

BAR BULLETIN

November 24, 2021 • Volume 60, No. 22



License Renewal and MCLE Compliance



State Bar of New Mexico licensing certifications and fees and Minimum Continuing Legal Education requirements are due Feb. 1, 2022*

- ✓ 2022 Licensing certifications and fees
- ✓ 2021 MCLE requirements

*The Supreme Court of New Mexico recently revised the rules relating to attorney licensing and MCLE rules (see NMSC Order No. 21-8300-030).

To complete annual licensing and MCLE requirements, visit www.sbnm.org and click **My Dashboard** in the top right corner. For questions, email mcle@sbnm.org.

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New Mexico State Bar Foundation
Center for Legal Education

CLE PROGRAMMING

from the Center for Legal Education



NOVEMBER 30

Webinar:

Me Too: Sexism, Bias, and Sexual Misconduct in the Legal Profession

1.0 EP
11 a.m. - Noon
\$89 Standard Fee

Teleseminar:

Ethics for Transactional Lawyers

1.0 EP
11 a.m.–Noon
\$79 Standard Fee

DECEMBER 1

Webinar:

2021 ADR Institute: Understanding Trauma and Stressors in Alternative Dispute Resolution Practice

4.5 G
9 a.m.–2:30 p.m.
\$212 Standard Fee

Teleseminar:

Business Torts: How Transactions Spawn Litigation, Part 1

1.0 G
11 a.m.–Noon
\$79 Standard Fee

DECEMBER 2

Teleseminar:

Business Torts: How Transactions Spawn Litigation, Part 2

1.0 G
11 a.m.–Noon
\$79 Standard Fee

Webinar:

2021 Immigration Law Institute: The Intersection of Criminal Law and Immigration

3.0 G, 1.0 EP
12:30–4:45 p.m.
\$196 Standard Fee

DECEMBER 3

Teleseminar:

Ethics of Joint Representations: Keeping Secrets & Telling Tales

1.0 EP
11 a.m.–Noon
\$79 Standard Fee

DECEMBER 6

Webinar:

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

1.0 EP
1:30–2:30 p.m.
\$55 Standard Fee

DECEMBER 7

Webinar:

“Let Me Ask You A Question. Suppose I was Considering ...”: A Mock Meeting of the Ethics Advisory Board

2.0 EP
10 a.m.–Noon
\$98 Standard Fee

Webinar:

In For a Penny, In for a Pound: Ethical Issues Associated with Co-Counsel Arrangements

1.0 EP
1–2 p.m.
\$49 Standard Fee

DECEMBER 8

In-Person and Webcast:

Family Law: Guardian ad Litem Training

6.8 G
8:30 a.m.–5 p.m.
\$288 Standard Fee

Webinar:

Ethics of Social Media Research

1.5 EP
11 a.m.–12:30 p.m.
\$129 Standard Fee

DECEMBER 9

Teleseminar:

Drafting Property Management Agreements

1.0 G
11 a.m.–Noon
\$79 Standard Fee

Webinar:

OneDrive: How Do I Use It

1.0 EP
11 a.m.–Noon
\$89 Standard Fee

DECEMBER 10

Teleseminar:

Ethics & Artificial Intelligence: What Lawyers Should Know

1.0 G
11 a.m.–Noon
\$79 Standard Fee

DECEMBER 14

In-Person and Webcast:

Gain the Edge! Negotiation Strategies for Lawyers (with Marty Latz)

5.0 G, 1.0 EP
9 a.m.–4:30 p.m.
\$282 Standard Fee

DECEMBER 15

Webinar:

Legal Malpractice Insurance & Claims Avoidance 101

1.0 EP
11 a.m.–Noon
\$89 Standard Fee

*In-person programs subject to current public health guidelines. Should changing guidance make meeting in-person not possible, registrants will be transferred to virtual format or given a refund. All visitors to the State Bar Center are encouraged to read the latest COVID information at the CDC website and take any actions to keep themselves and others comfortable and healthy as we continue to transition out of the pandemic. NOTE: Face masks must be worn at all times in the public areas of the building, regardless of vaccination status.

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

SUTIN WELCOMES OUR NEWEST ASSOCIATES



Amanda E. Cvinar practices in the areas of business and corporate law, intellectual property, mergers and acquisitions, liquor licensing, estate planning, renewable energy development and public finance. Amanda has worked for the PRC and in the Attorney General's Office. As a law clerk at Sutin, she assisted clients with forming, governing, and selling their businesses and with trademark applications to the USPTO.



Justin L. Greene centers his practice on employment and commercial litigation. During law school, Justin held several clerkships where his work involved employment-related litigation such as discrimination, harassment, wrongful termination, and wage-and-hour claims. He also worked as a research assistant on a book regarding the citizenship of Puerto Ricans following annexation of the island.



Mingjie L. Hoemmen focuses on employment law and civil rights, collections, and bankruptcy and creditors' rights. Prior to joining Sutin, Mingjie was the managing attorney of another firm's subrogation department and practiced in Navajo court. She has also worked as a legal translator for a California firm, translating legal, financial, and technical documents in Mandarin and English for IP infringement litigation.

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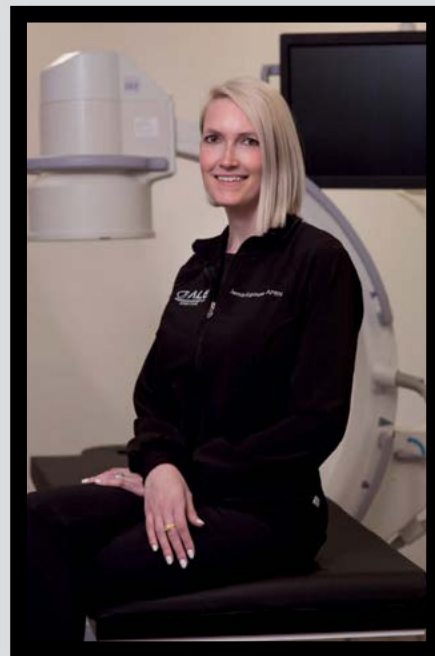
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Board Certified in Pain Medicine & Neurology



Jamie Espinosa, APRN



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Meetings

December

1
Employment and Labor Law Section
noon, teleconference

3
Legal Services and Programs Committee
10 a.m., teleconference

7
Health Law Section
9 a.m., teleconference

8
Children's Law Section
noon, teleconference

8
Tax Section
9 a.m., teleconference

9
Business Law Section
4 p.m., teleconference

10
Cannabis Law Section
9 a.m., teleconference

10
Prosecutors Section
noon, teleconference

Workshops and Legal Clinics

December

1
Divorce Options Workshop
6 p.m., virtual

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

2022

Coming soon!

Notices

COURT NEWS

New Mexico Supreme Court Rule-Making Activity

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

Supreme Court Law Library

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

Third Judicial District Court Mass Reassignment of Cases

On Aug. 25, Gov. Michelle Lujan-Grisham appointed Casey Fitch in Division V of the Third Judicial District Court. Effective Dec. 1, a mass reassignment of all pending cases previously assigned to the Honorable Lisa C. Schultz, District Judge, Division V, shall be reassigned to Honorable Casey Fitch. Pursuant to Supreme Court Rule 1.088, parties who have not yet exercised a peremptory excusal will have 10 days from Dec. 1 to excuse Judge Fitch.

U. S. District Court for the District of New Mexico Service on Court Committee

Chief Judge William P. Johnson and the Article III District Judges for the District of New Mexico would like to solicit interest from Federal Bar members for service on the Federal Bench and Bar Fund Committee. This Committee advises the Court and the Fund's Custodian with respect to the administration and operation of the Fund. See Administrative Order Misc. No. 91-09 for more information regarding the Federal Bench and Bar Fund. All interested Federal Bar members in good standing should reply by Nov. 30 to the Clerk of Court, U. S. District Court, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102; or by email to clerkofcourt@nmd.uscourts.gov to be considered for appointment to the Committee.

Professionalism Tip

With respect to my clients:

In appropriate cases, I will counsel my client regarding options for mediation, arbitration and other alternative methods of resolving disputes

STATE BAR NEWS 2022 Budget Disclosure Deadline to Challenge Expenditures

The State Bar of New Mexico Board of Bar Commissioners has completed its budgeting process and finalized the 2022 Budget Disclosure, pursuant to the State Bar Bylaws, Article VII, Section 7.2, Budget Procedures. The budget disclosure is available in its entirety on the State Bar website at www.sbnm.org on the financial information page under the About Us tab. The deadline for submitting a budget challenge is on or before 5 p.m., Nov. 30, 2021, and the form is provided on the last page of the disclosure document. The BBC will consider any challenges received by the deadline at its Dec. 8, 2021, meeting. Address challenges to: Executive Director Richard Spinello, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199; or rspinello@sbnm.org. Challenges may also be delivered in person to the State Bar Center, 5121 Masthead NE, Albuquerque, NM 87109.

License Renewal and MCLE Compliance—Due Feb. 1, 2022

State Bar of New Mexico licensing certifications and fees and Minimum Continuing Legal Education requirements are due Feb. 1, 2022. The Supreme Court of New Mexico recently revised the rules relating to attorney licensing and MCLE (see NMSC Order NO. 21-8300-030). For more information, visit www.sbnm.org/compliance

To complete your licensing certifications and fees and verify your MCLE compliance, visit www.sbnm.org and click "My Dashboard" in the top right corner. If you have not logged into our website recently, you will need to choose "Forgot Password." For questions about licensing and MCLE compliance, email mcle@sbnm.org or call 505-797-6054. For technical assistance accessing your account, email techsupport@sbnm.org or call 505-797-6018.

Board of Bar Commissioners Appointment to New Mexico State Bar Foundation Board

The Board of Bar Commissioners of the State Bar of New Mexico will appoint one director to the New Mexico State Bar Foundation Board for a three-year term. The New Mexico State Bar Foundation is the charitable arm of the State Bar of New Mexico representing the legal community's commitment to serving the people of New Mexico and the profession. The goals of the Foundation are to enhance access to legal services for underserved populations, promote innovation in the delivery of legal services, and provide legal education to members and the public. Active status members interested in serving on the Board should submit a letter of interest and a resume to bbc@sbnm.org by Nov. 29.

Appointments of Commissioners to Vacancies Seventh and Thirteenth Judicial Districts and the Eleventh Judicial District

No nomination petitions were received for two positions in the Seventh and Thirteenth Judicial Districts and one position in the Eleventh Judicial District, so the Board of Bar Commissioners will need to make appointments to those districts. The term will commence Jan. 1, 2022, and expire Dec. 31, 2022. Active status members with a principal place of practice (address of record) in the Judicial Districts with vacancies are eligible to apply. The 2022 Board of Bar Commissioners meetings are scheduled for: Feb. 25, May 20-21 (Las Cruces, in conjunction with a board retreat and member district event), August 11 (Hyatt Regency Tamaya Resort, in conjunction with the State Bar Annual Meeting), Oct. 21, and Dec. 7. Members interested in serving on the Board should submit a letter of interest and resume to bbc@sbnm.org by close of business on Nov. 24.

New Mexico Judges and Lawyers Assistance Program Defenders in Recovery

Defenders in Recovery meets every Wednesday night at 5:30 p.m. The first

Wednesday of the month is an AA meeting and discussion. The second is a NA meeting and discussion. The third is a book study, including the AA Big Book, additional AA and NA literature including the Blue Book, Living Clean, 12x12 and more. The fourth Wednesday features a recovery speaker and monthly birthday celebration. These meetings are open to all who seek recovery. We are a group of defenders supporting each other, sharing in each other's recovery. We are an anonymous group and not affiliated with any agency or business. Anonymity is the foundation of all of our traditions. Who we see in this meeting, what we say in this meeting, stays in this meeting. For the meeting link, send an email to defendersinrecovery@gmail.com or call Jen at 575-288-7958.

Employee Assistance Program

NMJLAP contracts with The Solutions Group, The State Bar's EAP service, to bring you the following: FOUR FREE counseling sessions per issue, per year. This EAP service is designed to support you and your direct family members by offering free, confidential counseling services. Check out the MyStress Tools which is an online suite of stress management and resilience-building resources. Visit www.sbnm.org/EAP. or call 866-254-3555. All resources are available to members, their families, and their staff. Every call is completely confidential and free.

Monday Night Attorney Support Group

The Monday Night Attorney Support Group meets at 5:30 p.m. 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.

NMJLAP Committee Meetings

The NMJLAP Committee will meet at 10 a.m. on Jan. 8, April 2, and July 9, 2022. The NMJLAP Committee was originally developed to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve

professionally in the legal field. Over the years the NMJLAP Committee has expanded their scope to include issues of depression, anxiety and other mental and emotional disorders for members of the legal community. This committee continues to be of service to the New Mexico Judges and Lawyers Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

N.M. Well-Being Committee Upcoming Meeting

The next meeting of the N.M. Well-Being Committee is 1 p.m. on Nov. 30. The 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.

Well-Being Survey

The N.M. Well-Being Committee invites members to complete its 2021 well-being survey. The survey is anonymous and the Committee will only gather generalized information to assist in pursuing initiatives for the improvement of the well-being of the legal community and its members. The survey will be open until Nov. 30. Visit <https://survey.sbnm.org/r/0LYaDI> to take the survey.

UNM SCHOOL OF LAW Law Library Hours

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

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OTHER NEWS

Gene Franchini N.M. High School Mock Trial Competition

Judge Registration is Open

Mock trial is an innovative, hands-on experience in the law for high school students of all ages and abilities. Every year, hundreds of New Mexico teenagers and their teacher advisors and attorney coaches spend the better part of the school year researching, studying, and preparing a hypothetical courtroom trial involving issues that are important and interesting to young people. To register to judge, visit <https://registration.civicvalues.org/mock-trial/registration/judge-volunteer-registration>. The competition is scheduled to be in person, but will be online if necessary. The qualifier tournament will be Feb. 18-19, 2022, in Albuquerque and Las Cruces and the state final competition will be March 11-12, 2022. For more information, contact Kristen at the Center for Civic Values at 505-764-9417 or Kristen@civicvalues.org.



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Complete online at www.sbnm.org/mydashboard.

New Website and Member Dashboard

Activate Your Account to Complete Licensing and MCLE Requirements

We have a new website!

Visit www.sbnm.org for a variety of resources and your Member Dashboard.

To complete your licensing certifications and fees and verify your MCLE compliance, visit www.sbnm.org and click **My Dashboard** in the top right corner. If you have not logged into our website recently, you will need to reset your account.

Need Help?

- ✓ **View tutorials and FAQs at www.sbnm.org/loginhelp**
- ✓ **Licensing and MCLE compliance questions**
mcle@sbnm.org • 505-797-6054
- ✓ **Technical assistance**
techsupport@sbnm.org • 505-797-6018



THE TOP TEN

Reasons Lawyers Get Sued

Reprinted from the New Mexico Lawyer, November 2019, Vol. 14, No. 4

By Jack Brant

On the old David Letterman Show, Dave had a funny bit at the beginning of each show where he would do “Dave’s Top Ten.” The topic could be anything from politics, to sports, to popular culture. He would start with number ten and progress to number one, which was the best or worst or most outrageous of whatever the topic was for that night.

In a more serious vein, here is our estimation of the Top Ten Reasons Lawyers Get Sued. There are undoubtedly other reasons that could be included on this list. The order is not based on statistics or empirical data. It is just a set of risk management/risk avoidance tips for lawyers. Here, then, is our take on the top ten reasons why lawyers get sued.

NUMBER 10: “Assisting” with a Case

This is one example of failing to identify who you represent and who you do not. It arises primarily from agreeing to help out a fellow lawyer – covering a hearing for a friend, jumping into a case on short notice when a fellow lawyer is in a pinch, assisting with research or briefing. Any situation where the client is aware of your involvement, however limited you believe it to be, can give rise to a belief by the client that you are also his or her lawyer – especially after the fact, if things go wrong. And you may indeed have become the client’s lawyer by becoming involved. Even though there must be an agreement between the lawyer and the client to create a lawyer-client relationship, the agreement can be express or implied. Nothing formal is required, nor is the payment of a fee required to create a lawyer-client relationship. If you give the client the impression that you are assisting in the representation and that you are involved in protecting the client’s interests, you are probably the client’s lawyer just as much as the “main” lawyer that you thought you were only helping out as a favor.

Furthermore, beware of representations that other lawyers may have made to their clients about your involvement. For example, if you share offices with other individual lawyers, have an agreement that no one will ever represent to a client that the lawyer in the next office or down the hall will help out with the case if necessary. A list of names on the door or on the sign out front could give the impression that you are all working together. Listing yourself “Of Counsel” on another lawyer’s letterhead can get you sued by the other lawyer’s client. Indeed, any situation in which a claim can be made of ostensible partnership or partnership-by-estoppel can give rise to such exposure.

NUMBER 9: Serving as “Local Counsel”

There is no such thing as a “limited” representation of a client absent an express written agreement between the lawyer and client limiting the lawyer’s role. Absent such an express agreement, every lawyer representing the client is fully responsible for everything that occurs in the representation. It is not a defense to contend, “That was the other lawyer’s responsibility, not mine.”

On the “Defense” side, there is risk in agreeing to serve as “local counsel” unless you insist on the right to be involved in all aspects of the case and you follow through by actually *being* involved in all aspects of the case. You should review everything even though the out-of-state counsel may draft the documents, have final say on strategy, and stand up in court. Make a record of any disagreements or issues you may have, and if necessary be prepared to withdraw from the representation if you believe that the client’s interests are not being protected or an ethical line is being crossed.

The same rules apply on the “Plaintiff” side. If you agree to be co-counsel on a case, regardless how you and the other lawyer have agreed to divide up the work, you are both fully responsible to the client for everything. Where you have been brought in by another lawyer, remember: the other lawyer is not your “client;” the client is your client. Beware of the situation where only the other lawyer has contact with the client. You need to know what the client is being told and what the client is telling the other lawyer.

NUMBER 8: Failure to Screen Clients

It is often hard to spot a problem client when they first come to see you about representation. Also, we might be inclined to overlook things as we all want and need the work. However, there are some common danger signs that should raise a red flag about whether you truly want to represent this person:

- multiple prior lawyers
- looking for a second opinion
- unrealistic expectations
- extreme anger or emotion
- a desire for revenge
- insistence on the use of Rambo tactics
- a story that sounds fishy or does not add up
- an offer to lie or manufacture evidence

You should also screen your existing clients for signs of trouble in the representation:

- failure to pay the fee
- changed circumstances in the client’s business or personal life
- signs of unhappiness with your work

NUMBER 7: Practicing Outside Your Area

The practice of law has become more and more specialized. Although there are still lawyers who engage very successfully in the general practice of law, the majority of lawyers limit their practice to a particular field, topic, or area. Because of this, it is actually quite rare for lawyers to make a clear mistake of law or procedure when practicing in their area of specialization.

However, real mistakes occur when lawyers venture out of their area of specialization. For example, there was a time when every lawyer was expected to be able to draft a will. Today, however, the area of wills, trusts and estates is extremely complex and fraught with danger for any lawyer who decides to “dabble” in it. The same is true in such areas as real estate, criminal law, domestic relations, and any heavily regulated field. Do not be tempted to “help out” an existing client in an area in which you do not regularly practice. Refer the client to a lawyer with expertise in that area and avoid the risk of committing malpractice.

The same is true geographically. State laws and rules of procedure are not all the same, and there are traps and pitfalls for any lawyer who decides to represent a client in another state or jurisdiction where the lawyer does not regularly practice. At a minimum, associate with a lawyer who does practice regularly in that jurisdiction.

NUMBER 6: Failure to Keep Client Apprised/ Failure to Document

Good risk management starts with good client relations. Yet it is surprising how little attention some lawyers pay to this simple rule of thumb. Lawyers who fail to return phone calls, who miss appointments with clients, who notify clients at the last minute of hearings and deadlines, who fail to keep clients apprised about their case, are in danger of being sued or receiving a disciplinary complaint.

Good risk management, not to mention standards of professionalism, demand that you be courteous to your clients. Be kind. Be friendly. Tell them regularly what is going on in their case. Answer their questions honestly. Copy your clients on everything. If you are serving as insurance defense counsel, this means copying not only the claims professional but the actual client/insured.

Good risk management also dictates that you write confirming letters or emails, or memos to the file, as to every significant decision in the representation. Make a written record in the file of all instructions to or from the client, all significant advice to the client, warnings, options and choices to be made. **DO NOT** count on the fact that you and the client are “working closely,” that the client is deeply involved in the representation, that the client is sophisticated, that “we are on the same page.” If things go badly, regardless of the client’s level of sophistication or involvement, you may be surprised to hear the client say: “You are the lawyer and I relied on you for everything.” Be on the safe side and put it all in writing, in the file.

NUMBER 5: Failure to Define the Scope of the Representation

While mistakes may be rare when lawyers are paying full attention, mistakes – primarily omissions – are common where the scope of the representation is not clear. This can result in situations wherein the lawyer does not think a matter is his or her responsibility, but the client does. For example, lawyer may represent the plaintiff in a personal injury case but does not pursue a workers compensation claim; or vice versa – the lawyer is handling a workers comp claim but does nothing with regard to a possible personal injury claim. Such situations can arise in a variety of representations where the client may have more than one legal issue.

There is also risk where the lawyer thought the representation was over, but the client did not. Some new issue may arise that is not dealt with properly; the client blames the lawyer, but the lawyer had no idea that further representation was expected. Avoid the risk by using termination letters when you believe the representation is over.

Another fairly common risk-producing situation is the “unknown client.” This is an unrepresented person who is involved in a transaction or situation in which the lawyer represents one of the parties. This unrepresented person may be “aligned” with the lawyer’s client, giving rise to a belief that the lawyer is protecting that other person’s interest as well. The lawyer may be completely unaware of this expectation. The solution is to look around in every transaction and situation for unrepresented parties, and consider communicating, in writing: “I am not your lawyer. I am not protecting your interests.”

There is risk in drafting documents for non-clients as part of a transaction, or representing to a non-client that he or she will be “taken care of.” The situation also arises in “scrivener” situations where the client comes to the lawyer with a third party, tells the lawyer that some deal has been worked out, and asks the lawyer to draw up the papers. In both such situations, the lawyer believes he or she is representing only the client, but the non-client believes that the lawyer is also protecting his or her interests.

NUMBER 4: Not Treating a Representation as “Real” Work

There is risk in “helping out” a family member or friend. Often, the lawyer does not view it as a “real” representation, does not give it the thought, care and attention that the lawyer gives to “real” cases, and mistakes and omissions can occur. There is also risk in doing a favor for an existing client on an unrelated matter – for example, a transactional lawyer agreeing to represent the client’s child in a scrape with the law. These situations combine two problems: working outside your area, and not treating the newer matter as “real” legal work. The same risk can even attach in giving gratuitous legal advice at a cocktail party or social gathering.

Any work that arises outside your normal intake process or that you are not being paid for should raise a red flag. Helping someone out and doing free legal work is great. Just remember that you are every bit as much a lawyer representing a client in

those situations as with your normal, paid legal work. You have the same duties of diligence, care and competence.

NUMBER 3: Conflicts of Interest

Conflicts of interest can take a variety of forms, some easily recognizable, some not as much. We all recognize that it is a conflict of interest to be adverse to an existing client or to a former client in a related matter. It may be harder to recognize where the lawyer's interests are potentially adverse to the client's or where the interests of two existing clients may be adverse.

Start with this rule: it is *always* risky to do business with an existing client. A lawyer is virtually begging for a conflict of interest lawsuit by loaning money to, borrowing money from, or getting into a business deal with a client.

A lawyer should never agree to provide legal services to both sides of a dispute or transaction. Do not agree to "draw up the papers" no matter how hard they try to convince you that everything has been worked out. This is true regarding divorces, contracts, business deals, and any other such situation. Beware also where the party on the other side is unrepresented and your client asks you to "draw up the papers." You may believe you are simply representing your client but the unrepresented party may see it differently.

Lawyers should also be cognizant of "positional" conflicts between existing clients – arguing one side of a proposition for one client and the opposite side for another client. Lawyers, especially at larger firms, should screen transactions and lawsuits carefully to be sure that clients of the firm, especially institutional clients, do not have interests at stake that are different from the interests of the client you are actually representing in the matter. If so, *both* clients may claim that you had a conflict of interest.

NUMBER 2: Suing a Client for Fees

Suing a client for fees is almost guaranteed to bring a counterclaim for legal malpractice. The only good risk management advice is to "keep current." Both at the beginning and throughout the relationship, the amount that you are charging and your expectations regarding payment must be absolutely clear, and you must be vigilant in enforcing that agreement. If you are on an hourly basis, you should bill regularly. You should not wait until the end of the representation to bill for your services. Do not allow the client to get behind on payment without addressing the issue immediately--and repeatedly if necessary. Failure to pay is often a sign that the client is not happy with the representation. Be prepared to withdraw from the representation rather than allowing the situation to worsen. **DO NOT** under any circumstances stop work on the representation as a way to pressure the client to pay. Your duties of diligence and competence continue so long as you continue to be the client's lawyer, regardless whether the client is behind in paying your fees.

If you do end up withdrawing from the representation, consider filing an attorney's charging lien. Charging liens are well-recognized under New Mexico law and courts will enforce them.

Relatedly, do not change your fee agreement with a client during the representation without insisting to the client that the new agreement be reviewed by independent counsel. It is a conflict of interest for the lawyer to increase his or her fee once the representation has commenced, given the ongoing fiduciary duty owed to the client. If you are representing an institutional client or being paid by an insurer, an hourly rate increase is probably safe so long as the client or insurer agrees to it.

NUMBER ONE: Missed Statute of Limitations

Missed statutes of limitations are a constant source of legal malpractice claims. Here are some pointers to try to avoid them:

They are often the result of calendaring the wrong statute of limitations. A common example is that claims against government entities under the New Mexico Tort Claims Act have a shorter statute of limitations than generic personal injury claims. Think through what limitations period applies as part of your initial evaluation. Do not simply assume that there is a three-year statute of limitations.

The lawyer should take personal responsibility to 1) evaluate the governing statute of limitations; 2) evaluate the filing deadline for this particular claim; and 3) ensure that the deadline is calendared properly. Lawyers often leave these tasks to staff; however, this is important legal work that the lawyer should attend to personally. Excuses such as "I was waiting to file until I got authority from the client," or "I was waiting for the retainer check," will not save you. If an attorney-client relationship has been established, the lawyer has an absolute duty to protect the client's interests. Filing a claim by the applicable deadline is one of the most important duties a lawyer has in the representation. So file the claim, and work out the details later, including declining or withdrawing from the representation if necessary.

If you do miss the filing deadline, all is not lost. In most such situations, the client must prove in the legal malpractice case that the claim was meritorious. If that is not in question, then be thankful that you are covered by legal malpractice insurance. And if you do not have legal malpractice insurance, you should. It's a dangerous world out there. ■

Before opening his own practice, Jack Brant was a director in the Albuquerque office of Rodey, Dickason, Sloan, Akin & Robb, P.A. He practices in the areas of attorney and accountant professional liability, legal ethics and disciplinary consulting and representation, insurance coverage and bad faith litigation, law firm joinder and break ups, law practice management, attorney fee disputes and general civil litigation.



For more from the Lawyers Professional Liability and Insurance Committee, flip to the center of this issue for the *New Mexico Lawyer*, containing a collection of articles about professionalism, professional liability insurance, disciplinary complaints and more.

Legal Education

November

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|----|---|----|---|
| 30 | Ethics for Transactional Lawyers
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org | 30 | Me Too: Sexism, Bias, and Sexual Misconduct in the Legal Profession
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org |
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December

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|---|---|----|---|----|--|
| 1 | Business Torts: How Transactions Spawn Litigation, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org | 8 | Ethics of Social Media Research
1.5 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org | 16 | Letters of Intent in Real Estate Transactions
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org |
| 2 | Business Torts: How Transactions Spawn Litigation, Part 2
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org | 9 | Drafting Property Management Agreements
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org | 17 | Trust & Estate Planning for Client Privacy in a Public World
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org |
| 3 | Ethics of Joint Representations: Keeping Secrets & Telling Tales
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org | 9 | OneDrive: How Do I Use It
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org | 17 | Flashes of Brilliance: Putting the Power Back in PowerPoint
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org |
| 6 | Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org | 10 | Ethics & Artificial Intelligence: What Lawyers Should Know
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org | 18 | 2021 Elder Law Institute
5.5 G, 1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org |
| 7 | Let Me Ask You a Question. Suppose I Was Considering... (Mock Meeting of the Ethics Advisory Committee)
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org | 13 | Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org | 20 | Ethics and Conflicts with Clients, Part 1
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org |
| 7 | In For a Penny, In for A Pound; Ethical Issues Associated with Co-Counsel Arrangements
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org | 14 | Gain the Edge! Negotiation Strategies for Lawyers
5.0 G, 1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org | 21 | Ethics and Conflicts with Clients, Part 2
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org |
| | | 15 | Legal Malpractice Insurance and Claims Avoidance 101
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org | 21 | Spinning Plates: Task Management for Lawyers
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org |

December

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| <p>22 Talking About Wealth Transfer Plans: Practical Strategies to Avoid Disputes Among Beneficiaries
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>28 An Afternoon of Legal Writing with Stuart Teicher
3.0 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>29 REPLAY: Revealing Unconscious Prejudice: How You Can Benefit (2020)
2.0 EP
Live Replay Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> |
| <p>27 REPLAY: Minimizing Cultural Errors in Professional Practice (2020)
1.5 EP
Live Replay Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>28 2021 Ethics Update, Part 1
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>30 2021 Ethics in Civil Litigation Update, Part 1
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> |
| <p>28 Ethics Lessons from a Jersey Guy with Stuart Teicher
0.5 G, 2.5 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>29 2021 Ethics Update, Part 2
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
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1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> |
| <p>28 Ethical Issues Representing a Band: Using the Beatles
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>29 Marketing Ethics 101
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | |

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

Opinions

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

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

Effective October 25, 2021

PUBLISHED OPINIONS

None

UNPUBLISHED OPINIONS

A-1-CA-38982	Bank of New York Mellon v. A Saul	Affirm	10/27/2021
A-1-CA-39731	J Coleman- Roderick v. The Islands at Rio Rancho Homeowners Association	Affirm	10/27/2021
A-1-CA-38805	State v. C Whitehead	Affirm	10/28/2021
A-1-CA-38940	City of Santa Fe v. J Ortiz	Affirm	10/28/2021
A-1-CA-39036	State v. E Hoggs	Affirm	10/28/2021
A-1-CA-38781	State v. S Bachicha	Reverse	10/29/2021
A-1-CA-38944	State v. C Medina	Reverse	10/29/2021
A-1-CA-39154	State v. R Lozano	Affirm	10/29/2021
A-1-CA-39167	New Mexico Department of Game and Fish v. C Davis	Affirm	10/29/2021
A-1-CA-39794	CYFD v. Jovanna V	Affirm	10/29/2021

Effective November 5, 2021

PUBLISHED OPINIONS

A-1-CA-37662	K Rawlings v. M Rawlings	Reverse/Remand	11/02/2021
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UNPUBLISHED OPINIONS

A-1-CA-37036	AFSCME LOCAL 2499 v. Board of County Commissioners	Reverse/Remand	11/02/2021
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Slip Opinions for Published Opinions may be read on the Court's website:

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

Rules/Orders

From the New Mexico Supreme Court

<http://www.nmcompcomm.us/>

THE SUPREME COURT OF NEW MEXICO ANNOUNCES 2021 YEAR-END RULE AMENDMENTS

Under Rule 23-106.1 NMRA, the Supreme Court has approved a number of rule changes for the 2021 rule-making cycle. What follows is a summary of new rule amendments that the Court approved on November 1, 2021. The summary also includes out-of-cycle rule amendments that the Court approved prior to November 1. Unless otherwise noted below and in the history note at the end of each approved rule, most new rule amendments will go into effect on December 31, 2021. The full text of the rule amendments in markup format and the related orders are available at <https://supremecourt.nmcourts.gov/supreme-court/opinions-rules-and-forms/approved-amendments-to-rules-and-forms/2021-2/>. Approved rule amendments will also appear in NMOneSource.com by their effective date.

ATTORNEY LICENSING AND MCLE RULES

Attorney Licensing and MCLE Requirements - Rules 15-302, 16-104, 17-202, 17-203, 17-204, 17-212, 17-301, 17A-003, 18-101, 18-102, 18-201, 18-203, 18-204, 18-301, 24-102, and 24-111 NMRA; New Rules 24-102.1 and 24-102.2 NMRA; and Withdrawn Rules 18-103, 18-202, 18-302, and 18-303 NMRA

The Supreme Court has approved amendments to Rules 15-302, 16-104, 17-202, 17-203, 17-204, 17-212, 17-301, 17A-003, 18-101, 18-102, 18-201, 18-203, 18-204, 18-301, 24-102, and 24-111 NMRA; the adoption of new Rules 24-102.1 and 24-102.2 NMRA; and the withdrawal of Rules 18-103, 18-202, 18-302, and 18-303 NMRA. Currently, annual requirements for bar dues and MCLE are on two separate tracks with different deadlines. These rule amendments consolidate the two separate processes into a single set of requirements, deadlines, and fees. The umbrella rule is Rule 24-102 NMRA, which has been expanded to include all annual license renewal requirements. The other proposed amendments align with those set forth in Rule 24-102. References to former rule numbers throughout the various rule sets have been updated accordingly.

CHILDREN'S COURT RULES AND FORMS

Fostering Connections Act proceedings - Rules 10-101, 10-103, 10-121, and 10-345; New Rules 10-360, 10-801, and 10-802 NMRA; and New Forms 10-901, 10-902, 10-903, 10-904, 10-905, 10-906, 10-907, and 10-908 NMRA

On September 28, 2021, the Supreme Court provisionally approved the Children's Court Rules Committee's proposal to adopt rule amendments and new rules and forms for use in proceedings under the Fostering Connections Act. The purpose of the Act, which was passed in 2019 and amended in 2020, is to provide ongoing support and services for young adults who age out of the foster care system without permanency. The rule amendments and new rules and forms take effect on November 12, 2021.

CODE OF PROFESSIONAL CONDUCT

Lawyer succession planning - New Rule 16-119 NMRA

The Supreme Court has approved the Code of Professional Conduct Committee's proposal to adopt a new Rule 16-119 NMRA. The new rule requires every lawyer practicing in New Mexico to have a written succession plan, either alone or as part of a law firm plan, specifying the steps to be taken in the event of the lawyer's incapacity, disability, or death. To allow for ample notice and training, the amendments will be effective for registration statement submitted under Rule 24-102.1 NMRA on or after October 1, 2022.

Lawyer communications and solicitation of clients - Rules 16-701, 16-702, and 16-703 NMRA; and Withdrawn Rules 16-704 and 16-705 NMRA

The Supreme Court has approved the Code of Professional Conduct Committee's proposal to amend Rules 16-701, 16-702, and 16-703 NMRA to incorporate certain of the 2018 amendments to the ABA Model Rules of Professional Conduct. Because the amendments to Rules 16-701, 16-702, and 16-703 also incorporate some provisions and commentary from Rules 16-704 and 16-705 NMRA, Rules 16-704 and 16-705 are being withdrawn.

LOCAL RULES

Local Safe Exchange and Supervised Visitation Programs in the Ninth and Twelfth Judicial District Courts - New Rules LR9-406 and LR12-402 NMRA

On September 21, 2021, the Supreme Court approved the Domestic Relations Rules Committee's proposal to adopt new Local Rules LR9-406 and LR12-402 NMRA, which establish safe exchange and supervised visitation programs in the ninth and twelfth judicial districts. The new rules took effect on September 21, 2021.

RULES OF CIVIL PROCEDURE AND CIVIL FORMS

Mandatory pre-filing and pre-judgment certifications in foreclosure actions - New Rules 1-003.3 and 1-054.2 NMRA; and New Forms 4-227 and 4-712 NMRA

On August 2, 2021, the Supreme Court approved new Rules 1-003.3 and 1-054.2 NMRA and new Forms 4-227 and 4-712 NMRA for use in foreclosure actions. New Rule 1-003.3 requires a plaintiff initiating a foreclosure complaint to certify pre-filing notice using new Form 4-227. New Rule 1-054.2 requires a plaintiff in a foreclosure action to certify loan modification and loss mitigation negotiations, using new Form 4-712, as a precondition to the entry of a judgment. The new rules and forms took effect on September 7, 2021.

Production of documents and things - Rule 1-034 NMRA

The Supreme Court has approved the Rules of Civil Procedure for State Courts Committee's proposal to amend Rule 1-034

NMRA to (1) clarify that in answering a request for production, the responding party shall permit inspection in its entirety unless the responding party files a proper objection; (2) require the responding party to state the specific reasons for an objection to a request for production; (3) require the responding party to state whether the response includes all responsive materials; and (4) if the responding party withholds any responsive materials based on an objection, require the objection to clearly describe with reasonable particularity the materials withheld for each objection. The Court also approved committee commentary that further explains the amendments.

Electronic filing and service fees as recoverable costs - Rules 1-054, 2-701, and 3-701 NMRA

The Supreme Court has approved the Rules of Civil Procedure for State Courts Committee's proposal to amend Rules 1-054, 2-701, and 3-701 NMRA to clarify that electronic filing and service fees are recoverable costs.

Court trust account requirements - Rule 1-102 NMRA

The Supreme Court has approved the Rules of Civil Procedure for State Courts Committee's proposal to amend Rule 1-102 NMRA to clarify that district courts must deposit litigant funds within two (2) business days of receipt in a bank that is a member of the Federal Deposit Insurance Corporation and in an account that is distinct from the court's accounts for general funds. The amendments also specify that funds deposited in a court trust fund checking account must be invested and maintained in a financial institution located within the court's judicial district and in accordance with governing statutes and any regulation prescribed by the Director of the Administrative Office of the Courts. The amendments also replace the references to "social security number" and "employer identification number" with the more-inclusive term "taxpayer identification number," and also cite Form W-9 (Request for Taxpayer Identification Number and Certification) by name.

Mandatory viewing of New Mexico Courts' Guardianship and Conservatorship Orientation Program videos - New Rule 1-144 NMRA

On January 14, 2021, the Supreme Court approved new Rule 1-144 NMRA, which requires all prospective guardians and conservators to view the Court's orientation program videos. The new rule took effect on February 1, 2021.

Tribal court personal representative - Rule 1B-102 NMRA; and Forms 4B-801 and 4B-802 NMRA

The Supreme Court has approved the Rules of Civil Procedure for State Courts Committee's proposal to amend Rule 1B-102 NMRA, and Forms 4B-801 and 4B-802 NMRA, to clarify that a domiciliary foreign personal presentative includes a tribal court appointee designated by a tribal court or the Bureau of Indian Affairs. Additionally, the amendments to Forms 4B-801 and 4B-802 NMRA recognize tribal court appointments. Finally, the amendments to Form 4B-801 NMRA allow "equivalent indicia of authority from a tribal court or the Bureau of Indian Affairs" to serve as a substitute for Letters of Administration or Letters Testamentary, recognizing that tribal courts may title documents differently than probate courts.

Summons and order for free process - Rules 2-202 and 3-202 NMRA; and Forms 4-204 and 4-223 NMRA

The Supreme Court has approved the Rules of Civil Procedure for State Courts Committee's proposal to amend Rules 2-202 and 3-202 NMRA by replacing "incapacitated" with "incompetent" for consistency with Rules 1-004(I) and 1-017(D) NMRA applicable to the district courts. Additionally, the Court has approved amendments to Rules 2-202 and 3-202 NMRA, as well as Form 4-204 NMRA, to permit *pro se* parties to serve a summons by mail. Finally, the Court has approved amendments to Form 4-223 NMRA to specify the methods of service a person seeking free service of process must first attempt in the district, magistrate, and metropolitan courts.

Electronic filing in civil cases in magistrate and metropolitan courts - Rules 2-205 and 3-205 NMRA

On January 19, 2021, the Supreme Court approved amendments to Rules 2-205 and 3-205 NMRA that require attorneys to file documents electronically in civil cases in the magistrate and metropolitan courts. The amendments took effect on March 5, 2021.

Title page of transcript of civil proceedings - Form 4-708 NMRA

The Supreme Court has approved the Rules of Civil Procedure for State Courts Committee's proposal to amend Form 4-708 NMRA for consistency with the comparable criminal form, Form 9-608 NMRA, to reflect that the court clerk, rather than the judge, issues the title page of a transcript of civil proceedings.

Forms for use during the gradual lifting of the stay of writs of garnishment and execution in consumer debt collection cases - New Forms 4-805.1 and 4-805.2 NMRA

Effective September 1, 2021, the Supreme Court approved new Forms 4-805.1 and 4-805.2 NMRA, which are applications for writs of garnishment and writs of execution in consumer debt collection cases. The new forms are in effect for a limited time only, through January 31, 2022. The forms are intended for use in conjunction with the Court's order that enacted a gradual lifting of the stay of writs of garnishment and execution that was imposed in response to the COVID-19 public health emergency.

Guardian's report and certificate of completion of adult guardian and conservator orientation program - Form 4-996 NMRA; and New Form 4-999.2 NMRA

Effective June 22, 2021, the Supreme Court approved amendments to Form 4-996 NMRA, Guardian's Report, to provide more information about a protected person who does not live in a facility, and the adoption of new Form 4-999.2, Certificate of Completion of Adult Guardian and Conservator Orientation Program, for use with Rule 1-144 NMRA, which mandates the viewing of orientation program videos for all prospective guardians and conservators.

RULES OF CRIMINAL PROCEDURE AND CRIMINAL FORMS

Order of trial - Rule 5-607 NMRA; and New Rules 6-603.1 and 7-603.1 NMRA

The Supreme Court has approved the Rules of Criminal Procedure for State Courts Committee's proposal to amend Rule 5-607 NMRA to clarify and make housekeeping changes to its text and committee commentary, and to adopt new Rules 6-603.1 and 7-603.1 NMRA that import Rule 5-607's sequence of trial events into jury trial practice in the magistrate and metropolitan courts.

Time limits for filing citations - Rules 6-201, 7-201, and 8-201 NMRA

The Supreme Court has approved the Rules of Criminal Procedure for State Courts Committee's proposal to amend Rules 6-201, 7-201, and 8-201 NMRA to incorporate an express time limitation for the filing of a citation and an explicit remedy—the potential dismissal of the citation with prejudice—for a late-filed citation.

Interview subpoenas - Rule 6-606 NMRA

The Supreme Court has approved the Rules of Criminal Procedure for State Courts Committee's proposal to amend Rule 6-606 NMRA to provide that a judge-issued subpoena in magistrate court will lie “only after good faith efforts to secure an interview . . . have been unsuccessful[.]” the same criterion that governs the issuance of interview subpoenas in metropolitan court under Rule 7-606 NMRA.

Time limits for probation violation hearings - Rules 6-802, 7-802, and 8-802 NMRA

The Supreme Court has approved the Rules of Criminal Procedure for State Courts Committee's proposal to amend Rules 6-802, 7-802, and 8-802 NMRA to provide explicit time limits for the holding of a probation violation hearing in the limited jurisdiction criminal courts.

Waiver of counsel and other public defender forms - Forms 9-401, 9-403, 9-403A, and 9-403B NMRA; and Withdrawn Form 9-401A NMRA

The Supreme Court has approved the Rules of Criminal Procedure for State Courts Committee's proposal to amend Forms 9-401, 9-403, 9-403A, and 9-403B NMRA, and to withdraw Form 9-401A NMRA, to adopt a single, detailed “Waiver of Counsel Advice” for use in all courts of criminal jurisdiction, align the form provisions governing the appointment of defense counsel with the current policies of the Law Offices of the Public Defender, and clarify the form provisions governing appeals of indigency determinations.

Dismissal of criminal charges on completion of deferred sentence - Form 9-603A NMRA

The Supreme Court has approved the Rules of Criminal Procedure for State Courts Committee's proposal to amend Form 9-603A

NMRA to make clear the mandatory nature of the dismissal remedy available to a defendant upon the defendant's completion of the terms of a deferred sentence without revocation.

UNIFORM JURY INSTRUCTIONS – CIVIL

Insurance has no bearing - UJI 13-208 NMRA

The Supreme Court has approved the UJI-Civil Committee's proposal to amend UJI 13-208 NMRA to align the instruction with jurors' current understanding of the role played by insurance and to provide for possible use of the instruction prior to the commencement of a trial.

Request for admission - New UJI 13-215 NMRA

The Supreme Court has approved the UJI-Civil Committee's proposal to adopt new UJI 13-215 NMRA to address the introduction of admitted facts at trial. The new instruction provides jurors with the definition of a request for admission and informs them of the effect of an admitted fact at trial.

UNIFORM JURY INSTRUCTIONS – CRIMINAL

Explanation of trial procedure - UJI 14-101 NMRA

The Supreme Court has approved the UJI-Criminal Committee's proposal to amend UJI 14-101 NMRA to simplify instructions on outside communications and internet use and to clarify that jurors ordinarily will not receive transcripts of witness testimony.

Procedure for instructing on uncharged offenses - UJI 14-202, 14-213, 14-221A, 14-308, 14-309, 14-310, 14-311, 14-312, 14-313, 14-358, 14-359, 14-360, 14-361, 14-362, 14-363, 14-378, 14-379, 14-380, 14-381, 14-382, 14-383, 14-403, 14-403A, 14-601, 14-954, and 14-971 NMRA

The Supreme Court has approved the UJI-Criminal Committee's proposal to amend the Use Notes to UJI 14-202, 14-213, 14-221A, 14-308, 14-309, 14-310, 14-311, 14-312, 14-313, 14-360, 14-361, 14-362, 14-363, 14-378, 14-379, 14-380, 14-381, 14-382, 14-383, 14-403, 14-403A, 14-601, 14-954, and 14-971 NMRA to reference the procedure for instruction on uncharged offenses outlined in UJI 14-140 NMRA.

Stalking and aggravated stalking - UJI 14-331 and 14-333 NMRA

The Supreme Court has approved the UJI-Criminal Committee's proposal to amend UJI 14-331 and 14-333 NMRA to conform more closely to the language of NMSA 1978, Section 30-3A-3 (2009), defining the crime of stalking, and NMSA 1978, Section 30-3A-3.1 (1997), defining the crime of aggravated stalking.

Reliance in fraud - UJI 14-1640 NMRA

The Supreme Court has approved the UJI-Criminal Committee's proposal to amend the committee commentary to UJI 14-1640 NMRA to reference the definition of reliance provided in *State v. Garcia*, 2016-NMSC-034, 384 P.3d 1076, and to remove outdated citations.

Battery on peace officer - UJI 14-2203 NMRA

The Supreme Court has approved the UJI-Criminal Committee's proposal to add one word to UJI 14-2203 NMRA to clarify the mens rea for battery. Specifically, "battery consists of intentionally touching or applying force in a rude, insolent, or angry manner."

Securities offenses - UJI 14-4301, 14-4302, 14-4310, 14-4311, 14-4312, 14-4320, and 14-4321 NMRA

The Supreme Court has approved the UJI-Criminal Committee's proposal to amend UJI 14-4301, 14-4302, 14-4310, 14-4311, 14-4312, 14-4320, and 14-4321 NMRA to update statutory references and style conventions.

Life without possibility of release or parole - UJI 14-7010, 14-7011, 14-7012, 14-7014, 14-7015, 14-7016, 14-7017, 14-7018,

14-7019, 14-7022, 14-7023, 14-7026, 14-7027, 14-7031, 14-7032, and 14-7034 NMRA; and Withdrawn UJI 14-7029, 14-7030, 14-7030A, and 14-7033 NMRA

The Supreme Court has approved the UJI-Criminal Committee's proposal to amend UJI 14-7010, 14-7011, 14-7012, 14-7014, 14-7015, 14-7016, 14-7017, 14-7018, 14-7019, 14-7022, 14-7023, 14-7026, 14-7027, 14-7031, 14-7032, and 14-7034 NMRA to provide instructions for sentencing proceedings for life imprisonment without possibility of release or parole in response to the repeal of the death penalty and in conformity with *State v. Chadwick-McNally*, 2018-NMSC-018, 414 P.3d 326, Rule 5-705 NMRA, and amendments to Rule 14-101 NMRA. The Court has also approved the Committee's recommendation to withdraw UJI 14-7029, 14-7030, 14-7030A, and 14-7033 NMRA.

The rule amendments summarized above can be viewed in their entirety at the New Mexico Supreme Court website at

<https://bit.ly/3C53aIN>

or

<https://supremecourt.nmcourts.gov/supreme-court/opinions-rules-and-forms/approved-amendments-to-rules-and-forms/2021-2/>

Advance Opinions

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-040
No. A-1-CA-36942 (filed May 6, 2020)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
FRANK C. LITTLE,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
JOHN A. DEAN, JR., District Judge

Released for Publication October 6, 2020.

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Opinion

Zachary A. Ives, Judge.

{1} Defendant appeals his convictions, following a jury trial, for one count of first-degree criminal sexual penetration of a minor under thirteen years of age (first-degree CSPM) in violation of NMSA 1978, Section 30-9-11(C)(1) (2001); three counts of criminal sexual penetration of a minor thirteen to eighteen years of age (second-degree CSPM), comprising two counts in violation of NMSA 1978, Section 30-9-11(D)(1) (2001) and one in violation of Section 30-9-11(E)(1) (2007, amended 2009); and two counts of criminal sexual con-

tact of a minor (CSCM), in violation of NMSA 1978, Section 30-9-13(B)(2)(a) (2001), against two victims, S.G. and S.P.¹ Defendant first challenges his conviction for first-degree CSPM as charged in Count 1, contending that insufficient evidence supports his conviction on that charge, or, alternatively, that the district court erred both in permitting the State to refresh the recollection of S.G., the victim of that crime, and in denying Defendant the opportunity to conduct recross-examination of S.G. Next, Defendant contends that the indistinguishable nature of his convictions for Counts 2 through 6, which charged second-degree CSPM, violated his constitutional right not to be placed

in jeopardy more than once for the same offense. Finally, Defendant contends that error in the jury instructions as to Count 4, CSCM, requires reversal of his conviction on that count. We reverse Defendant's conviction for first-degree CSPM and remand for a new trial. However, we affirm Defendant's three convictions for second-degree CSPM and both of his CSCM convictions.

DISCUSSION

I. We Reverse Defendant's Conviction for First-Degree CSPM

A. Summary of Pertinent Testimony

{2} To convict Defendant of first-degree CSPM, the State had to prove beyond a reasonable doubt that Defendant had penetrated S.G. while she was under age thirteen. *See* § 30-9-11(C)(1) (2001) (providing that criminal sexual penetration in the first degree "consists of all sexual penetration perpetrated . . . on a child under thirteen years of age"). At trial, the State possessed a police report that apparently indicated S.G. had told investigators that Defendant had penetrated her when she was twelve.² On direct and cross-examination, however, S.G. unequivocally testified—on five occasions—that Defendant had not abused her in this particular manner until after she turned thirteen.³ The State did not use the report to identify any inconsistency between the report and this testimony when it was given, and S.G. never testified that she did not recall her age at the time Defendant digitally penetrated her for the first time.

{3} The prosecutor began redirect examination on the issue of S.G.'s age by informing S.G. that she was "just going to read a little bit" from the police report and asking S.G. to tell her "whether [it was] true," drawing a hearsay objection from defense counsel. In the ensuing bench conference, the district court indicated that it would permit the State to impeach S.G. with her prior statement to the police and to refresh S.G.'s recollection of that statement by using the police report.⁴

¹Because Defendant perpetrated the CSPM at issue over the course of several years, different versions of the CSPM statute governed his various charges. *See generally State v. Lucero*, 2007-NMSC-041, ¶ 14, 142 N.M. 102, 163 P.3d 489 ("[T]he law[] at the time of the commission of the offense[] is controlling" (internal quotation marks and citation omitted)). Where a single count alleged that Defendant's crimes occurred during a time period spanning more than one version of the applicable statute, citations are to the version of the statute in effect at the beginning of that time period.

²Neither party provides a record cite to the police report in its briefs, and we have been unable to locate the report in the appellate record.

³S.G. testified on direct examination that Defendant began "molesting" her when she was twelve years old. She indicated that, to her, molestation meant touching with the hand, which sometimes included digital penetration. Nevertheless, S.G.'s testimony throughout direct examination made clear that, although Defendant began "molesting" her when she was twelve years old, he did not digitally penetrate her until after she turned thirteen. And S.G. reaffirmed during cross examination that there was no digital penetration at all before she turned thirteen.

⁴Defense counsel agreed that it would be proper to use the report for impeachment purposes.

{4} The prosecutor then asked S.G. about her response on cross-examination that she “didn’t really quite remember” the basis for all of her trial testimony and “ask[ed her] to read some[thing]” to refresh her recollection:

State: You said that the penetration with the finger did not start until 2004. But isn’t that different than what you told the officers?

Defense: Objection. She hasn’t said that she needed her recollection refreshed about that issue.

Judge: Sustained.

State: Ok. So, did that refresh your recollection of what you had actually told the officers?

Defense: Objection.

Judge: Overruled.

Defense: She didn’t—

Judge: She may ask if it refreshed her recollection.

State: Did [reviewing the police report] refresh your recollection of what you had told the officers about when the penetration started?

S.G.: Yes.

State: And how old were you when it started?

S.G.: Thirteen.

Defense: Objection, she’s already testified to that and hadn’t said she needed a refresher.

Court: Overruled.

State: Are you sure it was thirteen?

S.G.: Yes.

State: Were you able to read this?

...

S.G.: Some parts.

State: Then—were you too nervous to read it all the way?

S.G.: Yes.

State: Ok. So, would it help to bring it back up to refresh your memory?

S.G.: If I need to, then yes.

...

State: Did that refresh your memory?

S.G.: Yes.

State: About how old you were . . . the first time that he molested you?

S.G.: Yes.

State: And how old were you?

S.G.: Twelve.

Defense counsel objected and moved to strike, arguing that S.G. had “already testified previously” and that her testimony was “coming from the report, not her recollection.” The district court excused the jury to address this objection.

{5} Outside the presence of the jury and in the presence of S.G., who remained on the witness stand, the district court explained

to the State that its questioning was confusing. The prosecutor informed the court that she wanted to ask S.G. about her statement, made “at the time that this occurred, that she was twelve years old the first time she was penetrated,” but the court, apparently misunderstanding the response, disagreed, observing that S.G. had testified that she was thirteen and that the State was trying to “get her to say that she said she was twelve.” After the district court walked the State through the questioning it would permit to refresh S.G.’s recollection, the State rehearsed that questioning outside of the presence of the jury at the court’s direction:

State: Ok. All right. You had stated previously that you were thirteen when you were testifying.

S.G.: Yes.

State: And then you said that you weren’t quite remembering everything that you had told before.

S.G.: Yes.

State: And did you review something that refreshed your recollection?

S.G.: Yes.

State: And so, did it refresh your recollection?

S.G.: A little.

State: Ok. And so, based on that, how old were you when it started?

S.G.: Twelve.

{6} The district court then asked defense counsel to explain her objection. Defense counsel responded that “[her] objection [was] still that [S.G. was] testifying from recollecting the report, [rather than] her recollection of when it happened.” The district court replied that defense counsel could make that argument in closing or that it “[could] be the subject of cross-examination,” but did not believe it to be “objectionable” because whether “[S.G.] really remember[ed or] just read it from the report” went to the “weight that the jury [could] give the evidence.” Defense counsel asked whether, if the prosecutor “proceed[ed] with this matter,” she would have an opportunity for recross-examination. The district court denied the request, expressing confusion about its basis because defense counsel “knew about [S.G.’s] statement.” Defense counsel reminded the court that it “had just mentioned that [she] could address it on cross-examination,” but the court disagreed. It explained that defense counsel had been able to “cross-examine about the issue [of] . . . whether [S.G.] was under thirteen,” which it believed had been “adequately touched,” and that the prosecutor had not “gone past what’s allowed with redirect that would cause [the court] to let [defense counsel] cross again.”

{7} When the district court brought the jury back into the courtroom, the State resumed its redirect, which proceeded in pertinent part as follows:

State: Do you remember, around the time that this investigation was going on, telling the officer that you were twelve years old the first time that [Defendant] put his finger inside your vagina?

Defense: Objection. Foundation.

Judge: Overruled.

State: Do you remember saying that?

S.G.: Yes.

State: Ok. So, . . . is that the truth? Were you twelve years old when that started?

S.G.: Yes.

...

State: Ok. So, when we first looked at 2003, you had previously said that there had not been penetration. Do you now remember saying that, in fact, penetration started when you were twelve?

S.G.: Nah.

State: Ok. And that by “molesting” in 2003, it also meant that there was penetration?

S.G.: Excuse me?

State: Do you remember saying to the police that molesting when you were twelve, up here in 2003, also meant penetration?

S.G.: In 2003?

State: With the finger, ‘cause you said “molesting” means penetration with the finger. . . .

S.G.: Yes.

State: and touching.

S.G.: Yes.

State: Okay and so did that happen when you were twelve?

S.G.: Yes.

B. Sufficient Evidence Supports Defendant’s Conviction for First-Degree CSPM

{8} Defendant first challenges the sufficiency of the evidence to sustain his conviction for first-degree CSPM as to the jury’s finding that Defendant penetrated S.G. while she was under thirteen years of age, an essential element of the crime. When reviewing the sufficiency of the evidence, we “scrutin[ize] . . . the evidence and supervis[e] . . . the jury’s fact-finding function to ensure that . . . a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction.” *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829 (emphasis, internal quotation marks, and citation omitted). “The test for sufficiency of the evidence is whether substantial evidence of either

a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction.” *State v. Cabezuela*, 2015-NMSC-016, ¶ 14, 350 P.3d 1145 (internal quotation marks and citation omitted). “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *State v. Largo*, 2012-NMSC-015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation omitted). We consider even improperly admitted evidence in determining whether substantial evidence supports a defendant’s conviction. See *State v. Garcia*, 2019-NMCA-056, ¶ 18, 450 P.3d 418, cert. denied, 2019-NMCERT-009 (No. S-1-SC-37766, Sept. 10, 2019). Our review employs a two-step process in which we first “view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We then consider “whether the evidence, so viewed, supports the verdict beyond a reasonable doubt.” *State v. Garcia*, 2016-NMSC-034, ¶ 24, 384 P.3d 1076.

{9} Here, sufficient evidence supports the jury’s finding that Defendant penetrated S.G. while she was under thirteen because S.G. testified to that effect during redirect examination. After being presented with the police report, S.G. testified that it had refreshed her recollection and that she had been twelve when the penetration began.⁵ She then testified that she had been telling the truth when she told the police the same thing. This testimony was substantial evidence of the age element of Defendant’s first-degree CSPM charge. Although it contradicted S.G.’s testimony on direct and cross-examination, that inconsistency provides us with no basis to reverse on sufficiency grounds because “it is the exclusive province of the jury to resolve the factual inconsistencies in [a witness’s] testimony.” *State v. Sena*, 2008-NMSC-053, ¶ 11, 144 N.M. 821, 192 P.3d 1198 (alterations, internal quotation marks, and citation omitted).

{10} Defendant contends that we cannot consider S.G.’s redirect testimony regarding her age in our sufficiency analysis because the district court admitted it for the sole purpose of impeaching her previous testimony that Defendant

had not penetrated her until after she turned thirteen. We disagree. The State asked S.G. whether her statement to the police was true in order to prove that Defendant had penetrated S.G. while she was twelve, rather than to prove “the fact of the inconsistency,” *State v. Macias*, 2009-NMSC-028, ¶ 20, 146 N.M. 378, 210 P.3d 804, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110, between the statement and S.G.’s trial testimony. And the district court did not instruct the jury that it could not consider S.G.’s redirect testimony for the purpose of determining whether Defendant had penetrated S.G. while she was under thirteen years old. We conclude that sufficient evidence supports Defendant’s conviction for first-degree CSPM.

C. The Process Used to Refresh S.G.’s Recollection Constituted Reversible Error

{11} Defendant next contends that the district court committed reversible error in the manner in which it permitted the State to refresh S.G.’s recollection on the issue of her age. “We review the district court’s evidentiary rulings for an abuse of discretion.” *State v. Garnenez*, 2015-NMCA-022, ¶ 29, 344 P.3d 1054. “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case.” *Rojo*, 1999-NMSC-001, ¶ 41 (internal quotation marks and citation omitted). If we find an abuse of discretion in a non-constitutional evidentiary ruling, the error is grounds for reversal if “there is [a] reasonable probability [it] affected the verdict.” *Tollardo*, 2012-NMSC-008, ¶ 36 (emphasis, internal quotation marks, and citation omitted).

{12} “[W]itnesses are expected to testify in their own words,” but there are times when a failure of memory warrants the use of an exhibit to refresh recollection. *Macias*, 2009-NMSC-028, ¶ 23; see Rule 11-612 NMRA. “In order to refresh a witness’s recollection with an exhibit, the attorney must first establish that the witness does not recall the matter.” *Macias*, 2009-NMSC-028, ¶ 23. Stated differently, “[n]o means of arousing recollection may be used until the witness has satisfied the district judge that he [or she] lacks effective present recollection.” *State v. Bazan*, 1977-NMCA-011, ¶ 17, 90 N.M. 209, 561 P.2d 482 (internal quotation marks and citation omitted); see also *State v. Orona*, 1979-NMSC-011,

¶ 23, 92 N.M. 450, 589 P.2d 1041 (“The witness’s memory on the subject must be exhausted.”). Having established a lack of recollection, counsel must demonstrate that the exhibit will help the witness remember. *Macias*, 2009-NMSC-028, ¶ 24. If the exhibit has refreshed the witness’s memory, the witness may provide independent testimony. See *id.* ¶ 25 (“After the witness has considered the exhibit, the attorney must then ask the witness whether his or her memory has been refreshed. If the answer is yes, the exhibit is removed from the witness and the witness continues with his or her testimony.”); see also *Bazan*, 1977-NMCA-011, ¶ 17 (“[T]he district court judge has considerable discretion . . . to reject the testimony . . . by [ruling] . . . that the writing does not refresh [the witness’s] memory[.]” (internal quotation marks and citation omitted)). “The testimony must come from the witness’s restored memory, not from the exhibit, and certainly not from the questioning attorney.” *Macias*, 2009-NMSC-028, ¶ 25. Ultimately, “the refreshing of recollection must be conducted . . . to prevent inadmissible evidence from being suggested to the jury by any means[.]” *Id.* (internal quotation marks and citation omitted); see also Rule 11-103(D) NMRA (“To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.”).

{13} We conclude that the district court abused its discretion in denying Defendant’s motions to strike S.G.’s one-word affirmation that the report had “refresh[ed her] memory . . . [a]bout how old” she had been and subsequent testimony that she had been twelve. The police report’s account of S.G.’s prior statement constituted hearsay if offered to prove that S.G. had made the statement, and hearsay within hearsay, if offered to prove that Defendant committed CSPM against S.G. before she turned thirteen. See Rule 11-801(C)(2) NMRA (defining hearsay, in relevant part, as a statement that “a party offers in evidence to prove the truth of the matter asserted in the statement”). Admitting S.G.’s “refreshed” testimony regarding her age was error because the State failed to make any showing that the police report would be “the key to refreshing [S.G.’s] independent recollection[.]” rather than “a source of direct testimony.” *United States v. Weller*, 238 F.3d 1215, 1221 (10th Cir.

⁵While the State imprecisely asked S.G. whether the police report had “refresh[ed her] memory . . . [a]bout how old [she was] the first time [Defendant] had molested [her,]” see *supra* note 2, this question immediately followed a prior line of questioning regarding S.G.’s age when Defendant first perpetrated CSPM against her. This context makes clear that the State was asking S.G. whether the report refreshed her memory of her age when the penetration began.

2001). S.G. had not given any indication that her memory was failing on this critical topic.⁶ Nor had S.G. demonstrated “uncertain[ty or] hesitan[cy],” *Orona*, 1979-NMSC-011, ¶ 24, in her testimony regarding the issue. And S.G. never testified that seeing the police report would aid her memory before it was handed to her. The State’s belief that the prior statements described in the police report were correct was no basis for permitting it to use the report to refresh S.G.’s contrary memory.

{14} The district court compounded this error by overruling Defendant’s objection that S.G. was “testifying from recollecting the report,” rather than her recollection of when the CSPM happened. Because a witness’s refreshed *present* recollection is an indispensable foundational requirement for the use of refreshed testimony, see *Macias*, 2009-NMSC-028, ¶ 25, it was an abuse of discretion for the district court to conclude that S.G.’s potential lack of an independent recollection was not “objectionable.” See *Harrison v. Bd. of Regents of Univ. of N.M.*, 2013-NMCA-105, ¶ 14, 311 P.3d 1236 (“[W]e may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law.” (internal quotation marks and citation omitted)). Although S.G. testified that the report refreshed her memory of both her statement to the police and her age, the court’s misunderstanding of the law deprives us of any basis on which to conclude that was indeed the case. And we think that a sound exercise of discretion would have entailed more than a cursory inquiry into the extent of S.G.’s memory given the absence of any prior indication that S.G.’s memory was failing, the State’s repeated attempts to refresh her recollection, and the evident connection between S.G.’s recollection of her prior statement and her sudden change in testimony. See generally *Orona*, 1979-NMSC-011, ¶ 26 (“[I]f a party can offer a previously given statement to substitute for a witness’s testimony under the guise of ‘refreshing recollection,’ the whole adversary system of trial must be revised.” (internal quotation marks and citation omitted)).

{15} Particularly considered together, these errors were not harmless. The only evidence of an essential element of

first-degree CSPM was S.G.’s erroneously refreshed testimony that she had been twelve and her subsequent testimony that her statement to the police, as described in the police report, was true. Because the district court failed to determine whether S.G.’s erroneously refreshed testimony was based on S.G.’s independent recollection, we cannot ascertain whether this subsequent testimony was based on anything other than the report. As such, there is more than a reasonable probability that the erroneous process used to refresh S.G.’s recollection affected the verdict. See *State v. Branch*, 2010-NMSC-042, ¶ 15, 148 N.M. 601, 241 P.3d 602 (“A non-constitutional error is harmless when there is no reasonable probability the error affected the verdict.” (alteration, internal quotation marks, and citation omitted)), *overruled on other grounds by Tollardo*, 2012-NMSC-008, ¶ 37 n.6. We must therefore reverse Defendant’s conviction for first-degree CSPM.

D. The Denial of Defendant’s Request for Recross-Examination Constituted Fundamental Error

{16} In his final challenge to his conviction on Count 1, Defendant asserts that we should reverse because the district court prohibited him from challenging S.G.’s redirect testimony through recross-examination. Concerned about the constitutional implications of Defendant’s argument, we asked the parties to file briefs addressing the propriety of the district court’s restriction on cross-examination under the Confrontation Clause. See generally U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]”); *State v. Lopez*, 1996-NMCA-101, ¶ 14, 122 N.M. 459, 926 P.2d 784 (“The right to cross-examination is viewed as the most important element of the right of confrontation.”); see also *State v. Vargas*, 2017-NMSC-029, ¶¶ 13-15, 404 P.3d 416 (holding that this Court had not abused its discretion in reaching an unpreserved Fourth Amendment issue sua sponte). We now conclude that the district court erred because S.G.’s testimony on redirect marked the first occasion at trial on which she indicated that Defendant had perpetrated CSPM against her before she turned twelve, a fact that was an essential element of the first-degree CSPM offense

with which Defendant was charged. And, because S.G.’s redirect testimony was the only evidence of that essential element introduced at trial, we conclude that the district court’s ruling constituted fundamental error requiring reversal. We therefore hold that the district court violated Defendant’s confrontation rights in prohibiting recross-examination and that this ruling constituted fundamental error requiring reversal.

{17} We have long recognized that a criminal defendant has a Confrontation Clause right to recross-examination on “new matter[s] . . . brought out on redirect examination.” *State v. Vigil*, 1977-NMCA-119, ¶ 3, 91 N.M. 156, 571 P.2d 423 (citing *United States v. Morris*, 485 F.2d 1385 (5th Cir. 1973)); accord *United States v. Riggs*, 951 F.2d 1368, 1375 (3d Cir. 1991) (“When material new matters are brought out on redirect examination, the Confrontation Clause of the Sixth Amendment mandates that the opposing party be given the right of recross-examination on those new matters.”). When new matter is elicited on redirect, a trial court has no discretion to deny recross because “the discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the [Confrontation Clause.]” *United States v. Tolliver*, 665 F.2d 1005, 1008 (11th Cir. 1982) (internal quotation marks and citation omitted), and “[t]o deny recross[-] examination on matter first drawn out on redirect is to deny the defendant the right of any cross-examination as to that new matter.” *United States v. Caudle*, 606 F.2d 451, 458 (4th Cir. 1979) (emphasis added); see also *United States v. Jorgenson*, 451 F.2d 516, 520 (10th Cir. 1971); cf. *Empire W. Cos. v. Albuquerque Testing Labs., Inc.*, 1990-NMSC-096, ¶ 8, 110 N.M. 790, 800 P.2d 725 (“Only after the right to cross-examination has been substantially exercised does the right to further examination become discretionary.”). Without implying the existence of a “bright line rule delineating what constitutes ‘new matter,’” we agree with the United States Court of Appeals for the Fourth Circuit that redirect testimony raises new matter not only when “it encompasses a subject outside of the scope of direct examination,”

⁶At trial, the State justified its attempts to refresh S.G.’s recollection by asserting that S.G. had told defense counsel that “she didn’t quite remember” the factual basis for her testimony. The record of S.G.’s prior testimony belies that assertion. Throughout S.G.’s testimony on direct examination, the State and S.G. had referenced a calendar—admitted into evidence for all purposes as an exhibit in a ruling not challenged on appeal—that S.G. had created in 2010 to document Defendant’s abuse. On cross-examination, defense counsel attempted to undermine S.G.’s credibility by eliciting her testimony that, although she had remembered the events at issue “pretty well” at the time she created the calendar, she no longer did at the time of trial. S.G. then testified that what she was saying at trial was “based on the calendar[.]” rather than based on what she personally remembered. But S.G. did not testify or indicate that her general lack of recall extended to the subject of her age when Defendant first penetrated her. And S.G.’s adamant denial of being penetrated before she turned thirteen could not have been “based on the calendar,” which indicated only that she had been “molested” in 2003. See *supra* note 2.

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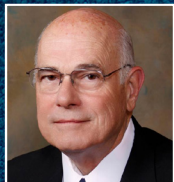
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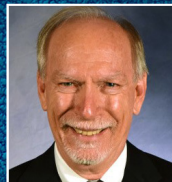
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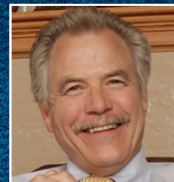
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How to Respond to a DISCIPLINARY COMPLAINT

By Gerald G. Dixon

I. Background

Approximately 700 disciplinary complaints are filed with the Disciplinary Board of the New Mexico Supreme Court against New Mexico attorneys every year. Clients, opposing counsel and sitting judges file complaints with the Disciplinary Board against attorneys in all areas of public and private practice. A complaint against an attorney can be filed either by mail or e-mail. The form can be downloaded from the Disciplinary Board's website.

Anger, disappointment, frustration and fear are among the most likely emotions felt by an attorney who is the recipient of a disciplinary complaint—especially when it is filed by a client or former client. Even if the complaint is frivolous, there is nothing more disheartening to an attorney, who possesses even a modicum of ego, than to receive a complaint where a client alleges they have been wronged. But ignoring a complaint, failing to take it seriously, or responding in anger rarely move the complaint towards resolution and, in fact, risks turning a meritless complaint into a larger issue for the attorney.

II. The Process

Once a complaint is filed, it is reviewed by chief disciplinary counsel. If a complaint alleges conduct which the Disciplinary Board does not have jurisdiction over, the chief disciplinary counsel will normally dismiss the complaint and immediately send a response to the complainant and advise them why no further investigation is merited. If a complaint contains any allegation which could implicate a violation of the Rules of Professional Conduct, the chief disciplinary counsel will then send the complaint along with a cover letter to the attorney who is being complained against. The cover letter will request a written response. Generally, a response is due within two weeks. If extenuating circumstances exist, additional time to submit a response can be requested by the attorney.



III. Responding to the Complaint

What should be included in a response? The first thing an attorney should do after receiving a complaint is read the entire complaint. When answering a complaint, the attorney should respond to **each and every** allegation in the complaint. The response should include a recitation of all relevant facts and, where appropriate, a copy of all relevant documents. The response should **not** include disparaging or belittling comments about the complainant. Those comments will do nothing to assist disciplinary counsel in trying to determine whether or not a violation of the rules of professional conduct has occurred. If a formal specification of charges is filed by disciplinary counsel, the attorney's response to the original disciplinary complaint may become part of the case record. In that case, an independent three person Hearing Panel, the Disciplinary Board and ultimately the Supreme Court will or

may be able to review those comments. It will serve no good purpose to claim that a client is responsible for an attorney's failure to comply with the Rules of Professional Conduct.

When preparing a response, the attorney should not treat the process as adversarial. Every effort should be made to disclose the relevant facts. In other words, the response should be truthful. In responding to a complaint, the attorney should be mindful of the confidentiality requirements contained in NMRA 16-106, particularly when a complaint is filed by someone other than the client or when the underlying matter is still pending. Nevertheless, Rule 16-106(B)(5) does allow a lawyer to disclose information relating to the representation of a client to establish a defense to the disciplinary complaint but only that information necessary to establish the defense. Thus, a lawyer should be careful not to disclose any confidences that are not absolutely necessary to respond to the complaint and should avoid disclosure that might cause harm to a client or their case.

Should an attorney retain counsel? Using the advice offered by Abe Lincoln "a man who represents himself has a fool for a client," the answer is yes. An attorney can provide independent and unbiased advice.

Even if an attorney is not retained to represent the lawyer with a pending disciplinary complaint, it is critical that the lawyer seek assistance from an experienced attorney to review a response before it is filed to perform a "tone check." In other words, the response should not contain statements which are irrelevant to the issues in the complaint or which contain inflammatory language directed at the client, the court, opposing counsel or the disciplinary process. Only an independent counselor can perform that role.

Should an attorney contact their professional liability insurance carrier? Yes, for two reasons. First, many malpractice policies provide coverage for Disciplinary Board complaints. Most carriers who provide coverage cover all attorney fees associated with hiring an attorney to assist with responding to complaint without requiring payment by the attorney of a deductible. Second, many insurance companies



"... the most important thing a recipient of a disciplinary complaint can do at the outset is to timely respond to the complaint and to continue to provide information when requested by disciplinary counsel."

consider a disciplinary board complaint as a "claim." Because all policies require timely notice of a claim, it is prudent to advise the insurance carrier and provide a copy of the complaint which was filed with the Disciplinary Board. Attorneys are often denied coverage when a complaint is later filed in district court and the attorney failed to provide timely notice of a disciplinary complaint, especially if the lawsuit is filed during a different policy period.

IV. Possible Outcomes

Pursuant to NMR Gov.Disc. 17-206, after reviewing the attorney's response and any subsequent investigation, disciplinary counsel can either dismiss the complaint, issue a letter of caution, offer an informal admonition, petition to refer the attorney to a diversionary program, or file a formal specification of charges. In the

event disciplinary counsel files a formal specification of charges against an attorney, after a hearing before an independent three person panel, the Disciplinary Board can dismiss the matter, or impose disciplinary action to include an informal admonition, formal reprimand or probation. The Disciplinary Board can also recommend more serious discipline, including public censure, suspension or disbarment. These latter recommendations are automatically reviewed by the New Mexico Supreme Court which may request briefing and may set the matter for oral argument before the Court. Ultimately, the Court may impose discipline to include any of the items listed above.

The good news (if there is any when it comes to attorney discipline) is that most complaints are ultimately dismissed without imposition of discipline. But in order for disciplinary counsel to get to the point of determining that the complaint does not warrant the pursuit of disciplinary action, they have to understand the complete picture. Therefore, the most important thing a recipient of a disciplinary complaint can do at the outset is to timely respond to the complaint and to continue to provide information when requested by disciplinary counsel. ■

About the Author

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There is No
Such Thing as

Too Much
Information

By Jeannie Hunt

My husband, who is not an attorney, will periodically tell me that he doesn't know anyone who communicates the same way that I do. I'm pretty sure he means that as a compliment...most of the time. What he is usually describing is this: He can have a conversation with a friend and then come back and tell me that the friend's partner had a baby. That's it. There is a new human in the world. That is the extent of the information he gathered. By the time I'm finished with that same conversation, I will know whether the baby is a boy or girl; length and weight at birth; if he or she has hair, how much, and what color; which parent the baby takes after; the baby's entire legal name and the legal name of all of his or her siblings; how many pets they have – including the species of said pets and those pets' entire legal names; how said siblings and family pets are taking to the new arrival; the theme of the nursery; and whether they have ever considered purchasing a bigger home and/or vehicle. I don't know if that is a Mars/Venus thing or an attorney thing. Either way, I cannot leave the conversation without extracting every single piece of relevant information from that conversation so I can roll it over and over in my head at night when I should be sleeping.

As my husband will tell you, some people find that style of conversation irritating and slightly creepy. Others consider it to be thorough. Whatever it may be, that is precisely the level of communication you need to have with your clients. Every time you finish speaking with your client, you need to be sure that you have spent all of the time needed asking the right questions and gathering the relevant information. You also need to be sure that when you are finished speaking with your client you have given that client all of the information he or she may need to continue forward. Thoroughly communicating with your client and documenting your file with those communications will save you a ton of money and heartache down the road.


What exactly should you tell your client? Everything. Your file, which includes all of your personal notes; all of your billing; and all of the communications you have had regarding that case, belongs to your client. With very limited exception, not relevant here, you cannot withhold any part of your file from your client when and if they ask for it. The client is entitled to know everything. That being said, please do not put anything in writing you wouldn't want your client to read. No one likes all of their clients all of the time but be sure everything you say and/or put in writing is professional. You do not want that email attached as Exhibit A to the malpractice complaint against you. Trust me; it happens.

Many of the cases I have defended could have been lessened or avoided entirely had the communication been better. We are all guilty of getting busy and rushing to the next task without taking the time to follow up with our client; answer a question; or confirm a conversation. Failing to timely respond to your client is not only against the Rules of Professional Conduct;¹ it is also a sure fire way to make your client mad. Clients who are mad because you won't communicate with them tend to sue you. While we all run the risk of being sued for malpractice even if we don't deserve it, good communication with your client will lessen the risk and be of tremendous help in the defense of a malpractice lawsuit. It is important to have good communication with your clients always but there are two specific areas in which thorough communication is absolutely vital: (1) communications regarding fees and billing; and (2) communications regarding your client's expectations.

Most of us have at least one client that pays extremely slowly, if they pay at all. As attorneys, it is tempting to fire off and file a short and sweet complaint against your client for unpaid fees. Don't do that. Ever. In New Mexico, a claim for legal malpractice



is a compulsory counterclaim to any claim by an attorney against their client for unpaid fees. See *Brunacini v. Kavanagh*, 1993-NMSC-157, ¶ 38, 117 N.M. 122. The compulsory counterclaim rule works the other way as well. If your client sues you for malpractice, any claim you have against that client for unpaid fees needs to be brought as a counterclaim immediately. The odds are pretty good you will never see any of those unpaid fees but your counterclaim can be pretty good leverage in a malpractice lawsuit.



"Many of the cases I have defended could have been lessened or avoided entirely had the communication been better."

Counterclaims of either type can usually be avoided with thorough communication regarding your billing and fees that begins at the start of your representation. Generally, the scope of your representation, the basis or rate of the fee, and the expenses for which the client will be responsible must be communicated with the client in writing when you start the representation or very shortly thereafter. See Rule 16-105 NMRA. Any changes to your fee agreement must also be made in writing. *Id.* Your engagement agreement should also include the interval at which the client will be billed; when exactly payment is due; and the penalty for late payments. While it is not required by the Rules of Professional Conduct, it is also a pretty good idea to go through those letters with your client line-by-line; have your client sign the letters; and then follow up with a quick email to your client summarizing that conversation.

After you have established your fee agreement with your client, the next step is to be sure you bill your client at regular intervals, usually monthly. Even if you didn't bill any time to that client that month, still send them a statement evidencing whether they are caught up in payments or the amount of any outstanding balance. As soon as your client's payments start slipping outside the agreed upon terms, you need to start communicating with your client in writing regarding the ways in which your client can bring his or her account current. Be cordial and professional. Your client is more likely to pay you if they like you and more likely to sue you if they do not. If that isn't working, keep communicating with your client at respectful intervals (i.e. not every day) and make sure your client is aware that you will withdraw from representation if you cannot come to mutually agreeable payment terms. Keep a close eye on that account and be sure to withdraw before the unpaid balance becomes more than you or your firm can bear. If you do reach a mutually agreeable payment plan, be sure to put the new agreement in writing.

It is just as important to stay on top of your client's expectations, starting at the very first meeting. Your client may be convinced their case is worth \$50 million or they may be

adamant that they didn't do anything wrong. Take the time to listen to your client and gather all the information. Give them your completely honest opinion about their case. Since some clients tend to have selective hearing, it is also a really good idea to follow up those conversations in writing. It takes far less time to write a letter than it does to defend a malpractice lawsuit.

Managing your client's expectations is a never-ending task. To the extent that you can, you need to make sure your client sees their case the way that you do; both the good and the bad. Nowhere is this more important than heading into mediation, arbitration, or trial. In every mediation in which I've ever participated, the mediator always requested a mediation statement. Different attorneys broach the mediation statement different ways. Some see the statement as a position paper, a chance to sell their case to the mediator. Others, myself included, tend to lay it all out for mediator, the beautiful facts and the ugly ones too. Whichever your preference, you need to make sure that your client understands the pros and cons of their case going into mediation, arbitration, or trial. Send your clients a completely separate letter setting forth the process of mediation, arbitration, and/or trial and the most likely outcome given all of the facts – not just the favorable ones. Be honest. Your client will be mad at you if you tell them their case is worth \$3 million and then settle for \$30,000. We all know what happens when clients get mad. Going into mediation, arbitration, trial, or even a hearing, it is vital that your client knows exactly what to expect. Cover yourself by putting that information in writing.

One other thing, keep your emails. All of your emails. Not just the ones you receive from your clients (or anyone else), but the ones you send as well. Create a folder for each and every case and file your emails as they come in. Take ten minutes one day a week to file your sent emails as well. Again, clients have selective hearing so be sure you confirm all of your important conversations in writing. If you don't know which conversations are important, err on the side of sending that email.

Remember, when it comes to communicating with your client, be thorough and/or a little creepy. Just don't be too creepy. ■

Endnotes

¹ Rule 16-104 NMRA

About the Author

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Do I, Or Don't I, Call My Professional Liability Insurance Company?

– Revisited, Almost 10 Years Later –

By Briggs F. Cheney

In 2012, I wrote an article titled *Do I, or Don't I Call My Professional Liability Insurance Company?*¹

As I re-read it, it is not half-bad, and its message is still an important one. But this comes from the author and from a lawyer who is “on the other side of the aisle” to use current vernacular—a defense lawyer. The reasons for revisiting the article and this topic are several. First, the message here is so darn important. Second, these 10 years have given birth to a whole new audience. Third, has there been a change in the insurance market and the law practice environment justifying a more conservative view of reporting “potential or possible”² claims.

Ten years ago, we did not have reciprocity or the uniform bar exam or the regionalization³ of the practice of law. 10 years ago, the bar was New Mexico barred lawyers who resided and practiced exclusively in New Mexico. That is not true today. This lack of familiarity, the importance of winning or prevailing at all costs and more “no holds barred” litigation, if not already, it will soon, enhance the threat of “potential or possible or threatened” legal malpractice claims⁴. For all the foregoing reasons, what is a “potential, or possible or threatened” claim will only be less clear, making only more difficult the decision, “do it or don't I call the legal malpractice carrier.”

In addition to the foregoing, what this lawyer referred to 10 years ago as the “short-lived secret” about disciplinary complaints and some lawyer's reluctance to report those complaints availing them of the benefit of counsel in the disciplinary proceeding may not exist as many policies require the lawyer insured to report all disciplinary complaints regardless of outcome.

One can debate what “potential or possible or threatened” claim means or what it is, or is not, but “not precise” is a polite way to describe those terms. Lawyers often delight in debating and litigating such vagueness, but does a lawyer want to engage



in such folly when their own personal pocketbook is on the line? Because it is hoped the answer to that question for most lawyers is “no”, this lawyer is going to dispense with discussion of the legal niceties and legal authorities and arguments on that question.

The rationale behind *claims-made* legal malpractice coverage is to provide more economical coverage for lawyers by allowing insurers the ability to close their books on an insurance policy at the expiration of the policy period. Unlike “occurrence coverage” where the policy period is not necessarily limited. In short and in theory, claims-made coverage provides the insurer with some level of predictability of its risk.

My criticism of the terms “potential or possible or threatened” as lacking preciseness may be unfair. In many ways, the notice requirement can be viewed as a “gift” to the lawyer, and not something that should be criticized. If viewed as a gift, a lawyer can benefit from the more economical premium and at the same time extend the lawyer's insurance coverage beyond a policy's annual period of coverage.

To partake of what I am calling this “gift” from the insurer, the insured lawyer must “objectively” comply with the notice

provision (those vague and imprecise words) - “potential, or possible or threatened.” Stated more directly, the insured lawyer must affirmatively provide the insurer with an unmistakable, clear, unequivocal statement that a possible or potential claim may exist. *LaForge v. American Casualty Co.*, 37 F.3d 580, 584 (10th Cir. 1994).

Confessing, “Father, I may have sinned” on the lawyer’s renewal application is not going to be adequate. *Id.* The notice issue and whether there is coverage are litigated based on the adequacy of the notice. Importantly,

“This lack of familiarity, the importance of winning or prevailing at all costs and more “no holds barred” litigation, if not already, it will soon, enhance the threat of “potential or possible or threatened” legal malpractice claims”

these coverage issues are generally litigated in federal courts. A passing reference on a renewal application or a lukewarm and less than detailed notice to an insurer during the policy period may be challenged. Being bashful or circumspect, regardless of the reason (“you really doubt the possible misstep will ever matriculate into a claim” or “because you want the insurer to see it as “long shot” and not raise your rates for that reason, the insured *soft-pedals* the seriousness of the claim” or “because you are embarrassed”) is a mistake. It is important to make a sufficient disclosure to the insurer so it is fairly on notice and can evaluate the possible risk.

This article and its predecessor are also going to be the subject of an episode of the State Bar’s podcast “SBNM is Hear” sometime next year. Here are some questions we anticipate discussing:

1. Should a lawyer wait until a claim is articulated in writing by a client or another lawyer on behalf of the client or suit is filed and ignore the “potential, or possible or threatened” language?
2. What about these vague and imprecise terms, “potential, or possible or threatened” claim – what do they mean?
3. Is it worth debating what they mean if your insurability is on the line?
4. Why are lawyers so uncomfortable putting an insurer on notice:
 - a. Because premiums may increase on renewal?
 - b. Is it pride or unwillingness to admit a possible mistake?
 - c. Is it the belief that the “mistake” will be resolved by some future development?
 - d. Is notification of a possible claim viewed as an admission by the lawyer insured?
5. Are lawyers in larger firms treated differently than solo or small firm practitioners?
6. Does a lawyer have a right to put the lawyer’s financial interests ahead of their client’s? If the lawyer – for whatever reason – provides the insurer with inadequate notice leaving the injured client without an avenue of recovery.

Endnotes

- ¹ Read the original article online at www.sbnm.org/newmexicolawyer
- ² The language in policies may vary, but these words are often used and because they lack preciseness and do often appear in legal malpractice policies, the comments in this paper are based on those terms.
- ³ This lawyer’s term to describe lawyers and law firms setting up satellite offices in this state, both plaintiffs and defense.
- ⁴ Right or wrong or because the opportunity has not presented itself to our appellate courts, the assignability of legal malpractice claims – can you or can’t you – is not conclusively resolved and the plaintiff’s bar are pursuing assigned legal malpractice claims.

About the Author

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Why Would You Want to Buy Professional Liability Insurance?

A Better Question is Why Wouldn't You?

By Eleanor C. Werenko

For some short period of my career, I had the pleasure of learning how to be a “lawyer’s lawyer” from lawyers that are really good at being lawyer’s lawyers. The kind of lawyers that you call when you get *the letter*. Or that your insurer calls when you are served with *the complaint*.

Not to trivialize the woes of my former clients, but that kind of work can be a lot of fun. It is challenging, and your clients and their practices are as diverse as the bar itself—from lawyers with micro-practices to lawyers from big firms and from lawyers representing individuals, to lawyers representing international clients before specialized courts.

The practice also scared me though; laying bare the myriad ways to fumble the ball. Showing me that even good lawyers, really good lawyers, make mistakes. Or even if they don’t make mistakes, can be accused of making mistakes. If you made a mistake, or were accused of making a mistake today, would your professional liability policy cover you? Are you sure? What if your partner commits a crime or fraud, are you covered as an innocent insured? What about that period between when you joined your current firm and your last job? These are just some of the questions that you might consider when it comes time to buy or renew a professional liability policy.

For the most part, our clients were lucky. In all but a few of our cases, the lawyers we represented had high quality professional liability insurance policies, with adequate loss limits, and provisions for defense costs. Even still though – they agonized. How much greater their suffering would have been without the benefit of an insurance policy to pay the costs of defense, to monitor the progress of defense, and ultimately to satisfy any judgment that might be rendered against the insured I can only imagine.

So, how do you choose a policy that will allow you to rest easily knowing that you, and your clients, are covered? While there is no one size fits all approach to choosing a professional liability policy, the following provides some food for thought in helping you to think through some of these hard questions. For more insights and tips on evaluating carriers and policies, look for the Lawyer’s Professional Liability Committee “Things to Consider When



Choosing a Professional Liability Insurance Policy” and talk with your agent or insurer to determine the policy that is right for you.

Why Purchase a Professional Liability Policy?

If the financial risks you face when practicing law without professional liability coverage are not enough (the costs of defending against a lawsuit or disciplinary complaint, the burden of satisfying a judgment, or the personal costs of declaring bankruptcy), you might also consider purchasing a professional liability policy to ease administrative burdens. Under the Rule 16-104 NMRA “[i]f, at the time of the client’s formal engagement of a lawyer, the lawyer does not have a professional liability insurance policy with limits of at least one-hundred thousand dollars (\$100,000) per claim and three-hundred thousand dollars (\$300,000) in the aggregate, the lawyer shall inform the client in writing using the form of notice prescribed by this rule.” I don’t know about you, but another letter that I have to generate and keep in my file, coupled with a potentially awkward conversation with my client might just push me over the edge.

More importantly though, a professional liability policy, protects your client. As attorneys our primary duty is to protect the interests of our clients. Buying a policy with adequate coverage serves this function while allowing attorneys to focus on the business of building and maintaining a healthy practice.

When Should you Purchase a Professional Liability Policy?

Ideally a lawyer would purchase a professional liability policy as soon as they are licensed to practice law. Because of the way that liability policies for attorneys are structured, as claims-made and reported policies (versus occurrence policies), you can never go back and buy coverage for work done in the past. Under this type of policy, work done after the policy starts is covered, but all work done prior to the date the policy goes into force is not be covered. In other words, claims-made and reported policies “provide coverage for claims first made and first reported to the insurance company while a policy is in force as long as the act, error, or omission upon which the claim is based occurred after the policy’s loss inclusion date and the individual attorney’s retroactive coverage date. The loss inclusion date is usually the inception date of the first claims-made policy purchased by a firm as long as there has not been a gap in coverage,” according to Mark Bassingthwaight in *A Young Lawyer’s Guide to Purchasing Lawyer’s Professional Liability Insurance* (<https://bit.ly/30dFepz>).

"More importantly though, a professional liability policy, protects your client. As attorneys our primary duty is to protect the interests of our clients. Buying a policy with adequate coverage serves this function while allowing attorneys to focus on the business of building and maintaining a healthy practice."

What is a Gap in Coverage and What Does that Mean for Me?

A gap in coverage occurs where there is a period of time in which a lawyer has no malpractice coverage in place. Apart from the uninsured period of time during the gap in coverage, the real issue with gaps in coverage, is that where a gap occurs, the loss inclusion date (for the firm) or the retroactive date (for an individual lawyer) is moved forward to the new date when coverage is obtained. What this means is that all work, regardless of how many years’ worth, prior to the loss inclusion or retroactive date, is uncovered. *Id.* The consequences of a gap in coverage can be far reaching making it very important for lawyers to ensure that they have a policy in force at all times.

How Much Insurance Do I Need?

In order to evaluate how much insurance you need, you will want to determine your risk and your risk tolerance. For some lawyers this will mean that they look at the value of their cases, or the transactions they handled in the prior years. For others it may be an evaluation of how much experience the lawyer has in the areas in which he or she is now, and has, practiced. Keeping in mind though that for policy limits under \$100,000/\$300,000 the lawyer will be subject to the disclosure requirements previously discussed. Under all circumstances your policy should be enough to defend the type of lawsuit that might be filed against you. In other words, if you practice, in areas of complex litigation, a lawsuit filed against

you will necessarily be complicated by the underlying law and will therefore be expensive. Best advice is to plan accordingly.

How are Defense Costs Handled?

How a policy handles defense costs is one of the most important considerations when choosing a professional liability policy. In New Mexico, you will find two principal types of policy provisions for defense costs. A “defense-within-limits” policy contains a provision reducing the policy’s applicable coverage by amounts paid by the insurer to defend the insured. Such provisions are also referred to as legal defense offset, shrinking limits, wasting coverage, cannibalizing limits, eroding or Pac-Man provisions. The New Mexico Public Regulation Commission has allowed such provisions to be placed in legal malpractice policies where the policy limit is at least \$500,000. 13.11.2.9(B)(1) (h) NMAC.

A “defense outside of limits” policy, on the other hand, does not reduce policy coverage to by amounts the insurer pays to defend its insured. Especially with low limits policies, defense costs can eclipse the limits of coverage quickly if the policy does not offer “defense outside of limits.”

In order for a defense-within-limits provision to be valid, the policy must not allow more than 50% of the policy limit to be eroded by defense costs. 13.11.2.10(A) NMAC. But that limitation may be omitted by the insurer if the policy allows the insured to select or consent to appointed defense counsel, participate in and assist in the direction of defense of the claim, and consent to a settlement. 13.11.2.10(C) NMAC. In other words, if the insurance policy allows significant participation by the insured attorney, the insurer may issue a policy allowing any amount of erosion of policy limits by defense costs. Depending on the policy and the claim, an insured may face a situation where he or she has to choose between adequately defending a claim and maintaining enough of the policy limits to reach a settlement or protect his or her assets in the event of an adverse judgment.

When choosing a professional liability policy, it is recommended that you look closely at a potential policy to determine how defense costs are handled and speak with your agent or insurer to determine whether this is the best choice for you. ■

About the Author

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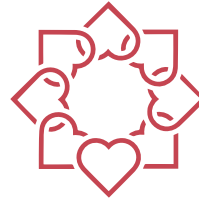
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but also when “a witness offers materially different testimony regarding a subject first introduced on direct.” *United States v. Blankenship*, 846 F.3d 663, 669 (4th Cir. 2017).

{18} S.G.’s changed testimony on redirect examination as to her age was “materially different” than her prior testimony on that subject. On direct and cross-examination, S.G. had repeatedly and unequivocally testified that Defendant had not penetrated her before she turned thirteen. This testimony provided the jury with no basis for finding that Defendant had committed first-degree CSPM; to the contrary, it was powerful evidence that Defendant had not committed that crime. It was not until her redirect testimony that S.G. provided incriminating evidence on the essential age element by testifying—for the first time—that penetration had occurred while she was twelve. Her redirect testimony on the issue was consequently new matter, and Defendant had a right under the Confrontation Clause to recross-examine S.G. as to her age when Defendant first penetrated her.

{19} The district court erred in concluding that Defendant was afforded an adequate opportunity for cross-examination because he had been able to cross-examine “about the issue [of] . . . whether [S.G.] was under thirteen” while “kn[ow]ing about the statement” that ultimately prompted S.G. to change her testimony. The court’s ruling applied an unduly restrictive definition of “new matter.” See *United States v. Baker*, 10 F.3d 1374, 1405 (9th Cir. 1993) (amended, Dec. 13, 1993) (concluding that the district court had “applied an overly narrow definition of ‘new matter’” in “interpret[ing] the standard to preclude recross if . . . questions fell within an ‘area’ or ‘subject matter’ for which cross-examination had previously been available”), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000). Defendant had no opportunity to challenge S.G.’s completely new redirect testimony that penetration had occurred while she was twelve. Before and throughout cross-examination, there was no reason for defense counsel to challenge S.G.’s testimony regarding her age. Had the testimony remained the same, it would not have supported a guilty verdict on the charge of first-degree CSPM, and the district court would have been required to direct a not guilty verdict. Even had defense counsel believed, as the prosecutor did, that S.G. was experiencing a lapse in memory, defense counsel was not required to seek incriminating testimony on the issue during cross-examination in hopes that she would be able to discredit it. But that was the only opportunity for cross-examination that the district court

afforded Defendant. Under our adversarial system of criminal justice, Defendant’s right to challenge the State’s case did not depend on whether he made the State’s case for it.

{20} Although we have identified error under the Confrontation Clause, Defendant at trial argued neither that the denial of recross violated his constitutional rights generally nor, in what would have been the “more desirable approach,” that it violated his rights under the Confrontation Clause. *State v. Silva*, 2008-NMSC-051, ¶ 10, 144 N.M. 815, 192 P.3d 1192 (holding that claimed Confrontation Clause error in the denial of a request for cross-examination about a specific issue is reviewed for fundamental error when a defendant does not alert the district court to a constitutional basis for the request), *unrelated holding clarified by State v. Guerra*, 2012-NMSC-027, ¶ 15, 284 P.3d 1076. We therefore review this issue only for fundamental error. *Id.* ¶ 11. Where a defendant’s guilt is not “so questionable that upholding a conviction would shock the conscience,” we will not reverse for fundamental error unless, “notwithstanding the apparent culpability of the defendant, substantial justice has not been served” because “a fundamental unfairness within the system has undermined judicial integrity.” *Id.* ¶ 13 (internal quotation marks and citation omitted); see also *State v. Barber*, 2004-NMSC-019, ¶ 18, 135 N.M. 621, 92 P.3d 633.

{21} We hold that such fundamental unfairness occurred in this case. Had Defendant succeeded in discrediting S.G.’s redirect testimony in the eyes of the jury, he would have been acquitted of first-degree CSPM. Cf. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (“The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.” (emphasis added)). The district court’s ruling “entirely vitiated,” *Silva*, 2008-NMSC-051, ¶ 15, Defendant’s right to cross examine S.G. regarding the only evidence sufficient to prove an essential element of that crime. We therefore conclude that this error independently requires reversal of Defendant’s conviction.

II. Defendant’s Convictions for Counts 2 through 6 Do Not Violate Double Jeopardy

{22} We next address Defendant’s contention that he has been subjected to double jeopardy by multiple convictions for one course of conduct of CSPM and CSCM per victim in his convictions for Counts 2 through 6. The jury found Defendant guilty of Counts 2 through 4 based on the abuse he perpetrated against S.G.: Count 2 was based on CSPM committed

between September 20, 2003, and February 28, 2005; Count 3 on CSPM committed between March 1, 2005 and December 30, 2006; and Count 4 on CSCM committed between January 1, 2007, and May 31, 2010. Defendant’s convictions for Counts 5 and 6 are based on his abuse of S.P.: Count 5 was based on CSPM committed between August 8, 2008, and April 30, 2010, and Count 6 on CSCM committed between May 1, 2010, and May 31, 2010.

{23} Defendant claims that we must reverse his convictions for all but one count of CSPM or, alternatively, one count of CSPM and one count of CSCM per victim because where “continuous and random contact (and here, penetration) . . . [is] said to have occurred over a lengthy period of time, but not at specific times[,]” it would violate double jeopardy to allow for multiple convictions to stand. Reviewing this issue de novo, *State v. Lente*, 2019-NMSC-020, ¶ 14, 453 P.3d 416, we disagree. The charges here were adequately differentiated to avoid the double jeopardy concerns raised by Defendant. See *id.* ¶¶ 47-49 (explaining that double jeopardy concerns related to “carbon copy” charges are eliminated where the charges are distinct in time period and conduct). The charges pertaining to each victim were separated into specific and distinct time periods and alleged distinct acts. The State did not allege that Defendant had perpetrated any specific sex act more than once in any given time period. This differentiation was borne out in the instructions the jury received at trial. The jury instructions for Counts 2, 3, and 4 required the jury to find that Defendant had engaged in three different sexual acts with S.G. during specific, consecutive time periods. The jury instructions for Counts 5 and 6 likewise asked the jury to find that Defendant had engaged in two different sexual acts with a second victim, S.P., during specific, consecutive time periods. The testimony elicited at trial fit within that framework and was sufficient to ensure that Defendant was not subjected to multiple punishments for the same offense: each victim testified and differentiated Defendant’s crimes by time period. See *id.* ¶ 52 (“Our primary concern in t[he] context [of double jeopardy] is to ensure that sufficient evidence exists to establish that each penetration is distinct from the others.” (internal quotation marks and citation omitted, alteration incorporated)). Where, as here, the identical actions are adequately separated, a defendant’s convictions withstand a double jeopardy challenge. See *id.* ¶ 30 (“There can be no question that our Legislature . . . intend[ed] for different acts of criminal sexual penetration and contact perpetrated against a child on different and discrete dates over a course of years to

constitute discrete violations of the statutes here implicated.”). As such, Defendant’s convictions for Counts 2 through 6 did not violate double jeopardy.

III. The Jury Instruction for Count 4 Was Not Fundamentally Erroneous

{24} Defendant argues that the jury instruction for Count 4 was fundamentally erroneous because it described a time frame that extended beyond S.G.’s eighteenth birthday, and we therefore have no way of knowing whether Defendant was convicted of CSCM based on conduct that occurred when S.G. was no longer a minor. We are not persuaded because the same instruction Defendant complains of also required the jury to find that S.G.

“was at least thirteen (13) but less than eighteen (18) years old.” Accordingly, the jury instructions only allowed the jury to find Defendant guilty for conduct that occurred before S.G. turned eighteen. It follows that the instruction for Count 4 would not have confused or misdirected a reasonable juror. *See Barber*, 2004-NMSC-019, ¶ 19 (explaining that there is no reversible error, and thus no fundamental error, when a reasonable juror would not have been confused or misdirected by the jury instructions provided). The instruction did not result in fundamental error. *See Cunningham*, 2000-NMSC-009, ¶ 21 (holding that fundamental error does not occur where the jury instructions as a

whole provide all of the essential elements of an offense).

CONCLUSION

{25} We reverse Defendant’s conviction for first-degree CSPM and remand for a new trial on that charge. We affirm Defendant’s remaining convictions.

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

WE CONCUR:
J. MILES HANISEE, Chief Judge
KRISTINA BOGARDUS, Judge

Advance Opinions

<http://www.nmcompcomm.us/>

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-041

No. A-1-CA-37640 (filed June 29, 2020)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
WILLIAM RAMEY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY

JAROD K. HOFACKET, District Judge

Released for Publication October 6, 2020.

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Opinion

Julie J. Vargas, Judge

{1} Defendant appeals his conviction for possession of a controlled substance, in violation of NMSA 1978, Section 30-31-23(E) (2011, amended 2019), following entry of a conditional plea. Defendant contends that the district court erred in denying his motion to suppress all evidence, including physical evidence, testimonial evidence, and statements made by Defendant. In support of his claim, Defendant argues that his right to be free from unreasonable seizure under the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico State Constitution was violated. That violation, he contends, requires the suppression of the evidence pursuant to the exclusionary rule because the discovery of a prior warrant did not purge the taint of the unconstitutional seizure. We agree with Defendant and therefore reverse.

BACKGROUND

{2} The Silver City Police Department has a practice whereby officers routinely pull up to unknown individuals walking at night and ask for their names and dates of birth. Officer Javier Hernandez testified during the suppression hearing that

the purpose of this practice is to create a “database [of] people” who are walking around Silver City on any particular night so he could review the names in the event a crime was committed later in the night.

{3} At approximately 12:18 a.m., Defendant, on his way home from work, was walking alone on the sidewalk, traveling east along New Mexico Highway 180. While driving his patrol car east on New Mexico Highway 180, Officer Hernandez spotted Defendant walking along the highway. The officer drove past Defendant, made a U-turn, drove westbound, traveled past Defendant again, and then made a second U-turn to pull up behind him.

{4} Officer Hernandez testified that, at the time he spotted Defendant, he had not had previous contact with Defendant, he did not recognize him as someone with active warrants, he was not looking for anyone fitting Defendant’s description, he did not recall reports of crimes committed in the vicinity of his encounter with Defendant, and Defendant was not acting suspiciously or in a way that made him think Defendant had committed a crime. Instead, Officer Hernandez testified, the reason he made contact with Defendant was simply because he was walking.

{5} Officer Hernandez parked his car less than fifty feet away from Defendant, shining his headlights on him. After stepping

out of his car, Officer Hernandez began walking toward Defendant, who had stopped walking. The officer then initiated the following exchange:

Officer Hernandez: What’s up, brother?

Defendant: [inaudible]

Officer Hernandez: Good, and you?

Defendant: Walking home.

Officer Hernandez: Yeah, where you live at?

Defendant: Up there on Rosedale.

Officer Hernandez: Ok. I’m just doing a citizen contact, man. Just seeing who’s out and about, okay? What’s your name?

Defendant: Will.

Officer Hernandez: Will. What’s your last name, Will?

Defendant: Ramey.

Officer Hernandez: How do you spell your last name?

Defendant: R-A-M-E-Y.

At this point, Officer Hernandez, who was standing a few feet away from Defendant, began writing down Defendant’s information. He then continued with the exchange:

Officer Hernandez: You live over there on Rosedale? That what you said?

Defendant: Yeah.

Officer Hernandez: What was your first name again?

Defendant: Will.

Officer Hernandez: Will. Okay what’s your date of birth, Will?

Defendant provided his date of birth, and the officer continued:

Officer Hernandez: Alright, man, you have a good one. Just be careful on your way home, okay?

Defendant: Okay.

Defendant began walking away from Officer Hernandez when the officer said something about Rosedale, to which Defendant responded, “Hell yeah! [inaudible].” Officer Hernandez replied, “I got you, man.” Still standing in the same spot where he stopped to speak with Defendant, Officer Hernandez immediately called into dispatch to tell them he had a name and date of birth for dispatch to check. After dispatch responded, Officer Hernandez provided Defendant’s information.

{6} When Officer Hernandez returned to his car dispatch informed him that Defendant had an outstanding warrant for driving with a revoked license. Upon learning this information, Officer Hernandez pulled up to Defendant again and arrested him on the warrant. While conducting a search incident to arrest, Officer

Hernandez discovered methamphetamine on Defendant's person.

{7} Defendant filed a motion to suppress the evidence seized during the search incident to arrest. The district court denied Defendant's motion to suppress, concluding the circumstances demonstrated the encounter was consensual and, therefore, not a seizure. Defendant appealed to this Court pursuant to a conditional guilty plea to the possession of a controlled substance charge, which reserved his right to appeal the denial of his motion to suppress.

DISCUSSION

{8} Defendant's appeal raises the following issues: (1) whether Officer Hernandez's actions of stopping Defendant to ask for his name and date of birth constituted a seizure; and (2) whether the evidence derived from any seizure must be suppressed.

I. Standard of Review

{9} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Yazzie*, 2019-NMSC-008, ¶ 13, 437 P. 3d 182 (internal quotation marks and citation omitted). We begin by reviewing the district court's factual determinations for substantial evidence. *Id.* "Substantial evidence is relevant evidence that a reasonable mind would accept as adequate to support a conclusion." *Id.* (internal quotation marks and citation omitted). We give "deference to the district court's review of the testimony and other evidence presented," and review contested facts "in a manner most favorable to the prevailing party." *Id.* (internal quotation marks and citations omitted). We then review the district court's application of the law to those facts de novo. *Id.*

II. Requesting Defendant's Identity Constituted a Seizure Under the Fourth Amendment

{10} Before examining whether Officer Hernandez's conduct in requesting Defendant's name and date of birth violated the Fourth Amendment, we must first consider whether, under the totality of the circumstances, Officer Hernandez's actions of stopping Defendant as he walked home constituted a seizure under the Fourth Amendment.

{11} "Law enforcement officers generally need no justification to approach private individuals on the street to ask questions." *State v. Gutierrez*, 2008-NMCA-015, ¶ 9, 143 N.M. 522, 177 P.3d 1096; *State v. Williams*, 2006-NMCA-062, ¶ 11, 139 N.M. 578, 136 P.3d 579 ("An officer may approach a person to ask questions or request identification, without any basis for suspecting that particular individual, as long as the police do not convey a message that compliance with their requests

is required." (internal quotation marks and citation omitted)). Indeed, "[p]olice contact is consensual so long as a reasonable person would feel free to disregard the police and go about his business or to decline the officers' requests or otherwise terminate the encounter." *State v. Murry*, 2014-NMCA-021, ¶ 13, 318 P.3d 180 (alteration, internal quotation marks, and citation omitted).

{12} However, "a person is seized within the meaning of the Fourth Amendment when, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *Id.* ¶ 12 (alterations, internal quotation marks, and citation omitted). "[I]f an officer conveys a message that an individual is not free to walk away, by either physical force or a showing of authority, the encounter becomes a seizure under the Fourth Amendment." *Id.* ¶ 13 (internal quotation marks and citation omitted). Instances of seizure by a show of authority, however, also "requires submission to the assertion of authority." *Id.* (internal quotation marks and citation omitted).

{13} To determine "whether a person was seized, we evaluate: (1) the circumstances surrounding the contact, including whether police used a show of authority; and (2) whether the circumstances of the contact reached such a level of accosting and restraint that a reasonable person would have believed he or she was not free to leave." *Id.* ¶ 14 (internal quotation marks and citation omitted). "In evaluating whether a reasonable person would feel free to leave, [this Court] look[s] to three factors: (1) the police conduct, (2) the person of the individual citizen, and (3) the physical surroundings existing at the time of the encounter." *Williams*, 2006-NMCA-062, ¶ 13. At issue in the present case is whether the circumstances surrounding the initial encounter between Officer Hernandez and Defendant conveyed a message to Defendant that he was not free to leave.

{14} We considered facts similar to these in *State v. Soto*, 2008-NMCA-032, 143 N.M. 631, 179 P.3d 1239. In *Soto*, the testimony established that it was the practice of the Ruidoso Downs Police Department to routinely pull people over to obtain information about their identities to assist officers in potentially solving crimes that occurred later in the night. *Id.* ¶ 2. At about 2:30 a.m., two Ruidoso Downs Police Officers observed the defendant riding his bicycle on a public service road. *Id.* Without activating their lights, the officers pulled alongside the defendant, at which point the defendant stopped his

bicycle. *Id.* ¶ 3. The officers asked where the defendant was going. *Id.* The defendant explained he was going home and when he was unable to give an address, one of the officers asked for his identification. *Id.* The defendant provided the officers with his driver's license, and the officers ran a warrant check on him. *Id.* The officers discovered that the defendant had an outstanding felony warrant and arrested him. *Id.* During the search incident to arrest, officers discovered that the defendant had methamphetamine in his possession. *Id.* {15} Rejecting the state's argument that the encounter was consensual, this Court held that the defendant was seized within the meaning of the Fourth Amendment. *See id.* ¶ 13. We explained that the officers' actions of pulling up next to and stopping the defendant's bicycle, their questioning of the defendant's activities, their request for his identification, their conduct in retaining the defendant's driver's license to run a warrant check, the lateness of the hour, and the defendant's "isolation" on the service road "conveyed to [the d] efendant that the officers expected [the d] efendant to comply with their requests." *Id.* Accordingly, we held that under the totality of the circumstances, a reasonable person "would not feel free to disregard the officers or terminate the encounter." *Id.* (alteration, internal quotation marks, and citation omitted).

{16} Here, Defendant was walking alone at 12:30 a.m., going from work to his home with no other people walking in the area. Officer Hernandez was driving in a patrol vehicle when he passed by Defendant, made a U-turn, passed by him again, and made another U-turn before pulling up behind Defendant and parking his vehicle, with his headlights shining on Defendant. Defendant had stopped walking when Officer Hernandez stepped out of his patrol car, and stood in the same spot as Officer Hernandez walked toward him. Officer Hernandez approached Defendant, coming within a few feet of him, asked where Defendant lived, and asked for his name and date of birth.

{17} The State argues that because the conversational tone was "cordial, friendly and not remotely confrontational" no seizure occurred. Additionally, the State argues that this case is distinguishable from *Soto* because Officer Hernandez's contact with Defendant was "far more brief and informal," he did not ask for details about where Defendant was going,¹ and he did not request or retain Defendant's identification. Notwithstanding these points of distinction, we are still faced with circumstances in which a reasonable

¹We note that upon Defendant informing Officer Hernandez that Defendant was walking home, Officer Hernandez asked where he lived. He did not, however, ask for more information after Defendant told him the street on which his home was located.

person would not have felt free to disregard Officer Hernandez's questions and walk away. Based on Defendant's isolation in the area, the lateness of the hour, Officer Hernandez's conduct in passing Defendant and performing two U-turns before parking behind Defendant with his headlights shining on Defendant, Defendant's conduct in stopping when the officer parked behind him, Officer Hernandez's question about where Defendant lived, and Officer Hernandez's request for Defendant's name and date of birth, a reasonable person would not have felt free to leave. *See id.*; *Williams*, 2006-NMCA-062, ¶ 11. Therefore, we conclude that Defendant was seized under the Fourth Amendment when Officer Hernandez stopped him and asked him questions. Having concluded Defendant was seized within the meaning of the Fourth Amendment, we now consider whether the evidence derived from this seizure is admissible or must be suppressed under the Fourth Amendment.

III. The Evidence Must Be Excluded

{18} "As a general rule, the federal constitution requires suppression of evidence obtained in a manner that runs afoul of the Fourth Amendment." *State v. Tapia*, 2018-NMSC-017, ¶ 13, 414 P.3d 332 (omission, internal quotation marks, and citation omitted). This "exclusionary rule encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and evidence later discovered and found to be derivative of an illegality, the so-called fruit of the poisonous tree." *Id.* (omission, internal quotation marks, and citation omitted). Notwithstanding the general rule that evidence obtained as a result of an improper seizure should be excluded, the United States Supreme Court has identified three exceptions to the exclusionary rule: the independent source doctrine, the inevitable discovery doctrine, and the attenuation doctrine. *Id.* ¶ 14.

{19} Rather than argue that the seizure of Defendant in this case was justified by reasonable suspicion or another exception to the warrant requirement, *see State v. Rowell*, 2008-NMSC-041, ¶ 10, 144 N.M. 371, 188 P.3d 95 ("Warrantless seizures are presumed to be unreasonable and the [s]tate bears the burden of proving reasonableness." (internal quotation marks and citation omitted)), the State contends that even if Defendant was seized, any evidence obtained following the seizure is nevertheless admissible under the attenuation doctrine. The attenuation doctrine provides that "[e]vidence is admissible when the connection between [the] unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee

that has been violated would not be served by suppression of the evidence obtained." *Tapia*, 2018-NMSC-017, ¶ 14 (internal quotation marks and citation omitted).

{20} To evaluate whether the relationship between the unlawful seizure and the challenged evidence has become "sufficiently weak [so as] to dissipate any taint" that results from the original illegality, the United States Supreme Court identified three factors relevant to the inquiry: "(1) the lapsed time between the illegality and the acquisition of the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct." *Id.* ¶ 15 (citing *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)).

{21} First, we note that only six minutes elapsed between the initial seizure and the discovery of the methamphetamine. Because the temporal proximity factor "[g]enerally . . . weighs in favor of suppression unless substantial time elapses between an unlawful act and when the evidence is obtained[.]" *State v. Edwards*, 2019-NMCA-070, ¶ 11, 452 P.3d 413 (internal quotation marks and citation omitted), we weigh this factor in favor of suppression. *See Utah v. Strieff*, ___ U.S. ___, ___, 136 S. Ct. 2056, 2062 (2016) (explaining that when evidence is discovered "only minutes after the illegal stop[.]" . . . such a short time interval counsels in favor of suppression").

{22} The second factor, whether there existed intervening circumstances attenuating the initial seizure from the discovery of the evidence, however, strongly favors attenuation. After obtaining Defendant's name and date of birth, Officer Hernandez transmitted the information to dispatch who notified the officer that Defendant had a valid, preexisting arrest warrant that was entirely unconnected with the initial seizure. When a defendant has "a preexisting, untainted, valid arrest warrant, which obligate[s] an officer to arrest [the d]efendant when [the officer] discover[s] it," this intervening circumstance "strongly favors attenuation." *Edwards*, 2019-NMCA-070, ¶ 12 (internal quotation marks omitted); *see Strieff*, 136 S. Ct. at 2062 ("In this case, the warrant was valid, it predated [the] Officer[']s investigation, and it was entirely unconnected with the stop.").

{23} Finally, we consider the purpose and flagrancy of the police misconduct, described as a "particularly significant," factor by the United States Supreme Court. *Id.* "[T]o be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure." *Edwards*, 2019-NMCA-070, ¶ 12 (internal quotation marks and citation omitted).

{24} We have previously explained that when "police stop[a d]efendant on the basis of nothing other than the vague notion that they would obtain [the d]efen-

dant's personal information from him, and without any further suspicion, they [run] a warrant check on him[, t]he purpose of the stop—to obtain information from [the d]efendant—[is] directly related to [the d]efendant's ultimate arrest." *Soto*, 2008-NMCA-032, ¶ 27; *see Strieff*, 136 S. Ct. at 2064 (rejecting the defendant's argument that the officer's detention of a defendant to ask what he was doing at a residence the officer was surveilling for drug activity was purposeful and flagrant, stating that the officer's actions were "not a suspicionless fishing expedition in the hope that something would turn up." (internal quotation marks and citation omitted)); *Tapia*, 2018-NMSC-017, ¶ 38 (concluding police misconduct was neither purposeful nor flagrant because "[n]othing in the record indicates that [the officer] initiated the traffic stop for the specific purpose of investigating [the d]efendant or for some other merely pretextual reason."). Therefore, to weigh in favor of suppression, a defendant must demonstrate "purposeful and flagrant official misconduct where: (1) the impropriety was obvious, or the official knew his conduct was likely unconstitutional but continued nonetheless; or (2) the misconduct was investigatory in design and purpose." *State v. Monafó*, 2016-NMCA-092, ¶ 15, 384 P.3d 134.

{25} Here, Officer Hernandez testified that it was his practice when working the night shift, regardless of whether a crime had been reported or not, to stop anyone he did not know and ask for their name and date of birth. He explained that his reason for doing this was to establish a database of people walking around Silver City at night, so that if a crime was committed later in the night, he could review the names of the people with whom he had had contact. This was a standard practice of the Silver City Police Department.

{26} Notwithstanding his testimony that the purpose behind his stop of Defendant was part of his practice to establish a database, we note that Officer Hernandez did not simply add Defendant to his list and continue with his shift. Instead, before he even left the spot where he stood speaking with Defendant, he contacted dispatch, and provided Defendant's information to perform a warrant check on Defendant—all without any suspicion that Defendant had engaged in or was engaging in criminal activity. *Compare Soto*, 2008-NMCA-032, ¶ 27 (observing that the "police stopped [the d]efendant on the basis of nothing other than the vague notion that they would obtain [the d]efendant's personal information from him, and without any further suspicion, they ran a warrant check on him"), *with Strieff*, 136 S. Ct. at 2063 (concluding that the officer "was at most negligent" in suspecting the

defendant of criminal activity), *Tapia*, 2018-NMSC-017, ¶ 38 (concluding that the record was devoid of evidence “that [the officer] initiated the traffic stop for the specific purpose of investigating [the defendant] or for some other merely pretextual reason[;] . . . rather, she addressed [the defendant] based on her observation that he was not wearing a seat belt”), and *Edwards*, 2019-NMCA-070, ¶ 12 (concluding that the police “investigation was clearly not a suspicionless fishing expedition in the hope that something would turn up[;] rather, [the officer]’s aim was to investigate the report of a possible serious crime, a shooting, and so he sought to interview potential departing witnesses” (internal quotation marks and citation omitted)). As the Supreme Court of Kansas concluded:

In applying the third [attenuation] factor, we also note that when law enforcement officers approach random citizens, request identification, and run warrant checks for no apparent reason, the officers clearly are performing investigatory detentions designed and executed in the hope that something might turn up. . . . Regardless of whether a suspicionless detention to identify a citizen and check that citizen for outstanding arrest warrants is characterized as a standard practice, a field interview, a pedestrian check, or a “fishing expedition,” such a detention can, and often will, demonstrate at least some level of flagrant police conduct.

State v. Morales, 300 P.3d 1090, 1103 (Kan. 2013), *abrogated on other grounds as recognized by State v. Tatro*, 445 P.3d 173, 180 (Kan. 2019).

{27} Although Officer Hernandez characterized the basis for stopping Defendant and requesting his name and date of birth

as falling within a standard practice of collecting names in case criminal activity occurred later on that night, his conduct demonstrated that his true purpose in gathering Defendant’s information was to run a warrant check. Accordingly, “the misconduct was investigatory in design and purpose,” *Monafo*, 2016-NMCA-092, ¶ 15, and therefore weighs in favor of suppression. Under these circumstances, we conclude admission of the evidence in Defendant’s possession would embolden police to engage in unreasonable seizures and, therefore, this factor weighs in favor of suppression. *See Strieff*, 136 S. Ct. at 2063 (explaining that the third factor contemplates “exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant”); *see also id.* at 2063-64 (concluding that the officer’s decision to stop the defendant was an isolated incident and “was at most negligent,” but observing that “[w]ere evidence of a dragnet search presented here, the application of the *Brown* factors could be different”); *cf. Tapia*, 2018-NMSC-017, ¶ 38 (concluding that “[t]his third consideration tips the balance away from suppression because nothing suggests that admission of the evidence will embolden police to engage in unconstitutional traffic stops”); *Edwards*, 2019-NMCA-070, ¶ 12 (holding that “[t]here is no evidence that [the officer] approached and addressed [the defendant] for arbitrary reasons, and similarly nothing suggests that admission of the evidence will embolden police to engage in unconstitutional investigatory detentions.” (alteration, internal quotation marks, and citation omitted)).

{28} Applying the three attenuation factors, we hold that the evidence discovered on Defendant’s person was inadmissible because the seizure was not sufficiently attenuated by the preexisting arrest warrant. *Compare Soto*, 2008-NMCA-032, ¶¶ 26-27 (excluding evidence obtained after an of-

ficer discovers and executes a preexisting arrest warrant, because the first and third factors weighed in favor of suppression), *with Strieff*, 136 S. Ct. at 2063 (“Although the illegal stop was close in time to [the defendant’s] arrest, that consideration is outweighed by two factors supporting the [s]tate.”), *Tapia*, 2018-NMSC-017, ¶¶ 35, 37-38 (concluding exclusion of the evidence is unnecessary when the first factor weighs in favor of suppression but the second and third factors weigh in favor of attenuation), and *Edwards*, 2019-NMCA-070, ¶¶ 11-12 (same). Having concluded Defendant’s right is protected under the Fourth Amendment of the United States Constitution, we need not reach his argument under Article II, Section 10 of the New Mexico Constitution. *See State v. Ketelson*, 2011-NMSC-023, ¶ 10, 150 N.M. 137, 257 P.3d 957 (“If the right is protected by the federal constitution, then the state constitutional claim is not reached.”).

CONCLUSION

{29} For the foregoing reasons, we reverse the district court’s order denying Defendant’s motion to suppress the evidence obtained as a result of Defendant’s unlawful seizure, and we remand to the district court to permit Defendant to withdraw his conditional plea. *See State v. Jean-Paul*, 2013-NMCA-032, ¶ 34, 295 P.3d 1072 (permitting the defendant to withdraw her conditional plea after prevailing on her appeal of the district court’s order denying her motion to suppress).

{30} **IT IS SO ORDERED.**
JULIE J. VARGAS, Judge

WE CONCUR:
KRISTINA BOGARDUS, Judge
SHAMMARA H. HENDERSON, Judge

Advance Opinions

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-042
No. A-1-CA-37467 (filed June 9, 2020)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CARROLL J. TUTON,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
DOUGLAS R. DRIGGERS, District Judge

Released for Publication October 6, 2020.

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Opinion

Zachary A. Ives, Judge.

{1} Defendant Carroll J. Tuton appeals his conviction for possession of methamphetamine in violation of NMSA 1978, Section 30-31-23(A) (2011, amended 2019), arguing that the district court erred by denying his motion to suppress 0.73 grams of methamphetamine a police officer found while searching his wallet during a traffic stop. We agree with Defendant that the expansion of the scope of the stop violated Article II, Section 10 of the New Mexico Constitution. Specifically, we conclude that the State did not establish that asking Defendant to name the friend whose house he had come from was reasonably related to his traffic offenses or that this questioning was based on reasonable suspicion of any other offense. Because this violation of the State Constitution tainted Defendant's consent to search his wallet, we reverse the order denying Defendant's motion to suppress the fruits of that search.

BACKGROUND

{2} At the suppression hearing, the State relied on the testimony of Officer Manuel Frias and Officer Kassidee Plumley of the Las Cruces Police Department. Officer Frias testified that he stopped Defendant's vehicle after observing Defendant fail to

use his turn signal and fail to stop at a stop sign. During the stop, Defendant was "very nervous [and] shaky" and, at first, "belligerent" and "[un]cooperative." When Officer Frias asked Defendant for his driver's license and proof of vehicle registration and insurance, Defendant produced his license but not the other two documents. Officer Frias directed Defendant to step out of his vehicle to advise him of the traffic citation he was receiving and have him sign that citation.

{3} With Defendant outside of his vehicle and before Defendant had signed the citation, Officer Frias asked Defendant where he was coming from; Defendant responded that he was coming from a friend's house. When Officer Frias asked which friend, Defendant identified the friend as Josh. Officer Frias then asked whether it was Josh Dimas—a person Officer Frias knew was under investigation for and had been previously convicted of drug trafficking—and Defendant replied that it was. Officer Frias then asked for and received Defendant's consent to search his vehicle. After completing this search, Officer Frias asked for and received Defendant's consent to pat him down and search his pockets. During the search of Defendant's pockets, Officer Frias found a wallet, which he handed to Officer Plumley, who had arrived as backup during the

stop. Officer Plumley searched the wallet and found a clear plastic bag containing methamphetamine.

{4} Officer Plumley testified that she observed Officer Frias talking to Defendant at the driver's side of Defendant's vehicle when she arrived at the scene. Defendant "appeared to be very nervous" inside of his vehicle, more so than most people are during traffic stops: he "kept grabbing for the steering wheel and then [putting his hands] back down" and "his hands were shaking." During the time that Officer Plumley was observing the interaction between Officer Frias and Defendant, they were having a "good natured discussion," and "nobody was being belligerent."

{5} At the conclusion of the suppression hearing, the State argued that the law allowed the officers to expand the traffic stop to ask questions about where Defendant was coming from and that the request for consent was lawful. Defense counsel responded that the officers lacked reasonable suspicion to expand the scope of the stop, arguing, among other things, that Officer Frias expanded the stop illegally, which tainted any consent Defendant might have given. The district court denied Defendant's motion to suppress without explanation.

{6} Defendant pled guilty to possession of methamphetamine in violation of Section 30-31-23(A). He appeals pursuant to a plea agreement that includes a provision allowing him to withdraw his guilty plea if he obtains a reversal of the order denying suppression.

DISCUSSION

{7} Defendant argues that Officer Frias violated the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution by expanding the scope of the traffic stop to question Defendant about where he had been before the traffic stop and, based on his responses, to request consent to search Defendant and the vehicle he was driving. Defendant contends that Officer Frias unreasonably extended the duration of the traffic stop and impermissibly deviated from the original justification for the stop by asking questions that were not reasonably related to traffic violations.

{8} Our "review of a district court's decision regarding a motion to suppress evidence involves mixed questions of fact and law." *State v. Funderburg*, 2008-NMSC-026, ¶ 10, 144 N.M. 37, 183 P.3d 922 (internal quotation marks and citation omitted). "We review the motion in two parts[.]" *State v. Garcia*, 2005-NMSC-017, ¶ 27, 138 N.M. 1, 116 P.3d 72. First, we "review the factual analysis for substantial

evidence.” *Id.* Reviewing the entire record, we ask whether “there was sufficient evidence to support the [district] court’s denial of the motion to suppress.” *State v. Monafó*, 2016-NMCA-092, ¶ 10, 384 P.3d 134 (internal quotation marks and citation omitted). Unless the record is to the contrary, we presume that “the court believed all uncontradicted evidence.” *State v. Jason L.*, 2000-NMSC-018, ¶ 11, 129 N.M. 119, 2 P.3d 856. In the absence of factual findings, “[w]hen the evidence conflicts, we consider the evidence that supports the district court’s ruling[.]” and we “draw all inferences and indulge all presumptions in favor of [that] ruling.” *Id.* Second, we undertake a *de novo* review of the legal analysis. *Garcia*, 2005-NMSC-017, ¶ 27. This entails assessing the totality of the circumstances to “decide the constitutional reasonableness of the police conduct” as a matter of law. *State v. Martinez*, 2020-NMSC-005, ¶ 16, 457 P.3d 254.

{9} Drawing all inferences in favor of the district court’s order denying the motion to suppress, we conclude that the Fourth Amendment allowed Officer Frias to ask Defendant the series of questions about where he had been. The United States Supreme Court has held that “[a]n officer’s inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.” *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). “Authority for [a traffic stop] ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.” *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). Stated differently, an officer may investigate potential offenses other than the traffic offenses without reasonable suspicion, but the officer “may not do so in a way that prolongs the stop.” *Id.* at 355. Under this precedent and considering the suppression hearing testimony in the light most favorable to the State, Officer Frias asked Defendant questions about his prior whereabouts before he explained the traffic citations to Defendant and before Defendant had signed the citations, and

the evidence does not suggest that the questioning at issue prolonged the stop or that Officer Frias took an unreasonable amount of time to investigate the traffic infractions. Accordingly, we conclude that the questions at issue did not render the detention unreasonable under the Fourth Amendment.

{10} However, Article II, Section 10 mandates a different analysis—one designed to “ensure[] that investigating officers do not engage in ‘fishing expeditions’ during traffic stops.”¹ *Leyva*, 2011-NMSC-009, ¶ 55. By contrast to the Fourth Amendment, “Article II, Section 10 [ordinarily] requires that all questions asked during the investigation of a traffic stop be reasonably related to the initial reason for the stop.” *Leyva*, 2011-NMSC-009, ¶ 55. “Unrelated questions” are only justified (1) if “supported by independent reasonable suspicion,” (2) “for reasons of officer safety,” or (3) “if the interaction has developed into a consensual encounter.” *Id.*; see *Bell*, 2015-NMCA-028, ¶ 16 (“[U]nder Article II, Section 10, both the duration and [the] scope of a stop must be reasonable under the circumstances and . . . even questions that do not prolong the encounter are improper if they are not reasonably related to the reason for the stop or otherwise supported by reasonable suspicion.” (alteration, internal quotation marks, and citation omitted)). Questions about travel plans or history are not exempt from these requirements. See, e.g., *State v. Duran*, 2005-NMSC-034, ¶ 37, 138 N.M. 414, 120 P.3d 836 (concluding that “limited questions about travel plans” were “reasonably related to the scope of the initial stop” for a misplaced registration sticker because the officer knew that “the stop was on a drug-courier route,” the officer saw “strange and suspicious tools in the back of the car and smelled the raw odor of gasoline,” and the defendant “presented an irregular bill of sale without normal paperwork”), *overruled on other grounds by Leyva*, 2011-NMSC-009, ¶¶ 17, 55 (explaining that the holding and reasoning of *Duran* are no longer valid under the Fourth Amendment, but affirming that *Duran*’s holding and reasoning continue to govern the scope of traffic

stops under Article II, Section 10); *State v. Van Dang*, 2005-NMSC-033, ¶¶ 1, 5, 15, 138 N.M. 408, 120 P.3d 830 (holding that questions about a driver’s travel plans were reasonable because the absence of driver’s name on a vehicle rental contract gave “the officer . . . a right to investigate whether the vehicle was stolen”); see also *Funderburg*, 2008-NMSC-026, ¶¶ 26-28 (recognizing that officers may ask questions about travel based on circumstances that evolve after the stop).

{11} Here, the State does not contend, and the suppression hearing evidence provides no basis for concluding, that Officer Frias’s questions were designed to protect the officers or that the questioning occurred during a consensual encounter after the traffic stop ended. Accordingly, Officer Frias’s questions about where Defendant had come from, and upon learning he had come from a friend’s house, about the friend’s name were only allowed under Article II, Section 10 if those questions were either reasonably related to the reason for the stop or based on reasonable suspicion that Defendant might have committed some other offense.

{12} The State has not established that the questions pass muster under either alternative. Neither officer articulated any connection between the investigation of the stop sign and turn signal violations that justified the traffic stop at its inception and the inquiry regarding Defendant’s travel history. And the progression of Officer Frias’s questioning does not allow us to draw any reasonable inference relating that questioning to the reason for the stop. Even granting that a simple inquiry into where Defendant was coming from could have had some relation to the investigation of the traffic offenses at issue here, the name of the friend whose house Defendant had been visiting and whether Defendant’s friend Josh was Josh Dimas plainly did not. The intrusiveness of this questioning consequently exceeded the degree permissible under the New Mexico Constitution unless the questions were supported by independent reasonable suspicion. See *Bell*, 2015-NMCA-028, ¶ 19 (“When a motorist is subjected to inquiries unsp-

¹Defendant preserved his state constitutional claim by arguing in the district court that the detention and searches violated his rights under Article II, Section 10 and by developing a factual basis for that argument during the suppression hearing. See *State v. Leyva*, 2011-NMSC-009, ¶ 49, 149 N.M. 435, 250 P.3d 861 (clarifying that in order to preserve a state constitutional claim, if the state constitutional provision at issue has previously been interpreted more expansively than its federal counterpart, defense counsel “must develop the necessary factual base and raise the applicable [state] constitutional provision in trial court” (emphasis omitted)). *But cf. State v. Bell*, 2015-NMCA-028, ¶ 12 n.1, 345 P.3d 342 (“As clear as this controlling precedent now is, we question why it is any longer necessary that the simultaneously applicable protections of the Fourth Amendment and Article II, Section 10 must be independently preserved when challenging the constitutional legality of a vehicle stop in New Mexico. To require dual assertions of such persistently overlapping protections, known well to both attorneys and the judges in whose courts these issues are most frequently raised, unnecessarily risks the waiver of important protections to motorists’ liberty. It is, however, for our Supreme Court to effectuate change to its own jurisprudence, and we review the [preservation issue] under *Leyva* and cases preceding it.”); *id.* ¶ 24 (Sutin, J., specially concurring) (“It is time to hold that in search and seizure cases our courts will automatically examine whether relief under Article II, Section 10 . . . should be available when it appears that relief is unavailable under the Fourth Amendment.”).

ported by reasonable suspicion during a vehicle stop, . . . the continuing detention of that person is illegal.”).

{13} They were not. Although Officer Frias discovered potential registration and insurance violations during the stop, the testimony at the suppression hearing did not connect his questioning to those offenses either. Nor did it tie these separate violations to Officer Frias’s investigation of any other potential crime. During the suppression hearing, the State presented no evidence that, at the time Officer Frias inquired about the name of Defendant’s friend, he had any reasonable basis for suspecting that Defendant had committed a drug offense. But neither the officers nor the State identified any other offense that Officer Frias could have been investigating by asking Defendant which friend he had been visiting and whether that friend was a person Officer Frias knew to be involved in drug trafficking. As the State candidly acknowledges, Officer Frias learned the only information that arguably gave the officers reasonable suspicion of a drug offense *after* he asked the questions at issue—from Defendant’s answers to those questions. Because facts discovered as a result of a seizure have no bearing on the legality of that seizure, *Jason L.*, 2000-NMSC-018, ¶ 20, Defendant’s answers to Officer Frias’s questions may not be used to justify expanding the scope of the detention to ask the questions in the first place.

{14} The traffic, registration, and insurance violations did not support the officers’ expansion of the scope of the investigation even when considered in conjunction with Defendant’s demeanor: his unusual degree of nervousness and his hostility toward Officer Frias at the outset of the stop. Our Supreme Court has made clear that its precedent does not “equat[e] simple nervousness with reasonable suspicion.” *State v. Neal*, 2007-NMSC-043, ¶ 29, 142 N.M. 176, 164 P.3d 57 (holding that a defendant’s “fidgety and nervous demeanor . . . did not suffice to create reasonable suspicion” (internal quotation marks and citation omitted)); *see, e.g., State v. Portillo*, 2011-NMCA-079, ¶ 23, 150 N.M. 187, 258 P.3d 466 (concluding that an officer lacked reasonable suspicion to expand the scope of a traffic stop by asking the driver questions about drugs and weapons where the prosecution relied exclusively on the driver’s abnormal demeanor, which included looking straight ahead and failing to make eye contact except for “a single furtive glance”). Demeanor is only one factor to be considered in weighing the totality of the

circumstances, and those circumstances as a whole must be reasonably connected to the expansion of an investigation. *See, e.g., State v. Olson*, 2012-NMSC-035, ¶ 15, 285 P.3d 1066 (holding that an officer had reasonable suspicion to investigate a driver for soliciting prostitution during a traffic stop for an expired license plate where the defendant made “an unusual maneuver” after seeing the officer’s marked patrol car and then “avoided eye contact” after his vehicle was stopped; the stop occurred late at night in an area where the officer had seen prostitutes working; and the officer recognized the passenger as a person who had worked as a prostitute); *Duran*, 2005-NMSC-034, ¶¶ 37-39 (holding that an officer had reasonable suspicion to investigate a driver for drug offenses based on the driver’s unusual degree of nervousness where the officer “observed the strange and suspicious tools in the back of the car and smelled the raw odor of gasoline”; the fact that the driver was “traveling on a drug trafficking route,” one that was indirect for the driver; and the officer’s “impression that [the d]efendant was making her story up as she went along”); *State v. Pacheco*, 2008-NMCA-131, ¶ 16, 145 N.M. 40, 193 P.3d 587 (holding that an officer had reasonable suspicion to investigate a driver for drug-related activity during traffic stop based on the driver’s “excessive nervousness” as well as “the strong odor of air freshener, heavy perfume, or after shave emanating from the vehicle, which [the officer] stated in his experience is frequently used by traffickers to conceal the odor of narcotics”; “the driver’s inability to produce a valid driver’s license”; a “strange situation with regard to the ownership and registration of the vehicle, including the driver’s inability to identify the source of authorization to operate the vehicle”; and apparent inconsistencies between the travel plan descriptions given by the driver and the passenger); *cf. State v. Vandenberg*, 2003-NMSC-030, ¶ 28, 134 N.M. 566, 81 P.3d 19 (holding that the officer had reasonable suspicion to conduct a pat down during a traffic stop based on the driver’s “extreme nervousness” and additional “specific observations of the suspect’s conduct” that raised concerns about officer safety). Neither officer articulated a specific reason why Defendant’s demeanor, in combination with other facts known at the time of the questioning at issue, gave the officers a reasonable basis for suspecting Defendant of any crimes other than traffic, registration, and insurance offenses. *Cf. Vandenberg*, 2003-NMSC-030, ¶ 31 (“[I]t

is not the degree of nervousness that allows the officer to pat a defendant down, but instead it is the articulation by the officer of specific reasons why the nervousness displayed by the defendant caused the officer to reasonably believe that his or her safety would be compromised.” (internal quotation marks and citation omitted)). On the record before us, Defendant’s nervousness while being investigated for violating traffic laws and not having proof of registration and insurance did not give rise to a reasonable suspicion sufficient to justify asking Defendant which friend he had been visiting and whether that friend was Josh Dimas, a person the officer believed to be involved in drug trafficking. {15} The State has not established that Officer Frias’s questions were reasonably related to the traffic offenses under investigation or that the questions were based on reasonable suspicion of Defendant’s involvement in any other offenses. We hold that the questioning amounted to a “fishing expedition” that violated Defendant’s state constitutional right to be free from unreasonable seizures.² *Leyva*, 2011-NMSC-009, ¶ 55.

{16} The remedy is suppression of the methamphetamine officers discovered during the search of Defendant’s wallet that occurred as a result of this unconstitutional detention. “An illegal stop taints any subsequent consent to search[,]” and the burden is on the prosecution to show sufficient attenuation between the illegality and the consent to search. *State v. Figueroa*, 2010-NMCA-048, ¶ 34, 148 N.M. 811, 242 P.3d 378; *see also Bell*, 2015-NMCA-028, ¶ 19 (“It is . . . settled law that evidence discovered as a result of the exploitation of an illegal seizure must be suppressed unless it has been purged of its primary taint.” (internal quotation marks and citation omitted)). Because the State has not attempted to shoulder this burden, we hold that the fruits of the search must be suppressed.

CONCLUSION

{17} We reverse the order denying Defendant’s motion to suppress and remand for further proceedings consistent with this opinion.

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

WE CONCUR:
J. MILES HANISEE, Chief Judge
MEGAN P. DUFFY, Judge

²Having concluded that the questioning at issue unreasonably expanded the scope of the traffic stop, we need not address Defendant’s argument that the officers unconstitutionally expanded the traffic stop in order to tow his vehicle or his other arguments under Fourth Amendment.



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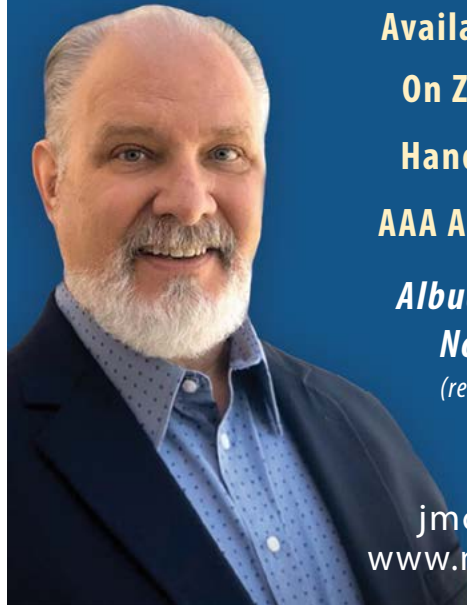


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The First Judicial District Attorney's Office has an Assistant Trial Attorney position which is entry level in magistrate court and a Trial Attorney (2-5 years experience) for juvenile court. Salary is based on experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to: "DA Employment," PO Box 2041, Santa Fe, NM 87504, or via e-mail to 1stDA@da.state.nm.us.

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Jay Goodman and Associates Law Firm, PC is seeking one full-time and one part-time attorney, licensed/good standing in NM with at least 3 years of experience in Family Law, Probate, Real Estate and Civil Litigation. If you are looking for meaningful professional opportunities that provide a healthy balance between your personal and work life, JGA is a great choice. If you are seeking an attorney position at a firm that is committed to your standard of living, and professional development, JGA can provide excellent upward mobile opportunities commensurate with your hopes and ideals. As we are committed to your health, safety, and security during the current health crisis, our offices are fully integrated with cloud based resources and remote access is available during the current Corona Virus Pandemic. Office space and conference facilities are also available at our Albuquerque and Santa Fe Offices. Our ideal candidate must be able to thrive in dynamic team based environment, be highly organized/reliable, possess good judgement/people/communication skills, and have consistent time management abilities. Compensation DOE. We are an equal opportunity employer and do not tolerate discrimination against anyone. All replies will be maintained as confidential. Please send cover letter, resume, and a references to: jay@jaygoodman.com. All replies will be kept confidential.

Associate Attorneys

Mynatt Martínez Springer P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking two associate attorneys to join our team. The firm's practice areas include insurance defense, civil rights defense, commercial litigation, and government representation. Applicants with 0-5 years of experience will be considered for full-time employment. If it is the right fit, the firm will also consider applications for part-time employment from attorneys with more than 5 years of experience. Associates are a critical component of the firm's practice and are required to conduct legal research; provide legal analysis; advise clients; draft legal reviews, pleadings, and motions; propound and review pretrial discovery; and prepare for, attend, and participate in client meetings, depositions, administrative and judicial hearings, civil jury trials, and appeals. Successful candidates must have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. The firm will consider applicants who desire to work remotely. Offers of employment will include salary commensurate with experience and a generous benefits package. Please send your cover letter, resume, law school transcript, writing sample, and references to rd@mmslawpc.com.

Assistant Investigative Trial Counsel

Prospectively, the New Mexico Judicial Branch is requiring full vaccination status as a condition of employment to being hired into the judiciary. The Executive Director of the State of New Mexico Judicial Standards Commission is accepting applications for an Assistant Investigative Trial Counsel, an FLSA exempt (not classified), at-will, and full-time position located in Albuquerque. NMJB pay range KK (\$25.107/hr - \$40.799/hr). Under general direction and review, the Assistant Investigative Trial Counsel assists in the investigation and prosecution of matters before the Commission involving the removal, retirement, or discipline of New Mexico judges and may assist with oral and written arguments before the New Mexico Supreme Court. Qualifications: Applicant must be a graduate of a law school meeting the standards of accreditation of the American Bar Association; possess and maintain a license to practice law in the State of New Mexico; be in good standing in New Mexico and all other states where law licensure held; and have no professional disciplinary actions or history. A minimum of two (2) years of experience in the practice of law is required. Knowledge: Thorough knowledge of United States and New Mexico constitutions, federal law, New Mexico case law, statutes, rules, policies and procedures; Code of Judicial Conduct; Rules of Professional Conduct; court jurisdiction and operations; manual and computerized legal research; principles of legal analysis and writing, legal proofreading and editing, standard English usage and grammar; and computer software applications (e.g., legal research, word processing, databases, court case management system, e-mail and internet). Skills and Abilities: Must be proficient in case analysis, investigation, evidence gathering, case building, and oral and written advocacy. Prior experience conducting trials, administrative prosecutions, or appellate work is an asset. Must also have proficient skill and ability in communicating effectively both orally and in writing with diverse individuals and groups; interpreting and assimilating information of legal significance; identifying legal issues; performing legal research; discerning the content and relative importance of cases, statutes, and other sources of law; applying law to complex and novel scenarios; maintaining confidentiality and using discretion when dealing with confidential and sensitive information; maintaining professional demeanor and composure; providing information to members of the bar and public in a courteous manner without giving legal advice; drafting orders, recommendations, and opinions which address all legal, policy and factual issues clearly, efficiently and effectively; organizing and establishing priorities and managing time and resources effectively on multiple projects; working well

both independently and collaboratively; using initiative and independent judgment with minimal supervision; receiving and following directions; applying relevant policies and procedures; using computers and computer software applications including word processing, databases, court case management system, e-mail and the internet; displaying teamwork, diligence, resourcefulness and adaptability while working in an environment subject to frequently changing priorities, high stress, and exposure to conflicting demands; meeting objective productivity and work-quality requirements; and researching, comprehending, explaining and resolving complex issues constructively. Must also have strong ability to establish and maintain cooperative working relationships; approach problems creatively; determine when to seek assistance and collaborate with other staff; persuade others using tact and diplomacy; accept constructive criticism and guidance; learn quickly and retain information; prepare and deliver presentations; maintain accurate files and records; and train, motivate and mentor others; plan and assign work, apply relevant policies and procedures to assigned work; provide meaningful employee feedback and performance evaluations; provide effective coaching and constructive criticism, mediate and manage conflict. Other: Must possess, exhibit, and maintain exemplary ethics. Fluency in Spanish is a desirable asset. Hiring may be dependent on successful completion of a background check. Work Environment and Physical Demands: The following functions are representative of the work environment and physical demands an employee may expect to encounter in performing tasks assigned to this job. Work requires the extensive use of computers and is performed in an office or court setting. The employee is regularly required to sit for long periods of time, talk, hear, read typed and/or hand-written material; perform repetitive hand, arm and finger motions as well as use manual/finger dexterity. May also be required to stand, walk, kneel/stoop, move, lift, pull and carry up to 25 pounds; travel (valid driver's license required), work overtime and/or flexible hours, weekends, and holidays; and be exposed to fluctuating building temperatures, hostile or violent situations, and contagious health conditions. The employee is expected to be punctual and to adhere to an assigned work schedule. TO APPLY: Please mail your resume with letter of interest, writing sample, three professional references, and salary history via U.S. Mail. No telephone calls, e-mails, faxes, or walk-ins please. Applications must be postmarked no later than December 3, 2021, and should be addressed to: Executive Director & General Counsel; Judicial Standards Commission; 6200 Uptown Blvd. NE, Suite 320; Albuquerque, NM 87110-4159.

Associate Attorney

Hatcher Law Group, P.A. seeks an Associate Attorney with four-plus years of legal experience for our downtown Santa Fe office. We are looking for an individual motivated to excel at the practice of law in a litigation-focused practice. Hatcher Law Group defends individuals, state and local governments and institutional clients in the areas of insurance defense, coverage, workers compensation, employment and civil rights. We offer a great work environment, competitive salary and benefit package. Send your cover letter, resume and a writing sample via email to juliez@hatcherlawgroupnm.com.

Litigation Attorney

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

Chief Children's Court Attorney Position Job ID 119554

The Children, Youth and Families Department is seeking to fill the Chief Children's Court Attorney position to be housed in any CYFD office in the state. Salary range is \$83,050 - \$144,507 annually, depending on experience and qualifications. Incumbent will be responsible for direction and management of Children's Court Attorneys and legal staff located throughout the state who handle civil child abuse and neglect cases and termination of parental rights cases. The ideal candidate must have a Juris Doctorate from an accredited school of law, be licensed as an attorney by the Supreme Court of New Mexico and have the requisite combination of executive management and educational experience. Executive Order 2021-046 requires all employees with the State of New Mexico to provide either proof of COVID-19 vaccination or proof of a COVID -19 Viral test every week. Benefits include medical, dental, vision, paid vacation, and a retirement package. For information, please contact: Marisa Salazar (505) 659-8952. To apply for this position, go to www.spo.state.nm.us The State of New Mexico is an EOE.

Attorneys

The Children, Youth & Families Department (CYFD) Office of General Counsel seeks organized, professional, and results-oriented attorneys with strong leadership skills to serve as Assistant General Counsel. This position is a great opportunity for anyone who would like to use their skills as an attorney to benefit child welfare services. CYFD offers a competitive compensation plan, excellent benefits, and a pension program. For more information on qualifications, and instructions on how to apply, please visit <https://www.spo.state.nm.us/career-services/>. You may also contact General Counsel Jeff Young directly at 505-469-8806. We invite all qualified applicants to apply to join our innovative team to help make a difference in the lives of children and families.

Associate Attorney

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

Associate Attorney and Legal Assistant

Gluth Law, LLC, an estate planning and probate firm in Las Cruces, New Mexico and El Paso, Texas, has immediate full-time openings for an associate attorney and legal assistant. Duties would primarily include preparation of estate planning and probate documentation as well as handling all aspects of estate and trust administration. Prior experience in these practice areas is preferred, but not required. Successful applicants will have strong organizational, writing, and time-management skills. Salary is commensurate with experience. Please send resume and references to alan@gluthlaw.com.

Associate Attorney

Dixon Scholl Carrillo PA is seeking an associate attorney with 3 or more years of experience to join them in their thriving litigation practice. We seek a candidate with excellent writing and oral advocacy skills and a strong academic background who is ready to be part of a hard-working team in a fun and friendly office. For consideration, please submit your resume to lcarrillo@dsc-law.com.

Family Law Attorney

New Mexico Financial & Family Law, P.C., in Albuquerque, New Mexico, is a leading New Mexico law firm. We specialize in bankruptcy law, family law, probate law, estate planning, guardianship/conservatorship, and other legal issues involving financial matters. With more than 25 years of experience in the field, we have a proven track record that speaks volumes on our ability to solve various problems. The cases we handle receive our personal attention, which has satisfied many clients. We are seeking a family law attorney to become part of our team! We have a great team atmosphere, friendly environment, modern office with a view, and no drama. You will represent clients in legal proceedings, draw up legal documents, advise clients on legal transactions, negotiate settlements for legal disputes, comply with all legal standards and regulations, and perform administrative and management functions related to the practice of law. We provide: 401K and 401K Matching; Medical, Dental, Vision, and Disability Insurance; Paid Parking; Paid Time Off; Performance Bonuses; and Private Offices. Salary is commensurate with experience. Qualifications include but are not limited to: A minimum of three years of experience in law; familiarity with various legal documents; strong analytical and problem-solving skills; ability to build rapport with clients; excellent written and verbal communication skills; valid bar license in the state of New Mexico; ability to reliably commute and/or work remotely; trial experience is preferred.

Assistant General Attorney Positions

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

Attorneys

Do you have a passion for defending constitutional rights and serving your community? If you have a commitment to public service and the ability to relate to and serve indigent clients in your community, then you may have what it takes to be a trial attorney with the Public Defender!

The State of New Mexico's Law Offices of the Public Defender is looking for attorneys to join their Albuquerque office and several rural communities. We are growing our team with multiple job opportunities in the beautiful cities across New Mexico, including Albuquerque. What are we looking for? Attorneys who want to put their passion for indigent advocacy to practice; Attorneys that have the ability to stand up for a client, and stand up to "the system."; Attorneys interested in positively impacting the lives of clients through holistic representation; Attorneys who are excited about the opportunity to gain vast amounts of courtroom and litigation experience, familiarity with state statutes and working knowledge of the rules of evidence and trial practice. We have several openings for Public Defenders, so don't miss your chance to become a part of our growing team! To learn more about the different opportunities in our Albuquerque office and across the state go to: <https://www.governmentjobs.com/careers/lopndm>

Children's Court Attorney Master Position Job ID 119560

The Children, Youth and Families Department is seeking to fill a Children's Court Attorney Master position housed in Albuquerque. Salary range is \$66,338 - \$106,141 annually, depending on experience and qualifications. Incumbent will provide advanced level professional legal services cases in context of litigation and providing counsel, interpretation of law, research, and legal analysis to Protective service Staff. The ideal candidate must have a Juris Doctorate from an accredited school of law, be licensed as an attorney by the Supreme Court of New Mexico and four (4) years of experience in the practice of law. Executive Order 2021-046 requires all employees with the State of New Mexico to provide either proof of COVID-19 vaccination or proof of a COVID -19 Viral test every week. Benefits include medical, dental, vision, paid vacation, and a retirement package. For information, please contact: Lynn Perls (505) 670-9570. To apply for this position, go to www.spo.state.nm.us The State of New Mexico is an EOE.

Metro Region Managing Attorney Position Job ID 119559

The Children, Youth and Families Department is seeking to fill the Metro Region Managing Attorney Children's Court Attorney position to be housed in Albuquerque. Salary range is \$62,598- \$108,921 annually, depending on experience and qualifications. Incumbent will be responsible for direction and management of Children's Court Attorneys and legal staff located in the Metro Region of the state who handle civil child abuse and neglect cases. The ideal candidate must have a Juris Doctorate from an accredited school of law, be licensed as an attorney by the Supreme Court of New Mexico and eight (8) years of professional level experience with a strategic impact directly related to the purpose of this position. Executive Order 2021-046 requires all employees with the State of New Mexico to provide either proof of COVID-19 vaccination or proof of a COVID -19 Viral test every week. Benefits include medical, dental, vision, paid vacation, and a retirement package. For information, please contact: Marisa Salazar (505) 659-8952. To apply for this position, go to www.state.nm.us/spo/. The State of New Mexico is an EOE.

Paralegal

The City of Albuquerque Legal Department is seeking a Paralegal to assist an assigned attorney or attorneys in performing substantive administrative legal work from time of inception through resolution and perform a variety of paralegal duties, including, but not limited to, performing legal research, managing legal documents, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings, setting up and maintaining a calendar with deadlines, and other matters as assigned. Excellent organization skills and the ability to multitask are necessary. Must be a team player with the willingness and ability to share responsibilities or work independently. Starting salary is \$21.31 per hour during an initial, proscribed probationary period. Upon successful completion of the proscribed probationary period, the salary will increase to \$22.36 per hour. Competitive benefits provided and available on first day of employment. Please apply at <https://www.governmentjobs.com/careers/cabq>.

Litigation Paralegal

25 years experience - available for employment or contract work. Full service litigation support; pleadings/motions/discovery requests and responses; identify and gather records & bills; medical records chronology; damage analysis; demand letters; trial preparation; and more. Rates negotiable. Strong work ethic, very reliable, and exceptional work product. Well-versed in legal and medical terminology. Send inquiries to lsmclegal216@gmail.com.

Deputy Director for the Administrative Office of the Courts

You are invited to join the AOC team in the challenging and rewarding work done by the New Mexico Judiciary! The New Mexico Judicial Branch is recruiting for a Deputy Director for the Administrative Office of the Courts (AOC) to oversee statewide judiciary operations. The Deputy Director works closely with the Director under the guidance of the New Mexico Supreme Court to manage all aspects of court operations. AOC responsibilities include oversight of court budgets that exceed \$200 million annually, personnel rules and actions statewide, court services and programs, and technology that include a statewide case management system and electronic filing. Duties include frequent contacts with executive and legislative agencies as well as active involvement with legislative initiatives before and during the annual legislative session. The New Mexico Judiciary is unified, giving the Director and Deputy Director significant, broad involvement in all aspects of court operations statewide. Serving as the Deputy Director provides the opportunity to play a vital role in developing and implementing policies and programs throughout the state. This position would serve as the AOC representative staffed to and supporting many judicial committees that develop and administer judicial policies. The office is located in Santa Fe, NM, the state capitol with a diverse culture, beautiful high desert mountains, and abundant museums, restaurants, and outdoor recreation opportunities. The AOC has additional offices in Albuquerque and occasional statewide travel. The salary range is \$90,000 to \$145,000. For more information or to apply to go to the Judicial Branch web page at www.nmcourts.gov under Career Opportunities or 505/827-4810. Equal Opportunity Employer

Legal Assistant

We are seeking a full-time legal assistant for our Albuquerque office. If you are proficient in Timeslips, Access, Odyssey, Word, Excel, and Outlook and are looking for an opportunity to work in a friendly office environment we encourage you to apply. The primary duties for this position include drafting documents and correspondence, maintaining files and court calendars, handling client relations and e-filing. The ideal candidate will be able to manage time effectively, handle complex cases, and have excellent organizational, proofreading, and communication skills. Please email your cover letter, current resume and three professional references to: kathleen@estateplannersnm.com.

Legal Secretary

The City of Albuquerque Legal Department (Litigation Division) is seeking a Legal Secretary to assist assigned attorneys in performing a variety of legal secretarial/administrative duties, which include but are not limited to: preparing and reviewing legal documents; creating and maintaining case files; calendaring; provide information and assistance, within an area of assignment, to the general public, other departments and governmental agencies. Please apply at <https://www.governmentjobs.com/careers/cabq>.

Legal Secretary (CYFD #101109602+)

The Children, Youth and Families Department is seeking to fill Legal Secretary positions to be housed in Albuquerque offices. Salary range is \$22,854 - \$39,766 annually, depending on experience and qualifications. Minimum Qualifications: High School diploma or Equivalent with six (6) months of directly related clerical and/or secretarial experience utilizing legal terminology, procedures, and documents. Substitutions Apply. Incumbent will perform work in an office setting: late hours and weekends work may be required. Will be exposed to regular periods of video display terminal and keyboard usage and stressful situations. Incumbent will cover large geographic area; therefore, extensive travel is required. Possible exposure to irate clientele. Incumbent will work under stress and frequent time constraints. Benefits include medical, dental, vision, paid vacation, and a retirement package. Executive Order 2021-046 requires all employees with the State of New Mexico to provide either proof of COVID-19 vaccination or proof of a COVID-19 Viral test every week. For information, please contact: Natasha Jackson or Amanda Carbajal (505) 841-7980. To apply for this position, go to www.spo.state.nm.us. The State of New Mexico is an EOE.

Bilingual Court Advocate

Under the general direction of the Clinical Director, the Bilingual Court Advocate is responsible for providing legal advocacy services to victims of domestic violence. Bachelor's Degree in Criminal Justice, Psychology, Social Work or related field preferred. Must have a minimum of 1-2 years of related experience working in non-profit, legal or social services setting. Must be fluent in speaking, reading and writing Spanish and English. Full job description: esperanzashelter.org or email hr@esperanzashelter.org

Paralegal

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

Paralegal/Legal Assistant

Well established Santa Fe personal injury law firm is in search of an experienced paralegal/legal assistant. Candidate should be friendly, honest, highly motivated, well organized, detail oriented, proficient with computers and possess excellent verbal and written skills. Duties include requesting & reviewing medical records, send out Letter of Protection & Letter of Representation, opening claims with insurance companies and preparing demand packages as well as meeting with clients. We are searching for an exceptional individual with top level skills. We offer a retirement plan funded by the firm, health insurance, paid vacation, and sick leave. Salary and bonuses are commensurate with experience. Please submit your cover letter and resume to personalinjury2905@gmail.com

Service

Forensic Genealogist

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

Office Space

Sun Valley Executive Suites

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

Miscellaneous

Search for Will

Seeking information concerning the Will of Sharon A Jones and of Sam P Jones, Placitas, NM. Contact Richard Gale 307-689-3736

Want To Purchase

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

Search for Will

I am looking for a Will and/or Trust created for Cathy J. McGinnis, deceased. If you have executed the original of either, and/or have the originals or copies, please contact me at 505- 872-0505. Marcy Baysinger, Attorney, Pregenzer, Baysinger, Wideman and Sale.

SUBMISSION DEADLINE

Holiday

Advertising Schedule

Due to a holiday closure, the following advertising submissions for the *Bar Bulletin* will apply:

December 22, 2021 issue:
Advertising submissions due December 3, 2021

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



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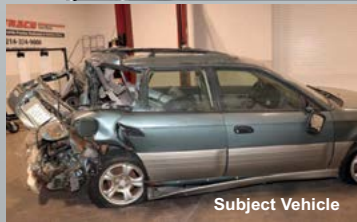
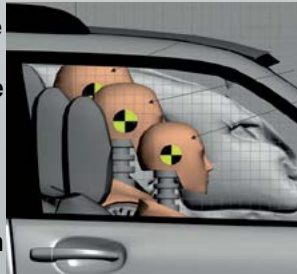
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Every vehicle accident case you handle has the potential to be on one of the 235 racks or in one of our six inspection bays at the firm's Forensic Research Facility. We continually study vehicle safety through the use of engineering, biomechanics, physics and innovation.



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