

BAR BULLETIN

January 25, 2023 • Volume 62, No. 2



New Mexico Weather, by Claire Hurrey (see page 4)

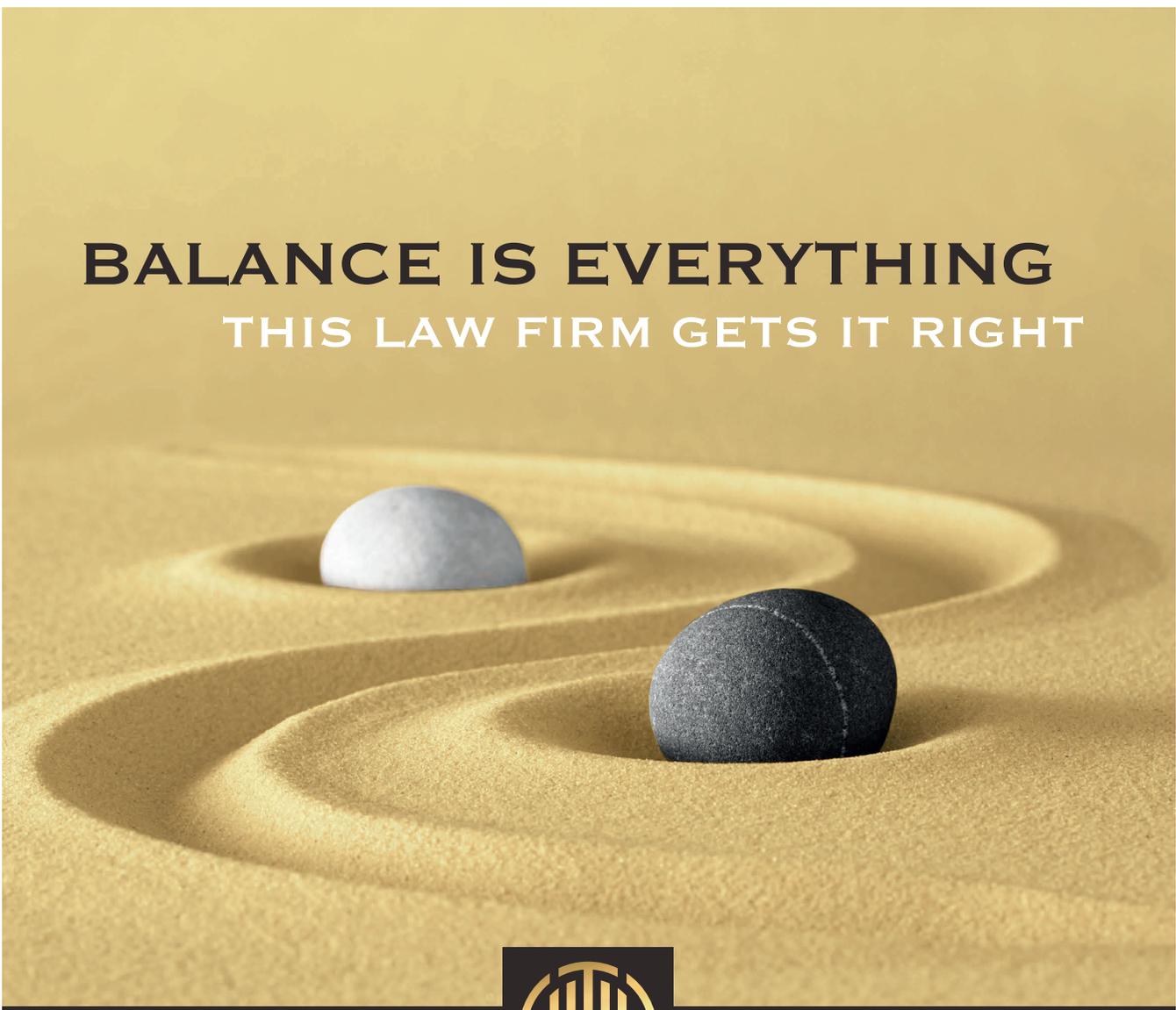
www.cehurrey.com

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SPECIAL INSERT
Excerpts from the
Client Protection Fund
2021 Annual Report

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**State Bar of
New Mexico**
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Executive Director, Richard Spinello
Marketing Communications Manager, Celeste Valencia, celeste.valencia@sbnm.org
Graphic Designer, Julie Sandoval, julie.sandoval@sbnm.org
Account Executive, Marcia C. Ulibarri, 505-797-6058 • marcia.ulibarri@sbnm.org
Brandon McIntyre, Communications Coordinator brandon.mcintyre@sbnm.org

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505-797-6000 • 800-876-6227
Fax: 505-828-3765 • address@sbnm.org

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Meetings

January

**27
Immigration Law Section**
noon, virtual

February

**3
Elder Law Section**
noon, virtual

**7
Health Law Section**
9 a.m., virtual

**10
Prosecutors Section**
noon, virtual

**14
Business Law Section**
11 a.m., virtual

**21
Solo and Small Firm Section**
9 a.m., virtual

**28
Intellectual Property Law Section**
noon, virtual

Workshops and Legal Clinics

January

**25
Consumer Debt/Bankruptcy Workshop**
6-8 p.m., virtual

February

**1
Divorce Options Workshop**
6-8 p.m., virtual

**22
Consumer Debt/Bankruptcy Workshop**
6-8 p.m., virtual

March

**1
Divorce Options Workshop**
6-8 p.m., virtual

**22
Consumer Debt/Bankruptcy Workshop**
6-8 p.m., virtual

April

**5
Divorce Options Workshop**
6-8 p.m., virtual

About Cover Image and Artist: "As my own vision travels across immense space, over large colorful masses, through atmospheres of beautiful light, I endeavor to share this with the viewer" - Claire E. Hurrey. These landscape oil paintings represent Hurrey's interest in how mass occupies space, in innumerable variations of weather and reflected light that create atmospheres of beauty. Both plein air studies and photographs were used for these studio works of the New Mexico landscape, painted from 2015-2016. Hurrey said, "My eyes are wide open to New Mexico's vast and immense desert spaces, big skies, and dramatic clouds, set over red rock cliffs with deep violet shadows, all held together by the light of its arid air." Hurrey has a bachelors in sociology and fine art, a masters in drawing, and a Masters of Fine Art in painting. See more about Claire E. Hurrey and her paintings at www.cehurrey.com.

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 1-5 p.m. For more information call: 505-827-4850, email: libref@nmcourts.gov or visit <https://lawlibrary.nmcourts.gov>.

Third Judicial District Court Announcement of Vacancy

A vacancy on the Third Judicial District Court exists as of Jan. 1 due to the retirement of the Honorable Judge Mary W. Rosner, Dec. 31, 2022. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. Camille Carey, Chair of the Third Judicial District Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: <https://lawschool.unm.edu/judsel/application.html>, or emailed to you by contacting the Judicial Selection Office at akin@law.unm.edu. The deadline for applications has been set for Jan. 12 at 5 p.m. Applications received after that time will not be considered. The Third Judicial District Court Judicial Nominating Commission will meet beginning at 9 a.m. on Jan. 23 to interview applicants for the position at the Third Judicial District Court, located at 201 W. Picacho Ave, Las Cruces, N.M., to evaluate the applicants for this position. The Committee meeting

Professionalism Tip

With respect to the courts and other tribunals:

I will be punctual for court hearings, conferences and depositions.

is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

Thirteenth Judicial District Court Notice of Mass Reassignment of Cases

Thirteenth Judicial District Court Chief Judge George P. Eichwald announced the mass reassignment of cases in Division IX, as a result of the 2022 General Election. Pursuant to 12-109 NMRA, Chief District Court Judge George P. Eichwald announced that, effective Jan. 3, all cases previously assigned to District Court Judge Karl W. Reifsteck will be reassigned to District Court Judge Allison P. Martinez. Pursuant to 1.088.1(C), parties who have not yet exercised a peremptory excusal will have 10 days from Jan. 25 to file their peremptory excusal.

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

The current term of office of full-time United States Magistrate Judge Laura Fashing is due to expire on Aug. 31. The United States 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) presiding over most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) presiding over various pretrial matters and evidentiary proceedings on delegation from a district judge, (4) taking of felony pleas and (5) 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 usmjnewmexico@nmd.uscourts.gov. Questions or issues may be directed to Monique Apodaca, who can be reached at 575-528-1439. Comments must be received by Feb. 18.

STATE BAR NEWS License Renewal and MCLE Compliance—Due Feb. 1, 2023

State Bar of New Mexico annual license renewal and Minimum Continuing Legal Education requirements are due Feb. 1, 2023. For more information, visit www.sbnm.org/compliance. To complete your annual license renewal and verify your MCLE compliance, visit www.sbnm.org and click “My Dashboard” in the top right corner. For questions about license renewal and MCLE compliance, email mcle@sbnm.org. For technical assistance accessing your account, email techsupport@sbnm.org.

Board of Bar Commissioners Meeting Summary

The Board of Bar Commissioners of the State Bar of New Mexico met on Dec. 14 at the Inn & Spa at Loretto in Santa Fe, NM. Action taken at the meeting follows:

- Approved the Oct. 21, 2022 meeting minutes;
- Received the 2023-2025 Strategic Plan with the timeline and assignments;
- Held an executive session to discuss a personnel matter;
- Reappointed Lucy Sinkular to the NM State Bar Foundation Board for a three-year term;
- Approved an application from the Board of Bar Examiners for Accredited Provider Status to Award Self Study Credit under Rule 18-204(C)(1) NMRA for board members' participation in Character and Fitness hearings;
- Appointed Don Anque to the Client Protection Fund Commission for the remainder of an unexpired term through December 31, 2023;
- Approved the liaison appointments to the Supreme Court Board and Committee for 2023;
- Received a report from the Executive Committee that met to approve the agenda and to discuss the Client Protection Fund Commission's request regarding random audits of trust accounts and created a special committee to look at the issue;
- Received a report from the Finance Committee, which included: 1) acceptance of the Oct. 2022 Financials; 3) approved amendments to the Reserve Funds Policy;

- 4) reported that no challenges were received to the 2023 Budget Disclosure;
- 5) updated bank account signers;
- 6) received a report on the 2023 licensing renewal;
- 7) received Third Quarter 2022 Financials for the Client Protection Fund, Access to Justice Fund and Judges and Lawyers Assistance Program;
- Received a report from the Policy and Bylaws Committee and approved the new licensing renewal policies;
- Received a written report from the Member Services Committee;
- Approved a new policy regarding requests from Sections, Committees and Divisions to display plaques recognizing their members in the Bar Center;
- Received a report on the Professional Practice Program new Rule 24-112 which provides for confidentiality as part of the program;
- Received a presentation on the Professional Programs Group 2023 Roadshow;
- Received an update on the Intellectual Property Law Section;
- Received the 2021 Client Protection Fund Annual Report;
- Received the results of the Board of Bar Commissioners election as follows: Second Judicial District – Lucy H. Sinkular and Steven S. Scholl; Third and Sixth Judicial Districts – Rosenda Chavez-Lara, Concepcion J. Flores, and David P. Lutz; Seventh and Thirteenth Judicial Districts – Jessica A. Perez and Simone M. Seiler; Fifth Judicial District (uncontested; elected by acclamation) – Parker B. Folse; and Eleventh Judicial District (uncontested; elected by acclamation) – Joseph F. Sawyer;
- Received a report from the President, which included her participation in the Public Lawyer of the Year Award, a meeting with UNM Dean Camille Carey; and the Senior Lawyers Division Memorial Scholarship Reception;
- Received a report from the President-Elect, which included the 2023 Meeting Schedule—Feb. 24, May 12, July 27 (Hyatt Regency Tamaya, in conjunction with the State Bar Annual Meeting), Oct. 13, and Dec. 6 or 13 (TBD) and the 2023 Internal Committee roster;
- Received a report from the NM State Bar Foundation President and the Legal Services Director on the new Modest Means Helpline Program;

- Received a report from the Executive Director; State Bar staff is working with the AMS provider to have a live demographics page which members will be able to access and view current data;
- Received reports from the Young Lawyers and Paralegal Divisions and bar commissioner districts;
- Presented plaques to commissioners with terms expiring the end of the year, including: Past President Carla Martinez, Catherine Cameron, and Jessica Perez as the 2022 YLD Chair.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the Feb. 24 meeting.

Client Protection Fund Commission 2021 Annual Report Now Available

The Client Protection Fund Commission finished its fifteenth year of operation in 2021, paying over \$60,000 to clients across 10 separate claims against six lawyers. Pursuant to Rule 17A-018(A), information related to claims, claimants and respondent lawyers with exceptions for approved claims and other limited purposes is confidential and is unavailable to the public as such. You can view the full report by visiting www.sbnm.org/CPF.

Employee Assistance Program January 2023 Newsletter

The Solutions Group's Jan. 2023 newsletter, which includes well-being-related tips for strong mental and physical health, is now available for members to read. Please visit www.solutionsbiz.com to find the Jan. 2023 newsletter.

Q1 Free Webinars

The Solutions Group will be running four free webinars in the fourth quarter of 2022. Visit www.solutionsbiz.com to view the following webinars.

- Hope Helps
- Habits: "Breaking Bad" (Building Good)
- Shining Light on the Winter Blues
- Communication in Relationships

Support With Work-Life Balance

The Solutions Group and EAP invite you to read its work-life balance flyer,

— *Featured* —

Member Benefit



Fastcase is a free member service that includes cases, statutes, regulations, court rules and constitutions. This service is available through www.nmbar.org. Fastcase also offers free live training webinars. Visit www.fastcase.com/webinars to view current offerings. Reference attorneys will provide assistance from 8 a.m. to 8 p.m. ET, Monday–Friday.

Customer service can be reached at 866-773-2782 or support@fastcase.com. For more information, contact Christopher Lopez, clopez@nmbar.org or 505-797-6018.

which provides information about various services and programs designed to help employees facilitate a healthy state of being as they navigate and manage their workloads. You can find the flyer by visiting www.solutionsbiz.com.

Equity in Justice Program Have Questions?

Do you have specific questions about equity and inclusion in your workplace or in general? Send in anonymous questions to our Equity in Justice Program Manager, Dr. Amanda Parker. Each month, Dr. Parker will choose one or two questions to answer for the Bar Bulletin. Go to www.sbnm.org/eij, click on the Ask Amanda link and submit your question. No question is too big or too small.

Listening Session on Disability

If you are a lawyer with a disability or a primary caretaker of a person with a disability, we invite you to a candid conversation regarding your experiences in the legal profession and legal settings and your

recommendations for improvement. Please reach out to Dr. Amanda Parker at amanda.parker@sbnm.org or call 505-797-6085 to be part of or help facilitate this session.

New Mexico Lawyer Assistance Program NM LAP Committee Meetings

The NM LAP Committee will meet at 4 p.m. (MT) on May 18, July 13, Oct. 5 and Jan. 11, 2024. The NM LAP 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. The NM LAP 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 Lawyer Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

Monday Night Attorney Support Group

The Monday Night Attorney Support Group meets at 5:30 p.m. (MT) on Mondays by Zoom. This group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Email Pam Moore at pmoore@sbnm.org or Briggs Cheney at bcheney@dsc-law.com for the Zoom link.

The New Mexico 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.

New Mexico Medical Review Committee

Notice of Commissioner Vacancy

In accordance with Section 41-5-14 of the New Mexico Medical Malpractice Act, the State Bar of New Mexico is accepting applications for Chair of the State Bar Medical Malpractice Review Committee. This position will select available members of the Committee to serve on Medical Malpractice Review panels. Applicants must maintain membership with the State Bar of New Mexico. Members can send applications to kate.kennedy@sbnm.org.

UNM SCHOOL OF LAW Law Library Hours

The Law Library is happy to assist attorneys via chat, email, or in person by appointment from 8 a.m. - 8 p.m. (MT) Monday through Thursday and 8 a.m. - 6 p.m. (MT) on Fridays. Though the Library no longer has community computers for visitors to use, if you bring your own device when you visit, you will be able to access many of our online

resources. For more information, please see lawlibrary.unm.edu.

Public Questions Portal

The UNM School of Law's new Public Questions Portal provides attorneys, court personnel and pro se litigants the ability to submit questions directly to the School of Law's Law Librarians via its dedicated public request account. Members can specify the kind of information they are researching in addition to other information that will help the librarians more quickly answer questions, route requests to the appropriate parties and provide document delivery services from the School of Law's databases and print collection. More information is available under the "Contact the Library" at lawlibrary.unm.edu.

OTHER NEWS

The Center for Civic Values Judges Needed for Gene Franchini New Mexico High School Mock Trial Competition

The Gene Franchini New Mexico High School Mock Trial Competition, open to any and all high school students, needs judges for its next event. The qualifier competitions will be held Feb. 17-18, 2023 at the Bernalillo County Metropolitan Court in Albuquerque and the Third Judicial District Court in Las Cruces. Those interested in attending the event may sign up at <https://civicvalues.org/mock-trial/registration/judge-volunteer-registration/> by Feb. 4, 2023. Please email any questions to Kristen Leeds at Kristen@civicvalues.org or by phone at 505-764-9417.



A Message from State Bar President Benjamin I. Sherman

Dear Member of the State Bar of New Mexico:

As we welcome 2023 and embark upon a new year, I hope that everyone enjoyed a peaceful holiday season and is entering the new year recharged and renewed. The start of the year is the perfect moment to reflect on last year's achievements and accomplishments, which were plentiful under my predecessor and now Immediate Past-President, Carolyn A. Wolf. From beginning to end, Carolyn served the State Bar and its members with excellence. With an expanded focus on well-being and special attention to members via events and initiatives such as the 2022 Membership Survey, the return of the in-person Annual Meeting and the introduction of the first annual Member Appreciation Week, the State Bar of New Mexico used 2022 as an opportunity to begin returning to a "new normal," following the COVID-19 public health crisis. As I embark on my year of leadership, in collaboration with the Board of Bar Commissioners (BBC), which includes President-Elect Erin Atkins, and Secretary-Treasurer Aja N. Brooks, I look forward to continuing Carolyn's legacy and ensuring that 2023 is another year of growing and strengthening our service to our members.

As a first step in that direction, I'd like to encourage and remind members to complete their annual license renewal and Minimum Continuing Legal Education requirements by Feb. 1. This is necessary for continued legal practice and representation in the state of New Mexico. Additionally, I want to remind all members of the new succession plan requirement outlined in Rule 16-119 NMRA, which must also be completed by members prior to renewing their license.

In 2023, members of the State Bar of New Mexico will see the return of the Resource Deskbook and Membership Listing. After a three-year print hiatus due to the pandemic and supply shortages, every active member of the State Bar of New Mexico will again receive a printed copy that will be sent to their address of record. The Resource Deskbook and Membership Listing is the State Bar's organization-wide collaborative effort to ensure that all members and legal organizations are up to speed on the growing population of attorneys in New Mexico and the leadership and staffing of various courts and legal offices around the state.

We are also excited to announce that members can look forward to the Annual Meeting, which will take place from July 27 – 29, and will once again be hosted at the Hyatt Regency Tamaya Resort & Spa. This year's Annual Meeting will feature numerous opportunities to attend informative CLEs, learn from insightful speakers on a variety of different legal topics, and enjoy various social and well-being events.

The State Bar of New Mexico will also continue to offer its excellent selection of professional development programs and well-being initiatives under the direction of its Director of Professional Programs, Pamela Moore. With two separate wellness programs, one solely dedicated to New Mexico's judiciary (Judicial Wellness Program) and the other to its attorneys (Lawyer Assistance Program), the State Bar's well-being arm is more active and informative than ever. We encourage all of our members to utilize the State Bar's well-being tools when needed to decompress and reset for the new year.

While the State Bar of New Mexico has many other exciting events and opportunities planned for its members throughout the year, I would like to take a moment to recognize the hard-working leadership and staff that make these events and opportunities possible. Having now spent several years working alongside my well-respected colleagues Richard Spinello, Kris Becker, and Stormy Ralstin, I know how dedicated they remain to our state's legal profession and its members, and I look forward to continuing collaborative efforts aimed at carrying out the State Bar of New Mexico's mission "to effectively serve its members and the public at large."

During the BBC New Officer Swearing-In Ceremony at the Inn and Spa at Loretto, in addition to thanking my esteemed colleagues, I spoke to the importance of diversity, equity and inclusion in our profession. In that regard, in 2021, the State Bar of New Mexico created the Equity in Justice Program, with its new Director, Dr. Amanda Parker. Having led the charge on diversity initiatives, Dr. Parker has been a wonderful addition to our team, and we hope to put forth further efforts in achieving racial and gender equality moving forward.

I am humbled by this incredible opportunity to serve as the 2023 President of the State Bar of New Mexico. It is very gratifying to be entrusted with leading the state of New Mexico's membership, and I strive to live up to those expectations. Here is to a successful and prosperous 2023!

Sincerely,



Benjamin I. Sherman
President, State Bar of New Mexico

2023 PRESIDENT

BENJAMIN I. SHERMAN

is Sworn In



2023 State Bar President Benjamin I. Sherman and Secretary-Treasurer Aja N. Brooks were sworn in on Dec. 14, 2022, at the Inn & Spa at Loretto in Santa Fe by Chief Justice C. Shannon Bacon. Justice Michael E. Vigil, Justice David K. Thomson, and Justice Julie J. Vargas were also in attendance and provided some remarks. The 2023 Board of Bar Commissioners officers are President Benjamin I. Sherman, President-Elect Erinna M. “Erin” Atkins (who was unable to attend and will be sworn in in 2023), Secretary-Treasurer Aja N. Brooks, and Immediate Past President Carolyn A. Wolf.



Justice Julie J. Vargas, Justice David K. Thomson, Justice Michael E. Vigil, Chief Justice C. Shannon Bacon



Aja N. Brooks is sworn in as Secretary-Treasurer



Each year, the outgoing president presents a special engraved gavel to the incoming president. Benjamin I. Sherman is joined by Carolyn A. Wolf and past presidents Jerry Dixon (2019), Erika E. Anderson (2014) and Henry A. Alaniz (2009).

2023 CAMPAIGN

Well-being: A Deeper Dive

Well-being can be defined as the combination of *feeling* good and *functioning* well. While much of the discussion focuses on getting a good night's sleep, eating well, exercising and practicing mindfulness, well-being is so much more than that. That "much more" is a journey that involves the process of looking inward, taking an honest self-inventory of our strengths and challenges, and wiring, rewiring, framing and reframing our inner thoughts about how we see ourselves, how we see the world and how we respond to challenges to our well-being. It's about our internal and external emotional stability, engagement, meaning, relationships, resilience, self-esteem and more. It's about a journey from doing just enough to "white knuckle it" to the next day before we start our routines over again to reaching "eudaimonic" well-being (e.g., finding meaning in life, experiencing a sense of personal growth, being autonomous in one's own decisions and behaviors) and hedonic well-being (e.g., feeling happy, being satisfied with one's own life). See *Perspective of the Lee Kum Sheung Center for Health and Happiness*¹.

In 2023, the NM Well-Being Committee will take a closer look at what well-being really means for attorneys and legal professionals. Through a series of podcasts and articles, we'll dive deeper to learn from members of the legal profession about their personal well-being journey; how those members moved from meeting the bare minimum requirements needed to get through the day to exceeding the bare minimum by building their inner resilience to meet challenges in their lives, making lasting changes to improve their lives, and living their lives with purpose and passion; in short, to be well.

¹ <https://www.hsph.harvard.edu/health-happiness/research-new/positive-health/measurement-of-well-being/>



State Bar of New Mexico
Well-Being Committee



The State Bar of New Mexico's Committee on Women and the Legal Profession (CWLP) is seeking nominations for the **JUSTICE PAMELA B. MINZNER OUTSTANDING ADVOCACY FOR WOMEN AWARD**. The CWLP awards this honor to New Mexico attorneys who have distinguished themselves during the prior year(s) by providing legal assistance to women who are underrepresented or underserved, or by advocating for causes that will ultimately benefit and/or further the rights of women. If you know of a New Mexico licensed attorney, of any gender, who embodies the spirit of Pamela B. Minzner Outstanding Advocacy for Women Award in the past year(s), please nominate this individual for this Award.

Our 2020 Awardee is Elizabeth "Liz" Garcia based upon her leadership at the Second Judicial District Court through the global pandemic. She was instrumental in developing policies to allow court staff to care for their families while working remotely or in a flexible manner, ensuring the safety of those that came to the court, keeping the court doors open for those in need – especially victims of domestic violence, and mentoring law students – remotely, yet effectively – to whom she was a welcome beacon of stability and wisdom in the pandemic chaos.

In 2023 due to a pandemic delay, the CWLP will award two recipients: one for work in 2021 and one for work in 2022. The award(s) will be presented at a Spring celebration in May 2023.

Nominations are due by 5 p.m. MST on Wednesday, March 15, 2023. Nominations include a short description of the work and its impact on the rights of women; additional letters of support describing the person's work and impact may be attached from multiple nominators. Additional letters should include: nominator name, contact info, years in practice, a description of their relationship with nominee, and a brief statement of how the nominee demonstrated service as an advocate for women and any examples to illustrate the nominee's work. **Visit www.sbnm.org/cwlp to submit your nomination!**



State Bar of New Mexico
Committee on Women
and the Legal Profession

Legal Education

January

- 25 - Dec. 31
Self-Study - Tools for Creative Lawyering: An Introduction to Expanding Your Skill Set
1.0 G, 2.0 EP
Online On-Demand
The Ubuntuworks Project
www.UbuntuworksSchool.org
- 25
REPLAY: Law Practice Management For New Lawyers (2022)
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 25
The Mindful Approach to Addressing Mental Health Issues
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 26
Risky Tenants: Drafting Issues for Landlords
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org
- 26
Retain Your Clients: A Roadmap to Effective, Ethical Client Service
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 26
Workers' Compensation: The Financial Impact
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 27
Real Talk-Microaggressions & Other Work Missteps (2022 Annual Meeting)
1.5 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 30
Tools for Creative Lawyering: An Introduction to Expanding Your Skill Set
1.0 G, 2.0 EP
Video Replay with Monitor (Live Credits)
The Ubuntuworks Project
www.UbuntuworksSchool.org
- 30
Ethics and Client Money: Trust Funds, Expenses, Setoffs & More
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org
- 31
Ethics, Attorneys, and Social Media: How to Keep the Disciplinary Counsel from Knocking at Your Door
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

February

- 1
Exit Strategies: Selling Companies to Employees, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
- 2
Workers' Compensation: The Fundamentals of Litigation
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 2
Exit Strategies: Selling Companies to Employees, Part 2
1.0 G
Teleseminar
Center for Legal Education of NMSBF
- 8
The Lawyer's Guide to Ethical Business Development
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 9
Workers' Compensation: Settlement Outcomes
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 17
Collaborative Family Law
10.0 G, 0.5 EP
Live Program
University of New Mexico School of Law
lawschool.unm.edu
- 17
Preventing Nuclear Settlements
1.0 G
Web Cast (Live Credits)
New Mexico Defense Lawyers Association
www.nmdla.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. Include course title, credits, location/course type, course provider and registration instructions.

March

- | | | | |
|---|------------------------------------------------------------------------------------------------------------------------------------------|----|---------------------------------------------------------------------------------------------------------------------|
| 3 | Taking and Defending Depositions
31.0 G, 1.5 EP
Live Program
University of New Mexico School of Law
lawschool.unm.edu | 21 | Poverty Law
10.0 G, 2.0 EP
Live Program
University of New Mexico School of Law
lawschool.unm.edu |
|---|------------------------------------------------------------------------------------------------------------------------------------------|----|---------------------------------------------------------------------------------------------------------------------|

April

- | | |
|----|--------------------------------------------------------------------------------------------------------------------------|
| 14 | Family Mediation
30.0 G, 2.0 EP
Live Program
University of New Mexico School of Law
lawschool.unm.edu |
|----|--------------------------------------------------------------------------------------------------------------------------|

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Elizabeth A. Garcia, Chief Clerk of the New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

CLERK'S CERTIFICATE OF ADMISSION

On December 13, 2022:
Joseph A. Farchione
Wheeler Trigg O'Donnell, LLP.
370 17th Street, Suite 4500
Denver, CO 80202
303-244-1800
farchione@wtotrial.com

Kenneth Robert Glodo III
1715 E. 1550 N.
Logan, UT 84341
435-764-2499
Glodo03@gmail.com

Theresa Bowen Hatch
Bowen Hatch Law, P.C.
1902 Wright Place, Suite 200
Carlsbad, CA 92008
760-539-7603
theresa@bowenhatchlaw.com

Karen R. McCarthy
The Bar Plan
622 Emerson Road, Suite 100
St. Louis, MO 63141
314-288-1017
krmccarthy@thebarplan.com

Jasmine R. Persinos Storm
Civil Case
Management Program
501 1st Avenue N.
St. Petersburg, FL 33701
941-462-0250
Jrpersinos.storm@gmail.com

Amber Rose Terry
Nelson & Kennard
5011 Dudley Blvd., Bldg. 250
McClellan Park, CA 95652
916-920-2295
aterry@nelson-kennard.com

On December 19, 2022:
Eric Anthony Raymon
Raymon Law Group
500 Marquette Avenue,
Suite 200
Albuquerque, NM 87102
480-249-7342
ear@raymonlawgroup.com

On December 28, 2022:
Stella Edens Pederson
Pregenzer, Baysinger,
Wideman & Sale, P.C.
460 St. Michael's Drive,
Suite 101
Santa Fe, NM 87505
505-872-0505
spederson@pbwslaw.com

CLERK'S CERTIFICATE OF LIMITED ADMISSION

On December 12, 2022:
Kathryn M. Franchini
Law Offices of the
Public Defender
301 N. Guadalupe
Santa Fe, NM 87501
505-395-2888
franchinik@gmail.com

On December 24, 2022:
Randall David Towns
Law Offices of the
Public Defender
301 Guadalupe Street
Santa Fe, NM 87501
505-395-2888

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective November 17, 2022:
William E. Frazier
1101 Cardenas Drive, N.E.,
Suite 203
Albuquerque, NM 87110
505-280-8654
boknowsdivorce@gmail.com

Effective November 21, 2022:
David T. Barton
2201 E. Camelback Road,
Suite 360
Phoenix, AZ 85016
602-753-4500
david@burnsbarton.com

Effective December 9, 2022:
Allan Joseph Hisey
Law Office of Allan J. Hisey
9312 Essex Green
College Station, TX 77845
505-259-7721
allan@ahisey.com

LeNatria Holly Jurist
JPMorgan Chase Bank, N.A.
8181 Communications Pkwy.,
Suite C
Plano, TX 75024
972-324-5399
lenatria.jurist@jpmchase.com

Effective December 16, 2022:
Charles T. Stoll
2546 Koa Avenue
Morro Bay, CA 93442
575-915-7762
charlie.stoll@gmail.com

Rebecca D. Walker
1205 Athena Drive, S.E.
Leesburg, VA 20175
847-722-3585
rdwalk01@yahoo.com

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective November 30, 2022:
Karl William Bryning
401 Main Street
Peoria, IL 61602

Marilyn E. Glaubensklee
951 SanDisk Drive
Milpitas, CA 95035

Jennifer Gruber Tanaka
2154 E. Commons Avenue,
Suite 2000
Centennial, CO 80122

Effective December 1, 2022:
Dana David
2626 Peachtree Road, N.W.,
Unit 801
Atlanta, GA 30305

Effective December 19, 2022:
Mark Allen Shaw
8297 Champions Gate Blvd.
#108
Champions Gate, FL 33896

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective January 1, 2022:
Eugene Thomas Kilbride
4223 Horizon Court
Turlock, CA 95382

Effective April 1, 2022:
Jeanne Cameron Washburn
603 Griegos Road, N.W.
Albuquerque, NM 87107

Effective October 12, 2022:
Jeffrey David Reynolds
16627 Pablo Island Drive
Groveland, FL 34736

Effective October 13, 2022:
Paul A. Kastler
102 Park Avenue
Raton, NM 87740

Effective October 20, 2022:
Sarah Reinhardt
7301 Indian School N.E.
Albuquerque, NM 87110

Effective October 25, 2022:
Shane Spear
P.O. Box 1684
Midland, TX 79702

Effective October 31, 2022:
Helen P. Nelson
P.O. Box 1232
Santa Fe, NM 87504

Paul M. Schneider
8605 Hempstead Ave.
Bethesda, MD 20817

Effective November 1, 2022:
James Bartholomew Boone
119 Thurston Drive
Bastrop, TX 78602

Fermin A. Rubio
3840 Shady Glen Avenue
Las Cruces, NM 88005

Susan S. Vance
201 W. Fifth Street, Suite 1100
Austin, TX 78701

Effective November 1, 2022:
S. Tyson Meek
4251 Stuart Street
Denver, CO 80212

Effective November 2, 2022:
Fabiola Maryam Casas
621 N. Seventh Street
McAllen, TX 78501

Effective November 3, 2022:

Effective November 3, 2022:
Robert Dean Kidd Jr.
 P.O. Box 40428
 Albuquerque, NM 87196

Effective November 4, 2022:
Anthony Aguirre
 700 Sonora Road, N.E.
 Rio Rancho, NM 87144

Effective November 10, 2022:
Wilbert Maez
 P.O. Box 3519
 Espanola, NM 87533

Effective November 15, 2022:
Emily Elizabeth Brown
 500 W. Texas Avenue, Suite 100
 Midland, TX 79701

Effective November 16, 2022:
Ronald Vincent LoLordo
 271 Zuni River Circle S.W.
 Los Lunas, NM 87031

Effective November 18, 2022:
Jamie Marie Dawson
 963 Market Street
 Parkersburg, WV 26101

Clayton Lee Parry
 6714 Woodcrest Lane
 Sachse, TX 75048

Effective November 23, 2022:
Heather Lynn Cannon
 P.O. Box 280389
 Lakewood, CO 80228

Carl Anthony Engstrand
 1819 Palmaire Avenue
 Phoenix, AZ 85020

Sirichand Khalsa
 3 Walnut Loop
 Espanola, NM 87532

George Ruhlen
 369 Montezuma Avenue,
 Suite 336
 Santa Fe, NM 87501

Effective November 28, 2022:
Mariah Mumm
 158 E. 1200 N.
 Centerville, UT 84014

Effective December 1, 2022:
Christina Jean Hendrickson Baca
 3967 Fiesta Drive
 Las Cruces, NM 88005
Bonnie P. Faucett
 3000 S. Hulen Street, Suite
 124, PMB #2014
 Fort Worth, TX 76109

Megan Elizabeth Gailey
 P.O. Box 20527
 Phoenix, AZ 85036

Richard G. Potts
 9629 S. 47th Place
 Phoenix, AZ 85044

Richard John Rubin
 1300 Canyon Road
 Santa Fe, NM 87501

Andrea Jay Walker
 P.O. Box 1229
 Fairacres, NM 88033

James M. Jackson
 927 Hwy. 93 S
 Salmon, ID 83467

Petra E. Rogers
 P.O. Box 82821
 Albuquerque, NM 87198

Effective December 5, 2022:
Marjorie Christensen
 638 E. Kyle Drive
 Gilbert, AZ 85296

Effective December 13, 2022:
Ann T. McCartney
 1 Alegre Court
 Los Lunas, NM 87031

Effective December 14, 2022:
Wesley Glen Johnson
 1312 14th Street, Suite 202
 Plano, TX 75048

Effective December 15, 2022:
Lee Hargis Huntzinger
 8520 River Street, N.E.
 Albuquerque, NM 87113

Ryan T. Jerman
 2244 Walnut Grove Avenue
 Rosemead, CA 91770

Patrick M. Schaefer
 7524 Republic Drive, N.E.
 Albuquerque, NM 87109

Patricia Johnson Turner
 1660 A Old Pecos Trail
 Santa Fe, NM 87505

Effective December 15, 2022:
Joseph Aaron Reynolds
 201 N Tryon Street, Suite
 3000
 Charlotte, NC 28270

Effective December 16, 2022:
William P. Gordon
 2501 Yale Blvd., S.E., Ste. 204
 Albuquerque, NM 87106

**CLERK'S CERTIFICATE OF
 NAME CHANGE**

As of October 25, 2022:
**Julia Gabrielle Ronquillo f/k/a
 Julia Gabrielle Coulloudon**
 P.O. Box 1293
 Albuquerque, NM 87103
 505-768-3100
 jcoulloudon@cabq.gov

As of November 22, 2022:
**Radha Inguva Bhatnagar f/k/a
 Radha Inguva**
 10337 Planter Box Street
 Las Vegas, NV 89178
 702-682-2859
 ringuva@thecmgrou.com

As of December 2, 2022:
**Shannon Murdock-Poff f/k/a
 Shannon Murdock**
 P.O. Box 78
 903 N. Fifth Street
 Estancia, NM 87016
 505-384-2974
 estdslm@nmcourts.gov

IN MEMORIAM

As of November 5, 2022:
Richard Kirby Barlow
 27 Tennis Ct., N.W.
 Albuquerque, NM 87120

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-033

No: A-1-CA-38654 (filed April 12, 2022)

STATE OF NEW MEXICO,
Plaintiff-Appellant,

v.

DAVIS HEBENSTREIT a/k/a
DAVIS TODD HEBENSTREIT,
Defendant-Appellee.

APPEAL FROM THE METROPOLITAN COURT OF BERNALILLO COUNTY

Courtney B. Weaks, Metropolitan Judge

Hector H. Balderas, Attorney General
Santa Fe, NM
Meryl Francolini, Assistant Attorney
General
Albuquerque, NM

for Appellant

Joseph Sullivan
Albuquerque, NM

for Appellee

OPINION

BOGARDUS, Judge.

{1} The March 24, 2022, memorandum opinion is withdrawn, and this formal opinion replaces it based on the April 8, 2022, order granting the State's motion to publish. The State appeals the metropolitan court's order dismissing without prejudice the State's criminal complaint against Defendant Davis Hebenstreit. The metropolitan court dismissed the complaint based on the unavailability of a State witness at trial. The State argues the metropolitan court erred in dismissing the complaint because the witness was not necessary to the prosecution of the case. We reverse and remand.

BACKGROUND

{2} This case arises from a stop at a sobriety checkpoint. Defendant was stopped at the checkpoint and later charged with aggravated DWI based on refusal to submit to chemical testing, pursuant to NMSA 1978, Section 66-8-102(D)(3) (2016).

{3} Defendant filed a motion to suppress based upon lack of reasonable suspicion to detain Defendant. The motion included the statement, "[D]efendant was detained by law enforcement[] unlawfully" and argued that Deputy Gallegos—the officer

who made contact with Defendant at the checkpoint—"did not have reasonable suspicion to detain [D]efendant initially [or] . . . beyond the scope of the initial traffic stop."

{4} On October 30, 2019, the parties convened for a bench trial. The State indicated it was ready to proceed to trial and that Deputy Gallegos and Sergeant LeCompte—the sobriety checkpoint's supervising officer—would be available to testify. Defendant, however, stated he was not ready to proceed because, while he had interviewed Deputy Gallegos, he had not yet had the opportunity to interview Sergeant LeCompte. The State responded that Defendant's motion to suppress did not challenge the constitutionality of the sobriety checkpoint itself, and therefore Sergeant LeCompte's testimony was "technically not relevant" because it was Deputy Gallegos who made contact with Defendant at the sobriety checkpoint and conducted the field sobriety test. Defendant answered that his motion was a "place marker" until he could interview Sergeant LeCompte. Defendant also argued that, since a sobriety checkpoint is an exception to the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution, the State had the burden of showing that the checkpoint was constitutional, and

Sergeant LeCompte was therefore a necessary witness. In response, the metropolitan court issued a subpoena for a pretrial statement from Sergeant LeCompte and reset the trial for a later date. Defendant interviewed Sergeant LeCompte on November 21, 2019.

{5} At the rescheduled bench trial on December 3, 2019, Deputy Gallegos was present but Sergeant LeCompte was unavailable to testify. After considering the requirements governing motions under Rule 7-304 NMRA, the metropolitan court concluded that Defendant's motion "was made as a place marker with enough specificity to trigger . . . the [necessity]" of Sergeant LeCompte's testimony at trial. The court therefore dismissed the case without prejudice. The State appeals.

DISCUSSION

{6} The State argues the metropolitan court erred in concluding that Defendant's motion to suppress attacked the constitutionality of the sobriety checkpoint with adequate particularity as required by Rule 7-304. Because Defendant's motion did not challenge the checkpoint's constitutionality with sufficient particularity, the State contends Defendant waived this issue for purposes of trial. And because Defendant had waived any challenge to the checkpoint's constitutionality, the State argues, Sergeant LeCompte's testimony—which would have been limited to addressing the checkpoint's constitutionality—was unnecessary and irrelevant to the prosecution of the case. As a result, the State argues the metropolitan court erred in dismissing the complaint due to Sergeant LeCompte's unavailability at trial.

{7} Defendant argues that his motion to suppress, which challenged his detention and invoked the Fourth Amendment and Article II, Section 10, sufficiently raised the constitutionality of the checkpoint to shift the burden to the State to prove Defendant's detention was lawful. Likewise, Defendant contends that his oral arguments before the metropolitan court sufficiently raised the constitutionality of the checkpoint by arguing that a sobriety checkpoint is an exception to the Fourth Amendment and Article II, Section 10, and therefore the State had the burden to show the checkpoint was constitutional. Defendant urges us to review the dismissal of the complaint under an abuse of discretion standard.

{8} "This case requires us to interpret and apply the New Mexico Rules of Criminal Procedure The proper interpretation of our Rules of Criminal Procedure is a question of law that we review de novo." *Allen v. LeMaster*, 2012-NMSC-001, ¶ 11,

Excerpts from the

**State Bar of New Mexico
Client Protection Fund**

2021

**ANNUAL
REPORT**

Presented to the
Supreme Court of New Mexico
and the State Bar of New Mexico
Board of Bar Commissioners

Full report available at
www.sbnm.org/CPF



State Bar of New Mexico
Client Protection Fund

2021 Commission

James T. Reist
Chair
Linda Vanzi
Vice-Chair
Jeff Baker
Secretary/Treasurer

Ex Officio Members

Richard B. Spinello
Stormy Ralstin



State Bar of New Mexico Client Protection Fund

Commissioners

Erin O'Brien Anderson
Andrew J. (Drew) Cloutier
Sally Galanter
Tanya Noonan Herring
Benjamin Sherman

Commission Liaison

Anne L. Taylor

December 31, 2021

Dear Colleagues:

It was my pleasure to serve as the 2021 Chair of your Client Protection Fund. The Fund was created to address financial losses suffered by clients of and others having a fiduciary relationship with a New Mexico lawyer due to the dishonest conduct of the lawyer. The management of the Fund (including receipt, holding and disbursement of funds) is entrusted to a Commission composed of nine lawyers (five lawyers appointed by the New Mexico Supreme Court, three appointed by the Board of Bar Commissioners, and the secretary-treasurer of the Board of Bar Commissioners).

The work of the Commission is described in the introduction section of this annual report. In large part, it centers around the consideration of claims and determining whether a claim meets the criteria for reimbursement. Serving as a Commissioner has been one of the most rewarding positions I have held as a lawyer, and I would encourage anyone with an interest in a service to the bar and the public to strongly consider applying for a vacancy as they are announced from time to time in the Bar Bulletin.

Recently, the Commission has seen an escalation of claims against deceased lawyers who either failed to place retainers or other unearned fees into a separate trust account (thereby commingling the client's funds with the lawyer's funds) or failed to maintain the requisite records for trust accounts. This makes it difficult or impossible to determine which trust account funds, if any, are being held for a particular client. Although these lawyers may not have intended harm, their failure to comply with rules involving trust accounts, retainers, and unearned fees, sometimes resulted in a conversion of funds belonging to the client or a delay in returning unearned funds to the client. This escalation of claims should remind all of us of the importance of complying with all rules applicable to the maintenance of trust accounts.

2021 marked the sixteenth full year of operation for the Commission. Of the seventeen claims fully processed in 2021, ten claims against six different lawyers were approved: resulting in payments totaling \$62,398.13. Seven claims were denied. Thirty-four claims were carried over to 2022, due to the timing of the Commission's receipt of those claims or the need for more extensive investigation of the claims.

I want to thank all the Commissioners who tirelessly served in 2021, particularly those whose terms on the Commission ended in 2021, including Erin O'Brien Anderson and Benjamin Sherman (who served as one-year term in his capacity as secretary-treasurer of the State Bar). Additionally, the assistance provided by the State Bar of New Mexico, including Richard Spinello, Stormy Ralstin, David Powell, Vanessa Sanchez and Kate Kennedy, and staff from the Disciplinary Board including Anne Taylor and Tamma Williams was essential to the success of the Commission's work.

Sincerely,

James T. Reist
2021 Chair



2440 Louisiana Blvd. NE, Ste 280
Albuquerque, NM 87110



(505) 842-5781
Fax (505) 766-6833



info@sbnm.org
www.sbnm.org

› Introduction



› History and Purpose

The purpose of the Client Protection Fund (CPF) is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in the courts of this jurisdiction. The Client Protection Fund Commission was established by order of the New Mexico Supreme Court effective Dec. 13, 2005, as a permanent commission of the State Bar of New Mexico Board of Bar Commissioners. The Supreme Court adopted a modified version of the American Bar Association's model rules for client protection funds and codified them at Rules 17A-001 et seq. of the New Mexico Rules Annotated. The Commission oversees the CPF and is charged with receiving, holding, managing, and disbursing money from the Fund according to the rules. The State Bar is responsible for administering the Commission, developing and approving the budget, and managing operations and staffing. Since Jan. 1, 2014, the New Mexico Disciplinary Board has assisted in the technical administration of the Commission's tasks, including the processing of claims under the Commission's direction.

› Revenues

The initial resources for the Fund were provided in 2005 by a Supreme Court order transferring funds from accumulated fines against lawyers who failed to comply with the Court's Minimum Continuing Legal Education requirements. In 2008, the Supreme Court ordered an additional transfer of funds from MCLE to the Fund. In 2009, the Supreme Court ordered a \$15 annual assessment of every active New Mexico attorney pursuant to Rule 17A-003 (B) NMRA. In 2010, 2012, 2016, and 2018 additional monies were also transferred from MCLE to the Fund by Supreme Court Orders. The State Bar and the Disciplinary Board provide in-kind support to the Fund and the Commission through staff support, office and meeting space, and fiscal administration. (See 2021 Financial Information, page 10). From time to time, the Fund receives monies from court-ordered sanctions directed to the fund at the discretion of the judge.

› Eligible Claims

To qualify for a reimbursement from the Fund, a client must have incurred a financial loss caused by the dishonest conduct of a New Mexico-licensed lawyer who was counseling, advising, or representing the client or serving in another fiduciary capacity such as a trustee. The claim must be filed no later than five years after the client knew or should have known of the lawyer's dishonest conduct. Dishonest conduct is specifically defined under the CPF rules as wrongful acts such as theft or embezzlement of money or the wrongful taking or conversion of money, property, or other things of value; e.g., failing to refund unearned fees or borrowing money from a client without the intention to repay or disregarding the lawyer's inability or reasonably anticipated inability to repay. A typical CPF claim involves a lawyer who collected a retainer from a client, performed some legal work, and then became unable or unwilling to finish the work or refund the unearned amount.

The rules also include a hardship exception which allows the Commission, in cases of extreme hardship or special and unusual circumstances, to recognize a claim that was filed late or would not otherwise be reimbursable. This exception is rarely used. The maximum reimbursable amount was increased in 2012 from \$10,000 to \$20,000 per individual claim, and, effective Jan. 1, 2016, from \$20,000 to \$50,000.

› Processing a Claim

The claimant must complete a prescribed claim form and have it notarized. The claimant must provide a copy of any written agreement pertaining to the claim and copies of any checks, money orders, receipts, or other proof of payment. The claimant is responsible for completing the form and providing evidence of a reimbursable loss up to the maximum amount payable per claim.



The CPF gives notice of a claim to the lawyer against whom it is filed (or the lawyer's representative) and allows 20 days for a response. The Disciplinary Board is also notified of the claim. After the lawyer's response and other initial facts and documents are gathered, the claim is assigned to one of the CPF commissioners for investigation. The commissioner investigates and presents a recommendation to the full Commission. If appropriate under the circumstances, the recommendation includes the investigating commissioner's estimate of any amount that should be allowed as a credit against the claim for the value of work the lawyer performed or costs the lawyer properly paid with client funds. The approval or denial of a claim requires the affirmative votes of at least five commissioners.

The claimant and the lawyer are notified of the Commission's decision. Either party may request reconsideration in writing within 30 days of the denial or determination of the amount of a claim. If no request for reconsideration is received, the check for any approved reimbursement is sent after the notice period expires. If a timely request is received, the check for any approved reimbursement is sent after the Commission has reconsidered its decision. Rule 17A-013 NMRA provides that in either case the Commission's decision is final and there is no further right of appeal. Reimbursement is discretionary and no person has a legal right to reimbursement from the Fund. As part of the claim form, the claimant agrees to assign his/her claims against the lawyer to the fund in the event that the CPF makes a payment, and the CPF may pursue reimbursement and recovery from the lawyer or the lawyer's successor (e.g., an estate).

› 2021 Annual Report Highlights and Commission Activities

The Client Protection Fund Commission finished its fifteenth full year of operation in 2021, paying just over \$62,398 in 10 claims against six lawyers. To date, the Commission has paid over \$1,000,000 in cumulative reimbursements for clients' financial losses involving 69 lawyers. Year-by-year and cumulative statistics appear later in this report.

The Commission met four times in 2021, all via Zoom. Due to the pandemic, there was no conference travel for the Commissioners.

The Commission reminds everyone that Rule 17A-018(A) protects the confidentiality of information on claims, claimants and respondent lawyers with exceptions for approved claims and other limited purposes as set forth below:

- A. Publicizing awarded claims. Claims, proceedings and reports involving claims for reimbursement are confidential until the commission authorizes reimbursement to the claimant, except as provided below, unless provided otherwise by law. After payment of the reimbursement, the commission shall publicize the nature of the claim, the amount of reimbursement and the name of the lawyer. The name and the address of the claimant shall not be publicized by the commission unless specific permission has been granted by the claimant. The commission may provide a waiver to the claimant which authorizes disclosure.

- B. Exceptions. This rule shall not be construed to deny access to relevant information by the disciplinary board, other professional discipline agencies or other law enforcement authorities as the commission shall authorize, or the release of statistical information that does not disclose the identity of the lawyer or the parties, or the use of such information as is necessary to pursue the fund's subrogation rights under Rule 17A-015 NMRA.



› **Visit the State Bar website at www.sbnm.org**
for further information on the
Client Protection Fund.



State Bar of New Mexico
Client Protection Fund

> 2021 Claims and Respondent Lawyers

2021 Claims and Respondent Lawyers

As required by Rule 17A-018, the Commission reports that 10 claims resolved in 2021 resulted in payments to the complaining party as a result of the actions of 6 lawyers. The following table summarizes those payments.

2021 Summary of Claims Approved by Lawyer

Lawyers	Lawyer's Status as of 12/31/2021	Claims Approved in 2021	Dollars Awarded in 2021	Reason
George Adelo	Deceased	1	\$2,000	Unearned Fees
Jon Fredlund	Suspended	1	\$2,490	Unearned Fees
Nathan Gonzales	Active	1	\$901.13	Unearned Fees
Christin Kennedy	Deceased	4	\$43,000	Unearned Fees
Armando Torres	Suspended	2	\$10,007	Unearned Fees
Rosanna Vasquez	Disbarred	1	\$4,000	Unearned Fees
Claims paid on lawyers	Total approved	10	\$62,398.13	

Annual Statistics 2006-2021

2006-2021 Annual Statistics

CLAIMS APPROVED	2006-16	2017	2018	2019	2020	2021	TOTALS
Total number of claims approved in whole or in part	229	7	11	6	7	10	270
Total dollar amount of claims approved and paid (revised from prior annual reports after reconciliation of cumulative lawyer summary)	\$845,902	\$31,655	\$43,054	\$22,093	\$41,877	\$62,398.13	\$1,046,979.13
CLAIMS DENIED							
Total number of claims denied in whole or part	208	20	20	11	12	7	278
Total dollar amount of denials	\$1,075,570	\$214,704	\$147,363	\$164,065	\$277,192	\$149,624.90	\$2,028,518.90
Dollar amount of reimbursement limit per claim	\$30,000 (through 2011) \$20,000 (effective 2012) \$50,000 (effective 2016)	\$50,000	\$50,000	\$50,000	\$50,000	\$50,000	-----
Claims made over limit	20	0	0	0	0	1	21
Total amount denied over limit	\$290,638	0	0	0	0	\$51,000	\$341,638
Total amount denied for other reasons	\$784,932	\$214,704	\$147,363	\$164,065	\$277,192	\$98,624.90	\$1,686,880.90
CLAIMS PENDING AT END OF YEAR							
Claims undecided and carried over to next year	89	14	12	15	16	34	-----
Claim amount pending at end of year	\$484,756	\$60,269	\$102,089	\$272,336	\$205,821	\$347,744.77	-----
ATTORNEY STATISTICS							
Total number of attorneys with claims filed	191	24	20	14	14	20	-----
Highest number of claims filed for a single attorney	34 (2008)	3	5	7	6	18	-----
AMOUNT REIMBURSED TO FUND	\$23,518	\$25,734.53	\$6,934.96	\$1,700	\$12,932.31	\$15,241.03	\$86,060.83



To view full report, visit
www.sbnm.org/CPF



State Bar of New Mexico
Client Protection Fund

5121 Masthead NE, Albuquerque, NM 87109
PO Box 92860, Albuquerque, NM 87199-2860

505-797-6093 • 800-876-6657

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267 P.3d 806. Rule 7-304(B) provides in relevant part that motions to the metropolitan court “shall state with particularity the grounds therefor.” *Accord State v. Goss*, 1991-NMCA-003, ¶ 13, 111 N.M. 530, 807 P.2d 228 (“Generally, motions to suppress must set out with particularity the grounds relied on for the relief sought.”). “[The d]efendants have the burden to raise an issue as to their illegal search and seizure claims. Once they have done so, the burden shifts to the [s]tate to justify the warrantless search or seizure.” *State v. Ponce*, 2004-NMCA-137, ¶ 7, 136 N.M. 614, 103 P.3d 54 (alterations, internal quotation marks, and citation omitted). Because this case turns on whether Defendant sufficiently raised an issue as to the illegality of the sobriety checkpoint, we consider the metropolitan court’s application of Rule 7-304 in light of our law governing the legality of these checkpoints. “Although there is no question that a [sobriety checkpoint] is a seizure, a [checkpoint] does not require reasonable suspicion or probable cause with respect to a particular motorist.” *State v. Bates*, 1995-NMCA-080, ¶ 9, 120 N.M. 457, 902 P.2d 1060. “[T]he constitutionality of the [checkpoint] depends on whether it is reasonable.” *Id.* ¶ 6; *see also State v. Bolton*, 1990-NMCA-107, ¶ 8, 111 N.M. 28, 801 P.2d 98 (“The reasonableness of a [checkpoint] provides a constitutionally adequate substitute for the reasonable suspicion that would otherwise be required to justify the detention of vehicles and the questioning of their occupants.”). A sobriety checkpoint “is constitutionally permissible so long as it is reasonable within the meaning of the [F]ourth [A]mendment as measured by its substantial compliance with [eight factors].” *City of Las Cruces v. Betancourt*, 1987-NMCA-039, ¶ 24, 105 N.M. 655, 735 P.2d 1161. “[A] sobriety checkpoint conducted in substantial compliance with the eight *Betancourt* factors is [also] constitutional under the New Mexico Constitution.” *State v. Madalena*, 1995-NMCA-122, ¶ 26, 121 N.M. 63, 908 P.2d 756.

{9} We conclude Defendant’s motion was insufficiently particular to alert the metropolitan court or State that the grounds for suppressing evidence related

to the checkpoint’s illegality. *See Goss*, 1991-NMCA-003, ¶ 13 (stating that “[g]enerally, motions to suppress must set out with particularity the grounds relied on for the relief sought”); *see also City of Santa Fe v. Marquez*, 2012-NMSC-031, ¶ 27, 285 P.3d 637 (“A motion to suppress presupposes that the evidence was *illegally obtained*.” (alteration, internal quotations, and citation omitted)). The record reflects that Defendant’s motion did not specifically challenge the legality of the checkpoint or argue the State failed to comply with any of the *Betancourt* guidelines for determining whether a checkpoint is reasonable. *Cf. Goss*, 1991-NMCA-003, ¶¶ 10, 14 (concluding that the defendants failed to preserve their challenge to the checkpoint’s legality based in part on the defendants’ failure to make a specific challenge concerning the constitutionality of the sobriety checkpoint itself or argue the checkpoint’s noncompliance with *Betancourt*).¹ Defendant’s motion does not cite *Betancourt*, mention any of *Betancourt*’s guidelines or facts implicating these guidelines, or use the term checkpoint or roadblock.

{10} Defendant’s motion, rather, was based upon the State lacking reasonable suspicion to detain Defendant. The reasonable suspicion required for a continued *investigatory detention* related to a sobriety checkpoint, however, is not required to stop a particular motorist at the checkpoint initially; the legality of a checkpoint stop and the legality of an investigative detention arising from that stop are distinct issues such that raising one does not necessarily implicate the other. *Compare Bates*, 1995-NMCA-080, ¶ 9 (stating that “a [sobriety checkpoint] does not require reasonable suspicion or probable cause with respect to a particular motorist”), with *State v. Hall*, 2016-NMCA-080, ¶ 17, 380 P.3d 884 (noting that a driver stopped at a sobriety checkpoint could be detained for *additional investigation* if the officer has reasonable and articulable suspicion of criminal activity based on the officer’s observations or the driver’s answers to the officer’s initial inquiry (emphasis added)), and *State v. Anaya*, 2009-NMSC-043, ¶ 15, 147 N.M. 100, 217 P.3d 586 (“Evading

a marked [sobriety] checkpoint is a specific and articulable fact that is sufficient to predicate reasonable suspicion for an investigatory stop.”).²

{11} {11} Although Defendant’s motion does state, “[D]efendant was detained by law enforcement[] unlawfully,” and “Deputy Gallegos did not have reasonable suspicion to detain [D]efendant initially,” we cannot say these statements “set out with particularity the grounds relied on” for suppressing evidence based on the *checkpoint’s* illegality. *Goss*, 1991-NMCA-003, ¶ 13; *accord* Rule 7-304(B). Defendant’s references to the Fourth Amendment and Article II, Section 10 in his motion and to the metropolitan court do not alter our conclusion.

{12} {12} Defendant effectively acknowledged to the metropolitan court that his motion had yet to articulate upon which grounds, if any, he believed the sobriety checkpoint to be illegal. Defense counsel stated his motion was “a place marker” until he could interview Sergeant LeCompte, but that he would file an amended motion after conducting the interview. Defendant did interview Sergeant LeCompte but failed to file an amended motion.

{13} {13} To the extent Defendant contends his motion was sufficiently particular when viewed together with his arguments to the metropolitan court discussing sobriety checkpoints generally, we disagree. Defendant argued to the metropolitan court that, since a sobriety checkpoint is an exception to the Fourth Amendment and Article II, Section 10, the burden was on the State to show the checkpoint’s constitutionality, and therefore Sergeant LeCompte was required to testify.

{14} Defendant, however, had the burden to raise an issue as to the *illegality* of the checkpoint, which would have then shifted the burden to the State to justify the checkpoint stop. *See Ponce*, 2004-NMCA-137, ¶ 7 (“[The d]efendants have the burden to raise an issue as to their illegal search and seizure claims. Once they have done so, the burden shifts to the [s]tate to justify the warrantless search or seizure.” (alterations, internal quotation marks, and citation omitted)). We cannot say Defendant raised an issue as to the checkpoint’s illegality

¹ Defendant points out that no evidentiary hearing occurred in this case, unlike in *Goss*, 1991-NMCA-003, and asserts that no evidentiary hearing occurred because Sergeant LeCompte failed to appear. Defendant, however, does not develop these arguments to explain why a lack of evidentiary hearing mattered under the circumstances. *See State v. Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (noting that we will “not review unclear or undeveloped arguments [that] require us to guess at what parties’ arguments might be”). We note, as well, that defense counsel interviewed Sergeant LeCompte but failed to make any argument to the metropolitan court that Sergeant LeCompte’s interview provided defense counsel with information germane to the illegality of the checkpoint.

² Defendant argues that his motion was sufficiently particular because evading sobriety checkpoints may also implicate a reasonable suspicion analysis and that, under New Mexico law, Defendant “could not avoid a detention as a result of the checkpoint.” In support of these propositions Defendant cites various cases in which a driver sought to avoid a sobriety checkpoint. These cases are inapposite. Defendant does not dispute he was stopped at a sobriety checkpoint, and his motion raised no facts indicating he sought to avoid the checkpoint.

sufficient to shift this burden to the State by merely stating that a checkpoint is an exception to the Fourth Amendment and Article II, Section 10. Accordingly, we conclude Defendant's motion was insufficiently particular to alert the district court or State to the grounds for suppressing evidence related to the checkpoint's illegality, and thus the burden to justify the checkpoint's legality did not shift to the State.

{15} Because we conclude Defendant's motion was insufficiently particular to shift this burden to the State, the legality of the checkpoint would not have been an issue at trial. *See Marquez*, 2012-NMSC-031, ¶ 25 (“[O]ur rules require suppression motions to be filed prior to trial, absent good cause.”); *State v. Can-*

delaria, 2019-NMCA-032, ¶ 27, 446 P.3d 1205 (“[M]otions asserting the denial of constitutional rights are indeed subject to pretrial motion deadlines.”). It follows that because the legality of the checkpoint was not at issue, Sergeant LeCompte's testimony—which would have been limited to questions concerning the checkpoint's legality—would not have been necessary. *See* Rule 11-401 NMRA (“Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence, and . . . the fact is of consequence in determining the action.”); *see also* Rule 11-602 NMRA (noting that personal knowledge of a matter is required for a witness to testify regarding the matter). Present at trial was Deputy Gallegos, who made contact with Defendant at

the checkpoint and thus had personal knowledge of the DWI investigation.³ *See* Rule 11-602 (requiring a witness to have personal knowledge of a matter to testify). Accordingly, the metropolitan court erred in dismissing the case based on Sergeant LeCompte's unavailability to testify at trial.

{16} **CONCLUSION**

{17} {16} For the foregoing reasons, we reverse and remand to the metropolitan court for reentry of the charges against Defendant.

{18} {17} **IT IS SO ORDERED.**

{19} **KRISTINA BOGARDUS, Judge**

{20} **WE CONCUR:**

{21} **SHAMMARA H. HENDERSON, Judge**

{22} **KATHERINE A. WRAY, Judge**

³ Defendant was charged with aggravated DWI for refusing to submit to chemical testing, contrary to Section 66-8-102(D)(3). Pursuant to this charge, the State would have had to prove that Defendant operated a motor vehicle while under the influence of intoxicating liquor and that he refused to submit to chemical testing. *See* UJI 14-4508 NMRA. That the State apparently expected Sergeant LeCompte to be present at trial does not change our conclusion that his testimony would not have been necessary in light of Defendant's failure to adequately raise an issue as to the checkpoint's illegality.

Advance Opinions

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-034

No: A-1-CA-36798 (filed April 14, 2022)

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ROGER WARFORD,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY

Fred T. Van Soelen, District Judge

Hector H. Balderas, Attorney General

Eran Sharon, Assistant Attorney

General

Santa Fe, NM

for Appellee

Lindsey Law Firm, LLC

Daniel R. Lindsey

Clovis, NM

for Appellant

OPINION

MEDINA, Judge.

{1} After conditionally pleading guilty to driving while under the influence of intoxicating liquor or drugs (DWI), contrary to NMSA 1978, § 66-8-102(A) (2010, amended 2016)¹, Roger Warford (Defendant) appeals the district court's denial of his motion to exclude the results of a blood draw performed pursuant to the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2019). Defendant argues the phlebotomist who drew his blood was not authorized to do so because, according to Defendant, a phlebotomist is not a laboratory technician under NMSA 1978, § 66-8-103 (1978) and the phlebotomist in this case was not employed by a hospital because her direct employer was a laboratory that contracted with the hospital where she worked. We conclude, consistent with our Supreme Court's recent decision in *State v. Adams*, 2022-NMSC-008, 503 P.3d 1130, that phlebotomists who have adequate training and experience are qualified as laboratory technicians to perform legal blood draws under the Implied Consent Act so long as they were employed to do so by a hospital or physician. *Id.* ¶ 1. We further conclude that, given the facts and circumstances presented in this case, the phlebotomist

who drew Defendant's blood was employed by a hospital. Finally, we conclude that Defendant's additional argument that there was insufficient evidence to support the enhancement of his DWI conviction is without merit. We affirm.

BACKGROUND

{2} In January 2015, Defendant drove into a motel parking lot and parked next to a vehicle in which two police officers were conducting surveillance of a motel room pending receipt of a search warrant. Defendant stepped out of his truck, staggered to the passenger side of the officers' vehicle, and asked them if they were police officers. Defendant then walked towards the hotel, went upstairs, and approached the room the officers intended to search. The officers prevented Defendant from entering the room. Defendant had bloodshot and watery eyes, an odor of alcohol on his breath, and slurred speech. He also had two sixteen-ounce beer cans, one half empty and one unopened, in his jacket. Defendant admitted to having consumed five to six sixteen-ounce beers.

{3} A uniformed officer was summoned to investigate Defendant for DWI. Defendant failed standardized field sobriety tests and was arrested for DWI. Defendant agreed to a blood test and was transported to the Plains Regional Medical Center (PRMC), a hospital in Clovis, where Mirna Gaxiola, a certified phlebotomist, drew Defendant's

blood for testing.

{4} Defendant was charged with DWI (4th Offense). Defendant moved to exclude his blood test results. Defendant asserted the evidence was insufficient to demonstrate the testing was conducted in accordance with the Implied Consent Act, under Section 66-8-103, which provides that “[o]nly a physician, licensed professional or practical nurse or laboratory technician or technologist employed by a hospital or physician shall withdraw blood from any person in the performance of a blood-alcohol test.” *Id.*; see also § 66-8-109(A) (“Only the persons authorized by Section 66-8-103 . . . shall withdraw blood from any person for the purpose of determining its alcohol or drug content.”).

{5} The State responded that under Section 66-8-103, laboratory technicians are included in the categories of approved medical personnel authorized to draw blood under Section 66-8-109 and that under 7.33.2.15(A)(1) NMAC, the term laboratory technician includes phlebotomists. From this, the State argued that Gaxiola was authorized to draw Defendant's blood under Section 66-8-103 because she attended and completed a Phlebotomy Technique Training course at Eastern New Mexico University, and upon completion was certified as a Phlebotomy Technician. {6} During a hearing on the motion, Defendant argued the district court was required to exclude the blood test because Gaxiola did not fall into any of the statutory categories, and therefore was not qualified to conduct the test. Defendant provided the district court with a copy of a recorded pretrial interview he conducted of Gaxiola in which she stated she was a certified phlebotomist, not a licensed professional, laboratory technologist or technician, or hospital employee.

{7} At a later hearing, the district court denied Defendant's motion to exclude, explaining that, despite Gaxiola's statements, based on its own legal research and given Gaxiola's status as a phlebotomist for TriCore Laboratory (TriCore), which contracts with the hospital to perform all of the hospital's blood services, she “is a technician under the statute employed by the hospital for the purposes of the Implied Consent Act.”

{8} Defendant entered a conditional plea of no contest to DWI, reserving the right to appeal the ruling on any motion filed in the case. Defendant then appealed to this Court. After ordering supplemental

¹ Section 66-8-102(D)(3) was held unconstitutional by this Court in *State v. Storey*, 2018-NMCA-009, ¶ 32, 410 P.3d 256. That subsection refers to aggravated DWI, which is not at issue here, and Storey did not affect the constitutionality of the subsections we reference in this opinion.

briefing on two issues,² we certified this case to the New Mexico Supreme Court, as it presented a similar question of statutory construction to six other cases before our Supreme Court.

{9} Following acceptance of the certification of this case, our Supreme Court issued an opinion in *Adams*, holding that an emergency medical technician (EMT) who was employed by a hospital or physician and had adequate training and experience in performing blood draws qualified as a “laboratory technician” for the purposes of Section 66-8-103. *Adams*, 2022-NMSC-008, ¶ 34. Our Supreme Court subsequently quashed certification of this case, returning it to this Court.

DISCUSSION

I. The District Court’s Denial of the Motion to Exclude the Blood Test Results Was Not an Abuse of Discretion

{10} Generally, “[w]e review the [district] court’s decision to exclude or admit evidence for an abuse of discretion.” *State v. Hanson*, 2015-NMCA-057, ¶ 5, 348 P.3d 1070. “This case requires us to engage in statutory interpretation to determine what the appropriate foundation is for admitting the results of blood tests to determine the content of alcohol or drugs under the Implied Consent Act. We do so under a de novo standard of review.” *State v. Garcia*, 2016-NMCA-044, ¶ 8, 370 P.3d 791.

{11} The Implied Consent Act provides in relevant part that “[o]nly the persons authorized by Section 66-8-103 . . . shall withdraw blood from any person for the purpose of determining its alcohol or drug content.” Section 66-8-109(A). Section 66-8-103 in turn limits the class of persons who may withdraw blood to the following: “Only a physician, licensed professional or practical nurse or laboratory technician or technologist employed by a hospital or physician shall withdraw blood from any person in the performance of a blood-alcohol test.”

{12} On appeal, Defendant contends that the phlebotomist who drew his blood does not qualify as a “laboratory technician,” is not employed by a hospital or physician, and, as a result, was not authorized to perform blood draws under Section 66-8-103. We first address whether the phlebotomist in this case qualified as a laboratory technician. Concluding she does, we next address whether the fact that the phlebotomist was employed by TriCore, and not directly with the hospital, renders her unqualified. We conclude that she was qualified.

A. The Phlebotomist in This Case Qualified as a Laboratory Technician

{13} In light of our Supreme Court’s recent opinion in *Adams* and for the reasons that follow, we hold that the district court correctly concluded that Gaxiola was a laboratory technician under Section 66-8-103.

{14} In *Adams*, addressing arguments highly similar to those here, our Supreme Court determined that an EMT is qualified to draw blood as a “laboratory technician” under Section 66-8-103 “so long as they were employed to do so by a hospital or physician and have adequate training and experience” *Adams*, 2022-NMSC-008, ¶ 1. *Adams* addressed whether this Court’s decision in *Garcia*, which held that the EMT in that case was not authorized to draw blood under Section 66-8-103, precluded all EMTs from being qualified to draw blood under that provision. *See Garcia*, 2016-NMCA-044, ¶¶ 1, 21-24. The defendant in *Adams* argued that *Garcia* stood for the proposition that EMTs did not fall under the five enumerated categories of those who may perform blood draws and that the Legislature did not intend to authorize legal blood draws by anyone falling outside those categories. *Adams*, 2022-NMSC-008, ¶ 17. Our Supreme Court rejected these contentions. The Court concluded, after examining the dictionary definitions of “laboratory technician,” that the term “laboratory technician” was ambiguous on its face, *id.* ¶¶ 11-15, and then proceeded to examine the legislative purpose of the Implied Consent Act, *see id.* ¶¶ 16-29. As part of this examination, the Court contrasted the facts of *Garcia* with the facts in *Adams*. In *Garcia*, the EMT who performed the blood draw did so improperly and was not trained to perform blood draws for the purposes of the Implied Consent Act. *Adams*, 2022-NMSC-008, ¶¶ 28-29. In contrast, the EMT who performed the blood draw in *Adams* had specifically been trained to perform blood draws “for [the] purposes of determining drug and alcohol content” and one of her job duties was to “perform legal blood-alcohol blood draws at the request of law enforcement personnel.” *Id.* ¶ 31 (alteration, internal quotation marks, and citation omitted). The EMT also had performed thousands of blood draws and performed the contested blood draw in accordance with the instructions in the Scientific Laboratory Division (SLD) kit. *Id.* ¶ 32.

{15} Our Supreme Court then held that “EMTs who are employed by a hospital or physician and who possess the proper

education and experience” are qualified as laboratory technicians to perform blood draws under Section 66-8-103. *Adams*, 2022-NMSC-008, ¶ 34. In so holding, our Supreme Court observed that “[p]rohibiting medical professionals who possess such training in this area from administering blood draws would needlessly impose burdens on the discovery and removal of the intoxicated driver and, thus, thwart the legislative policy.” *Id.* (internal quotation marks and citation omitted).

{16} *Adams* informs our analysis in this case. The State argues that Gaxiola is qualified to draw blood under Section 66-8-103 because the Legislature intended that people with her skills and experience should fall within the “laboratory technician” category, noting that SLD’s regulations specifically include “phlebotomists” in the definition of laboratory technicians. *See* 7.33.2.15(A) NMAC (“The term laboratory technician shall include phlebotomists.”); *cf. Adams*, 2022-NMSC-008, ¶ 29 (stating that this Court’s opinion in *Garcia* addressed the EMT’s lack of qualifications to draw blood for the purposes of Section 66-8-103, not whether an EMT with greater experience and training could potentially draw blood under the statute). We agree.

{17} The record reflects that Gaxiola, like the EMT in *Adams*, had the requisite training and experience to draw Defendant’s blood. The district court found that Gaxiola, a phlebotomist, was a technician under the statute. Defendant does not contest the finding, which was based on the pretrial interview Defendant submitted to the court. Gaxiola completed a phlebotomy course from Eastern New Mexico University in Portales. Gaxiola stated that upon graduating from the course she received a certificate demonstrating that she was a certified phlebotomist. Soon after graduation, she was hired by TriCore as a Clinical Lab Assistant I to perform blood draws at PRMC. She also received additional training in blood draw procedures once placed at PRMC. *See Adams*, 2022-NMSC-008, ¶ 31 (“[The EMT] testified that she was taught how to perform blood draws by other nurses and technicians [at the hospital].”). Gaxiola explained that she was the only clinical lab assistant working during her shifts, which entailed conducting blood draws during morning rounds at the hospital, and stated that she performed approximately fifty blood draws during each of her shifts.

{18} Gaxiola also demonstrated knowledge of legal blood draw procedures, including ensuring the SLD kit was sealed

² The parties were ordered to brief (1) whether Section 66-8-103 requires a laboratory technician to be employed by a hospital or physician; and (2) assuming Gaxiola was a laboratory technician, whether she was employed by a hospital or physician under Section 66-8-103.

and not expired, following the instructions on the kit, and sealing the kit and returning it to the requesting officer. Gaxiola stated that when law enforcement presented her with individuals for implied consent blood draws, she performed those blood draws in a room designated for law enforcement related blood draws. *See Adams*, 2022-NMSC-008, ¶ 32 (observing that the EMT could explain the difference between a hospital blood draw and a law enforcement blood draw). And, when officers provided her with SLD blood draw test kits, she only used kits that were sealed and not expired. *See Garcia*, 2016-NMCA-044, ¶ 4 (“SLD-approved blood draw kits include everything that is needed for a blood draw to ensure continuity and standardization, and to avoid compromising the accuracy and integrity of blood samples.”). She followed the instructions that came with the kit. Once she completed the blood draw, Gaxiola sealed the test kit box and returned it to the requesting officer.

{19} {19} Consistent with *Adams*, we conclude that prohibiting phlebotomists—with adequate training and experience to perform legal blood draws—from administering blood draws would thwart the legislative purpose of the Implied Consent Act. 2022-NMSC-008, ¶ 34. We therefore conclude that Gaxiola, who possessed the requisite training and experience to perform blood draws, qualified as a laboratory technician within the meaning of Section 66-8-103, so long as she was employed by a hospital or physician—the matter we turn to next.

B. The Phlebotomist in This Case Was “Employed” by a Hospital Within the Meaning of Section 66-8-103³

{20} We next determine whether Gaxiola was an employee of a hospital for the purposes of Section 66-8-103. *See Adams*, 2022-NMSC-008, ¶ 7 (clarifying in part that “in order for a medical professional to qualify as a laboratory technician for the purposes of performing legal blood draws, the person must be employed by a hospital or physician to perform blood draws”). Defendant argues that even if Gaxiola was “deemed a technician or technologist,” she was not qualified to perform his blood draw because she was not employed by a hospital or physician as specified in Section 66-8-103. We disagree and explain.

{21} We first observe that, while *Adams* stated that Section 66-8-103 requires a laboratory technician or technologist to be employed by a hospital, *Adams* did not consider what the term “employed” encompassed. *See Adams*, 2022-NMSC-008, ¶¶ 1, 7 (stating that a laboratory

technician must be “employed to [draw blood] by a hospital,” but not interpreting the term “employed”). Thus, whether Gaxiola is considered an employee of a hospital for the purposes of Section 66-8-103 is a question of first impression regarding the interpretation of the statute that we review de novo. *See State v. Duhon*, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50.

{22} “Our primary goal when interpreting statutory language is to give effect to the intent of the [L]egislature.” *State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284. “We first look to the plain meaning of the statutory language.” *State v. Farish*, 2021-NMSC-030, ¶ 11, 499 P.3d 622. “When words are not otherwise defined in a statute, we give those words their ordinary meaning absent clear and express legislative intention to the contrary. To do so, we consult common dictionary definitions.” *Adams*, 2022-NMSC-008, ¶ 10 (alteration, internal quotation marks, and citation omitted). “Unless ambiguity exists, [the appellate courts] must adhere to the plain meaning of the language.” *Id.* (internal quotation marks and citation omitted). We, however, will not do so if the plain meaning “leads to an absurd or unreasonable result.” *State v. Marshall*, 2004-NMCA-104, ¶ 7, 136 N.M. 240, 96 P.3d 801. “A statute is ambiguous when it can be understood by reasonably well-informed persons in two or more different senses.” *Adams*, 2022-NMSC-008, ¶ 10 (internal quotation marks and citation omitted). “If the relevant statutory language is unclear, ambiguous, or reasonably subject to multiple interpretations, then the Court should proceed with further statutory analysis.” *State v. Almanzar*, 2014-NMSC-001, ¶ 15, 316 P.3d 183. In this context, our courts often have turned to the legislative purpose of the Implied Consent Act to discern legislative intent. *See, e.g., Adams*, 2022-NMSC-008, ¶¶ 16-34; *Garcia*, 2016-NMCA-044, ¶ 24; *State v. Wiberg*, 1988-NMCA-022, ¶¶ 13-17, 107 N.M. 152, 754 P.2d 529; *State v. Trujillo*, 1973-NMCA-076, ¶ 21, 85 N.M. 208, 510 P.2d 1079. “Accordingly, we analyze these statutes not only within the statutory scheme of the Motor Vehicle Code but also within the context of the policy underlying the offense of DWI. The purpose of our DWI legislation is to protect the health, safety, and welfare of the people of New Mexico.” *State v. Johnson*, 2001-NMSC-001, ¶ 6, 130 N.M. 6, 15 P.3d 1233.

{23} We first observe that the term “employ” means “[t]o commission and entrust with the performance of certain acts or functions” in addition to its often-used

meaning “[t]o hire.” *Employ*, *Black’s Law Dictionary* (11th ed. 2019). Defendant advances a strict adherence to the meaning of employ, advocating that a laboratory technician must be directly employed by a hospital or physician. The State, in contrast, argues that the term should be construed more broadly in light of the purposes of the Implied Consent Act. We agree with the State.

{24} We conclude that the term “employ” is ambiguous on its face, in that it can reasonably be understood to have more than one meaning, as both the State and Defendant have argued on appeal. We therefore turn next to the legislative purpose of Section 66-8-103. *See Adams*, 2022-NMSC-008, ¶ 15. We must analyze the term “through the lens of the Legislature’s intended purpose, which [our Supreme Court has] conclude[d] encompasses two goals: (1) to protect patients subject to a blood draw and (2) to ensure the collection of a reliable blood sample for use in DWI prosecutions.” *Id.* ¶ 22. Contrary to Defendant’s argument, requiring a laboratory technician to be directly employed by a hospital or physician is not necessary to achieve these purposes. An examination of the facts and circumstances of this case makes this evident.

{25} Upon completing her phlebotomy class, Gaxiola applied for and was hired as a Clinical Lab Assistant I by TriCore in August or September 2014. PRMC contracted with TriCore to perform blood draws. TriCore placed Gaxiola at PRMC to perform the hospital’s blood draws, where she received additional training in PRMC’s blood-draw procedures. Gaxiola worked at PRMC through TriCore for nearly two years. Gaxiola’s explanation of her job duties as a phlebotomist at PRMC shows that PRMC entrusted her with the performance of blood draws during her shifts, even if PRMC did not hire her directly. In sum, the record demonstrates that PRMC contracted with TriCore, who in turn hired Gaxiola, a phlebotomist, to perform legal blood draws, trained her in blood-draw procedures, and determined she was qualified to perform blood draws, including legal blood-draw tests.

{26} In light of this record, determining that Gaxiola was an employee of the hospital for the purposes of Section 66-8-103 is consistent with the dual purposes of this provision—i.e., ensuring the safety of Defendant and ensuring the reliability of the blood test. *See Adams*, 2022-NMSC-008, ¶ 34 (“Allowing EMTs who, along with their certification, have the training and experience in the skill of drawing blood

³ During the January 30, 2017 hearing, defense counsel argued that Section 66-8-103 required a technician to be employed by a hospital and that Gaxiola was not a hospital employee. The district court later ruled that Gaxiola was an employee of the hospital for purposes of the statute. We therefore reject the State’s contention that this issue was not preserved.

to perform legal blood draw tests and who are employed by a hospital or physician to do so, furthers the purpose of the statute to ensure the safety of the patient and the reliability of the blood sample.”). Furthermore, determining that Gaxiola was an employee of PRMC supports Section 66-8-103’s purpose “to deter driving while intoxicated and aid in discovering and removing from the highways the intoxicated driver.” See *Adams*, 2022-NMSC-008, ¶ 34 (internal quotation marks and citation omitted). It is also consistent with this Court’s and our Supreme Court’s previous constructions of Section 66-8-103 “to broaden, not narrow, the category of individuals authorized to draw blood.” *Adams*, 2022-NMSC-008, ¶ 23; see *id.* ¶¶ 23-29 (discussing this Court’s decisions in *Trujillo*, *Wiberg*, and *Garcia*). Holding otherwise—i.e., that Gaxiola was not a hospital employee simply because she was not directly employed by the hospital or a physician but rather employed by TriCore, a contractor used by the hospital to perform blood draws—would “unnecessarily limit the classes of individuals who could assist in furthering the statute’s legislative purpose” and produce the absurd result of disqualifying technicians the hospital trained to perform implied consent blood draws. See *id.* ¶ 27 (internal quotation marks and citation omitted); *Wiberg*, 1988-NMCA-022, ¶ 13 (rejecting a construction of Section 66-8-103 as it would “unnecessarily limit the classes of individuals who could assist in furthering the statute’s legislative purpose” of “aid[ing] in discovering and removing the intoxicated driver from the highways”). Consistent with the legislative purpose of the Implied Consent Act, we interpret the term “employ” in Section 66-8-103 to encompass Gaxiola’s relationship to PRMC, which entrusted her with the performance of legal blood draws. See *Employ*, *Black’s Law Dictionary* (11th ed. 2019); *Adams*, 2022-NMSC-008, ¶ 1 (“[S]uch medical professionals are qualified to draw blood under [Section 66-8-103] so long as they were employed to do so by a hospital.” (emphasis added)); see also *Adams*, 2022-NMSC-008, ¶ 34 (“It is the Court’s responsibility to resolve any ambiguity in Section 66-8-103 in a way that supports the legislative purpose to deter driving while intoxicated and aid in discovering and removing from the highways the intoxicated driver.” (internal quotation marks and citation omitted)).

{27} Therefore, based on the foregoing, we hold that Gaxiola was qualified, under Section 66-8-103, as a laboratory techni-

cian employed by a hospital to perform Defendant’s blood draw, and we affirm the district court’s denial of Defendant’s motion to exclude.

II. The District Court Properly Enhanced Defendant’s DWI Conviction

{28} Defendant next challenges the use of one of his prior DWI convictions to enhance his DWI sentence in this case, arguing the State did not meet its burden in showing that the prior conviction was counseled. For the reasons that follow, we affirm. A person convicted of DWI who has been convicted of previous DWI charges faces enhanced penalties. See § 66-8-102(F)-(J) (2010). When prior DWI convictions are used to enhance a defendant’s sentence, “[t]he [s]tate bears the initial burden of establishing a prima facie case of a defendant’s previous convictions.” *State v. Sedillo*, 2001-NMCA-001, ¶ 5, 130 N.M. 98, 18 P.3d 1051. “Proof beyond a reasonable doubt of the prior DWI convictions is not needed.” *Id.* Once a prima facie case is established, “[t]he defendant is then entitled to bring forth contrary evidence. However, the [s]tate bears the ultimate burden of persuasion on the validity of prior convictions.” *Id.* (citation omitted).

{29} The State attached a certified copy of an abstract of record from the Motor Vehicle Division of the Taxation and Revenue Department (1991 Abstract) to its enhancement information. The 1991 Abstract documented Defendant’s August 1990 DWI arrest, identified a court docket number, and showed that a hearing was held in October 1991; Defendant requested counsel, he entered a plea of guilty, and he received a sentence of ninety days with eighty-three days suspended. In addition to identifying the sentence and fine imposed for the DWI conviction, the “remarks” box on the 1991 Abstract contains the text “P.D. Raina Owen, 620 Roma NW” and is signed by Bernalillo County Metropolitan Court Judge Mark Shapiro.

{30} Defendant argued below, as he does on appeal, that the 1991 Abstract did not establish that an attorney was appointed to represent him. The district court reviewed the abstract and stated during a hearing that the name of Raina Owen was located in the 1991 Abstract where the name of defense counsel’s name usually appears. Defense counsel suggested that “P.D.” could stand for police department or probation department and that the address of 620 Roma NW might be the address for the Albuquerque Police Department. The district court took the matter under advisement.

{31} In September 2017, the district court issued a letter decision, finding that the 1991 Abstract showed Defendant requested counsel and “includes what appears to be the name and address of an attorney, ‘P.D. Raina Owen, 620 Roma NW.’” The district court noted that the defense had not come forward with evidence challenging the validity of Defendant’s 1991 DWI conviction, rejected Defendant’s argument that the notation “P.D. Raina Owen, 620 Roma NW” could have been the address of the police department, and concluded that Defendant’s 1991 prior conviction would be used to enhance Defendant’s sentence.

{32} The parties appeared for a sentencing hearing during which defense counsel again asserted that “P.D. Raina Owen 620 Roma NW” might be reference to a “police station” or “some other thing” and objected to the district court’s finding that it was documentation of the attorney who represented Defendant in 1991. The district court reiterated that the defense had not come forward with evidence to challenge the validity of the State’s prima facie evidence of Defendant’s prior DWI conviction, and stated: (1) where the name Raina Owen and the 620 Roma address appear on the abstract is the location the court knows the name of defense counsel is located; and (2) based on that knowledge, the most reasonable explanation is that “P.D.” stands for “public defender.” The district court enhanced Defendant’s DWI conviction with his 1991 DWI conviction.

{33} “The burden on making a prima facie case is not onerous on the [s]tate.” *State v. Simmons*, 2006-NMSC-044, ¶ 14, 140 N.M. 311, 142 P.3d 899 (discussing habitual offender enhancements). A “prima facie case” is defined as “a party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.” *Yurcic v. City of Gallup*, 2013-NMCA-039, ¶ 29, 298 P.3d 500 (alteration, internal quotation marks, and citation omitted). The 1991 Abstract undisputedly contained the following evidence: (1) Defendant’s 1990 arrest in Bernalillo County; (2) Defendant’s request for an attorney; (3) Defendant’s DWI guilty plea; (4) the finding of Defendant’s guilt in 1991; (5) the name and signature of the judge who found him guilty; (6) a handwritten notation of “P.D. Raina Owen, 620 Roma NW”; and (7) Defendant’s DWI sentence. The district court used its experience to find the information sufficient to infer that Defendant was represented by counsel, Raina Owen, when he plead guilty

⁴ Defendant’s unsubstantiated accusation that the district court’s finding was arrived at through independent investigation of facts outside the record, in violation of Rule 21-209(C) NMRA, supplies no basis for relief on appeal. See *State v. Hall*, 2013-NMSC-001, ¶ 28, 294 P.3d 1235 (“It is not our practice to rely on assertions of counsel unaccompanied by support in the record.” (internal quotation marks and citation omitted)).

to DWI in 1991, because the name Raina Owen appeared on the abstract where the district court expects defense counsel to be identified.⁴ We conclude that the foregoing was sufficient to meet the State's initial burden of proving its prima facie case of Defendant's 1991 DWI conviction. See *Sedillo*, 2001-NMCA-001, ¶¶ 8-9.

{34} The burden then shifted to Defendant to show that his prior DWI conviction was invalid by demonstrating that the notation "P.D. Raina Owen, 620 Roma NW" does not indicate Defendant was represented by counsel. See *Simmons*, 2006-NMSC-044, ¶ 13 ("[T]he [s]tate must make its prima facie showing, including all of the required elements for a prior felony conviction as defined by the habitual of-

fender statute, and then the burden of proof shifts to the defendant."). Defendant did not do so. Instead, Defendant speculated that the initials "P.D." could stand for "police department" or "probation department" and that "620 Roma NW" might be the address of the Albuquerque Police Department. Counsel's speculations are not evidence demonstrating the invalidity of a prior conviction. See *State v. Cordova*, 2014-NMCA-081, ¶ 10, 331 P.3d 980 ("[A]rgument of counsel is not evidence." (internal quotation marks and citation omitted)). To the extent Defendant's conjectures gave rise to a conflict in the interpretation of the information contained on the 1991 Abstract, the district court, as fact-finder, was entitled

to reject Defendant's interpretation of the evidence. See *Sedillo*, 2001-NMCA-001, ¶ 1.

{35} In sum, we conclude that the State met its initial burden of proving a prima facie case of Defendant's 1991 DWI conviction, and Defendant failed to rebut this showing.

CONCLUSION

{36} For the foregoing reasons, we affirm the district court's denial of Defendant's motion to exclude his blood test results and the enhancement of his sentence.

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

JACQUELINE R. MEDINA, Judge

WE CONCUR:

JENNIFER L. ATTREP, Judge

ZACHARY A. IVES, Judge

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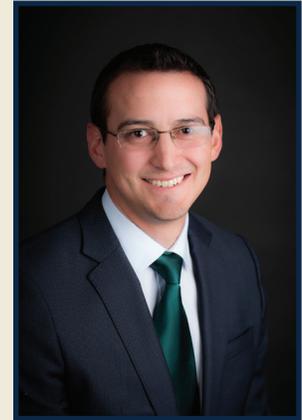
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The *Bar Bulletin* publishes twice a month on the second and fourth Wednesday. Advertising submission deadlines are also on Wednesdays, three weeks prior to publishing by 4 pm.

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.**

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