

# BAR BULLETIN

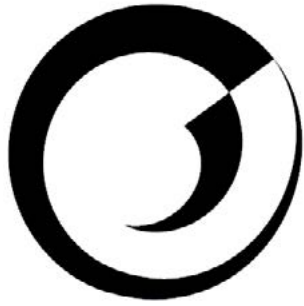
August 25, 2021 • Volume 60, No. 16



Watching the Spirits Rise, by Jenni Butler [etsy.com/shop/vistaglassonline](https://www.etsy.com/shop/vistaglassonline)

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# ALB

**PAIN MANAGEMENT  
& SPINE CARE**

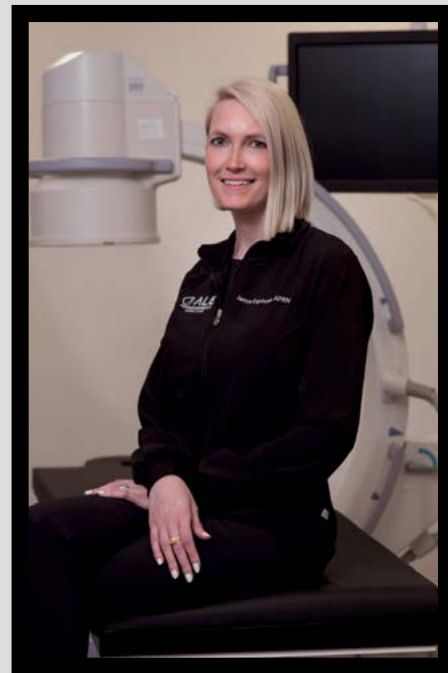
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## Meetings

### August

**25**  
**Natural Resources, Energy and Environmental Law Section Board**  
 Noon, teleconference

**26**  
**Trial Practice Section Board**  
 Noon, State Bar Center

**27**  
**Immigration Law Section Board**  
 Noon, teleconference

### September

**1**  
**Employment and Labor Law Section Board**  
 Noon, teleconference

**7**  
**Health Law Section Board**  
 9 a.m., teleconference

## Workshops and Legal Clinics

### August

**25**  
**Consumer Debt/Bankruptcy Workshop**  
 6-8 p.m., Video Conference  
 For more details and to register, call 505-797-6094

### September

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

**22**  
**Consumer Debt/Bankruptcy Workshop**  
 6-8 p.m., Video Conference  
 For more details and to register, call 505-797-6094

### October

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

**About Cover Image and Artist:** Jenni Butler has been creating original stained glass for more than 20 years in the East Mountains. She enjoys creating her own patterns and draws lots of inspiration from nature. Another one of her passions is painting. Her favorite mediums are acrylic and watercolors. Her inspiration comes from the endless splendor of nature. One of her favorite activities is hiking, being in the woods and near the water. Fantasy is another common theme in her work. You will see fairies, fanciful settings, lots of animals, both known and strange. Like most artists, there are many mediums she creates with. Besides Tiffany-style stained glass, she paints, sketches, creates mosaics and fuses glass for jewelry. She loves learning new art forms, whatever suits the project best!



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[www.sbnm.org](http://www.sbnm.org)



# Notices

## COURT NEWS

### New Mexico Supreme Court Rule-Making Activity

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

### Supreme Court Law Library

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

### U.S. District Court, District of New Mexico Public Notice Concerning Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of part-time U.S. Magistrate Judge B. Paul Briones is due to expire on March 20, 2022. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new four-year term. The duties of a magistrate judge in this court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court. Comments may be submitted by email to [MJMSP@nmcourt.fed.us](mailto:MJMSP@nmcourt.fed.us). Questions or issues may be directed to Monique Apodaca by calling 575-528-1439. Comments must be received by Sept. 6.

## Professionalism Tip

### With respect to other judges:

In all written and oral communications, I will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

### Public Notice Concerning Reappointment of Incumbent U.S. Magistrate Judge.

The current term of office of full-time U.S. Magistrate Judge Steven C. Yarbrough is due to expire on May 6, 2022. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term. The duties of a magistrate judge in this court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court. Comments may be submitted by email to [MJMSP@nmcourt.fed.us](mailto:MJMSP@nmcourt.fed.us). Questions or issues may be directed to Monique Apodaca by calling 575-528-1439. Comments must be received by Sept. 6.

### New Mexico Court of Appeals Applicants Announcement

Eight applications were received in the Judicial Selection Office at 5 p.m. on Aug. 9. The vacancy occurred, due to the appointment of the Judge Briana Zamora to the New Mexico Supreme Court, effective Aug. 6. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the court. The New Mexico Court of Appeals Nominating Commission convened on Aug. 23 at the Albuquerque New Mexico Court of Appeals satellite office located at 2211 Tucker NE, Albuquerque, to evaluate the applicants for this position. The commission meeting was open to the public. Any individual who wished to be heard about any of the candidates had an opportunity to be heard at the meeting. The names of the applicants in alphabetical order: **Aletheia V.P. Allen, Scott Thomas Fuqua,**

**Lauren Keefe, Mekko M. Miller, Olga Serafimova, Mark Daniel Standridge, Nick Sydow and Katherine Anne Wray.**

### Third Judicial District Court Candidate Announcement

The Third Judicial District Court Nominating Commission meeting convened by Zoom on July 28 at 9 a.m., and completed its evaluation of the seven applicants to fill the vacancy on the Third Judicial District Court due to the retirement of the Judge Lisa C. Schultz, effective June 30. The commission recommends the following candidates to Governor Michelle Lujan Grisham. The names of the applicants in alphabetical order: **Amy B. Bailey, Judge, Casey Bruce Fitch, Robert Lara Jr. and Judge Jeanne H. Quintero.**

### Ninth Judicial District Court Applicants Announcement

Nine applications were received in the Judicial Selection Office at 5 p.m. on Aug. 6. The vacancy occurred, due to the retirement of the Judge Matthew Chandler, effective Aug. 6. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the court. The Ninth Judicial District Court Judicial Nominating Commission will convene in-person beginning at 9 a.m. on Aug. 25 at the Curry County Courthouse located at 700 N. Main, Clovis, N.M. to evaluate the applicants for this position. The commission meeting is open to the public. Any individual who wishes to be heard about any of the candidates will have an opportunity to be heard at the meeting. Fully vaccinated individuals are not required to wear face masks, although they may choose to do so. Face masks must be worn at all times by individuals who are not fully vaccinated. The names of the applicants in alphabetical order: **Angelina Baca, Jake Boazman, Brett J. Carter, Christian P. Christensen, Benjamin S. Cross, Quentin Ray, Justin Lynn Robbs, Brian Scott Stover and Erin Sumrall Van Soelen.**

## Hidalgo County District Court New Clerk's Office Hours

Effective July 12, the new office hours for the Hidalgo County District Court Clerk's Office will be 8 a.m.–5 p.m., closing during the noon hour, Mondays through Thursdays. Because the Hidalgo County Court-house is closed to the public on Fridays, the Hidalgo County District Court Clerk's Office will be closed for in person services; however the Court will be available by telephone at 575-542-3411 and email at lordadmin@nmcourts.gov on Fridays during the office hours noted above.

## 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 <https://www.sbnm.org/covid> for a compilation of resources from national and local health agencies, canceled events and frequently asked questions. This page will be updated regularly during this rapidly evolving situation. Please check back often for the latest information from the State Bar of New Mexico. If you have additional questions or suggestions about the State Bar's response to the coronavirus situation, please email Executive Director Richard Spinello at [rspinello@sbnm.org](mailto:rspinello@sbnm.org).

## Resolutions and Motions

Resolutions and motions will be heard at 8 a.m. on Friday, Oct. 8, 2021, at the opening of the State Bar of New Mexico 2021 Annual Meeting and Member Appreciation Event. To be presented for consideration, resolutions or motions must be submitted in writing by Sept. 8 to Executive Director Richard Spinello PO Box 92860, Albuquerque, NM 87199; fax to 505-828-3765; or email [rspinello@sbnm.org](mailto:rspinello@sbnm.org).

## Rocky Mountain Mineral Law Foundation Board Appointment

The president of the Board of Bar Commissioners will make one appointment to the Rocky Mountain Mineral Law Foundation Board for a three-year term. The appointee is expected to attend the Annual Trustees Meeting and the Annual Institute, make

annual reports to the appropriate officers of their respective organizations, actively assist the Foundation on its programs and publications, and promote the programs, publication and objectives of the Foundation. Active status members in New Mexico wishing to serve on the board should send a letter of interest and brief resume by Aug. 31 to [info@sbnm.org](mailto:info@sbnm.org).

## New Mexico Judges and Lawyers Assistance Program

*NMJLAP is 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 Attorney Support Group

- Aug. 30 at 5:30 p.m.
- Sept. 6 at 5:30 p.m.
- Sept. 13 at 5:30 p.m.

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

## NMJLAP Committee Meetings

- Oct. 2 at 10 a.m.

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

## Employee Assistance Program Managing Stress Tool for Members

NMJLAP contracts with The Solutions Group, The State Bar's EAP service, to bring you the following: **FOUR FREE** counseling sessions per issue, per year.

— *Featured* —

**Member Benefit**



Clio's groundbreaking suite combines legal practice management software (Clio Manage) with client intake and legal CRM software (Clio Grow) to help legal professionals run their practices more successfully. Use Clio for client intake, case management, document management, time tracking, invoicing and online payments and a whole lot more.

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

- **My Stress Profiler:** A confidential and personalized stress assessment that provides ongoing feedback and suggestions for improving your response to 10 categories of stress, including change, financial stress, stress symptoms, worry/fear and time pressure.
- **Podcasts and videos available on demand:** Featuring experts in the

field, including Dan Goleman, Ph.D., emotional intelligence; Kristin Neff, Ph.D., self-compassion; and David Katz, M.D., stress, diet and emotional eating.

- **Webinars:** Covering a variety of topics including A Step Forward: Living Through and With the Grief Process, Creating a Mindfulness Practice, and Re-entering the Workforce.

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

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

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

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

#### **N.M. Well-Being Committee Meetings:**

- Sept. 28, at 1 p.m.
- Nov. 30, at 1 p.m.

#### **Upcoming Legal Well-Being in Action Podcast Release Dates:**

- Aug. 25: Fear
- Sept. 22: Stigma & Counseling
- Oct. 27th: Lawyering By Video Pt. 2

### **Legal Services and Programs Committee**

#### **Seeking Sponsors for Breaking Good High School Video Contest**

The Legal Services and Programs Committee will host the sixth annual Breaking Good Video Contest for 2021. The video contest aims to provide an opportunity for New Mexico high school students to show their creative and artistic talents while learning about civil legal services available to their communities. The LSAP Committee would like to invite members or firms of the legal community to sponsor monetary prizes awarded to first, second, and third place student teams and the first place teacher sponsor. The video contest sponsors will be recognized during the presentation of the awards, to take place on 2022 Law Day, and on all promotional material for the video contest. For more information regarding details about the prize and scale and the video contest in general, or additional sponsorship information, visit [sbnm.org/breakinggood](http://sbnm.org/breakinggood).

#### **Public Law Section Now Accepting Nominations for Lawyer of the Year Award**

Since 1996, the Public Law Section has presented the annual Public Lawyer Award to lawyers who have had distinguished careers in public service and who are not likely to be recognized for their contributions. The Public Law Section is now accepting nominations for the Public Lawyer of the Year Award for 2021. Visit [sbnm.org/publiclaw](http://sbnm.org/publiclaw) to view previous recipients and award criteria. Nominations are due at 5 p.m. on Aug. 31. Award presentation date and format to be determined but will be in the fall for hopeful in-person celebrations. The selection committee will consider all nominated candidates. Sign up for the Public Law Section at [sbnm.org/sections!](http://sbnm.org/sections!)

### **UNM SCHOOL OF LAW Law Library Hours**

Due to COVID-19, UNM School of Law is currently closed to the general public. The building remains open to students, faculty and staff, and limited in-person classes are in session. All other classes are being taught remotely. The law library is functioning under limited operations, and the facility is closed to the general public until further notice. Reference services are available remotely Monday through Friday, from 9 a.m.-6 p.m. via email at [UNMLawLibref@gmail.com](mailto:UNMLawLibref@gmail.com) or voicemail at 505-277-0935. The Law Library's document delivery policy requires specific citation or document titles. Please visit our Library Guide outlining our Limited Operation Policies at: <https://libguides.law.unm.edu/limitedops>.

### **OTHER BARS Seeking to Form New Mexico Chapter**

Seeking interest in forming a New Mexico chapter/affiliate of the Asian American Bar Association or South Asian American Bar Association. Interested individuals should email Reema Nandy at [Rnandy@bhfs.com](mailto:Rnandy@bhfs.com).



**Julie Neerken** passed away peacefully on Aug. 4 in Phoenix, Ariz., at age 71 after a five-year battle with cancer. She grew up in Kalamazoo, Mich., and attended the University of Michigan for both her bachelor's degree in English and her J.D. While at Michigan Law, she also met her husband, Jim Widland. Julie began her legal career in Illinois before striking out with her new

husband to New Mexico, where the two of them practiced law for decades. Julie specialized in employee benefits law and enjoyed a distinguished career that included numerous accolades such as appearing in *The Best Lawyers in America*, achieving the the highest Martindale-Hubbell rating, being named to Southwest Super Lawyers, and being listed in Chambers-USA. She was a director with the Rodey Law Firm and retired in 2015. While she appreciated the intellectual challenge of her chosen area of the law, she really enjoyed the fact that she did legal work that helped people. Julie was socially conscious and made sure to extend her professional activities into the realm of public service including work on behalf of the New Mexico Educational Retirement Board and the Chaparral Council of the Girl Scouts. She helped create the New Mexico IOLTA program, which provides legal services to people in need. Julie and Jim raised two children in Albuquerque: Kate Gallego, mayor of Phoenix, Ariz., and Thomas Widland, head of Systematic Macro Research at Two Sigma, a financial sciences company based in New York City. Julie was a loving and beloved mother. She was a treasured friend as well, who made deep connections that lasted across decades thanks to her kindness and generosity. She was an avid reader who was often reading several books at once on a wide variety of topics. And she was an animal lover (any dog who joined Julie's home won the canine lottery), and later in life she became an enthusiastic birder. She loved theater, music, and live concerts. Julie was preceded in death by her parents John and Nancy Neerken. She is survived by her husband of 42 years, Jim Widland, her children Kate Gallego and Tom Widland, her grandson Michael Gallego, her brother John Neerken, and her sister Katharine Maxey.

**(John) Ronald Boyd**, local lawyer, died peacefully with family by his side at his home in Canada de Los Alamos outside of Santa Fe on May 30. Ronald was born in Cleburne, Texas, on June 29, 1945. Growing up in Central Texas, he honed his practical joke skills. Attending the University of Texas, Austin, he completed his undergraduate studies and law degree. While living in Austin, he heard about a beautiful, culturally-rich, bohemian, small town in New Mexico. With his law degree and little else he moved to Santa Fe. Always industrious and capable of making friends of strangers, Ronald convinced a local lawyer, Al Sanchez, to take him on as an apprentice. After earning his bar license, Ronald opened his own practice. He was known as a generous lawyer who would take the most hopeless of cases, often times working for barter or without charge. Both a friend to, and a thorn in the side of, opposing counsel, court clerks, and judges alike, Ronald loved being a lawyer, working up until days before his death. He met Marjorie, a native of Chicago, in Santa Fe, introduced by mutual friends. They purchased a small historic "shotgun" house along the railroad in Lamy, N.M., where they brought home their two babies. Losing the house to fire, Ronald and Marjorie began working towards their dream of building a solar-heated, environmentally low-impact home on land outside of Santa Fe, where Marjorie continues to live. Ronald loved being a father, making time to coach his kid's sports teams, and keeping Lucienne and Ethan busy with silly adventures like chasing down florescent-colored golf balls he would hit into the arroyos and pinon trees around their home. Other than his family, practicing law, and golf, Ronald's other deep commitment was to his faith and guru, Mata Amritanandamayi, "Amma". Among fellow devotees and in the presence of Amma, Ronald found lifelong friends and peace from his recurring health struggles. He attended Satsang most Saturday evenings where he was able to express his love for music, first learning the finger cymbals, then drums, and finally guitar. On Sundays, he joined his friends from the Burrito Project at the Ashram to make lunches for Santa Fe's unhoused people. Known as the "plant guy," he shared his capable green-thumb by growing and then selling plants each year to raise money for the Amma Center of New Mexico. Ronald was preceded in death by his father, John Porter Boyd, his mother, Mary Kathryn Boyd Fountain, and his step-father, Lee Fountain. His is survived by his wife, Marjorie Sahlin Boyd, his children Lucienne Ohanian (Ara Ohanian) and Ethan Boyd, his brother, Gary Boyd (Mildred "Mickie" Boyd), and his grandchildren, Raffi and Sarkis.





## Administrative Office of the Courts

### Supreme Court Justice Briana H. Zamora takes the oath of office



*Supreme Court Justice Briana H. Zamora with her family after taking the oath of office. From left, father Ernest Zamora, daughter Addie, Justice Zamora, daughter Amara and mother Bernadette Sanchez.*

Supreme Court Justice Briana H. Zamora was sworn into office on Aug. 9 during a private ceremony in the Supreme Court courtroom.

Justice Zamora's family and fellow Supreme Court justices were in the courtroom as Chief Justice Michael Vigil administered the oath of office. Invited guests otherwise attended through two video viewing sights made available.

“As we face unprecedented challenges, I see opportunities,” said Justice Zamora. “With the

leadership of my fellow justices and the entire judiciary, I am confident that we can emerge from these difficult times with great resolve and a greater appreciation of our sense of fairness and justice.”

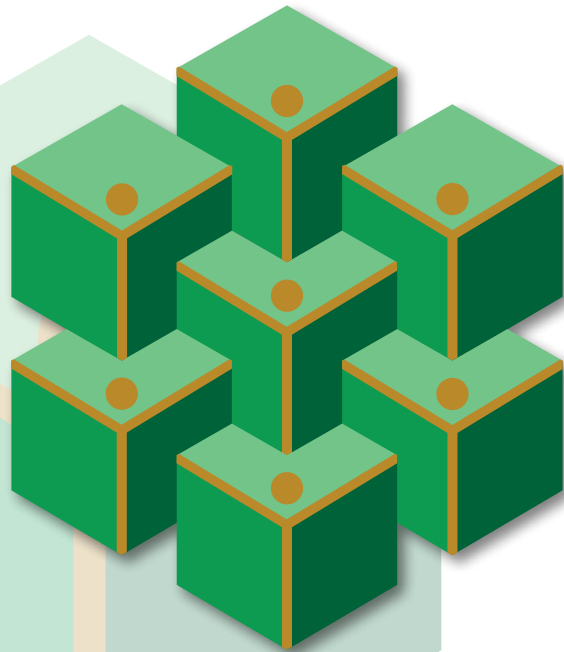
An Albuquerque native, Justice Zamora graduated from the University of New Mexico School of Law, graduating in 2000 with honors and received the Fredrick M. Hart Award in Commercial Law. Justice Zamora began her judicial career when she was appointed in 2008 to the Bernalillo County Metropolitan court bench. Justice Zamora spent a decade as a judge at the Second Judicial District Court presiding over adult criminal cases before being elected to the N.M. Court of Appeals in 2018.

The governor appointed Justice Zamora after Senior Justice Barbara J. Vigil retired earlier this summer.



# State Bar of New Mexico Interest on Lawyers Trust Accounts

## I O L T A Interest on Lawyers Trust Accounts



### *Funding Civil Legal Services in New Mexico*

#### **What is an IOLTA account?**

A pooled, interest-bearing demand deposit account used by lawyers to hold client funds.

#### **Where does IOLTA interest go?**

The interest generated on IOLTA accounts is remitted to the State Bar of New Mexico and distributed through an annual grant process conducted by the State Bar's Access to Justice Fund Grant Commission.

#### **What do the grants fund?**

The Commission awards grants to Civil Legal Service Providers throughout New Mexico. These organizations provide civil legal assistance to low-income New Mexicans. In the 2019-2020 grant cycle, the Commission awarded \$675,000 to civil legal service programs. Of that amount, \$270,000 came from IOLTA funding.

#### **How can I help?**

By choosing a bank with the highest interest rates for IOLTA, you are increasing the funding for civil legal services in New Mexico. To find out which banks offer the highest rates check our website at <https://www.sbnm.org/Licensing-Regulatory/IOLTA> or email [iolta@sbnm.org](mailto:iolta@sbnm.org).

*Leadership Circle banking institutions go above and beyond the eligibility requirements of the Rule to support the State Bar in its mission to ensure access to critically needed legal aid for low-income New Mexicans. These financial institutions pay an interest rate equal to the higher of 55% of the Federal Funds Target rate OR 0.35%.*

*Leadership Circle*



**WELLS FARGO**

---

Century Bank of Santa Fe

Pinnacle Bank

BMO Harris

**THE NEW MEXICO ACCESS TO JUSTICE COMMISSION**, as a commission of the New Mexico Supreme Court, sets priorities for civil legal providers around the state, makes recommendations to the Supreme Court to improve court services, and troubleshoots legal service issues statewide as they arise. The ATJ Commission does not directly fund any civil legal service providers.

### ■ **Use your IOLTA account to make a difference**

As attorneys, we are morally, ethically, and professionally obligated to do pro bono work and make financial contributions when possible. However, there is another easy way to help that does not add to our workload or stretching our wallets. We can actually help serve those in need through a mechanism that many of us already have set up as a part of our practice, our IOLTA Accounts.

### ■ **History of the IOLTA Program**

IOLTA Accounts or “Interest on Lawyers Trust Accounts” are specialized accounts for lawyers to hold their client’s money. When client funds cannot practically earn income for the client, the funds are deposited in a pooled IOLTA account. The income generated on the pooled funds is used for civil legal aid and other programs that support access to justice for low-income people. New Mexico’s rules governing our professional conduct set forth strict requirements regarding the holding of our client’s funds, see Rule 16-115 NMRA, and the rules governing the New Mexico bench and bar also specifically outline the strict requirements and regulation of attorney trust accounts or IOLTA Accounts. See Rule 24-109 NMRA. Like a regular bank account, the account will earn interest based on the amount of money held in the account. However, the interest on the IOLTA Account does not belong to the attorney, law firm or to an individual client in the pooled trust account. So where does this interest go? In the 1980s, the American Bar Association proposed an IOLTA Program, where the interest accrued by these accounts would be used to fund law-related public service activities. New Mexico adopted the proposed IOLTA Program. The accrued interest from lawyers’ IOLTA Accounts is collected by the State Bar of New Mexico and deposited into the Access to Justice Grant Fund, which provides yearly grants to organizations that provide free or low-cost civil legal services to New Mexicans.

### ■ **How do IOLTA Accounts work?**

Rule 24-109 NMRA sets out the special rules governing IOLTA Accounts and how banks must administer them. Pursuant to this rule, the banking institution holding the IOLTA Account must pay the same interest rate as it would on any other equivalent account. However, banking institutions may agree to pay a higher rate. To identify such institutions, the State Bar has formed a Leadership Circle comprised of those institutions who opted to pay an interest rate equal to 55% of the Federal Funds Target rate OR 0.35%, whichever is higher.

### ■ **What banking institutions are in the Leadership Circle?**

The following banking institutions have agreed to go beyond the eligibility requirements for IOLTA Accounts:

Enterprise Bank & Trust  
Wells Fargo  
Century Bank of Santa Fe

Pinnacle Bank  
BMO Harris

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## ■ **How is the interest on IOLTA Accounts used?**

The need for civil legal services in New Mexico is tremendous. Through our civil legal service providers, IOLTA funding keeps people sheltered, employed, and supporting their children. The organizations using these funds handle cases involving eviction, foreclosure, child custody, guardianship, consumer debt, immigration, and restraining orders against an abusive partner.

## ■ **What can I do?**

One of the biggest ways an attorney or law firm can impact the IOLTA program is by ensuring your IOLTA Account is with one of the banks in the Leadership Circle. These are the banks that have committed to paying a much higher interest on IOLTA Accounts than is otherwise required.

For example, when Wells Fargo committed to the higher interest rate and joined the Leadership Circle in 2019, the interest rate it paid on the IOLTA Accounts went up from 0.2% to 1.0%. This resulted in an increase of approximately \$30,000 per month to the IOLTA Program to fund civil legal services. Changing your IOLTA Account to one of the banks identified in the Leadership Circle is a direct and painless way to substantially increase funding for organizations providing free civil legal services to people in our state.

## ■ **Why should I act now to help with this effort?**

The answer, unsurprisingly, is COVID-19. As a result of the pandemic, we are at a moment where access to the civil justice system for those without the ability to pay for a lawyer is critical. With a projected rise in evictions and foreclosures, once state and federal stays and moratoria are lifted, and an increase in domestic violence during the pandemic, the safety and stability of many New Mexicans depends on civil legal help. Changing your IOLTA account is a simple way to provide some of this much-needed help.

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**For questions or more information about the IOLTA program  
with the State Bar of New Mexico, please contact  
Kate Kennedy at 505-797-6059 or [kkennedy@sbnm.org](mailto:kkennedy@sbnm.org).**



State Bar of New Mexico  
Interest on Lawyers  
Trust Accounts

Resources:  
Rule 24-109 NMRA  
<https://www.sbnm.org/Licensing-Regulatory/IOLTA/>



# No One Escapes Fear

By Briggs Cheney

**A**s I begin this, I am set for trial in a case which has been pending for almost four years. The opposing counsel are two of the best; one is a lawyer I practiced with and mentored years ago and who left our firm to make his name in the plaintiff's world, and he has made it big with more fast cars than I have fears to prove it.

I am scared. I am afraid. It is a significant and difficult case. Should my client prevail? I don't know. But what if we don't? what if I don't do a good job? What if I make a mistake? What if these really good lawyers *hand me my head on a platter*? What if that lawyer I mentored, humiliates me? I could go on with *what ifs*. I am afraid.

What I am feeling - just 40 days out from trial - comes and goes in intensity and can be described by the three acronyms of **FEAR**. There are moments of "**F**...k **E**verything **A**nd **R**un" when I feel physically scared and almost in a state of panic. On those occasions, I am overwhelmed by "**F**uture **E**vents **A**ppearing **R**eal."

I want to run, but I am a lawyer. I have practiced 49 years; I can't be afraid. I am not supposed to be afraid. But there is no escaping it, I am afraid.

In those moments - and they come and go - I force myself to remember the third acronym of fear. "**F**orgetting **E**verything's **A**ll **R**ight."

Confronting fear is a uniquely personal adventure. Each of us has to find our own way. Sometimes it helps to see how others have managed and found their way through fear.

More than twenty-five years ago, I was called by a lawyer I had never met, Meg Davidson, asking a favor - if I would meet with her and her friend. A very small favor. Little did I know at the time that Meg would repay that favor with one of the greatest gifts I have ever received.

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**Whatever is scaring  
you, let yourself feel  
it and when you let  
yourself feel it, then  
you deal with it ...**

---

Meg was a lovely human being and a great lawyer; a partner with Keleher and McLeod. Not all that long after meeting with Meg and her friend, Meg was diagnosed with cancer, and she started her battle with that disease. A friendship had been kindled out of that small favor she asked of me and we met and talked not infrequently following her

diagnosis. It is important to note that Meg had so many friends - she didn't let herself be alone.

Meg was a spiritual person and she shared with me the story behind a simple bracelet she had discovered in a wonderful *hole in the wall* jewelry store just off the Plaza in Santa Fe - a charm that passed through a one-inch tubular charm. On one end of the charm was a raised male lion and on the other end were two raised crouching female lions. Engraved on the charm in between the male and female lions was the prey. The charm has a name - *Run Toward the Roar*.



The story goes that when lions hunt, the male lion separates from the female lions and when the male lion roars, the prey, in fear, run away from the roar and into the clutches of the female lions that do the killing. The lesson - run toward what scares you.

Meg spent more than five years running toward her cancer and doing so with such grace before she left us in March of 2003. We all miss her.

Not long after meeting Meg, I met *Biker Steve* in a twelve-step meeting. Biker Steve is gone too, but he was known for many pieces of wisdom in the recovery world, and a favorite for me was his mantra, “Feel Deal Heal.” I didn’t understand it at first, and it was some years into my own recovery before I realized the part *fear* had played in my life and the meaning behind *Biker’s* mantra.

Whatever is scaring you, let yourself *feel* it and when you let yourself *feel* it, then you *deal with it* – you find a small sense of freedom and strength in sitting in the fear - you get better, you can *heal*.

Just recently – as I have been writing this piece - I met a young man, twenty-one and a Canadian. We’ll call him *Josh*. Josh and a close friend’s daughter met at McGill University in Montreal and Josh was visiting Albuquerque. After a fun dinner in Corrales where we talked about all matters of things in life and as we were driving home, from the back seat Josh asked me, “what piece of wisdom would you share with me.” I enjoy young folks and had many questions for them over dinner about their lives, where they hoped to go in life, their hopes and dreams, so Josh’s question of me was a fair one, but not an easy one *out of left field* (actually from the back seat). My answer was okay under the circumstances, but the next morning as I sipped my first cup of coffee and found stillness, my answer from the evening before found some clarity. I texted Josh the following: “Don’t do life alone. Find a *Something Else*. Embrace ambiguity and the Joy of not knowing.”

Where did that moment of clarity come from? It was a particularly good cup of coffee – a blend of one-third *Café du Mond* with chicory from New Orleans and two-thirds *New Mexico Pinion Coffee* vanilla/bourbon from 4<sup>th</sup> Street right here in the Q. Or maybe it was *Something Else*. Here is where it gets personal.

No one escapes fear. It is how we choose to manage fear; or fear will manage us.

If you are “doing life alone”, if **you** are **in charge** and **responsible** for outcomes in your life – for how your life plays out – then ambiguity and the unknown is **your fear**.

There is no reason to debate the reality that **none** of us control that much in our lives. Some things, yes, but the majority of what goes on in and around our lives is beyond our control.

How does one embrace ambiguity and find joy in not knowing? Do you want to know **when** and **how** you are going to die? Some people will answer that question “yes” and that is not an irrational answer. I prefer *Delicious Ambiguity* (Google “Gilda Radner and ambiguity”).

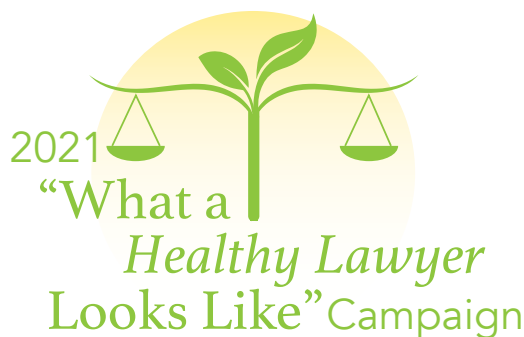
If we can admit we are not in control of the majority of what goes on in and around our lives, then who is? Something Else?

Yes, I am afraid and scared about how my case will play out. But *Biker Steve* taught me to feel that fear and Meg’s lesson for me was to run toward that fear. Something Else takes it from there. *Delicious Ambiguity*.

***Briggs Cheney:***

*Not by design but happenstance, Briggs’ career in the law has been that of being a lawyer’s lawyer.*

*Following graduation from law school at UNM and for the better part of his 49 years of practice, Briggs has had the honor of helping lawyers throughout New Mexico - defending them in the civil arena and guiding them through the disciplinary process. Briggs has been recognized for his legal skills in representing lawyers and he has been a leader in local, state and national bars. He has tirelessly helped the struggling and suffering lawyer as others helped him.*



## Thank you, Feferman, Warren and Mattison!



Throughout the country, cy pres awards have been utilized to fund vital civil legal services. We are grateful to **Feferman, Warren and Mattison** for directing cy pres funds to Equal Access to Justice this year. These awards play a significant role in ensuring meaningful access to justice for all New Mexicans. Thank you!

**Equal Access to Justice** is an ideal recipient of cy pres awards! To learn more about designating Equal Access to Justice as the recipient of a cy pres award, contact us today: **(505) 339-8096 / heather@ej-nm.org / www.ej-nm.org**



EQUAL  
ACCESS TO  
JUSTICE

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State Bar of New Mexico  
Judges and Lawyers  
Assistance Program



The  
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Group

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

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

[www.sbnm.org](http://www.sbnm.org)

# Opinions

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

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

## Effective July 30, 2021

### PUBLISHED OPINIONS

|              |                   |                |            |
|--------------|-------------------|----------------|------------|
| A-1-CA-37792 | State v. J French | Reverse/Remand | 07/27/2021 |
| A-1-CA-38812 | State v. R Ayon   | Reverse/Remand | 07/27/2021 |
| A-1-CA-39220 | State v. N Julg   | Affirm         | 07/27/2021 |
| A-1-CA-38499 | CYFD v. Ruben C   | Reverse/Remand | 07/29/2021 |

### UNPUBLISHED OPINIONS

|              |                                    |                |            |
|--------------|------------------------------------|----------------|------------|
| A-1-CA-37417 | State v. F Granados                | Affirm         | 07/26/2021 |
| A-1-CA-38855 | M Jolley v. Rush Truck Leasing INC | Reverse/Remand | 07/26/2021 |
| A-1-CA-39030 | State v. O Romero                  | Affirm         | 07/26/2021 |
| A-1-CA-37155 | J Wilcox v. GEO Group, Inc         | Affirm         | 07/27/2021 |
| A-1-CA-38515 | State v. M Hart                    | Affirm         | 07/28/2021 |
| A-1-CA-38679 | State v. H White                   | Affirm         | 07/28/2021 |
| A-1-CA-38347 | State v. S Crumbley                | Reverse/Remand | 07/29/2021 |
| A-1-CA-38435 | E Powell v. V Powell-Worley        | Reverse/Remand | 07/29/2021 |
| A-1-CA-38436 | E Ross v. V Powell-Worley          | Reverse/Remand | 07/29/2021 |
| A-1-CA-38542 | State v. D Griffin                 | Reverse/Remand | 07/29/2021 |
| A-1-CA-38629 | State v. E Delagarza               | Affirm         | 07/29/2021 |
| A-1-CA-38778 | State v. J Evans                   | Affirm         | 07/29/2021 |
| A-1-CA-38790 | M Fresques v. R Thomas             | Affirm         | 07/29/2021 |
| A-1-CA-39375 | State v. J Hernandez               | Affirm         | 07/29/2021 |
| A-1-CA-38058 | Wells Fargo Bank v. K Kline        | Affirm         | 07/30/2021 |
| A-1-CA-38955 | J Adams v. C Doss, M.D.            | Affirm         | 07/30/2021 |
| A-1-CA-39371 | CYFD v. Daniel O.                  | Affirm         | 07/30/2021 |

## Effective August 6, 2021

### UNPUBLISHED OPINIONS

|              |                               |                |            |
|--------------|-------------------------------|----------------|------------|
| A-1-CA-39372 | CYFD v. Ruben B               | Affirm         | 08/03/2021 |
| A-1-CA-37979 | State v. R Romero             | Affirm         | 08/05/2021 |
| A-1-CA-38369 | State v. E Gaytan             | Reverse/Remand | 08/05/2021 |
| A-1-CA-38528 | A Sinard v. J Wortley         | Affirm/Reverse | 08/05/2021 |
| A-1-CA-39470 | J Jackson v. A-H Tires, et al | Dismiss        | 08/05/2021 |
| A-1-CA-37980 | State v. C Pacheco            | Affirm         | 08/06/2021 |

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

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



# Legal Education

## August

- 26 **What on Earth is the Wage? The State of Play on Prevailing Wages**  
1.5 G  
Live Webinar  
American Immigration Lawyers Association  
www.aila.org
- 27 **REPLAY: A Look at the Practice of Law Through the Decades: A Panel Discussion of Women Attorneys Practicing Law in New Mexico from 1980 to the Present (2020)**  
1.5 G  
Live Replay Webinar  
Center for Legal Education of NMSBF  
www.sbnm.org
- 29 **Current Issues 2021**  
14.7 G  
Live Webinar  
Center for Public Utilities NMSU  
business.nmsu.edu
- 31 **Trust and Estate Planning for Firearms**  
1.0 G  
Teleseminar  
Center for Legal Education of NMSBF  
www.sbnm.org
- 31 **Hot Topics in Marriage-Based Adjustment of Status**  
1.5 G  
Live Webinar  
American Immigration Lawyers Association  
www.aila.org

## September

- 2 **Solutions for “Stuck” Employment-Based Cases**  
1.5 G  
Live Webinar  
American Immigration Lawyers Association  
www.aila.org
- 9 **APA Litigation: How to Take USCIS Denial to Federal Court**  
1.5 G  
Live Webinar  
American Immigration Lawyers Association  
www.aila.org
- 10 **32nd Annual Appellate Practice Institute**  
5.9 G, 1.0 EP  
In-Person and Live Webinar  
Center for Legal Education of NMSBF  
www.sbnm.org
- 14 **Advanced Strategies for EB-1 RFEs**  
1.5 G  
Live Webinar  
American Immigration Lawyers Association  
www.aila.org
- 16-17 **2021 Employment & Labor Law Institute**  
5.4 G, 1.3 EP  
Live Webcast/Live Seminar,  
Center for Legal Education of NMSBF  
www.sbnm.org
- 22 **Mandatory Succession Planning: It Has To Happen, But It Doesn’t Have To Be That Difficult**  
1.0 EP  
Live Webinar  
Center for Legal Education of NMSBF  
www.sbnm.org
- 22 **Clear and Present Danger! Protecting Your Firm from Malpractice Exposure**  
1.0 EP  
Live Webinar  
Attorney Protective  
www.attorneyprotective.com
- 23 **Bad Review? Bad Response? Bad Idea! - Ethically Managing Your Online Reputation**  
1.0 EP  
Live Webinar  
Center for Legal Education of NMSBF  
www.sbnm.org
- 23 **Breaking Through the Backlog: Employment-Based Visa Interviews After COVID**  
1.5 G  
Live Webinar  
American Immigration Lawyers Association  
www.aila.org
- 24 **Changing Minds Inside and Out of the Courtroom**  
1.0 G  
Live Webinar  
Center for Legal Education of NMSBF  
www.sbnm.org
- 28 **Staying Out of the News: How To Avoid Making the Techno-Ethical Mistakes that Put You on the Front Page**  
1.0 EP  
Live Webinar  
Center for Legal Education of NMSBF  
www.sbnm.org
- 29 **10 Steps to Client Relationship Mastery**  
1.0 EP  
Live Webinar  
Center for Legal Education of NMSBF  
www.sbnm.org

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

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|--|---|
| <p>30    <b>Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.sbnm.org</p> | <p>30    <b>Crafting a Winning Direct Examination: Practical Tips and Examples</b><br/>1.5 G<br/>Live Webinar<br/>American Immigration Lawyers Association<br/>www.aila.org</p> |
|--|---|

## October

- |   |  |  |
|---|--|--|
| <p>1    <b>Balloon Fiesta CLE</b><br/>11.0 G, 1.0 EP<br/>Live Webinar<br/>Destination CLEs<br/>907-231-2111</p>   | <p>12    <b>“The Tiger King Case” - Murder for Hire: The Prosecution of Joseph Maldonado-Passage</b><br/>3.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.sbnm.org</p> | <p>20    <b>Whistleblowers Are Heroes: Bringing Medicaid Fraudsters and Elder Abusers to Justice</b><br/>2.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.sbnm.org</p> |
| <p>5    <b>How To Stay “Professional” When Videoconferencing: It’s Not As Hard As You Think!</b><br/>1.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.sbnm.org</p> | <p>13    <b>Child Sex Abuse Cases: Pretrial Strategies and Proceeding to Trial</b><br/>2.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.sbnm.org</p>                   | <p>21    <b>Annual New Mexico Family Law Retreat</b><br/>8.0 G<br/>Live Webinar<br/>New Mexico Legal Group<br/>505-843-7303</p>  |

## November

- |   |  |  |
|---|--|--|
| <p>2    <b>The O.J. Simpson Trial: Attorney Blunders, Bungles and Bloopers – PLUS Amazing PowerPoint Trial Tips</b><br/>3.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.sbnm.org</p> | <p>5    <b>Cross-Examination: The Big Picture and the Three Keys to Question Formation at Trial and at Depositions</b><br/>1.5 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.sbnm.org</p> | <p>30    <b>Me Too: Sexism, Bias, and Sexual Misconduct in the Legal Profession</b><br/>1.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.sbnm.org</p> |
| <p>4    <b>Copyright + Art: Told Through Colorful Stories and Original Artwork</b><br/>2.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.sbnm.org</p>                                  | <p>9    <b>How To Make Cross-Examination An Open Book Exam at Trial and at In-Person or Online Depositions</b><br/>1.5 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.sbnm.org</p>         |  |

# Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

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## CLERK'S CERTIFICATE OF SUSPENSION

---

**Ryan H. McKelvey**  
McKelvey Law Firm, PC  
4420 Prospect Avenue, NE  
Albuquerque, NM 87110

**Jillian R. Mershon**  
Kerrigan and Associates  
6801 N. Broadway,  
Suite 101  
Oklahoma City, OK 73116  
and  
Kerrigan and Associates  
1216 Burkshire Terrace  
Norman, OK 73072

**Ashley N. Minton**  
208 Paseo Vista Loop, NE  
Rio Rancho, NM 87124  
and  
Husch Blackwell LLP  
4801 Main St.,  
Suite 1000  
Kansas City, MO 64112

**Matthew J. O'Neill**  
Whitener Law Firm, PC  
4110 Cutler Avenue, NE  
Albuquerque, NM 87110

**Nels Orell**  
5127 San Adan Avenue, NW  
Albuquerque, NM 87120

**Tara Jean Pazo**  
NM Children, Youth &  
Families Dep't  
1031 Lamberton Place, NE  
Albuquerque, NM 87107

**Monique M. Rangel**  
John Wayne Higgins &  
Associates  
515 Roma Avenue, NW  
Albuquerque, NM 87102

**Jeffrey R. Salberg**  
Jorgensen & Salberg, LLP  
500 Marquette Ave. NW,  
Suite 1200  
Albuquerque, NM 87102

**Orlando A. Sandoval**  
Sandoval Law Firm  
PO Box 27663  
Albuquerque, NM 87125

**Richard A. Sandoval**  
Sandoval Firm  
1442-D S. St. Francis Drive  
Santa Fe, NM 87505

**John L. Walker**  
Law Offices of the Public  
Defender  
505 Marquette Ave. NW,  
Suite 120  
Albuquerque, NM 87102  
and  
PO Box 1462  
Albuquerque, NM 87103

**Howard C. Williams III**  
Law Firm of Howard Wil-  
liams  
1650 Hotel Circle N.,  
Suite 210  
San Diego, CA 92108  
and  
Law Firm of Howard  
Williams  
3073 Karnes Way  
San Diego, CA 92117

---

## CLERK'S CERTIFICATE OF WITHDRAWAL

---

Effective July 20, 2021:  
**Elizabeth Ann Alongi**  
5080 N. 40th Street,  
Suite 245  
Phoenix, AZ 85018

---

## CLERK'S CERTIFICATE OF SUSPENSION

---

Effective July 22, 2021:  
**Julia Lacy Armstrong**  
Armstrong & Armstrong, PC  
4630 NDCBU  
218 Beimer Street  
Taos, NM 87571

---

## CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

---

Effective July 16, 2021:  
**Charles Llewellyn Davis**  
2738 San Diego Avenue, SE  
Albuquerque, NM 87106  
505-934-7525  
charlesldavisabq@gmail.com

---

## CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS AND CHANGE OF ADDRESS

---

Effective June 29, 2021:  
**David W. Duncan**  
2511 Borrego Drive  
Durango, CO 81301  
970-759-6610  
electra735@hotmail.com

---

## CLERK'S CERTIFICATE OF LIMITED ADMISSION

---

On July 9, 2021:  
**Paul E. Haidle**  
City of Albuquerque Legal  
Department  
PO Box 2248  
One Civic Plaza, NW (87102)  
Albuquerque, NM 87103  
505-768-4688  
phaidle@cabq.gov

---

## CLERK'S CERTIFICATE OF SUSPENSION

---

Effective July 28, 2021:  
**Hayden Hatch**  
Law Office of Joel A. Levine  
1515 W. Koenig Lane,  
Suite 100  
Austin, TX 78756

---

## CLERK'S CERTIFICATE OF SUSPENSION

---

Effective July 28, 2021:  
**Bennett H. Kenzie**  
8409 34th Street W.  
Saint Louis Park, MN 55426

---

## CLERK'S CERTIFICATE OF NAME CHANGE

---

As of July 8, 2021:  
**Kimberly Molina Key**  
f/k/a **Kimberly Morgan**  
**Molina**  
Cotton Bledsoe Tighe &  
Dawson PC  
500 W. Illinois, Suite 300  
Midland, TX 79701  
432-684-5782  
kmolina@cbtd.com

---

## CLERK'S CERTIFICATE OF NAME AND ADDRESS CHANGE

---

As of June 29, 2021:  
**Raoaa Riad King**  
f/k/a **Raoaa Riad Edmon**  
Office of the El Paso District  
Attorney  
500 E. San Antonio Avenue  
#201  
El Paso, TX 79901  
701-864-0180  
r.king@epcounty.com

---

## CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS AND CHANGE OF ADDRESS

---

Effective June 1, 2021:  
**Camille P. Koehler**  
2828 Maximillian Road, NW  
Albuquerque, NM 87104

---

## CLERK'S CERTIFICATE OF NAME AND ADDRESS CHANGE

---

As of June 2, 2021:  
**Lisa R. Kovelman**  
f/k/a **Lisa R. Abeyta**  
Kovelman Law LLC  
PO Box 53308  
Albuquerque, NM 87153  
505-401-3432  
kovelmanlaw@gmail.com

**CLERK'S CERTIFICATE  
OF WITHDRAWAL AND  
CHANGE OF ADDRESS**

Effective June 30, 2021:

**Joan E. Kozon**262 Meetinghouse Road  
South Chatham, MA 02659**CLERK'S CERTIFICATE  
OF REINSTATEMENT  
TO ACTIVE STATUS**

Effective July 23, 2021:

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# Advance Opinions

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From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Supreme Court

**Opinion Number: 2020-NMSC-008**

No: S-1-SC-36865 (filed April 23, 2020)

STATE OF NEW MEXICO,  
Plaintiff-Petitioner,  
v.  
CRYSTAL ORTIZ,  
Defendant-Respondent.

**ORIGINAL PROCEEDING ON CERTIORARI**

STAN WHITAKER, District Judge

Released for Publication August 11, 2020.

HECTOR H. BALDERAS,  
Attorney General  
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for Respondent

## Opinion

**Judith K. Nakamura,  
Chief Justice.**

{1} If a criminal defendant wants a duress instruction then they must admit that they committed the criminal act. *See Esquibel v. State*, 1978-NMSC-024, ¶ 9, 91 N.M. 498, 576 P.2d 1129, *overruled on other grounds by State v. Wilson*, 1994-NMSC-009, ¶ 6, 116 N.M. 793, 867 P.2d 1175. Defendant Crystal Ortiz was convicted of four crimes, two of which were related to her driving her vehicle into another person. At her trial, Ortiz requested the jury be instructed to consider whether she acted under duress when she struck the person. However, because she testified at trial that she hit the person accidentally, the district court denied her duress instruction. The Court of Appeals reversed and determined that she was entitled to a duress instruction. *State v. Ortiz*, 2018-NMCA-018, ¶ 16, 412 P.3d 1132. We reverse the Court of Appeals.

### I. BACKGROUND

{2} A basic statement of the facts and procedural history of this case is provided below. Additional facts are provided as necessary in the discussion section.

{3} A grand jury indicted Ortiz on five counts. The crimes charged were (1) causing great bodily injury by vehicle (DWI), a violation of NMSA 1978, Section 66-8-

101(B), (C) (2004, amended 2016); (2) aggravated battery with a deadly weapon (a vehicle), a violation of NMSA 1978, Section 30-3-5(A), (C) (1969); (3) leaving the scene of an accident where great bodily injury had occurred, a violation of NMSA 1978, Section 66-7-201(A), (C) (1989); (4) aggravated driving while under the influence of intoxicating liquor, a violation of NMSA 1978, Section 66-8-102(D) (2010, amended 2016); and (5) criminal damage to property amounting to \$1,000 or less, a violation of NMSA 1978, Section 30-15-1 (1963).

{4} The indictment flowed from an incident in which Ortiz, while intoxicated, drove her vehicle (an SUV) into Brandon Hughes, her ex-boyfriend. After striking Hughes, Ortiz crashed her SUV into a fence where it became stuck. Hughes' leg was severely injured. Ortiz fled from the scene on foot and was located by the police a short time later.

{5} On the morning of the first day of trial, Ortiz alerted the district court that she wanted the jury instructed on duress because Hughes engaged in threatening conduct. The court determined that it would resolve the question “whether there’s evidence to support [the giving of the duress instruction] or not once we get to that point.”

{6} During trial, Ortiz explained that she struck Hughes accidentally and amid a flurry of chaotic activity precipitated

by Hughes who made unwanted sexual advances and behaved aggressively. Ortiz explained that these advances were alarming to her because Hughes had raped her during the time they dated. While testifying for the State, Hughes denied these allegations and gave an account of the incident that suggested that Ortiz hit him purposefully because she was angry with him. He explained that Ortiz drove her SUV onto the sidewalk, hit him, and crashed through the fence with him on the hood.

{7} When, at the end of trial, the district court returned to the question of Ortiz’s entitlement to a duress jury instruction, the court initially expressed agreement with the State’s perspective that, because Ortiz claimed that she struck Hughes accidentally, she could not claim duress as a defense to any charge predicated on the fact that Hughes was struck. Ultimately, however, the court concluded that Ortiz was not entitled to a duress instruction because the law is settled that the accused’s “[f]ear of immediate harm must be viewed together with whether a reasonable person in the defendant’s position would have acted the same way under the circumstances” and that “a reasonable person would not violate the law if legal alternatives are available.” *State v. Castrillo*, 1991-NMSC-096, ¶ 15, 112 N.M. 766, 819 P.2d 1324, *holding modified by State v. Baca*, 1992-NMSC-055, ¶ 15, 114 N.M. 668, 845 P.2d 762. The district court determined that Ortiz did not act reasonably by driving her SUV into Hughes as she could have taken less drastic action to escape whatever threat to her he purportedly presented.

{8} The jury convicted Ortiz on all but one of the counts—criminal damage to property. She appealed all counts except her conviction for leaving the scene of an accident. *Ortiz*, 2018-NMCA-018, ¶ 1.

{9} The Court of Appeals affirmed Ortiz’s aggravated DWI conviction, but reversed her convictions for great bodily injury by vehicle and aggravated battery. *Id.* ¶ 27. The Court held that the district court wrongly denied Ortiz the opportunity to present a duress defense as to these two counts and reasoned that Ortiz offered sufficient evidence at trial—Ortiz’s rape allegations and assertions that Hughes made unwanted sexual advances and behaved aggressively on the night of the incident—to warrant giving her jury the duress instruction. *Id.* ¶¶ 16-17. The Court remanded for a new trial. *Id.* ¶ 27.

{10} Ortiz did not petition this Court for a writ of certiorari to challenge the Court of Appeals’ affirmance of the aggravated DWI conviction. The State did ask this

Court to review the Court of Appeals' decision to reverse the great bodily injury and aggravated battery convictions. Our jurisdiction is uncontested. See N.M. Const. art. VI, § 3; NMSA 1978, § 34-5-14(B) (1972).

## II. DISCUSSION

{11} The specific question presented is whether Ortiz's jury should have been instructed that duress was a possible defense to causing great bodily injury by vehicle and aggravated battery. The State argues that Ortiz's contention that she accidentally perpetrated the criminal acts at issue here precludes her from asserting duress as a defense to the crimes. We agree, and to understand why, we clarify the law governing duress and closely examine the record and evidence presented at trial.

### A. Duress

{12} A defendant seeking a duress instruction must make "a prima facie showing that he was in fear of immediate and great bodily harm to himself or another and that a reasonable person in his position would have acted the same way under the circumstances." *Castrillo*, 1991-NMSC-096, ¶ 4. By asserting duress, the accused admits performing the crime but seeks excusal from punishment on grounds that the action was compelled by an imminent threat of serious harm to the accused or another. See Rule 14-5130 NMRA (instructing that duress necessarily involves the commission of crime and violation of the law); *Esquibel*, 1978-NMSC-024, ¶ 9; *State v. Rios*, 1999-NMCA-069, ¶¶ 12, 17, 127 N.M. 334, 980 P.2d 1068. These New Mexico authorities hint at the conclusion we reach here—to claim duress, you must admit committing the criminal act. Case law from other jurisdictions reaches the same conclusion.

{13} "[A] person who commits a crime under duress makes a choice to violate the law, even though that choice is compelled." *State v. Daoud*, 679 A.2d 577, 581 (N.H. 1996) (internal quotation marks and citation omitted). They know their "actions will lead to injury or that [their] purpose is to cause injury." *United States v. Solorzano-Rivera*, 368 F.3d 1073, 1079-80 (9th Cir. 2004) (internal quotation marks and citation omitted). The assertion of duress necessarily presupposes "that the defendant has voluntarily performed the criminal act[.]" *United States v. Johnson*, 956 F.2d 894, 897 (9th Cir. 1992). The defendant asserting "duress admits that [they] committed the unlawful act, but pleads an excuse for doing so." *State v. Riker*, 869 P.2d 43, 52 (Wash. 1994) (en banc).

{14} In duress, "the actor engages in conduct voluntarily, correctly perceives the nature of his act, and is aware that it is wrong." Paul H. Robinson, *Criminal Law*

*Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199, 225 (1982). "He is exculpated because he lacks the capacity to control his conduct: he cannot fairly be held accountable for it. . . . The duress defense is based solely on this defect in control." *Id.* If duress is successfully asserted, the crime perpetrated is excused as a blameless act. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. Cal. L. Rev. 1331, 1350, 1357-60 (1989).

{15} For these reasons, some jurisdictions refer to duress as a "confession and avoidance" defense. See *State v. Hess*, 449 P.2d 46, 50 (Ariz. Ct. App. 1969), *abrogated on other grounds by State v. Rodriguez*, 961 P.2d 1006, 1011 (Ariz. 1998); *People v. Suazo*, 867 P.2d 161, 166 (Colo. App. 1993); *State v. Gordon*, 365 A.2d 1056, 1056 (Conn. 1976); *People v. Calvano*, 282 N.E.2d 322, 325 (N.Y. 1972); *People v. Contes*, 91 A.D.2d 562, 563 (N.Y. App. Div. 1982), *aff'd*, 454 N.E.2d 932 (N.Y. 1983); *State v. Duty*, 1982 WL 2887, at \*4 (Ohio Ct. App. 1982); *State v. Milam*, 156 N.E.2d 840, 857 (Ohio Ct. App. 1959) (Skeel, J., dissenting); *Rodriguez v. State*, 368 S.W.3d 821, 824 (Tex. App. 2012). These jurisdictions do this because duress requires the defendant "to first admit that he engaged in the proscribed conduct by admitting to all elements of the underlying offense, then claim that his commission of the offense" excuses the act. *Rodriguez*, 368 S.W.3d at 824 (internal quotation marks and citation omitted). The basic thought at work here is that "[o]ne cannot establish that an act is [excused] without first . . . admitting to the commission of[] the predicate act." *Id.* (internal quotation marks and citation omitted).

{16} One prominent scholarly article contends that the duress defense is singularly unique because it demands that courts and society more broadly ask and answer an entirely counterintuitive question: Under what circumstances is it unjust to punish a wrongdoer who commits a wrong entirely intentionally? Dressler, *supra*, 62 S. Cal. L. Rev. at 1357-59. This is indeed the question duress forces us to confront because "the coerced actor not only possesses the capacity to understand the attendant factual and legal circumstances, but he does *in fact* realize what it is he is doing." *Id.* at 1359. "When [hypothetical actor] D steals a watch under duress, he knows that he is taking a watch; when he commits perjury, he realizes that he is uttering a falsehood under oath[.]" *Id.* In neither case "could D reasonably deny that he knew that his actions were unlawful." *Id.*

{17} These authorities establish that a defendant cannot request the duress instruction if they deny any intention to

perpetrate a crime. The validity of this view is further established by our uniform jury instruction for duress.

{18} The duress instruction directs the jury that they must evaluate why "the defendant was forced to" commit the crime under consideration. UJI 14-5130. The instruction further requires the jury to evaluate the consequences to the defendant "if he did not commit the crime[.]" *Id.* When the crime at issue is a strict liability crime, the jury must also ensure that the defendant was not "compelled . . . to violate the law" due to his own conduct. *Id.* Lastly, the instruction informs the jury that they must decide whether a reasonable person would also have acted in the same way as the defendant. *Id.*

### B. Evidence Presented at Trial

{19} Ortiz offered the following account of the incidents. She and Hughes met one another for dinner and then went to a bar. They left the bar together, and Hughes drove them back to his house in Ortiz's SUV. Ortiz intended to spend the night at Hughes' house as she had done before. Hughes then made unwanted sexual advances that she rejected. She explained that these unwanted advances distressed her because, as previously noted, she alleged that Hughes had raped her during the time they dated one another. She testified that she felt compelled to leave and so left Hughes' house and got into her SUV. Hughes followed her and got into the SUV with her. She drove away from the house with Hughes in the front passenger seat.

{20} Ortiz testified that they drove some distance from Hughes' house. She said that Hughes yelled and screamed at her as they drove and that she eventually decided that she should call her father. As she was making that call, Hughes grabbed the phone from her hand and, in doing so, caused her to "jerk" the steering wheel of her SUV. When this happened, she drove onto the sidewalk and then through the fence. This chain of events was, according to Ortiz, how she came to hit the fence and Hughes. A close examination of Ortiz's explanation, in her own words, about how precisely Hughes was struck makes clear Ortiz could not claim duress for striking him with her SUV.

{21} The following testimony from Ortiz on cross-examination shows quite clearly that she was adamant Hughes was struck accidentally and solely as a consequence of the fact that he caused her to "jerk" the wheel of her SUV. Ortiz spoke the words that follow after being challenged by the State to explain how Hughes could be simultaneously in the vehicle pulling her hand and causing her to swerve and in front of the vehicle in a position where he could be struck.

Ortiz: Well, when he pulled me, I jerked. I completely jerked over the—the vehicle jerked over. And so when he—he was, like, trying to run around. It seemed like I don't know what he was doing.

Prosecutor: So there was, like, a delayed reaction between when he grabbed your hand and you jerked the vehicle?

Ortiz: No. It happened all at the same time.

Prosecutor: So what you're telling us is that [Hughes] grabbed your hand, got out of the vehicle, and ran around in front of it all in the same, like, two-second period?

Ortiz: It seemed like seconds, yes.

{22} Ortiz went on to testify that she had no knowledge that she hit Hughes when she accidentally drove onto the sidewalk and through the fence. Although Hughes testified that he was yelling out in pain after the accident and that Ortiz briefly consoled him and told him to be quiet, Ortiz claimed that she did not hear Hughes yelling, did not see him after the accident, and denied having any knowledge at the time the incident happened that she had hit Hughes and severely injured him. She claimed that she knew only that she had driven through the fence.

#### C. Ortiz's Entitlement to the Duress Instruction

{23} "While an accused is entitled to instruction on his theory of the case if evidence exists to support it, the court

need not instruct if there is absence of such evidence." *State v. Gardner*, 1973-NMSC-034, ¶ 22, 85 N.M. 104, 509 P.2d 871. Of course, a defendant must also be entitled to the instruction as a matter of law. See *State v. Ellis*, 2008-NMSC-032, ¶ 17, 144 N.M. 253, 186 P.3d 245. Given Ortiz's testimony, she was not entitled, as a matter of law, to a duress instruction for the offenses we are concerned with here.

{24} As noted, Ortiz claimed that she drove onto the sidewalk and through the fence because Hughes caused her to "jerk" the wheel of her SUV and this, in turn, caused Ortiz to swerve and drive into him. She said that she had no idea Hughes was struck. She knew only that she hit the fence. Ortiz's counsel described the fact that Hughes was struck as an event that was accidental. The prosecutor did as well. Ortiz did not object to this characterization of the incident. Indeed, she characterized it in exactly the same way.

{25} In sum, the gist of Ortiz's testimony was that she did not even know Hughes was struck when she hit the fence. He was struck accidentally and nonvolitionally. Because Ortiz testified that she did not intentionally or volitionally hit Hughes, she could not invoke duress as a defense to the two convictions with which we are here concerned.

{26} The cases already cited and our uniform jury instruction make clear that it is a necessary and immovable presupposition of duress that the accused admit performing the criminal act with which

she is charged. This law exists for good reason. If Ortiz was permitted to invoke duress as to the crimes charged for striking Hughes and if her jury was instructed on duress as a defense to those charges, her jury would have been required to ask and answer an entirely nonsensical question: whether a reasonable person in Ortiz's position would also have accidentally hit Hughes. Accidents are, by definition, unique events caused by circumstances that are not reproducible. It makes no sense to ask whether a reasonable person in Ortiz's position would also have accidentally struck Hughes.

#### III. CONCLUSION

{27} For the reasons stated above, Ortiz was not entitled to a duress instruction with respect to the crimes at issue in this appeal—great bodily injury by vehicle and aggravated battery. We therefore reverse and remand to the Court of Appeals to consider Ortiz's double jeopardy arguments that were not addressed. *Ortiz*, 2018-NMCA-018, ¶ 1.

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

**JUDITH K. NAKAMURA, Chief Justice**

**WE CONCUR:**

**BARBARA J. VIGIL, Justice**

**C. SHANNON BACON, Justice**

**DAVID K. THOMSON, Justice**

**MARY L. MARLOWE SOMMER, Judge**

**Sitting by designation**

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

**Opinion Number: 2020-NMCA-032**

No. A-1-CA-36814 and A-1-CA-37086  
(filed March 24, 2020)

MICHAEL O'BRIEN and  
O'BRIEN AND ASSOCIATES, INC.,  
Plaintiffs-Appellants/Conditional  
Cross-Appellees,

v.

JENNIE BEHLES; BEHLES LAW FIRM PC;  
BEHLES LAW FIRM; RON MILLER; RON  
MILLER CPA; RON MILLER CPA, PC; and  
MILLER AND ASSOCIATES, CPA, PC,  
Defendants-Appellees/Conditional  
Cross-Appellants.

**APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY**

RAYMOND L. ROMERO, District Judge

Released for Publication June 23, 2020.

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and Associates, CPA, PC

## Opinion

### Linda M. Vanzi, Judge.

{1} Plaintiffs Michael O'Brien (O'Brien) and O'Brien and Associates, Inc. (OBA) appeal from the district court's order granting judgment as a matter of law in favor of Defendant Behles Law Firm, PC (Behles firm). Plaintiffs brought a malicious abuse of process claim against the

Behles firm and others in connection with the litigation of a lien claim against OBA's property. Plaintiffs raise three arguments on appeal. First, Plaintiffs contend that the district court erred in holding that O'Brien, individually, lacked standing. Second, they argue that the district court erroneously granted judgment as a matter of law on OBA's malicious abuse of process claim. Finally, Plaintiffs seek reversal of the district court's award of costs to the

Behles firm. The Behles firm argues, on conditional cross-appeal, that the district court erred (under the Rules of Evidence, and under principles of collateral estoppel) by admitting into evidence the findings of fact and conclusions of law resulting from the lien litigation.

{2} We affirm the district court's dismissal of O'Brien, individually, who was not a real party in interest. However, we reverse the district court's dismissal of OBA's malicious abuse of process claim. We hold as a matter of first impression that lack of probable cause to continue proceedings is a cognizable malicious abuse of process claim. Plaintiffs asserted such a claim in this case, and the district court erred in dismissing it. Among the district court's errors was its decision to give preclusive effect to all of the underlying findings of fact and conclusions of law and to admit these into evidence. We also reverse the award of costs to the Behles firm.

#### BACKGROUND

{3} To say that this litigation has been protracted would be an understatement. It has persisted over fourteen years, through two lawsuits, two trials, a mistrial, and two appeals. Numerous attorneys and judges have been involved in both proceedings. In the first lawsuit, some of the Defendants claimed to have a lien on real property owned by Plaintiff OBA. The lien claim was relatively complex and resulted in a lengthy trial, appeal, and a post-judgment motion. At each step, the claim was resolved in OBA's favor.

{4} In this (second) lawsuit, Plaintiffs claim that Defendants maliciously abused the proceedings in the first lawsuit. Complicating matters, it appears that Plaintiffs, Defendants, and the district court each have a different understanding of Plaintiffs' malicious abuse of process claim. They also appear to ignore portions of the record and aspects of the law that do not conform to their understanding of the case. These divergent paths resulted in a combination of omissions and errors that has rendered our review circuitous and difficult. The briefing on appeal was, often, of little assistance. In order to assist the reader, we begin by explaining what happened in each lawsuit.<sup>1</sup> We then turn to the parties' arguments.

#### I. The Lien Litigation

{5} The lien litigation concerned real estate known as the Orilla del Rio property, owned by OBA. On August 22, 2002,

<sup>1</sup>This background is drawn from the evidence presented in the malicious abuse of process litigation and from our opinion on appeal of the first lawsuit, *O'Brien & Associates, Inc. v. Behles Law Firm, P.C.*, No. 30,724, mem. op. (N.M. Ct. App. July 12, 2012) (non-precedential). Although some of the lien litigation facts were not properly before the district court in the malicious abuse of process trial, we include them here in order to provide a general history and to furnish a context for our analysis below.



OBA entered into a contract for sale of an undescribed piece of realty to an entity called Del Rio Corporation (Del Rio), with Ron Green signing on behalf of Del Rio as its manager. Shelby Phillips III (Phillips) loaned Del Rio the funds for the \$100,000 down payment on the contract. OBA and Green intended for Del Rio to develop the Orilla del Rio property, and Green was supposed to (but did not) prepare a final contract and set up an escrow account on behalf of the corporation for that purpose. Del Rio was in default under the contract by early 2003. Moreover, Green had not actually formed Del Rio when he signed the contract with OBA; according to Green, “Del Rio Corporation” was already in use by another business, so he formed an entity called Riverside Properties Corporation (Riverside) instead. Ostensibly, Riverside was created to fulfill the buyer’s obligation under the August 22, 2002 contract. However, there was no written assignment of the contract to Riverside, and its certificate of incorporation was revoked by the State of New Mexico effective March 31, 2003, and never reinstated.

{6} Green, a former client of the Behles and Miller firms, was indebted to them for unpaid professional fees for matters unrelated to the issues in the lien litigation. On July 2, 2004, the firms filed an action to foreclose on certain security interests purportedly conveyed to them by Green in consideration for his debt.<sup>2</sup> One of those was a “[c]ollateral assignment or security agreement” (security agreement) “covering an[] undivided one-half (½) interest in all of Riverside Properties Corporation’s interest in assignment of the Molly Doolittle contract on real property and water rights.” The underlying security agreement document, recorded in July 2003, was apparently signed by Phillips as President of Riverside, and indicated that it was conveying a one-half interest in “[a] ssignment of Molly Doolittle’s [sic] contract on Real Estate properties,” describing the Orilla Del Rio subdivision.<sup>3</sup> Based on this security agreement and a disclaimer of interest from Riverside (also apparently signed by Phillips), and upon Green’s consent, judgment was entered against Green and Riverside, in favor of the Behles and Miller firms. The firms recorded the transcript of judgment in Sierra County in October 2004. The firms claimed their lien on the Orilla del Rio property by way of the aforementioned security agreement and transcript of judgment.

{7} OBA filed suit in 2006, seeking to cancel the liens on the Orilla del Rio property, one of which was the lien claimed by Behles and Miller. Discovery progressed, and in May 2009, while cross-motions for summary judgment were pending, Phillips was deposed. He testified that the signatures of “Shelby Phillips III” on the security agreement and disclaimer of interest were not, in fact, his signatures. When asked if he had authorized Green to sign these documents, Phillips stated that he could not recall ever giving Green permission to sign on his behalf. OBA’s counsel at the time, Douglas Baker, wrote a letter to Behles on May 15, 2009, asking that the Behles and Miller firms dismiss their lien claim, given the testimony of Phillips, together with the other evidence developed in discovery (showing, for instance, that Riverside’s articles of incorporation were revoked prior to any purported conveyance to the Behles and Miller firms). Baker also indicated that, if the firms refused to dismiss the claims, he would consider filing a claim for malicious abuse of process. Behles responded that she did not believe Phillips’ testimony, and that she planned to conduct further investigation into Riverside’s incorporation documents.

{8} Oral argument on the pending summary judgment motions was held on June 8, 2009. Phillips had not yet signed his deposition testimony, and the parties wished to depose Green (who had proved difficult to notice for deposition); accordingly, the parties sought further discovery. Recognizing that these issues would not be resolved before trial, which was scheduled to commence the next month, the district court denied the motions for summary judgment, citing in its brief order that “material facts remain in dispute.” Although the record is unclear, it appears that Green was finally deposed approximately two weeks before the commencement of trial. Green apparently testified that he had in fact signed Phillips’ name to the articles of incorporation for Riverside, the security agreement, and the disclaimer of interest, but that Phillips had authorized Green to do so.

{9} On May 13, 2010, following a ten-day bench trial, the district court judge, Edmund Kase, III, entered findings of fact and conclusions of law in favor of OBA, concluding that the Behles and Miller firms did not have a valid lien against the Orilla del Rio property. Judge Kase found that the security agreement, disclaimer of

interest, and Riverside articles of incorporation were forged documents. Judge Kase also concluded that the security agreement and disclaimer of interest were invalid, because a power of attorney is statutorily required for conveyances on behalf of another of interests in real property, *see* NMSA 1978, §§ 47-1-5 (1897), -7, (1901) -11 (1937), and there was no evidence that Phillips had granted such power to Green. {10} Judge Kase stated that the transcript of judgment, having been obtained in part through the forged documents, did not create a judgment lien against the Orilla del Rio property. Moreover, Riverside had no equitable or other interest in the Orilla del Rio property. First, Riverside had not acquired Del Rio’s interest in the August 22, 2002 contract. Among other things, there was no written assignment from Del Rio to Riverside, nor evidence of OBA’s written consent (required under the contract) to any assignment of the purchaser’s interest. Second, even if Riverside had acquired Del Rio’s interest, Riverside’s corporate status had been revoked prior to the signing or recording of the documents through which it purportedly conveyed an interest to the Behles and Miller firms, rendering those documents a “nullity.” Judge Kase also found that OBA and Green did not intend Green to be personally interested in the Orilla del Rio real estate, or to be bound by the contract. Moreover, the Behles and Miller firms stipulated that Green had no personal interest in the property, and that any interest he had was abandoned prior to or as a result of Green’s bankruptcy (entered September 9, 2007). {11} Judge Kase stated in his findings that the Behles and Miller firms had become aware “as of at least May 8, 2009” that Phillips did not sign the collateral assignment or security agreement, or the disclaimer of interest, but that the firms “transferred, issued, or continued to use and rely upon” those documents, knowing “that they contained acknowledgements of their legal efficacy which were improper and/or forged.” However, Judge Kase rejected some of OBA’s proposed findings that Behles and Miller had participated in the forgeries or had committed fraud.

{12} The Behles and Miller firms appealed. In July 2012, this Court affirmed the district court’s findings and conclusions in their entirety, on several grounds. The Behles and Miller firms’ primary argument on appeal was that they had a valid lien on the Orilla del Rio property by way of Green’s personal interest in the

<sup>2</sup>The Behles firm was counsel in the lien case, representing the firm’s interest, and the interest of Miller’s accounting firm (Miller is, or was at the relevant time, a CPA).

<sup>3</sup>It appears the document may have been worded this way because the August 22, 2002 contract included a provision for Del Rio to pay \$75,000 to Molly Doolittle—money owed by O’Brien on the original contract of sale, from Doolittle to O’Brien, on the Orilla del Rio property.

August 22, 2002 contract, which they claimed had not been terminated prior to their judgment foreclosing Green and/or Riverside's interest in that contract. But we agreed with Judge Kase's findings that Green individually never had any equitable interest under that contract. Moreover, we noted the firms' apparent stipulation that Green had no such interest.

## II. The Malicious Abuse of Process Litigation

{13} On March 4, 2011, while the lien suit was pending before this Court on appeal, Plaintiffs brought a claim for malicious abuse of the lien proceedings, against the Behles firm, Jennie Behles (Behles) individually, the Miller firm, and Ron Miller (Miller) individually (collectively, Defendants).<sup>4</sup> Plaintiffs brought this claim through amendment of an existing complaint (alleging legal malpractice against other defendants not involved in this appeal) before the district court in Lincoln County. As we discuss in greater detail below, Plaintiffs' malicious abuse of process claim was that "Defendants misused the legal process by continuing their defense [of the lien claim] after May 8, 2009, when they learned of information during the deposition of . . . Phillips . . . that showed their defense was without probable cause."

{14} After this Court issued its decision affirming Judge Kase's dismissal of the lien claim, Plaintiffs filed a motion to bar relitigation of the issues decided by Judge Kase, including virtually all factual findings and conclusions of law relating to the Behles and Miller firms' lien claim. On February 11, 2014, the district court (in Lincoln County) granted Plaintiffs' motion but held that Plaintiffs were permitted to offer as evidence in support of their malicious abuse of process claim only certain findings and conclusions related to the lien claim. The district court also held that Plaintiffs were barred from relitigating findings rejected by Judge Kase (i.e., the findings that the Behles and Miller firms had committed fraud or participated in the forgery), as these had the legal effect of factual findings against Plaintiffs.

{15} Unsatisfied with this outcome, the Behles and Miller firms filed a motion in the Sierra County case on July 29, 2014, under Rule 1-060(B)(6) NMRA, seeking expedited relief from six of the district court's findings of fact in the lien litigation. Specifically, the firms argued that OBA had used the lien proceedings to "establish" the six identified findings (going mainly to the Behles and Miller firms' knowledge of the

invalidity of the forged documents) for a later malicious abuse of process claim. The firms argued that these six findings were unsupported by the record and/or immaterial to the validity of the asserted lien. On February 6, 2015, the district court denied the motion.

{16} On August 1, 2014, Defendants filed another motion in Lincoln County, seeking to exclude Judge Kase's 2010 decision from evidence at trial. Defendants raised two evidentiary arguments in opposition to the admission of the findings and conclusions in Judge Kase's May 13, 2010 decisions: (1) they were not relevant under Rule 11-402 NMRA to the facts known before the trial; and (2) the jury might give undue weight to or be confused by admission of the findings in evidence, such that the findings should be excluded as prejudicial under Rule 11-403 NMRA. Alternatively, Defendants asked that certain additional findings be admitted in evidence and that the jury be instructed about the findings rejected by the district court. The district court denied the motion to exclude but ordered that Judge Kase's decision could be admitted in its entirety, or that the parties could stipulate to limit the introduction of the decision to the specific findings and conclusions the parties would be arguing to the jury. Ultimately, Judge Kase's entire decision, including all findings and conclusions were admitted as an evidentiary exhibit.

{17} At trial,<sup>5</sup> Plaintiffs called as their first witness Baker, who testified regarding the events of the prior litigation, including OBA's attorney's fees, Baker's communications with Behles regarding the lien claim, and Baker's reasons for believing that, following Phillips' deposition and the discovery that Riverside's incorporation had been revoked prior to the signing of the security agreement, the Behles firm could not have had a reasonable belief in the validity of the lien claim. Baker also testified that, approximately two weeks before trial, Behles and Miller had made a settlement demand to O'Brien in the amount of \$600,000 in spite of the fact that any lien on the Orilla del Rio property (if valid) was worth less than half that amount.<sup>6</sup> O'Brien and Miller were also called as witnesses. O'Brien testified that he had to withdraw money from his retirement account in order to pay for some of the legal fees incurred by his corporation in the lien litigation, for which he incurred a \$14,000 tax penalty.

{18} At the close of Plaintiffs' case, the Miller Defendants moved for judgment

as a matter of law, which the district court granted, for reasons that we need not detail here. The Behles Defendants joined in a motion for judgment against O'Brien individually for lack of standing, and made their own motion for judgment in favor of the Behles Defendants. The court granted the motion with respect to Behles individually, reasoning that she had not been shown to be an active participant in the lien litigation in her personal capacity. However, the court denied the motion with respect to the Behles firm, finding that "a reasonable jury would have a legal sufficient evidentiary basis to find for [OBA.]" The court also concluded that O'Brien did not have standing to pursue a malicious abuse of process claim, as he was not a party to the underlying lien litigation and was not a real party in interest with respect to the claims against Defendants

{19} The Behles firm then proceeded with its case, calling Behles, and two expert witnesses—Briggs Cheney, an attorney who testified to the reasonableness of the Behles firm's decision to take the lien claim to trial, and Sam Baca, an accountant who testified regarding damages. Behles testified regarding the various theories upon which she based her decision to pursue the firms' lien claim at trial. Specifically, Behles testified that, if Green's testimony had been credited by Judge Kase, Judge Kase could have found that Phillips had authorized Green to sign the documents at issue, given an exception to the usual requirement of a power of attorney in order to convey real estate on behalf of another, set forth in *Miera v. Miera*, 1919-NMSC-016, ¶ 10, 25 N.M. 299, 181 P. 583. Alternatively, she asserted that she believed Phillips had ratified Green's signature on the relevant documents. Behles testified that she also believed Green to be personally liable on the underlying contracts. Additionally, Behles argued that she had a valid judgment lien against Riverside's interest in the property and that Riverside had validly conveyed its interest to the Behles firm. Finally, Behles agreed that she had made an offer of settlement prior to trial, but insisted that it was for \$200,000 to \$250,000 and that the \$600,000 figure was the total offer of settlement from Defendants, collectively (co-defendant Carl Kelly Construction also had lien claims in the case). She added that she and Miller had "\$300,000 worth of debt," and therefore would not have asked for \$600,000 in settlement.

<sup>4</sup>Both OBA and O'Brien, individually, brought a malicious abuse of process claim against Defendants.

<sup>5</sup>Following an initial mistrial in 2015, the matter finally proceeded to jury trial in August 2017.

<sup>6</sup>Green apparently valued his own one-half interest in the property (through his alleged partial interest in Riverside) at \$200,000 though it is unclear how he reached this figure.

{20} At the conclusion of trial, the district court granted the Behles firm's motion for judgment as a matter of law. In opposition to the motion, Plaintiffs' counsel argued that the Behles firm's pretrial settlement offer was an extortion attempt, but the district court did not consider this claim as a separate malicious abuse of process claim. The district court held that a previous order amending the complaint limited Plaintiffs to a claim that Defendants "misused the legal process by continuing [their] defense [of the lien claim] after May 8, 2009, when [Defendants] learned of information during the deposition of [Phillips] that showed [their] defense was without probable cause." (Internal quotation marks omitted.) The district court then concluded that there were no disputed facts pertinent to the question of continuing probable cause and, therefore, it was for the court to decide whether the Behles firm had probable cause to continue prosecuting its lien claim, citing *Weststar Mortgage Corp. v. Jackson*, 2003-NMSC-002, ¶ 16, 133 N.M. 114, 61 P.3d 823, and UJI 13-1639 NMRA.

{21} In its analysis of continued probable cause, the district court noted that probable cause "is to be determined at the time the decision is made to proceed or continue with the claim, and should not be judged by some later learned facts[.]" again citing *Weststar Mortgage Corp.*, 2003-NMSC-002, ¶ 16. The district court found that Judge Kase had denied the parties' motions for summary judgment on June 8, 2009, because there was a factual dispute for trial (implying that the dispute constituted the discrepancy between Green's testimony and Phillips' testimony, with respect to the documents ultimately determined to be forged). The district court noted Judge Kase's rejection of proposed findings of fact to the effect that the Behles and Miller firms had themselves committed forgery or fraud, and concluded that this was a "clear indication" that Judge Kase believed the Behles and Miller firms "did not know the documents were forged when it relied on them at trial." The court also concluded that, apart from the factual dispute resulting from Phillips' and Green's testimony and related documents, the Behles firm had an "alternative means of asserting and defending its lien" at trial, namely: the transcript of judgment and judgment lien against Green and Riverside, combined with a partial summary judgment finding (early in the lien litigation) that the O'Brien/Del Rio contract was, initially, a valid contract. In contradiction to its earlier statement

that probable cause was a question for the court, the district court then stated that "a reasonable jury would not have a legally sufficient evidentiary basis to find for . . . Plaintiff on the issue that [the Behles firm] lacked probable cause to continue the defense of its lien." Later, the district court awarded costs to the Behles firm. Plaintiffs appealed.<sup>7</sup>

#### DISCUSSION

{22} The first issue we address on appeal is whether the district court erred in granting the Behles firm judgment as a matter of law as to O'Brien, individually, on the basis that O'Brien lacks standing to pursue a malicious abuse of process claim against the Behles firm and is not a real party in interest. The second issue is whether the district court erred in granting judgment in favor of the Behles firm on the basis that the Behles firm had probable cause to take its lien claim to trial. In the course of discussing this issue, we address both parties' arguments regarding the effect of Judge Kase's findings and conclusions on the district court's determination. Last, we address the issue of the district court's award of costs to the Behles firm.

#### I. Standard of Review

{23} Judgment as a matter of law may be entered against a party where a reasonable jury would not have a legally sufficient evidentiary basis to find in the party's favor on an issue essential to the party's cause of action. See Rule 1-050(A) NMRA. "Therefore, a directed verdict is appropriate only when there are no issues of fact to be presented to a jury." *Hedicke v. Gunville*, 2003-NMCA-032, ¶ 9, 133 N.M. 335, 62 P.3d 1217. "Any conflicts in the evidence or reasonable interpretations of the evidence are viewed in favor of the party resisting the directed verdict." *Sunwest Bank of Clovis, N.A. v. Garrett*, 1992-NMSC-002, ¶ 9, 113 N.M. 112, 823 P.2d 912. "The sufficiency of evidence presented to support a legal claim or defense is a question of law for the trial court to decide[.]" and, on appeal, we review such questions de novo. *Hedicke*, 2003-NMCA-032, ¶ 9 (internal quotation marks and citation omitted).

#### II. O'Brien Is Not a Real Party in Interest

{24} Plaintiffs argue that the district court erred in entering judgment as a matter of law against O'Brien, individually. Plaintiffs' sole arguments on appeal are that (1) New Mexico's cause of action for malicious abuse of process contains no requirement of "party" status in the underlying litigation; and (2) O'Brien has standing to sue because he suffered an individual injury in the form of a tax penalty that O'Brien in-

curred in order to pay the fees owed by his corporation in the lien litigation. Whether a party has standing to sue or is a real party in interest presents a question of law, which we review de novo. See *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 5, 130 N.M. 368, 24 P.3d 803; see also *Rienhardt v. Kelly*, 1996-NMCA-050, ¶ 16, 121 N.M. 694, 917 P.2d 963 (holding that, because the plaintiff met the legal criteria set forth in Rule 1-017 NMRA, "it was error for the trial court to dismiss him as an excessive plaintiff").

{25} Standing to sue and real party in interest are distinct but overlapping concepts. Both are "used to designate a plaintiff who possesses a sufficient interest in the action to be entitled to be heard on the merits." 6A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1542 (3d ed. 2010). New Mexico's standing doctrine requires litigants to allege that "(1) they are directly injured as a result of the action they seek to challenge[.], (2) there is a causal relationship between the injury and the challenged conduct[.], and (3) the injury is likely to be redressed by a favorable decision." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 1, 144 N.M. 471, 188 P.3d 1222. The issue of standing frequently arises when some governmental action is attacked on the ground that it violates private rights or a constitutional principle. See, e.g., *id.* ¶ 2 (affirming this Court's holding that the plaintiffs lacked standing to seek relief from an allegedly unconstitutional civil forfeiture ordinance); see also *Kent v. N. Cal. Reg'l Office of Am. Friends Serv. Comm.*, 497 F.2d 1325, 1329 (9th Cir. 1974). In contrast to federal standing jurisprudence, in New Mexico, standing is usually a prudential matter, addressed to justiciability, not jurisdiction. See *ACLU*, 2008-NMSC-045, ¶ 9 (holding that "standing in our courts is not derived from the state constitution and is not jurisdictional"); see also *Phoenix Funding, LLC v. Aurora Loan Servs., LLC*, 2017-NMSC-010, ¶¶ 19-20, 390 P.3d 174 (reasoning that, "when a claim is created by statute, the justiciability requirements of standing, ripeness, and mootness can be jurisdictional" but that "when a claim is not created by statute but rather was born of common law, the lack of the traditional justiciability prerequisites does not impair a court's jurisdiction" (emphasis omitted)). {26} Rule 1-017(A) also requires that "[e]very action shall be prosecuted in the name of the real party in interest[.]" This rule is implicated where there is a question as to whether the plaintiff "is the owner of the right being enforced and is in a position to discharge the defendant from the liability

<sup>7</sup>Plaintiffs did not appeal the district court's dismissal of the claim against Behles, individually. Moreover, we do not address Plaintiffs' arguments concerning the judgment in favor of the Miller Defendants, as Plaintiffs and the Miller Defendants have now reached a settlement.

being asserted in the suit.” *Marchman v. NCNB Tex. Nat’l Bank*, 1995-NMSC-041, ¶ 15, 120 N.M. 74, 898 P.2d 709 (internal quotation marks and citation omitted); see *id.* (holding that the corporation, not its shareholders, owned the rights asserted in the lawsuit). Thus, while standing focuses on whether the plaintiff’s injuries are fairly traceable to the defendant’s conduct, the real party in interest requirement focuses on whether the plaintiff is “the person who possesses the right sought to be enforced.” 6A Wright & Miller, *supra*, § 1542 (noting that, in spite of the confusion regarding these concepts, a “plaintiff must be both the real party in interest and have standing” (emphasis added)). However, our courts have sometimes blended the concepts and conceived of the real party in interest requirement as a species of standing. See, e.g., *Marchman*, 1995-NMSC-041, ¶¶ 15-25 (holding that individual shareholders did not have standing to claim damages for injuries to a corporation because the corporation was the real party in interest as to such claims); *Sw. Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co.*, 2006-NMCA-151, ¶ 11, 140 N.M. 720, 148 P.3d 806 (holding that, because the plaintiff corporation “may have sustained damages separate and distinct from” settlement proceeds paid by the subrogating insurance carrier, the plaintiff had standing as a real party in interest to pursue compensation for any such distinct damages); *Edwards v. Franchini*, 1998-NMCA-128, ¶¶ 3-11, 125 N.M. 734, 965 P.2d 318 (affirming the district court’s grant of summary judgment for lack of standing, where the defendants argued that the plaintiffs were not the real party in interest on their breach of contract and legal malpractice claims because such claims were a part of a bankruptcy estate and only the bankruptcy trustee could assert them).

{27} Here, the district court concluded that O’Brien lacked standing to assert a malicious abuse of process claim against the Behles firm, because “[a] party who. . . was never named as a defendant or plaintiff in [the] underlying proceeding could not claim it was compelled to incur defense costs in the proceeding.” It also concluded that O’Brien, individually, is not a real party in interest for purposes of the malicious abuse of process claim against the Behles firm. Although we question the district court’s first conclusion, we do not address whether party status in the underlying proceeding is a standing requirement for a later malicious abuse of process claim because our Supreme Court’s analysis in *Marchman* compels the result that O’Brien is not a real party in interest in this case.

{28} In *Marchman*, contractual, fraud, and tort claims were brought against a Texas bank by four plaintiffs: a Texas

corporation, a New Mexico corporation owning all of the Texas corporation’s stock, and two shareholders of the New Mexico corporation. 1995-NMSC-041, ¶ 1. The district court granted partial summary judgment in favor of the bank as to the New Mexico corporation and the two shareholders, all of whose claims were “derivative of the claims of the Texas corporation.” *Id.* ¶ 2. Our Supreme Court agreed that only the Texas corporation was a real party in interest, because “[a] corporation and a shareholder—even a sole shareholder—are separate entities, and a shareholder of a corporation does not have an individual right of action against a third person for damages that result because of an injury to the corporation.” *Id.* ¶¶ 15-16. In other words, when the alleged wrongful acts were directed at the corporation, not the shareholders, “the cause of action accrues to the corporation and not to the shareholders in their individual capacit[ies].” *Id.* ¶ 22. “[A]lthough stockholders of a corporation suffer when the corporation incurs a loss, only the corporation may vindicate its rights. An indirectly injured party should look to the recovery of the directly injured party, not [to] the wrongdoer[,] for relief.” *Id.* ¶ 17 (internal quotation marks and citation omitted). With respect to this general rule, our Supreme Court recognized only two possible exceptions. A shareholder may bring a claim for damages from injury to the corporation where the shareholder has (1) suffered an injury separate and distinct from other shareholders; or (2) where she is owed a special duty (through contract, or otherwise) by the wrongdoer. *Id.* ¶¶ 19, 21; see also *Delta Automatic Sys., Inc. v. Bingham*, 1999-NMCA-029, ¶ 14, 126 N.M. 717, 974 P.2d 1174 (discussing the two exceptions recognized in *Marchman*).

{29} Here, the injury claimed as a result of the Behles firm’s alleged malicious abuse of process is the burden and expense associated with the continued lien litigation. The alleged wrongful conduct—compelling a party to participate in unjustifiable litigation—was directed at OBA, the entity against whom the Behles firm refused to withdraw the lien claim. See *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 14, 124 N.M. 512, 953 P.2d 277, *overruled on other grounds by Durham v. Guest*, 2009-NMSC-007, ¶ 29, 145 N.M. 694, 204 P.3d 19; *Marchman*, 1995-NMSC-041, ¶ 22. Plaintiffs argue that O’Brien, sole shareholder of OBA, may assert a malicious abuse of process claim, together with the corporation, because O’Brien “obviously is the human being that’s involved in the case, [and] has suffered a particular damage” due to a \$14,000 tax penalty resulting from the withdrawal of funds from O’Brien’s 401-K account.

{30} First, this argument ignores that O’Brien withdrew the funds at issue to pay the legal fees for OBA in connection with the continued lien litigation. The tax penalty associated with the withdrawal is a consequence of the Behles’ firm’s alleged wrongful conduct *against OBA*, not against O’Brien, individually. See *Delta Automatic Sys.*, 1999-NMCA-029, ¶¶ 13, 16 (applying *Marchman* and holding that the shareholders’ alleged injuries, including damage to their personal credit standing, inability to maintain their standard of living, and emotional distress, were derivative of the defendants’ alleged breach of duty to the corporation, not any breach of duty to the shareholders directly).

{31} Second, to the extent Plaintiffs’ argument may be interpreted as asserting a “special duty” owed to O’Brien, Plaintiffs fail to identify the basis of any such duty. Plaintiffs only contend that a jury should have been permitted to decide whether it was foreseeable that O’Brien would suffer damages as a result of the lien litigation. But foreseeability is pertinent to *breach* of duty, not the existence of a duty in the first place, and the existence of a duty is a matter of law for the court. See *Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 2014-NMSC-014, ¶ 4, 326 P.3d 465 (discussing the role of foreseeability when analyzing breach of duty and causation); *id.* ¶ 25 (“Foreseeability is not a question for courts to consider when determining the existence of a duty[.]”); *Oakey v. May Maple Pharmacy, Inc.*, 2017-NMCA-054, ¶ 22, 399 P.3d 939 (“The existence of a duty is a question of policy to be determined by the court as a matter of law with reference to legal precedent, statutes, and other principles comprising the law.” (internal quotation marks and citation omitted)). Plaintiffs have cited no authority for the proposition that the Behles firm owed O’Brien any special duty above and beyond the firm’s duty to OBA; accordingly, we will assume that none exists. *Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482 (“Where a party cites no authority to support an argument, we may assume no such authority exists.”). Indeed, Plaintiffs have not distinguished our holding in *Delta Automatic Systems*, where we concluded, in a similar context, that the defendants did not owe the shareholders any special duty above and beyond their duty to the corporation, “even though the [plaintiffs] were the sole shareholders of [the corporation] and [the d]efendants knew that the [plaintiffs’] livelihood depended on [the corporation’s] success.” 1999-NMCA-029, ¶ 16. For the foregoing reasons, we affirm the district court’s entry of judgment as a matter of law against O’Brien, individually, because he is not a real party in interest with respect to the malicious abuse of process claim against the Behles firm.

### III. The District Court Erred in Its Dismissal of OBA's Malicious Abuse of Process Claim Against the Behles Firm

{32} We are forced into a somewhat circuitous discussion of Plaintiffs' malicious abuse of process claim, by virtue of the district court's missteps, together with the parties' arguments ignoring aspects of the factual record and existing law. We address the issues as follows. First, we discuss malicious abuse of process in New Mexico and whether lack of probable cause to continue proceedings is a cognizable malicious abuse of process claim. We hold that it is. Second, we address whether Plaintiffs asserted such a claim in this case. We hold that they did, and that they were properly limited to that claim at trial. Third, we focus on the district court's analysis of whether the Behles firm lacked continued probable cause to litigate its lien claim. In order to do this, we first address the law of collateral estoppel because both parties present arguments about what effect the findings and conclusions from the lien litigation should have had on the probable cause element of OBA's claim. We conclude that the district court erred in giving preclusive effect to all of the findings and conclusions, and we explain the analysis that the district court should have conducted. We also explain why the findings and conclusions should not have been admitted as an evidentiary exhibit. Although this alone would be a basis for reversal of the district court's judgment, in order to provide guidance on remand, we next examine the district court's broader determination that the Behles firm had probable cause to continue its lien claim. We conclude that the district court failed to undertake the necessary examination of the factual record and legal arguments relevant to whether the Behles firm had a reasonable belief that it could prevail on its lien claim at trial. For all these reasons, we reverse and remand.

#### A. Malicious Abuse of Process and Lack of Probable Cause to Continue Proceedings

{33} New Mexico has restated two traditionally distinct torts—malicious prosecution and abuse of process—as a single cause of action: malicious abuse of process. *DeVaney*, 1998-NMSC-001, ¶¶ 12-17 (explaining the merger of the torts, both of which served the common purpose of “offer[ing] redress to a plaintiff who has been made the subject of legal process” for an improper purpose, and protecting the “interest in freedom from unjustifiable litigation” (internal quotation marks and citation omitted)). The elements of the combined tort of malicious abuse of process are “(1) the use of process in a judicial proceeding that would be improper in the

regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages.” *Durham*, 2009-NMSC-007, ¶ 29; see UJI 13-1636 NMRA. A “judicial proceeding,” for purposes of a malicious abuse of process claim, includes both criminal and civil proceedings. UJI 13-1637 NMRA.

{34} The first element (misuse of process) requires an “overt act,” which may be shown in one of two ways: (1) filing a complaint without probable cause, or (2) an irregularity or impropriety suggesting extortion, delay, or harassment, or some other illegitimate end. *Durham*, 2009-NMSC-007, ¶ 29; see UJI 13-1639, -1639A NMRA; *DeVaney*, 1998-NMSC-001, ¶ 21. *DeVaney* defined “probable cause,” for purposes of the first type of misuse of process, as “the reasonable belief, founded on known facts established after a reasonable pre-filing investigation, that a claim can be established to the satisfaction of a court or jury.” 1998-NMSC-001, ¶ 22 (citation omitted); see UJI 13-1639. In the second type of misuse of process, an irregularity or impropriety may be shown by the “irregular use of a procedure, or by *some other act* by the defendant that indicates the wrongful use of judicial proceedings.” UJI 13-1639A (emphasis added); see *Durham*, 2009-NMSC-007, ¶¶ 29, 31 (noting that “the use of process for an illegitimate purpose forms the basis” for a malicious abuse of process claim, and therefore “[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required” (emphasis, internal quotation marks, and citation omitted)). The Committee Commentary in our jury instructions provides examples of “acts” indicating the wrongful use of proceedings, such as a request for excessive damages in the complaint, attachment on property other than that involved in the litigation or in an excessive amount or excessive execution on a judgment. UJI 13-1639A. Although malicious abuse of process is a tort that should be construed narrowly, in order to protect the right of access to the courts, our Supreme Court’s intention in combining the formerly distinct torts of abuse of process and malicious prosecution was to preserve them, restating them only “for the sake of simplicity and to avoid confusion.” *Durham*, 2009-NMSC-007, ¶ 27.

{35} With respect to the first type of misuse of process, our Supreme Court’s definition of “probable cause,” UJI 13-1639, was taken in part from the Restatement (Second) of Torts Section 675 (1977), which provides that “[o]ne who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for

doing so if he reasonably believes in the existence of the facts upon which the claim is based” and explains in comment d, that the touchstone is whether he reasonably believes he can establish the existence of such facts “to the satisfaction of a court and jury.” See *DeVaney*, 1998-NMSC-001, ¶ 22. This definition applies to the Restatement’s definition of malicious prosecution in the civil context, also called the “wrongful use of civil proceedings,” as follows:

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if

(a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and

(b) except when they are *ex parte*, the proceedings have terminated in favor of the person against whom they are brought.

Restatement (Second) of Torts § 674 (1977). Our Supreme Court did not incorporate favorable termination into our cause of action for malicious abuse of process, concluding that this traditional requirement (reflected in Restatement (Second) of Torts Section 674(b)) was a “procedural and evidentiary safeguard” in malicious prosecution actions, not an element of the underlying claim. *DeVaney*, 1998-NMSC-001, ¶ 23. However, the remainder of the Restatement (Second) of Torts Section 674’s definition is similar to the first type of malicious abuse of process claim in New Mexico. Compare Restatement (Second) of Torts § 674(a) (identifying the commencement or continuation of an action without probable cause and for a purpose other than “proper adjudication of [a] claim” as a misuse of process), with UJIs 13-1636, -1639 (together defining beginning a proceeding without probable cause and in order to accomplish an illegitimate end as a “misuse of process”). The distinction is, of course, that the Restatement (Second) of Torts Section 674 explicitly recognizes that one might not only initiate, but *continue* a proceeding without probable cause. See Restatement (Second) of Torts §§ 674, 675. Restatement (Second) of Torts Section 674, comment c explains that “one who continues a civil proceeding that has properly been begun or one who takes an active part in its continuation for an improper purpose after he has learned that there is no probable cause for the proceeding becomes liable as if he had then initiated the proceeding.” New Mexico courts have not squarely addressed the viability of a cause of action premised

on continuing litigation without probable cause, but we see no reason to diverge from Restatement (Second) of Torts Section 674. {36} First, we see no meaningful conceptual distinction between the conduct of a defendant who commences litigation without probable cause and the conduct of a defendant who continues litigation without probable cause. Though most jurisdictions conceptualize malicious prosecution and abuse of process as distinct torts, those addressing the question of liability for continued prosecution of a criminal or civil action without probable cause have almost unanimously recognized such a cause of action as a logical corollary to a cause of action for initiating a case without probable cause. *See, e.g., Turner v. Thomas*, 794 S.E.2d 439, 450-56 (N.C. 2016) (Ervin, J., concurring) (collecting cases from thirty-four states recognizing a cause of action for malicious prosecution under a lack of continued probable cause theory, and noting that, as of December 2016, only Delaware had explicitly rejected the theory). Moreover, while neither party drew our attention to the case, our Supreme Court also approved of a jury instruction acknowledging the viability of such a cause of action under the former tort of malicious prosecution of a civil action. *See Bokum v. Elkins*, 1960-NMSC-091, ¶¶ 9-10, 17, 67 N.M. 324, 355 P.2d 137 (affirming judgment in favor of the plaintiff, finding sufficient the district court's instruction that the defendants were liable for malicious prosecution if the jury found, among other things, that the defendants "were without probable cause to maintain or to continue said civil action and that said action was instituted or continued in malice on the part of the [d]efendants").

{37} Second, we have said that, in addition to an illegitimate purpose, malicious abuse of process requires some "overt act," in order to "prevent a chilling effect on claims well-founded in fact and law and asserted for the legitimate purpose of redressing a grievance." *DeVaney*, 1998-NMSC-001, ¶ 21. A claim premised on lack of continued probable cause would preserve this requirement because the plaintiff would have the burden of proving an overt act: the defendant's pursuit of his or her claim in spite of the discovery of facts negating a reasonable belief that the claim could be proved to the satisfaction of a court or jury. *See id.* ¶ 22; Restatement (Second) of Torts §§ 674 cmt. c, 675(a) cmt. d.

{38} Third, our Supreme Court has already relied on aspects of the above-discussed sections of the Restatement, and other related sections, for the development of New Mexico's malicious abuse of process cause of action. *See, e.g., DeVaney*,

1998-NMSC-001, ¶ 44 (quoting comment j to Restatement (Second) of Torts Section 674 for the proposition that "[w]hether a withdrawal or an abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought and whether the withdrawal is evidence of a lack of probable cause for their initiation, depends upon the circumstances under which the proceedings are withdrawn"); *see also DeVaney*, 1998-NMSC-001, ¶ 41 (relying on Restatement (Second) of Torts Sections 681B(1)(c) and 681B(2)(a) (1977) for the proposition that probable cause is a question for the trial judge, not the jury, but that the jury is to determine the factual circumstances relevant to the probable cause analysis); *Durham*, 2009-NMSC-007, ¶ 26 (citing, in part, the Restatement (Second) of Torts Section 682 (1977), which provides that "one who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process" (alteration omitted)). Plaintiffs offer no reason why the Restatement's framework should be rejected here.

{39} Plaintiffs argue that our Supreme Court, in *Durham*, 2009-NMSC-007, ¶ 29, "held that lack of probable cause is only a required element for an abuse of process claim that occurs at the initiation of a claim." But this is incorrect; *Durham* simply held that a plaintiff alleging a procedural impropriety or wrongful use of proceedings (the second type of misuse of process) need not have initiated judicial proceedings. *Id.* ¶ 29. To the extent Plaintiffs argue that our current case law and jury instructions do not overtly provide a cause of action for a claim based on the lack of continued probable cause, this only begs the question, because, as we have said, we find no case in which our courts were asked to rule on the issue. It seems to us that this cause of action has not been incorporated into our definition because it has never been addressed, not because it was rejected. Moreover, as we discuss below, it was Plaintiffs who argued to the district court a cause of action for malicious prosecution based on lack of continued probable cause, though they now regret the district court having followed their lead.

#### **B. Plaintiffs' Malicious Abuse of Process Claim**

{40} Plaintiffs argue that they did not allege a lack of continued probable cause for Defendants' lien claim, but the wrongful use of the lien proceedings "for an improper or illegitimate motive[.]" The Behles firm, on the other hand, asserts that Plaintiffs' theory of the case was always that Defendants continued the lien litiga-

tion without probable cause following the Phillips deposition, such that Plaintiffs waived or should be estopped from asserting any other theory.

{41} Plaintiffs' initial complaint contained no specific factual allegations regarding Defendants' asserted abuse of process. The Miller Defendants filed a motion for summary judgment on April 1, 2013, surmising from the underlying case that Plaintiffs were alleging (1) a lack of continued probable cause following Phillips' deposition for Defendants to pursue the lien claim, and/or (2) procedural impropriety, in that Defendants "advanced" improperly executed or forged documents, following the Phillips deposition. Plaintiffs' response suggested that they were embracing both of these theories, focusing primarily on the second. At oral argument on the motion, however, Plaintiffs' counsel argued almost exclusively the first claim (citing Section 674 of Restatement (Second) of Torts): that Defendants pursued the lien after learning that the underlying documents were forged and/or improper, continuing the litigation without probable cause. The district court denied the Miller Defendants' motion.

{42} Plaintiffs then reasserted the probable-cause-based theory in argument on Defendants' motion to dismiss based on the statute of limitations, in which Defendants had (again) sought clarification regarding Plaintiffs' theory of the case. Based on Plaintiffs' argument, the district court found that the only "event" at issue, for statute of limitations purposes and for purposes of clarifying the factual basis of Plaintiffs' claim, was the continuation of the litigation after Phillips' deposition. During the presentment hearing on this motion, Defendants asked that the factual basis of Plaintiffs' claim be memorialized in some way, "so that when we get to trial we haven't prepared a case or a defense based on lack of probable cause [after] . . . Phillips' deposition and all of a sudden we're having to defend against some other lack of probable cause [or] some other procedural impropriety."

{43} Ultimately the district court entered an order on January 15, 2014, resolving the statute of limitations issue, but also amending the complaint by interlineation to state that "Defendants misused the legal process by continuing their defense after May 8, 2009, when they learned of information during the deposition of . . . Phillips . . . that showed their defense was without probable cause." The district court further ordered that "Plaintiffs may not base their claim for malicious abuse of process on any other events, unless they submit to the [c]ourt a list of such events, and the dates upon which they occurred . . . on or before March 24, 2014." The dis-

trict court explained that “[t]his [o]rder does not prevent Plaintiffs from offering evidence at trial of other events in support of their claim based upon Defendants’ continuing defense after May 8, 2009.”

{44} At the pretrial conference on August 14, 2017, defense counsel referenced the court’s January 15, 2014 order, and the absence of any further amendments to the complaint, stating that “we understand that this case is limited to continuing the case after May 8, 2009, . . . [a]nd there is no claim for procedural impropriety.” Plaintiffs’ counsel responded: “That’s right[,]” and “Yeah . . . [t]hat’s the case.” When the district court mentioned that the model UJI form jury instructions would have to be modified, because the form refers to initiating a case without probable cause, Plaintiffs’ counsel replied that “[w]e’re not talking . . . about initiating the case,” and told the court that the operative timeframe was “when [Defendants] became aware . . . that there was a forged signature on critical documents.” The court then clarified that “if they did have probable cause, it ceased to exist essentially [after] that deposition?” To which Plaintiffs’ counsel responded, “[W]e have submitted some jury instructions on that specific issue.” The court stated, “Okay. . . . We’re not going to be talking about a procedural impropriety.” The pretrial order states as Plaintiffs’ contention that “Defendants . . . continued their claim against [OBA’s] property based on forged documents and other insufficient evidence and did so with an improper or illegitimate motive and, when given the opportunity by the judge to dismiss their claims . . . refused to do so.” Defendants’ statement sets forth why they purportedly did not lose probable cause to pursue the lien claim after May 8, 2009.

{45} In spite of the foregoing, Plaintiffs argue that they have all along been asserting the second type of malicious abuse of process claim—wrongful use of proceedings under UJI 13-1639A, which (as set forth above) requires a showing of an irregular use of a procedure, or “some other act . . . that indicates the wrongful use of judicial proceedings.” While Plaintiffs did, in fact, submit to the court a proposed jury instruction under UJI 13-1639A, their instruction does not follow the requirement of describing the act(s) of impropriety or the act(s) indicating the wrongful use of proceedings—it only states that Defendants “misused the process to extort money from [P]laintiffs.” An

improper purpose, such as extortion, is an element of both types of malicious abuse of process—but it is distinct from the overt act requirement. See UJI 13-1636, -1639, -1639A; see also *DeVaney*, 1998-NMSC-001, ¶ 30 (noting that “‘it may not be inferred from evidence of an improper purpose alone that there was not probable cause,’ . . . or that there was not a proper use of process, and the burden of proving the overt act by independent evidence remains upon the plaintiff” (quoting Restatement (Second) of Torts § 669A cmt. b (1977))). Furthermore, although Plaintiffs did not submit a probable-cause-based instruction under UJI 13-1639, they submitted another instruction that would have asked the jury to find that Defendants continued their lien claim with an illegitimate motive at any one of four points after the discovery that the relevant documents were forged or invalid. This instruction failed to address probable cause, but it certainly suggests that continuation of the litigation is the overt act upon which Plaintiffs’ claim is based. Though Plaintiffs’ arguments at trial may be read collectively to assert claims that the Behles firm’s reliance on legally invalid documents and its extortionate settlement offer were acts demonstrating the wrongful use of proceedings, even these arguments were ambiguous. On appeal, Plaintiffs essentially ignore the requirement of an act or acts showing the wrongful use of proceedings.

{46} In short, until the commencement of trial, and to some extent during the trial, Plaintiffs sought to maintain a claim that Defendants continued the litigation without probable cause, while ignoring the elements of probable cause. This option was not available to them. Parties are generally bound by the issues formulated in the pretrial conference, and resulting order, which may be modified only to prevent manifest injustice. See Rule 1-016(E) NMRA; see also *Fahrbach v. Diamond Shamrock, Inc.*, 1996-NMSC-063, ¶ 24, 122 N.M. 543, 928 P.2d 269 (holding that “by the time of entry of the pretrial order, our rules contemplate that the issues to be tried will have been identified” and that “[t]he principle is well established that a pretrial order, made and entered without objection, and to which no motion to modify has been made, controls the subsequent course of action” (internal quotation marks and citations omitted)). As set forth above, the pretrial conference and order in this case indicate that Plaintiffs’ claim

was based on the alleged lack of continued probable cause to prosecute the lien claim, following the Phillips deposition. In addition, “judicial estoppel prevents a party who has successfully assumed a certain position in judicial proceedings from then assuming an inconsistent position, especially if doing so prejudices a party who had acquiesced in the former position.” *Sw. Steel Coil, Inc.*, 2006-NMCA-151, ¶ 18 (internal quotation marks and citation omitted). Plaintiffs benefited from asserting a probable-cause-based theory during pretrial motion practice, and it is generally manifestly prejudicial to any litigant for the opposing party to materially alter the basic theory of his or her claim or defense during trial. Accordingly, Plaintiffs are estopped from arguing that a probable cause analysis does not apply to OBA’s malicious abuse of process claim.

{47} For the same reasons, the district court did not abuse its discretion in limiting OBA to a claim based on the alleged lack of continued probable cause. See Rule 1-016(E); *Fahrbach*, 1996-NMSC-063, ¶¶ 24-25 (holding that “[o]rdinarily, only those theories of liability contained in the pretrial order will be considered at trial” and that, although trial courts have latitude to amend the pretrial order to conform to the evidence or to prevent manifest injustice, such amendment is a matter of discretion). This is particularly so because there was a prior order requiring Plaintiffs to file a motion if they wished to add a claim other than a claim based on Defendants “continuing their defense” after May 8, 2009.<sup>8</sup> Having decided that Plaintiffs asserted a cognizable theory that Defendants lacked continued probable cause to pursue the lien litigation and that OBA was limited to that theory, we turn to the district court’s decision in this case.

### C. Application of the Sierra County Findings and Conclusions to the Probable Cause Determination

{48} Before addressing the district court’s broader probable cause determination, we address the district court’s treatment of Judge Kase’s findings and conclusions from the lien litigation. The Behles firm argues that the district court erred in giving collateral estoppel effect to Judge Kase’s findings and conclusions because Plaintiffs “failed to establish that the ultimate facts and issues in the [malicious abuse of process] lawsuit were actually litigated and necessarily decided” in the

<sup>8</sup>We acknowledge that the January 15, 2014 order resolved a motion concerning the statute of limitations, and that the district court’s primary concern was ensuring that Plaintiffs’ cause of action was within the statute of limitations; however, as set forth above, it is apparent that the district court also amended the complaint based on Plaintiffs’ own articulation of their claim, and in response to Defendants’ request that the claim be memorialized. Plaintiffs did not object to the entry of the order, nor did they file a motion to modify the order or the complaint.

Sierra County case.<sup>9</sup> The Behles firm also argues that Judge Kase's findings and conclusions should not have been admitted into evidence because they were irrelevant and more prejudicial than probative. Plaintiffs respond that the Behles firm sought to defend itself in the malicious abuse of process case through relitigating the lien's validity, which the firm should be estopped from doing. Plaintiffs also note that the district court apparently ignored Judge Kase's findings to the effect that the Behles firm was aware of the legal invalidity of the documents upon which the firm was relying at trial.

{49} Collateral estoppel "promotes judicial economy and protects parties from endless relitigation." *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 13, 139 N.M. 637, 137 P.3d 577. Unlike *res judicata*, which precludes "relitigation of the same claim between the same parties," collateral estoppel, also called "issue preclusion," prevents a party from relitigating ultimate factual issues that were actually and necessarily decided in a prior suit. *Id.* ¶¶ 2, 13 (internal quotation marks and citation omitted). The party seeking to preclude relitigation of an issue must demonstrate that:

- (1) the party to be estopped was a party to the prior proceeding,
- (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation.

*Shovelin v. Cent. N.M. Elec. Co-op., Inc.*, 1993-NMSC-015, ¶ 10, 115 N.M. 293, 850 P.2d 996. "If the movant introduces sufficient evidence to meet all elements of this test, the trial court must then determine whether the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior litigation." *Id.* Our Supreme Court has stated that "the doctrine of offensive collateral estoppel may be applied when a plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully." *Silva v. State*, 1987-NMSC-107, ¶ 11, 106 N.M. 472, 745 P.2d 380. We review the trial court's determination on a question of collateral estoppel for an abuse of discretion. See *Shovelin*, 1993-NMSC-015, ¶ 10.

{50} The district court admitted the entirety of Judge Kase's findings and conclusions and OBA's proposed, but rejected,

findings into evidence, and purported to give those findings preclusive effect. Indeed, the district court explicitly found that, because Judge Kase rejected proposed findings that the Behles firm had participated in forgery or fraud, Judge Kase necessarily determined that the Behles firm did not know the documents were forged when it relied on them at trial. The district court described this as "significant in determining that the Behles [firm] had probable cause to continue defense of its lien." The district court's interpretation of the rejected findings is dubious in light of the findings entered by the district court that, after learning that Phillips had not signed the critical documents, the Behles firm "continued to use and rely upon" the forged documents "knowing that they contained acknowledgement of their legal efficacy which were improper and/or forged." But, in any event, we also agree with the Behles firm that these findings were non-essential to the lien claim, given that the firms' knowledge had no bearing on the lien's validity. These, and the numerous non-essential factual findings in Judge Kase's fifty-page findings and conclusions should not have been given preclusive effect. See *Paulos v. Janetacos*, 1942-NMSC-057, ¶¶ 12-15, 46 N.M. 390, 129 P.2d 636. It was therefore an abuse of discretion for the district court to bar relitigation of these issues and to rely on them for its probable cause determination. Because there were hundreds of findings and conclusions, we will not list them individually, but the non-essential findings include those concerning the Behles firm's knowledge; the rejected findings regarding fraud or forgery, evidentiary findings, findings which amount to conclusions of law, and findings concerning other Defendants. Only the factual findings necessary to a determination on the lien claim are findings which may have preclusive effect. Though we reverse and remand in light of this error, we also address the analysis that should have been undertaken by the district court, as this issue is likely to arise on remand. See *State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 37, 136 N.M. 309, 98 P.3d 699 (addressing an issue likely to recur on remand in order to provide guidance to the district court).

{51} Whether an issue was "actually litigated" and "necessarily determined" in the prior lawsuit, such that it has preclusive effect, first requires comparison with the present lawsuit, and whether there is an identity of factual issue in the two cases.

See *State ex rel. Peterson v. Aramark Corr. Servs., LLC*, 2014-NMCA-036, ¶ 34, 321 P.3d 128; see *Paulos*, 1942-NMSC-057, ¶¶ 1, 5, 9-16, 24 (holding that a prior finding concerning the plaintiff's failure to perform under an alleged contract with the decedent was a decisive fact in a suit seeking specific performance and binding on the plaintiff in his later suit for recovery for the value of services allegedly rendered to the decedent, but that other merely evidentiary findings were not decisive or preclusive). Moreover, if there is an identity of issue, that issue must be not merely relevant, but dispositive and necessary to the earlier judgment, and actually litigated. *Paulos*, 1942-NMSC-057, ¶¶ 13-14; see also *Brundage v. K.L. House Constr. Co.*, 1964-NMSC-243, ¶ 5, 74 N.M. 613, 396 P.2d 731 (holding that an ultimate and necessarily determined fact is one "upon which the court's conclusion rests and without which . . . the judgment would lack support in an essential particular").

{52} Accordingly, here, to determine whether any of the factual issues in the lien litigation were dispositive and identical to a factual issue in the malicious abuse of process litigation, the district court should first have examined the elements of the lien claim. The Behles and Miller firms asserted their lien based on two theories: (1) the security agreement purportedly assigning half of Riverside's interest in the Molly Doolittle contract and (2) a transcript of judgment and related judgment lien. With respect to the first theory, the firms were required to show that the security agreement was a valid agreement and assignment, such that it rendered the Orilla del Rio property security for Green's debt to the firms. See, e.g., 51 Am. Jur. 2d *Liens* § 40 (2020) (defining and discussing equitable liens). This theory also implicated the validity of the underlying August 22, 2002 contract. With respect to the second theory, a judgment lien is a "lien on the real estate of the judgment debtor from the date of the filing of the transcript of the judgment in the office of the county clerk of the county in which the real estate is situate." NMSA 1978, § 39-1-6 (1983). "[A] judgment lien can attach only to whatever interest the debtor has in the property. If he has no interest, then no lien can attach." *Romero v. State*, 1982-NMSC-028, ¶ 15, 97 N.M. 569, 642 P.2d 172 (citing 2 A.C. Freeman, *A Treatise of the Law of Judgments* § 950 (5th ed. 1925)). Thus, the Behles and Miller firms were required to show that they held a valid transcript of

<sup>9</sup>The Behles firm adopted arguments made by the Miller firm in its brief on conditional cross-appeal. The Miller brief raises other arguments regarding evidentiary rulings by the district court, but these are moot in light of the settlement between the Miller Defendants and Plaintiffs. Nor do we address the argument in the Miller brief that Plaintiffs failed to establish a manifest lack of probable cause because this argument does not belong in a cross-appeal—it is simply another argument in opposition to Plaintiffs' brief in chief. In addressing Plaintiffs' brief, Defendants were limited to their answers. See Rule 12-210(C)(2) NMRA.



judgment and judgment lien against Green and/or Riverside, and that Green and/or Riverside had an interest in the Orilla del Rio property. Ultimate factual findings are those essential to Judge Kase's determination that the lien was invalid under both of these theories.

{53} The next step in the analysis is whether any of those ultimate factual findings are also essential to the malicious abuse of process claim. See *Peterson*, 2014-NMCA-036, ¶ 34. A malicious abuse of process claim, in the probable cause context, necessarily involves the merits of the claim in a prior proceeding. In order to establish malicious abuse of process, OBA was required to show (among other things) that the Behles firm lacked continued probable cause, or "a reasonable belief, founded on known facts established after a reasonable . . . investigation," that the Behles firm's lien claims could "be established to the satisfaction of a court or a jury." UJI 13-1639 (alteration omitted); *DeVaney*, 1998-NMSC-001, ¶ 22. Probable cause "is to be judged by facts as they appeared at the time, not by later-discovered facts." *Weststar Mortg. Corp.*, 2003-NMSC-002, ¶ 16 (internal quotation marks and citation omitted). Therefore, the mere termination of civil proceedings "adverse to the person initiating them is not evidence that they were brought without probable cause." Restatement (Second) of Torts § 675 cmt. b; see *Guest v. Berardinelli*, 2008-NMCA-144, ¶ 18, 145 N.M. 186, 195 P.3d 353 (noting that "the fact that [the d]efendants' claims were ultimately dismissed by the district court has no bearing on the question of whether [the d]efendants had probable cause to file suit").

{54} However, "dismissal can create an inference of lack of probable cause in some circumstances." *S. Farm Bureau Cas. Co. v. Hiner*, 2005-NMCA-104, ¶ 13, 138 N.M. 154, 117 P.3d 960 (citing *DeVaney*, 1998-NMSC-001, ¶ 23). Here, some of Judge Kase's findings of fact may be both dispositive of the determination that the lien was invalid and create an inference of lack of probable cause. For instance, Judge Kase found that Riverside's articles of incorporation were revoked before it purportedly transferred an interest to the Behles and Miller firms. There may be evidence that the Behles firm was aware of this fact when it chose to continue the

litigation following the Phillips deposition. If so, the finding would be an essential fact in both proceedings. But OBA bears the burden of demonstrating the applicability of issue preclusion through proving what was known by the Behles firm at the relevant time with respect to that issue. *Silva*, 1987-NMSC-107, ¶ 12 (holding that "it is the burden of the movant invoking the doctrine of collateral estoppel to introduce sufficient evidence for the court to rule on whether the doctrine is applicable").

{55} We also recognize that, where the underlying litigation did *not* terminate in favor of the party who later makes a claim of malicious abuse of process, that unfavorable termination is a complete defense because it "is conclusive evidence of the existence of probable cause." *DeVaney*, 1998-NMSC-001, ¶ 23 (citing Restatement (Second) of Torts § 675 cmt. b); see also *Fleetwood Retail Corp. of N.M. v. LeDoux*, 2007-NMSC-047, ¶ 28, 142 N.M. 150, 164 P.3d 31 (discussing that, where a counter-claim for malicious abuse of process based on lack of probable cause is brought in the underlying suit, the proceedings may be bifurcated, since "the jury's determination in the original plaintiff's favor on the underlying claims would trump any finding . . . of a lack of probable cause"). Thus, had Judge Kase found in favor of the Behles firm on the lien claim, that finding would furnish a complete defense to OBA's probable-cause-based malicious abuse of process claim. But Judge Kase found for OBA; therefore, the Behles firm is estopped from attempting to secure a complete defense through relitigating the validity of the lien claim. See Restatement (Second) of Torts § 674 cmt. e (stating that "the person who unsuccessfully initiates civil proceedings cannot relitigate the validity of his claim in an action brought for their wrongful initiation"). The Behles firm may only litigate the reasonableness of its investigation and belief that the lien was valid—it may not litigate whether the lien was valid because that potential defense was already decided against them. In addition, and as a necessary corollary, the lien's invalidity is to be considered by the district court and/or jury as an established procedural fact. We emphasize that whether any given factual issue should be given preclusive effect with respect to the elements of OBA's malicious abuse of process

claim is, as set forth above, a separate matter.<sup>10</sup>

{56} Finally, we agree with the Behles firm that Judge Kase's findings and conclusions should not have been admitted as an evidentiary exhibit. If any particular factual finding concerning the lien claim is determined to have preclusive effect, the fact-finder (whether the court, or the jury) should deem such finding to be established. A prior memorialization of that issue (e.g., in Judge Kase's written findings and conclusions) is not evidence as such. It is merely a document that contains a statement of the issue, and admitting the entire document as evidence suggests that the jury or fact-finder is to weigh it, in spite of the fact that the document itself is hearsay and, where the entire document is admitted, may be more prejudicial than probative. Rules 11-403, 11-801(C) NMRA. An issue that has collateral estoppel effect is not to be re-weighed, but is to be considered finally decided. With respect to the jury, precise jury instructions setting forth the established factual issue should be given, as necessary.

{57} In sum: (1) we reverse and remand for a new trial because the district court erroneously admitted in evidence and barred relitigation of non-essential findings (and non-essential rejected findings) from Judge Kase's findings and conclusions; (2) the preclusive effect of any findings essential to the lien determination should be analyzed under the framework set forth above; (3) the procedural fact of the lien's invalidity is to be considered established, and the Behles firm is barred from relitigating the lien's validity; and (4) if any particular factual issues are found to be preclusive, they should be deemed established, not admitted as an evidentiary exhibit.

#### D. The Probable Cause Determination

{58} Because we reverse and remand on the issue of the preclusive effect of the Sierra County findings and conclusions, and because those findings were pivotal at trial, we do not address in great detail the parties' arguments with respect to probable cause. However, because we (again) anticipate that this issue is likely to arise on remand, we explain our agreement with Plaintiffs' general contention that the district court's probable cause determination lacked an adequate factual and legal basis.<sup>11</sup> We also explain our

<sup>10</sup>Because we reverse and remand on the collateral estoppel effect of the Sierra County findings, and we do not know whether any particular issue will be found to have preclusive effect under the correct analysis, we do not address Behles firm's arguments concerning its opportunity to fully and fairly litigate the pertinent issue(s) in the Sierra County proceeding.

<sup>11</sup>Plaintiffs also argue that the jury should have been permitted to consider evidence going to the Behles firm's allegedly improper motive, but improper motive is only relevant if the Behles firm lacked continued probable cause. If the Behles firm *had* continued probable cause, then OBA's claim is subject to dismissal, even if the Behles firm had an improper motive in the underlying litigation. See *DeVaney*, 1998-NMSC-001, ¶ 30 (citing Restatement (Second) of Torts Section 669A cmt. b, incorporated by reference in Section 675 comment j, which states that "it may not be inferred from evidence of an improper purpose alone that there was not probable cause"); see also UJI 13-1639 use note 3 (noting that a special verdict form should be used for the jury to decide any factual disputes relevant to the court's determination of probable cause, and that "[t]he verdict form should also guide the jury on whether and when it should go on to consider the defendant's motive").

disagreement with Plaintiffs regarding the appropriate time-frame for the continued probable cause analysis.

{59} Continuing probable cause is defined as a reasonable ongoing investigation of a claim, *and* a reasonable belief, based on the facts known at the relevant time, that the claim could be established to the satisfaction of a court or jury. *See* UJI 13-1639; *DeVaney*, 1998-NMSC-001, ¶ 22; Restatement (Second) of Torts § 674 cmt. d. The existence of probable cause is a question for the district court. *See Weststar Mortg. Corp.*, 2003-NMSC-002, ¶ 17 (citing Restatement (Second) of Torts § 681B); UJI 13-1639 use note 3, comm. cmt. If factual issues relevant to the probable cause analysis are not in dispute, the court makes its determination, and further instructs the jury as necessary. *See Weststar Mortg. Corp.*, 2003-NMSC-002 ¶ 17; *S. Farm Bur. Cas. Co.*, 2005-NMCA-104, ¶ 12 (stating that “if the extent of a [claimant’s] knowledge in the underlying suit” at the relevant time, “is not in dispute, the issue becomes one of law”). However, if there are material disputes of fact relevant to the existence of probable cause, the jury must resolve them, preferably through special interrogatories. *See* UJI 13-1639 use note 3.<sup>12</sup>

{60} In *Fleetwood Retail Corp. of New Mexico*, our Supreme Court admonished that “a court’s analysis of probable cause should be undertaken in a manner that will likely have the least chilling effect on a litigant’s access to the courts[,]” 2007-NMSC-047, ¶ 20, and that a lack of probable cause “must be manifest,” *id.* ¶ 13 (internal quotation marks and citation omitted). Probable cause does not require certainty, and where the defendant is an attorney, he/she generally has reasonable latitude to assert novel claims, or those with a relatively slim chance of success, given the duty of an attorney to zealously advocate for his/her client. *See Guest*, 2008-NMCA-144, ¶¶ 13, 19-21; *see also* Restatement (Second) of Torts § 674 cmt. d. The question is whether an attorney’s opinion that there was a sound chance that the claim might be sustained was a reasonable one. *See* Restatement (Second) of Torts § 675 cmt. f. Yet, if an attorney “acts without probable cause for belief in the possibility that the claim will succeed, and for an improper purpose,” that attorney “is subject to the same liability as any other person.” Restatement (Second) of Torts § 674 cmt. d. Moreover, a person “cannot have a reasonable belief in the existence

of the facts on which the proceedings are based if [she/]he knows that the alleged facts are not true.” Restatement (Second) of Torts § 675 cmt. d.

{61} Furthermore, where an attorney is representing his or her own interests in a proceeding, the reasonableness of the attorney’s belief must be assessed in that light. Ordinarily, a defendant may only rely on the advice of his attorney as a defense to a probable-cause-based malicious abuse of process claim where the defendant has no reason to believe that his attorney has a personal interest in the outcome of the case. *Id.* cmt. h. In the unusual circumstances of this case—where the Behles firm represented itself to pursue its own claim, in addition to the Miller firm’s claim, in the underlying litigation—we think the reasonableness inquiry must account for the interested quality of the Behles firm’s decision-making in choosing to continue the litigation.

{62} With this guidance in mind, we conclude that, although Behles testified regarding her belief that she had various avenues of proof for the lien claim, the district court failed to examine the factual or legal support for her theories, and thus was ill-equipped to make an objective assessment of whether that belief was reasonable. For example, while Behles testified that she believed the critical documents were legally valid because Phillips had later ratified Green’s signature, she presented no evidence from which the reasonableness of that belief could be evaluated. Similarly, Behles cited *Miera*, 1919-NMSC-016, ¶ 10, for the proposition that Phillips could authorize Green to sign the critical documents without a power of attorney, but the exception recognized in *Miera* requires the presence of the authorizing person at the signing of a conveyance related to property. There was no evidence that Phillips was present for the signing of the security agreement or other documents. These issues of fact were material because if the Behles firm’s theories had no basis in fact, those theories could not support a reasonable belief that the lien claim could be proved to the satisfaction of the court.

{63} Second, Behles cited various statutes and case law in support of her theories, but the district court did not analyze whether the law provides support for the theories advanced. For instance, although Behles claimed that Riverside could convey its assets, even if the corporation was dissolved the statutes cited by Behles, NMSA 1978, §§ 53-16-5, -6, -24 (1967), apply to

a corporation which exists but intends to dissolve, and addresses legal rights and remedies after dissolution, whereas the issue in the underlying litigation was whether Riverside was legally capable of conveying any assets through the security agreement, when it seems that Riverside’s articles of incorporation had been revoked, arguably rendering it legally non-existent, and unable to contract. *See* 19 Am. Jur. 2d *Corporations* § 2377 (2020) (“Forfeiture of the corporate charter destroys the corporation’s existence as a legal entity, and after a charter is forfeited, the corporation has no right to conduct any further business.”). Similarly, Behles claimed that she had an “independent” basis to proceed on the lien claim, in the form of the transcript of judgment—an argument the district court credited in its findings. But the evidentiary exhibits show that the judgment was based on the security agreement and disclaimer of interest that were later found to be forged and invalid. One case explicitly cited by Behles for the proposition that a judgment cannot be set aside, even if the evidence on which it was based was fraudulent, *See Day v. Trigg*, 1922-NMSC-012, ¶¶ 6-17, 27 N.M. 655, 204 P. 62, so held because the party attempting to invalidate the judgment participated in the litigation that produced the judgment; therefore, that party could have raised the issue in the first proceeding. Here, OBA was not a party to the proceeding through which the Behles firm obtained the judgment and transcript of judgment. A closer examination of these issues was required in order for the district court to determine the reasonableness of the Behles firm’s belief that it could prove the lien claim to the satisfaction of a court or jury. We also agree with Plaintiffs that Judge Kase’s brief order denying summary judgment due to disputes of fact should not have been given weight in the probable cause analysis, particularly given that both Baker and Behles testified that they sought further discovery during the summary judgment hearing, when Green had not yet been deposed, and trial was scheduled for the next month.

{64} However, we disagree with Plaintiffs that the district court should have considered whether, *after* the trial before Judge Kase, the Behles firm lacked probable cause to appeal and file post-judgment motions. Probable cause involves an inquiry into the reasonableness of a belief that a claim can be proved to the satisfaction of the fact-finder. Plaintiffs were free to argue and present proof in support of their claim

<sup>12</sup>The district court’s order stated that probable cause was a determination for the court, but later stated that there was no evidence from which a reasonable jury could find for OBA on the element of probable cause. We assume that the district court intended to say that, because the Behles firm had probable cause to continue its lien claim, there was no evidence from which a reasonable jury could find in favor of OBA on the malicious abuse of process claim (the probable cause element having been negated as a matter of law). *See* Rule 1-050.

that the Behles firm did not have continued probable cause to take the lien claim to trial. But once a fact-finder passed on the validity of the lien claim, the reasonableness of the Behles firm's belief became irrelevant. The claim was decided. Rather, an unsuccessful appeal or unsuccessful post-judgment motion practice may be relevant to the malicious abuse of process claimant's damages.

#### **IV. The District Court's Award of Costs to the Behles Firm Is Reversed**

{65} Plaintiffs also seek reversal of the district court's order granting the Behles firm its costs. Because we reverse and remand on the malicious abuse of process claim, for all the reasons set forth above, we grant Plaintiffs' request to reverse on the issue of costs, pending a final adjudication on remand. Rule 1-054(D) NMRA.

#### **CONCLUSION**

{66} We affirm the district court's dismissal of O'Brien. With respect to OBA, we reverse and remand for further proceedings in accordance with this opinion.

{67} **IT IS SO ORDERED.**  
**LINDA M. VANZI, Judge**

**WE CONCUR:**  
**JACQUELINE R. MEDINA, Judge**  
**BRIANA H. ZAMORA, Judge**

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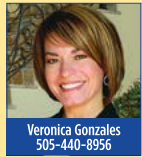
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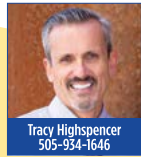
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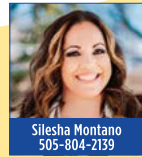
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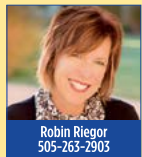
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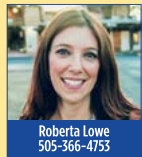
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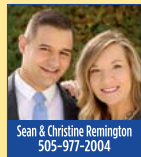
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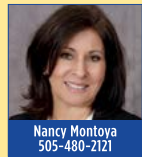
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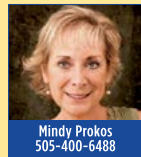
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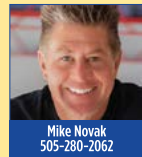
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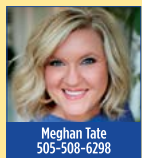
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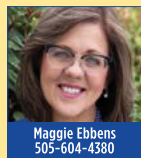
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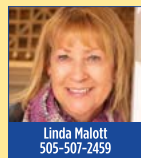
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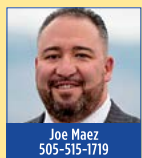
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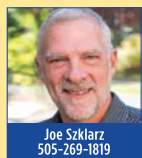
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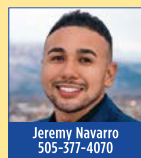
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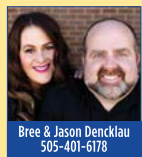
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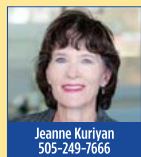
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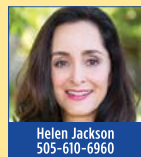
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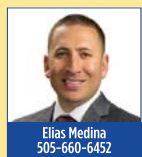
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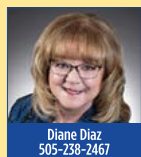
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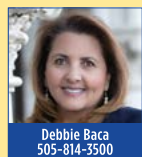
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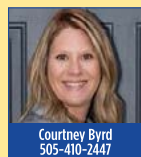
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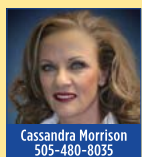
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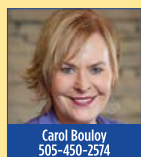
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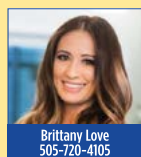
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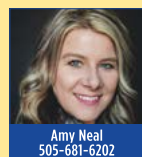
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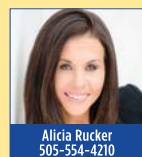
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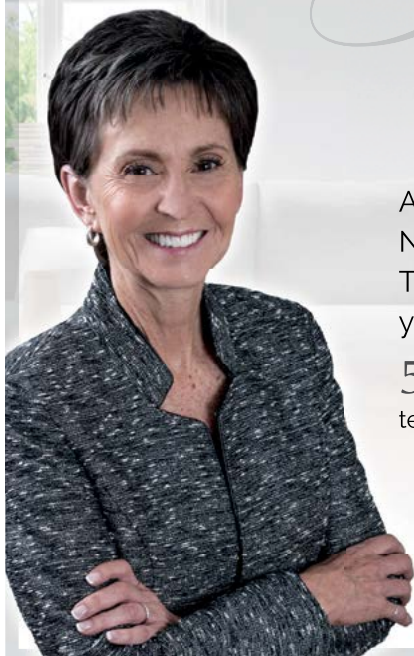


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### Litigation Attorney

Robles, Rael & Anaya, P.C. is seeking an attorney with experience (5-7 years) in civil litigation. The successful candidate should be familiar with the law regarding governmental liability and be able to advise insurance and risk management agencies. Candidates are expected to have excellent communication skills (written and oral), be a self-starter who takes ownership of executing tasks, have an ability to manage and prioritize assigned case-load and be an effective team player. We offer a competitive compensation and benefits package, 401k plan, professional development, CLE credits and more. We also offer a defined bonus incentive program. Please submit a resume and writing sample to [chelsea@roblesrael.com](mailto:chelsea@roblesrael.com).

### Managing City Attorney

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

## ROBERT CASWELL INVESTIGATIONS



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## Positions

### Full-time Associate

Bardacke Allison LLP seeks an associate attorney. Our commercial litigation and intellectual property firm prioritizes teamwork, mentorship, and growth to provide representation at the highest levels. Send your resume, statement of interest, transcript, and writing sample to [nancy@bardackeallison.com](mailto:nancy@bardackeallison.com). Submissions will be kept confidential.

### Senior Trial Attorney Trial Attorney

### Assistant Trial Attorney

The Third Judicial District Attorney's Office in Las Cruces is looking for: Senior Trial Attorney, Trial Attorney, Assistant Trial Attorney. Please see the full position descriptions on our website <http://donaanacountyda.com/> Submit Cover Letter, Resume, and references to Whitney Safranek, Human Resources Administrator at [wsafranek@da.state.nm.us](mailto:wsafranek@da.state.nm.us).

## Attorney

Opening for Associate Attorney in Silver City, New Mexico. No experience necessary. Thriving practice with partnership opportunities with focus on criminal defense, civil litigation, family law, and transactional work. Call (575) 538-2925 or send resume to Lopez, Dietzel & Perkins, P. C., david@ldplawfirm.com, Fax (575) 388-9228, P. O. Box 1289, Silver City, New Mexico 88062.

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

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

## Litigation Attorney

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

## New Mexico Court of Appeals Staff Attorney

The New Mexico Court of Appeals is accepting applications for one or more Associate Staff Attorney or Assistant Staff Attorney positions. The positions may be located in Santa Fe or Albuquerque, depending on the needs of the Court and location of successful applicants. Target pay for Associate Staff Attorney positions is \$73,000, plus generous fringe benefits. Target pay for Assistant Staff Attorney positions is \$66,259, plus generous fringe benefits. Eligibility for Associate Staff Attorney positions requires three years of practice or judicial experience. Assistant Staff Attorney positions requires one year of practice or judicial experience. Court of Appeals staff attorneys have a large impact on the development of law in the state and manage a caseload of appeals covering all areas of law. Extensive legal research and writing is involved. The work atmosphere is congenial and intellectually demanding. Interested applicants should submit a (1) resume, (2) completed New Mexico Judicial Branch Resume Supplemental Form, (3) letter of interest, (4) law school transcript, and (5) writing sample of 5-7 double-spaced pages to: Aletheia Allen, coava@nmcourts.gov, 2211 Tucker Ave., NE, Albuquerque, New Mexico 87106. More information and resume supplemental form is available at [www.nmcourts.gov/careers](http://www.nmcourts.gov/careers).

## 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](mailto:rd@mmslawpc.com).

## Senior Attorney

DNA-People's Legal Services is a non-profit law firm providing high quality legal services to persons living in poverty on the Navajo, Hopi, and Jicarilla Apache Nations, and in parts of Northern Arizona, Northwest New Mexico, and Southern Utah. DNA is seeking to hire an experienced Senior Attorney (State Licensed). The Senior Attorney must be a graduate of an accredited law school and a member of the Arizona, New Mexico, or Utah bar association, or if licensed in another jurisdiction, able to gain admission to one of these jurisdictions within one year by motion or reciprocity. Must have at least five (5) years of experience as an attorney in a legal aid organization or similar non-profit law firm with strong litigation skills; strong oral and written communication skills; the ability to travel and work throughout the DNA service area; competence in working with diverse individuals and communities, especially with Native Americans, persons of color, and other marginalized communities; a commitment to providing legal services to the poor; the ability to identify and successfully pursue strategic, systemic, and affirmative advocacy; good judgment, ability to handle stress, initiative, and willingness to work as a team; and ability to manage and supervise others, including the ability to mentor other students and law students. Senior Attorneys are supervised by the Director of Litigation and Executive Director. Please contact DNA Human Resources for additional information including a job description and a complete listing of minimum job qualifications. We provide excellent benefits, including full health insurance, dental and vision, generous paid holidays, vacation, and sick leave. Please send employment application found at <https://dnalegalservices.org/>, resume, cover letter, and other application materials to [HResources@dnalegalservices.org](mailto:HResources@dnalegalservices.org) or fax to 928.871.5036.

## Associate Attorney

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

### Entry Level and Experienced Trial Attorneys

The Thirteenth Judicial District Attorney's Office is seeking entry level as well as experienced trial attorneys. Positions available in Sandoval, Valencia, and Cibola Counties, where you will enjoy the convenience of working near a metropolitan area while gaining valuable trial experience in a smaller office, which provides the opportunity to advance more quickly than is afforded in larger offices. Salary commensurate with experience. Contact Krissy Fajardo [kfajardo@da.state.nm.us](mailto:kfajardo@da.state.nm.us) or 505-771-7400 for an application. Apply as soon as possible. These positions will fill up fast!

### Assistant City Attorney

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

### Lawyers – 2-6 Years Experience

Montgomery & Andrews, P.A. is seeking lawyers with 2 – 6 years of experience to join its firm in Santa Fe, New Mexico. Montgomery & Andrews offers enhanced advancement prospects, interesting work opportunities in a broad variety of areas, and a relaxed and collegial environment, with an open-door policy. Candidates should have strong written and verbal communication skills. Candidates should also be detail oriented and results-driven. New Mexico licensure is required. Please send resumes to [rvalverde@montand.com](mailto:rvalverde@montand.com).

### Senior Assistant City Attorney

Fulltime professional position, involving primarily civil law practice. Under the administrative direction of the City Attorney, represents and advises the City on legal matters pertaining to municipal government and other related duties, including misdemeanor prosecution, civil litigation and self-insurance matters. Juris Doctor Degree AND three year's experience in a civil law practice; at least one year of public law experience preferred. Must be a member of the New Mexico State Bar Association, licensed to practice law in the state of New Mexico, and remain active with all New Mexico Bar annual requirements. Valid driver's license may be required or preferred. If applicable, position requires an acceptable driving record in accordance with City of Las Cruces policy. Individuals should apply online through the Employment Opportunities link on the City of Las Cruces website at [www.las-cruces.org](http://www.las-cruces.org). Resumes and paper applications will not be accepted in lieu of an application submitted via this online process. This will be a continuous posting until filled. Applications may be reviewed every two weeks or as needed. SALARY: \$73,957.99 - \$110,936.99 / Annually OPENING DATE: 07/07/2021 CLOSING DATE: Continuous

### Assistant City Attorney – City of Rio Rancho

The Assistant City Attorney position provides support and assistance in planning, zoning, land development, contract negotiation and drafting, criminal procedure, policy evaluation and development, real estate and commercial transactions, civil rights, public finance, and public services. Position represents the City in legal proceedings before city, state and federal courts and agencies, including particularly criminal misdemeanor prosecution. May also assist in providing advice to the Mayor, Governing Body, City Manager and Department Directors regarding various legal matters and administrative concerns. Juris Doctor from an accredited and ABA-approved college or university law school; Three (3) years of experience in the areas of laws related to municipal government, public relations, litigation, bonds, land use, contracts, tort liability, planning, zoning, property, labor and personnel law, and criminal procedures; Prior experience working in a municipality, prior experience prosecuting misdemeanor and felony cases and working as an attorney in a federal, state, or local public agency. Must be a member in good standing of the State Bar of New Mexico; license to practice law in the State of New Mexico. For more information and to apply, visit: <https://rrnm.gov/196/Employment-and-Volunteer-Opportunities>

### Full-Time Unclassified Law Clerk

The Sixth Judicial District Court is recruiting for a full-time unclassified Law Clerk position in Deming, NM, #23600-10111880. Target pay range/rate is 100% - \$27,891 hourly. Opened 08/06/2021 and until filled. The complete job description detailing the qualifications, job duties, competencies/qualifications, work environment and physical demands, condition of employment, a list of benefits, and required forms to apply for the position are at <https://humanresources.nmcourts.gov/career-opportunities.aspx>. Proof of education and writing samples are required. Faxed applications will not be accepted. Equal Opportunity Employer.

### Experienced Litigation Attorney

Cordell & Cordell, P.C., a domestic litigation firm with over 100 offices across 37 states, is currently seeking an experienced litigation attorney for an immediate opening in its offices in Albuquerque and Santa Fe, NM. The candidate must be licensed to practice law in the state of New Mexico, have minimum of 3 years of litigation experience with 1st chair family law preferred. The position offers a significant signing bonus, 100% employer paid premiums including medical, dental, short-term disability, long-term disability, and life insurance, as well as 401K and wellness plan. This is a wonderful opportunity to be part of a growing firm with offices throughout the United States. To be considered for this opportunity please email your resume with cover letter indicating which office(s) you are interested in to Hamilton Hinton at [hhinton@cordelllaw.com](mailto:hhinton@cordelllaw.com)

### Full-time Associate Attorney

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

## **Executive Director – New Mexico Board of Bar Examiners**

The Executive Director of the New Mexico Board of Bar Examiners fills a high-level strategic, administrative, legal, and supervisory position overseeing all aspects of the administration of the New Mexico Bar Examination. The Executive Director works under the supervision of the Board of Bar Examiners, which is responsible for assessing the minimum legal competency and character and fitness of all applicants, as well as any other eligibility factors for admission to the bar in New Mexico; eligibility for admission also includes reinstatement, Uniform Bar Exam (UBE) transfer, and limited license applications. This is a hands-on role for a legal professional who is prepared to be involved in and responsible for every aspect of the bar admissions process and administration. The Executive Director manages the day-to-day operations of the office of the Board of Bar Examiners, including management of operations, oversight of Board accounts in matters of budget and other financial areas essential to the operation of the Board. The Director hires and supervises office staff and contractors. The Executive Director evaluates applicant submissions, identifies and oversees the review and resolution of applicant character and fitness issues, and serves as the Board's expert in the administration of the Rules Governing Admission to the Bar. The Executive Director represents the Board in matters with the New Mexico Supreme Court and nationally with the National Conference of Bar Examiners, as needed, and works directly with Board committees in development of strategic direction for the Board. The Executive Director should have extensive experience in managing operations to include finance, budget and staffing in a legal setting as well as experience communicating and collaborating with multiple stakeholders. Additionally, the Executive Director should have experience drafting motions and findings of fact and conclusions of law, as well as managing legal proceedings in court or in administrative proceedings. The position is located in Albuquerque, NM. Starting salary range is \$102,000 to \$135,000, depending on experience, plus a benefits package. Transmit resume and cover letter by e-mail to [info@nmexam.org](mailto:info@nmexam.org). Deadline to apply is September 3, 2021. For a full description of the position, go to: <https://nmexam.org/employment/> The Board of Bar Examiners is an equal opportunity employer. Skills and Abilities: Demonstrated excellent oral and written communications skills; Demonstrated leadership skills, to include strategic thinking, sound decision making, problem solving, and interpersonal skills. Ability to deal with numerous diverse stakeholders in a professional manner is essential skill; Ability to develop, implement, and adjust, as necessary, short and long term plans for bar admissions, set priorities for the office, and manage multiple activities simultaneously and within deadlines; Demonstrated experience in supervising staff

and contractors, to include development of goals for staff and a regular evaluation process to document growth. Contractors should have clear deliverables and timelines documented and overseen by the Executive Director; Strong organizational ability and attention to detail; Ability to interpret and apply Supreme Court Rules and other applicable laws; Working knowledge of a wide range of business technology and software. Ability to learn customized database and other software applications as needed; Ability to understand complex grading principles and statistical interpretations. Required qualifications: J.D. from an ABA-accredited law school; Bar licensure in one or more U.S. states and, if not already licensed in New Mexico, licensure in New Mexico within one year from hiring; Demonstrated experience in managing a group or organization, including operations, staffing, and financial management; Experience in litigating civil, criminal, and/or administrative matters.

## **Trial Attorney Eleventh Judicial District Attorney's Office, Div II**

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

## **Water & Environmental Law**

Law & Resource Planning Associates, P.C., ("LRPA"), an AV-rated law firm, is accepting resumes for an experienced, personable Attorney with strong academic and technical credentials to work primarily in the area of natural resource law and environmental and water law. Competitive salary commensurate with experience. Excellent benefits package. All inquiries kept confidential. Please submit a cover letter, resume, transcript(s), and writing samples to Hiring Coordinator, LRPA, P.C., P.O. Box 27209 Alb., NM 87125 E-mail responses may be submitted to [J.Brumbfield@lrpa-usa.com](mailto:J.Brumbfield@lrpa-usa.com)

## **UNM is seeking a Civil Rights Complainant Advisor**

The University of New Mexico's President's Office seeks a part-time Civil Rights Complainant Advisor to support and guide students, faculty and/or staff engaged as complainants in civil rights proceedings. This individual assists participants in navigating the administrative hearing process, reviews documents and helps the participant prepare for proceedings, accompanies participants to meetings and proceedings and assists the participant at the hearing phase by providing guidance on direct and cross-examination of parties and witnesses. For details and application please see <https://unm.csod.com/ux/ats/careersite/18/home/requisition/16665?c=unm> JD or MA preferred. Benefits eligible. EEO Employer.

## **Assistant City Attorney**

The City of Albuquerque Legal Department is hiring for various Assistant City Attorney positions. The Legal Department's team of attorneys provides a broad range of legal services to the City, as well as represent the City in legal proceedings before state, federal and administrative bodies. The legal services provided may include, but will not be limited to, legal research, drafting legal opinions, reviewing and drafting policies, ordinances, and executive/administrative instructions, reviewing and negotiating contracts, litigating matters, and providing general advice and counsel on day-to-day operations. Attention to detail and strong writing and interpersonal skills are essential. Preferences include: Five (5)+ years' experience as licensed attorney; experience with government agencies, government compliance, real estate, contracts, and policy writing. Candidates must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Current open positions include: Assistant City Attorney - APD Compliance; Assistant City Attorney - Office of Civil Rights; Assistant City Attorney - Environmental Health; Assistant City Attorney - Employment/Labor. For more information or to apply please go to [www.cabq.gov/jobs](http://www.cabq.gov/jobs). Please include a resume and writing sample with your application.

## **Attorney III Positions**

The Office of the State Engineer is seeking to hire 3 Attorney III positions to provide high level professional legal services on the most complex, difficult, and sensitive matters of water law in the specific areas of water right adjudications, administrative proceedings, judicial appeals, providing counsel to different divisions within the agency, and participating in negotiations for the Litigation & Adjudication Program. Apply at <https://www.spo.state.nm.us/> Job Opening ID 118186

### Deputy City Attorney

The City of Albuquerque Legal Department is seeking a Deputy City Attorney for its Property and Finance Division. The work includes management, oversight and development of the Property and Finance Division's Managing Attorneys, Assistant City Attorneys and staff. This person will track legal projects, timelines, deliverables, and project requirements within the division. Out-side of managerial duties, work includes but is not limited to: contract drafting, analysis, and negotiations; drafting ordinances; drafting regulatory law; assisting with Inspection of Public Records Act requests; procurement; providing general legal advice in matters regarding public finance, commercial transactions, real estate transactions, public works, and risk management; review of inter-governmental agreements; and civil litigation. Attention to detail and strong writing skills are essential. Seven (7)+ years of legal experience, including three (3)+ years of management experience is preferred. An applicant must be an active member of the State Bar of New Mexico, in good standing. Please apply on line at [www.cabq.gov/jobs](http://www.cabq.gov/jobs) and include a resume and writing sample with your application.

### Senior Trial District Attorney and Deputy District Attorney

The 6th Judicial District Attorney's Office has an opening for a Senior Trial District Attorney and a Deputy District Attorney position in Silver City. Must have experience in criminal prosecution. Salary DOE. Letter of interest, resume, and three current professional references to [MRenteria@da.state.nm.us](mailto:MRenteria@da.state.nm.us).

### Judicial Wellness Program Manager

The New Mexico Judges and Lawyers Assistance Program (NMJLAP) invites qualified and knowledgeable applicants to join our team as a full-time (30 hours per week) Judicial Wellness Manager. The successful incumbent will focus on judges, judicial staff, and their immediate family members who are affected by a wide range of personal and professional issues. NMJLAP seeks a licensed clinician (LADAC, LMHC, LPCC, LISW, or LMSW) who has previously worked with high-functioning professionals. Knowledge of the legal system in NM is a plus, particularly as it pertains to the process of becoming a judge and the stressors of that unique job. \$40,000-\$45,000 per year, depending on experience and qualifications. Generous benefits package included. EOE. Qualified applicants should submit a resume and cover letter to [HR@sbnm.org](mailto:HR@sbnm.org). Visit [https://www.sbnm.org/Portals/NMBAR/PubRes/State%20Bar%20Careers/Judicial%20Wellness%20Program%20Manager.pdf?ver=rK\\_s2TWDGH4CpS9tPHx-1w%3d%3d](https://www.sbnm.org/Portals/NMBAR/PubRes/State%20Bar%20Careers/Judicial%20Wellness%20Program%20Manager.pdf?ver=rK_s2TWDGH4CpS9tPHx-1w%3d%3d) for full details and application instructions.

### Assistant District Attorney

The Fifth Judicial District Attorney's office has immediate positions open for new or experienced attorneys, in our Carlsbad, Hobbs and Roswell offices. 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](mailto:5thDA@da.state.nm.us).

### Director of Accounting

Modrall Sperleng, one of New Mexico's largest law firms, is searching for a Director of Accounting. The ideal candidate must have extensive knowledge and experience with all aspects of the operational and financial issues associated with cash management, client billing, accounts payable, accounts receivable, payroll processing, taxes, budgeting, general ledger management, and preparation of monthly, annual, and ad hoc financial statements. Must generate profitability reports and other accounting reports as needed, maintain asset schedules and compute depreciation, and prepare initial tax schedules. Prepares and oversees year-end distribution of shareholder income. Supervises a staff of seven. Candidates must demonstrate independent judgment and initiative in recognizing and resolving problems, possess impeccable integrity in personnel and fiduciary matters, have excellent written and verbal communication skills, and be detail oriented. Strong technical skills with accounting and billing software required. A bachelor's degree in Accounting and a minimum of 10 years of related experience, including 3 years of supervisory/management experience, is required for consideration. CPA strongly preferred. This is an outstanding opportunity to work with one of New Mexico's leading law firms. Please send resumes to [susanh@modrall.com](mailto:susanh@modrall.com).

### Paralegal

Join our unique and professional team! We are looking for a paralegal who is highly organized, detail oriented and a team player. The position requires knowledge of State and Federal e-filing, calendaring, discovery and general litigation. We offer a competitive salary and benefits package that includes health insurance, vision insurance, dental insurance, paid PTO/vacation plus an employer funded 401K retirement plan. All inquiries kept strictly confidential. Please send a resume to [staff@lrioslaw.com](mailto:staff@lrioslaw.com).

### Intake Coordinator

The New Mexico State Bar Foundation Legal Resources for the Elderly Program (LREP) seeks a full-time Intake Coordinator to answer incoming calls, conduct and complete intakes, and establish case files in the LREP electronic case management system. This position also provides clerical assistance and support to other LREP staff as required. The successful applicant must have excellent communication, customer service, and organizational skills. Minimum high school diploma required. Generous benefits package. \$15-\$17 per hour, depending on experience and qualifications. EOE. Qualified applicants should submit a cover letter and resume to [HR@sbnm.org](mailto:HR@sbnm.org). Visit [https://www.sbnm.org/Portals/NMBAR/PubRes/State%20Bar%20Careers/Intake%20Coordinator.pdf?ver=eICeW\\_pN9xAe-5rrc6c9rA%3d%3d](https://www.sbnm.org/Portals/NMBAR/PubRes/State%20Bar%20Careers/Intake%20Coordinator.pdf?ver=eICeW_pN9xAe-5rrc6c9rA%3d%3d) for full details and application instructions.

### Paralegal

Coyte Law P.C. has a position available for an experienced litigation paralegal. This is a civil rights practice with an emphasis on solitary confinement and human rights violations. We are looking for someone capable of dealing with unpleasant and at times shocking fact patterns. This is an opportunity to work in a very interesting and difficult area of the law. The position requires experience with federal court filings and procedures. Please send a letter of interest, salary requirements and resume to [mcoyte@me.com](mailto:mcoyte@me.com). Applications will be kept confidential.

### 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>.

### Litigation Paralegal

Lewis Brisbois is seeking a professional, proactive Paralegal to join our growing office. Candidates should be proficient in all aspects of the subpoena process, reviewing medical records, and research. Performs any and all other duties as necessary for the efficient functioning of the Department, Office and Firm. Practices and fosters an atmosphere of teamwork and cooperation. Ability to work independently with minimal direction. Ability to work directly with partners, associates, co-counsel and clients. Ability to delegate tasks and engage firm resources in the completion of large projects. Excellent organizational skills and detail oriented. Effective written and oral communication skills. Ability to think critically and analytically in a pressured environment. Ability to multi-task and to manage time effectively. Knowledge of Microsoft Office Suite, familiarity with computerized litigation databases. Ability to perform electronic research using Lexis. Please submit your resume along with a cover letter and two writing samples to phxrecruiter@lewisbrisbois.com and indicate "New Mexico Paralegal Position". All resumes will remain confidential.

### Paralegal

Paralegal position in established commercial civil litigation firm. Requires minimum of 3-5 years' prior experience with knowledge of State and Federal District Court rules and filing procedures; factual and legal online research; trial preparation; case management and processing of documents including acquisition, review, summarizing and indexing of same; drafting discovery and related pleadings; maintaining and monitoring docketing calendars; oral and written communications with clients, counsel, and other case contacts; familiar with use of electronic databases and legal-use software technology. Must be organized and detail-oriented professional with excellent computer skills. All inquiries confidential. Salary DOE. Competitive benefits. Email resumes to e\_info@abrfirm.com or Fax to 505-764-8374.

### Litigation Paralegal

Experienced full-time litigation paralegal wanted for busy downtown Santa Fe law firm. This position involves the performance of a variety of paralegal duties, including, but not limited to, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings. Knowledge of State and Federal District Court rules and filing procedures, performing legal research. Familiarity with the use of electronic databases and legal-use software technology a plus. Must be organized and detail-oriented, and the ability to multitask in addition to being a team player. Competitive salary and benefits provided. Please send your resume to tgarduno@montand.com.

### Service

#### Forensic Genealogist

Certified, experienced genealogist: find heirs, analyze DNA tests, research land grants & more. www.marypenner.com, 505-321-1353.

### Miscellaneous

#### Want To Purchase

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

## 2021 Bar Bulletin Publishing and Submission Schedule

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

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

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

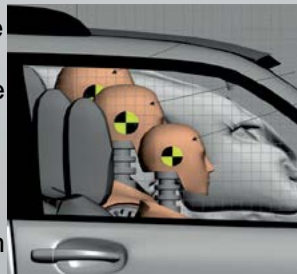
The publication schedule can be found at  
**www.sbnm.org.**

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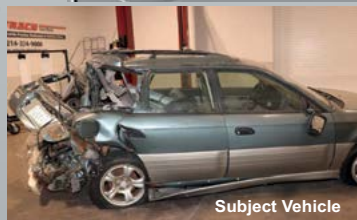
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