Official Publication of the State Bar of New Mexico

BAR BULLETIN

November 23, 2022 • Volume 61, No. 22

Inside This Issue

New Mexico State Bar Foundation
Center for Legal Education

End-of-Year Programming

from the Center for Legal Education

NOVEMBER 29

Teleseminar
Ethics for Business Lawyers
1.0 EP
11 a.m.–Noon

NOVEMBER 30

Webinar
Drug Testing and the Chain of Custody
2.0 G
10 a.m.–Noon

Teleseminar
Liquidation: Legal Issues When a Client Decides to Close a Business
1.0 G
11 a.m.–Noon

Webinar
Determining Competency and Capacity in Mediation
2.0 G
2–4 p.m.

DECEMBER 2

In-Person and Webcast
Introduction to Legal Specialties: Getting to Know Six Areas of Law
6.0 G
9 a.m.–4:30 p.m.

DECEMBER 5

Webinar
Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
Noon–1 p.m.

Teleseminar
Professionalism for the Ethical Lawyer
1.0 EP
11 a.m.–Noon

DECEMBER 6

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

Webinar
Well That Seemed Like a Good Idea: Practical Best Practice Tips
1.0 EP
1–2 p.m.

DECEMBER 7

Teleseminar
Rights of First Offer, First Refusal in Real Estate
1.0 G
11 a.m.–Noon

DECEMBER 8

In-Person and Webcast
3rd Annual Women in Law Conference: Transitions in the Legal Profession: Adjustment, Adaptability and Authenticity During Change
1.25 G, 5.5 EP
8 a.m.–5 p.m.

Teleseminar
Ethics of Beginning and Ending Client Relationships
1.0 EP
11 a.m.–Noon

DECEMBER 9

In-Person or Webcast
2022 Guardian Ad Litem Training
6.25 G
8:30 a.m.–4:30 p.m.

Teleseminar
Selection and Preparation of Expert Witnesses in Litigation
1.G
11 a.m.–Noon

DECEMBER 14

In-Person or Webcast
2022 Tax Law Institute
6.5 G, 1.0 EP
8 a.m.–4:45 p.m.

Teleseminar
2022 Ethics Update, Part 1
1.0 EP
11 a.m.–Noon

DECEMBER 15

Teleseminar
2022 Ethics Update, Part 2
1.0 EP
11 a.m.–Noon

DECEMBER 16

In-Person and Webcast
New Mexico Burning: 2022 Natural Resources Law Institute
5.0 G, 1.0 EP
9 a.m.–4:30 p.m.

DECEMBER 19

Teleseminar
Equity & Diversity in Law Practice: Best Practices for Law Firms
1.0 EP
11 a.m.–Noon

DECEMBER 22

Teleseminar
Ethics in Negotiations - Boasts, Shading, and Impropriety
1.0 EP
11 a.m.–Noon

DECEMBER 27

Teleseminar
Ethics and Virtual Law Offices
1.0 EP
11 a.m.–Noon

DECEMBER 28

Teleseminar
Lawyer Ethics of Email
1.0 EP
11 a.m.–Noon

DECEMBER 29

Teleseminar
Ethics and Conflicts with Clients, Part 1
1.0 EP
11 a.m.–Noon

DECEMBER 30

Teleseminar
Ethics and Conflicts with Clients, Part 2
1.0 EP
11 a.m.–Noon

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

State Bar of New Mexico
Est. 1886

Officers, Board of Bar Commissioners
Carolyn A. Wolf, President
Benjamin I. Sherman, President-Elect
Erinna M. Atkins, Secretary Treasurer
Carla C. Martinez, Immediate Past President

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

The *Bar Bulletin* (ISSN 1062-6611) is published twice a month by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin,* PO Box 92860, Albuquerque, NM 87199-2860.

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

November 23, 2022 • Volume 61, No. 22

www.sbnm.org

Table of Contents

Meetings

December

6
Health Law Section
9 a.m., virtual

7
Employment and Labor Law Section
noon, virtual

9
Cannabis Law Section
9 a.m., virtual

13
Bankruptcy Section
noon, US Bankruptcy Court

13
Appellate Section
noon, virtual

14
Tax Section
9 a.m., virtual

15
Public Law Section
noon, virtual

20
Solo and Small Firm Section
noon, virtual/State Bar Center

28
Intellectual Property Law Section
noon, JAlbright Law LLC

29
Trial Practice Section
noon, virtual

30
Immigration Law Section
noon, virtual

Workshops and Legal Clinics

December

7
Divorce Options Workshop
6-8 p.m., virtual

14
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

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

Supreme Court Law Library

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

Bernalillo County Metropolitan Court

Notice of Appointment and New Assignment

With Gov. Lujan Grisham's appointment of Shonnetta R. Estrada to Division XI of the Metropolitan Court, effective Nov. 14, Judge Estrada will be assigned to the Felony Division.

Second Judicial District Court

Notice to Attorneys

Pursuant to the Constitution of the State of New Mexico, Judge Emeterio L. Rudolfo has been appointed to Division XXI of the Second Judicial District Court by Gov. Michelle Lujan Grisham. Effective Oct. 31, individual notices of judge reassignment will be sent to private attorneys in active cases; a list of active case reassignments will be emailed to the Law Offices of the Public Defender, the District Attorney's Office and the Attorney General's Office in lieu of individual notices of reassignment. An email notification regarding the reassignment of inactive cases and probation violation cases will be sent to the Law Offices of the Public Defender, the District Attorney's Office, the Attorney General's Office and the private defense bar. Pursuant to New Mexico Supreme Court Order 22-8500-007, peremptory excusals have been temporarily suspended during the COVID-19 Public Health Emergency.

Professionalism Tip

With respect to the courts and other tribunals:

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests.

Twelfth Judicial District and Magistrate Courts

Notice of Hearing Officer Vacancy

The Twelfth Judicial District Court for Lincoln and Otero Counties is accepting applications for a full-time, at-will Domestic Relations Hearing Officer. The Domestic Relations Hearing Officer will hear matters in both counties. Applicants must hold a J.D. from an accredited law school, a license to practice law in N.M. and five years of experience in the practice of law. For a complete job description and application instructions, please visit the jobs section on the New Mexico Judiciary's website at www.nmcourts.gov. Submit the mandatory application form or resume and mandatory resume supplemental form, along with proof of education to Roselyn Flores, HR Department, 1000 New York Avenue, Room 209, Alamogordo, N.M. 88310.

U.S. District Court for the District of New Mexico

Proposed Amendments to Local Rules of Criminal Procedure

Proposed amendments to the Local Rules of Criminal Procedure of the United States District Court for the District of New Mexico are being considered. A "redlined" version (with the proposed amendments to 57.4 Law Student Practice) and a clean version of these proposed amendments are posted on the Court's website at www.nmd.uscourts.gov. Members of the Bar may submit comments by email to clerkofcourt@nmd.uscourts.gov or by mail to U.S. District Court, Clerk's Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, N.M. 87102, Attn: Cynthia Gonzales, no later than Nov. 30.

New Mexico Judicial Performance Evaluation Commission

Invitation to Take Judicial Survey

The New Mexico Judicial Performance Evaluation Commission is encouraging all attorneys who receive an invitation to complete a survey regarding District Court Judges whom they appeared before between Oct. 1, 2021-Sept. 30, 2022 to fill out and return the survey as soon as possible. JPEC emphasizes that the health of the judiciary and the voters of New Mexico depend on attorneys' honest and prompt responses. The survey criteria – legal ability, fairness, communications skills and preparation, attentiveness, temperament and control over proceedings – are the American Bar Association's definition of what constitutes a "good judge." The survey also seeks constructive feedback. JPEC has robust protocols in place to ensure all survey responses and comments are strictly anonymous. The surveys are distributed by an independent firm, Research & Polling Inc. (RPI). Respondent-identifiable data is never attached to attorneys' personal information, never leaves the secure RPI server and is never provided to the judges, the Administrative Office of the Courts or JPEC. Surveys are an aggregate of all responses and are 100 percent anonymous. Each survey only takes about five minutes per judge, and attorneys' experiences and insights are critical to JPEC in creating credible, reliable judicial evaluations and making sound recommendations to voters. Anyone with questions is encouraged to contact JPEC at www.nmjpec.org or call 1-800-687-3417.

State Bar News

2023 Budget Disclosure

Deadline to Challenge Expenditures

The State Bar of New Mexico Board of Bar Commissioners has completed its budgeting process and finalized the 2023 Budget Disclosure, pursuant to the State Bar Bylaws, Article VII, Section 7.2, Budget Procedures. Starting Nov. 1, 2022, the budget disclosure will be 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, 2022, 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. 14, 2022, meeting. Address challenges to: Executive Director Richard Spinello, State Bar of New Mexico, PO Box 92860, Albuquerque, N.M. 87199;

or info@sbnm.org. Challenges may also be delivered in person to the State Bar Center, 5121 Masthead NE, Albuquerque, N.M. 87109.

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

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

Board of Bar Commissioners

Meeting Summary

The Board of Bar Commissioners of the State Bar of New Mexico met on Oct. 21 at the State Bar Center, Albuquerque, NM. Action taken at the meeting follows:

- Approved the Aug. 11, 2022 meeting minutes;
- Received the 2023 Proposed Budget Presentation and approved the 2023 Budget with a $20 increase in licensing fees;
- Approved the 2023-2025 Strategic Plan from the Board Retreat in May;
- Reviewed the Board Survey results on meeting logistics;
- Elected Commissioner Aja Brooks as Secretary-Treasurer and Commissioner Erin Atkins as President-Elect for 2023;
- Held an executive session to discuss a personnel matter;
- Received a request from the Client Protection Fund Commission regarding random audits of trust accounts and referred it to the Board's Executive Committee;
- Reappointed Donna Connolly to the ATJ Fund Grant Commission;
- Received a request from New Mexico Legal Aid regarding a reappointment and appointments to vacancies on their board; reappointed James C. Martin for an additional three-year term and appointed Joseph M. Zebas and Hon. Timothy David Eisenberg (ret.) to fill vacancies for unexpired terms through Dec. 2023; received a new appointment process from NMLA and referred it to the Policy and Bylaws Committee;
- Received a report from the Executive Committee concerning its meeting during which it approved the agenda and received a presentation on the 2023 Proposed Budget;
- Received a report from the Finance Committee concerning its meeting during which it 1) reviewed and accepted the Sept. 2022 Financials; 2) received a letter from CLA with proposed increases in rates for the audit and tax prep and authorized staff to negotiate with CLA; 3) reviewed and approved the 2023 Budget; 4) discussed reserve funds and approved the creation of a policy for an automatic rollover at the end of the year; and 5) reviewed and accepted the Sept. 2022 financials;
- Received a report from the Policy and Bylaws Committee regarding the following: 1) approved amendments to the YLD Bylaws removing the age requirement of 36 and increasing the years in practice to 10; this provision is also in the Rules, so staff was authorized to request the Supreme Court for a Rule change; 2) reviewed proposed licensing renewal policies and late fee waiver forms and referred them back to the Policy and Bylaws Committee for further review; and 3) approved Rule 18-204(C)(1) Provider Application Forms for Legal Service Providers and Working Boards, Committees or Commissions;
- Received a report from the Governmental Affairs Committee re: a request from the New Jersey State Bar Association to support H.R. 4436, the Daniel Anderl Judicial Security and Privacy Act of 2021, to protect judicial officers; a notice was published in the Bar Bulletin and a letter will be sent to the NM Congressional Delegation requesting their support of this legislation;
- Received a report from the Bar Center Committee which looked at the need for upgrades and repairs to the building and discussed a request from NREEL to display plaques at the Bar Center; a policy will be drafted for the Board's consideration at the December meeting;
- Received a report from the President, which reported on her participation in Judicial Nominating Commissions, the Compilation Commission and Judicial Compensation Commission of which she serves as member, the New Admittee Swearing-in Ceremony, and a visit to Alamogordo to speak to local bar members;
- Received a report from the President-Elect, which included the 2023 Meeting Schedule—Feb. 24, May 12, July 27 (Hyatt Regency Tamaya, in conjunction with the State Bar Annual Meeting), Oct. 13, and Dec. 6 or 13 (TBD); the 2023 officer swearing-in ceremony and reception will be held on Dec. 14 at the Inn & Spa at Loretto; the 2023 Internal Committee sign-up sheet was distributed for commissioners to volunteer;
- Distributed the Supreme Court Board and Committee Liaison list for commissioners to volunteer to serve as liaisons in 2023;
- Received a report from the N.M. State Bar Foundation President; the fundraising consultant will be attending the board's Nov. meeting to present his preliminary report and provide fundraising training for the board;
- Received a report from the Executive Director; he provided new organization charts for the State Bar and Bar Foundation and reported on the Board Election which had five districts with openings and three districts that are contested and will have elections; he also distributed the Judicial Performance Evaluation Commission report;

- Received reports from the Senior Lawyers, Young Lawyers, and Paralegal Divisions and bar commissioner districts;
- Received a report on the ABA House of Delegates from State Delegate Charles Vigil; and
- Received an update on the Employment and Labor Law Section.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the Dec. 14 meeting.

Client Protection Fund

Notice of Commissioner Vacancy

In accordance with Rule 17A-005 (B), the State Bar of New Mexico is seeking a Commissioner appointment to the Client Protection Fund. The new commissioner would fulfill the remainder of the current commissioner's term. The term will begin Jan. 1, 2023 and conclude Dec. 31, 2023. The attorney selected for the vacancy will be eligible for up to two more three-year terms. Applicants must be active members of the State Bar of New Mexico. Members can forward their applications to kate.kennedy@sbnm.org.

Employee Assistance Program

Lifelines: Information for Your Life

The Solutions Group and EAP invite you to read its Fall 2022 issue of Lifelines, which includes articles from various authors regarding stress relief and overall well-being. You can find the issue by visiting www.solutionsbiz.com.

Holiday Stress Management

The holidays can be a difficult time for anybody, which is why members are encouraged to follow tips laid out in the Holiday Stress Handout found at www.sbnm.org/Member-Services/New-Mexico-Lawyer-Program/Employee-Assistance-Program.

November 2022 Newsletter

The November 2022 newsletter, which includes well-being-related tips for strong mental health for the workplace, is now available for members to read. Please visit https://www.sbnm.org/Member-Services/New-Mexico-Lawyer-Assistance-Program/Employee-Assistance-Program to find the November 2022 newsletter, found under "The Solutions Group Monthly Newsletters." This month's newsletter includes tips on prioritizing work over politics, eliminating potential bullying behaviors and managing holiday stress.

Q4 Webinars

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

- The Joys and Responsibilties of Pet Ownership
- Supporting your Mental Health with Self-Care
- Being Civil in an Uncertain World
- Secrets to Having More Fun and Less Stress During the Holidays

New Mexico Lawyer Assistance Program

NM LAP Committee Meetings

The NM LAP Committee will meet at 4 p.m. on Jan. 12, 2023. The NM LAP Committee was originally developed to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve professionally in the legal field. The NM LAP Committee has expanded their scope to include issues of depression, anxiety, and other mental and emotional disorders for members of the legal community. This committee continues to be of service to the New Mexico Lawyer Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

Monday Night Attorney Support Group

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

The New Mexico Well-Being Committee

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

New Mexico Medical Review Committee

Notice of Commissioner Vacancy

In accordance with Section 41-5-14 of the New Mexico Medical Malpractice Act, the State Bar of New Mexico is accepting applications for Chair of the State Bar Medical Malpractice Review Committee. This position will select available members of the Committee to serve on Medical Malpractice Review panels. The position will start Dec. 1, and applicants must maintain membership with the State Bar of New Mexico. Members can send applications to kate.kennedy@sbnm.org.

UNM School of Law

Law Library Hours

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

Other News

The Center for Civic Values

Judges Needed for Gene Franchini New Mexico High School Mock Trial Competition

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

The Supreme Court of New Mexico Announces 2022 Year-End Rule Amendments

Under Rule 23-106.1 NMRA, the Supreme Court has approved a number of changes to the rules, forms, and uniform jury instructions for the 2022 rulemaking cycle. What follows is a summary of those changes that the Court approved on November 1, 2022. The summary also includes out-of-cycle amendments approved by the Court this year. Unless otherwise noted below and in the history note at the end of each approved rule, form, or UJI, the amendments will take effect on December 31, 2022. The full text of the amendments in markup format and the related orders are available on the Court's website by clicking here. Approved rule amendments will also appear on NMOneSource.com by their effective date.

Ad Hoc Civil Backlog Committee

Court-annexed arbitration in the Second Judicial District Court – Amended Rule LR2-603 NMRA

The Supreme Court approved amendments to Rule LR2-603 NMRA to increase the arbitration limit from $25,000 to $50,000. Under the amended rule, all civil cases filed in the Second Judicial District shall be referred to arbitration when no party seeks relief other than a money judgment and no party seeks an amount in excess of $50,000. The amendments to Rule LR2-603 took effect on June 1, 2022.

Ad Hoc Criminal Justice Review Committee

Judicial involvement in plea discussions in district court – Amended Rule 5-304 NMRA

On recommendation of the Ad Hoc Criminal Justice Review Committee, the Supreme Court provisionally approved amendments to Rule 5-304 NMRA to allow judicial participation in settlement conferences as a means to streamline the processing of criminal cases in district court. The amended rule took effect on January 18, 2022.

Notice of dismissal of criminal complaint – New Form 9-415.1 NMRA; Amended Form 9-415 NMRA

The Supreme Court adopted new Form 9-415.1 NMRA for notice of dismissal in DWI felony and non-felony cases and approved amendments to Form 9-415 NMRA for notice of dismissal in general felony and non-felony cases. Both forms notify the defendant that the state may refile the same criminal charges, or other charges resulting from the same incident, and that the defendant has a continuing obligation to inform the court of any changes in contact information. New Form 9-415.1 includes a notice that the dismissal of DWI charges does not affect any license revocation proceedings by the Motor Vehicle Division. The new and amended forms took effect on July 25, 2022.

Case management and calculation of deadlines in criminal cases in the Eighth and Second Judicial Districts – New Rule LR8-301 NMRA; Amended Rule LR2-308 NMRA

The Supreme Court adopted new Rule LR8-301 NMRA and approved amendments to LR2-308 NMRA to implement and clarify preexisting procedures for effective case management of criminal cases in the Eighth and Second Judicial Districts, respectively. The new and amended rules took effect on September 12, 2022

Board of Bar Commissioners

Professional Practice Program – New Rule 24-112 NMRA

On recommendation of the State Bar of New Mexico Board of Bar Commissioners, the Supreme Court has adopted a new rule to provide for confidentiality in an attorney's use of the State Bar's Professional Practice Program, which is designed to support best practices and promote compliance with professional obligations by lawyers admitted to practice law in New Mexico

---

Children's Court Rules and Forms

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

In 2021, the Supreme Court provisionally approved the Children's Court Rules Committee's proposal to approve rule amendments and adopt 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.

Code of Professional Conduct Committee

Attorney licensing –New Rule 15-301.3 NMRA; Amended Rule 15-103 NMRA

On August 19, 2022, the Supreme Court approved amendments to Rule 15-103 and adopted new Rule 15-301.3. Under amended Rule 15-103, a "[l]icense to practice law shall not be denied based solely on the applicant's citizenship or immigration status." New Rule 15-301.3 creates a procedure for issuing limited law licenses to attorneys who (1) are married to active duty military service members stationed in New Mexico and (2) currently reside or plan to reside in New Mexico within six months of the date of application for limited licensure. Under both rules, license applicants must certify their understanding of the Rules of Professional Conduct, including the succession planning requirements of Rule 16-119 NMRA; the Rules Governing Discipline, including the trust accounting requirements of Rule 17-204 NMRA; the Creed of Professionalism of the State Bar of New Mexico; and the rules of the Supreme Court of New Mexico and the New Mexico statutes relating to the conduct of attorneys.

Practice by foreign lawyers – Amended Rules 16-505 and 24-106 NMRA

The Supreme Court has approved amendments to Rules 16-505 (Unauthorized practice of law; multijurisdictional practice of law) and 24-106 (Practice by nonadmitted lawyers) to make both rules consistent in their definitions of a "foreign lawyer" as one who is authorized to practice law in any other United States jurisdiction or before the highest court of record in any other country. Further, the amended rules permit limited practice by foreign lawyers who comply with the remainder of the applicable rules.

Domestic Relations Rules Committee

Objections to recommendation of special commissioner or hearing officer – Amended Rules 1-053.1 and 1-053.2 NMRA

The Supreme Court has approved amendments to the provisions governing a party's objection to the recommendations of a domestic violence special commissioner or a hearing officer in domestic relations and child support cases. The amended rules enumerate what must be included in a party's objection and expand the window for filing an objection from ten (10) days to fourteen (14) days after the entry of the recommendations. In addition, the amendments clarify the district court's process and standard of review when an objection to the recommendations has been raised.

Kinship Guardianship Act proceedings – New Rules 1-150, 1-151, 1-152, 1-153, 1-154, 1-155, and 1-156 NMRA; New Forms 4A-514, 4A-515, 4A-516, and 4A-517 NMRA; Amended Forms 4A-501, 4A-502, 4A-503, 4A-504, 4A-505, 4A-506, 4A-507, 4A-508, 4A-509, 4A-510, 4A-511, 4A-512, and 4A-513 NMRA

The Supreme Court has adopted new rules and forms and approved amendments to current domestic relations forms to simplify and guide the process in kinship guardianship cases, particularly in instances when a child's parent has signed a voluntary placement agreement with the Child, Youth and Families Department (CYFD), see NMSA 1978, § 40-10B-3(M) (2020), and the guardian is eligible for subsidies under NMSA 1978, §§ 40-10B-16 to -18 (2020).

Guardianship and Conservatorship Steering Committee

Financial filings in conservatorship proceedings – Amended Rule 1-145 NMRA

On recommendation of the Guardianship and Conservatorship Steering Committee, the Supreme Court provisionally approved new Rule 1-145 NMRA, which took effect on March 16, 2022. The new rule governs the filing of reports by a professional conservator in a conservatorship proceeding under NMSA 1978, Section 45-5-409 (2021)

Local Rules

First Judicial District Court Local Rules – New Rules LR1-117, LR1-406, LR1-407, LR1-408, LR1-409, LR1-410, and LR1-411 NMRA; Amended Rules LR1-102, LR1-104, LR1-106, LR1-108, LR1-111, LR1-112, LR1-113, LR1-114, LR1-201, LR1-202, LR1-302, LR1-401, LR1-403, and LR1-404 NMRA; Amended and Recompiled Rule LR1-116 NMRA; New Forms LR1-Form 701, LR1-Form 702, LR1-Form 703, LR1-Form 704A, and LR1-Form 704B NMRA

On recommendation of the First Judicial District Court, the Supreme Court has adopted new rules and forms and has approved amendments to the local rules of the First Judicial District concerning various subject matter and procedural requirements.

Rules of Civil Procedure for State Courts Committee

Expungement – New Rule 1-077.1 NMRA; Amended Rules 1-004 and 1-079 NMRA; New Forms 4-951 to -960.3 NMRA

On recommendation of the Rules of Civil Procedure for State Courts Committee, the Supreme Court provisionally adopted new rules and forms and approved amendments to Rules 1-004 and 1-079 NMRA to implement the Criminal Record Expungement Act, NMSA 1978, Sections 29-3A-1 to -9 (2019, as amended through 2021). The new and amended rules and forms took effect on January 28, 2022.

Rules of Criminal Procedure for State Courts Committee

Pretrial release and detention – Amended Rules 5-106, 5-401, 5-403, 5-409, 6-401, 6-403, 6-409, 6-501, 7-401, 7-403, 7-409, 7-501, 8-401, and 8-403 NMRA; Amended Form 9-303 NMRA

The Supreme Court has approved the Rules of Criminal Procedure of State Courts Committee's proposal to amend the rules and forms that address pretrial release and detention procedures in the district, magistrate, metropolitan, and municipal courts. Among other things, the proposed amendments achieve the following: (1) clarify the circumstances under which the district court may return jurisdiction to the magistrate or metropolitan court following a pretrial detention hearing, (2) require the court to conduct a status review hearing within a certain time frame for a defendant held in custody pending trial, and (3) revise provisions that address the district court's authority to conduct concurrent preliminary examination and pretrial detention hearings.

Preliminary examination timing and witness testimony – Amended Rules 5-201, 5-302, 6-202, and 7-202 NMRA

The Supreme Court has approved amendments to Rules 5-201, 5-302, 6-202, and 7-202 NMRA, which clarify several procedural matters. First, under amended Rules 5-302, 6-202, and 7-202, a preliminary examination must be concluded and a disposition entered within the time limits of Paragraph A of each rule. In addition, the amended rules contain a provision to trigger the time limits for preliminary examination in a case that has been dismissed and refiled by the prosecutor. The amendments also clarify how revocation or modification of conditions of release affect the time limits for preliminary examination, as well as permit witnesses to appear by audiovisual communication under "compelling circumstances." Finally, under amended Rule 5-201, and as explained in the amended committee commentary to Rules 6-202 and 7-202, "Any offenses that are included in the bind-over order but not set forth in the criminal information shall be dismissed without prejudice" by the district court.

Evidence at preliminary examination – New Rule 5-302.1 NMRA; Amended and Recompiled Rules 6-202.1 and 7-202.1 NMRA; Recompiled Rules 5-302.2 and 5-302.3 NMRA

The Supreme Court has approved amendments to the existing magistrate and metropolitan court Rules 6-608 and 7-608 NMRA to expand the exceptions to the Rules of Evidence that apply to preliminary examinations in limited jurisdiction courts. The Supreme Court has also adopted new Rule 5-302.1 NMRA to create consistent exceptions for preliminary examinations in the district court. Finally, the Court has approved the recompilation of the following rules: Rules 5-302A and 5-302B as Rules 5-302.2 and 5-302.3 NMRA, respectively, and Rules 6-608 and 7-608 NMRA as Rules 6-202.1 and 7-202.1 NMRA, respectively.

Order on probation violation hearing – Amended Form 9-618 NMRA; Withdrawn Forms 9-619 and 9-620 NMRA

The Supreme Court has approved the Rules of Criminal Procedure for State Courts Committee's proposal to combine three closely-related probation violation forms used in the magistrate and municipal courts into a single combined form, Form 9-618 NMRA entitled Order on Probation Violation Hearing. The Supreme Court has withdrawn Forms 9-619 and 9-620 NMRA.

Redaction of witness information - New Rules 5-502.1, 6-504.1, 7-504.1, and 8-504.1 NMRA

The Supreme Court has approved the Rules of Criminal Procedure for State Courts Committee's proposal to adopt new rules for district, magistrate, metropolitan, and municipal courts that would permit parties to redact from discovery the personal identifier and contact information of witnesses and victims to avoid disclosure of that information to the defendant and the public. Under the new rules, complete, unredacted discovery must still be provided to opposing counsel.

Undeliverable summons – Amended Rules 5-209, 6-205, 7-205, and 8-204 NMRA

The Supreme Court has approved the Rules of Criminal Procedure for State Courts Committee's proposal to amend the district, magistrate, and metropolitan court rules that address the issuance of summons to avoid a situation where a defendant has not received the summons for the initial appearance and, as a result, is arrested and jailed on a warrant. The amendments grant the trial court discretion to make exceptions for a defendant's failure to appear at the initial appearance when a mailed summons has been returned as not delivered. In such a case, the court may direct personal service, issue a no-bond warrant so the defendant may be booked and released on recognizance, or cancel or quash an existing warrant and suspend the bench warrant fee.

Rules of Evidence Committee

Pretrial notice; other crimes, wrongs, or acts – Amended Rule 11-404 NMRA

The Supreme Court has approved amendments to Rule 11-404 NMRA based on the 2020 amendment to Federal Rule of Evidence 404(b). Under the amended rule, the prosecution must provide reasonable notice in writing before trial that the prosecution intends to offer evidence of crimes, wrongs, or other acts. In that notice, the prosecution must articulate "the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose."The prosecution may give notice in any form during trial if good cause exists to excuse the lack of pretrial notice.

Ancient documents – Amended Rule 11-803 NMRA

The Supreme Court has approved amendments to Rule 11-803(16) NMRA based on a 2017 amendment to Federal Rule of Evidence 803(16). Under the amended rule, the definition of ancient document has changed from a document "that is at least twenty (20) years old" to one "that was prepared before January 1, 1998."

Supreme Court

Rulemaking and Standing Rules Committees – Amended Rules 23-106 and 23-106.1 NMRA

The Supreme Court approved amendments to Rules 23-106 and 23-106.1 NMRA to update the list of standing rules committees, to require committee chairs to file an annual report with the Supreme Court, and to grant committee chairs and committee staff the discretion to excuse a committee member's absence from a given committee meeting if the committee member requests an excusal in writing.

Rehearing in the Supreme Court – Amended Rule 12-404 NMRA

The Supreme Court approved amendments to Rule 12-404 NMRA to clarify the procedure on a motion for rehearing. The amendments took effect March 30, 2022.

Clerk's residence and office – Amended Rule 23-102 NMRA

The Supreme Court approved amendments to Rule 23-102 NMRA to remove the requirement that the Clerk of the Supreme Court reside in Santa Fe. The amendments took effect on March 30, 2022.

Foreclosure Settlement Program –Amended Rule 1-054.2 NMRA; New Forms 4-228, 4-229, and 4-230 NMRA; Amended Forms 4-227 and 4-712 NMRA

The Supreme Court approved amendments to Rule 1-054.2 and Forms 4-227 and 4-712 NMRA and adopted new Forms 4-228, 4-229, and 4-230 NMRA in response to the creation of the Homeowner Assistance Fund, part of the American Rescue Plan Act of 2021, and the expansion of federal loss mitigation options aimed at curbing financial hardship caused by the COVID-19 pandemic. The new and amended rules and forms took effect on May 23, 2022.

Forms to implement the Eviction Prevention and Diversion Program – New Forms 4-904A, 4-904B, 4-905A, 4-905B, 4-908A, 4-908B, 4-908C, 4-908D, and 4-923A NMRA

The Supreme Court adopted new forms to implement the Eviction Prevention and Diversion Program. The Program commenced with a pilot project in the Ninth Judicial District and expanded to the Second, Fifth, Tenth, and Twelfth Judicial Districts on April 1, 2022. The program is currently expanding statewide. The new forms took effect on February 1, 2022, for all cases that are subject to the Eviction Prevention and Diversion Program

Uniform Jury Instructions - Civil

Conduct of jurors – Amended UJI 13-110 NMRA

The Supreme Court has approved the UJI-Civil Committee's proposal to amend the introductory instruction given in civil jury trials to enhance the jury's comprehension of permitted conduct during trial. In particular, the amended UJI 13-110 NMRA contains a more detailed and explicit seventh paragraph, which instructs jurors not to use electronic resources, including internet sites and social media, to comment on or obtain information about the parties, witnesses, counsel, or issues in the case.

Unfair Practices Act – New UJIs 13-2501, 13-2502, 13-2503, 13-2504, 13-2505, 13-2506 NMRAand Introduction and Appendix to Chapter 25 of the Uniform Jury Instructions – Civil

On recommendation of the UJI-Civil Committee, the Supreme Court adopted new UJIs for use in cases involving claims brought under the Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019). The new instructions took effect on February 21, 2022.

Whistleblower Protection Act - New UJIs 13-2321, 13-2322, 13-2323, 13-2324, 13-2325, 13-2326, and 13-2327 NMRA; Amended UJI 13-2300 NMRA

The Supreme Court has approved the UJI-Civil Committee's proposal to adopt a set of new jury instructions, a special verdict form, and committee commentary for use in claims under the Whistleblower Protection Act (WPA), NMSA 1978, §§ 10-16C-1 to -4 (2010). The instructions explain the elements of a WPA claim and provide guidance on particular elements that may be disputed in a given case, as well as instruct on the statutory affirmative defense, NMSA 1978, § 10-16C-4. The general introduction to UJI Chapter 23 (Employment), UJI 13-2300 NMRA, has been amended accordingly.

Uniform Jury Instructions - Criminal

Incompetency and insanity – Amended UJIs 14-5101, 14-5104 , 14-6011, and 14-6014 NMRA

The Supreme Court has approved the UJI-Criminal Committee's proposal to update the essential elements of the insanity instruction, UJI 14-5101, and the determination of competency instruction, UJI 14-5104, along with related instructions, to conform to precedent. Specifically, the amendments align the competency instruction with the Supreme Court's guidance in State v. Linares, 2017-NMSC-014, ¶ 34, 393 P.3d 691 (reiterating the test for competency laid out in State v. Rotherham, 1996-NMSC-048, ¶ 13, 133 N.M. 246, 923, P.2d 10131), and revise the insanity instruction to reflect guidance from State v. White, 1954-NMSC-050, ¶ 10, 58 N.M. 324, 270 P.2d 727 (explaining that "insanity . . . is a true disease of the mind, normally extending over a considerable period of time, as distinguished from a sort of momentary insanity arising from the pressure of circumstances").

Aggravated fleeing a law enforcement officer – Amended UJI 14-2217 NMRA

The Supreme Court has approved the UJI-Criminal Committee's proposal to amend the aggravated fleeing instruction in response to the holding of State v. Vest that a defendant can be convicted of aggravated fleeing a law enforcement officer if the defendant drives in a dangerous manner while fleeing, regardless of whether there is another person in the vicinity of the police pursuit. 2021-NMSC-020, ¶ 6, 488 P.3d 626. The amendments modify the second element of the instruction to encompass willful and careless conduct that endangered "or could have endangered the life of another person." The committee commentary has been expanded to explain that the focus of the crime is on the social harm of the defendant's conduct and not the particular result of that conduct.

Escape from jail and inmate release programs - New UJIs 14-2228A, 14-2228B, and 14-2228C NMRA; Amended UJI 14-2221 NMRA; Withdrawn UJI 14-2228 NMRA

The Supreme Court has approved the UJI-Criminal Committee's proposal to amend the use notes and commentary of the escape from jail instruction, UJI 14-2221 NMRA, and to adoptbthree new instructions specifically addressing escape from a jail release program, UJI 14-2228ANMRA, escape from a penitentiary release program, UJI 14-2228B NMRA, and escape from a community custody release program, UJI 14-2228C NMRA.

Falsification of documents - Amended UJI 14-4402 NMRA

The Supreme Court has approved the UJI-Criminal Committee's proposal to amend the falsification of documents instruction and commentary to instruct the jury on the definition of "material fact." Under the amended instruction, a "material fact is a fact that is integral to the right to Medicaid payments and that has a natural tendency to influence the Human Services Department to pay for [services]."

Failure to appear - Amended UJI 14-2229 NMRA

The Supreme Court has approved the UJI-Criminal Committee's proposal to modify the first element of the failure to appear instruction to include the severity of the charges in the underlying proceeding where the defendant failed to appear, in conformance with NMSA 1978, Section 31-3-9 (1999).

Justifiable homicide by public officer or employee – Amended UJI 14-5173 NMRA

The Supreme Court has approved amendments to UJI 14-5173 NMRA to bring the instruction in line with the requirements of NMSA 1978, Section 30-6-2(B) (1989), as recommended in State v. Mantelli, 2002-NMCA-033, ¶ 48, 131 N.M. 692, 42 P.3d 272. The amended instruction requires the jury to assess the totality of the circumstances to determine whether the defendant acted as a reasonable officer at the time of the killing.

Criminal trespass and breaking and entering – Amended UJIs 14-1401, 14-1402, 14-1410 NMRA

The Supreme Court has approved amendments to the UJIs for criminal trespass and breaking and entering to align the elements of the offenses with guidance from the Court of Appeals in State v. Ancira, 2022-NMCA-053, ¶¶ 28-31, 517 P.3d 292 (holding that the plain language of NSMA 1978, Section 30-14-1(B) (1995) requires proof of actual knowledge that permission to enter had been denied as opposed to proof of what a reasonable person would have understood)s.

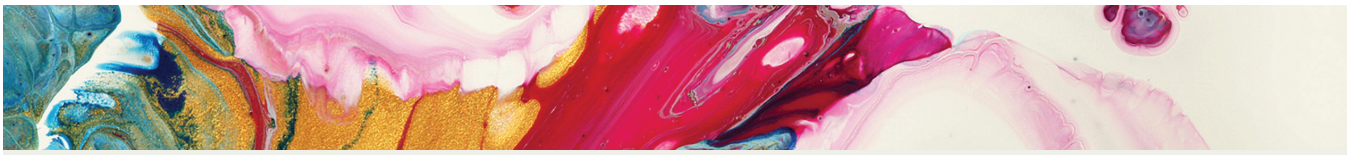
The rule amendments summarized above can be viewed in their entirety at the New Mexico Supreme Court website at
https://bit.ly/3C53aIN
or
https://supremecourt.nmcourts.gov/supreme-court/opinions-rules-and-forms/approved-amendments-to-rules-and-forms/2021-2/

Mandatory Succession Planning Rule - effective October 1, 2022

- On the 2023 Annual Registration Statement, New Mexico Attorneys will be required to certify their compliance with Rule 16-119 NMRA.
- Rule 16-119 requires every attorney practicing law in New Mexico to have a written succession plan.
- Find out more regarding the Rule and its requirements by:
  - Listening to a succession planning podcast on *SBNM is Hear*
  - Attending a CLE webinar on Succession Planning on October 12, 2022

Contact the State Bar Professional Development Program at 505-797-6079 or the State Bar Regulatory Programs at 505-797-6059. Visit www.sbnm.org/successionplanning for sample plans and resources.

State Bar of New Mexico
Est. 1886



Official Publication of the State Bar of New Mexico

BAR BULLETIN

Call for Cover Art

Make your artwork visible to more than 8,000 attorneys, judges, paralegals and other members of the legal community!

We are soliciting for artists and galleries to submit artwork to be displayed on future covers of the *Bar Bulletin*. A variety of artwork types, mediums, and subjects will be accepted. We welcome new and repeat artists! Please pass this information to any interested artists you know.

For more information and submission guidelines, visit **www.sbnm.org/coverart**

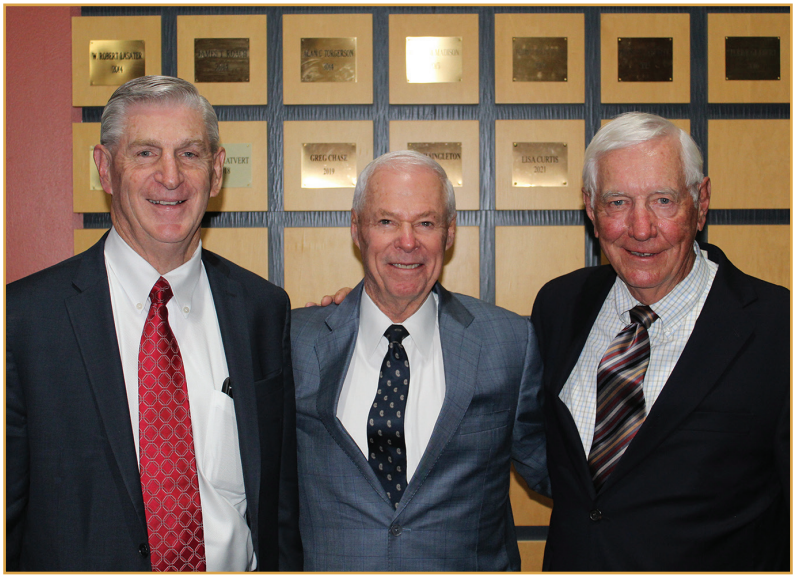
Have questions? Contact State Bar Communications Coordinator Brandon McIntyre at brandon.mcintyre@sbnm.org

New Inductees to the Roehl Circle of Honor

Charles A. Pharris and Rick Beitler

— Oct. 26, 2022 —

Two new attorneys were inducted into the Roehl Circle of Honor. The Circle of Honor is named after the late Joseph E. Roehl who is known as one of the premier trial lawyers of our generation. New inductees are welcomed into the circle each year to honor his memory and commitment to the trial lawyer community.



Rick Beitler , Jerry Roehl, and Charles A. Pharris

Charles A. Pharris practiced law for about 45 years at the Keleher & McLeod law firm. Starting as an insurance defense lawyer, one year after graduating from the UNM School of Law, he later moved to other types of litigation including products liability, aviation, medical malpractice defense and commercial cases. He was honored to serve on the Board of Bar Commissioners and as President of the State Bar of New Mexico. He has been retired for about 10 years and now resides in Steamboat Springs, Colorado.

Rick Beitler is a shareholder and director at Rodey, Dickason, Sloan, Akin & Robb, P.A.'s Albuquerque office. His 43-year professional experience has been devoted primarily to tort litigation with a heavy emphasis on medical malpractice defense. He extensive experience representing physicians and other healthcare providers before the New Mexico Medical Review Commission. He has served as Chair of the State Bar of New Mexico's Trial Practice Section and Health Law Section and Co-Chair of the State Bar of New Mexico's Insurance Committee.

Legal Education

November

23 **Ethics of Identifying Your Client: It's Not Always Easy**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

29 **Ethics of Business Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

30 **Liquidation: Legal Issues When a Client Decides to Close a Business**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

30 **Drug Testing and the Chain of Custody**
2.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

30 **Determining Conpetency and Capacity in Mediation**
2.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

December

1 **Spanish for Lawyers I**
20.0 G
In-Person
UNM School of Law
lawschool.unm.edu

1 **2022 Immigration Law Institute: Special Topics**
3.25 G, 1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

2 **End-of-Year Ethics: The Rules of Succession Planning and Trust Accounting**
2.0 EP
Webcast
New Mexico Trial Lawyers Association & Foundation
www.nmtla.org

2 **Introduction to Legal Specialties: Getting to Know Six Areas of Law**
6.0 G
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org

5 **Professionalism for the Ethical Lawyer**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

5 **Basics of Trust Accounting**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

6 **"Let Me Ask You a Question. Suppose I was Considering ...": A Mock Meeting of the Ethics Advisory Board**
2.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

6 **Well That Seemed Like a Good Idea: Practical Best Practice Tips**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

7 **Rights of First Offer, First Refusal in Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

8 **Ethics of Beginning and Ending Client Relationships**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

8 **Probate in a Nutshell**
1.0 G
Webcast
New Mexico Legal Aid/Volunteer Attorney Program
www.newmexicolegalaid.org

8 **Do Something Different: Defense Strategies for Stopping Nuclear Verdicts**
1.0 G
Webcast
New Mexico Defense Lawyers Association
www.nmdla.org

8 **2022 WCA of NM Winter Education Seminar**
4.0 G, 2.0 EP
Live
Workers Compensation Association of New Mexico
www.wcaofnm.com

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.

December (cont.)

8 **3rd Annual Women in Law Conference Transitions in the Legal Profession: Adjustment, Adaptability and Authenticity During Change**
1.25 G, 5.5 EP
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org

9 **Selection and Preparation of Expert Witnesses in Litigation**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

9 **2022 Guardian Ad Litem Training**
6.25 G
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org

13 **Gain the Edge! Negotiation Strategies for Lawyers**
5.0 G, 1.5 EP
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org

14 **2022 Ethics Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

14 **2022 New Mexico Tax Conference**
6.5 G, 1.0 EP
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org

15 **2022 Ethics Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

15 **2022 Trial Law Institute**
5.5 G, 1.0 EP
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org

16 **New Mexico Burning: 2022 Annual Natural Resources, Energy and Environmental Law Institute**
5.0 G, 1.0 EP
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org

16 **Last Chance: Best of the Best**
5.5 G, 0.7 EP
Video Replay W/Moderator (Live Credits)
New Mexico Trial Lawyers Association & Foundation
www.nmtla.org

19 **Equity & Diversity in Law Practice: Best Practices for Law Firms**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

20 **REPLAY: Recreational Cannabis in the Workplace (2021)**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

21 **REPLAY: Trial Practice Issues - Preserving Issues for Appeal, Discovery Challenges, & Practicing in COVID Moving Forward (2021)**
1.5 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

21 **Drafting Indemnity Agreements in Business and Commercial Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

22 **Ethics in Negotiations - Boasts, Shading, and Impropriety**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

27 **Ethics and Virtual Law Offices**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

27 **Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

28 **REPLAY: Mandatory Succession Planning: It Has To Happen, But It Doesn't Have To Be That Difficult**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

28 **Lawyer Ethics of Email**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

29 **REPLAY: Indian Water Law (2021)**
0.5 G, 0.5 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

29 **Ethics and Conflicts with Clients, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

30 **Ethics and Conflicts with Clients, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

From the New Mexico Supreme Court

Opinion Number: 2022-NMSC-015
No: S-1-SC-38743 (filed June 30, 2022)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
JESSE MASCARENO-HAIDLE,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Courtney B. Weaks, District Judge

Presiliano Raúl Torrez,
District Attorney
James W. Grayson, Deputy District Attorney
Albuquerque, NM

for Petitioner

Bennett J. Baur, Chief Public Defender
Kimberly M. Chavez Cook, Appellate Defender
Noah Walker Gelb, Assistant Appellate Defender
Santa Fe, NM

for Respondent

OPINION

VIGIL, Justice.

{1} When one of our district court judges is asked to decide whether a person charged with committing a felony will be jailed pending trial, that judge must predict what that person's future behavior will be if released. But "there is no way to absolutely guarantee that any defendant released on pretrial conditions will not commit another offense." *State v. Brown*, 2014-NMSC-038, ¶ 54, 338 P.3d 1276. To reduce the margins of error, this inexact, consequential task demands that the judge be given as much information as possible prior to making a decision. *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 103, 410 P.3d 201. This allows for an informed decision to be made that not only protects the dignity and constitutional rights of the accused, but it also protects society. *See* N.M. Const. art. II, § 13.

{2} Here, the State failed to meet its evidentiary burden to place Defendant, Jesse Mascareno-Haidle, in pretrial detention. The State asks us to clarify the standard it must meet in order for the district court to grant pretrial detention. Specifically, the State challenges the requirement that it must prove that there are no release conditions that will reasonably protect the safety of any other person or the community if Defendant were released. Thus the State requests that it be allowed to present less, not more, information to a judge attempting to predict what a person's future behavior will be. We decline the State's request and adhere to our order issued after oral argument upholding the Court of Appeals' affirmance of the district court's denial of pretrial detention. Having failed to meet the burden or preserve the issue, the State cannot be heard to complain. We write to explain our reasoning and rationale.

I. FACTUAL AND PROCEDURAL BACKGROUND

{3} On January 29, 2021, Detective J. Allred of the Albuquerque Police Department filed a criminal complaint-arrest warrant which chronicled his efforts to investigate a series of residential burglaries in Albuquerque. The affidavit recites the following.

{4} A homeowner reported that on October 3, 2020, at approximately 3:30 a.m., a vehicle was stolen from his home using keys taken from inside the home while he and his family were sleeping. The intruder gained entry through a window facing the backyard, which was easily accessible from the street behind the home. A latent print impression from the window was obtained, and police determined that it matched a known fingerprint of Defendant. A second homeowner reported her home was burglarized overnight while her family was sleeping inside on November 19, 2020. There was no sign of forced entry. Entry was presumed to be from an unlocked back door, which the departing intruder had left wide open. The home backs directly onto a recreation trail and arroyo, granting easy access to that back door. One of the items stolen was an Xbox with a unique serial number, and investigation disclosed that Defendant sold that Xbox to a pawnshop on December 2, 2020. On the basis of the evidence identifying Defendant in connection with these two incidents, Defendant was charged with one count of residential burglary, one count of unlawful taking of a motor vehicle, and one count of receiving/transferring stolen property (over $250, less than $500).

{5} In January 2020, after investigating five other residential burglaries, Detective Allred concluded he was investigating a serial burglary case with common features: the burglaries occurred during the overnight hours while the occupants were sleeping, and entry was gained through an open window or door in the back of the home which was easily accessible by a main street or open space. Detective Allred began researching databases and dispatch call records of home burglaries that he knew of and that were reported as having occurred in the early morning hours. He discovered over eighty separate burglaries having taken place in Albuquerque in the middle of the night while the occupants were sleeping. In many of the cases, cars were stolen. Some homeowners had videos showing two or three burglars, and in all of them (except one) the burglars wore masks. Detective Allred also investigated six additional cases from Los Lunas which he believed involved the same suspects. The remainder of Detective Allred's affidavit details both his investigation of seven specific burglaries with similar patterns and his investigation of Defendant, who was eighteen at the time, and two of his associates. The investigation also involved automobiles, stolen from burglarized homes, which ended up being parked or abandoned near Defendant's home.

{6} Defendant was arrested on January 29, 2021, the day the criminal complaint-arrest warrant affidavit was filed. On the next day, the State filed a motion for pretrial detention pursuant to Article II, Section 13 of the New Mexico Constitution and Rule 5-409 NMRA. To support its motion, the State presented Detective Allred's criminal complaint-arrest warrant affidavit, the pretrial services public safety assessment (PSA)[1] recommending that Defendant be released on his own recognizance, the results of a criminal history search pertaining to Defendant, and the register of actions in the case.

{7} A hearing on the motion for pretrial detention was held on February 3, 2021. The State rested its entire detention case on the foregoing documents. Noticeably lacking was any testimony from Detective

Allred and any argument that no conditions of release could protect the community from Defendant if he were released. The district court judge denied detention. The district court judge found "that the magnitude of the allegations are inherently dangerous" but "that the State has failed to prove by clear and convincing evidence that no release conditions will reasonably protect the safety of another person or the community." Defendant was ordered to be released subject to conditions, including: pretrial services supervision and compliance with all of its conditions, not to possess any firearms or dangerous weapons, not to return to the location of any of the alleged crimes, not to consume alcohol, not to buy or sell or consume or possess illegal drugs, to notify the court of any change of address, not to leave Bernalillo County without prior permission of the court, to maintain weekly contact with his attorney, and not to leave his residence between the hours of 6:00 p.m. and 8:00 a.m. without prior permission of the court. The order setting conditions of release was filed on the day of the detention hearing, February 3, 2021.

{8} Two days later, the State filed a second criminal complaint-arrest warrant affidavit signed by Detective Allred. These charges were based on facts that were also alleged in the criminal complaint-arrest warrant affidavit describing Detective Allred's investigation of a residential burglary taking place on December 16, 2020, in which two violins and a Lexus SUV were stolen while the occupants of the home slept. The charges were larceny (over $20,000), conspiracy to commit a second-degree felony, residential burglary, unlawful taking of a motor vehicle, two counts of conspiracy to commit a third- or fourth-degree felony, and contributing to the delinquency of a minor.

{9} The State filed a second motion for pretrial detention pursuant to Article II, Section 13 of the New Mexico Constitution and Rule 5-409. As with the first motion, the State supported its second motion with Detective Allred's second criminal complaint-arrest warrant affidavit, an updated pretrial services PSA that again recommended Defendant's release on his own recognizance, the results of a criminal history search, and the register of actions in the case. An arrest warrant was issued, and on February 12, 2021, Defendant was arrested at his home—his required location under the existing conditions of his release.

{10} At the hearing on its second motion for detention, which was held before a different district court judge, the State presented testimony of Detective Allred. Detective Allred disclosed that after the initial motion for detention was denied, he and the prosecutor agreed they could move forward with certain charges "right away." They wanted to file new charges, so they could get another chance to obtain an order detaining Defendant pretrial. Their concern, "based on the circumstances surrounding the magnitude of these burglaries," was that Defendant would reoffend if not in custody.

{11} When Defendant was originally arrested on January 29, 2021, he was cooperative and gave Detective Allred a two-hour recorded statement. Based on his notes at the time of the interview, Detective Allred estimated that Defendant admitted to committing around twenty-eight specific burglaries. Defendant specifically admitted committing the burglaries underlying the charges set forth in both of the pending criminal complaints. Defendant also identified his two accomplices. Defendant said that he committed the burglaries because, due to the COVID-19 pandemic, he was not able to work to support his daughter. Defendant was clear that he targeted homes in well-to-do neighborhoods or "rich houses," where the people could afford to replace the things that were stolen. Defendant was not able to remember some burglaries, and there were others that he absolutely denied committing, including the Los Lunas burglaries.

{12} The sum of the burglaries Defendant admitted to committing, together with those Detective Allred suspected Defendant of committing, was between seventy-five and eighty in Albuquerque. Detective Allred added that a shotgun was found in a search of Defendant's home. In addition, the police found at the home of one of Defendant's accomplices a Glock handgun and the suppressor for an AR-15 (but not the AR-15 itself) that was stolen in one of the Los Lunas burglaries. Finally, the State presented evidence that two years prior, Defendant, a juvenile at the time, was caught committing a burglary with another juvenile.

{13} Defendant's witness at the second detention hearing was Jessica Etoll, a licensed master social worker for the Law Offices of the Public Defender. She had scheduled an assessment with Defendant which did not take place due to his second arrest, but she spoke with Defendant on the day of the second hearing. Defendant was able and willing to work with her, and they came up with a plan for his release. The plan was for Defendant to live with his mother and two younger siblings and to work with his mother in an inventory collecting business. Ms. Etoll would also be assisting Defendant in obtaining his GED. Defendant needed to be involved with his seventeen-month-old child, so Ms. Etoll would not only be helping Defendant but she would also be helping his family. She stressed that it was important for Defendant to meet with her in person so she could continue with a needs assessment.

{14} The district court then heard arguments from both sides. The State began its argument by reciting its evidentiary burden as mandated by Article II, Section 13 of the New Mexico Constitution: "So the State is arguing for pretrial detention, that [Defendant] is a danger to the community and that there are no release conditions that will reasonably protect the safety of the community or any other person." This passing, generic reference to "release conditions" was the only time the State mentioned the subject during the entire hearing. The State failed to present evidence that no conditions or combination of conditions could be imposed to reasonably protect the community if Defendant was released. Moreover, the State neither argued nor provided any assertion that conditions of release sufficient to reasonably protect public safety could not be imposed. Instead, the State focused its argument solely on the dangerousness component of the detention determination, drawing the district court's attention to Detective Allred's account of Defendant's alleged admission to committing multiple burglaries and the State's concern that the burglaries involved "some firearm connection."

{15} The defense centered its argument on the State's failure to present evidence at both detention hearings: "[T]he State provided zero evidence as to whether or not [Defendant] can abide by conditions of release." Defense counsel pointed to Defendant's compliance with the release

[1] The PSA, developed by Arnold Ventures, is a multi-factor risk assessment tool that measures a defendant's risk—if released prior to trial—of failing to appear for judicial proceedings and engaging in new criminal activity or new violent criminal activity. See The University of New Mexico, Bernalillo Cnty. Pub. Safety Assessment Validation Study, 2 (June 2021), https://isr.unm.edu/reports/2021/bernalillo-county-public-safety-assessment-validation-study.pdf. The PSA's evaluative factors range from a defendant's present age and the violent nature, if any, of the charged offenses, to various aspects of a defendant's prior convictions and failures to appear, if any. Id. at 7; id. at 10, 22 (finding, inter alia, the PSA scores compiled in over 10,000 cases emanating from the risk assessment pilot program previously approved by this Court for use in the Second Judicial District to be "good" predictive indicators of new criminal activity and "fair" predictive indicators of new violent criminal activity).

conditions imposed in the initial release order, including Defendant's apparent adherence to the order's curfew requirements as reflected in the ease by which the police rearrested Defendant at his mother's residence during evening hours covered by the court-ordered curfew. Defense counsel asked the district court to release Defendant under the same conditions that were previously imposed following the first detention hearing.

{16} Announcing its decision at the conclusion of the hearing, the district court stressed, "There's nothing more dangerous and—and more invasive than entering somebody's home through an unlocked door in the middle of the night. That is the most dangerous activity that you can engage in. I want to make that extremely clear. The extent of this is alarming—beyond alarming." However, based on the fact that the motion for detention was previously denied and that a period of time albeit short had passed, and no homes were burglarized in the interim, the district court concluded that "conditions of release can be fashioned in which the [c]ourt feels that they can prevent [Defendant] from committing future crime and protect the safety of the community."

{17} A formal order was entered in which the district court found Defendant to be dangerous, but because "the State having again failed to provide by clear and convincing evidence that no conditions of release will reasonably protect the safety of another person or the community" and because "a good faith argument cannot be made against release on conditions of release when the request for pretrial detention was already once denied and Defendant was without violation after that release," the State's second motion for detention was denied. Defendant was ordered to be released subject to the original conditions with the added requirements that he live at home, submit to drug and alcohol testing, maintain thirty hours of weekly employment, submit to medical, psychological, psychiatric or substance abuse treatment, and comply with geographical restrictions by GPS monitoring.

{18} The State appealed to the Court of Appeals, which summarily affirmed the district court's order, and we granted certiorari. *See* Rule 12-204 (D), (E) NMRA.

II. DISCUSSION

{19} The State's petition for certiorari reminds us that in *State v. Ferry*, 2018-NMSC-004, ¶ 6, 409 P.3d 918, we held "that the nature and circumstances of a defendant's conduct in the underlying charged offense(s) may be sufficient, despite other evidence, to sustain the State's burden of proving by clear and convincing evidence that the defendant poses a threat to others or the community." The State then declares, "The Court did not address whether this same evidence may be sufficient, by itself, to sustain the State's burden to prove that no release conditions will reasonably protect the safety of the community." The State appeals to this Court to answer that question.

A. Standard of Review

{20} A district court's decision addressing pretrial release or detention issues will be set aside only upon a showing that the decision (1) "is arbitrary, capricious, or reflects an abuse of discretion," (2) "is not supported by substantial evidence," or (3) "is otherwise not in accordance with law." Rule 12-204(D)(2)(b). "An abuse of discretion occurs when the court exceeds the bounds of reason, all the circumstances before it being considered." *Brown*, 2014-NMSC-038, ¶ 43 (internal quotation marks and citation omitted); *see Ferry*, 2018-NMSC-004, ¶ 2 (defining the term *discretion* in the context of a pretrial detention appeal as "the authority of a district court judge to select among multiple correct outcomes"). "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *State v. Groves*, 2018-NMSC-006, ¶ 25, 410 P.3d 193 (internal quotation marks and citation omitted). And "a decision is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Id.* (internal quotation marks and citation omitted).

B. Bail Reform in New Mexico

{21} In *Brown*, 2014-NMSC-038, ¶¶ 19-38, and *Torrez*, 2018-NMSC-005, ¶¶ 33-68, we summarized the history of bail in New Mexico and the United States. We reiterate some of that history here to give context to our discussion and analysis.

{22} Beginning with statehood in 1912 and before it was amended, Article II, Section 13 of the New Mexico Constitution directed in pertinent part: "All persons shall be bailable by sufficient sureties . . . ." N.M. Const. art. II, § 13 (1911, amended 2016). In 1988, this right to bail provision was amended to read, "All persons shall, before conviction be bailable by sufficient sureties . . . .", N.M. Const. art. II, § 13 (1988, amended 2016); *see* 1988 N.M. Laws, 1st Special Session at 1120 ("Constitutional Amendment No. 5"), which persists today. With limited exceptions,[2] our Constitution has guaranteed all persons accused of committing crimes the right to bail and release pending trial. This was also true for almost every state constitution adopted after 1776, and at the federal level by the Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73. *Brown*, 2014-NMSC-038, ¶¶ 26-27. The constitutional right to bail upholds the fundamental principle that a defendant is not to be punished—imprisoned—until the charges brought by the state are proven beyond a reasonable doubt in a court of law. *See id.* ¶ 19. Thus the original purpose of bail in New Mexico was to ensure that the defendant appeared in court as required. *Id.* ¶ 38. Upon release, a defendant's pretrial freedom was conditioned on appearing in court as required, complying with the law, and complying with any conditions of release imposed by the court. *Id.* ¶ 21. A defendant's failure to satisfy any of these conditions could result in revocation of the release and a remand of the defendant into custody. *Id.*

{23} Subsequently, studies of bail in the United States recognized inequities, chief among which was that money bail discriminated against the poor. *Id.* ¶¶ 28-32. Indigent defendants who were unable to post bail were therefore imprisoned—punished—solely because they could not afford to post bail or pay commercial bondsmen to secure their release pending trial. *Id.* These concerns motivated Congress to enact the Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214, the first major federal reform since the Judiciary Act of 1789. *Brown*, 2014-NMSC-038, ¶ 33. Under this act, release on personal recognizance was the presumptive norm, unless the judge "determined that such release [did] not reasonably assure the defendant's appearance in court," in which case the judge would determine a "conditional pretrial release under supervision or other terms" designed to reasonably assure the defendant's appearance and decrease the risk of flight. *Id.* ¶ 33.

{24} However, the 1966 act did not account for or recognize circumstances in which a defendant posted bond and was released but was a danger to another person or the community. *Id.* ¶ 34. This was addressed by

[2] The first phrase of the current exceptions to the constitutional right to bail, "for capital offenses when the proof is evident or the presumption great," was present at statehood; the 1980 constitutional amendment added the second phrase of the current exceptions, "in situations in which bail is specifically prohibited by this section." N.M. Const. art. II, § 13 (1911, 1980, amended 2016); see 1979 N.M. Laws, 1st Regular Session at 2003 ("Constitutional Amendment 3"). The 1980 constitutional amendment also added the only two additional specific exceptions to the right to bail: when (1) the defendant was charged with "a felony and ha[d] previously been convicted of two or more felonies, within the state" and (2) the defendant was charged with "a felony involving the use of a [firearm] and ha[d] a prior felony conviction, within the state," neither of which the 2016 amendment retained. N.M. Const. art. II, § 13 (1980, amended 2016).

Congress in the Bail Reform Act of 1984, which retains many of the key provisions of the 1966 act but at the same time "allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'" *United States v. Salerno*, 481 U.S. 739, 741, (1987) (omission in original) (quoting the Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837); *see Brown*, 2014-NMSC-038, ¶ 34.

{25} Our first bail rules were adopted in 1972. *Brown*, 2014-NMSC-038, ¶ 37. Modeled on the federal 1966 act, the rules normalized a presumption of pretrial release by the least restrictive conditions, emphasizing that they should not require financial security. *Id.* With the passage of the federal 1984 act, our rules added that the court, in fashioning conditions of release, was also required to consider the potential danger to the community caused by the defendant's release. *Id.* ¶ 38. Nevertheless, a presumption of pretrial release under the least restrictive conditions remained the normative presumption. *Id.* ¶¶ 39-41.

{26} In 2016, for the first time since statehood, a constitutional amendment was passed which granted judicial authority to deny a defendant pretrial release. *Torrez*, 2018-NMSC-005, ¶ 1. In pertinent part, Article II, Section 13 of the New Mexico Constitution now states, "Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community."

C. The Requirements for Pretrial Detention

{27} In order to subject a presumed-innocent defendant to pretrial detention, the state is required to prove "by clear and convincing evidence that (1) the defendant poses a future threat to others or the community, and (2) no conditions of release will reasonably protect the safety of another person or the community." *Ferry*, 2018-NMSC-004, ¶ 3; *Torrez*, 2018-NMSC-005, ¶¶ 100, 102. That is the shared mandate of our New Mexico Constitution, court rules, and case law. *See* N.M. Const. art. II, § 13; Rule 5-409; *Ferry*, 2018-NMSC-004, ¶ 3; *Torrez*, 2018-NMSC-005, ¶¶ 100, 102.

{28} In keeping with the presumption of innocence that attaches to all defendants prior to conviction, and with the related maxim that "punishment should follow conviction, not precede it," *Sewall v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 481 P.3d 1249, 1253 (Nev. 2021) (internal quotation marks and citation omitted), our Constitution requires the state to be held to an exacting standard when it asks a court to order a defendant to remain jailed while awaiting trial. *See* N.M. Const. art. II, § 13. Proof by clear and convincing evidence represents that standard, one satisfied only by "evidence that instantly tilts the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *Groves*, 2018-NMSC-006, ¶ 36 (brackets, internal quotation marks, and citation omitted).

{29} Although the clear and convincing evidence threshold is a "heavy burden," *State v. Lara*, 1990-NMCA-075, ¶ 24, 110 N.M. 507, 797 P.2d 296, it is by no means beyond reasonable reach. In practical terms, the evidentiary burdens imposed on the state at a pretrial detention hearing are considerably less severe than those the state faces at trial. In this respect, our case law and court rules afford the state considerable flexibility and ease in presenting its case for detention by (1) dispensing with the rules of evidence, Rule 5-409(F)(5), (2) declining to extend a defendant's constitutional confrontation rights to a detention hearing, *Torrez*, 2018-NMSC-005, ¶¶ 45, 89, 91, and (3) not imposing any categorical requirement for live-witness testimony, *id.* ¶¶ 80-95, 110; *Ferry*, 2018-NMSC-004, ¶ 3 (endorsing the use in detention hearings of live testimony or a "proffer [of] documentary evidence in a form that carries sufficient indicia of reliability"). The state, far from being bound by all the requirements of the Constitution and the rules of evidence, may rely on "all helpful and reliable information" at its disposal, *Torrez*, 2018-NMSC-005, ¶ 103, to establish to the court's satisfaction, under the clear and convincing standard, that no conditions of release will reasonably protect the public against a defendant's future dangerousness. This lenient evidentiary burden persists even though a defendant detained while awaiting trial—and innocent until proven guilty—will be subjected to conditions of confinement identical to those imposed on a defendant proven guilty beyond a reasonable doubt at trial.

{30} The state's burden of proving the first element required to obtain pretrial detention has been considerably lessened. The state may rely solely on "the nature and circumstances of a defendant's conduct in the underlying charged offense(s)" as sufficient to prove by clear and convincing evidence that a defendant is dangerous—that is, "that the defendant poses a [future] threat to others or the community." *Ferry*, 2018-NMSC-004, ¶ 6. Thus the state, the prosecuting authority that decides which offenses to charge the defendant with in the first place, may now rely on those same charges for proof of dangerousness. *Id.*

{31} However, we also emphasized in *Ferry* that even if this initial burden is satisfied, "the State must still prove by clear and convincing evidence, under Article II, Section 13, that 'no release conditions will reasonably protect the safety of any other person or the community.'" *Ferry*, 2018-NMSC-004, ¶ 6. Here, the State's burden of proving this second element required for pretrial detention cannot be lessened. It is the constitutional standard mandated by Article II, Section 13. We have already noted that the State failed to produce any evidence or make any argument that no release conditions could be imposed to reasonably protect the safety of any other person or the community. "We are not oblivious to the pressures on our judges who face election difficulties, media attacks, and other adverse consequences if they faithfully honor the rule of law when it dictates an action that is not politically popular." *Brown*, 2014-NMSC-038, ¶ 54. Even so, under the Constitution and our rules, the district court judge in this case was left with no alternative but to deny the State's motion to detain Defendant. This legal dictation to which the district court judge adhered is not some new revelation. Since 2017, Rule 5-409(H) has directed that "[t]he court shall deny the motion for pretrial detention if, on completion of the pretrial detention hearing, the court determines that the prosecutor has failed to prove the grounds for pretrial detention by clear and convincing evidence."

{32} Recognizing that it failed (twice) to make its case, the State now asks us to ignore the explicit mandate of the Constitution and our rules and hold that the nature and circumstances of a defendant's conduct in the underlying charged offense(s) may be sufficient, by itself, to sustain the State's burden to prove that no release conditions will reasonably protect the safety of the community.

B. The State's Misplaced Reliance on a Single Factor as Dispositive of the State's Detention Burden

{33} We now turn to the core of the State's appeal, its contention that the "extreme" nature of Defendant's "lawlessness" evidenced a "habitual wanton disregard for the law and for homeowner safety," a circumstance that, in the State's view, is incompatible with a finding that a combination of release conditions could provide an adequate deterrent to further dangerous criminal conduct. As explained next, this argument is both unpreserved for appellate review and lacking in merit.

{34} As for preservation, at the detention hearing giving rise to this appeal, the State failed to make any argument to the district court judge that no release conditions could be imposed that would reasonably protect the safety of any other person or the com-

munity, and the State never invoked a ruling from the district court judge on the issue that it now raises on appeal. *See* Rule 12-321(A) NMRA In fact, this Court expressed its concern regarding the State's failure to argue to the district court that no conditions of release would be sufficient to protect the community from Defendant. The State conceded that it was required to make the argument and acknowledged that its arguments to the district court only "focused on dangerousness." This familiar preservation principle takes on particular significance in the context of pretrial detention hearings. After all, rulings stemming from detention hearings are by their nature high-stakes endeavors fraught with uncertainty; rulings made all the more challenging by the short deadlines governing their issuance. *See* Rule 5-409(G), (H) (requiring the district court to issue an order granting or denying a detention motion upon the completion of the detention hearing and to file "findings of the individualized facts" justifying its ruling "no later than three (3) days after the conclusion of the hearing"). Considering the demanding nature of the district judges' role in deciding pretrial detention motions, it is incumbent on the prosecuting attorney and defense counsel alike to clearly stake out their respective hearing positions on the record. The interests of justice—and of fairness to all involved and to the community at large—demand no less.

{35} Here, when asked if there were "any other arguments as to conditions of release," the State responded, "I would ask for a GPS monitor." The district court judge then announced the updated conditions of release, including GPS monitoring, and asked again, "Is there any other conditions of release or any other arguments from [the State] or [Defendant] at this time?" The State responded, "No arguments, Your Honor." Having failed at the detention hearing giving rise to this appeal to raise any argument opposing Defendant's release on conditions, the State will not now be heard to complain that the hearing's outcome on that issue was not to its liking.

{36} Moreover, putting such preservation issues aside, the State would not prevail even were we to consider its apparent contention that the district court erred in not giving dispositive effect to the nature and circumstances of Defendant's underlying conduct in gauging the likely effectiveness of potential release conditions. That position is directly at odds with controlling precedent from this Court, which makes clear that pretrial detention or release decisions cannot be made to turn on any single factor, be it the nature and circumstances of the charged offense(s) or otherwise. *See Torrez*, 2018-NMSC-005, ¶ 101 ("Detention decisions, like release conditions, should not be based categorically on the statutory classification and punishability of the charged offense."); *Brown*, 2014-NMSC-038, ¶ 52 ("Neither the Constitution nor our rules of criminal procedure permit a judge to base a pretrial release decision solely on the severity of the charged offense."); *Ferry*, 2018-NMSC-004, ¶ 7 (cautioning "litigants and the court" against "automatically consider[ing] any one factor to be dispositive in pretrial detention hearings"). To allow the State to rely solely on the nature and circumstances of the charged offenses, not only to prove that the defendant poses a future threat to others or the community but also to prove that no release conditions will reasonably protect the safety of any other person or the community, would all but eliminate Article II, Section 13 and the corresponding constitutional burden of the State.

{37} Adoption of such a rigid interpretation of Rule 5-409(F)(6) also would run counter to what aptly has been described in the federal realm as the unique, "factbound" nature of a court's pretrial detention determination, which "must be made individually and, in the final analysis, must be based on evidence which is before the court regarding the particular defendant." *United States v. Tortora*, 922 F.2d 880, 888 (1st Cir. 1990); *see id.* ("No two defendants are likely to have the same pedigree or to occupy the same position."); *accord United States v. Traitz*, 807 F.2d 322, 325-26 (3d Cir. 1986) ("Each [pretrial detention] case, of course, is *sui generis*, and must be decided on the basis of the particular record adduced.").

{38} Instead, a more expansive, broad-based approach is dictated under the prevailing New Mexico court rule governing the pretrial detention process, whose provisions make clear that the district court

> *shall* consider *any* fact relevant to the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release and any fact relevant to the issue of whether any conditions of release will reasonably protect the safety of any person or the community.

Rule 5-409(F)(6) (emphases added). The rule, in Subparagraphs (a)-(g), goes on to set forth a nonexhaustive list of seven factors intended to guide the parties' presentation of evidence—and the resulting findings of the court—bearing on the two central inquiries stated at the beginning of Subsection (F)(6) of the rule: "the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release" and the separate but related question of "whether any conditions of release will reasonably protect the safety of any person or the community." The relevant factors specified in Rule 5-409(F)(6) are as follows:

> (a) the nature and circumstances of the offense charged, including whether the offense is a crime of violence;
>
> (b) the weight of the evidence against the defendant;
>
> (c) the history and characteristics of the defendant;
>
> (d) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;
>
> (e) any facts tending to indicate that the defendant may or may not commit new crimes if released;
>
> (f) whether the defendant has been ordered detained under Article II, Section 13 of the New Mexico Constitution based on a finding of dangerousness in another pending case or was ordered detained based on a finding of dangerousness in any prior case; and
>
> (g) any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, provided that the court shall not defer to the recommendation in the instrument but shall make an independent determination of dangerousness and community safety based on all information available at the hearing.

{39} The first of the factors listed for consideration under this rule involves "the nature and circumstances of the offense charged." Rule 5-409(F)(6)(a). Nothing in the rule suggests, however, that the placement of this factor at the top of the list of other relevant factors somehow signals that singular importance can be given to it. And the State offers no textual analysis in support of such an interpretation. Nor is there any other basis on which to construe the rule in a manner more restrictive than its literal wording and in the process allow detention judges to consider "the nature and circumstances of the offense" factor in isolation and to the exclusion of all other relevant factors, whether those factors are expressly identified in the rule or not. To the contrary, Rule 5-409(F)(6) must be read to require a detention court to engage in a delicate case-by-case balancing of *all* relevant factors, with the calculus limited only "by what evidence the litigants present." *Ferry*, 2018-NMSC-004, ¶ 7.

III. CONCLUSION

{40} For the reasons stated in this opinion, we abide by our prior order upholding the Court of Appeals' affirmance of the district court's denial of pretrial detention.

{41} IT IS SO ORDERED.

MICHAEL E. VIGIL, Justice

WE CONCUR:

C. SHANNON BACON, Chief Justice

DAVID K. THOMSON, Justice

JULIE J. VARGAS, Justice

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-025
No: A-1-CA-37734 (filed December 22, 2021)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
KEVIN BARLOW REED,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF TORRANCE COUNTY
Angie K. Schneider, District Judge

Certiorari Denied, May 3, 2022, No. S-1-SC-39187;
Cross-Petition Denied, February 24, 2022, No. S-1-SC-39187.
Released for Publication June 14, 2022.

Hector H. Balderas, Attorney General
Anne Minard, Assistant
Attorney General
Santa Fe, NM
Charles J. Gutierrez, Assistant
Attorney General
Albuquerque, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Caitlin C.M. Smith, Assistant
Appellate Defender
Santa Fe, NM

for Appellant

OPINION

HENDERSON, Judge.

{1} A jury convicted Defendant Kevin Reed of one count each of armed robbery, contrary to NMSA 1978, Section 30-16-2 (1973); conspiracy to commit armed robbery, contrary to NMSA 1978, Section 30-28-2 (1979); false imprisonment, contrary to NMSA 1978, Section 30-4-3 (1963); possession of a firearm by a felon, contrary to NMSA 1978, Section 30-7-16(A)(1) (2001, amended 2020); aggravated battery with a deadly weapon, contrary to NMSA 1978, Section 30-3-5(C) (1969); and two counts of aggravated assault with a deadly weapon, contrary to NMSA 1978, Section 30-3-2(A) (1963). Defendant appeals his convictions, claiming that he received ineffective assistance of counsel and that a number of his convictions violate his protection against double jeopardy. We reject Defendant's claim that the record on direct appeal establishes a prima facie case of ineffective assistance of counsel. However, we reverse Defendant's convictions for aggravated battery with a deadly weapon, one count of aggravated assault with a deadly weapon, and false imprisonment as we conclude that they violate his protection against double jeopardy. We remand this case to the district court to amend the judgment and sentence accordingly.

BACKGROUND

{2} Two men robbed a restaurant in Alamogordo, New Mexico. In the evening, as the restaurant's owner, Katherine Budak, attempted to close the restaurant's door, the taller of the two men hit her on the head with a gun, causing her to fall to the floor and lose control of the door. In response to screams from Ms. Budak, a restaurant employee, Joanna Gunn, ran to the door, where she found Ms. Budak on the floor being physically attacked by the shorter man. The taller man stepped over Ms. Budak and entered the restaurant.

{3} The taller man pointed guns at Ms. Gunn and the restaurant's other two employees and ordered them to lie down on the floor. Once Ms. Gunn was on the floor, he approached her and touched her near her throat with a gun. Ms. Gunn offered to retrieve the restaurant's money for the taller man, at which point he physically lifted her from the floor and ordered her to do so. The two men left the restaurant with between sixty and one hundred and fifty dollars.

{4} About one month later, as Ms. Budak shopped in an Albertson's grocery store, she recognized a store employee, D'Andre Howell, as the shorter man from the robbery, and she contacted law enforcement. During their investigation, law enforcement officers had previously identified Mr. Howell and Defendant as suspects in the robbery. When questioned by law enforcement, Mr. Howell admitted to his involvement in the robbery and identified Defendant as the taller man who was with him that evening. A grand jury returned an indictment charging Defendant with several crimes based on the events from the evening of the robbery.

{5} At trial, Mr. Howell testified against Defendant. Upon stipulation of fact by the parties, the district court relayed Defendant's status as a felon to the jury. The jury convicted Defendant of one count each of the following: armed robbery, conspiracy to commit armed robbery, false imprisonment, possession of a firearm by a felon, aggravated battery with a deadly weapon, and two counts of aggravated assault with a deadly weapon. He now appeals. We reserve further discussion of the pertinent facts for our analysis.

DISCUSSION

I. Defendant's Convictions for Aggravated Battery With a Deadly Weapon, One Count of Aggravated Assault With a Deadly Weapon, and False Imprisonment Must Be Vacated Because They Violate Defendant's Protection Against Double Jeopardy

{6} Defendant argues that his convictions for armed robbery, aggravated battery with a deadly weapon, aggravated assault with a deadly weapon, and false imprisonment, violate his protection against double jeopardy. Specifically, Defendant maintains that his conviction for armed robbery subsumes his convictions for the lesser offenses of aggravated battery with a deadly weapon, one count of aggravated assault with a deadly weapon, and false imprisonment. He further argues that his conviction for one count of aggravated assault with a deadly weapon subsumes his conviction for false imprisonment. We agree.

{7} The United States and New Mexico Constitutions guarantee that criminal defendants may not "be twice put in jeopardy" for the same offense. U.S. Const. amend. V.; N.M. Const. art II, § 15.

"The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment." NMSA 1978, § 30-1-10 (1963). Claimed violations of the protection against double jeopardy are questions of law, which require de novo review. *State v. Contreras*, 2007-NMCA-045, ¶ 18, 141 N.M. 434, 156 P.3d 725.

{8} In double description, double jeopardy cases, the defendant is convicted under multiple statutes for the same conduct. *State v. Bernal*, 2006-NMSC-050, ¶ 7, 140 N.M. 644, 146 P.3d 289. Such is the case here. We therefore apply the test articulated in *Swafford v. State*, 1991-NMSC-043, ¶ 12, 112 N.M. 3, 810 P.2d 1223, and first ask "whether the conduct was unitary, meaning whether the same criminal conduct is the basis for both charges." *Bernal*, 2006-NMSC-050, ¶ 9. If it is not, the protection against double jeopardy has not been violated and we proceed no further. *Id.* If it is, we proceed to ask "whether the [L]egislature intended to create separately punishable offenses." *State v. Baroz*, 2017-NMSC-030, ¶ 22, 404 P.3d 769. "Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment[s] in the same trial." *Swafford*, 1991-NMSC-043, ¶ 25.

{9} Our inquiry for unitary conduct turns on "sufficient indicia of distinctness" between the acts at issue. *Id.* ¶ 26; *see also State v. Sena*, 2020-NMSC-011, ¶ 46, 470 P.3d 227. Conduct is not unitary, rather it is separate and distinct, when space and time separates the events, or "the quality and nature of the acts or the objects and results involved are distinguishable[.]" *State v. Contreras*, 1995-NMSC-056, ¶ 14, 120 N.M. 486, 903 P.2d 288 (omission, internal quotation marks, and citation omitted). Likewise, conduct is not unitary "when one crime is completed before another is committed, or when the force used to commit a crime is separate from the force used to commit another crime." *Sena*, 2020-NMSC-011, ¶ 46. In conducting our analysis, we may consider "the elements of the charged offenses, the facts presented at trial, and the instructions given to the jury." *Id.* "We also consider whether the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses." *State v. Schackow*, 2006-NMCA-123, ¶ 18, 140 N.M. 506, 143 P.3d 745 (internal quotation marks and citation omitted).

{10} Pursuant to the statute, the district court instructed the jury that to convict Defendant of armed robbery, it must find, in relevant part, that

> 1. [D]efendant took and carried away U.S. currency from [Ms.] Budak and/or [Ms.] Gunn or from their immediate control intending to permanently deprive [Ms.] Budak and/or [Ms.] Gunn of the U.S. [c]urrency; [and]
> . . . .
> 3. [D]efendant took the U.S. currency by force or violence or threatened force or violence[.]

See § 30-16-2; UJI 14-1621 NMRA. Where, as here, the jury instructions provide alternative bases for conviction of an offense, and the record is silent as to which alternative the jury relied on for its verdict, we apply the *Foster* presumption, which demands that we assume that the jury relied on the alternative that may violate the protection against double jeopardy. *See Sena*, 2020-NMSC-011, ¶ 47 (citing *State v. Foster*, 1999-NMSC-007, ¶ 28, 126 N.M. 646, 974 P.2d 140, *abrogated on other grounds by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683).

{11} Our Supreme Court has recently held that "*Foster* does not require a further presumption that the same conduct was then relied upon by the jury in convicting [the d]efendant of each crime" and that "the *Foster* presumption is rebutted by evidence that each crime was completed before the other crime occurred." *Id.* ¶ 54; *see also State v. Vigil*, 2021-NMCA-024, ¶ 21, 489 P.3d 974, *cert. denied*, 2021-NMCERT-___ (No. S-1-SC-38748, Apr. 22, 2021). We have taken this direction from our Supreme Court as requiring us "to engage in an analysis of a defendant's conduct[.]" *State v. Phillips*, 2021-NMCA-062, ¶ 29 n.1, 499 P.3d 648, *cert. granted*, 2021-NMCERT-___ (No. S-1-SC-38910, Nov. 1, 2021). In *Sena*, the *Foster* presumption was rebutted because the facts of the case made plain that the offenses at issue "were separated by both time and intervening events." *Sena*, 2020-NMSC-011, ¶ 56.

{12} The state's conduct at the trial of the defendant in *Sena* stands in marked contrast to its conduct at Defendant's trial in this case. Here, contrary to the State's arguments, the completed offense principle does not control. As we explain, according to the State's theory of the case, articulated to the jury during closing arguments and presented in the jury instructions, there can be no neat delineation between Defendant's actions. In *Sena*, however, "the [s]tate never communicated any theory to the jury nor did it argue any specific facts support[ed]" the charge at issue. *State v. Sena*, 2018-NMCA-037, ¶ 45, 419 P.3d 1240, *aff'd in part, rev'd in part, and remanded*, 2020-NMSC-011, ¶¶ 11, 41, 42, 57, 59. Indeed, in *Sena*,[1] "[e]ven the . . . jury instruction . . . contained broad, boilerplate language straight from the statute, providing no insight into the [s]tate's theory of the case." *Id.* (citing *State v. Montoya*, 2011-NMCA-074, ¶ 43, 150 N.M. 415, 259 P.3d 820 for the proposition that prosecutors "can avoid double jeopardy violations by identifying specific, non[]unitary conduct in jury instructions"). Bearing this distinction in mind, we now conduct an analysis of each conviction that Defendant asserts is a violation of his protection against double jeopardy.

A. Aggravated Battery With a Deadly Weapon

{13} Defendant first argues that his conviction for aggravated battery against Ms. Budak is subsumed by his armed robbery conviction. Pursuant to the statute, the district court instructed the jury that, to convict Defendant of aggravated battery with a deadly weapon, it must find, in relevant part, that

> 1. [D]efendant touched or applied force to [Ms.] Budak by striking her in the head with a deadly weapon; [and]
> 2. [D]efendant intended to injure [Ms.] Budak[.]

See § 30-3-5; UJI 14-322 NMRA.

{14} Defendant contends that the force elements for both armed robbery and aggravated battery with a deadly weapon were satisfied when Defendant hit Ms. Budak on the head with a gun, and thus the conduct was unitary. The State counters that the force from the armed robbery was separate from the force for the aggravated battery with a deadly weapon, arguing that the door to the restaurant had been pushed open by Mr. Howell before Defendant struck Ms. Budak with a gun, making the robbery entirely independent of the battery. However, Ms. Budak testified that the force that allowed Defendant to "gain access" to the restaurant was Defendant hitting her in the head with a gun. During closing arguments, the State also relied on this use of force as a basis on which the jury could find that the force element for armed robbery was met. We therefore agree with Defendant that the force elements for both armed robbery and aggravated battery with a deadly weapon were satisfied simultaneously and proceed to analyze the punitive intent of our Legislature. *See State v. Swick*, 2012-NMSC-018, ¶ 11, 279 P.3d 747.

[1] Citations to this Court's opinion in Sena are included solely for the purpose of providing background information not present in the opinion of our Supreme Court.

{15} In *State v. Fuentes*, when considering whether our Legislature intended to punish armed robbery and aggravated battery with a deadly weapon separately, we held "that these two criminal statutes regulate distinct deviant social conducts and protect separate, societal interests" and thus perceived no violation of the protection against double jeopardy when defendants are convicted of both crimes. 1994-NMCA-158, ¶¶ 1, 16, 18, 119 N.M. 104, 888 P.2d 986. Recently, however, we have indicated that it is inappropriate to stand on *Fuentes* alone as the basis for outright rejection of a double jeopardy argument in light of our Supreme Court's adoption of the modified *Blockburger* test that applies when evaluating the Legislature's punitive intent. *State v. Evensen*, No. 33,338, mem. op. ¶¶ 25, 28-29 (N.M. Ct. App. May 11, 2015) (non-precedential); *see also State v. Young*, No. 35,315, mem. op. ¶¶ 4-6 (N.M. Ct. App. Mar. 1, 2017) (non-precedential) (applying the modified *Blockburger* test where the defendant claimed his convictions for armed robbery and aggravated battery with a deadly weapon violated his protection against double jeopardy). Today, we formally recognize this principle.

{16} The modified *Blockburger* test applies in cases where the statutes behind the charged offenses "are vague and unspecific" or "written with many alternatives." *State v. Gutierrez*, 2011-NMSC-024, ¶ 48, 150 N.M. 232, 258 P.3d 1024 (internal quotation marks and citation omitted). It requires us to answer whether the legal theory advanced by the State at trial results in one offense subsuming the other. *See id.* ¶ 58; *Swick*, 2012-NMSC-018, ¶¶ 21, 24. More specifically, our analysis is guided by the State's theory of what conduct violated the statutes at issue. *See State v. Porter*, 2020-NMSC-020, ¶ 18, 476 P.3d 1201.

{17} With this framework in mind, we continue our analysis by looking to the elements of the two offenses to ascertain if the definition of one subsumes the definition of the other. *See State v. Montoya*, 2013-NMSC-020, ¶ 32, 306 P.3d 426. Having outlined the elements of armed robbery and aggravated battery with a deadly weapon above, it is apparent that the two statutes have distinct elements, including the intent necessary to effectuate each offense: "Robbery requires the specific intent to deprive the victim of his property; it is a crime primarily directed toward protection of property interests. Aggravated battery, on the other hand, requires the specific intent to injure the victim, which is not present in robbery." *Fuentes*, 1994-NMCA-158, ¶ 8 (emphasis omitted). Thus, one of these offenses is not subsumed by the other based on these definitions alone.

{18} We turn, then, to Defendant's contention that the State charged him with armed robbery with little specificity and provided many alternative bases on which the jury could find that the force element had been satisfied. We agree. As outlined above, the jury instruction for armed robbery permitted the jury to convict Defendant for armed robbery based on "force or violence or threatened force or violence" against either Ms. Budak or Ms. Gunn. *See State v. Armijo*, 1999-NMCA-087, ¶ 8, 127 N.M. 594, 985 P.2d 764 (stating that "jury instructions become the law of the case and, absent proof conforming to the instructions, the state could not prevail" (internal quotation marks and citation omitted)). Accordingly, we must appraise the State's theory of the case to determine whether the force for Defendant's armed robbery conviction was the same force for Defendant's aggravated battery with a deadly weapon conviction. We hold that it was.

{19} As outlined above, the State advanced a theory that Defendant used force from the outset of robbery. Specifically, the State argued that Defendant "got the money," i.e., the U.S. currency mentioned in the jury instruction for armed robbery, either by battering Ms. Budak with a gun upon arrival at the restaurant's door, or by threatening force or violence against Ms. Gunn once he entered the restaurant. While the State maintains that it "did not cast . . . Defendant's crime of battery on [Ms. Budak] as part of the robbery itself[,]" this is simply contrary to the record. Indeed, at trial, the State explicitly told the jury during closing arguments that Defendant's threatening conduct toward Ms. Gunn or his battery on Ms. Budak would satisfy the "force" or "violence" or "threatened force or violence" needed to convict Defendant for armed robbery. Given that the jury was instructed that it could rely on the same conduct to satisfy the force elements of both armed robbery and aggravated battery with a deadly weapon, we hold that Defendant's conviction for aggravated battery with a deadly weapon, as the lesser offense, must be vacated. *See State v. Santillanes*, 2001-NMSC-018, ¶ 28, 130 N.M. 464, 27 P.3d 456 ("[D]ouble jeopardy requires that the lesser offense merge into the greater offense such that the conviction of the lesser offense, not merely the sentence, is vacated."). We look next to Defendant's conviction for aggravated assault with a deadly weapon.

B. Aggravated Assault With a Deadly Weapon

{20} Defendant argues that his conviction for aggravated assault against Ms. Gunn is subsumed by his armed robbery conviction. Pursuant to the statute, the district court instructed the jury that to convict Defendant of aggravated assault with a deadly weapon, it must find, in relevant part, that

> 1. [D]efendant pointed a handgun at [Ms.] Gunn and/or pressed the handgun against [Ms.] Gunn's throat;
> 2. [D]efendant's conduct caused [Ms.] Gunn to believe [Defendant] was about to intrude on [Ms.] Gunn's bodily integrity or personal safety by touching or applying force to [Ms.] Gunn in a rude insolent or angry manner; [and]
> 3. A reasonable person in the same circumstances as [Ms.] Gunn would have had the same belief[.]"

See § 30-3-2; UJI 14-305 NMRA.

{21} Like his argument for aggravated battery with a deadly weapon, Defendant contends that the force elements for both armed robbery and aggravated assault were simultaneously satisfied when Defendant pointed a gun at Ms. Gunn. The State argues that Defendant committed multiple assaults against Ms. Gunn, some of which were completed before the armed robbery and any one of which the jury could have relied on to convict Defendant. We reject the State's argument as contrary to the *Foster* presumption. The jury instruction for armed robbery allowed the jury to rely on force against Ms. Budak *or* Ms. Gunn, and the State relied on the use of force against Ms. Budak as a basis on which the jury could find that the force element for armed robbery was met. *Foster* requires us to assume that, for purposes of our analysis of these convictions, the jury relied on the use of force against Ms. Gunn for the armed robbery conviction because the jury instruction was framed in the alternative to allow the jury to convict Defendant of armed robbery against either Ms. Budak or Ms. Gunn. *See Sena*, 2020-NMSC-011, ¶¶ 46-47. Thus, the use of force against Ms. Gunn for the aggravated assault with a deadly weapon conviction is the same use of force as that relied upon for the armed robbery conviction. We therefore conclude that Defendant's conduct was unitary and move on to analyze whether the offenses may be punished separately. *See Swick*, 2012-NMSC-018, ¶ 11.

{22} Standing on our holding in *Fuentes*, we have observed that "[t]he armed robbery statute is directed primarily toward protecting against the loss of property" while "[t]he aggravated assault statute is directed toward preserving the integrity of a person's body against the threat of injury or . . . actual serious bodily injury." *State v. Armijo*, 2005-NMCA-010, ¶ 30, 136 N.M. 723, 104 P.3d 1114.

Thus, we reasoned that, under a traditional *Blockburger* analysis, our Legislature intended to create two offenses that provide for separate punishments. *Id.* ¶¶ 21, 30. Defendant urges us to adopt the modified *Blockburger* test here as well. We oblige because, as outlined above, the jury instruction for armed robbery permitted the jury to convict Defendant for armed robbery based on "force or violence or threatened force or violence" against either Ms. Budak or Ms. Gunn and therefore provided multiple alternatives and little specificity. *See Gutierrez*, 2011-NMSC-024, ¶ 48.

{23} Again, we begin our analysis by looking to the elements of the two offenses to ascertain if the definition of one subsumes the definition of the other. *See Montoya*, 2013-NMSC-020, ¶ 32. Our outline above of the elements necessary for both offenses reveals that the definition of armed robbery subsumes the definition of aggravated assault with a deadly weapon. Indeed, the actions needed to effectuate aggravated assault with a deadly weapon, as charged in this case, did not require anything more of Defendant than the actions necessary to effectuate armed robbery. Our inquiry here is therefore at an end, because where "one statute is subsumed within the other, . . . the statutes are the same for double jeopardy purposes—punishment cannot be had for both." *State v. Luna*, 2018-NMCA-025, ¶ 11, 458 P.3d 457 (internal quotation marks and citation omitted). Accordingly, Defendant's conviction for aggravated assault of Ms. Gunn with a deadly weapon must be vacated. *See Santillanes*, 2001-NMSC-018, ¶ 28. Finally, we turn to Defendant's conviction for false imprisonment.

C. False Imprisonment

{24} Defendant argues that his conviction for false imprisonment of Ms. Gunn is subsumed by his convictions for armed robbery and aggravated assault of Ms. Gunn with a deadly weapon. Because we have already concluded that Defendant's conviction for aggravated assault with a deadly weapon must be vacated, we need only analyze whether his conviction for armed robbery subsumes his conviction for false imprisonment. At the outset, we note that the State charged Defendant with kidnapping, but offered false imprisonment as a lesser included offense for which the jury could convict Defendant. *See State v. Sotelo*, 2013-NMCA-028, ¶ 12, 296 P.3d 1232 ("[F]alse imprisonment is a subset of kidnapping.").

{25} Pursuant to the statute, the district court instructed the jury that to convict Defendant of kidnapping, it must find, in relevant part, that

> 1. [D]efendant took or restrained or confined or transported [Ms.] Gunn by force or intimidation by pointing firearms at her and requiring her to do or not to do certain things;
> 2. [D]efendant intended to inflict physical injury on [Ms.] Gunn[] and/or to keep her from looking at . . . [D]efendant's face, against her will for the purpose of preventing an identification; [and]
> 3. The taking or restraint or confinement or transportation of [Ms.] Gunn was not slight, inconsequential, or merely identical to the commission of another crime, armed robbery[.]

See NMSA 1978, § 30-4-1 (2003); UJI 14-403A NMRA. Likewise, the district court instructed the jury that, to convict Defendant of false imprisonment, it must find, in relevant part, that

> 1. [D]efendant restrained or confined [Ms.] Gunn against her will; [and]
> 2. [D]efendant knew that he had no authority to restrain or confine [Ms.] Gunn[.]

See § 30-4-3; UJI 14-401 NMRA.

{26} As with the other convictions for which Defendant complains of violations of his protection against double jeopardy, Defendant contends that because the State argued before the jury that it could rely on pointing a gun at Ms. Gunn or pressing a gun to her throat as the basis for the "force or violence or threatened force or violence" necessary for armed robbery and the "force or intimidation" necessary for kidnapping, we must view his conduct as unitary. The State made clear at trial that the conduct necessary to effectuate kidnapping also reflects its theory as to false imprisonment. Again, Defendant urges us to adopt the modified *Blockburger* test for the issues here. For the reasons that follow, we accept Defendant's position.

{27} The State specifically argued during closing argument that the "force or violence or threatened force or violence" necessary for armed robbery functionally satisfied the "restraint or confinement by force" necessary for kidnapping. While the jury rejected some elements of kidnapping as it proceeded to consider false imprisonment as a lesser included offense, it still found that Defendant "restrained or confined" Ms. Gunn. In its briefing, the State lists "factors [of] distinctness" to separate Defendant's conduct in such a way as to ascribe different conduct to each of Defendant's convictions. The flaw in the State's position here, as is true for each of Defendant's challenged convictions, is that it now looks to the record in an effort to sort out Defendant's conduct with distinction and tie it to a specific charge, when below it encouraged the jury to use the same conduct to convict Defendant of nearly every charge. The State cannot wait for an appeal to adequately separate Defendant's conduct to support each conviction; rather, the State must do this work below to ensure that distinct conduct supports each charge tried. For these reasons, Defendant's conduct constituting "force or violence or threatened force or violence" for armed robbery and "restraint or confinement" for false imprisonment in this case is unitary, and we proceed to determine whether multiple punishments were intended. *See Swick*, 2012-NMSC-018, ¶ 11.

{28} We first analyze whether the elements of false imprisonment are subsumed by the elements of armed robbery. *See Montoya*, 2013-NMSC-020, ¶ 32. Our review of the relevant elements for these offenses outlined above reveal that they are. Indeed, to complete false imprisonment here, nothing more was required of Defendant than was required for his commission of armed robbery, except for Defendant's knowledge "that he had no authority to restrain or confine [Ms.] Gunn[.]" However, "when a defendant's underlying acts are unlawful, it may be inferred that the defendant knows, too, that he has no lawful authority to restrain the victim in the commission of those unlawful acts" and the knowledge element is immaterial to our analysis here. *State v. Barrera*, 2002-NMCA-098, ¶ 11, 132 N.M. 707, 54 P.3d 548. Because Defendant cannot be punished twice for this conduct, *see Luna*, 2018-NMCA-025, ¶ 11, his conviction for false imprisonment must be vacated, *see Santillanes*, 2001-NMSC-018, ¶ 28, and we proceed no further.

II. Ineffective Assistance of Counsel Claims

{29} Defendant argues that he received ineffective assistance from his trial counsel. Specially, Defendant contends that because his trial counsel did not move to sever the charge of felon in possession of a firearm from his remaining charges, and that because his trial counsel did not cross-examine Mr. Howell concerning Mr. Howell's criminal history, he did not receive constitutionally adequate representation. Defendant has failed to establish a prima facie case of ineffective assistance of counsel as to both claims.

{30} Criminal defendants possess a constitutional right to "reasonably effective assistance of counsel." *State v. Tafoya*, 2012-NMSC-030, ¶ 59, 285 P.3d 604 (internal quotation marks and citation omitted); *see also* U.S. Const. amend. VI; N.M. Const. art. II, § 14. "We review claims of ineffective assistance of counsel de novo." *State v. Dylan J.*, 2009-NMCA-027, ¶ 33, 145 N.M. 719, 204 P.3d 44. Claims of ineffective assistance of counsel are assessed using the test articulated by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Dylan J.*, 2009-NMCA-027, ¶ 36.

To make a prima facie case of ineffective assistance of counsel under this test, Defendant bears the burden of demonstrating "attorney error and prejudice." *See State v. Crocco*, 2014-NMSC-016, ¶ 14, 327 P.3d 1068. New Mexico's appellate courts generally prefer that criminal defendants bring claims of ineffective assistance of counsel in habeas corpus proceedings, rather than on direct appeal. *See Bernal*, 2006-NMSC-050, ¶ 33; *State v. Barela*, 2018-NMCA-067, ¶ 17, 429 P.3d 961. For a claim of ineffective assistance of counsel raised on direct appeal, "we evaluate the facts that are part of the record." *Crocco*, 2014-NMSC-016, ¶ 14 (internal quotation marks and citation omitted).

A. Severance of the Charge of Felon in Possession of a Firearm

{31} Based on the record before us, we are unable to determine whether the absence of a motion to sever Defendant's charge of felon in possession of a firearm from his remaining charges "represent[s a] potentially serious failure[] on the part of trial counsel" or sound trial tactic or strategy, "which may demand a full-bodied inquiry at an evidentiary hearing on habeas corpus." *Bernal*, 2006-NMSC-050, ¶ 35; *see also Crocco*, 2014-NMSC-016, ¶ 15 ("Without an adequate record, an appellate court cannot determine that trial counsel provided constitutionally ineffective assistance."); *State v. Garcia*, 2011-NMSC-003, ¶ 33, 149 N.M. 185, 246 P.3d 1057 (recognizing that only a " 'sound' trial tactic or strategy withstands review"). We are therefore unable to conclude that Defendant has demonstrated a prima facie case for ineffective assistance of counsel as to the question of severance. We note, of course, that Defendant may choose to pursue this particular claim in a habeas corpus petition, at which time a hearing may be held to consider evidence concerning trial counsel's performance and any resulting prejudice. *See Bernal*, 2006-NMSC-050, ¶ 35.

B. Cross-Examination of Mr. Howell

{32} We next turn to Defendant's second argument, i.e., that his trial counsel was ineffective for failing to cross-examine Mr. Howell concerning his criminal history. Specifically, Defendant argues that his trial counsel should have inquired into Mr. Howell's criminal history subsequent to the night of the restaurant robbery because Mr. Howell testified on direct examination that, at the time of the robbery, he had no criminal history.

{33} We begin with the principle that our analysis here is not an occasion for retrospection. *See Lytle v. Jordan*, 2001-NMSC-016, ¶ 50, 130 N.M. 198, 22 P.3d 666. Defendant's argument relies solely on the proposition that his trial counsel should have done more to attack Mr. Howell's credibility, while conceding that his trial counsel did indeed cross-examine Mr. Howell on the truthfulness of his trial testimony and his answers to questions from law enforcement during its investigation, and on the terms of his plea agreement as they related to his testimony against Defendant. While, in hindsight, it may have been prudent to elicit testimony on Mr. Howell's criminal history, if admissible, under the specific facts of this case, where trial counsel conducted an extensive cross-examination of Mr. Howell, we cannot conclude that trial counsel's performance here was deficient. *See State v. Martinez*, 2007-NMCA-160, ¶ 26, 143 N.M. 96, 173 P.3d 18 (noting that a "questionable" approach to representation "does not necessarily amount to ineffective assistance"); *see also Lytle*, 2001-NMSC-016, ¶ 26 ("Judicial scrutiny of counsel's performance must be highly deferential." (internal quotation marks and citation omitted)).

{34} As well, Defendant's argument is premised largely on speculation. Specifically, Defendant states that evidence of Mr. Howell's criminal conduct subsequent to the night of the restaurant robbery would have been admitted had trial counsel pursued such questioning on cross-examination. However, the admission of evidence and the limits on cross-examination fall within the district court's sound discretion. *See State v. Bent*, 2013-NMCA-108, ¶ 13, 328 P.3d 677 (recognizing that "the district court has broad discretion over cross-examination"); *State v. Landgraf*, 1996-NMCA-024, ¶ 19, 121 N.M. 445, 913 P.2d 252 (recognizing the district court's "broad discretion to determine the relevance and probative value of offered testimony"); *State v. Ramming*, 1987-NMCA-067, ¶ 33, 106 N.M. 42, 738 P.2d 914 ("Admission of evidence is discretionary with the [district] court."). Even if any evidence concerning Mr. Howell's criminal history would have been admitted by the district court, in particular, the nature of the convictions, the impact such admission would have had on the jury is also entirely speculative. *See State v. Elliott*, 1977-NMSC-002, ¶ 10, 89 N.M. 756, 557 P.2d 1105 (noting that appellate courts "will not speculate about hypothetical evidence that might have been developed at the defendant's trial"). We therefore decline to assume that the district court would have unequivocally admitted evidence of Mr. Howell's criminal conduct. *See State v. Ortega*, 2014-NMSC-017, ¶¶ 57, 59, 327 P.3d 1076 (rejecting ineffective assistance of counsel claims with "purely speculative" arguments unsupported by the record).

{35} Thus, we cannot conclude that Defendant has demonstrated that his trial counsel erred in his performance by failing to cross-examine Mr. Howell concerning Mr. Howell's criminal history. We need not proceed to analyze prejudice. *See Garcia*, 2011-NMSC-003, ¶ 34 (noting that the question of prejudice in an ineffective assistance of counsel claim need not be reached if the defendant does not demonstrate deficiency in trial counsel's performance).

{36} For all these reasons, we hold that Defendant has not made a prima facie case of ineffective assistance of counsel on direct appeal, and we therefore decline to remand the case to the district court for a hearing on the same. *See State v. Swavola*, 1992-NMCA-089, ¶ 3, 114 N.M. 472, 840 P.2d 1238 (restricting remand "to those cases in which the record on appeal establishes a prima facie case of ineffective assistance"). Again, our holding herein should not be construed to prejudice Defendant's ability to pursue a similar claim in a habeas corpus proceeding.

CONCLUSION

{37} Defendant's convictions for aggravated battery with a deadly weapon, one count of aggravated assault with a deadly weapon, and false imprisonment violate principles of double jeopardy and are therefore reversed. We reject Defendant's claims that the record on direct appeal establishes a prima facie case of ineffective assistance of counsel. We remand this case to the district court with instructions to amend the judgment and sentence in accordance with this opinion.

{38} IT IS SO ORDERED.

SHAMMARA H. HENDERSON, Judge

WE CONCUR:

JACQUELINE R. MEDINA, Judge

ZACHARY A. IVES, Judge

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-026
No: A-1-CA-36925 (filed June 9, 2020)

STATE OF NEW MEXICO ex rel.
FRANK C. FOY, JOHN CASEY, and SUZANNE FOY,
Qui Tam Plaintiffs-Appellants,
v.
VANDERBILT CAPITAL ADVISORS, LLC; VANDERBILT FINANCIAL, LLC; VANDERBILT FINANCIAL TRUST; OSBERT M. HOOD; RON D. KESSINGER; ROBERT P. NAULT; JAMES R. STERN; PATRICK A. LIVNEY; STEPHEN C. BERNHARDT; KURT W. FLORIAN, JR.; ANTHONY J. KOENIG, JR.; MARK E. BRADLEY; PIONEER INVESTMENT MANAGEMENT U.S.A., INC.; PIONEER GLOBAL ASSET MANAGEMENT S.P.A.; UNICREDIT S.P.A.; KATTEN MUCHIN ROSENMAN LLP; RICHARDS, LAYTON & FINGER, P.A.; CLIFFORD PRICE WATERHOUSE COOPERS; BRUCE MALOTT; MEYNERS + CO; MARLA WOOD; GARY BLAND; SUSAN O. BLAND; CITIGROUP; CITIGROUP GLOBAL MARKETS INC.; BEAR, STERNS & CO. INC.; JP MORGAN SECURITIES, INC.; UBS INVESTMENT BANK; UBS SECURITIES LLC; CALYON SECURITIES (USA), INC.; CALYON CREDIT AGRICOLE CIB; CREDIT AGRICOLE SA; JEFFERIES CAPITAL MANAGEMENT, INC.; FORTIS SECURITIES LLC; FORTIS NV; ACA MANAGEMENT, L.L.C.; ABN AMRO, INC.; STONECASTLE SECURITIES, L.L.C.; NEPC; ALLAN C. MARTIN; MERRILL LYNCH & CO., INC.; LINDA CONTARINO; CLAUDIA CORRERA; GAETANA CORRERA; JOHN DOE #1; DAVID CONTARINO (JOHN DOE #2); MARC CORRERA (JOHN DOE #3); ANTHONY CORRERA (JOHN DOE #4); and JOHN DOE #5 THROUGH #100,
Defendants-Appellees,
and
AUSTIN CAPITAL MANAGEMENT, LTD; AUSTIN CAPITAL MANAGEMENT GP CORP.; CHARLES W. RILEY; BRENT A. MARTIN; DAVID E. FRIEDMAN; WILL JASON ROTTINGER; VICTORY CAPITAL MANAGEMENT, INC.; KEYCORP; BEREAN CAPITAL; DUDLEY BROWN; TREMONT PARTNERS, INC.; TREMONT CAPITAL MANAGEMENT, INC.; TREMONT GROUP HOLDINGS, INC.; OPPENHEIMER FUNDS, INC.; GARY BLAND; DAVID CONTARINO; BRUCE MALOTT; MEYNERS COMPANY; MARC CORRERA; ANTHONY CORRERA; SANDIA ASSET MANAGEMENT; ALFRED JACKSON; DAVIS HAMILTON AND JACKSON; GUY RIORDAN; JUNIPER CAPITAL; ILEEN KOTECKI; DAN HEVESI; HENRY "HANK" MORRIS; JULIO RAMIREZ; PAUL CROSS; CROSSCORE MANAGEMENT; SDN INVESTORS; PSILOS GROUP; ALBERT WAXMAN; JEFFREY KRAUSS; STEPHEN KRUPA; DAVID EICHLER; DARLENE COLLINS; WETHERLY CAPITAL GROUP; DAN WEINSTEIN; VICKY SCHIFF; QUADRANGLE ROUP; ALDUS EQUITY; SAUL MEYER; MERCELLUS TAYLOR; MATTHEW O'REILLY; RICHARD ELLMAN; DEUTSCHE BANK; DIAMOND EDGE CAPITAL; MARVIN ROSEN; CARLYLE MEZZANINE PARTNERS; CARLYLE GROUP; DB INVESTMENT MANAGERS; TOPIARY TRUST; PARK HILL GROUP; DAN PRENDERGAST; CATTERTON PARTNERS; BLACKSTONE GROUP; GOLD BRIDGE CAPITAL; DARIUS ANDERSON; KIRK ANDERSON; ARES MANAGEMENT;INROADS GROUP; CAMDEN PARTNERS; HFV; BARRETT WISSMAN; TAG; AJAX INVESTMENTS; CAYTON DUBILIER AND RICE; INTERMEDIA; LEO HINDERY;WILLIAM R. HOWELL; CABRERA CAPITAL; MARTIN CABRERA; CRESTILNE INVESTORS; JOHN DOE #1; AND JOHN DOE #3 THROUGH #50,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Louis P. McDonald, District Judge

Certiorari Denied, October 9, 2020, No. S-1-SC-38413.
Released for Publication June 21, 2022.

Victor R. Marshall & Associates, P.C.
Victor R. Marshall
Albuquerque, NM

for Appellants

Hector H. Balderas, Attorney General
Joseph M. Dworak, Assistant Attorney General
Santa Fe, NM

Angelica Anaya Allen, Assistant Attorney General
Brian L. Moore, Assistant Attorney General
Albuquerque, NM

for State of New Mexico

continued from previous page

Rodey, Dickason, Sloan,
Akin & Robb, P.A.
Andrew G. Schultz
Albuquerque, NM

Fried, Frank, Harris,
Shriver & Jacobson LLRP
Peter L. Simmons
New York, NY

for Vanderbilt Appellees

Madison Harbour & Mroz, P.A.
William C. Madison
Albuquerque, NM

for Appellee Livney

Esquivel & Howington, LLC
Martin R. Esquivel
Albuquerque, NM

for Appellee Malott

FallickLaw, Ltd.
Gregg Vance Fallick
Albuquerque, NM

for Appellees Malott and Wood

Holland & Hart LLP
Mark F. Sheridan
Julia Broggi
Santa Fe, NM

Paul Weiss Rifkind Wharton &
Garrison, LLP
Richard A. Rosen
New York, NY

for Appellees Citigroup Inc.; Citigroup Global Markets Inc.; Bear, Stearns & Co., Inc.; JP Morgan Securities Inc.; and ABN AMRO Inc.

Budagher & Associates
John A. Budagher III
Albuquerque, NM

Reed Smith LLP
Jordan W. Siev
New York, NY
Andrew C. Bernasconi
Washington, DC
for Appellee Calyon Securities (USA) Inc. n/k/a Credit Agricole Securities (USA) Inc.

Keleher & McLeod, P.A.
W. Spencer Reid
David W. Peterson
Albuquerque, NM

for Appellee ACA Management, LLC

Miller Stratvert, P.A.
Kirk R. Allen
Albuquerque, NM

Morvillo Abramowitz Grand Iason &
Anello P.C.
Edward M. Spiro
Richard D. Weinberg
New York, NY

for Appellee Merrill Lynch & Co., Inc.

Modrall, Sperling, Roehl,
Harris & Sisk, P.A.
Brian K. Nichols
Albuquerque, NM

Proskauer Rose LLP
Dietrich L. Snell
New York, NY
for Appellees Ares Management, Collins, Eichler, Krauss, Krupa, Psilos Group, and Waxman

Modrall, Sperling, Roehl,
Harris & Sisk, P.A.
John R. Cooney
R.E. Thompson
Albuquerque, NM

Robbins, Russell, Englert, Orseck,
Untereiner & Sauber LLP
Richard A. Sauber
Washington, DC

for Appellee Quadrangle Group LLC

Michael W. Brennan, P.A.
Michael W. Brennan
Santa Fe, NM

for Appellees Blackstone Group, Park Hill Group, and Prendergast

Maldegen, Templeman & Indall LLP
Jon J. Indall
Santa Fe, NM

for Appellees Intermedia and Hindery

Butt Thornton & Baehr PC
Rodney L. Schlagel
Albuquerque, NM

for Appellee Howell

Keleher & McLeod, P.A.
Sean Olivas
Albuquerque, NM

for Appellees Cabrera Capital and Cabrera

OPINION

BUSTAMANTE, Judge Pro Tempore.

{1} A long and winding road has led these cases to our door. Following eight years of litigation at the trial and appellate levels, the district court entered a judgment that dismissed the Qui Tam Plaintiffs' Fraud Against Taxpayers Act (FATA) claims in their entirety. The judgment also approved a settlement negotiated by the Attorney General's Office (AGO) with certain—but not all—defendants. Raising a plethora of issues, Qui Tam Plaintiffs appeal. We affirm.

I. Background and Procedural Posture

{2} These two now-consolidated actions were among the first actions filed in New Mexico under the auspices of FATA, NMSA 1978, §§ 44-9-1 to -14 (2007, as amended through 2015). FATA allows private persons to "bring a civil action for a violation of Section 44-9-3 . . . on behalf of the person and the state or political subdivision."

Section 44-9-5(A). Cases brought by private parties in like circumstances are commonly known as "qui tam actions." *State ex rel. Foy v. Austin Capital Mgmt., Ltd.* (*Austin II*), 2015-NMSC-025, ¶ 3, 355 P.3d 1. And the private persons bringing the actions are generally referred to as qui tam plaintiffs. The qui tam plaintiffs who initiated these actions are Frank C. Foy, Suzanne Foy, and John Casey. We will refer to them as "Qui Tam Plaintiffs."

{3} Litigation under FATA has produced five reported opinions, including two involving the case we decide today. *Austin II*, 2015-NMSC-025, ¶ 1 (holding that FATA's retroactive effect does not violate the *Ex Post Facto* clauses of the United States and New Mexico Constitutions); *State ex rel. Foy v. Oppenheimer & Co.*, 2019-NMCA-045, ¶¶ 3, 23, 447 P.3d 1159 (affirming dismissal of qui tam action pursuant to Section 44-9-9(D)); *N.M. State Inv. Council v. Weinstein*, 2016-NMCA-069, ¶ 2, 382 P.3d 923 (affirming approval of settlements over the qui tam plaintiffs' objections); *State ex rel. Peterson v. Aramark Corr. Servs., LLC*, 2014-NMCA-036, ¶ 3, 321 P.3d 128 (concluding that issue and claim preclusion concepts did not bar the action); *State ex rel. Foy v. Austin Capital Mgmt., Ltd.* (*Austin I*), 2013-NMCA-043, 297 P.3d 357, *aff'd in part, reversed in part by Austin II*, 2015-NMSC-025. The opinions in these cases do not directly resolve all the issues presented to us here, but they do provide useful history and context to our discussion. *Weinstein* is particularly apropos.

A. Pre-Consolidation Procedures

{4} Qui Tam Plaintiffs Frank and Suzanne Foy filed their first FATA complaint in July 2008. *See State ex rel. Foy v. Vanderbilt Capital Advisors, LLC* (*Vanderbilt*), D-101-CV-2008-1895. The *Vanderbilt* complaint focused on investments made in 2006 by the State Investment Council (SIC) and the New Mexico Educational Retirement Board (ERB) in collateralized debt obligations (CDOs). The complaint alleged that Defendants made numerous false and misleading claims and representations concerning the nature and quality of the investments, the risks involved, and relationship between Defendants. Defendants included apparently all of the individuals, financial institutions, accounting firms, and legal services firms involved in creating, financing, and marketing the CDO instruments.

{5} In accordance with Section 44-9-5(B), the complaint was filed under seal. Following some delay, the AGO filed the State's "Notice of Election to Decline Intervention" in December 2008. *See* § 44-9-6(F). That filing allowed the complaint to be unsealed and for litigation to proceed.

{6} Qui Tam Plaintiffs filed their second FATA action in April 2009. *See State ex rel. Foy v. Austin Capital Mgmt., Ltd.* (*Austin*), No. D-101-CV-2009-01189. The initial complaint focused on losses suffered in investments made through Austin in the now-infamous funds operated by Bernie Madoff, asserting that those investments—and others—were made as a result of political influence exerted by the executive branch. Less than two months later Qui Tam Plaintiffs filed a first amended complaint adding more than fifty new Defendants and more detailed allegations of "pay-to-play" wrongdoing involving payment of undisclosed and improper third-party placement fees to Mark Correra. The file does not reveal an election not to intervene by the AGO, but the AGO did sign a joint motion to unseal the complaint. The order granting the joint motion makes clear that the AGO did not intend to be actively involved in the case, at least not initially. The two cases were assigned to different district court judges.

{7} Consisting primarily of discovery skirmishes, challenges to jurisdiction, and a short-lived removal to federal court, little of what ensued the next four years is particularly pertinent to the issues before us. Four items do stand out, however.

{8} First, the *Vanderbilt* district court judge—Judge Stephen Pfeffer— dismissed all claims that accrued prior to the effective date of FATA on ex post facto grounds. The district court in *Austin*—Judge John Pope—later adopted the reasoning and analysis of Judge Pfeffer's ruling. Judge Pope's ruling ultimately led to our Supreme Court's ruling in *Austin II* that FATA does not violate ex post facto limitations. 2015-NMSC-025, ¶ 1. As of October 2011, litigation in the *Austin* case was stayed while the case was on appeal, with the exception that the district court was allowed to rule on the AGO's pending motion for partial dismissal of the "pay-to-play" allegations in the FATA complaint. The district court never ruled on the motion.

{9} Second, in June 2011, Qui Tam Plaintiffs filed identical motions in both cases to disqualify Attorney General Gary King and Day Pitney—the law firm the SIC had hired to pursue recovery efforts with regard to "pay-to-play" improprieties in its investments—from representing the SIC. The motion asserted that Attorney General King's political ties to Governor Richardson's administration prevented him from participating in the case. The motion also alleged that a number of assistant attorneys general had personal ties to the administration that precluded them from working on the case. And the motion asserted that the State Investment Officer and the vice-chair of the SIC were complicit in the pay-to-play activities alleged in the first amended complaint. With regard to Day Pitney, the motion asserted that it had represented the Trustee of the New York Common Fund in its efforts to recover money from Austin and thus Day Pitney necessarily had divided loyalties. The motion also argued that Day Pitney had a conflict because most of its revenue came from representing "Wall Street" firms in securities case, and that this was influencing how it was conducting the litigation—all to the detriment of the SIC. Qui Tam Plaintiffs attached numerous exhibits to the motion, including a March 2011 letter Mr. Victor Marshall sent to Governor Susana Martinez explaining Qui Tam Plaintiffs' position concerning the conflicts as they perceived them.

{10} The district court in *Vanderbilt* denied the motion on the ground that Qui Tam Plaintiffs lacked standing to raise the conflict of interest issue. The district court in *Austin* never ruled on the motion.

{11} Third, in May 2011, the AGO filed motions in *Vanderbilt* and *Austin* seeking dismissal of those portions of the qui tam complaints that relied on allegations of pay-to-play and improper use of third-party marketers in connection with SIC investments. The motions attached edited versions of the qui tam complaints reflecting the AGO's request. The *Vanderbilt* court granted the motion in December 2011. The *Austin* court never entered an order on the motion.

{12} Fourth, in February 2013, the AGO, on behalf of the State, filed a motion asking the district court to approve a settlement it had negotiated on behalf of the SIC and the ERB. The settlement was part of the AGO's alternative remedy plan that specifically addressed the CDO investments the SIC and ERB had made through the Vanderbilt entities. The AGO's alternative plan was summarized in *Weinstein* and need not be repeated here. 2016-NMCA-069, ¶¶ 11-14. A copy of the signed settlement agreement (Settlement Agreement) was attached to the motion. It is the same document and agreement before us now, seven years later. The $24.25 million payment called for in the Settlement Agreement remains in escrow to this date.

{13} The district court denied the AGO's motion, expressing concern about the propriety and feasibility of assessing the fairness, adequacy, and reasonableness of the settlement at that point. The court noted, for example, that our Supreme Court's decision on the constitutionality of FATA's retroactive provisions might affect the accuracy of the parties' assessment of Defendants' exposure. In addition, the court expressed concern about whether it could assess the settlement in the absence of more formal discovery by the parties.

Also, the court was concerned that the AGO had over-reached by asking that Qui Tam Plaintiffs not be allowed to challenge the settlement and not be allowed to request an award, attorney fees, or expenses.

{14} In the same order, the district court stayed all proceedings in the case until such time as our Supreme Court decided the ex post facto issues. The case lay fallow until August 2015 when our Supreme Court mandated the matter back to the district court, entered an order consolidating the *Vanderbilt* and *Austin* proceedings and designated Judge McDonald to preside over both cases.

{15} We highlight these aspects of the pre-consolidation history of the cases to demonstrate that the primary issues we will deal with have been present and have been dealt with repeatedly—in this litigation and in other cases. The contentiousness of the relationship between Qui Tam Plaintiffs and the AGO is notable and unfortunate.

B. Post-Consolidation Litigation

{16} The first substantive activity in the case after mandate issued was Qui Tam Plaintiffs' request for a status conference to address a number of items, including service of process issues, a new complaint Qui Tam Plaintiffs intended to file, discovery matters, and "[e]nforcement of Judge Pfeffer's Order of July 13, 2013" denying the AGO's first motion to approve the Settlement Agreement. Qui Tam Plaintiffs filed their motion to amend the complaint before the requested status conference was held. The proposed "Amended, Supplemented and Consolidated Complaint" added sixty-three new Defendants, included new assertions of false and misleading statements about the investments, and made new assertions of conspiracies among Defendants.

{17} On the same day—and in explicit response to Qui Tam Plaintiffs' request—the AGO filed its status report. The AGO explained its alternative enforcement efforts to date and laid out its litigation strategy for the cases, including reviving its request for approval of the Settlement Agreement and seeking complete dismissal of Qui Tam Plaintiffs' complaints. The AGO also sought "to clarify the role of the State vis a vis Qui Tam Plaintiffs" in the litigation, urging that FATA did "not displace the predominating authority of the New Mexico Attorney General to represent the interests of the State[.]"

{18} At the October 2015 status conference, the district court decided that it would be more efficient to hear and decide the AGO's motions to dismiss and to approve the Settlement Agreement before it dealt with the request to amend the complaints.

{19} In accordance with the district court's order, the AGO filed its motion to dismiss first, arguing—in part—that "the State, which is the real party in interest, has created its own enforcement plan and elected, pursuant to FATA Section 44-9-6(H), to seek alternate remedies to FATA." The motion also asked that the district court hold "that the settlements approved by Judge Singleton in *The New Mexico State Investment Council v. Gary Bland, et. al.*, No. D-101-[C]V-2011-01534 . . . have a preclusive effect on . . . Qui Tam Plaintiffs' FATA claims related to pay-to-play at the SIC." This motion framed the course of the litigation through the evidentiary hearing held in April 2016.

{20} In tenacious pursuit of their argument that SIC's enforcement counsel Day Pitney had fatal conflicts of interest, Qui Tam Plaintiffs filed a separate FATA suit against the law firm, accusing it of wide-ranging nefarious conduct. *See State ex rel. Foy v. Day Pitney LLP, et. al.*, No. D-101-CV-2015-02049. Qui Tam Plaintiffs filed a copy of the complaint in these cases as a "related proceeding." The filing gave rise to heated motion practice, but it is not clear what ultimately came of the filing. The complaint was not introduced or used at the hearing. The primary case was stayed in July 2016 and continues to be inactive.

{21} Highlighting their focus on disqualifying Day Pitney as a litigation strategy, Qui Tam Plaintiffs in January 2016 filed a "Motion to Give No Effect to Day Pitney Settlements." The motion relied on the FATA suit against Day Pitney, but also attached case captions from electronic searches showing that Day Pitney had in the past represented some of the "Wall Street" Defendants in the case, including Citigroup, JP Morgan, Deutsche Bank, Ernst & Young, Merrill Lynch, and Bank of America. None of the cases involved SIC or ERB recovery efforts. This motion led to another round of briefing by the AGO, Vanderbilt, and other settling Defendants.

{22} Finally, Qui Tam Plaintiffs requested leave to submit "Limited Discovery Concerning Day Pitney Conflicts" on Day Pitney. The district court allowed Qui Tam Plaintiffs to serve six interrogatories on two Day Pitney attorneys. Qui Tam Plaintiffs served the interrogatories on March 17 and the attorneys responded on April 13—nine days before the evidentiary hearing on the AGO's motions.

{23} The district court provided the parties three and a half days of trial time starting April 25, 2016. The parties submitted their requested findings of facts and conclusions of law by the end of July 2016. The district court entered its findings and conclusions ten months later and its final judgment on September 5, 2017. Qui Tam Plaintiffs timely appealed.

II. Issues and Appellate Review Standards

{24} As a preliminary matter, we address certain aspects of Qui Tam Plaintiffs' briefing in order to provide context to our decisional process.

{25} First, Qui Tam Plaintiffs' brief in chief (BIC) asserts that the appeal presents only questions of law subject to de novo review "[b]ecause the district court dismissed this case without discovery and without a trial[.]" Qui Tam Plaintiffs apparently do not think the three-and-one-half-day evidentiary hearing they participated in qualifies as a "trial." They are mistaken. We will apply the appropriate standard of review to the issues Qui Tam Plaintiffs have properly preserved and argued.

{26} Second, Qui Tam Plaintiffs' approach to briefing carries consequences with regard to our review of the case. For example, in keeping with their theory that the appeal presents only legal issues, the BIC does not include any specific attack on, or even any point of disagreement with, any of the district court's findings of fact. Instead the BIC asserts a blanket "challenge [to] all of the district court's findings and conclusions." This approach is improper, ineffective, and contrary to the Rules of Appellate Procedure. *See* Rule 12-318(A)(4) NMRA (requiring a "specific attack on any finding, or the finding shall be deemed conclusive").

{27} Rule 12-318(A)(4) also requires "with respect to each issue presented . . . citations to authorities, record proper, transcript of proceedings, or exhibits relied on." The BIC includes very few citations to the record proper, transcript of the hearing, or the exhibits admitted. This by itself is problematic for our review in that it would require us to search a large record proper (some 16,000 pages) on our own for pertinent material. This we are not required to do. Presentation of an organized, lucid argument is Qui Tam Plaintiffs' burden, and they cannot foist it on this Court. "This [C]ourt will not search the record to find evidence to support an appellant's claims." *In re Estate of Heeter*, 1992-NMCA-032, ¶ 15, 113 N.M. 691, 831 P.2d 990.

{28} In addition, the BIC utterly fails to include a summary of the "substance of the evidence bearing on [a] proposition[.]" Rule 12-318(A)(3). "[A]n appellant is bound by the findings of fact made below unless the appellant properly attacks the findings, and . . . the appellant remains bound if he or she fails to properly set forth all the evidence bearing upon the findings." *Martinez v. Sw. Landfills, Inc.*, 1993-NMCA-020, ¶ 18, 115 N.M. 181, 848 P.2d 1108 (citing *Maloof v. San Juan Cty. Valuation Protest Bd.*, 1992-NMCA-127, ¶ 19, 114 N.M. 755, 845 P.2d 849).

To the extent the BIC cites material from the record, it discusses only those aspects which tend to support its position. This is not in keeping with the letter or spirit of the Rules of Appellate Procedure. As a result, we will not address any issues that are subject to the substantial evidence standard of review. *See Wachocki v. Bernalillo Cty. Sheriff's Dep't*, 2010-NMCA-021, ¶¶ 15-17, 147 N.M. 720, 228 P.3d 504.

{29} Thus, we will not address whether the district court's findings of fact concerning the Settlement Agreement are supported by substantial evidence. Similarly, we will not address the findings of fact supporting the district court's conclusion that dismissal of the FATA claims is appropriate. And, we will not address Qui Tam Plaintiffs' challenge to the findings of fact supporting the district court's conclusion that the Settlement Agreement was appropriately approved and ratified by the SIC and ERB. We will, however, examine any properly preserved legal arguments that affect these issues.

{30} Third, we will not address undeveloped and incoherent arguments. Qui Tam Plaintiffs' bald assertion that the district court did not carry out our Supreme Court's mandate in *Austin II* fits that category.

{31} Fourth, Qui Tam Plaintiffs complain that the district court refused to enforce a subpoena duces tecum they served in 2009 on an entity called the Moving America Forward Foundation. Qui Tam Plaintiffs cite to an "Exhibit 16" to show what they expected to get with the subpoena. "Exhibit 16" was not offered or admitted at the hearing and is not part of the record on appeal. The BIC does not cite to the record to demonstrate when enforcement was requested, when the matter was argued, or why the district court denied it. Under these circumstances, we will not address the issue.

{32} Fifth, Qui Tam Plaintiffs assert that "the [district] court relied on statements by the lawyers in the case." Apart from citation to general case law, the BIC fails to provide any detail about what the "statements" were, how they were made, or how the district court "relied" on them. There is not a single citation to the record. We cannot address this issue.

{33} Sixth, Qui Tam Plaintiffs argue that it was error for the district court to admit transcripts of depositions conducted by the Securities and Exchange Commission (SEC) as part of its investigation of pay-to-play activities in New Mexico and elsewhere. However, Qui Tam Plaintiffs fail to direct our attention to where in the record they objected to the admission of the transcripts. Absent a timely objection, Qui Tam Plaintiffs did not preserve the issue for appeal. *See Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 ("[O]n appeal, the party must specifically point out where, in the record, the party invoked the court's ruling on the issue. Absent that citation to the record or any obvious preservation, we will not consider the issue."). In any event, the district court was clear that it was admitting the material only to show that the AGO received it in the course of its investigation, and not as substantive evidence. We also note that Qui Tam Plaintiffs offered Anthony Correra's SEC deposition, and it was admitted on the same basis.

{34} Seventh, in the BIC, Qui Tam Plaintiffs argue that the district court gave "collateral effect to settlements in other cases which were never tried." In addition to not providing any record proper citation, Qui Tam Plaintiffs' assertion ignores the final judgment entered in this case. In paragraph 4 of the final judgment, the district court noted that the State's "motion to determine the preclusive effect, if any, to the previously-approved settlements between . . . [D]efendants other than the Vanderbilt Settling Defendants is now moot[.]"

Discovery and Evidentiary Rulings

{35} **Q**ui Tam Plaintiffs assert that the district court refused to allow them any discovery as to the merits of the case against Defendants or as to the fairness and adequacy of the Settlement Agreement. They also complain that they were not allowed to sufficiently explore Day Pitney's conflicts of interest. Discovery and evidentiary rulings are generally reviewed for abuse of discretion. *See Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 6, 139 N.M. 671, 137 P.3d 611. We do not normally disturb a discovery ruling unless it "is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153. We may, however, find an abuse of discretion when a ruling is based on a misapprehension of the law. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450.

A. Discovery Issues

{36} The BIC is void of any citation to the record reflecting any submitted discovery or any motion to allow discovery as to the merits of the case against Defendants or of the Settlement Agreement. There is one reference in the BIC to the previously mentioned motion for limited discovery concerning Day Pitney conflicts. In that pleading Qui Tam Plaintiffs assert that if evidence is to be heard at the scheduled April hearing, "Foy must be allowed to conduct discovery." Apparently, at least some of these matters were considered during a March 14 status conference because the district court entered an order allowing discovery on two Day Pitney attorneys. The order does not mention any discussion about discovery as to the merits or the settlement. And the record before us does not include a transcript of the March 14 status conference.

{37} Qui Tam Plaintiffs also fail to acknowledge that they were provided or had access to all of the informal discovery the AGO had amassed during its pursuit of its alternative remedy, including the entire (some 5,000,000 pages) SEC investigation, plus all material gathered internally from SIC and ERB files and personnel interviews. The SEC material was provided in October 2012—three and one-half years before the hearing in this case.

{38} Given the state of the briefs and record, we could refuse to deal with the issues per the discussion above. But Qui Tam Plaintiffs make a legal argument that Sections 44-9-5 and -6 of FATA give them a "statutory right to gather and present evidence in opposition to the dismissal of the FATA lawsuit." The BIC is obtuse on this point, but Qui Tam Plaintiffs appear to assert a variation on the argument they made in *Weinstein* that FATA gives them an unfettered right to discovery. The variation makes no difference. Qui Tam Plaintiffs' arguments were made, analyzed, and resolved in *Weinstein*. *See* 2016-NMCA-069, ¶¶ 41-62. Qui Tam Plaintiffs fail to mention, much less attempt to distinguish *Weinstein*'s discussion of the issue. There is thus no reason to revisit the discussion. We do note, however, that in *Weinstein*, the qui tam plaintiffs at least submitted a discovery request that the district court curtailed. *See id.* ¶ 15. Here, Qui Tam Plaintiffs did not even do that.

{39} Finally, with regard to the discovery served on Day Pitney, Qui Tam Plaintiffs argue that the responses were inadequate and that the district court improperly denied their motion to compel further discovery. Qui Tam Plaintiffs fail to acknowledge that their motion to compel was filed on July 6, 2016—almost three months after the hearing in April was held and completed. The lateness of the motion to compel would be sufficient reason by itself to deny it.

B. Refusal to Admit Exhibit 18

{40} During the hearing Qui Tam Plaintiffs offered into evidence an audio recording, ostensibly of Saul Meyer—one of the defendants in the cases—talking about the investment atmosphere in New Mexico and making some remarkable assertions about then-Governor Richardson and the Correras. The district court refused to admit the recording primarily because the tape was not authenticated.

On appeal, Qui Tam Plaintiffs do not argue that the district court was wrong in its assessment or that the exhibit was admissible under some other rule of evidence. Qui Tam Plaintiffs' only argument is that they could not authenticate the tape because the "court barred any discovery."

{41} We have noted above that Qui Tam Plaintiffs did not serve any discovery requests nor move for permission to submit discovery apart from the asserted Day Pitney conflicts of interest. The district court sustained a proper objection to an exhibit. It cannot be faulted for not "allowing" discovery it was not asked to allow.

C. Amendment of Qui Tam Plaintiffs' Complaint

{42} Qui Tam Plaintiffs argue that the district court "prevented" them from amending their complaints contrary to Rule 1-015(A), (B), and (D) NMRA. Qui Tam Plaintiffs do not cite any order in the record to support their argument. Neither do they cite to any oral rulings denying the motion to amend. The district court acted on the request to amend at a status conference held to determine how the now-consolidated cases would proceed. It was Judge McDonald's first contact with the cases. The conversation started with Qui Tam Plaintiffs alerting the court to their recent motion to amend and their argument as to why it was needed. Various Defendants then suggested that—in accordance with the AGO's stated intent to pursue dismissal of the FATA claims entirely and to get approval of the settlement—it would be more efficient to hear those motions first. If they were granted, there would be no need to consider amending the complaint. After hearing the parties' arguments, the district court decided that the best way to proceed would be to consider the AGO's motions first. The district court set a briefing schedule for the motions and held the motion to amend in abeyance.

{43} The district court's order to hold the motion to amend in abeyance is reviewed under the abuse of discretion standard. *See All. Health of Santa Teresa, Inc. v. Nat'l Presto Indus.*, 2007-NMCA-157, ¶ 26, 143 N.M. 133, 173 P.3d 55. We see no abuse of discretion here. The district court chose a plan for the litigation that could avoid the need for amending the complaint. And, in recognition that the plan might not pan out, the district court simply held off ruling on the motion. We will not second-guess the district court's reasonable administration of the case before it. *See id.*

D. Authority of the Attorney General to Seek Dismissal of the FATA Claims and Approval of the Settlement Agreement

{44} Qui Tam Plaintiffs vaguely argue that the AGO did not have "legal authority" to appear in these cases and represent the State because it elected not to intervene when the cases were first filed and because it never sought to formally intervene thereafter. We hesitate to address the issue because, once again, Qui Tam Plaintiffs do not provide any references to the record indicating when this matter was brought to the attention of the district court. We have decided to address the matter because it is an important question of law affecting the operation of FATA and because it is likely to arise in the future.

{45} Qui Tam Plaintiffs advanced a version of the argument below in a pleading they called "Consolidated Response to Recent Motions to Dismiss." They did not, however, mention below that the AGO's failure to formally intervene was problematic. That facet of the argument was thus not preserved. *See Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717 ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court."). We will not address it further, except to note that it would have been a mere formality in this case given that the AGO had by then been actively engaged in the case since 2009 when Judge Pfeffer asked it to provide an amicus brief on the issue of FATA's retroactive provisions. The AGO also filed a brief in support of Qui Tam Plaintiffs' motion to reconsider Judge Pfeffer's ex post facto dismissal order. Thus by the time the AGO filed its motion for partial dismissal in May 2011, it had been actively engaged in the case for seventeen months.

{46} Putting the technical issue of intervention aside, the question becomes: may the AGO seek dismissal of a qui tam FATA complaint—and ask the district court to approve alternate-remedy settlements it has negotiated—after it has declined to take over the action pursuant to Section 44-9-5(D)(2)? The answer must be "yes" based on a relatively straightforward reading of FATA combined with the broad statutory powers and duties of the Attorney General.

{47} Interpretation of statutes is, of course, a question of law that we undertake de novo. *State ex rel. Children, Youth & Families Dep't v. Maurice H.* (*In re Grace H.*), 2014-NMSC-034, ¶ 65, 335 P.3d 746. We look first to "the wording of the statute and attempt to apply the plain meaning rule[.]" *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 9, 148 N.M. 426, 237 P.3d 728 (internal quotation marks and citation omitted). When construing individual statutory sections within a comprehensive act, we "examine the overall structure of the act and consider each section's function within the comprehensive legislative scheme." *Britton v. Office of the Att'y Gen.*, 2019-NMCA-002, ¶ 27, 433 P.3d 320. When the language of the act is not readily susceptible to a plain meaning analysis, we may also "consider the practical implications and the legislative purpose of the statute[.]" *Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶ 11, 146 N.M. 473, 212 P.3d 361; *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346, 871 P.2d 1352.

{48} Qui Tam Plaintiffs' analysis begins and ends with Section 44-9-5(D). The gist of their argument is that, once the AGO declines to take over the case, qui tam plaintiffs and their counsel become the sole representative of the State's interest. Qui Tam Plaintiffs quote from the first sentence of Section 44-9-6(F) to polish off their argument: "If the state . . . elects not to proceed with the action, the qui tam plaintiff shall have the right to conduct the action." The upshot of Qui Tam Plaintiffs' analysis is that once in control, they cannot be supplanted.

{49} But Qui Tam Plaintiffs improperly ignore the last sentence of Section 44-9-6(F): "When the qui tam plaintiff proceeds with the action, the court, without limiting the status and rights of the qui tam plaintiff, may permit the attorney general or political subdivision to intervene at a later date upon a showing of good cause." Subsection (F) allows the AGO to reengage after initially declining to "take over the action[,]" pursuant to Section 44-9-5(D)(2). *See* § 44-9-6(F).

{50} The more interesting question is how the litigation will proceed once the AGO has intervened. Joinder of the AGO results in two parties ostensibly representing the state. Section 44-9-6 is not clear about the relationship between qui tams and the AGO when the AGO intervenes in an ongoing action. Should qui tams continue as the lead party representing the state, or do the parties' roles revert to that described in Section 44-9-6(A) and (D)? These sections contemplate that the AGO will be in control of the litigation. The parties' arguments below and here revolve around this primary question.

{51} We conclude that in the context of *this* case, the issue is largely irrelevant because we are not presented with a situation where continued active litigation against Defendants was necessarily in the offing. Rather, the AGO's purpose and objective in getting back in was to end the FATA litigation and get the alternative remedy settlement it had negotiated approved. Section 44-9-6(B) and (C) allow the "State" to proceed exactly as the AGO did here.

{52} The source of the AGO's authority to participate actively in a qui tam proceeding once it has reengaged is not a mystery. Qui Tam Plaintiffs argue that because they are the sole representative of the "State," the AGO cannot claim the same mantle unless it relies on some undefined common law power—which the AGO does not have—to act. This argument, again, ignores Section 44-9-6(F) allowing the AGO to intervene. More importantly, Qui Tam Plaintiffs do not explain how or why a decision early in the life of qui tam action not to take over the case negates the AGO's statutory status as the state's legal representative. The Legislature has endowed the AGO with broad powers and burdened it with broad duties. NMSA 1978, Section 8-5-2(A), (B), and (J) (1975) provide:

> Except as otherwise provided by law, the attorney general shall:
>
> A. prosecute and defend all causes in the [S]upreme [C]ourt and [C]ourt of [A]ppeals in which the state is a party or interested;
>
> B. prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor;
>
> . . . .
>
> J. appear before local, state and federal courts and regulatory officers, agencies and bodies to represent and to be heard on behalf of the state when, in his judgment, the public interest of the state requires such action or when requested to do so by the governor[.]

These sections make clear that the AGO is the state's lawyer. It would be absurd for us to conclude that an election under Section 44-9-5(D) negates these powers and duties. The Legislature simply could not have intended that result.

E. The District Court Applied an Appropriate Standard of Proof to Find "Good Cause" for Dismissal of the FATA Complaint

{53} Section 44-9-6(B) of FATA provides:

> The state . . . may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and to present evidence at a hearing.

In its conclusions of law relevant to the AGO's motion, the district court observed that "[i]n jurisdictions that, like New Mexico, have enacted statutes containing a 'good cause' requirement for dismissal of a qui tam action, courts have adopted a highly deferential 'rational basis' standard of review. Under that standard, the [s]tate need only proffer a reason for dismissing the action that is 'rationally related to a valid government purpose.' "

{54} Qui Tam Plaintiffs argue that this deferential rational basis standard is simply incompatible with FATA's requirement of good cause. Unfortunately, they do not provide any analysis beyond juxtaposition of the words.

{55} As the district court recognized, we are not writing on a blank slate. California and Nevada courts have concluded that the "rational basis" standard is appropriate under their false claims acts, both of which require a showing of "good cause" for dismissal of a qui tam action at the behest of the state. *See* Cal. Gov't Code § 12652(e)(2)(A) (West 2013); Nev. Rev. Stat. Ann. § 357.120(2) (West 2015).

{56} California took up the issue first in *Laraway v. Sutro & Co.*, 116 Cal. Rptr. 2d 823 (Cal. Ct. App. 2002). In *Laraway* the qui tam plaintiff filed an action asserting that a contractor and certain employees of a school district were improperly paid for travel expenses because they were not pre-approved. *Id.* at 826. The school district intervened and filed a motion to dismiss. *Id.* The qui tam plaintiff argued that his complaint stated a cause of action and thus there could be no good cause to dismiss it. *Id.* at 828. The trial court disagreed. *Id.* at 826.

{57} On appeal, the court noted that good cause was not defined in the statute. *Id.* at 829. "Good cause" is not defined in FATA either. The court observed that the meaning of good cause is of necessity relative and dependent on all circumstances. *Id.* at 830. As such, the meaning of "good cause" in the context of the California False Claims Act (and FATA) requires statutory construction. Because "good cause" is susceptible to more than one reasonable meaning, the plain meaning approach to construction is of no avail. We must resort to other aids, including consideration of the legislative purpose and aim to be achieved, the place of the statute in the scheme of governance, and the actors involved. We should also consider the practical implications various interpretations would have on implementation of the statute. *See id.*; *see also Bishop*, 2009-NMSC-036, ¶ 11.

{58} The *Laraway* court suggested that a reasonable place to start was a compendium of what good cause might include in this context; for example, "reasons that are fair, honest, in good faith, not trivial, arbitrary, capricious, or pretextual, and reasonably related to legitimate needs, goals, and purposes." *Laraway*, 116 Cal. Rptr. 2d at 830. The approach commends itself to us.

{59} With these considerations in mind, the *Laraway* court first noted that the Ninth Circuit Court of Appeals had adopted a dismissal standard as matter of substantive due process for the Federal False Claims Act even though it does not include a good cause requirement. *Id.*; *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (holding that the government can dismiss an FCA action for any reason rationally related to legitimate government purpose, and the reason may not be fraudulent, arbitrary, capricious or illegal).

{60} Turning to California's legislative history with regard to its false claims statute and the purpose of qui tam statutes in general, the *Laraway* court essentially adopted the Ninth Circuit's approach, holding:

> 116 Cal. Rptr. 3d at 831.

{61} We adopt the *Laraway* court's formulation. This is not "good cause lite" or "dismissal on demand." Properly applied, the standard will not result in mere rubberstamping of the AGO's requests for dismissal.

{62} Having established a meaning for good cause under FATA, we now turn to our review of the district court's ruling. The district court's decision is most appropriately reviewed under an abuse of discretion standard. *See id.* at 829. Findings of good cause will require district courts to assess and weigh the factors listed. We have no reason to impose a de novo review in that there would be little if anything to be gained in terms of accuracy of the result by having an appellate court reweigh the evidence. Assessment of such things as bad faith, pretext, motives, and relative merits of case are best done by district courts.

{63} Viewing the district court's ruling through the lens we just adopted, we see no abuse of discretion. As directed by the district court, we read its rulings on the motion to dismiss and approval of the Settlement Agreement together. The unchallenged findings of fact reflect a focus on three areas of inquiry. First, it detailed the AGO's extensive collection efforts taken apart from the FATA claims. These alternative remedies include: (1) *SIC v. Bland*, the source of our opinion in *Weinstein*; (2) *New Mexico Educational Retirement Board v. Renaissance Private Equity Partners, L.P., et. al.*, No. D-101-CV-2010-03598—the district approved the settlements involved in that proceeding, Qui Tam Plaintiffs have appealed those judgments, and the matter is currently pending in this Court as No. A-1-CA-38096; (3) the informal litigation and discovery process that led to the Settlement Agreement in this case; and (4) the AGO's participation in the *Austin Capital* class action.

{64} The AGO's pursuit of alternative remedies has been fruitful. The settlements already approved and those pending review will result in recoveries in the tens of millions of dollars.

{65} In contrast, the district court's findings indicate that the FATA claims are not progressing well, are unwieldy, include inherent proof hurdles, are subject to nonfrivolous jurisdictional challenges, and are likely to drag on for many more years because of protracted motion practice and expected appeals. The district court's observations and concerns about the viability and practicality of Qui Tam Plaintiffs' litigation strategy are well-founded. Comparing the relative success of the AGO's alternative remedies with the lack of progress and built-in difficulties with Qui Tam Plaintiffs' efforts is enough to support the district court's decision. The district court could readily conclude that the AGO's request to dismiss is well-founded, in good faith, not pretextual and based on adequate investigation.

{66} Given the strength of the factual record supporting the decision below, there is no reason to rely on the separation of powers concepts urged by the AGO. We leave exploration of that idea for a case with a more suitable record.

F. The Terms of the Settlement Agreement Are Not Precluded by FATA

{67} At the last moment, Qui Tam Plaintiffs filed a motion asserting that the attorney fee provision of the Settlement Agreement is precluded by FATA. Filed after they had filed their notice of appeal to this Court, the motion marked the first time the issue had been raised. The district court denied the motion without elaboration.

{68} The Settlement Agreement includes the following provision describing one of the prerequisites to assigning an "Effective Date" to it:

> The court in the *Qui Tam* action shall have entered a judgment . . . (iv) ordering that no money shall be payable by any of the Defendant Released Parties or the Escrow Agent to the *Qui Tam* Action plaintiffs or their attorneys, whether under [FATA], or for any other reason (including the doctrine of *quantum meruit*), and that if such amounts are determined by the court to be due at all, they shall be paid solely by NMSIC, NMERB and/or the State of New Mexico or from the settlement proceeds distributed to them under this Agreement.

The purpose of the provision is obviously to ensure that the settling Defendants' obligation to pay money would be limited to the sums stipulated in the Settlement Agreement.

{69} Qui Tam Plaintiffs argue that this provision is contrary to Section 44-9-7(D) and Section 44-9-10 of FATA. Section 44-9-7(D) provides, "Any award to qui tam plaintiff shall be paid out of the proceeds of the action or settlement, if any. The qui tam plaintiff shall also receive an amount for reasonable expenses incurred in the action plus reasonable attorney fees that shall be paid by the defendant." Section 44-9-10 provides, "The state . . . shall not be liable for expenses or fees that a qui tam plaintiff may incur in investigating or bringing an action pursuant to the Fraud Against Taxpayers Act."

{70} The gist of Qui Tam Plaintiffs' argument is that their costs and attorney fees cannot be included in or paid from a lump sum fund such as that created in the Settlement Agreement. We disagree.

{71} "The meaning of language used in a statute is a question of law that we review de novo." *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61. If the wording of the statute is not "clear and unambiguous" we may look to the history and background of the statute. *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 13, 121 N.M. 764, 918 P.2d 350. We may also consider the practical implications of different interpretations and how they fit with the purpose of the act. *See Bishop*, 2009-NMSC 036, ¶ 11; *Miller v. N.M. Dep't of Transp.*, 1987-NMSC-081, ¶ 8, 106 N.M. 253, 741 P.2d 1374. In short, as Justice Daniels reminded us in *State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317, "[i]n interpreting statutory language . . . , it is necessary to think thoughts and not words."

{72} Section 44-9-7(A) addresses how proceeds of a qui tam action may be divided when the state "proceeds with an action brought by a qui tam plaintiff." Section 44-9-7(B) addresses how the proceeds of a qui tam action may be divided when the state declines to participate and allows the qui tam action to take its course without the state's participation. There is no provision in FATA that specifically addresses how a qui tam plaintiff is to share in funds collected through an alternative remedy by way of a settlement. Section 44-9-6(H) provides, "If an alternative remedy is pursued, the qui tam plaintiff shall have the same rights in such a proceeding as the qui tam plaintiff would have had if the action had continued pursuant to this section." That sentence does not provide any guidance in and of itself since it simply refers parties to the process of litigation and a qui tam plaintiff's right to participate as described in Section 44-9-6.

{73} Section 44-9-7(D) is a general provision. The first sentence of Section 44-9-7(D) unremarkably provides that qui tam plaintiffs shall receive their "award" payment from the "proceeds of the action or settlement." The second sentence creates the right of qui tam plaintiffs to be reimbursed their expenses incurred in the action and to receive "reasonable attorney fees that shall be paid by the defendant." Both sentences reflect the typical concern in qui tam statutes that the public fisc not be responsible to a private person for the cost of pursuing qui tam claims. *See* 31 U.S.C. § 3730(d)(1) (2018) ("Any such person shall also receive an amount for reasonable expenses . . . necessarily incurred, plus reasonable attorney[] fees and costs. All such expenses, fees, and costs shall be awarded against the defendant."); Cal. Gov't Code § 12652(g)(1)(C)(8) ("All expenses, costs, and fees shall be awarded against the defendant and under no circumstances shall they be the responsibility of the state or political subdivision.").

{74} {74} The requirement that a qui tam plaintiff's attorney fees "be paid by the defendant" is beguiling in its simplicity, to paraphrase Justice Montgomery in *State ex rel. Helman*, 1994-NMSC-023, ¶ 23. It seems clear, but there is no intrinsic meaning to the words. It is useful to consider how different interpretations of the phrase "shall be paid" would operate in the real world. Of course, Defendants should pay Qui Tam Plaintiffs' expenses rather than the State. There are different ways that can be accomplished while safeguarding the public fisc, but none of the mechanisms can be said to be mandatory under Section 44-9-7(D).

{75} Qui Tam Plaintiffs' argument (made to the district court—not here) is that attorney fees must be paid "in addition to the amounts recovered by the [S]tate." That formulation would work well if all qui tam cases went to trial and resulted in a verdict. Ancillary procedures to determine fees in that scenario are common.

{76} But requiring such ancillary judicial determinations would not work well in cases resolved by settlement. Settlements are generally structured like the Settlement Agreement before us. That is, the parties arrive at a sum acceptable to them given their view of the case, including their potential exposure, the odds of an unfavorable or favorable outcome at trial, the expense involved in taking a matter to trial, etc. Both parties want to end litigation, but a defendant has a particular desire to end it once and for all at a known cost. Requiring that a potential liability remain open to a litigant can be a marked disincentive to reaching an agreement. We note that New Mexico has a strong public policy of encouraging settlements. *McConal Avia-*

tion, Inc. v. Commercial Aviation Ins. Co., 1990-NMSC-093, ¶ 20, 110 N.M. 697, 799 P.2d 133 ("We feel compelled to enforce the terms and expectations of the settling parties."); *Bd. of Educ. v. N.M. State Dep't of Pub. Educ.*, 1999-NMCA-156, ¶ 14, 128 N.M. 398, 993 P.2d 112 ("[P]ublic policy encourages, and we have a duty to enforce, settlement agreements.").

{77} In the context of a global, lump sum settlement, the question of how the defendant pays a qui tam plaintiff's attorney fees is really a matter of accounting. The state (or the qui tam plaintiff) knows that there will be a claim for qui tam plaintiff's "contingency award" and for attorney fees and costs. The state—or qui tam plaintiff—must take that potential claim against the fund created by the settlement into account as it decides what it is willing to settle for. That determination involves educated guesswork and is no different from any other consideration driving negotiations. If the state assumes, for example, that the qui tam plaintiff's claims are likely to absorb twenty percent of the fund, and it is willing to accept the remaining eighty percent as a reasonable measure of the state's due, all parties' interests have been served. There is no statutory reason to interfere with that process.

{78} There is little case law on the issue. Qui Tam Plaintiffs and the AGO cite to none. Defendant Vanderbilt cites two cases that appear to involve lump sum settlements under the federal FCA, but neither delves deeply into the issue raised here. *See Brooks v. Unites States*, 383 F.3d 521, 522, (6th Cir. 2004); *U.S. ex rel. Hullinger v. Hercules, Inc.*, 80 F. Supp. 2d 1234, 1239 (D. Utah 1999).

{79} The most relevant case we found is *United States ex rel. Sharma v. University of Southern California*, 217 F.3d 1141 (9th Cir. 2000). There, the qui tam plaintiff pursued his case on his own and eventually reached a settlement of $650,000 total. *Id.* at 1143 n.2. The qui tam plaintiff and the defendant allocated $250,000 to the FCA claim and $400,000 to the non-qui tam retaliation claim. *Id.* The qui tam plaintiff asserted that his thirty percent statutory award should be applied to the total FCA award. *Id.* The United States argued that the FCA portion included the qui tam plaintiff's fees and costs and they could not be considered "proceeds" subject to his contingency claim. *Id.* Rather than disallow the settlement, the district court modified the agreement by applying the statutory rate to a sum calculated by subtracting the fees and costs form the gross FCA allocation. *Id.* at 1142. This modification was sufficient to bring the settlement into compliance with FCA's specific requirement that fees and costs be "awarded against the defendant." *See id.* at 1143, 1145.

{80} The approach taken by the court in *Sharma* is not the only way to do the calculation. It does indicate, however, that a lump sum settlement is an acceptable way to resolve a qui tam action in the federal arena. We see no reason why it would not be acceptable under FATA. We leave the details of allocation to the district court in the first instance.

G. Day Pitney's Conflicts of Interest Issue

{81} It is fair to observe that since our Supreme Court's remand order—and perhaps before—Qui Tam Plaintiffs have focused most of their attention in this litigation on their assertion that Day Pitney has serious conflicts of interest that preclude it from representing the SIC and that foreclose a finding that the Settlement Agreement was negotiated at arms-length. As noted above, the record reveals numerous efforts to convince the district court of the conflicts, including the separate FATA suit against Day Pitney. In addition, Qui Tam Plaintiffs filed a writ of superintending control with the New Mexico Supreme Court in July 2016, asking it to intervene even before the district issued its rulings.

{82} Despite Qui Tam Plaintiffs' efforts, the district court decided that Day Pitney did not have a disqualifying conflict and that the Settlement Agreement was negotiated at arms-length.

{83} The district court also decided that Qui Tam Plaintiffs "did not establish that the alleged conflicts prejudice[d] or injure[d] the [Q]ui [T]am [P]laintiffs' rights."

{84} As is their practice, Qui Tam Plaintiffs have not challenged any of the district court's findings as not being supported by substantial evidence. "An unchallenged finding of the trial court is binding on appeal." *Seipert v. Johnson*, 2003-NMCA-119, ¶ 26, 134 N.M. 394, 77 P.3d 298; *see* Rule 12-318(A)(4). Qui Tam Plaintiffs' briefing is, however, teeming with hyperbolic assertions of "fact" and descriptions of conspiracies for which there is no support in the record other than their allegations. For purposes of our analysis, we have ignored all such material. To the extent Qui Tam Plaintiffs refer to actual material in the record, they make no attempt to provide a full summary of evidence on any issue. Rather, they invariably cite only material that supports their version of events, contrary to Rule 12-318(A)(3).

{85} In its findings of fact related to the motion to dismiss, the district court found:

> 3. The State of New Mexico, through the New Mexico Attorney General's office (NMAGO) the State Investment Council (SIC), and Educational Retirement Board (ERB), have investigated and pursued claims against various persons and entities through this Fraud Against Taxpayers Act (FATA) action and outside of this action.
>
> . . . .
>
> 5. Through the investigation, the SIC issued a request for proposals ("RFP") and retained the law firm of Day Pitney . . . to complete the investigation and, acting as commissioned Special Assistant Attorneys General, to seek recoveries . . .
>
> 6. The SIC was told that Day Pitney represented numerous financial institutions in unrelated matters and that Day Pitney could not conduct litigation against its clients. Those clients include Deutsche Bank, Citigroup, Merrill Lynch, Bank of America, JP Morgan and Ernst & Young. The SIC understood and agreed that the State would be responsible for evaluating potential claims the SIC might have against Day Pitney clients and, if warranted, pursing those claims.

{86} In its findings of fact and conclusions of law related to approval of the Settlement Agreement, the district court found and concluded:

Findings of Fact

> 48. Day Pitney represented only the SIC, and never represented the ERB, in connection with recovery efforts related to pay-to-play activities.
>
> 49. . . . Day Pitney's expertise in securities cases, including on the defense side, was a strong factor that helped convince the SIC to hire the firm as outside counsel.
>
> 50. The SIC hired Day Pitney with the understanding that it was the responsibility of the State, not Day Pitney, to investigate and pursue claims, if any, against any individual or financial entity Day Pitney had previously represented.
>
> . . . .
>
> 69. Notably, by the time the May 2015 vote was held, Foy and/or his counsel repeatedly had voiced their criticisms of Day Pitney, its performance, and its alleged conflicts of interest in multiple forums, including in written submissions to the SIC, in oral presentations during public comment period at SIC meetings, and at a public meeting of the State Legislature's Investments and Pensions Oversight Committee in 2011.

Conclusions of Law

7. The members of the SIC made an informed decision to approve the Settlement [Agreement] with Vanderbilt. The SIC and ERB ratifications occurred after the [Qui Tam P]laintiffs publicly stated their concerns about alleged conflicts of interest on the SIC's lawyers at the Day Pitney law firm. The members of the SIC and ERB boards were able to consider all that information in determining whether to approve the Vanderbilt Settlement [Agreement].

. . . .

14. [The district c]ourt is satisfied that the attorneys for both the State and Vanderbilt engaged in arm's length negotiations in reaching the Settlement Agreement.

15. [Qui Tam P]laintiffs did not establish that the alleged conflicts prejudice or injure the [Qui Tam P]laintiffs' rights.

. . .

19. The representation by Day Pitney did not create a conflict of interest, and Day Pitney's work for the NMAGO demonstrated its expertise in this type of matter.

{87} The district court thus found that Qui Tam Plaintiffs did not have standing to assert the conflict and that there was simply no conflict. We will focus our analysis on the "no conflict" ruling. The issue of standing is presented more clearly here than in *Weinstein*, 2016-NMCA-069, ¶ 94. We decline to address it, however, because it does not necessarily lead to a definitive resolution of the issue. That is, if we determine that Qui Tam Plaintiffs had standing, we would still have to analyze the conflicts issue on its merits.

{88} Rule 16-107(A)(1) and (2) NMRA of New Mexico's Rules of Professional Conduct provide:

> Except as provided in Paragraph B of this rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

{89} Qui Tam Plaintiffs' original assertion of conflict was that Day Pitney's work included securities defense matters and thus it could not be trusted to represent the SIC effectively against "Wall Street" firms. Qui Tam Plaintiffs' focus sharpened in 2015 when they found eight cases involving Vanderbilt Defendants in which Day Pitney acted as defense counsel. None of the cases were related in any way to New Mexico's pay-to-play claims.

{90} Qui Tam Plaintiffs argue that these instances of representation create nonconsentable conflicts. They rely heavily on *Roy D. Mercer, LLC v. Reynolds*, 2013-NMSC-002, ¶ 1, 292 P.3d 466. In *Mercer*, our Supreme Court held that "when an attorney has played a substantial role on one side of a law suit and subsequently joins a law firm on the opposing side of that lawsuit, both the lawyer and the new firm are disqualified from any further representation, absent informed consent of the former client." *Id.* ¶ 1 (emphasis omitted). *Mercer* thus involved egregious facts not present here. And, even with those facts, our Supreme Court held out the possibility that client consent could cure or waive the conflict. *Mercer* does not control the situation before us.

{91} More importantly, Qui Tam Plaintiffs ignore the fact that Day Pitney disclosed its relationship with the firms before entering into the contract with the SIC. As a result of the disclosure, the AGO agreed that Day Pitney would not represent the SIC in collection efforts against any of its former or current clients. Decisions concerning proceeding against them—and prosecution of litigation against them—would be handled by in-house AGO attorneys. Day Pitney's work under its contract with the SIC was limited "to the extent Day Pitney is not subject to a conflict of interest with respect a particular qui tam defendant[.]"

{92} Limitation of the scope of representation is a recognized method for eliminating conflicts of interest when there is no direct relationship between the representations. *See* Restatement (Third) of the Law Governing Lawyers § 121, cmt. c(iii), illus. 4 (2019); 1 G. Hazard, W. Hoder & P. Jarvis, The Law of Lawyering, § 12.24 (4th ed. 2015 Supp.).

{93} Limiting the scope of representation can be effective because it addresses the primary factors Rule 16-107 and Section 121 of Restatement (Third) of the Law Governing Lawyers examine to determine whether a conflict exists and how courts should react to them. Under Rule 16-107(A)(2), there must be a "significant risk" that the representation of one or more clients will be materially limited by the lawyer's responsibilities to others. The primary concern is loyalty, as *Mercer* noted. 2013-NMSC-002, ¶ 1. But, there are also related concerns about improper use or dissemination of confidential information. These concerns can be ameliorated by limiting the scope of the representation as long as the client is informed and consents and the limitation does not unduly interfere with the work the client wants. *See* Restatement (Third) of the Law Governing Lawyers § 19.

{94} The district court's unchallenged finding that Day Pitney and the SIC agreed to limit the scope of Day Pitney's work to exclude its other clients supports its conclusion that no conflict existed.

Conclusion

{95} Having found no error, we affirm the judgment.

{96} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge Pro Tempore

WE CONCUR:

JULIE J. VARGAS, Judge

BRIANA H. ZAMORA, Judge

EQUITY IN JUSTICE

ASK AMANDA!

Do you have specific questions about equity and inclusion in your workplace or in general?

Send in anonymous questions to our Equity in Justice Program Manager, Dr. Amanda Parker. Each month Dr. Parker will choose one or two questions to answer for the Bar Bulletin. Go to **www.sbnm.org/eij**, click on the Ask Amanda link and submit your question.

No question is too big or too small!

Classified

Positions

Associate Attorney

Quinones Law Firm LLC, a well-established defense firm in search of a full-time associate attorney with 0-5 years' experience, preferably with current or past judicial clerkship experience. Primary practice in general defense litigation (employment law, civil rights, tort law). Please send resume to quinoneslaw@cybermesa.com

Associate Attorney

The firm of MYNATT MARTÍNEZ SPRINGER P.C. is looking for associates. Our practice focuses primarily on the defense of public entities and their employees but runs the gamut on all civil matters. The pay and benefits are competitive, and the billable hours are manageable. We are located in the City of Las Cruces, sometimes known as the Paris of the Rio Grande. Here, for the price of a small hovel in Santa Fe, you can purchase a moderate-sized mansion. The weather is beautiful, the food is spicy (we are right next to Hatch after all), the crime is low (looking at you Albuquerque), and the sunsets are stunning. If you are interested in making a change, email us at rd@mmslawpc.com.

Deputy District Attorney, Senior Trial Attorneys, Trial Attorneys, and Assistant Trial Attorneys

The Third Judicial District Attorney's Office in Las Cruces is seeking a Deputy District Attorney, Senior Trial Attorneys, Trial Attorneys, and Assistant Trial Attorneys. You will enjoy the convenience of working in a metropolitan area while gaining valuable trial experience alongside experienced Attorney's. Please see the full position descriptions on our website http://donaanacountyda.com/ Submit Cover Letter, Resume, and references to Whitney Safranek, Human Resources Administrator at wsafranek@da.state.nm.us

Various Attorney Positions

The New Mexico Office of Attorney General is recruiting various attorney positions. The NMOAG is committed to attracting and retaining the best and brightest in the workforce. NMOAG attorneys provide a broad range of legal services for the State of New Mexico. Interested applicants may find listed positions by copying the URL address to the State Personnel website listed below and filter the data to pull all positions for Office of Attorney General. https://www.spo.state.nm.us/view-job-opportunities-and-apply/applicationguide/

Various Assistant City 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 es-tate, 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 – EHD – Air Quality; Assistant City Attorney – Property & Finance. For more information or to apply please go to www.cabq.gov/jobs. Please include a resume and writing sample with your application.

Eleventh Judicial District Attorney's Office, Div II

The McKinley County District Attorney's Office is seeking applicants for an Assistant Trial Attorney, Trial Attorney and Senior Trial Prosecutor. Senior Trial Attorney position and Trial Attorney position requires substantial knowledge and experience in criminal prosecution, rules of evidence and rules of criminal procedure; trial skills; computer skills; audio visual and office systems; ability to work effectively with other criminal justice agencies; ability to communicate effectively; ability to re-search/analyze information and situations. Assistant Trial Attorney position is an entry level position and requires basic knowledge and skills in the areas of criminal prosecution, rules of evidence and rules of criminal procedure; public relations, ability to draft legal documents; ability to work effectively with other criminal justice agencies. These positions are open to all persons who have knowledge in criminal law and who are in good standing with the New Mexico Bar or any other State bar. The McKinley County District Attorney's Office provides regular court-room practice and a supportive and collegial work environment. Salaries are negotiable based on experience. Submit letter of interest and resume to District Attorney Bernadine Mar-tin, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter to Bmartin@da.state.nm.us. Position to commence immediately and will remain opened until filled.

City Attorney

Job Description: The City of Gallup is recruiting for a City Attorney. The City Attorney is one of two officers appointed by the Mayor and City Council. The City Attorney serves at the pleasure of the City Council and is an at-will employee. Essential responsibilities and duties may include, but are not limited to the following: Is responsible for providing legal representation and legal counsel in all matters to the City Council; its committees, boards and commissions; the City Manager; and to the departments within the City of Gallup. Prepares or assists in the preparation of City ordinances, resolutions, agreements, contracts, deeds, leases, joint powers agreements and approves the form of such instruments. Develops new ordinances and resolutions to implement the policies of the City Council. Analyzes changes in Federal and state law and court decisions to determine the impact on the City. Represents the City in legal actions and ensures that violations of the City Code are prosecuted. Retains outside counsel to provide legal counsel and representation in specialized areas of law and oversees and directs outside counsel Represents the City in both administrative and judicial litigation and retains and works with outside counsel to represent the City in litigation in specialized areas of law. Performs other duties as may be required by the Charter, City Code, or the Mayor and City Council. STARTING SALARY AND BENEFITS: $100,000 - $130,000 annually, DOQ. The City provides excellent fringe benefits: PERA Retirement Plan; VOYA Deferred Compensation; and Health, Dental, Life & Vision Plan. MINIMUM REQUIRED QUALIFICATIONS: Graduation from an accredited law school with a possession of a Juris Doctorate degree; Five (5) years of experience practicing law; Valid driver's license. Must meet City's insurability requirements. SPECIAL REQUIREMENTS: Must be licensed to practice law in the State of New Mexico. PREFERRED QUALIFICATIONS: At least eight (8) years of experience practicing in areas of law relevant to the representation of New Mexico governmental entities; Experience representing New Mexico municipalities, or other similar governmental entities, either as an employee, contract attorney, or for a law firm that is contracted to do work for such entity; Legal experience in a broad range of areas of law including: open meetings, public records, government contracting, public procurement, labor and employee relations, civil rights, tort claims, land use, utilities, and prosecution of criminal offenses; Experience drafting legal documents including ordinances, resolutions, policies and procedures, contracts, joint powers agreements, leases and land conveyancing documents, administrative and judicial pleadings, and legal opinions. Applicants selected to interview will be asked to submit a writing sample. CLOSING DATE: Open until filled, however the first review of applications will occur on November 15, 2022. The City of Gallup is an Equal Opportunity Employer that is committed to hiring qualified individuals and does not discriminate in employment or the provision of services on the basis of race, color, religion, national origin or ancestry, disability, age, gender, Vietnam Era or disabled veteran status, sexual orientation or medical condition. All applicants will be evaluated solely on the basis on job-related qualifications. For more information and to apply for this position, please visit the City of Gallup's website at: www.GallupNM.gov

Associate Attorney – Civil Litigation

Sutin, Thayer & Browne is seeking a full-time Civil Litigation Associate. The candidate must have at least 3 years of experience relevant to civil litigation, and must have excellent legal writing, research, and verbal communication skills. Competitive salary and full benefits package. Visit our website https://sutinfirm.com/ to view our practice areas. Send letter of interest, resume, and writing sample to sor@sutinfirm.com.

Litigation Attorney

Cordell & Cordell, P.C., a domestic litigation firm with over 100 offices across 36 states, is currently seeking an experienced litigation attorney for an immediate opening in its office in Albuquerque, 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 firm offers 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 to Hamilton Hinton at hhinton@cordelllaw.com

Full-Time or Part-Time Licensed Attorney

Winger Law Firm, PC seeks a full-time or part-time New Mexico licensed attorney to assist with insurance, personal injury, and general civil litigation. This position requires a motivated, self-starter with solid research and writing skills. Insurance defense experience is a plus but not required. Candidate must be familiar with State and Federal Rules of Civil Procedure. This position is remote with extremely flexible hours. Winger Law Firm prides itself on providing competent, efficient legal services to clients with an emphasis on creating a manageable and enjoyable work-life balance for its employees. All inquiries kept confidential. Salary DOE. Please forward your resume to jobs@wingerlawfirm.com

Associate Attorney

Santa Fe Law Group seeks an associate attorney with a strong interest in water law and real estate. Our boutique practice in Santa Fe also includes estate planning, business, construction, family law, and related litigation. Send your resume, statement of interest, transcript, and writing sample to srf@santafelawgroup.com. All levels considered, with ideal candidates having 1-4 years of practice experience.

AOC Deputy Director

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 location is Albuquerque (oasis in the high desert, full of rich history, diverse culture, authentic art & dynamic traditions, painted skies, abundant space and more than 310 days of sunshine) or Santa Fe (the state capitol with a diverse culture, beautiful high desert mountains, and abundant museums, restaurants, and outdoor recreation opportunities), New Mexico. The AOC has offices in both Albuquerque and Santa Fe, with occasional statewide travel. The salary range is $100,000 to $200,000. For more information or to apply to go to the Judicial Branch web page at www.nmcourts.gov under Career Opportunities. Equal Opportunity Employer

Entry Level and Experienced Trial Attorneys

The Thirteenth Judicial District Attorney's Office is seeking both entry level and experienced trial attorneys. Positions available in Sandoval, Valencia, and Cibola Counties. Enjoy the convenience of working near a metropolitan area while gaining valuable trial experience in a smaller office, providing the opportunity to advance more quickly than is afforded in larger offices. The 13th Judicial District has family friendly policies. Salary is depending on experience. Ranging from $65,000- $92,000 Contact Krissy Fajardo @ kfajardo@da.state.nm.us or visit our website for an application @https://www.13th.nmdas.com/ Apply as soon as possible. These positions will fill up fast!

Staff Attorney

The New Mexico Prison & Jail Project (NMPJP) is a nonprofit legal organization that advocates to protect the rights of incarcerated people in New Mexico by bringing civil rights lawsuits and other legal actions on their behalf. NMPJP has a new position available for a full-time staff attorney. Generous benefits package. Salary dependent on experience. Work will be primarily remote with daily coordination of activities occurring with NMPJP's Director and Paralegal via Zoom, email, texts and calls, and with at least one in-person meeting per week at the NMPJP office in Albuquerque. The ideal candidate will have a passion for advocating for the rights of people who are incarcerated and significant experience with federal and state litigation. We also seek candidates with a proficiency in legal research and document drafting; and excellent written, verbal and interpersonal communication skills. Email a letter of interest and resume to the selection committee at info@nmpjp.org.

Litigation Attorney – IRC111263

The Los Alamos National Laboratory Office of General Counsel (OGC) is seeking an early career litigation attorney to perform legal work on a wide range of interesting litigation, including general commercial, construction, contract disputes, employment, labor and other disputes. You will prepare case assessments, update management on status of litigation, evaluate potential outcomes and propose litigation approaches that meet institutional objectives. Qualified candidates will be a member of a Bar in good standing and have experience with administrative litigation, administrative hearings and enforcement proceedings. This position also requires the ability to obtain a DOE security clearance. Apply online using IRC111263 at: www.lanl.jobs Los Alamos National Laboratory is an equal opportunity employer.

Attorney with 2-5 Years' Experience

James Wood Law, a law firm in Albuquerque, NM specializing in Plaintiffs' medical malpractice cases, seeks an associate attorney with 2-5 years' experience. (We will also consider applications from more experienced attorneys.) We offer a competitive salary and benefits, including 401(k) and employer-paid health insurance. Please submit a resume and one writing sample to jwood@jameswoodlaw.com.

Associate Attorney

Zinda Law Group, a rapidly growing, elite personal injury law firm with offices across the Southwest, is looking for an ambitious and passionate associate to join our growing team in New Mexico. As an associate, you will work alongside a dynamic and experienced team of attorneys in Texas, Colorado, Arizona, and New Mexico. At Zinda Law Group, we handle complex cases and maintain a small docket, enabling us to best serve our clients. Our attorneys pride themselves on their skills, compassion, and commitment to helping those in need. Here, we do things differently. We are innovative, use cutting edge technology, and have a start-up mentality. Our firm is a member of the Inc. 5000 and was named one of the top Firms in the Austin area for 2020 by Austin Monthly Magazine. At least one (1) year of experience practicing personal injury or civil litigation is preferred but we are interested in seeing resumes from recent graduate. Must be licensed and in good standing with the New Mexico Bar Association. To apply, please send your resume and cover letter to recruiting@zdfirm.com

Attorney

Madison, Mroz, Steinman, Kenny & Olexy, P.A., an AV-rated civil litigation firm, seeks an attorney with 3+ years' experience to join our practice. We offer a collegial environment with mentorship and opportunity to grow within the profession. Salary is competitive and commensurate with experience, along with excellent benefits. All inquiries are kept confidential. Please forward CVs to: Hiring Director, P.O. Box 25467, Albuquerque, NM 87125-5467.

Personnel Hearing Officer

The City of Albuquerque is soliciting responses from qualified firms or attorneys interested in serving as contract Personnel Hearing Officer for personnel hearings under the City's Merit System Ordinances, §3-1-1 et seq. ROA 1994 and the Independent Hearing Office Ordinance Section §2-7-2 ROA 1994. The hearing officers may also provide services for other miscellaneous hearings under assorted City Ordinances. The full Request for Proposals can be accessed at: https://cabq.bonfirehub.com/portal/?tab=openOpportunities Proposals are due no later than January 4, 2023 @ 4:00pm Local Time.

Supreme Court of New Mexico Rules Attorney (At-Will)

Come work in the historic Supreme Court Building in Santa Fe, New Mexico! The New Mexico Supreme Court is accepting applications to fill the position of Rules Attorney for the Supreme Court Clerk's Office. This position provides the opportunity to work closely with a broad array of legal professionals across the state to craft and amend the Supreme Court's Rules of Practice and Procedure. The Rules Attorney is essential to the rulemaking process of the Supreme Court. Among other duties, the Rules Attorney is primarily responsible for coordinating and staffing the Supreme Court's standing rules committees, including preparing drafts of new and amended rules, forms, and uniform jury instructions, researching applicable state and federal law, and preparing materials for monthly committee meetings; reviewing petitions for rule change requests and assigning those requests to the appropriate rules committee; collaborating with the New Mexico Compilation Commission on changes to the New Mexico Rules Annotated; preparing memoranda and final rule change proposals for the Supreme Court Justices' review; and disseminating notice of Supreme Court rulemaking activity via email and publication in the Bar Bulletin. This position requires both excellent interpersonal skills and a particular eye for the details of technical legal writing, including proper citation, grammar, punctuation, spelling, and editing. Minimum Qualifications: Education: Must be a graduate of a law school meeting the standards of accreditation of the American Bar Association and; possess and maintain a license to practice law in the Stat of New Mexico. Experience: Three (3) years' of experience in the practice of applicable law, or as a law clerk, service on a Supreme Court Committee, or appellate practice experience preferred. For further details, see https://www.nmcourts.gov/careers/. To apply for this position interested applicants should submit a letter of interest, resume, proof of education/transcripts, New Mexico Judicial Branch Application for Employment to: Barbara J. Lujan; Human Resources Administrator; 237 Don Gaspar, Room 12; Santa Fe, New Mexico 87501; Email: supbjl@nmcourts.gov. PROOF OF EDUCATION IS REQUIRED. Applications may be emailed or mailed. Target Salary: $59,675 - $96,974 or $28.690 -$46.622 hourly . Deadline is December 21, 2022

Deputy City Attorney

Fulltime professional position which will assure that civil and criminal actions are resolved within established guidelines; advises the City Attorney on operational and legal issues; assumes operational functions of the City Attorney in his/her absence; coordinates the management of legal issues with staff, contract law firms and independent counsel; represents the City in litigation, negotiations, settlements and other municipal legal proceedings; confers with and provides advice and counsel to City officials and staff. Reviews legal documents, contracts, leases and issues; conducts factual and legal analysis to determine criminal and civil liabilities based on the facts of law and evidence. Reviews legal documents, contracts, leases and issues; conducts factual and legal analysis to determine criminal strategies and civil liabilities based on the facts of law and evidence; reviews and approves resolution strategies; advises staff on negotiation and litigation tactics; conducts conferences with opposing parties and counsel concerning settlement of cases; defends civil cases in both federal and state District Court and represents the City in both Tenth Circuit and New Mexico appellate courts. Monitors trends in municipal law and risk management issues, and recommends operational, procedural and policy improvements. Juris Doctor Degree AND seven year's experience in a civil and criminal legal practice; at least one year of experience in municipal finance, land use, and public labor law is preferred. Must be a member of the New Mexico State Bar Association, licensed to practice law in the state of New Mexico, and remain active with all New Mexico Bar annual requirements. Valid driver's license may be required or preferred. If applicable, position requires an acceptable driving record in accordance with City of Las Cruces policy. Individuals should apply online through the Employment Opportunities link on the City of Las Cruces website at www.las-cruces.org. Resumes and paper applications will not be accepted in lieu of an application submitted via this online process. This will be a continuous posting until filled. Applications may be reviewed every two weeks or as needed. SALARY: $93,935.71 - $136,743.36 / Annually CLOSING DATE: Continuous. Vanessa F. King, Senior Office Manager/Paralegal/Legal Department/City Attorney's Office, Paralegal State Bar # 159917, CCM# 181, Direct (575) 541-2014, Main (575) 541-2128, Email vking@las-cruces.org, 700 N. Main Street, Suite 3200, Las Cruces, NM 88001

The Office of the Second Judicial District Attorney

The Office of the Second Judicial District Attorney improves the quality of life of the citizens of Bernalillo County by reducing crime through thoughtful enforcement of the law and the development of a criminal justice system. The Office is an Equal Employment Opportunity Employer and is seeking applicants for Assistant Trial Attorney, Trial Attorney, Senior Trial Attorney and Deputy District Attorney positions. Pursuant to the New Mexico District Attorney's Compensation Plan, the position of attorney is "At Will" and serves at the pleasure of the District Attorney. Salary is commensurate with experience. Resume and three professional references must be received at the Office of the Second Judicial District Attorney. Attorneys must be licensed to practice law in the State of NM or be able to obtain a limited law license. Applicants selected for an inter-view must notify the Office of the Second Judicial District Attorney of the need for a reasonable accommodation due to a disability. Please submit resumes to: https://berncoda.com/careers/

Attorney (3+ years)

Well established (17+ years) civil defense firm is seeking an experienced attorney with 3+ years litigation experience for an associate position with prospects of becoming a shareholder. We are flexible, team oriented and committed to doing excellent work for our clients. We have long standing clients and handle interesting matters, including in the areas of labor/employment, construction, personal injury, medical malpractice, commercial litigation, civil rights, professional liability, insurance defense, and insurance coverage. We are looking for a team player with a solid work record and a strong work ethic. Excellent pay and benefits and opportunities for bonuses. All replies will be kept confidential. Interested individuals should e-mail a letter of interest and resumes to Conklin, Woodcock & Ziegler, P.C. at: jobs@conklinfirm.com.

Compliance Specialist

The UNM Office of Compliance, Ethics & Equal Opportunity (CEEO) seeks a highly qualified individual to investigate alleged civil rights and compliance violations at the University, particularly in the areas of Title IX, Title VII, and ADA. The CEEO Compliance Specialist also trains and educates the campus community on UNM compliance policies and values, and works with CEEO leadership to identify opportunities for improvement. This is a JD preferred position. For a complete position description, please visit unmjobs.unm.edu. UNM is an affirmative action and equal opportunity employer, making decisions without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, veteran status, disability, or any other protected class.

Assistant Santa Fe County Attorney I and II

Santa Fe County is soliciting applicants for an Assistant County Attorney (ACA) I and II. The successful candidate will focus their practice in areas assigned based upon experience, need, and interest. The ideal candidates are those with strong analytical, research, communication, and interpersonal skills, who enjoy working hard in a collaborative, fast-paced environment on diverse and topical issues that directly impact the community. The salary ranges for the positions are $28.8461-$38.4134 and $38.4615- $45.6730/hr. respectively, depending upon qualifications and budget availability. Applicants must be licensed to practice law in the State of New Mexico or obtain a limited license prior to the start of employment. Individuals interested in joining our team must apply through Santa Fe County's website, at http://www.santafecountynm.gov/job_opportunities.

Attorney (7+ years)

Well established (17+ years) civil defense firm is seeking an experienced attorney with 7+ years litigation with prospects of becoming a shareholder. We are flexible, team oriented and committed to doing excellent work for our clients. We have long standing clients and handle interesting matters, including in the areas of labor/employment, construction, personal injury, medical malpractice, commercial litigation, civil rights, professional liability, insurance defense, and insurance coverage. We are looking for a team player with a solid work record and a strong work ethic. Excellent pay and benefits and opportunities for bonuses. All replies will be kept confidential. Interested individuals should e-mail a letter of interest and resumes to Conklin, Woodcock & Ziegler, P.C. at: jobs@conklinfirm.com.

Executive Director

New Mexico Legal Aid (NMLA) seeks a Executive Director to lead its statewide program that provides free legal services to eligible clients throughout New Mexico. NMLA has a $12 million budget and over 100 staff working out of 11 offices. The position offers a great opportunity for the Executive Director to enhance services, collaborate with the legal community, and work with federal, state and local agencies to increase funding. To apply, submit a letter expressing your interest in the position, your qualifications for the job, bar status, and what you hope to contribute to the organization's future. Please include a resume/CV and the names and contact information for three professional references. Materials should be submitted electronically to dgroenenboom4@gmail.com in Microsoft Word or PDF format. For further information about the position visit: https://newmexicolegalaid.isolvedhire.com/jobs/732458.html

Attorneys- Primary Responsibility Advising Albuquerque Police Department (APD)

The City of Albuquerque Legal Department is hiring attorneys with the primary responsibility of advising the Albuquerque Police Department (APD). Duties may include: representing APD in the matter of United States v. City of Albuquerque, 14-cv-1025; reviewing and providing advice regarding policies, trainings and contracts; reviewing uses of force; drafting legal opinions; and reviewing and drafting legislation, ordinances, and executive/administrative instructions. At-tention to detail and strong writing skills are essential. Additional duties and representation of other City Departments may be assigned. Salary and position will be based upon experience. Please apply on line at www.cabq.gov/jobs and include a resume and writing sample with your application.

Lateral Partner/ Senior Associate Attorney

Moses, Dunn, Farmer & Tuthill (MDFT) has an opening for a lateral partner or senior associate attorney with 5 to 15 years' experience in business or commercial litigation and real estate law. The ideal candidate is an experienced attorney who will take pride in their work and is interested in growing and expanding their established client base at MDFT. Our firm is an AV Preeminent® firm that has expertise in a wide variety of civil practice areas including real estate, business trans-actions, probate, employment, and litigation. MDFT has served the needs of its world-wide business clientele and individuals from all walks of life for more than 67 years and we are committed to continuing that legacy for years to come. We offer a collegial and collaborative work environment, as well as a flexible billable hour requirement and compensation structure. At MDFT, you will work alongside attorneys with decades of experience and be given ample opportunities to grow. If you share our values and believe that you can thrive at MDFT, we look forward to talking with you about joining our team! Please send your resume to Alicia Gutierrez, alicia@moseslaw.com.

Briefing Attorney

Excellent licensed briefing attorney with strong education, experience and appellate qualifications. Practice includes Texas, New Mexico, and other states, State and Federal Courts. Expect an active trial practice for Nationally recognized Texas NM Plaintiff PI trial attorney in El Paso/Las Cruces. Full-time Salary range: $80,000.00 - $150,000.00 per year. Please submit resume and writing sample to jimscherr@yahoo.com

City Attorney – City of Rio Rancho

The City of Rio Rancho, NM, is seeking a City Attorney to join the legal team. The position supports and guides staff in matters concerning land use/development, contracts, grants, civil rights, public works & utilities, bonds, policy, torts, property law, labor & employment, civil litigation, criminal prosecution, and more. The City Attorney's office provides representation in hearings/ proceedings before state, federal, municipal courts and other agencies. Internal clients: city manager, department directors, elected officials, and employees. Minimum qualifications: Juris Doctor degree from an accredited, ABA-approved law school and three years' experience as a government attorney or experience in government-related law practice. Must be in good standing with the State Bar of New Mexico and licensed to practice law in the State of New Mexico. Benefits include lucrative paid leave, health insurance, retirement options, and more. To learn more and to apply, vis-it: https://rrnm.gov/196/ Employment-and-Volunteer-Opportunities

Civil Litigation Defense Firm Seeking Associate and Senior Associate Attorneys

Ray | Pena | McChristian, PC seeks both new attorneys and attorneys with 3+ years of experience to join its Albuquerque office either as Associates or Senior Associates on a Shareholder track. RPM is an AV rated, regional civil defense firm with offices in Texas and New Mexico handling predominantly defense matters for businesses, insurers and government agencies. If you're a seasoned NM lawyer and have clients to bring, we have the infrastructure to grow your practice the right way. And if you're a new or young lawyer we also have plenty of work to take your skills to the next level. RPM offers a highly competitive compensation package along with a great office environment in Uptown ABQ and a team of excellent legal support professionals. Email your resume and a letter of interest to cray@raylaw.com.

Legal Director/Litigator

The New Mexico Foundation for Open Government (FOG) seeks a first time Legal Director/Litigator. The ideal candidate will be a highly motivated self-starter with civil trial court experience. The Legal Director will strategically select and pursue lawsuits that will advance FOG's mission, which includes enforcing and protecting the New Mexico Inspection of Public Records Act (IPRA), Open Meetings Act (OMA), and The First Amendment. Part time remote work opportunity. Some in-state travel. Candidates are asked to send a cover letter detailing experience, education and background and a sample legal brief to info@nmfog.org. Full details at www.nmfog.org. Please respond by Dec. 2, 2022.

Records Custodian

New Mexico Department of Health (NMDOH) Office of General Counsel is in search of a Records Custodian. The ideal candidate has experience working with the public. The position will coordinate IPRA requests by working with the public, office staff, and NMDOH staff to identify, gather, screen responsive documents, provide reports, and maintain the IPRA database. The position will provide technical guidance and assistance to division and facility records custodians and assist in the development of policies and procedures related to records. For complete job posting and to apply for this position, please see Records Custodian (DOH/OCG#10983) at https://www.spo.state.nm.us/work-for-new-mexico/ . For any other questions please email Christine.Guillen@doh.nm.gov

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 $22.38 per hour during an initial, proscribed probationary period. Upon successful completion of the proscribed probationary period, the salary will increase to $23.48 per hour. Competitive benefits provided and available on first day of employment. Please apply at https://www.governmentjobs.com/careers/cabq.

Legal Assistant

Looking for a team-oriented legal assistant with strong written and verbal communication skills, excellent organizational ability and work ethic with a great attitude to fill a position assisting a partner attorney within a fast-paced litigation practice, which is regularly in trial. The job requires excellent writing and proofreading ability, and proficiency in the use of a Microsoft Office and digital office technology. Only compassionate and considerate people who genuinely want to help our clients should apply. We are a truly diverse workplace and anyone that wants to work with us needs to bring tolerance to the office every day. Salary dependent on experience and 3-5 years of experience is preferred. Great benefits package offered. Please contact (505) 243-2808.

Legal Secretary – Advanced

New Mexico Department of Health (NMDOH) Office of General Counsel is in search of a legal secretary. The ideal candidate would be experienced in working in a legal environment providing support to multiple attorneys and staff. Duties include providing secretarial support for the office including reception of visitors, answering phones, assisting in filing and archiving documents, and other tasks related to the operation of the office. For complete job posting and to apply for this posting please see Legal Secretary – Advanced (DOH/OCG#57299) at https://www.spo.state.nm.us/work-for-new-mexico/ . For any other questions please email Christine.Guillen@doh.nm.gov

Paralegal

Paralegal position in established commercial civil litigation firm. Prior experience preferred. Requires knowledge of State and Federal District Court rules and filing procedures; factual and legal online research; trial preparation; case management and processing of documents including acquisition, review, summarizing, indexing, distribution and organization of same; drafting discovery and related pleadings; maintaining and monitoring docketing calendars; oral and written communications with clients, counsel, and other case contacts; proficient in MS Office Suite, AdobePro, Powerpoint and adept at learning and use of electronic databases and legal software technology. Must be organized and detail-oriented professional with excellent computer skills. All inquiries confidential. Salary DOE. Competitive benefits. Email resumes to e_info@abrfirm.com or Fax to 505-764-8374.

Paralegal

Peifer, Hanson, Mullins & Baker, P.A., is seeking an experienced commercial litigation paralegal. The successful candidate must be a detail-oriented, team player with strong organizational and writing skills. Experience in database and document management preferred. Please send resume, references and salary requirements via email to Shannon Hidalgo at shidalgo@peiferlaw.com.

Experienced Legal Assistant

Montgomery & Andrews, P.A., is seeking an experienced legal assistant with good interpersonal skills as well as clerical and computer skills. Applicant must be organized, detail-oriented, able to multitask and have good verbal and written communication skills. Firm offers a congenial work environment, competitive compensation, and a benefit package. Please send resume to tgarduno@montand.com.

Legal Courier / File Clerk

Downtown litigation firm seeking F/T legal courier / file clerk. Must be able to lift 40 lbs, have strong attention to detail, organizational and time management skills. Responsibilities include, but not limited to, court filings, mail/hand deliveries and pick-ups, in town and out of town, inventory, ordering and stocking supplies, reception relief, copying, scanning, filing and general office duties. Must be computer literate. Must provide own vehicle and proof of insurance. Benefits include paid mileage, health insurance, and paid time off/sick leave. Please e-mail resume to Shannon Hidalgo at shidalgo@peiferlaw.com – no telephone inquiries please.

Various Paralegal Positions

The New Mexico Office of Attorney General is recruiting various paralegal positions. The NMOAG is committed to attracting and retaining the best and brightest in the workforce. NMOAG paralegal provide a broad range of legal services for the State of New Mexico. In-terested applicants may find listed positions by copying the URL address to the State Per-sonnel website listed below and filter the data to pull all positions for Office of Attorney General. https://www.spo.state.nm.us/view-job-opportunities-and-apply/applicationguide/

In-House Paralegal

No more billable hours or balancing competing attorney and/or multiple client expectations. U.S. Eagle Federal Credit Union, voted a Family Friendly Business in 2022, is looking for a qualified in-house paralegal to work with the credit union's in-house counsel in a collection and bankruptcy focused legal role. This is a unique opportunity to become part of a great, people-focused team. Remote work opportunity with occasional weekly trips into the office located at 3939 Osuna RD NE. For additional information and to apply please visit: https://www.useagle.org/us-eagle/about-us-eagle/career-opportunities

Legal Secretary

AV rated insurance defense firm seeks full-time legal assistant with five plus years' experience in insurance defense and civil litigation. Position requires a team player with strong word processing and organizational skills. Proficiency with Word, knowledge of court systems and superior clerical skills are required. Should be skilled, attentive to detail and accurate with a Minimum typing speed of 75 wpm. Excellent work environment, salary, private pension, and full benefits. Please submit resume to mvelasquez@rileynmlaw.com or mail to 3880 Osuna Rd. NE, Albuquerque, NM 87109

Paralegal

AV Rated insurance defense firm needs full-time paralegal. Seeking individual with minimum of five years' experience as a paralegal in insurance defense. Excellent work environment, salary private pension, and full benefits. Please submit resume and references to Office Manager, 3880 Osuna Rd., NE, Albuquerque, NM 87109 or email to mvelasquez @rileynmlaw.com.

Legal Secretary

Downtown firm looking for legal secretary who is a team player with a great attitude. Top dollar wages to start with a sign-up bonus of $1,000 after 30 days. Duties include calendaring, scheduling, preparation of pleadings and client interaction. Benefits include health, dental, disability, 401K, and parking. Contact NMLegalOffice15@gmail.com with resume and to set up interview.

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 santafelawoffice2@gmail.com

Legal Assistant Position

Macias-Mayo & Thomas, P.C., a Santa Fe based law firm serving clients throughout the State of New Mexico, seeks a legal assistant to join its growing firm. We specialize in family law, estate planning and mediation. We have a congenial office environment and expect all team members to work professionally and collaboratively together. The legal assistant must be professional and courteous in all communications, possess strong organizational and computer skills, and have the ability to multi-task responsibilities, including: answering phones, interviewing new clients, maintaining multiple calendars, managing deadlines, processing court documents, preparing correspondence and assisting with administrative duties as needed. Competitive salaries and benefits available, depending on qualifications and experience. Prospective team members should submit a resume, references, and cover letter to admin@m-mtlaw.com.

Two Paralegal Positions

Macias-Mayo & Thomas, P.C., a Santa Fe based law firm serving clients throughout the State of New Mexico, seeks two paralegals to join its growing firm. We specialize in family law matters including complex international cases, adoption and artificial reproductive technology; as well as estate planning and mediation. We have a congenial office environment and expect all team members to work professionally and collaboratively together. All successful candidates must have strong organizational, writing and computer skills, knowledge of state and federal court rules and filing procedures, the ability to manage cases with large volumes of documents, and professional communication skills. Both paralegal positions require experience with litigation matters, the ability to draft motions, pleadings and correspondence, organize and analyze discovery, interview clients and witnesses, and a general ability to assist clients during highly emotional circumstances. One paralegal will also assist with the preparation of estate planning documents; therefore, interest or experience in this area is helpful. Individuals fluent in English and Spanish are preferred, but not required. We offer competitive salaries and benefits dependent on qualifications and experience. Prospective team members should submit a resume, references, and cover letter to admin@m-mtlaw.com.

Experienced Legal Secretary

Peifer, Hanson, Mullins & Baker, P.A. is hiring a full time experienced legal secretary. The successful candidate must be a detail-oriented team player with strong organization and motivational skills. Salary DOE. Profit-sharing, health insurance, three weeks leave first year, and overtime available. Please send resume, references and salary requirements via email to Shannon Hidalgo at shidalgo@peiferlaw.com. No phone calls please.

Paralegal

Madison, Mroz, Steinman, Kenny & Olexy, P.A., an AV-rated civil litigation firm, seeks a full-time paralegal with a minimum of three (3) years' experience, including, but not limited to, current working knowledge of State and Federal District Court rules and filing procedures, document and case management, performing legal research, preparing discovery, drafting pleadings, calendaring, experience in summarizing medical records, and trial preparation. The candidate must be detail oriented with strong organization skills and the ability to multi task. Salary is competitive and commensurate with experience, along with excellent benefits. All inquiries are kept confidential. Please forward CVs to becky@madisonlaw.com, or mail to Human Resources Manager, P.O. Box 25467, Albuquerque, NM 87125-5467.

Paralegal

Peak Legal Group, LLC has an immediate opening for an experienced full-time Paralegal for our growing family law formation and reformation legal practice. Our Westside law firm practices in all areas of Family Law, in addition to adoptions, assisted reproductive technology and foster parent representation. Experience in family law litigation or a related field is preferable. We are looking for a hard-working, dedicated team member who would enjoy working in a family-oriented law firm that works hard and plays hard. We offer a great work environment, a competitive salary and a generous benefits package. Send your resume, cover letter and list of references to sheryl@pklegalgrp.com.

Positions Wanted

Contract Paralegal For Hire

Over 16 years of experience in civil (Plaintiff) and criminal work. PI, Med-Mal, Wrongful Death, MVA, Trucking, Nursing Homes, and Guardianships. Go to www.thezorragroup.com for more information or call Amber Zorra at (505) 659-4023.

Office Space

Private Office Suite

Private office suite in law building for rent. Includes separate clerical common area, access to conference room, and kitchenette. Only a few blocks from all court houses located at 900 Lomas NW. Contact Kim @ 505-331-3044 or email baiamonte4301@gmail.com

Single Office Available in Santa Fe

Single Office Available In Santa Fe located at the St. Francis Professional Center located on St. Francis Drive. Ideal for solo attorney. Lots of parking and easy access to the Courts. Contact Ralph Montez at (505) 577-6002 or (505)984-3004.

Office Suites-ALL INCLUSIVE-

Virtual mail, virtual telephone reception service, hourly offices and conference rooms available. Witness and notary services. Office Alternatives provides the infrastructure for attorney practices so you can lower your overhead and appear more professional. 505-796-9600/ officealternatives.com.

Offices For Rent

Offices for rent, 820 Second Street NW, two blocks from courthouses, all amenities including copier, fax, telephone system, conference room, high-speed internet, phone service, and receptionist, call Ramona at 243-7170.

Services

Engineering Forensics and Investigation Services

Expert Witness, Engineering Forensics and Investigation Services: I can get to the bottom of your engineering investigation and explain it, so everyone can understand. Call/v-mail/text/email today, Prof. Anthony Menicucci PhD-Engr., forensics engineer with experience testifying in Federal & State court. anthony@armatech.us, 505-249-2075 for more info.

Miscellaneous

Want to Purchase

Want to Purchase minerals and other oil/gas interests. Send Details to: PO Box 13557, Denver, CO 80201

Search for Revocable Trust

Albuquerque / Rio Rancho Area. Searching for THE MICHIKO MERRITT REVOCABLE TRUST. Please contact Becky Torres at 505-221-6709

Office furniture for sale:

Unique travertine marble conference room table, two travertine marble office desks, four travertine marble credenza/computer desks, settee, conference and reception room chairs, filing cabinets, one large square table, two wood desks, two glass L-shape desks, two heavy wood book shelves, large pieces of art from noted NM artists. If interested please call the office of Geer Wissel & Levy at (505) 243-1733.

SUBMISSION DEADLINE

Holiday Advertising Schedule

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

December 28, 2021 issue:
Advertising submissions due December 6, 2022

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

State Bar of New Mexico
Est. 1886

ARTURO L. JARAMILLO

Summer Law Clerk Program

- ☑ **Does your firm, business, or organization want to be part of an ABA Awarded program? It's the only one of its kind in the country!**
- ☑ **Do you want to help ignite first year law student's passion in your field of law?**
- ☑ **Are you committed to promoting diversity and inclusion through the membership of the State Bar?**

If you answered yes to one or all of these questions, then participating in the Arturo Jaramillo Clerkship Program can help accomplish these goals! Arturo L. Jaramillo, the first Hispanic president of the State Bar of New Mexico, developed the Summer Law Clerk Program ("Program") in 1993 to offer first year law students of diverse backgrounds the opportunity to clerk in legal settings that provide a foundation for the students' law careers and to promote equal employment opportunities for persons who have historically been under-represented in the legal profession. The Program creates employment opportunities in medium and large law firms, state and local public agencies, and corporate law departments in New Mexico by providing a summer law clerk experience for motivated and deserving law students who meet the programs eligibility criteria.

To learn more, please contact the organizers of the event!

DENISE CHANEZ
dchanez@rodey.com

LEON HOWARD
lhoward@aclu-nm.org

State Bar *of* New Mexico
Committee on Diversity
in the Legal Profession

Co-counsel for your toughest cases.

In-house expertise in all catastrophic cases including carbon monoxide and electrocutions.

Over $20 million in co-counsel settlements in 2021 and more than $1 billion in the firm's history.

Call us for your next case, 505.832.6363.
SpenceNM.com.

SPENCE