signed the form that accompanied the kit, and submitted the kit to an evidence custodian for delivery to SLD. Under these circumstances, we conclude the district court did not abuse its discretion in finding Deputy Salazar's testimony sufficient to satisfy the State's foundational burden and to establish the blood drawer was qualified under Section 66-8-103.

B. Right to Confrontation

{26} Defendant additionally claims that "[f]ailure to call expert witnesses regarding the blood/alcohol examination would be a denial of the right to cross-examine witnesses[.]" "Under the Confrontation Clause, U.S. Const. amend. VI, an out-of-court statement that is both testimonial and offered to prove the truth of the matter asserted may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant." *State v. Smith*, 2016-NMSC-007, ¶ 42, 367 P.3d 420 (internal quotation marks and citation omitted). "We review de novo a challenge made pursuant to the Confrontation Clause." *State v. Gallegos*, 2016-NMCA-076, ¶ 44, 387 P.3d 296.

{27} The reasons Defendant believes his right to confrontation was violated are not clear to us. Notably, Defendant has not identified any out-of-court testimonial statements that would give rise to a confrontation violation. And we are under no obligation to develop or review this unclear argument. See *Guerra*, 2012-NMSC-014, ¶ 21 (explaining that appellate courts do not review unclear or undeveloped arguments); *Duttie*, 2017-NMCA-001, ¶ 15 ("For this Court to rule on an inadequately briefed constitutional issue would essentially require it to do the work on behalf of [the defendant]"). To the extent Defendant argues the nurse who conducted the blood draw should have been called, that issue has been addressed above and furthermore does not present a confrontation problem. See *Nez*, 2010-NMCA-092, ¶¶ 13-14, 16 (concluding that an officer's testimony regarding the nurse's blood draw of the defendant and the officer's subsequent mailing of the sample to SLD, satisfied foundational requirements and that, once the state had satisfied the foundation requirements, "the need to cross-examine the blood drawer is reduced to questions of the chain of custody," which "does not provide grounds for a confrontation objection to the admissibility of a blood-alcohol report"); see also *State v. Martinez*, 2007-NMSC-025, ¶ 25, 141 N.M. 713, 160 P.3d 894 ("The protections afforded by the Confrontation Clause do not extend to preliminary questions of fact").

C. Nexus Between BAC and Time of Driving

{28} Defendant additionally contends the evidence did not sufficiently demonstrate the BAC obtained from the blood draw

accurately represented Defendant's BAC at the time of driving. This, Defendant argues, made the results of the blood test inadmissible as evidence of Defendant's BAC at the time of driving. Defendant, however, has not developed this argument or even demonstrated whether the State did in fact seek to establish that the test results showed Defendant's BAC *at the time of driving*. See *Guerra*, 2012-NMSC-014, ¶ 21.

{29} It is possible the State merely sought to admit the testimony regarding Defendant's BAC as evidence of the alcohol concentration at the time of the test, rather than at the time of driving. See § 66-8-110(E) (stating that if a chemical test "is administered more than three hours after the person was driving a vehicle, the test result may be introduced as evidence of the alcohol concentration in the person's blood or breath *at the time of the test* and the trier of fact shall determine what weight to give the test result for the purpose of determining a violation of Section 66-8-102" (emphasis added)). Moreover, Defendant was convicted under Section 66-8-102(A), which requires only that the State prove Defendant was impaired to the slightest degree while driving, not that his BAC exceeded a certain level within a certain time of driving. To the extent Defendant's argument is premised on the notion that the State must have proven Defendant's BAC was at or above a certain level at the time of driving, we conclude the law does not support this contention. See § 66-8-102(A) (criminalizing driving under the influence of intoxicating liquor); see also § 66-8-102(C)(1) (criminalizing driving if BAC is .08 or more "*within three hours of driving*" (emphasis added)).

IV. Double Jeopardy

{30} Finally, Defendant argues, as he did below, that the State was barred from bringing this case in district court on double jeopardy grounds because the State refiled the case in district court after a jury was selected, but not sworn, in magistrate court. We generally apply a de novo standard of review to the constitutional question of whether there has been a double jeopardy violation. *State v. Rodriguez*, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737. "[W]here factual issues are intertwined with the double jeopardy analysis, . . . the [district] court's fact determinations [are subject to a] deferential substantial evidence standard of review." *Id.* Jeopardy attaches when a defendant is "put to trial before the trier of the facts, whether the trier be a jury or a judge." *State v. Davis*, 1998-NMCA-148, ¶ 14, 126 N.M. 297, 968 P.2d 808 (internal quotation marks and citation omitted). For "a jury trial, jeopardy attaches at the point when a jury is impaneled and

sworn to try the case.” *State v. Nunez*, 2000-NMSC-013, ¶ 28, 129 N.M. 63, 2 P.3d 264.

{31} The district court found the jury in magistrate court was never sworn to hear evidence. Accordingly, jeopardy never attached during the magistrate court proceedings, and double jeopardy presented no bar to the proceedings in district court. While Defendant admits the jury was never sworn in, he nevertheless maintains the State’s tactics were unfair and not in good faith. Defendant provides no legal

authority in support of his argument that the district court proceedings should have been barred based on principles of unfairness and bad faith. And we “will not consider an issue if no authority is cited in support of the issue and . . . given no cited authority, we assume no such authority exists.” *State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129. Further, to the extent Defendant asks us to change well-settled law regarding the point at which jeopardy attaches, we decline to do so.

CONCLUSION

{32} For the foregoing reasons, we reverse the district court’s order denying Defendant’s motion to suppress and remand for the district court to redetermine its ruling in light of *Birchfield* and this opinion and for any further proceedings consistent therewith.

{33} **IT IS SO ORDERED.**
JENNIFER L. ATTREP

WE CONCUR:
MEGAN P. DUFFY, Judge
BRIANA H. ZAMORA, Judge

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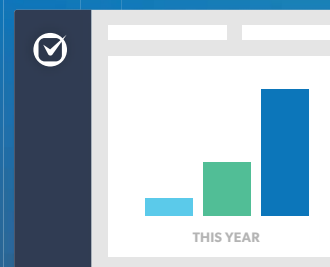
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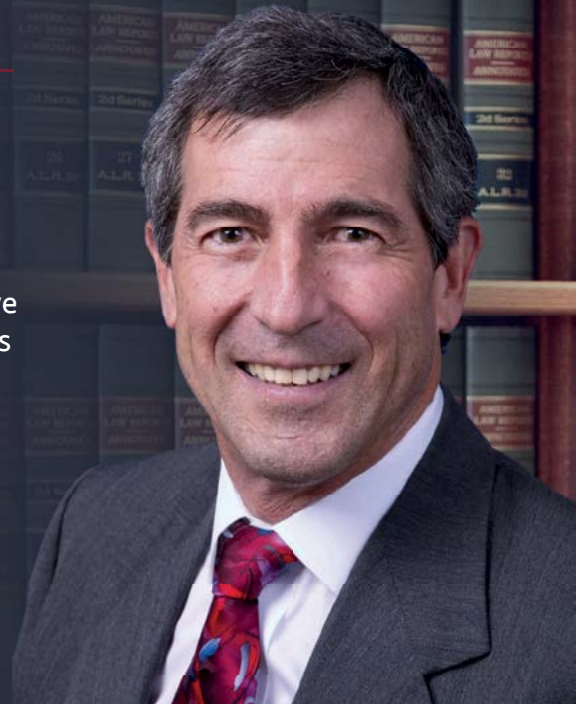
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Judge Tim Garcia, Ret., and the distinguished team of independent panelist at PADRE, led by the Hon. Layn R. Phillips, thank you for all the virtual cases we addressed in New Mexico during the 2020 Covid-19 pandemic.

In light of the continued disruptions this new year, we will continue to use our video conference platform as our primary mediation method for several more months in 2021. Limited in-person sessions are also being scheduled in New Mexico for later this year.

Please contact the PADRE office or Judge Garcia directly to reserve the dates for your next mediation session. Stay healthy as we all get our vaccines and have the chance to work face-to-face again in 2021.



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ROYBAL-MACK AND CORDOVA P.C. is pleased to announce our new firm partner, **Dynette C. Palomares**. She works in the firm's family law department where she focuses on outcomes for families and children. She understands that the litigation will end, but the family must continue to function after the case. Her leadership has been an instrumental asset to the firm as well as her influence and we look forward to her new endeavors as partner.

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Thursday, May 20, 2021 7:45 a.m. - 4:00 p.m.

Registration:

Please mail your contact information (including preferred email address) and a check for \$100 to:
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Materials will be available to registered attendees for download at WilcoxMyers.com. Please visit our website on May 20th, 2021 to access your materials and visit the virtual charity room.

Seminar Credit:

Professional Credit Pending: CLE, CE, CFP, CPA and Insurance. Note: CE credits for CFPs (and Insurance credits) may only be available for attendees who are present the entire day, per the governing regulations.

AGENDA

| | | |
|---|--------------------------------|--------------------|
| SIGN IN | | 7:45 – 8:15 A.M. |
| INTRODUCTORY REMARKS | | 8:15 – 8:30 A.M. |
| FEDERAL AND STATE ESTATE AND GIFT TAX UPDATE 2021 | VICKIE R. WILCOX, J.D., LL.M. | 8:30 – 9:30 A.M. |
| WHEN A CLIENT DIES: PROBATE AND TRUST/ESTATE ADMINISTRATION | MADISON R. JONES, J.D., M.B.A. | 9:30 – 10:30 A.M. |
| BREAK | | 10:30 – 10:45 A.M. |
| AN EMPLOYMENT LAWYER'S GUIDE: BEST PRACTICES FOR THE SMALL BUSINESS OWNER | SARAH K. DOWNEY, J.D. | 10:45 – 11:45 A.M. |
| VIRTUAL LUNCH WITH BREAKOUT CHARITY ROOMS | | 11:45 – 12:45 P.M. |
| THE STATE OF THE STATE | SENATOR PETER WIRTH, J.D. | 12:45 – 1:45 P.M. |
| FORTIFYING ESTATE PLANS: WHAT DOES (NOT) WORK | GREGORY W. MACKENZIE, J.D. | 1:45 – 2:45 P.M. |
| BREAK | | 2:45 – 3:00 P.M. |
| ETHICS: BEST PRACTICES FOR OFFICE MANAGEMENT (PARTICULARLY DURING A PANDEMIC) | ANNE TAYLOR, J.D. | 3:00 – 4:00 P.M. |

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Positions

Court of Appeals - Judges Jacqueline Medina and Briana Zamora Senior Law Clerks in Albuquerque

Judges Jacqueline Medina and Briana Zamora of the New Mexico Court of Appeals are each hiring for a Senior Law Clerk in Albuquerque. Senior Law Clerks work closely with the judges to draft opinions and resolve cases involving all areas of the law. Outstanding legal research and writing skills are necessary. Four years of legal practice or clerking experience and a New Mexico law license are required. Current annual salary is \$69,222. Please send cover letter, resume, law school and undergraduate transcripts, and writing sample to: Anna Box, Court Manager, coaamb@nmcourts.gov, 2211 Tucker Avenue, Albuquerque NM, 87106.

Deputy District Attorney

Immediate opening for a Deputy District Attorney in Silver City. Salary Depends on Experience. Benefits. Please send resume to Michael Renteria, District Attorney, MRenteria@da.state.nm.us or call 575-388-1941.

Two Staff Attorneys

The New Mexico Immigrant Law Center is committed to advancing justice and equity by empowering low-income immigrant communities. We are currently hiring for two staff attorney positions (Economic Justice Program and Survivor of Crime Program), as well as, a paralegal/partially accredited DOJ Representative. We provide excellent benefits, including full health insurance, dental and vision, generous paid holidays, vacation, and sick leave. We provide competitive non-profit salary and a family friendly work environment. Please see: www.nmilc.org for more information and instructions on how to apply.

Assistant District Attorney

The Fifth Judicial District Attorney's office has immediate positions open for new or experienced attorneys, in our Carlsbad office. Salary will be based upon the New Mexico District Attorney's Salary Schedule with starting salary range of an Assistant Trial Attorney to a Senior Trial Attorney (\$58,000 to \$79,679). Please send resume to Dianna Luce, District Attorney, 301 N. Dalmont Street, Hobbs, NM 88240-8335 or e-mail to 5thDA@da.state.nm.us.

Alternative Dispute Resolution Mediators and Facilitators

The New Mexico Department of Education Special Education Division is seeking Facilitators and Mediators to resolve disputes between parents and school districts under the Individuals with Disabilities Education Act (IDEA). Contracts will be awarded for a one-year period, from July 1, 2021 through June 30, 2022, renewable annually for up to four years. Applicants must be experienced Mediators and Facilitators with knowledge of special education related issues. The Request for Applications for both Mediators and Facilitators is available on the Special Education website at: <https://webnew.ped.state.nm.us/information/rfps-rfis-rfas/>. The deadline to submit separate applications for Mediator and/or Facilitator is March 26, 2021.

Attorney

Butt Thornton & Baehr PC seeks an attorney with a minimum five years' experience, at least 3 years' of which are in civil litigation. Butt Thornton & Baehr PC is in its 62nd year of practice. We seek an attorney who will continue our tradition of excellence, hard work, and commitment to the enjoyment of the profession. Please send letter of interest, resume, and writing samples to Ryan T. Sanders at rtsanders@btblaw.com.

Assistant City Attorney

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

Request For Applications: Hearing Officers

The New Mexico Public Education Department, Division of Vocational Rehabilitation (NMDVR) and the New Mexico Commission for the Blind (NMCB) are seeking attorneys to serve as due process hearing officers to adjudicate disputes between the agencies and applicants/recipients of vocational rehabilitation services under the Federal Rehabilitation Act of 1973, 29 U.S.C. 701 et seq., as amended through Public Law 114-95. Contracts will be awarded in one-year terms, with the option to extend in one-year increments for three additional years. Prior hearing officer experience is preferred but NMDVR and NMCB will also consider applicants with four years or more of administrative law experience. Knowledge of laws applicable to persons with disabilities and/or vocational rehabilitation laws is preferred. The Request for Applications for Hearing Officers is available on the New Mexico Division of Vocational Rehabilitation's website at <http://www.dvr.state.nm.us/>. The RFA includes the Stevens Amendment notices for NMDVR and NMCB. Prospective Offerors with questions should contact Joseph "Joby" Padilla at joseph.padilla@state.nm.us. The deadline to submit applications is March 17, 2021.

Attorney/Paralegals – Statewide Positions

New Mexico Legal Aid is hiring. Current Attorney and Paralegals positions are available statewide. Please visit <https://www.newmexicolegalaid.org> for the full job ads. Full Benefits, Salary DOE

Associate Attorneys

Mynatt Martínez Springer P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking associate attorneys with 0-5 years of experience to join our team. Duties would include providing legal analysis and advice, preparing court pleadings and filings, performing legal research, conducting 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.

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The Los Alamos National Laboratory Office of Laboratory Counsel is seeking a highly experienced attorney to lead the Intellectual Property (GC-IP) group in its mission to provide timely services and advice on a variety of IP matters related to dynamic institutional priorities. The attorney will lead all strategic initiatives, provide advice to the Laboratory's senior management and technology transfer division and co-develop and advise on IP-related policies and procedures. Other duties include drafting and reviewing agreements and conducting and participating in negotiations. The attorney will have a J.D. degree and 12 years of experience after passing the Bar, along with the demonstrated ability to lead and coordinate the legal work of a patent function involving attorneys and paralegals in an in-house, law firm or government setting. Apply online at www.lanl.gov/jobs. Los Alamos National Laboratory is an EO employer – Veterans/Disabled and other protected categories. Qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, sexual orientation, gender identity, disability or protected veteran status.

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Deputy City Attorney

The City of Rio Rancho is seeking a Deputy City Attorney to assist in representing the City in legal proceedings before city, state, and federal courts, agencies and provides advice to the Mayor, Governing Body, City Manager and Department Directors on all legal matters of concern to the City. This position requires a JD from an accredited, ABA approved college or university law school, (5) Five years' related law experience, and licensed to practice law in the State of NM. To review the complete job description and to apply, visit: <https://rrnm.gov/196/Employment>

Associate Lawyer - Litigation

Sutin, Thayer & Browne is looking to hire a full-time associate with 2-5 years of 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 sor@sutinfirm.com.

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Chapman and Priest, P.C. seeks Associate Attorney to assist with increasing litigation case load. Candidates should have 2-10 years civil defense litigation experience, good research and writing skills, as well as excellent oral speaking ability. Candidate must be self-starter and have excellent organizational and time management skills. Trial experience a plus. Please send resume, references, writing sample and salary requirements to cassidyolguin@cplawnm.com.

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Center For Self Help and Dispute Resolution

Foreclosure Settlement Program

The Second Judicial District Court is accepting applications for a Full Time At Will Attorney As-sociate. This position will be assigned to the Foreclosure Settlement Program (FSP) and will operate under the direction of the Chief Judge, the Presiding Civil Judge, and upper level Court man-agement. The Attorney Associate will facilitate settlement facilitation conferences between lenders and borrowers in residential foreclosure cases pending before the Court and will be responsible for conducting status conferences, settlement facilitations and reporting of statistical data to Court man-agement. The majority of communication will take place via telephone and email, with occasional in-person or virtual settlement facilitations. The Attorney Associate is independent and impartial and shall be governed by the Rules of Professional Conduct, Mediation Procedures Act, NMSA 1978 §44-7B-1 to 44-7B-6, and Mediation Ethics and Standards of Practice. The Attorney Associ-ate will coordinate with program administrative staff to support the FSP. Qualifications: Must be a graduate of a law school meeting the standards of accreditation of the American Bar Association; possess and maintain a license to practice law in the State of New Mexico and have three (3) years of experience in the practice of applicable law, or as a law clerk. Experience in settlement facilitation/mediation and residential mortgage foreclosure matters and loss mitigation is strongly encouraged. SALARY: \$40,975 hourly, plus benefits. Send application or resume supplemental form with proof of education and writing sample to the Second Judicial District Court, Human Resource Office, P.O. Box 488 (400 Lomas Blvd. NW), Albuquerque, NM, 87102. Applications without copies of information requested will be rejected. Application and resume supplemental form may be obtained on the New Mexico Judicial Branch web page at www.nmcourts.gov. CLOSES: March 19, 2021 at 5:00 p.m.

Town Prosecutor

The Town of Silver City, New Mexico is seeking a qualified attorney interested in serving as a contract Town Prosecutor. The position requires prosecuting Grant County criminal misdemeanor cases in Municipal, Magistrate and District Court. The applicant must possess a working knowledge of criminal law, strong communication skills (oral and written), be a self-starter, and have the ability to manage and prioritize the assigned case-load. Please direct inquiries to (575) 534-6359 or personnelofficer@silvercitynm.gov.

Full-Time Paralegal

Egolf + Ferlic + Martinez + Harwood LLC is hiring a full-time paralegal position. The Firm is based in downtown Santa Fe but represents clients throughout the state. Ideal candidate will show initiative, demonstrate attention to detail and organization, and work well under pressure. They must be able to communicate well with others, while also being able to work independently. Litigation experience a plus! For the right candidate, the Firm is willing to train individuals with related experience or education. The Firm offers a competitive salary and benefits package that includes healthcare, life insurance & retirement match. Interested candidates should submit a resume to Annette@EgolfLaw.com

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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

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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!

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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>.

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Civil litigation firm seeking Paralegal with minimum of 3 or more years experience, including current working knowledge of State and Federal District Court rules and filing procedures, trial preparation, document and case management, calendaring, and online research, is technologically adept and familiar with use of electronic databases and legal-use software. Qualified candidates must be organized and detail-oriented, with excellent computer and word processing skills and the ability to multi-task and work independently. Salary commensurate with experience. Please send resume with references and a writing sample to paralegal3.bleuslaw@gmail.com

Paralegal

The Santa Fe office of Hinkle Shanor LLP seeks a paralegal for the practice areas of environmental, water, natural resources, real property, public utility and administrative law. Candidates should have a strong academic background, excellent research skills and the ability to work independently. Paralegal training or experience is not necessary. Competitive salary and benefits. All inquiries kept confidential. Santa Fe resident preferred. Please email resume to: gromero@hinklelawfirm.com

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Search for Wills

Searching for Wills of Eloy F. Martinez, deceased. Lived in Santa Fe, NM and Las Cruces, NM and of Eloy A. Martinez, deceased who lived in Santa Fe, NM. Please contact Kristi A. Wareham at 505-820-0698 with any information

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2021 Bar Bulletin Publishing and Submission Schedule

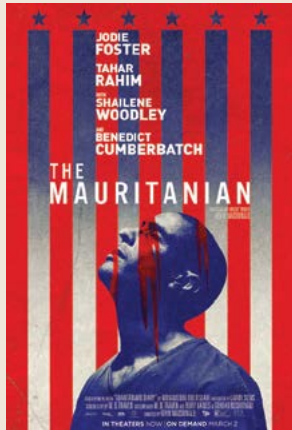
The *Bar Bulletin* publishes twice a month on the second and fourth Wednesday. Advertising submission deadlines are also on Wednesdays, three weeks prior to publishing by 4 pm.

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

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

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

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We are pleased and proud that our partner Nancy Hollander's dedication, brilliance, and hard work in representing Guantanamo prisoner Mohamedou Ould Slahi, along with her co-counsel, Teri Duncan, have resulted in a major motion picture, "The Mauritanian." The film is based on Slahi's memoir, "Guantanamo Diary," written while he was detained. It stars Jodie Foster (as Nancy) and Tahar Rahim (as Mohamedou), with Shailene Woodley (as Teri) and Benedict Cumberbatch (as Lt. Col. Couch). Foster and Rahim have been nominated for Golden Globe Awards and for British "BAFTA" awards.

The film had its theatrical release on February 12, and is now available for rental on Amazon, iTunes, and anywhere you purchase movies to rent.

OUR CONGRATULATIONS TO BOTH NANCY AND TERI FOR THEIR AMAZING WORK IN FREEING OUR CLIENT AND FOR THE RECOGNITION OF THEIR WORK IN THIS EXTRAORDINARY MOTION PICTURE.

“I am excited about the film. We all hope Mohamedou's true story of his torture, despair, hope and his ability to forgive, brought to the screen through the inspiration of director Kevin Macdonald, will bring Guantanamo back into the public eye. We must close it, end indefinite detentions without charge and apply our Constitutional guarantees to those we do charge.”

— NANCY HOLLANDER

*Nancy and Teri's successful defense of Mohamedou,
with our strong and sustained support, reflects our firm's
long-standing commitment to pursuing justice.*

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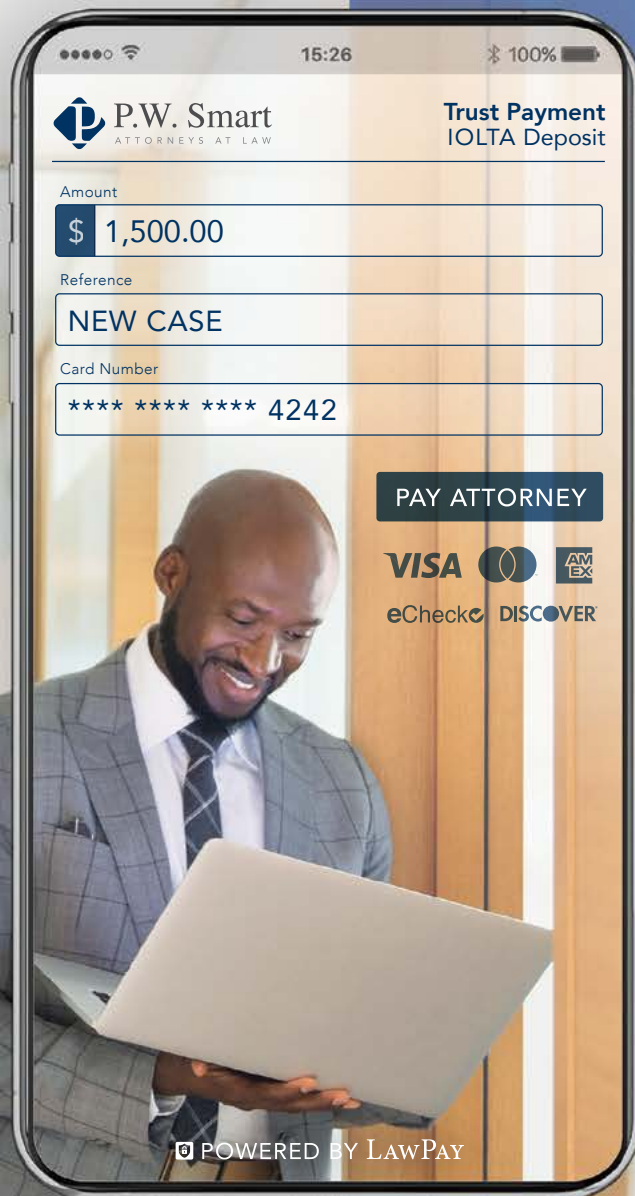
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