

# BAR BULLETIN

## DIGITAL ISSUE

May 22, 2024 • Volume 63, No. 5-D



*Lobo Gris Mexicano*, by Joan Kelly (see page 4)

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### Inside This Issue

U.S. District Court, District of New Mexico:  
Invitation to Discussion on Practicing Law in  
the U.S. District Court for the District of New  
Mexico ..... 5

New Mexico Supreme Court:  
Out-of-Cycle Rule Amendments..... 9

Disciplinary Quarterly Report..... 10

Rules/Orders: Formal Reprimands ..... 11

Clerk's Certificates ..... 15

From the New Mexico Supreme Court

    2024-NMSC-001: No. S-1-SC-39186:  
    State v. Ontiveros ..... 16

    2024-NMSC-002: No. S-1-SC-38948:  
    State v. Mares ..... 20

    2024-NMSC-003: No. S-1-SC-39355:  
    State v. Lorenzo ..... 27

From the New Mexico Court of Appeals

    Formal Opinions ..... 31

    Memorandum Opinions..... 33

**SPECIAL INSERT**

The State Bar of  
New Mexico's  
Resources  
**For Health  
& Wellness**



State Bar of New Mexico  
Well-Being Committee

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# Table of Contents

Notices ..... 5  
 Opportunities For Pro Bono Service and Resources For The Public Calendars..... 8  
 New Mexico Supreme Court: Out-of-Cycle Rule Amendments..... 9  
 Disciplinary Quarterly Report ..... 10  
 Rules/Orders - Formal Reprimands ..... 11  
 State Bar of New Mexico 2024 Annual Meeting..... 13  
 New Mexico State Bar Foundation Golf Classic..... 14  
 Clerk's Certificates ..... 15

**From the New Mexico Supreme Court**

2024-NMSC-001: No. S-1-SC-39186: State v. Ontiveros..... 16  
 2024-NMSC-002: No. S-1-SC-38948: State v. Mares ..... 20  
 2024-NMSC-003: No. S-1-SC-39355: State v. Lorenzo ..... 27

**From the New Mexico Court of Appeals**

Formal Opinions..... 31  
 Memorandum Opinions..... 33  
 Advertising ..... 41

## Section, Division and Committee Meetings

Section, Committee, Division	May	June	Time, Format
<b>Animal Law</b>	8	N/A	12:30 p.m., Zoom
<b>Appellate</b>	7	4	Noon, Zoom
<b>Bankruptcy Law</b>	14	11	Noon, Bankruptcy Court & Zoom
<b>Business Law</b>	14	11	11 a.m., Zoom
<b>Cannabis Law</b>	10	14	9 a.m., Zoom
<b>Children's Law</b>	20	17	Noon, Zoom
<b>Elder Law</b>	3	7	Noon, Zoom
<b>Employment and Labor Law</b>	1	5	12:30 p.m., Zoom
<b>Family Law</b>	17	21	9 a.m., Zoom
<b>Health Law</b>	7	4	9 a.m., Zoom
<b>Immigration Law</b>	31	28	11 a.m., Zoom
<b>Indian Law</b>	19	N/A	Noon, Zoom
<b>Intellectual Property Law</b>	28	25	Noon, Zoom
<b>NREEL</b>	28	25	Noon, Zoom
<b>Prosecutors</b>	10	N/A	Noon, Zoom
<b>Public Law</b>	15	19	Noon, Zoom

**About Cover Image and Artist:** Joan Kelly is a self-taught artist who has been drawing and painting for as long as she can remember. She has also always felt deeply connected to animals, and they are the subject of her art. Through her art, Joan hopes to celebrate the beauty and defend the worth of animals and the natural world. Joan is a retired New Mexico lawyer and is grateful to live in the beautiful state of New Mexico.



# Notices

Please email notices desired for publication to [notices@sbnm.org](mailto:notices@sbnm.org).

## 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://mmonesource.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. (MT). Library Hours: Monday-Friday 8 a.m.-noon and 1-5 p.m. (MT). For more information call: 505-827-4850, email: [libref@nmcourts.gov](mailto:libref@nmcourts.gov) or visit <https://lawlibrary.nmcourts.gov>.

### N.M. Administrative Office of the Courts

#### New Mexico Courts Launch New Website

New Mexico Courts launched a new website to provide the public with an improved user experience and a fresh, new look. The website is [nmcourts.gov](http://nmcourts.gov). View the press release from the Administrative Office of the Courts that explains the new features of the website at <https://www.sbnm.org/News-Publications/Bar-Bulletin/Online-Notices/Court-Notices>.

### U.S. District Court, District of New Mexico

#### Invitation to Discussion on Practicing Law in the U.S.

#### District Court for the District of New Mexico

The United States District Court for the District of New Mexico invites New Mexico Associates, Summer Associates and law students to join Hon. William P. Johnson and Hon. James O. Browning in the Vermejo Courtroom for a discussion about practicing law in the United States District Court for the District of New Mexico. This event will take place on June 25 at 10 a.m. (MT) at the Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd NW, Albuquerque, N.M. 87102. Refreshments

## Professionalism Tip

**With respect to my clients:**

I will advise my client against pursuing matters that have no merit.

will be provided by the Bench & Bar Fund. RSVP to [USDCEvents@nmd.uscourts.gov](mailto:USDCEvents@nmd.uscourts.gov) to reserve a seat for this event.

## STATE BAR NEWS

### Save the Date for the State Bar of New Mexico's 2024 Annual Meeting on Oct. 25

The Annual Meeting looks a little different this year! Save the Date for the State Bar of New Mexico's 2024 Annual Meeting on Oct. 25. "Be Inspired" during one full day of legal education, networking with your colleagues in the N.M. legal community, inspirational speakers and activities, entertainment, and much more. Join us either in-person at the State Bar Center or virtually and earn all 12 of your CLE credits for the year! More information and registration can be viewed soon at <https://www.sbnm.org/AnnualMeeting2024>.

### New Mexico Lawyer Assistance Program Monday Night Attorney Support Group

The Monday Night Attorney Support Group meets at 5:30 p.m. (MT) on Mondays by Zoom. This group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Join the meeting via Zoom at <https://bit.ly/attorneysupportgroup>.

### NM LAP Committee Meetings

The NM LAP Committee will meet at 4 p.m. (MT) on July 11 and Oct. 11. 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.

### New Mexico Well-Being Committee Meetings

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. The Well-Being Committee will meet the following dates at 3 p.m. (MT): May 28, July 30, Sept. 24 and Nov 26. Email Tenessa Eakins at [Tenessa.Eakins@sbnm.org](mailto:Tenessa.Eakins@sbnm.org).

### The Solutions Group Employee Assistance Program

Presented by the New Mexico Lawyer Assistance Program, the Solutions Group, the State Bar's Employee Assistance Program (EAP), extends its supportive reach by offering up to four complimentary counseling sessions per issue, per year, to address any mental or behavioral health challenges to all SBNM members and their direct family members. These counseling sessions are conducted by licensed and experienced therapists. In addition to this valuable service, the EAP also provides a range of other services, such as management consultation, stress management education, webinars, critical incident stress debriefing, video counseling, and a 24/7 call center. The network of service providers is spread across the state, ensuring accessibility. When reaching out, please make sure to identify yourself with the NM LAP for seamless access to the EAP's array of services. Rest assured, all communications are treated with the utmost confidentiality. Contact 505-254-3555 to access your resources today.

## **New Mexico State Bar Foundation Pro Bono Opportunities**

The New Mexico State Bar Foundation and its partner legal organizations gratefully welcome attorneys and paralegals to volunteer to provide pro bono service to underserved populations in New Mexico. For more information on how you can help New Mexican residents through legal service, please visit [www.sbnm.org/probono](http://www.sbnm.org/probono).

## **Save the Date for the New Mexico State Bar Foundation Golf Classic on Sept. 30**

You're invited to the New Mexico State Bar Foundation Golf Classic on Sept. 30 at 9 a.m. (MT) at the Tanoan Country Club in Albuquerque! Please save the date and get your golf team together. All proceeds benefit the New Mexico State Bar Foundation. More information on sponsorships and registration is coming soon.

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

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

## **2024 Law Scholarship Golf Classic**

The UNM School of Law Alumni/ae Association's annual Law Scholarship Golf Classic is happening on June 7 with a shotgun start at 8 a.m. (MT) on the UNM Championship Golf Course (South). This is your chance to help with the Alumni/ae Association student scholarships and have an outstanding day of golf and friendly competition! Please go to <https://lawschool.unm.edu/alumni/events/golf.html> to register, or contact Lynn Taylor at [lynn.taylor@law.unm.edu](mailto:lynn.taylor@law.unm.edu). We hope to see you on the green!

— *Featured* —

**Member Benefit**



**The  
Solutions  
Group**

Take advantage of a free employee assistance program, a service offered by the New Mexico Judges and Lawyers Assistance Program in cooperation with The Solutions Group. Get help and support for yourself, your family and your employees. Services include up to four FREE counseling sessions/issue/year for any behavioral health, addiction, relationship conflict, anxiety and/or depression issue. Counseling sessions are with a professionally licensed therapist. Other free services include management consultation, stress management education, critical incident stress debriefing, substance use disorder assessments, video counseling and 24/7 call center. Providers are located throughout the state.

**To access this service call  
855-231-7737 or 505-254-3555  
and identify with NMLAP.  
All calls are confidential.**



# WRITE ARTICLES for the Bar Bulletin!



The *Bar Bulletin* isn't just a place for information; it's a hub for discourse and perspectives on timely and relevant legal topics and cases! From A.I. and technology to family law and pro bono representation, we welcome you to send in articles on a variety of issues pertaining to New Mexico's legal community and beyond!

**By publishing your work in the Bar Bulletin, you will:**



• Increase your law firm or organization's visibility



• Have your article read by over 8,000 State Bar of New Mexico members



• Get a FREE shoutout on social media for your published submissions



• Gain recognition by your colleagues and peers for your contributions to the State Bar of New Mexico's official publication

For information on submission guidelines and how to submit your articles, please visit [www.sbnm.org/submitarticle](http://www.sbnm.org/submitarticle).

**We look forward to your submissions!**



**State Bar of  
New Mexico**  
Est. 1886



# Opportunities for Pro Bono Service CALENDAR

## May

- |   |  |  |
|---|--|--|
| <p><b>31 Asylum Initial Application and Work Permit Pro Se Clinic</b><br/>In-Person<br/>New Mexico Immigrant Law Center<br/>New Mexico Legal Aid<br/><a href="http://www.nmilc.org/asylum">www.nmilc.org/asylum</a><br/>Location: Announced prior to clinic</p> | <p><b>31 Legal Fair</b><br/>In-Person<br/>New Mexico Legal Aid<br/><a href="http://bit.ly/NMLALegalFairSignUp">bit.ly/NMLALegalFairSignUp</a><br/>Location: Rio Rancho</p> | <p><b>31 Special Immigrant Juvenile Status State Predicate Orders Clinic</b><br/>In-Person<br/>New Mexico Immigrant Law Center<br/><a href="https://dsnp.co/tp02aM">https://dsnp.co/tp02aM</a><br/>Location: Clovis-Carter Public Library Genealogy Room</p> |
|---|--|--|

## June

- |  |  |   |
|--|--|---|
| <p><b>5 Citizenship &amp; Residency Workshop</b><br/>In-Person<br/>New Mexico Immigrant Law Center<br/><a href="http://www.nmilc.org/citizenship">www.nmilc.org/citizenship</a><br/>Location: El Centro de Igualdad y Derechos</p> | <p><b>21 Law-La-Palooza Legal Fair</b><br/>In-Person<br/>New Mexico Legal Aid<br/><a href="http://bit.ly/NMLALegalFairSignUp">bit.ly/NMLALegalFairSignUp</a><br/>Location: Albuquerque</p> | <p><b>27 Asylum Initial Application and Work Permit Pro Se Clinic</b><br/>In-Person<br/>New Mexico Immigrant Law Center<br/>New Mexico Legal Aid<br/><a href="http://www.nmilc.org/asylum">www.nmilc.org/asylum</a><br/>Location: Announced prior to clinic</p> |
|--|--|---|

*If you would like to volunteer for pro bono service at one of the above events, please contact the hosting agency.*



# Resources for the Public CALENDAR

## May

- |  |   |  |
|--|---|--|
| <p><b>24 Consumer Debt/Bankruptcy Workshop</b><br/>Virtual<br/>State Bar of New Mexico<br/>Call 505-797-6094 to register<br/>Location: Virtual</p>   | <p><b>31 Asylum Initial Application and Work Permit Pro Se Clinic</b><br/>In-Person<br/>New Mexico Immigrant Law Center<br/>New Mexico Legal Aid<br/><a href="http://www.nmilc.org/asylum">www.nmilc.org/asylum</a><br/>Location: Announced prior to clinic</p> | <p><b>31 Legal Fair</b><br/>In-Person<br/>New Mexico Legal Aid<br/><a href="http://bit.ly/NMLALegalFairSignUp">bit.ly/NMLALegalFairSignUp</a><br/>Location: Rio Rancho</p> |
| <p><b>31 Special Immigrant Juvenile Status State Predicate Orders Clinic</b><br/>In-Person<br/>New Mexico Immigrant Law Center<br/><a href="https://dsnp.co/tp02aM">https://dsnp.co/tp02aM</a><br/>Location: Clovis-Carter Public Library Genealogy Room</p> |   |  |

Listings in the *Bar Bulletin* Pro Bono & Volunteer Opportunities Calendar are gathered from civil legal service organization submissions and from information pertaining to the New Mexico State Bar Foundation's upcoming events. All pro bono and volunteer opportunities conducted by civil legal service organizations can be listed free of charge. Send submissions to [probono@sbnm.org](mailto:probono@sbnm.org). Include the opportunity's title, location/format, date, provider and registration instructions.



**THE SUPREME COURT OF NEW MEXICO  
ANNOUNCES OUT-OF-CYCLE RULE AMENDMENTS**

In accordance with Rule 23-106.1 NMRA, the Supreme Court has approved out-of-cycle rule amendments. What follows is a summary of those amendments that the Court approved on May 8, 2024. The amendments are effective May 8, 2024. The full text of the amendments in markup format, the related rules and administrative orders, and a memorandum from the Administrative Office of the Courts are available on the Court's website at <https://supremecourt.nmcourts.gov/2024-approved-amendments-to-rules-and-forms/>. The approved rule amendments will also be available on NMOneSource.com.

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**SUPREME COURT**

***Pretrial Release and Detention*** – New Rule 5-403.1 NMRA; Amended Rules 5-208, 5-401, 5-403, 5-409, 6-204, 6-401, 6-403, 7-204, 7-401, 7-403, 8-401, and 8-403 NMRA; and Amended Form 9-210A NMRA

The New Mexico Supreme Court has adopted a new criminal rule and approved amendments to a criminal form and various criminal rules dealing with revocation or amendment of a defendant's conditions of release, pretrial detention, and arrest warrants in criminal cases. The amendments also implement new processes to automatically review conditions of release or consider revocation of conditions of release for defendants alleged to have committed new crimes while released before trial.

THE RULE AMENDMENTS SUMMARIZED ABOVE  
CAN BE VIEWED IN THEIR ENTIRETY AT THE  
NEW MEXICO SUPREME COURT WEBSITE

<https://supremecourt.nmcourts.gov/2024-approved-amendments-to-rules-and-forms/>

# REPORT BY DISCIPLINARY COUNSEL

# DISCIPLINARY QUARTERLY REPORT

Reporting Period: January 1, 2024 – March 31, 2024

## Final Decisions

Final Decisions of the NM Supreme Court ..... 2

*In the Matter of John B. Campbell*, (No. S-1-SC-40258). The New Mexico Supreme Court entered an order indefinitely suspending the Respondent pursuant to Rule 17-211(B)(1) NMRA, effective February 27, 2024, for a period no less than 18 months.

*In the Matter of Francis J. Rio*, (No. S-1-SC-39928). The New Mexico Supreme Court entered an order indefinitely suspending the Respondent no less than 1 year, with the suspension deferred and conditions imposed. A formal reprimand was also ordered.

## Summary Suspensions

Total number of attorneys summarily suspended ..... 1  
 Total number of attorneys summarily suspended (reciprocal) ..... 0

## Administrative Suspensions

Total number of attorneys administratively suspended ..... 2

## Disability Inactive Status

Total number of attorneys removed from disability inactive states ..... 0

## Charges Filed

Charges were filed against an attorney for allegedly filing a criminal complaint without factual or legal basis and with no good-faith agreement for an extension, modification or reversal of existing law, by using means that have no substantial purpose other than to embarrass, delay or burden a third person and/or engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for alleged lack of candor toward a tribunal, failing to provide adequate and/or competent representation to a client; failing to act diligently on behalf of a client, engaging in conduct intended to disrupt a tribunal, by

using means that have no other purpose than to embarrass, delay or burden a third person; by making a statement with reckless disregard as to its truth or falsity concerning the integrity of a judge, by asserting an issue without basis in fact; and/or misconduct involving dishonesty, fraud, deceit or misrepresentation.

## Injunctive Relief

Total number of injunctions prohibiting the unauthorized practice of law ..... 0

## Reciprocal Discipline

Total number of reciprocal discipline filed ..... 1

## Reinstatement from Probation

Petitions for reinstatement filed ..... 0

## Public Censure

Public Censure ..... 1

## Formal Reprimands

Total number of attorneys formally reprimanded ..... 0

## Informal Admonitions

Total number of attorneys admonished ..... 0

## Letters of Caution

Total number of attorneys cautioned ..... 11

Attorneys were cautioned for the following conduct: (1) conflict of interest, (1) specifically prohibited conflicts, (1) improper statements about judge's integrity, (3) failure to communicate, (5) lack of diligence, (2) lack of competence, (1) improper conduct with represented party, (1) improper means, (1) improper fees.

### Complaints Received

<i>Allegations</i> .....	<i>No. of Complaints</i>
Trust Account Violations .....	0
Conflict of Interest .....	1
Specifically prohibited conflicts .....	2
Neglect and/or Incompetence .....	21
Failure to Follow Client Instructions.....	0
Misrepresentation or Fraud .....	7
Improper Withdrawal.....	0
Fees.....	4
Improper Communications.....	11
Prosecutorial Misconduct.....	4
Advertising Violations.....	0
Improper Statements about Judge.....	0
Improper Means.....	18
UPL .....	0

Lack of Fairness to Opposing Party/Counsel.....	3
Contact with Represented Party.....	0
Meritless Claims or Defenses.....	0
Lack of Diligence.....	11
Other.....	29
*Total number of complaints received.....	183*

\*Denotes total number of complaints received through 3/31/2024. May differ from the total number reflected in allegations due to reporting timing.



# Rules/Orders

From the New Mexico Supreme Court

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

## BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of KELLY S. O'CONNELL, ESQ.

DISCIPLINARY NO. 2023-08-4556

An Attorney Licensed to Practice Law before the Courts of the  
State of New Mexico

### FORMAL REPRIMAND

You are being issued this Formal Reprimand pursuant to a *Conditional Agreement Admitting the Allegations and Consent to Discipline* ("Agreement") which was approved by a Disciplinary Board Hearing Committee and a Disciplinary Board Panel.

You had before a New Mexico State Court Magistrate Judge ("Judge") two cases, "*Garcia*" and "*Kuhns*." On August 15, 2022, the Judge denied two of your motions in *Garcia*. In response, on August 19, 2022, you filed in district court a Notice of Appeal along with an Interlocutory Appeal (D-307-LR-2022-00037) (the latter did not contain language required for interlocutory appeals). The Judge then submitted a memo to the District Court, in which he accused you of "distort[ing] the truth," among other things.

On November 8, 2022, the district court judge dismissed the appeal because the Judge's *Order on Motion* was not a final order. Not only are appeals from non-final Orders generally prohibited, interlocutory appeals from magistrate court are not allowed. *State v. Heinsen*, 2004-NMCA-110.

On November 28, 2022, you filed in *Kuhns* a "*Notice of Recusal*" because of the Judge's questioning of your truthfulness in the memo to the district court in *Garcia*. On December 7, 2022, the Judge denied the *Notice of Recusal*. On December 27, 2022, you filed a *Motion to Reconsider*, which the Judge denied on January 6, 2023.

You filed a *Motion to Excuse Judge* in other cases before the Judge and did not stop your efforts in *Kuhns* (discussed below).

On January 6, 2023, in *Kuhns*, you orally moved for an in-camera inspection of an arrest video in which you contended the arresting officer, Officer X, gazed lasciviously at the defendant during her arrest. On January 9, 2023, the Judge issued his *Order on Motion* in which he disclosed that he had contacted the police Lieutenant overseeing the investigation on your claim and that the Lieutenant said nothing improper had happened and the investigation had concluded.

On February 6, 2023, during your opening statement in *Garcia*, you told the jury that Officer X "is currently under investigation . . . for a most serious allegation in another case [*Kuhns*]." You also told the jury that you did not know the results of any investigation, despite the Judge having issued an *Order* on January 9, 2023, stating that the investigation was concluded.

On February 10, 2023, in *Garcia*, you filed a *3rd Motion to Recuse*. On February 14, 2023, you filed in *Kuhns* your *Third Motion to Recuse Judge*. The same day, the Judge denied the motion. On February 17, 2023, the Judge issued an *Order* in *Garcia* denying your *3rd Motion to Recuse*. Later, you filed more motions to recuse in other cases before the Judge who denied all but one.

On February 21, 2023, the Judge issued his *Judgment and Sentence* in *Garcia* after a jury verdict against the defendant. On February 22, 2023, you filed a *Notice of Appeal* in *Garcia*, thus depriving the Judge of further jurisdiction. Yet, on April 3, 2023, you filed yet another *Motion to Recuse* in *Garcia*, which the Judge denied.

Your conduct violated the following Rules of Professional Conduct: Rule 16-301, by filing multiple frivolous motions; Rule 16-304(E), by alluding to a matter at trial that a reasonable lawyer would not believe is relevant; Rule 16-305(D), by engaging in conduct intended to disrupt a tribunal; Rule 16-404(A), by using means that had no substantial purpose other than to embarrass, delay or burden a third person; and Rule 16-804(D), by engaging in conduct that is prejudicial to the administration of justice.

You cooperated with disciplinary counsel in this matter and you demonstrated remorse, both mitigating factors.

You are hereby formally reprimanded for these acts of misconduct pursuant to Rule 17-206(A)(5) of the Rules Governing Discipline. This formal reprimand will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. In addition, in accordance with Rule 17-206(D), the entire text of this formal reprimand will be published in the State Bar of New Mexico Bar Bulletin. You also must pay costs incurred in this disciplinary proceeding.

Dated April 19, 2024  
The Disciplinary Board of the  
New Mexico Supreme Court

By  
Vickie R. Wilcox, Esq.  
Board Chair

## BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Consolidated Matters of FRANCIS J. RIO, III, ESQ.

DISCIPLINARY NOS. 2021-11-4502  
2022-08-4525

An Attorney on Probation to Practice Before the Courts of the  
State of New Mexico

### FORMAL REPRIMAND

A hearing was held before the New Mexico Supreme Court on March 11, 2024, and the Court entered its Order on March 21, 2024, wherein they ordered that you be indefinitely suspended from the practice of law but that the suspension be deferred, and you be placed on supervised probation with specific conditions. Additionally, the Supreme Court ordered the issuance of this Formal Reprimand.

Your misconduct stemmed from your practice as a contract public defender. The Supreme Court noted during oral argument that there are difficulties associated with practice as a public defender – not limited to large caseloads and the challenges of practicing in widespread rural areas. While your misconduct occurred while you were acting as a contract public defender, however, the area of law one chooses to practice does not relieve the responsibility to comply with the Rules of Professional Conduct. *See, State v. Martinez*, 1982-NMSC-020 ¶2 (“Public defenders, paid with public funds, are not excused from compliance with the [Rules of Professional Conduct].”)

Disciplinary complaints were filed against you for your failures to attend at least fifteen (15) hearings despite being the attorney of record and having proper notice. The Supreme Court also echoed the concern that you neglected to timely file pleadings and adequately communicate with a client resulting in that client languishing in jail for more than 100 days.

Your clients were either incarcerated or in danger of being incarcerated, thereby making them vulnerable victims. The Hearing Committee and the Board Panel below commented on your cavalier attitude towards these vulnerable victims and the Supreme Court questioned your recognition that your conduct was improper.

The New Mexico Supreme Court found that you violated the following Rules of Professional Conduct:

1. 16-101 – by failing to provide competent representation to a client;
2. 16-103 – by failing to act with reasonable diligence and promptness in representing a client;
3. 16-104(A)(3) and (4) – by failing to keep the client reasonably informed about the status of the matter and failing to comply with reasonable request for information;
4. 16-302 – by failing to make reasonable efforts to expedite litigation consistent with the interest of the client;
5. 16-304(C) – by knowingly disobeying an obligation under the rules of a tribunal; and
6. 16-804(D) – by engaging in conduct that is prejudicial to the administration of justice.

The Supreme Court found that while the purpose of attorney discipline is primarily protection of the public there is also a concern over the public’s perception of the legal profession. *See, In re Key*, 2005-NMSC-014. The public cannot be allowed to believe that it is permissible to fail to appear for clients simply because of the caseload or bureaucracy attendant to acting as contract public defender. There is no disagreement that public defenders provide a valuable service, are not highly compensated, and face difficulties unique to their chosen practice. This does not, however, alleviate your responsibilities under the Rules of Professional Conduct. To hold those who practice as public defenders or other public service agencies to a different standard than, for example private criminal defense attorneys or civil litigation attorneys, would lead to inconsistent and unfair application of the Rules of Professional Conduct. The New Mexico Supreme Court has emphasized the need for discipline to be applied in a “fair and consistent manner” *See, In re Montoya*, 2011-NMSC-042 ¶67. Therefore, it was determined that the proper sanction consistent with New Mexico precedent and the *ABA Standards for Imposing Lawyer Discipline* was the issuance of this Formal Reprimand together with a deferred suspension and supervised probation. It is hoped that the discipline imposed will be sufficient to impress upon you the seriousness of your misconduct and you will drastically alter not only how you practice law but your attitude toward your clients and responsibilities.

Dated February 19, 2024  
The Disciplinary Board of the  
New Mexico Supreme Court

By  
Vickie R. Wilcox, Esq.  
Disciplinary Board Chair



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## CLERK'S CERTIFICATE OF INDEFINITE SUSPENSION FROM MEMBERSHIP IN THE STATE BAR OF NEW MEXICO

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Effective March 12, 2024:  
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From the New Mexico Supreme Court

From the New Mexico Supreme Court

**Opinion Number: 2024-NMSC-001**

No: S-1-SC-39186 (filed December 18, 2023)

**STATE OF NEW MEXICO,**

Plaintiff-Petitioner,

v.

**ANDREW ONTIVEROS,**

Defendant-Respondent.

**ORIGINAL PROCEEDING ON CERTIORARI**

John Dean, District Judge

Hector H. Balderas, Attorney General

Benjamin L. Lammons, Assistant At-

torney General

Santa Fe, NM

for Petitioner

Bennett J. Baur, Chief Public Defender

Allison H. Jaramillo, Assistant

Appellate Defender

Santa Fe, NM

for Respondent

## OPINION

### ZAMORA, Justice.

{1} The issue before us is whether law enforcement violated the Fourth Amendment to the United States Constitution when, incident to an arrest, police conducted a warrantless inventory search of a vehicle that was lawfully parked at the registered owner's home. We conclude on the facts of this case that the inventory search violated Defendant's Fourth Amendment rights and affirm the Court of Appeals.

#### I. BACKGROUND

{2} Officer Alvin Bencomo of the Farmington Police Department was on patrol when he observed a car with a broken taillight and a cracked front windshield drive past him. To initiate a traffic stop, Officer Bencomo activated his emergency lights and followed the car a short distance before it turned into a trailer park and came to a stop. There were two men in the car: Defendant, who was driving, and his passenger. When Officer Bencomo made contact with Defendant, he ran Defendant's name through dispatch and discovered Defendant's license had been revoked due to a prior conviction for driving while intoxicated. After Defendant informed Officer Bencomo that the car he was driving did not have an interlock device, the officer arrested him.

{3} During the traffic stop, Defendant told the officer that the car was registered to his grandmother and that he had parked it in front of her trailer. The grandmother did not appear at the scene at any time during the police investigation. After completing a license plate check, the officer confirmed that Defendant's grandmother owned the car Defendant was driving. Officer Bencomo testified that although he did not independently verify who owned the trailer, he knew that the car was parked in front of the grandmother's residence.

{4} After the arrest, Officer Bencomo asked Defendant whether his passenger had a valid driver's license. Instead of directly answering the question, Defendant responded by suggesting to the officer that the car should stay parked where it was in front of his grandmother's residence. Officer Bencomo rejected Defendant's suggestion, deciding instead to tow and impound the car for safekeeping because it was parked in an "open area" and "the registered owner was not on-scene." In anticipation of the impoundment, the Farmington police conducted a pre-tow inventory search of the interior and trunk of the grandmother's car. Among other contraband, the search yielded controlled substances and drug paraphernalia.

{5} Officer Bencomo testified that the pre-tow search of the car was consistent with standard police procedures set out in the

Department's written tow and impoundment policy. Under the Department's policy, officers *may* consider towing a vehicle when "reasonably necessary to[] safeguard the vehicle and/or its contents" among other goals. This can occur in a variety of circumstances, including "[w] whenever the operator of [a] vehicle has been arrested, injured, or otherwise incapacitated" or "[w] whenever the operator of [a] vehicle is found to have suspended or revoked driving privileges and there exists no properly licensed driver, designated by the owner of the vehicle, readily available to drive the vehicle." The Department's policy also clarifies the mandatory nature of a police inventory search providing that "[a]ny vehicle towed at the direction of a law enforcement officer *shall* have a complete inventory of the vehicle's contents performed to protect the [Department] from liability and to safeguard the property rights of the owner of the vehicle's contents" (emphasis added).

{6} At the close of the suppression hearing, the district court found that the car was parked directly in front of the trailer that belonged to Defendant's grandmother, the registered owner of the car. Nonetheless, the district court denied Defendant's motion to suppress, concluding that, as a matter of law, both the impoundment and inventory search of the car were lawful. The district court determined that law enforcement (1) "was in lawful custody and control of the vehicle based on the traffic stop and arrest of Defendant," (2) "followed the scope and procedure of the [Department's policy]" given Defendant's arrest, and (3) reasonably towed Defendant's vehicle despite its location on private property. Defendant thereafter pleaded guilty to possession of a controlled substance and driving with a suspended or revoked license pursuant to a conditional guilty plea, reserving the right to appeal the denial of his suppression motion. On appeal, the Court of Appeals reversed, concluding that the State failed to satisfy any of the burdens it bears under *State v. Davis*, 2018-NMSC-001, 408 P.3d 576, and that the warrantless inventory search of the vehicle was unlawful under the Fourth Amendment. *State v. Ontiveros*, 2022-NMCA-019, ¶¶ 10-24, 508 P.3d 910.

{7} We granted the State's petition for writ of certiorari to determine the lawfulness under the Fourth Amendment of the inventory search conducted by the police.

#### II. DISCUSSION

##### A. Standard of Review

{8} Appellate review of motions to suppress presents mixed questions of law and fact. *State v. Martinez*, 2018-NMSC-007, ¶

8, 410 P.3d 186. We examine whether there is substantial evidence to support the district court's factual findings, deferring to the district court's review of the testimony and other evidence presented and viewing the facts in the manner most favorable to the prevailing party. *Id.* ¶¶ 3, 8. Here, there is no challenge to the district court's factual findings, which we accept and view in the manner most favorable to the State, the prevailing party in the district court. Applying the law to the facts, we determine de novo the constitutional reasonableness of the search or seizure. *State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964.

### B. The Impoundment and Inventory Doctrine

{9} The Fourth Amendment protects individuals from unreasonable government searches. U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). The ultimate touchstone of any Fourth Amendment inquiry is reasonableness. *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); *State v. Yazzie*, 2019-NMSC-008, ¶ 13, 437 P.3d 182. The application of the Fourth Amendment's reasonableness standard depends on the facts and circumstances of each case. *Cooper v. California*, 386 U.S. 58, 59 (1967). The State bears the burden of establishing the validity of a warrantless search, which is presumed unreasonable under the Fourth Amendment. *Davis*, 2018-NMSC-001, ¶ 11.

{10} To justify the warrantless inventory search of the vehicle Defendant was driving at the time of his arrest, the State relies on the impoundment and inventory doctrine, which is one of three recognized community caretaking exceptions to the warrant requirement of the Fourth Amendment. *See State v. Ryon*, 2005-NMSC-005, ¶ 25, 137 N.M. 174, 108 P.3d 1032. The impoundment and inventory doctrine allows law enforcement to impound a vehicle and perform a warrantless inventory search of the vehicle for public safety and other non-criminal, non-investigatory purposes. *See State v. Byrom*, 2018-NMCA-016, ¶ 10, 412 P.3d 1109 (citing *Ryon*, 2005-NMSC-005, ¶¶ 13, 24; *Cady*, 413 U.S. at 441). It is the non-criminal nature of law enforcement's contact with citizens that gives rise to this community caretaker exception. *Id.* ¶ 33; *accord South Dakota v. Opperman*, 428 U.S. 364, 368-69 (1976).

{11} To meet its burden, the State must demonstrate that a police officer's decision to conduct a warrantless inventory search serves a recognized community caretaking function. These functions may include removing the vehicle so it is not a traffic hazard or protecting it from theft or vandalism. *Opperman*, 428 U.S. at 368-69. Although a police officer is not required to adopt the least intrusive means available to safeguard a vehicle and its contents, *Colorado v. Bertine*, 479 U.S. 367, 374-75 (1987), the inventory search must nonetheless be reasonable in light of all attendant facts and circumstances, *Opperman*, 428 U.S. at 375.

### C. Impoundment and Inventory Search of This Vehicle Was Unreasonable

{12} Police inventory searches are constitutionally reasonable if (1) the object is lawfully in police control or custody, (2) the inventory of the object is made pursuant to established police regulations, and (3) the search of the object is reasonable. *Davis*, 2018-NMSC-001, ¶ 12; *State v. Williams*, 1982-NMSC-041, ¶ 4, 97 N.M. 634, 642 P.2d 1093. This three-factor test has historically provided our courts with a functional framework for analyzing whether inventory searches are constitutionally reasonable. But as the Court of Appeals recognized, "the state of the law of the impoundment and inventory doctrine has evolved from the distinctive three-part test . . . and now focuses more generally on the reasonableness of the officer's asserted custody or control of the item seized and searched." *Byrom*, 2018-NMCA-016, ¶ 26; *see Williams*, 1982-NMSC-041, ¶¶ 5-7; *State v. Boswell*, 1991-NMSC-004, ¶¶ 8-14, 111 N.M. 240, 804 P.2d 1059. In this context, reasonableness "is a function of an officer's responsibility to safeguard the citizen's property and a prudent officer's need to insulate the police from liability should the citizen's property be lost or stolen." *Byrom*, 2018-NMCA-016, ¶ 34; *see Opperman*, 428 U.S. at 369; *Boswell*, 1991-NMSC-004, ¶¶ 9-10; *State v. Ruffino*, 1980-NMSC-072, ¶ 5, 94 N.M. 500, 612 P.2d 1311.

#### 1. Police Control or Custody

{13} To determine whether an inventory search pursuant to a law enforcement decision to tow a vehicle was reasonable, we look first to whether Defendant's vehicle was lawfully in police control or custody. *Davis*, 2018-NMSC-001, ¶ 15. For the police to have lawful custody or control of a driver's vehicle incident to an arrest, there must be a reasonable nexus between the arrest and the reason for searching the vehicle. *Williams*, 1982-NMSC-041, ¶ 6. As our search and seizure jurisprudence has developed, the proper focus of the reasonableness of impoundment and inventory

is whether the object—here a vehicle—is made insecure by the arrest. *Davis*, 2018-NMSC-001, ¶ 21. Properly applied, the community caretaking doctrine provides only a limited exception to the warrant requirements of the Fourth Amendment. It should not be countenanced as a broad catch-all justification for warrantless inventory searches.

{14} We begin our analysis by determining whether the vehicle driven by Defendant was made insecure due to an increased risk of theft or vandalism as a consequence of his arrest. Given the location of Defendant's vehicle at the time of his arrest and relying on the uncontested facts from the suppression hearing, we conclude that it was not.

{15} At the time of his arrest, the vehicle driven by Defendant was legally parked at the registered owner's home. There was no evidence and there were no findings that the vehicle created a hazard to other drivers where it was parked or that it was made less secure by Defendant's arrest. The State nonetheless argues that the inventory search was reasonable because Defendant's lawful arrest prevented him from driving the vehicle and because there was no one else who was immediately available or amenable to take possession of the vehicle given that the registered owner was not on the scene and that Defendant did not respond to Officer Bencomo's inquiry about whether the passenger had a valid driver's license.

{16} When no one is immediately available to take possession of a vehicle, law officers may have a legitimate non-investigatory reason to impound a vehicle and conduct an inventory search, such as to protect a defendant's property or to protect themselves from claims or disputes over lost or stolen property. *See, e.g., Jaynes v. Mitchell*, 824 F.3d 187, 197 (1st Cir. 2016). But those non-investigatory reasons evaporate when, as here, law enforcement knows the vehicle is legally parked at the registered owner's home. Leaving the vehicle where it was parked because no one else could immediately take possession of the vehicle did not subject the vehicle or Defendant's property to an increased risk of theft or vandalism due to his arrest. Nor did the police have an increased risk of claims or disputes about lost or stolen property as they generally have no community-caretaking duty to protect a vehicle parked on the owner's property. *Cf. 3 Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment* § 7.3(c), at 840 (6th ed. 2020) ("If a person is arrested in or at his place of residence and his car is parked in the garage or lot or other place where that person ordinarily leaves his car, then the police cannot justify seizure of the car on the ground that such action is needed for the protection of the vehicle and its contents.").

{17} In contrast, the State appears to rely on Officer Bencomo's testimony that the vehicle was parked in an "open area" to argue that law enforcement did have a community-caretaking duty to protect the vehicle despite its being lawfully parked at the registered owner's residence. However, the State's support for such a legal duty is speculative and points to nothing in the factual record of the district court to demonstrate the necessary risk to the vehicle. See *Davis*, 2018-NMSC-001, ¶ 21. The record establishes that Officer Bencomo knew that Defendant's grandmother was the registered owner of the vehicle and that the vehicle was lawfully parked at her residence. Under these facts, the State's reliance on the officer's unexplained characterization of the "open area" does not establish a legitimate, non-investigatory reason to impound the vehicle or conduct an inventory search.

{18} The State argues generally that the Court of Appeals erred by burdening law enforcement with a new "comparative risk assessment tool" that improperly focuses on the location of the vehicle and by concluding that Defendant's arrest did not increase the risk of loss, theft, or destruction of the vehicle he was driving. We disagree. The Court of Appeals analysis falls squarely within the reasonableness parameters we most recently articulated in *Davis*, the case of principal reliance by the State, Defendant, and the Court of Appeals. One specific and important focus of the constitutional reasonableness inquiry in impoundment and inventory cases is "whether the object is made insecure by the arrest." *Davis*, 2018-NMSC-001, ¶ 21. That inquiry necessarily entails an assessment of whether the location of the vehicle subjects it to an increased risk of theft or vandalism because of the driver's arrest, making the vehicle's location an important and consistently recognized factor in determining whether the police have lawful control and custody of it.

{19} For the reasons discussed above, we conclude that this vehicle parked at its owner's residence was not under lawful custody or control by law enforcement. *But cf. id.* ("[I]t would be 'clearly improper for the police to simply leave' unattended at the scene of an arrest those objects belonging to an arrestee that are rendered insecure by the arrest." (citation omitted)).

## 2. Established Police Procedures

{20} We next address the challenge to established police procedures. The district court's finding that the police followed the standardized procedure set out in the Department's policy in inventorying and impounding the car following Defendant's arrest is supported by the record below and applicable law.

{21} The Department's policy specifically requires that an officer's impoundment and inventory of a vehicle be "reasonably necessary" to "safeguard the vehicle and/or its contents" among other goals. That proviso sufficiently "circumscribe[s] the discretion of individual officers," *Bertine* 479 U.S. at 376 n.7, and the Court of Appeals properly rejected Defendant's argument that the Department's policy was facially violative of the Fourth Amendment. *Ontiveros*, 2022-NMCA-019, ¶ 19.

{22} However, the Court of Appeals also determined that the officer failed to adhere to the Department's discretionary policy because he made it his own personal policy always to tow vehicles upon a driver's arrest. *Ontiveros*, 2022-NMCA-019, ¶ 16. In so concluding, the Court of Appeals failed to "indulge in all reasonable inferences in support of the district court's decision and disregard all the inferences or evidence to the contrary," *Martinez*, 2018-NMSC-007, ¶ 15 (brackets and internal quotation marks omitted).

{23} Viewed in the manner most favorable to the State, the evidence was sufficient to support a finding that the impoundment of the car was not a foregone conclusion, but instead was consistent with the standardized criteria contained in the Department's tow and impound policy. These standardized criteria authorize the Department's officers to consider towing and impounding a vehicle when it is "reasonably necessary to," among other things, "safeguard the vehicle or its contents." The policy also provides that an officer may consider towing a vehicle when its operator has been arrested.

{24} As confirmed by the dash-cam video of the encounter, Officer Bencomo's pre-inventory questioning of Defendant included asking Defendant whether his passenger had a valid driver's license. In asking Defendant whether his passenger had a valid driver's license, it is reasonable to conclude that Officer Bencomo was exercising the discretion afforded him under the Department's policy by trying to determine if someone else could take possession of the vehicle as an alternative to impoundment.

{25} The Court of Appeals concluded that Officer Bencomo's testimony at the suppression hearing indicated that he did not adhere to the Department's policy and instead made it his policy always to tow vehicles upon a driver's arrest. *Ontiveros*, 2022-NMCA-019, ¶ 16. The strongest support in the record for that conclusion is Officer Bencomo's testimony that he "usually tr[ies] to conduct everything standard with all [his] arrests and tow every . . . car" whose driver is arrested (emphasis added). But we do not view the officer's reference to his usual approach in deciding whether

to impound a vehicle as sufficient evidence of a complete abandonment of the governing departmental tow and impound policy when, as here, his questioning of Defendant evidences the exercise of at least some consideration of whether it was reasonably necessary to impound the vehicle driven by Defendant. Considering the totality of the circumstances, indulging all reasonable inferences in support of the district court's decision, and disregarding the contrary inference drawn by the Court of Appeals from the officer's reference to his impoundment-related predilections, we conclude the police decision to impound and inventory the vehicle was consistent with the standardized criteria contained in the Department's tow and impound policy.

## 3. Reasonableness of the Impoundment and Inventory Search

{26} The third factor in determining whether an impoundment and inventory search is valid is that it be reasonable. *Davis*, 2018-NMSC-001, ¶ 12. An inventory search is reasonable if it furthers one of the following governmental interests: "(1) to protect the arrestee's property while it remains in police custody; (2) to protect the police against claims or disputes over lost or stolen property; or (3) to protect the police from potential danger." *Id.* ¶ 16 (internal quotation marks and citation omitted). An inventory search is not reasonable if police acted in bad faith or for the sole purpose of investigating a possible crime. See *Bertine*, 479 U.S. at 372.

{27} As analyzed above, we conclude that the vehicle Defendant was driving was not subject to a heightened risk of theft or vandalism due to his arrest compared to any other time when the vehicle was parked at the owner's residence without the owner being immediately present. Given that there was no heightened risk to the vehicle, we conclude that the vehicle did not need to be impounded and searched to protect the police against possible claims or disputes over lost or stolen property. As to the third community caretaking justification for a warrantless inventory search, there is no claim that such an impoundment and search was needed to protect the police from potential danger and no evidence in the record of any potential danger to the police were an impoundment and search not performed. Accordingly, this rationale does not bear on our analysis.

{28} As a final observation, we note that often, as here, there may be analytical overlap between a challenge to the first or second *Davis* factor—whether the object was lawfully in police custody or control or whether the inventory was made pursuant to established police regulations—and a challenge to the third factor, whether the search itself was constitutionally reason-



able. *Davis*, 2018-NMSC-001, ¶ 27. In some circumstances, as in *Davis* regarding custody or control, the inquiry into the first or second factor may effectively resolve the inquiry into the third factor, and little, if any, further analysis will be necessary. *Id.* ¶¶ 27-31; *see also State v. Boswell*, 1991-NMSC-004, ¶¶ 12-14, 111 N.M. 240, 804 P.2d 1059 (concluding that analysis of first *Davis* factor tracked facts relevant to third *Davis* factor). In other circumstances, such as when an individual is also or exclusively challenging the scope or manner of the inventory search, the core purposes of the inventory doctrine will once again guide our analysis of that particular challenge. *See, e.g., Ruffino*, 1980-NMSC-072, ¶¶ 1-2 (challenging the inventory search of locked car trunk upon

the defendant's arrest on a minor charge); *State v. Shaw*, 1993-NMCA-016, ¶¶ 1-3, 115 N.M. 174, 848 P.2d 1101 (challenging the taking of individual cigarettes out of their pack during a booking inventory search following the defendant's arrest on a domestic disturbance charge); *State v. Vigil*, 1974-NMCA-065, ¶ 4, 86 N.M. 388, 524 P.3d 1004 (challenging inventory search of closed paper bag in locked trunk following the defendant's arrest for assault). While potentially repetitive, this analytical overlap ensures that the impoundment and inventory search exception to the Fourth Amendment remains sharply focused on the non-criminal, non-investigatory justifications for the community caretaking exemption for warrantless searches.

### III. CONCLUSION

{29} The State failed to meet its burden under the Fourth Amendment to demonstrate the reasonableness of the impoundment and warrantless inventory search of the vehicle driven by Defendant at the time of his arrest. Accordingly, we affirm the Court of Appeals in granting Defendant's motion to suppress, and we remand to the district court for further proceedings consistent with this opinion.

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

**BRIANA H. ZAMORA, Justice**

**WE CONCUR:**

**C. SHANNON BACON, Chief Justice**

**MICHAEL E. VIGIL, Justice**

**DAVID K. THOMSON, Justice**

From the New Mexico Supreme Court

From the New Mexico Supreme Court

**Opinion Number: 2024-NMSC-002**

No: S-1-SC-38948 (filed December 22, 2023)

**STATE OF NEW MEXICO,**

Plaintiff-Appellee,

v.

**EDDIE M. MARES,**

Defendant-Appellant.

**CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS**

John Dean Jr., District Judge

Bennett J. Baur, Chief Public Defender

Luz C. Valverde, Assistant Appellate

Defender

Santa Fe, NM

for Appellant

Hector H. Balderas, Attorney General

John Kloss, Assistant Attorney

General

Santa Fe, NM

for Appellee

## OPINION

**VARGAS, Justice.**

{1} Defendant Eddie Mares signed a waiver of his *Miranda* rights and agreed to speak with police after he requested an attorney at his felony first appearance, after he was appointed an attorney, and even after his appointed attorney advised him not to speak to police. In this case, we determine that the police did not violate Defendant's right to counsel under the Sixth Amendment to the United States Constitution by interviewing him. As the United States Supreme Court made clear in *Montejo v. Louisiana*, 556 U.S. 778 (2009), police may initiate contact with a represented defendant and seek to obtain the defendant's statement and waiver of counsel outside the presence of counsel. This is the rule even when the defendant previously asserted the right to counsel in open court, *id.* at 797, and even when the defendant does not consult with counsel about the wisdom of waiver before deciding to waive, *id.* at 786. Under *Montejo*, "the decision to waive [the Sixth Amendment right to counsel] need not itself be counseled. And when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick." *Id.* (citation omitted).

{2} We consider the question on certification from the Court of Appeals, which perceived an apparent conflict between this Court's prior precedent construing the Sixth Amendment and the later-decided rule in *Montejo*. Order of Certification to the New Mexico Supreme Court, *State v. Mares*, A-1-CA-37950 (N.M. Ct. App. June 4, 2021); *see also* NMSA 1978, § 34-5-14(C) (1972) (allowing the Court of Appeals to certify to this Court "a significant question of [constitutional] law" or "an issue of substantial public interest"). In addition to resolving the substantive Sixth Amendment issue, we take this opportunity to clarify the parameters for certification from the Court of Appeals under Section 34-5-14(C). We hold that the Court of Appeals should certify an issue when it appears that our precedent directly controls that issue and is contrary to later United States Supreme Court precedent. We further clarify that we accept certification of issues rather than cases, thus abrogating *Collins ex rel. Collins v. Tabet*, 1991-NMSC-013, ¶ 46 n.10, 111 N.M. 391, 806 P.2d 40, and *Rhein v. ADT Auto.*, 1996-NMSC-066, ¶ 2, 122 N.M. 646, 930 P.2d 783.

{3} We recognize that the United States Supreme Court's opinion in *Montejo* is controlling precedent under which Defendant's Sixth Amendment rights were not violated, and to the extent that *State v. Des-*

*noyers*, 2002-NMSC-031, 132 N.M. 756, 55 P.3d 968, *abrogated on other grounds by State v. Forbes*, 2005-NMSC-027, ¶ 6, 138 N.M. 264, 119 P.3d 144, conflicts with *Montejo*, *Desnoyers* is overruled. We do not reach the question of whether Article II, Section 14 of the New Mexico Constitution provides greater protection because that question was not properly preserved. We remand the remaining issues raised by Defendant's appeal to the Court of Appeals.

### I. BACKGROUND

#### A. Factual Background

{4} At his first appearance on charges of criminal sexual penetration of a minor, Defendant requested counsel to assist in his defense, and the court appointed counsel. Counsel advised Defendant not to speak with anyone about the case, including police. The following day, notwithstanding the fact that Defendant was represented by counsel, police interviewed Defendant in jail.

#### 1. The interview

{5} At the start of the interview, police stated multiple times that they "want[ed] to hear [Defendant's] side of the story" and implied that if they knew his side of the story, they could help Defendant counter media and social media narratives about Defendant's guilt. They invited Defendant to ask his own questions, because "[i]nformation goes both ways." Defendant asked why police had put his information in the news and on social media, and stated that he had already lost his job and his house due to the charges against him. The police offered to answer his questions once Defendant waived his *Miranda* rights, stating:

We can talk about all that, okay?

I apologize that it put you in a bad spot. That's never my intent, okay? Um, but to start off, since you're here in jail, we do have to go over your rights, okay? And you've heard them before. You do have the right to remain silent. Anything you say can and will be used against you. You have the right to a lawyer, and if you cannot afford a lawyer, one will be provided by, for free. By signing this, you're saying you understand these rights and voluntarily waive them, will answer questions. Um, that being said, if you sign this, you have the right to not talk to us at any point in time. So if you become uncomfortable or whatever, then just bring it up and you can stop talking to us. Does that make sense?

{6} Defendant signed the waiver. Defendant then told police that counsel “told me not to, not to even actually talk to you guys, period. . . . [T]hat’s their advice, like don’t talk to anybody besides us. . . . But like I said, I have nothing to hide.” The police downplayed counsel’s advice, stating, “They always say that. They always say that though anyway. That they know something that’s in your benefit to talk to us. Like the lawyers that say, ‘Don’t talk to cops!’ Like oh, sometimes they want to hear your side of the story.”

{7} Subsequently, Defendant made several statements that could be construed as incriminating. When confronted with the victim’s story, Defendant responded, “I don’t know. I mean, okay. I mean if it happened, I mean it happened. But from my thoughts, I didn’t touch her.” Defendant agreed with an officer’s suggestion that it was “possible” that Defendant could not remember some of the night’s events because he had too much to drink. When police asked whether Defendant had penetrated the victim with “just fingers rather than full on,” Defendant replied, “To be honest, I cannot tell you exactly. I couldn’t tell you exactly. And to be honest, this conversation does make me uncomfortable because that is my daughter, and it’s uncomfortable.” An officer replied, “There’s no way around it being uncomfortable. But we gotta talk about it at the same time. I guess we’re kind of stuck here, trying to figure it out together.”

{8} At one point, police told Defendant that “we’re here to help you.” Defendant stated, “Everything in my brain right now is telling me that I shouldn’t be talking to you,” to which police replied, “And that’s the strong thing, don’t ever talk to the cops. Man, like you say. . . . [y]our side of the story needs to get out there, dude.” Another officer stated, “People get so messed up, like, ‘oh shit. [M]aybe I shouldn’t talk to the po,’” but “[your] situation [is] not going to get any worse” by talking to police because “the charges are already filed. . . . You’re not going to have more charges. No, that’s not the case. We’re just here to find out what happened and to get the truth out.”

## 2. District court proceedings

{9} The State filed a motion to admit Defendant’s statements to police. The State argued that the police interview did not violate Defendant’s Sixth Amendment right to counsel pursuant to *Montejo*. Defense counsel filed a motion to suppress the statements, arguing in relevant part that *Montejo* did not control this case because it was factually distinguishable.

{10} Prior to the suppression hearing, the parties stipulated to the following timeline of events: (1) the criminal complaint was filed on May 19, 2017; (2) one month later, on June 18, Defendant was arrested;

(3) the following day, June 19, Defendant applied for a public defender, the district court ordered the appointment of counsel, Defendant met with an attorney from the public defender’s office, and that attorney instructed Defendant not to speak with anyone; (4) the following day, June 20, police spoke to Defendant in jail.

{11} The district court denied Defendant’s motion to suppress and granted the State’s motion to admit Defendant’s statements. The district court concluded that “[u]nder the federal constitution, this issue is controlled by *Montejo*” and “Defendant has not presented to the court any argument or law that the New Mexico state constitution would provide greater protection than the federal constitution.”

{12} The jury convicted Defendant on two counts of criminal sexual penetration of a minor. The district court sentenced Defendant to thirty years in prison.

## 3. Defendant’s appeal

{13} Defendant appealed to the Court of Appeals, arguing that (1) police interviewed him in violation of his right to counsel under the Sixth Amendment because Defendant asserted his right to counsel at his first appearance and was represented by counsel at the time of the interview and (2) the district court improperly denied the jury’s request to review transcripts of Defendant’s interview with police. Defendant also raised a cursory argument that police violated his Fifth Amendment right to silence because they did not stop the interview when Defendant said that he felt “uncomfortable.”

## B. Certification from the Court of Appeals

{14} The Court of Appeals issued an order of certification to this Court because it determined that this case presented two issues of substantial public interest and a significant question of constitutional law. Order of Certification at 3, *Mares*, A-1-CA-37950 (citing Section 34-5-14(C)). First, the Court of Appeals reasoned that an issue of substantial public interest is presented by the apparent conflict between the Sixth Amendment rule discussed by this Court in *Desnoyers*, 2002-NMSC-031, ¶ 16 (recognizing the Sixth Amendment rule from *Michigan v. Jackson*, 475 U.S. 625 (1986)), and the subsequent precedent of the United States Supreme Court, *Montejo*, 556 U.S. at 797 (overruling *Jackson*). Order of Certification at 3-6, 12, *Mares*, A-1-CA-37950. Second, the Court of Appeals reasoned that there is apparent doctrinal tension in New Mexico case law regarding the Court of Appeals’ power to depart from our precedent, which presents both an issue of substantial public interest and a significant question of law under the New Mexico Constitution. *Id.* at 7-12.

## C. The Case Before This Court

{15} We accepted certification of both issues and ordered supplemental briefing to “update the briefs filed in the Court of Appeals and address any new points raised in the Court of Appeals’ certification order.” In the supplemental briefing, the parties elaborated upon each issue raised in the Court of Appeals case—including those issues that we did not certify—but did not address the procedural issue raised in the certification order. For the reasons given in the discussion that follows, we instruct the parties in future certification cases to cabin their arguments to the certified issues.

{16} Defendant makes the following arguments before this Court: (1) his statements should have been suppressed because under a narrow reading, the holding of *Montejo* does not apply to this case; (2) Article II, Section 14 of the New Mexico Constitution provides greater protection than the Sixth Amendment, and therefore Defendant’s waiver of counsel should be invalid under Article II, Section 14; (3) police violated Defendant’s Fifth Amendment right to silence by continuing the interrogation after Defendant attempted to stop it; and (4) the district court erred by denying the jury’s request to review the transcript of Defendant’s interview with police.

{17} The State argues that (1) the district court properly admitted Defendant’s statements because Defendant waived his Sixth Amendment rights through his waiver of *Miranda* rights; (2) the district court did not err in denying the jury’s request to review the transcript of Defendant’s interview with police; and (3) Defendant did not preserve his argument under Article II, Section 14, which should not be construed more broadly than the Sixth Amendment.

{18} In this opinion, we also address the procedural issue certified by the Court of Appeals, which the parties did not address. The Court of Appeals identified doctrinal tension in our case law regarding that Court’s ability to depart from this Court’s precedent when there is an apparent conflict between our precedent and that of the United States Supreme Court. Order of Certification at 7-8, *Mares*, A-1-CA-37950. One line of cases would allow the Court of Appeals to depart from our precedent only if our precedent is dicta. *Id.* (citing *State v. Dopslaf*, 2015-NMCA-098, ¶ 11, 356 P.3d 559; and *State v. Bazan*, 1977-NMCA-011, ¶ 15, 90 N.M. 209, 561 P.2d 482). A second line of cases would allow the Court of Appeals to depart from our precedent if our precedent did not decide the precise issue involved in the current case. *Id.* at 8-9 (citing *State v. Duarte*, 2004-NMCA-117, ¶ 12, 136 N.M. 404, 98 P.3d 1054). We address and resolve this tension.



## II. SUBSTANTIVE ISSUE

### PRESENTED ON CERTIFICATION

{19} We begin by addressing the substantive issue presented on certification and hold that the Sixth Amendment was not violated when Defendant waived his *Miranda* rights and agreed to speak with police despite being represented by counsel. We further conclude that Defendant did not preserve his state constitutional claim of additional protections under Article II, Section 14. Finally, we address the procedural questions surrounding the certification of cases under Section 34-5-14(C).

#### A. Police Did Not Violate Defendant's Sixth Amendment Rights When Defendant Agreed to Speak with Them After He Requested Counsel at His First Appearance

{20} It is clear that Defendant's Sixth Amendment right to counsel had already attached at the time he was interviewed in jail: Defendant had been criminally charged, he had been haled into court for his first appearance, he requested counsel, and he was appointed counsel by the court. See *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (holding that the Sixth Amendment right to counsel attaches "at or after the time that judicial proceedings have been initiated against" a defendant). Thus the question in this case is not whether Defendant had the right to counsel under the Sixth Amendment at the time of his interrogation by police—he undeniably did. See *Montejo*, 556 U.S. at 786 (explaining that the Sixth Amendment guarantees the right to the assistance of counsel "at all critical stages of the criminal proceedings. Interrogation by the State is such a stage" (internal quotation marks and citations omitted)). Instead, the question is whether Defendant waived that right and whether his request for counsel at his first appearance invalidated such a waiver.<sup>1</sup> "The standard of review for suppression rulings is whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party. . . . We review de novo the district court's application of the law to those facts." *State v. Madonda*, 2016-NMSC-022, ¶ 15, 375 P.3d 424 (brackets, internal quotation marks, and citations omitted).

#### 1. *Montejo* overruled *Jackson* and is binding United States Supreme Court precedent

{21} In *Jackson*, the United States Supreme Court established a bright-line rule that after a defendant requests counsel "at an arraignment or similar proceeding," any subsequent waiver of counsel made

to police is "invalid" if the police initiated contact with the defendant. 475 U.S. at 636. In *Montejo*, the United States Supreme Court rejected that rule. 556 U.S. at 797 (overruling *Jackson*). In stark contrast to *Jackson*, *Montejo* established a new Sixth Amendment analysis under which a defendant's invocation of the right to counsel in an initial court proceeding is not relevant to whether the defendant subsequently waived that right in a police-initiated interrogation. See 556 U.S. at 797 (noting that the defendant cannot invoke the right to counsel "anticipatorily," and stating that "[w]hat matters . . . is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing" (internal quotation marks and citation omitted)).

{22} In place of *Jackson's* bright-line rule, *Montejo* held that "the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent." *Id.* at 786. A voluntary, knowing, and intelligent waiver may be given "whether or not [the defendant] is already represented by counsel," and whether or not the defendant has discussed the waiver with counsel: "the decision to waive need not itself be counseled." *Id.* *Montejo* thus focused the waiver analysis on a defendant's freedom of choice. To prohibit a defendant from waiving the right to counsel outside of court and counsel's presence, *Montejo* reasoned, would be to "imprison a man in his privileges and call it the Constitution." *Id.* at 788 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942)).

{23} Moreover, *Montejo* made clear that when police read a defendant the *Miranda* warnings and the defendant waives counsel after receiving those warnings, the defendant's waiver is deemed knowing, intelligent, and voluntary. *Id.* at 786-87. A defendant who has received *Miranda* warnings "has been sufficiently apprised of the nature of [the defendant's] Sixth Amendment rights, and of the consequences of abandoning those rights, so that [the defendant's] waiver on this basis will be considered a knowing and intelligent one." *Id.* (quoting *Patterson v. Illinois*, 487 U.S. 285, 296 (1988)). "Since the right [to counsel] under both [the Fifth and Sixth Amendments] is waived using the same procedure, doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver." *Id.* at 795 (citation omitted). As legal scholars have

succinctly summarized, under *Montejo*, "As long as the police give the *Miranda* warnings . . . and the suspect validly waives the right to counsel, that will now suffice for Sixth Amendment purposes." Barbara E. Bergman, Theresa M. Duncan & Marlo Cadeddu, 3 Wharton's Criminal Procedure § 15:14 (14th ed. June 2023 update).

#### 2. Defendant waived his right to counsel after receiving *Miranda* warnings; under *Montejo*, that waiver was valid for Sixth Amendment purposes

{24} Under *Montejo's* Sixth Amendment framework, Defendant knowingly, intelligently, and voluntarily waived his right to counsel through his waiver of *Miranda* rights. As part of the *Miranda* warnings, police informed Defendant that he had the right to counsel and that counsel would be provided for free. Thus, Defendant is deemed to have known that he had the right to an attorney and is deemed to have intelligently and voluntarily waived that right. "[W]hen a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick" to show that a waiver of counsel was knowing, intelligent, and voluntary. *Montejo*, 556 U.S. at 786; see also *Patterson*, 487 U.S. at 299-300 (holding that a valid *Miranda* waiver is sufficient to waive the Sixth Amendment right to counsel in the context of postindictment custodial interrogation).

{25} The facts of this case provide even more support for the conclusion that Defendant's waiver was knowing, intelligent, and voluntary, beyond the simple fact that Defendant was given *Miranda* warnings. In this case, Defendant knew that he had the right to counsel because he had been appointed an attorney and had discussed with that attorney *the very scenario* under which Defendant ultimately provided the waiver of counsel. As Defendant stated, his attorney "told me not to, not to even actually talk to you guys, period . . . don't talk to anybody besides us." Thus, not only is Defendant deemed to have known, but Defendant *actually* knew that he had no obligation to speak to police: his attorney expressly told him so. Defendant's choice to go against his attorney's advice and speak with police was therefore intelligent and voluntary. As Defendant stated, he freely chose to speak with police because he felt that he had "nothing to hide."

{26} We conclude that under *Montejo*, Defendant's waiver was valid. Defendant made a knowing, intelligent, and voluntary choice to engage with police and

<sup>1</sup> Defendant does not contend that he was coerced into giving the statement by virtue of police tactics, and that issue is not before us. See *State v. Evans*, 2009-NMSC-027, ¶ 46, 210 P.3d 216 (recognizing that there is a point in which police threats, promises or deception can cross the line into coercion).



waive his right to counsel notwithstanding counsel's advice. *Montejo* abolished any presumption that Defendant's earlier assertion of the right to counsel at his first appearance invalidates the waiver that Defendant made to police. 556 U.S. at 787, 797. Therefore, we hold that Defendant's statements to police were not taken in violation of his Sixth Amendment right to counsel. We affirm the district court's ruling that Defendant's statements were admissible at trial.

**B. We Do Not Reach the Issue of Whether Article II, Section 14 Provides Greater Protections Than the Sixth Amendment Because Defendant Did Not Preserve This Issue**

{27} "To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked." Rule 12-321 NMRA. When a defendant seeks additional protections under our state constitution that are not available under the federal constitution, we have different preservation requirements depending upon whether the relevant state constitutional provision has previously been interpreted more broadly than its federal counterpart. *See generally State v. Gomez*, 1997-NMSC-006, ¶¶ 22-23, 122 N.M. 777, 932 P.2d 1 (establishing a different standard for a constitutional provision with established precedent than for one with no precedent). Specifically,

Where a state constitutional *provision* has previously been interpreted more expansively than its federal counterpart, trial counsel must develop the necessary factual base and raise the applicable constitutional *provision* in trial court. Where the provision has never before been addressed under our interstitial analysis, trial counsel additionally must argue that the state constitutional provision should provide greater protection, and suggest reasons as to why.

*State v. Leyva*, 2011-NMSC-009, ¶ 49, 149 N.M. 435, 250 P.3d 861. We emphasize that this argument must be made "*in the trial court*" and should not be withheld for appeal. *Gomez*, 1997-NMSC-006, ¶ 23. "This will enable the trial court to tailor proceedings and to effectuate an appropriate ruling on the issue." *Id.*

{28} Defendant argues that he preserved the state constitutional claim because trial counsel cited Article II, Section 14 in her motion to suppress. Apart from that citation, however, trial counsel did not mention the New Mexico Constitution. Trial counsel did not show that Article II, Section 14 "has previously been interpreted more expansively than its federal

counterpart" or "additionally . . . argue that the state constitutional provision should provide greater protection, and suggest reasons as to why." *Leyva*, 2011-NMSC-009, ¶ 49. Therefore, under *Gomez* and *Leyva*, Defendant has not met his burden to show that his constitutional claim under Article II, Section 14 was preserved.

{29} On appeal, Defendant urges that we should reach the state constitutional issue despite the lack of argument below because this issue implicates Defendant's "fundamental rights and the general public interest to be free from police interrogation without the assistance of counsel, after counsel has been retained." Although we have the discretion to consider unpreserved issues that involve the general public interest or fundamental rights, *see* Rule 12-321(B)(2)(a), (d), we do not accept Defendant's invitation to use that discretion to review his state constitutional claim. The process for raising and preserving state constitutional claims has been clearly established in *Gomez*, 1997-NMSC-006, and *Leyva*, 2011-NMSC-009. That process cannot be avoided by pointing out that constitutional rights are fundamental (they generally are) or that the public interest is served by announcing the scope of those rights (it generally is). Were we to adopt an exception to the constitutional preservation requirement whenever a state constitutional question involved fundamental rights or the general public interest, the exception would swallow the rule set forth in *Gomez* and *Leyva*. Instead, we adhere to that precedent and reiterate that state constitutional claims must be properly preserved at the trial level if litigants wish those claims to be considered on appeal.

{30} We do not reach the issue of the scope of Article II, Section 14 because it was not properly preserved in the trial court. However, *Montejo* does not preclude states from adopting a more stringent approach to waiver of counsel in the context of police-initiated interrogations of defendants who have previously invoked the right to counsel in a court proceeding. *See* 556 U.S. at 783 (noting that "[the *Jackson*] rule would apply well enough in States that require the indigent defendant formally to request counsel before any appointment is made"); *see also id.* at 793 ("If a State *wishes* to abstain from requesting interviews with represented defendants when counsel is not present, it obviously may continue to do so"). Our opinion today should not be understood to bar this issue, if properly developed in the trial court, from being raised on appeal in future cases.

**III. PARAMETERS OF CERTIFICATION FROM THE COURT OF APPEALS**

{31} We now clarify the parameters of certification from the Court of Appeals under Section 34-5-14(C) and Rule 12-606 NMRA. First, we explain that the Court of Appeals is bound by our precedent that directly controls an issue. If our directly controlling precedent is in conflict with later United States Supreme Court precedent, then the Court of Appeals should certify the matter to us under Section 34-5-14(C). However, if our precedent does not directly control an issue, then the Court of Appeals is free to rule on that issue.

{32} Second, we determine that the "matter" certified under Section 34-5-14(C) refers to an issue rather than a case. In so doing, we abrogate *Collins*, 1991-NMSC-013, ¶ 46 n.10, and *Rhein*, 1996-NMSC-066, ¶ 2.

**A. The Court of Appeals Should Certify an Issue When Our Precedent Directly Controls That Issue and a Later United States Supreme Court Opinion Is Contra**

**1. Vertical stare decisis and the *Alexander* doctrine**

{33} It is axiomatic that our justice system requires strict adherence to vertical stare decisis, which is the principle that lower courts are bound by the precedent of reviewing courts. *See stare decisis*, *Black's Law Dictionary* (11th ed. 2019) (defining *vertical stare decisis* as "[t]he doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction"); *see also* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *Stan. L. Rev.* 817, 820 (1994) (stating that vertical stare decisis "constitutes a virtually undiscussed axiom of adjudication"); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 *Cornell L. Rev.* 401, 402 n.6 (1987-88) (noting that "[t]here is no serious debate regarding [the] obligation [to respect vertical stare decisis], perhaps because the alternative is so obviously chaos"). The essence of vertical stare decisis is that "[a]bsent a formal overruling, Supreme Court decisions remain indefeasibly binding on all inferior tribunals; finding a precedent to be controlling brings the inquiry to its end." Randy J. Kozel, *The Scope of Precedent*, 113 *Mich. L. Rev.* 179, 203 (2014).

{34} This Court first explicitly enforced the requirement of vertical stare decisis in *Alexander v. Delgado*, in which we held that the Court of Appeals lacked authority to overrule this Court's precedent. 1973-NMSC-030, ¶ 9, 84 N.M. 717, 507 P.2d. 778 ("[T]he Court of Appeals is to be governed by the precedents of this [C]ourt."). Our recognition of vertical stare

decis, sometimes known as the *Alexander* doctrine, requires that the Court of Appeals follow this Court's precedent "even when a United States Supreme Court decision seems contra," *State v. Manzanares*, 1983-NMSC-102, ¶ 3, 100 N.M. 621, 674 P.2d 511, or when the Court of Appeals determines that this Court "would conclude that the precedent is no longer good law and would overrule it given the opportunity," *Aguilera v. Palm Harbor Homes, Inc.*, 2002-NMSC-029, ¶ 6, 132 N.M. 715, 54 P.3d 993 (internal quotation marks and citation omitted). We have noted that "the operative fact for the application of the *Alexander* rule is the existence of precedent from this Court on the matter, and it is not necessary for that precedent to have been reconsidered or reaffirmed." *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 22, 135 N.M. 375, 89 P.3d 47. And of course, "the existence of scholarly criticism of one of our opinions does not diminish its binding nature as precedent." *Id.* Thus vertical stare decisis, as recognized in the *Alexander* doctrine, requires absolute fealty to this Court's precedents by the Court of Appeals.<sup>2</sup>

{35} Although the *Alexander* doctrine is absolute with regard to whether our precedent binds the Court of Appeals, we have rarely had occasion to consider the "interrelated but analytically distinct" question of "precedential scope, which determines whether a prior judicial statement applies to the dispute presently under consideration." Kozel, *supra*, at 185. In the above-cited cases, there was no question as to whether the Court of Appeals had violated vertical stare decisis by abrogating our binding precedent because, in each of those cases, the Court of Appeals had ruled directly contrary to our previous holdings. See *Alexander*, 1973-NMSC-030, ¶¶ 7, 12, 15-16 (disapproving of the Court of Appeals' manner of abolishing unavoidable accident as a defense and directing that a UJI on that topic no longer be given in direct contravention of our binding precedent); see also *Manzanares*, 1983-NMSC-102, ¶¶ 1-3, 6-7, 13 (reversing the Court of Appeals' refusal to apply a double jeopardy rule from *State v. James*, 1979-NMSC-096, 93 N.M. 605, 603 P.2d 715, in direct contravention of our binding precedent); *Aguilera*, 2002-NMSC-029, ¶¶

1, 6 (reversing the Court of Appeals' holding that arbitrators have authority to award punitive damages in direct contravention to our binding precedent); *Martinez*, 2004-NMSC-009, ¶¶ 1, 18-20 (examining the Court of Appeals' refusal to apply the pueblo rights doctrine in direct contravention of our binding precedent).

{36} In only one case have we considered precedential scope. In *State v. Wilson*, 1994-NMSC-009, ¶¶ 4-6, 116 N.M. 793, 867 P.2d 1175, we held that the *Alexander* doctrine does not require the Court of Appeals to follow our uniform jury instructions when those instructions have never previously been challenged. In *Wilson*, the Court of Appeals determined that one of our uniform jury instructions omitted elements that were essential to the offense, but determined that under the *Alexander* doctrine the Court of Appeals lacked authority to question a uniform jury instruction that this Court had approved. *Id.* ¶¶ 24-26. We accepted certification of the case and held that "the Court of Appeals is not precluded from considering error in jury instructions, but is precluded only from overruling those instructions that have been considered by this Court in actual cases and controversies that are controlling precedent." *Id.* ¶ 4. As we explained:

[W]e see no reason why the Court of Appeals should be precluded from questioning the validity of the instruction just as it would any other precept not yet passed on by the Supreme Court. Although this Court's adoption of uniform jury instructions proposed by standing committees of the Court establishes a presumption that the instructions are correct statements of law, that fact alone is not sufficient precedent to tie the hands of the Court of Appeals.

Therefore, we hold that the Court of Appeals has authority to question uniform jury instructions in cases in which the instruction has not been challenged previously and to amend, modify, or abolish the instruction if it is erroneous.

*Id.* ¶¶ 5-6 (emphasis added). Thus, in the only case in which we directly

confronted the question of the scope of our precedent under the *Alexander* doctrine, we rejected an expansive view of our precedent in favor of a more restrictive one.

{37} With this background in mind, we turn now to explain how the Court of Appeals should determine whether it is free to decide an issue or should certify the issue to us.

## 2. Under the *Alexander* doctrine, the Court of Appeals is bound to follow our precedent that directly controls an issue

{38} Our cases construing the *Alexander* doctrine have not addressed the question of how the Court of Appeals is to determine the scope of our precedent's binding authority over it. This lack of clarity has led to the *Alexander* doctrine variously being interpreted to allow the Court of Appeals to decide an issue either when our precedent is "dicta" or when it has not decided the "precise issue" involved in the instant case. Compare *Dopslaf*, 2015-NMCA-098, ¶ 11 (concluding that our precedent discussing the holding of another case was "dicta and, as such, is not binding authority"), and *Bazan*, 1977-NMCA-011, ¶ 15 (concluding that the *Alexander* doctrine did not require the Court of Appeals "to follow the dicta" in a territorial case "when that dicta is based on an obvious confusion" between the evidentiary rules governing recorded recollection and refreshed memory), with *Duarte*, 2004-NMCA-117, ¶ 11 ("[W]e are given more latitude [under the *Alexander* doctrine] when the precise issue has not been already decided by our Supreme Court.").

{39} We do not endorse the former approach because it is notoriously difficult to distinguish dicta from holding, both in theory and practice. See generally Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 997, 2005 (1994) ("As currently understood, the distinction [between holding and dicta] is almost entirely malleable."); see also *Manzanares*, 1983-NMSC-102, ¶¶ 2, 7 (disagreeing with the Court of Appeals' characterization of part of our precedent as "dicta" when in fact it was an alternative holding). The distinction is supposed to rest on whether a statement in an opinion is necessary to the decision: "holdings" being the necessary statements,

<sup>2</sup> Federalism principles create one exception to vertical stare decisis within the state court system: that is, when the United States Supreme Court interprets a federal constitutional provision more expansively than this Court has previously recognized, the Court of Appeals may recognize the federal expansion of rights before this Court formally adopts those rights. See *Duarte*, 2004-NMCA-117, ¶ 12 ("Because Crawford [v. Washington, 541 U.S. 36 (2004)] interprets the federal constitution in a way that grants broader rights to criminal defendants, we believe we are bound to follow it. For this reason, we are confident that our Supreme Court would adopt Crawford, and we accept this opportunity to adopt Crawford in New Mexico." (citation omitted)). That is because the federal constitution establishes a floor, not a ceiling, for individual rights, and our courts cannot curtail rights that have been granted by the federal constitution. See *Kilpatrick v. State*, 1985-NMSC-064, ¶ 7, 103 N.M. 52, 702 P.2d 997 ("Although individual states may provide broader rights under state constitutions than those required by similar provisions of the United States Constitution, states are not free to restrict those rights to something less than as guaranteed under the federal charter.").



and “dicta” being the unnecessary ones. Compare *holding*, *Black’s Law Dictionary* (11th ed. 2019) (“A court’s determination of a matter of law pivotal to its decision; a principle drawn from such a decision.”), with *dictum*, *Black’s Law Dictionary* (11th ed. 2019) (defining *obiter dictum* literally as “something said in passing,” or figuratively as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case”). But attempting to apply those definitions to real-world cases is not so simple. “Law is not an exercise in mathematical logic. And statements of a legal rule set forth in a judicial opinion do not always divide neatly into ‘holdings’ and ‘dicta.’” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 831 (2007) (Breyer, J., dissenting); see also Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 *Stan. L. Rev.* 953, 956 (2005) (noting that lawyers do not have a “shared conceptual foundation for analyzing [the distinction between dicta and holding in] even modestly complex cases”).

{40} Moreover, the binary distinction between holding and dicta cannot fully capture the nuances of legal reasoning. Legal opinions can set forth important doctrines, synthesize new analytical frameworks, and establish procedural rules which are not strictly necessary to the decision in the case, but which nonetheless provide legal guidance that should be understood as binding. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (establishing the doctrine “that government may treat people differently because of their race only for the most compelling reasons”; therefore, “all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny”); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (establishing a two-part analytical framework to determine whether an administrative agency correctly interpreted a statute); *Miranda v. Arizona*, 384 U.S. 436, 468-72 (1966) (establishing a procedural rule requiring that police officers provide specific warnings prior to custodial interrogation); see also Kozel, *supra*, at 182 (noting that precedent includes “elements of . . . prior opinions that extend far beyond the narrow application of a legal rule to a discrete set of facts,” such as “doctrinal frameworks, elaborate judicial instructions, and broadly articulated rationales”). Thus the applied reasoning of an opinion, not only its narrow results, creates precedent. See generally Larry Alexander, *Constrained by Precedent*, 63 *S. Cal. L. Rev.* 1, 5 (1989) (discussing three competing models of precedential scope and arguing in favor of the “rule model,” which includes the reasoning set forth in an opinion). “[T]he precedential

force of an earlier case ultimately rests upon the reasons underlying the court’s decision . . . because precedents derive their legitimacy from their reasoning.” Dorf, *supra*, at 2059. Given these considerations, we conclude that the “holding/dicta” distinction is too ambiguous—and potentially too narrow—to serve as a useful model for determining the scope of our precedent.

{41} Instead, we take a more pragmatic approach. We hold that the Court of Appeals has the authority to depart from our precedent if our precedent does not directly control the issue in the case at bar. A precedential case is directly controlling if it “compel[s] the outcome” of the issue in the current case; that is, if the precedential case “answer[s] the definitive question” in the case at bar. *Lambrix v. Singletary*, 520 U.S. 518, 528 n.3 (1997). In other words, if we have not directly ruled on an issue in a manner that would be dispositive in the case at bar, the Court of Appeals is free to conduct its own analysis of the issue.

{42} Conversely, when we have directly ruled on an issue in a manner that would be dispositive in the case at bar, the Court of Appeals must apply that same rule to the case at bar. See *Martinez*, 2004-NMSC-009, ¶ 21 (“[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” (emphasis added) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989))). In such cases, if the Court of Appeals determines that our previous ruling is in conflict with later United States Supreme Court precedent, it should certify the issue to us pursuant to Section 34-5-14(C).

{43} This approach is consistent with our reasoning in *Wilson*, in which we held that the Court of Appeals was free “to amend, modify, or abolish” a uniform jury instruction as long as we had not “specifically address[ed] the validity of” the instruction in a precedential opinion. 1994-NMSC-009, ¶¶ 4-6. Our approval of a uniform jury instruction indicates that we have considered that instruction and determined that it appears to accurately state the law. *Id.* ¶ 5 (“[T]his Court’s adoption of uniform jury instructions proposed by standing committees of the Court establishes a presumption that the instructions are correct statements of the law.”). But under *Wilson*, that presumption “is not sufficient precedent to tie the hands of the Court of Appeals.” *Id.* That is, the Court of Appeals is not bound by our initial determination that a uniform jury instruction accurately states the law

unless and until we have actually applied that instruction to the facts of a case. *Id.* ¶ 4 (“[T]he Court of Appeals . . . is precluded only from overruling those instructions that have been considered by this Court in actual cases and controversies that are controlling precedent.”). The Court of Appeals “does not have authority to alter an instruction that has been reviewed and ruled upon by this Court.” *Id.* ¶ 6.

{44} Similarly, when we recognize a general principle of law in an opinion, it indicates that we have considered that principle and determined that it accurately states the law. But unless and until we have actually applied that principle to the facts of a case—unless that principle “has been reviewed and ruled upon by this Court”—the Court of Appeals is not necessarily bound by our determination. *Id.* (emphasis added); see also *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821) (noting, by Chief Justice Marshall, that “principles which may serve to illustrate” a proposition in a previous case “may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision”). That is, if our statement of a general principle of law in a precedential case did not directly control the outcome of that issue, “we see no reason why the Court of Appeals should be precluded from questioning the validity of” that principle, “just as it would any other precept not yet passed on by the Supreme Court.” *Wilson*, 1994-NMSC-009, ¶ 5.

{45} We examine this case as an example. Here, the Court of Appeals could have applied *Montejo*—notwithstanding *Desnoyers*—because *Desnoyers* does not directly control the issue of whether Defendant could waive his Sixth Amendment right to counsel through a valid *Miranda* waiver. In *Desnoyers*, we noted the *Jackson* rule while explaining the general Sixth Amendment rule as it existed at the time. We did not, however, apply *Jackson* at any point. *Desnoyers* did not turn on the issue of waiver, but instead on the issue of whether the defendant properly asserted his right to counsel. 2002-NMSC-031, ¶¶ 16-17. Because we did not rule on waiver, *Desnoyers* does not directly control the waiver issue in this case. The Court of Appeals has the authority to decide such issues independently, without certification to this Court.

#### **B. We Accept Certification of Issues Rather Than Cases**

{46} The statute governing certification of cases to this Court, § 34-5-14(C), provides:

The supreme court has appellate jurisdiction in matters appealed to the court of appeals, but undecided by that court, if the court of appeals certifies to

the supreme court that *the matter* involves:

(1) a significant question of law under the constitution of New Mexico or the United States; or

(2) an issue of substantial public interest that should be determined by the supreme court. Any certification by the court of appeals under this subsection is a final determination of appellate jurisdiction.

(Emphasis added.)

{47} We have previously held that the “matter” to be resolved on certification is the entire case rather than the discrete issue or issues identified in the order of certification. *Collins*, 1991-NMSC-013, ¶ 46 n.10 (“We construe the word ‘matter’ [in Section 34-5-14(C)] to mean the entire case in which the appeal is taken.”); see also *Rhein*, 1996-NMSC-066, ¶ 2 (“On certification from the Court of Appeals we decide the entire case in which the appeal is taken.” (citing *Collins*, 1991-NMSC-013, ¶ 46 n.10)). As such, this Court has generally decided all appellate issues in a certified case even when the majority of the issues present no certifiable questions. See *Collins*, 1991-NMSC-013, ¶¶ 46-52; *Rhein*, 1996-NMSC-066, ¶ 2; but see *State v. Walker*, 1993-NMSC-069, ¶ 3, 116 N.M. 546, 865 P.2d 1190 (“We limit our review of this case to the . . . issue for which it was certified . . . . For resolution of the other issues . . . , we remand this case to the Court of Appeals.”). In a few instances, the Court of Appeals has proposed resolutions of the noncertified issues for our consideration, and we have adopted those proposals in our opinions. See, e.g., *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 32, 137 N.M. 734, 114 P.3d 1050 (appending the Court of Appeals certification order to the opinion and “adopt[ing] the Court of Appeals’ analysis and conclusions regarding the remaining issues that were raised on appeal”); see also, e.g., *Wilson*, 1994-NMSC-009, ¶ 7 (adopting and appending Court of Appeals’ proposed disposition to our opinion to resolve remaining issues on appeal).

{48} However, we do not perceive that the law mandates the conclusion drawn in *Collins* and *Rhein*. Certification under Section 34-5-14(C) is part of our discre-

tionary jurisdiction. See N.M. Const. art. VI, § 2 (providing that we have mandatory jurisdiction over cases involving sentences of death or life imprisonment, but “[i]n all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law”); see also Rule 12-102 NMRA (enumerating four types of appeals under our mandatory jurisdiction and noting that “[a]ll other appeals shall be taken to the Court of Appeals”). Thus, we have the discretion to accept or reject certification orders issued by the Court of Appeals under Section 34-5-14(C). See *Martinez v. Chavez*, 2008-NMSC-021, ¶¶ 12-13, 144 N.M. 1, 183 P.3d 145 (per curiam) (holding that the Legislature cannot require this Court to accept as final the Court of Appeals’ determination of appellate jurisdiction because this Court has inherent power to review all rulings of the Court of Appeals). Moreover, the term “matter” is used in the same statute to describe that which we accept on certiorari, see § 34-5-14(B), and we grant certiorari to review issues, rather than cases, see Rule 12-502(C)(2)(b) NMRA (stating that “the Court will consider only the questions set forth in the petition”) and Rule 12-502(C)(2)(d) (enumerating four bases for granting a writ of certiorari). Finally, we have the power to “limit the questions to be argued” in a certification case brought under Section 34-5-14(C). Rule 12-606. Therefore, there is no basis in statute or rule for the requirement that *Collins* and *Rhein* imposed on our certification jurisdiction. On the contrary, our statutes and rules allow us the discretion to accept or reject certification and to limit our review to defined questions.

{49} Additionally, we conclude that the requirement imposed by *Collins* and *Rhein* is not justified by prudential concerns. When we accept cases rather than issues on certification, we expand our scope of review beyond those issues that are eligible for certification under the criteria set forth in Section 34-5-14(C). In so doing, we assume the role of an error-correcting court. But the certification of cases under Section 34-5-14(C) is not intended for this Court to correct error. Section 34-5-14(C) is intended to allow our review of “a significant question of law under the constitution” or “an issue of substantial public

interest that should be determined by the supreme court.” Just as “it is improper for this Court to consider [on certiorari review] any questions except those set forth in the petition for certiorari,” *Fikes v. Furst*, 2003-NMSC-033, ¶ 8, 134 N.M. 602, 81 P.3d 545, so too we conclude that it is improper for this Court to consider any questions on certification except those issues that the Court of Appeals certified to us and that we accept under the criteria set forth in Section 34-5-14(C).

{50} Accordingly, we now hold that we accept certification of and decide discrete issues rather than cases under Section 34-5-14(C). We direct future litigants to focus any supplemental briefing filed in this Court pursuant to Section 34-5-14(C) and Rule 12-606 to only the issue(s) certified. Any additional issue(s) will be remanded to the Court of Appeals.

#### IV. CONCLUSION

{51} Under the controlling United States Supreme Court precedent of *Montejo*, Defendant validly waived his Sixth Amendment right to counsel through his waiver of *Miranda* rights even though he had requested and obtained counsel at his first appearance. To the extent that our precedent in *Desnoyers* conflicts with *Montejo*, *Desnoyers* is now overruled. We do not reach the question of whether Article II, Section 14 would provide additional protections because Defendant did not preserve his state constitutional claim.

{52} In future cases involving an apparent conflict between our precedent and later United States Supreme Court precedent, the Court of Appeals may reach any issue over which our precedent is not directly controlling. We clarify that we accept issues rather than cases on certification, thereby abrogating *Collins* and *Rhein*. In accordance with this holding, we remand all remaining issues to the Court of Appeals for proceedings consistent with this opinion.

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

**JULIE J. VARGAS, Justice**

**WE CONCUR:**

**C. SHANNON BACON, Chief Justice**

**MICHAEL E. VIGIL, Justice**

**DAVID K. THOMSON, Justice**

**BRIANA H. ZAMORA, Justice**

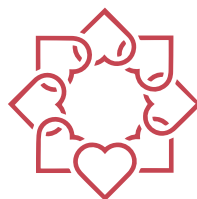


MAY 2024

The State Bar of  
New Mexico's  
Resources  
**For Health  
& Wellness**



State Bar of New Mexico  
Well-Being Committee



The  
Solutions  
Group





The **New Mexico Lawyer Assistance Program** provides confidential, professional and peer assistance to help individuals identify and address problems with alcohol and other drugs, depression and other mental health/emotional disorders. NM LAP endeavors to improve the well-being of lawyers, law students, paralegals, law clerks and all other legal staff through support, education and early intervention with the goal of ensuring every legal professional is healthy and fit to practice.

### Meet the Friendly Faces of NM LAP



**Pamela Moore, MA, LPCC**, currently serves as a Licensed Professional Clinical Counselor and Director of the State Bar of New Mexico's Professional Programs Group where she educates the legal community on positive health and well-being and assists in providing resources and services to any legal professional struggling with mental, emotional or behavioral issues.

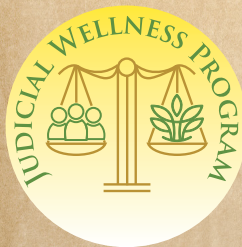


**Tenessa Eakins** is the Case Manager of the State Bar of New Mexico Lawyer Assistance Program, overseeing a 24-hour helpline and managing the NM LAP monitoring program. With a background as an EMT-B for San Diego's 911 services, she brings valuable experience to her role. Ms. Eakins is dedicated to promoting positive health and well-being within the legal community through educational initiatives.

Find more information about the New Mexico Lawyer Assistance Program at [www.sbnm.org/nmlap](http://www.sbnm.org/nmlap)



## The Concierge Service for New Mexico Judges



The **New Mexico Judicial Wellness Program** offers resources and services which provide support for professional development and any other services needed to promote the health and wellness of the judiciary. It is designed and available to support judges of any level throughout New Mexico.

*Better together in the  
New Mexico Judiciary*



Find more information about the New Mexico Judicial Wellness Program and its resources for judges at [www.sbnm.org/nmjwp](http://www.sbnm.org/nmjwp) or call 505-797-6097



# The State Bar of New Mexico's Resources For Health & Wellness



The State Bar of New Mexico is proud to provide members with numerous programs, member benefits and resources enabling them to improve their health and overall well-being and facilitate a centered mind and body. The challenges associated with the legal profession can often be overwhelming, which is why the State Bar of New Mexico has designed specific programs aimed at all legal professionals in New Mexico to enhance personal wellness and resilience, as well as maximize your effectiveness as a legal professional.

Below are the State Bar of New Mexico's programs and resources for supporting health and wellness in the legal field.



## New Mexico Lawyer Assistance Program

The New Mexico Lawyer Assistance Program (NM LAP) is the State Bar of New Mexico's main service to attorneys and other legal professionals focused on confidential, professional and peer assistance designed to help individuals identify and address struggles with alcohol and other drugs, depression and other mental health/emotional disorders. NM LAP endeavors to improve the well-being of lawyer, law students, paralegals, law clerks and all other legal staff through support, education and early intervention with the goal of ensuring every legal professional is healthy and fit to practice. You can find more information about NM LAP at [www.sbnm.org/NMLAP](http://www.sbnm.org/NMLAP).



## Employee Assistance Program

Brought to you by the New Mexico Lawyer Assistance Program, the services of the Employee Assistance Program (EAP) include up to four FREE counseling sessions/issue/year for ANY mental or behavioral health struggle. Counseling sessions are with a professionally licensed therapist. Other FREE services include management consultation, stress management education, critical incident stress debriefing, video counseling and a 24/7 call center. You can find more information about EAP at <https://www.sbnm.org/EAPservices>.



## New Mexico Judicial Wellness Program

The New Mexico Judicial Wellness Program (NMJWP) promotes and optimizes health among New Mexico Judges by creating and facilitating educational programs and offering resources and services which provide a supportive environment for our judiciary to restore and maintain one's overall mental, physical and spiritual well-being. You can find more information about NMJWP at [www.sbnm.org/NMJWP](http://www.sbnm.org/NMJWP).



State Bar of New Mexico  
Well-Being Committee



# NM LAP Milestones



1987

- Jim Finnon, Tom Talbot and Chris Lucero raise concerns about alcohol-related issues in the legal community to Briggs Cheney.
- The four attorneys present their concerns to the members of the New Mexico Board of Bar Commissioners, receiving a favorable response.
- The New Mexico Board of Bar Commissioners invites Lawyer Assistance Programs from Florida, Texas and Washington State to address the issue.

1988

- Establishment of the New Mexico Lawyers Concerned for Lawyers (NM LCL).
- Steve Anderson is engaged by NM LCL to implement a helpline and counseling services.
- Initiation of weekly attorney support group meetings by NM LCL.

1991

- Appointment of Ms. Jill Yeagley, Director of the National Council on Alcoholism and Drug Dependence, as a part-time manager for NM LCL.
- Commencement of educational engagements for bar members by the NM LCL.
- Per the amendment of Rule 16-803, the NM LCL now includes reporting obligations regarding impaired attorneys.

1994

- Introduction of a diversion program by NM LCL, modeled after the Federation of State Physician Health Programs (FSPHP), to address disciplinary issues related to substance use.
- Expansion of NM LCL focus to include law students.

2001

- The International Lawyers in Alcoholics Anonymous (ILAA) conference traditionally convenes directly after the annual assembly of the Commission on Lawyer Assistance Program (CoLAP). In 2001, the event was hosted in Albuquerque, New Mexico. Thanks to the collaborative endeavors spearheaded by Briggs Cheney, William Stratvert, and numerous committed members of the New Mexico Lawyers Concerned For Lawyers (NM LCL), meticulous preparations were made to facilitate a seamless assembly for the ILAA meeting in Albuquerque.

2005

- Supreme Court Justice Edward L. Chavez approaches Jill Yeagley about including judges into the program's focus.
- The NM LCL transitions the longstanding Monday evening support group meeting, which had been convened since the late 1980s in downtown church basements, to the premises of the UNM School of Law - an event of huge significance. Initially, there was apprehension regarding the visibility of the attendees in a public setting, particularly within the esteemed environment of the law school. However, the presence of Professor David Stout, a prominent figure on the law school faculty who was not anonymous, played a pivotal role in dispelling such concerns. Professor Stout actively encouraged law students to participate, and individuals like Rick Cravens were notable examples of students who availed themselves of this opportunity.

2007

- Supreme Court rules in using a portion of the NM Disciplinary Board's budget to further fund the program.
- "NM LCL" changes to the "New Mexico Lawyers and Judges Assistance Program (NM LJAP)."

2017

- Audit conducted by the American Bar Association's Commission on Lawyer Assistance Programs (CoLAP) in New Mexico prompts the formation of a steering committee to facilitate program growth.
- Appointment of Pamela Moore as the Full-Time Program Manager. Position grows to Director within two months.
- The program rebrands and becomes the "New Mexico Judges and Lawyers Assistance Program (NM JLAP)."

2018

- NM JLAP contracts with The Solutions Group to offer a statewide Employee Assistance Program, free of charge to every NM legal professional.
- NM Supreme Court Justice Edward Chavez approached Pamela Moore about starting Judicial Roundtables for state judges at all levels.
- Justice Edward Chavez and Pamela Moore record a Mock Roundtable session and present it to the 2018 Judicial Conclave.
- NM JLAP becomes a program of 2 full-time SBNM individuals with the hiring of a Clinical Coordinator.

2019

- NM JLAP works with SBNM Executive Director and Board of Bar Commissioners to start the New Mexico Well-Being Committee. The first meeting with all stakeholders was in January 2020.
- NM JLAP starts offering a Mocktail Bar at legal events.
- NM Lawyer publication centers on wellbeing with the heavy lift of content coming from the NM JLAP.
- NM JLAP hires Tenessa Eakins as its new Clinical Coordinator. By 2023, Ms. Eakins transitions into the role of Case Manager for the NM JLAP.

2020

- The inception of the Judicial Wellness Program and its associated subcommittees stems from the NM Well-Being Committee's initiatives. This program spearheads an annual wellness campaign, generating monthly articles for judges and podcast episodes.
- The materials, featuring insights from esteemed local and national experts, are also disseminated under the banner of "Legal Well Being in Action," the podcast of the NM Well-Being Committee and the NM LAP that has garnered global listenership.
- Monday Night Attorney Support Group Meeting moves to weekly online meetings.

2022

- NM LAP Director, Pamela Moore, wins first Well-Being in Excellence award.
- Renaming of the program to the "New Mexico Lawyer Assistance Program (NM LAP)."
- Recruitment of Retired Judge Sandra Engel as the manager of NM Judicial Wellness Program.

2023

- NM LAP is a part of statewide Professional Programs Group Roadshow presentations.
- NM LAP meticulously documents its legacy through the NM LAP Legacy Project, an initiative aimed at preserving and presenting the comprehensive history of the program.



## State Bar of New Mexico Lawyer Assistance Program



### **1. Who does the New Mexico Lawyer Assistance Program serve?**

The NM LAP offers its services to encompass attorneys, judges, law students, paralegals, office staff and all other legal professionals operating within legal offices and court rooms.

### **2. What is the purpose of the New Mexico Lawyer Assistance Program?**

Our program aims to provide support, resources and referrals for legal professionals struggling with substance use disorder or other addictions, or any mental or behavioral health challenge such as anxiety, depression, etc. The NM LAP also offers wellbeing education to foster a healthier and more resilient legal community.

### **3. How does the program assist legal professionals with chemical dependency?**

We provide confidential listening and guidance, conduct assessments, offer referrals to specialized treatment programs, ensure ongoing structure/support and maintain accountability measures.

### **4. How can legal professionals access the NM LAP services?**

Members can find information about accessing our services on our website: [www.sbnm.org/LAP](http://www.sbnm.org/LAP). Legal professionals who need assistance for themselves or others can initiate phone contact through our confidential helpline at 505-420-8179 or 505-228-1948. Members can also reach out to our dedicated volunteer peer support attorneys. Referrals to the NM LAP can come from colleagues, employers or other concerned individuals.

### **5. Are the services provided by the program confidential?**

Confidentiality serves as a pivotal aspect of our program. Each piece of information, verbal or written, entrusted to our team receives the highest level of discretion and complies rigorously with HIPAA standards.

### **6. What types of educational presentations does the program offer?**

Our program offers tailored educational presentations focusing on mental health, vicarious trauma, empathy fatigue, life balance, boundaries, substance use and overall well-being specifically designed for legal professionals. These presentations are intended to foster awareness, mitigate stigma and cultivate a culture of well-being within the legal profession.

### **7. Can the program assist with dual diagnoses referrals, addressing both mental health and substance use issues?**

Yes, our program recognizes the complex interplay between mental health and substance use. We provide integrated support and referrals to professionals who can address both aspects of a dual diagnosis.



## 8. How do I access the free counseling through the NM LAP?

Please contact the Solutions Group at 505-254-3555 and reference NM LAP for access to our four complimentary counseling services that are offered per issue and per year. For example, someone may use the EAP counseling services for depression and receive four free sessions on that issue. If they have a death in the family in the same year, they may also use another four free sessions to address grief and loss. You can find more detailed information on the EAP at [www.sbnm.org/EAPservices](http://www.sbnm.org/EAPservices).

## 9. What are all the ways I can access information about the NM LAP or the EAP?

For further information regarding the **NM LAP** and its offerings, interested individuals may explore the following resources:

- Visit the NM LAP webpage at <https://www.sbnm.org/LAP>.
- Access updates and events by searching for the **State Bar of New Mexico Lawyer Assistance Program** on Facebook.
- Follow **@StateBarofNM** on Instagram for updates on upcoming events.
- Direct inquiries can be made via phone at **505-420-8179** or **505-228-1948**.

For additional details regarding the **Solutions Group**, interested parties can utilize the following channels:

- Visit the Solutions Group website at <https://solutionsbiz.com/>.
- Contact the Solutions Group directly by phone at **505-254-3555**.

## 10. What other services does the NM LAP offer?

- **Professional Assessment and Referral:** A qualified member of the LAP team will conduct a comprehensive assessment of the legal professional's situation either at our office (5121 Masthead, NE, Albuquerque, N.M.) or at a location of their convenience. Following the assessment, tailored recommendations and available resources will be provided. Our program maintains an extensive and regularly updated network of licensed healthcare professionals and facilities.
- **Peer Support Network:** Individuals seeking assistance through the NM LAP program will have the opportunity to contact our staff who will provide them with contact information for a judge or lawyer from the LAP Committee who has experienced similar challenges. These individuals serve as peer volunteers, available for support and guidance. It is at the discretion of the individual seeking assistance to reach out to these peers for support.
- **Professional and Peer Interventions:** In circumstances where appropriate, a member of the LAP staff can organize and facilitate an intervention aimed at guiding the struggling individual towards seeking the necessary help and support.
- **Attorney Support Meetings:** LAP hosts a weekly support meeting where members of the legal community come together to offer mutual support in overcoming challenges and managing the stresses inherent in the legal profession. We invite you to join us every Monday night at 5:30 p.m. (MT) via Zoom at this link: <https://bit.ly/attorneysupportgroup>.



# The Solutions Group

# Tools & Resources

Presented by the New Mexico Lawyer Assistance Program, **The Solutions Group**, the State Bar's Employee Assistance Program (EAP), extends its supportive reach by offering up to four complimentary counseling sessions per issue, per year, to address any mental or behavioral health challenges to all State Bar of New Mexico members, legal staff and their direct family members. These counseling sessions are conducted by professionally licensed therapists. In addition to this valuable service, the EAP also provides a range of other services including management consultation, stress management education, webinars, critical incident stress debriefing, video counseling, a MyStressTools app and a 24/7 call center. The network of service providers is available for in-person sessions or teletherapy, ensuring accessibility. When reaching out, please make sure to identify yourself with the NM LAP for seamless access to the EAP's services. All communications are treated with the utmost confidentiality. **Contact 505-254-3555 to access your resources today.**



## TSG Webinars

The Solutions Group provides FREE quarterly webinars on a variety of personal and professional topics. Please select the date and time that works best for you. After registering, you will receive a confirmation email containing information about joining the training. For more information, visit <https://solutionsbiz.com/solutions/employee-assistance-program/employee-resources/employee-eap-resources/webinars/>.



## Employee Assistance Program Counseling

The Solutions Group provides brief solutions-focused counseling designed to address personal struggles with stress, marital and relationship problems, parenting and family challenges, workplace conflicts, substance use, depression, anxiety, grief support and more. Your counseling sessions can take place in-person or on a secure and private HIPAA-compliant video conferencing, or by telephone. Counseling services include four complimentary counseling sessions per issue, per year, to address any mental or behavioral health challenges to all State Bar of New Mexico members, staff and their direct family members. Counseling sessions serve all age groups. For more information on counseling services, visit <https://solutionsbiz.com/solutions/employee-assistance-program/employee-resources/eap-counseling/>.



## My Stress Tools

StressStop is an online suite of stress management and resilience-building resources. The online suite is available at no cost to you and your family members

via The Solutions Group EAP website. This resource is expected to be available as a convenient App in 2025, it includes:

- **My Stress Profiler:** A confidential and personalized stress assessment that provides ongoing feedback and suggestions for improving your response to 10 categories of stress, including change, financial stress, stress symptoms, worry/fear and time pressure.
- **Podcasts and Videos:** Featuring experts in the field, including Dan Goleman, Ph.D., Emotional Intelligence; Kristin Neff, Ph.D., Self-Compassion; and David Katz, M.D., Stress, Diet and Emotional Eating.
- **Webinars:** Covering a variety of topics including work-life balance, thinking through stress and mindfulness at work.
- **Relaxation Exercises:** Music and guided relaxation.
- **Expert Q&A:** Answers to questions on dealing with change, insomnia, and depression, reducing stress, the benefits of chocolate, and more.

For additional information regarding My Stress Tools and instructions for enrollment, visit the following link: <https://solutionsbiz.com/solutions/employee-assistance-program/employee-resources/employee-eap-resources/stressstop/>



## Helpful Resources

In addition to free confidential counseling services, you also have access to resources that will help you through everyday stressors. Below are several tools to use, including newsletters, quarterly updates and more. For more information, visit <https://solutionsbiz.com/solutions/employee-assistance-program/employee-resources/employee-eap-resources/helpful-resources/>.



### **What is JWELL and JCALL?**

The Judicial Wellness Program (JWP) is operated out of the State Bar of New Mexico under the Professional Programs Group. It is a service solely for New Mexico Judges, including ALJ's and Hearing officers.

The JWP provides resources and support for mental or behavioral health struggles. There is also a professional development component that can support judges in improving their skills, performance and leadership. Read on to find out more...

### **Do I have to be an active NM judge to access it?**

Active and retired judges have access.

### **What specific resources are available to me as a NM Judge?**

- Judicial Roundtables: an online space to speak about your experiences and challenges of being a judge with fellow colleagues across the state
- JWELL monthly eblast: an email with wellness resources and information that are judicial topic specific
- JCALL Helpline: a confidential line to obtain any resources and support for substance use/mental/behavioral health
- Judicial Coaching Resource (JCR): A confidential, free peer-to-peer coaching platform for judges coaching judges
- Educational well-being presentations

### **Will my anonymity be protected if I ask for help for a colleague or myself?**

Yes. JCALL will keep your name and specific report confidential and provide support/help to the individual.

### **Are all JWELL services free?**

Yes. There is no cost to the judges.

### **How do I access JWELL and JCALL services and resources?**

Simply email [Sandra.engel@sbnm.org](mailto:Sandra.engel@sbnm.org) or call 505-797-6097 and we will put you in touch with who or whatever you need. You can also visit our website at <https://www.sbnm.org/Member-Services/New-Mexico-Judicial-Wellness-Program>.

### **Are there free counseling services available to me if I need help?**

JWELL works with the Solutions Group to provide counseling resources. Judges are entitled to four free counseling sessions per issue per year for you, your court staff and your immediate family. Call 505-254-3555 or contact them on their website at <https://solutionsbiz.com/>. Identify with the NM LAP and they will ask you a few questions to get you to the right provider for your needs.

They provide counseling for many mental and behavioral struggles including, but not limited to: depression, substance use, anxiety, grief, burnout, and relationship conflict.

### **Will all of the services provided by JWELL be confidential?**

Yes. Confidentiality serves as a cornerstone of our resource. Any information we receive will receive the highest level of discretion and complies with HIPPA standards.



# Unlocking Legal Excellence:

## The Values of Executive Coaching for Attorneys

By Judge Sandra Engel (Ret.)

“If what got you here won’t get you there, then what will it take to get there?” Marshall Goldman said it a little differently but made the same point.<sup>1</sup> As practicing attorneys, we have access to a wide range of professional development tools and resources that can propel us forward in our professional journeys. The usual suspects include things like continuing legal education classes in an area specific to our practice, or a State Bar or professional conference, or webinars or online resources that help us develop skills in office management or accounting systems for our office. We can also draw from vast online libraries of books and online resources on virtually any subject. But just as the Goldman point makes clear, sometimes the usual suspects – those very tools and resources that got us to this point in our professional life – are not the ones that will enable us to advance our careers to a new level. Executive coaching can be a most powerful, often overlooked, “new” tool that you can use to unleash your potential in your field.

### What Is Coaching?

What is coaching? The International Coaching Federation defines it as: *Partnering with clients in a thought-provoking and creative process that inspires them to maximize their personal and professional potential.*<sup>2</sup>

What does that really mean? It involves a creative confidential space where a coach partners with a client to explore their thinking patterns, shine a new light on old paradigms and design new paths forward in areas where an attorney or judge has been stuck.

Unlike mentoring and consulting which typically involves providing “answers” to the client, coaching empowers the individual to discover their own answers, uncovering powerful ideas and solutions that prove most effective for that individual.



### History Of Executive Coaching

Executive coaching emerged from the work of Thomas Leonard, a financial planner who in the early 1980’s wanted to help his colleagues in the banking industry improve their performance and achieve their goals.<sup>3</sup> The same model that Leonard developed is followed today across industries and markets,

supporting thousands of executives on their professional journey.

Coaching has been widely used in the technology and health care industries, with Steve Jobs and Jeff Bezos often touting the power of working with their executive coaches. It has recently been expanding into the legal field, with many larger law firms using coaches to improve partners’ and associates’ performance and organizational management skills. Attorneys in solo practice are finding this type of coaching beneficial in building stronger practices with a focus on marketing opportunities and business ventures. The courts are also introducing peer-to-peer coaching programs where judges coach their colleagues.

The State Bar of New Mexico offers a Judicial Coaching Resource that exists as part of its Judicial Wellness Program. The resource started in 2022 and continues to add more coaches as demand dictates. As recent studies have found that professional judicial coaching can be a huge benefit to state judges, five other states including Colorado, Massachusetts, Minnesota, Virginia and Idaho have also developed robust judicial coaching resources.

### Benefits For You

How can this tool help you personally and professionally? Executive coaching comes with a unique value to lawyers that is outside the normal realm of professional development.

It is a confidential partnership that is tailor-made for you and your unique needs. By working with a coach, you will have the ability to grow your business, find new ways to market, improve your litigation and/or writing skills and more. You can find ways to handle difficult clients, have difficult conversations and effectively manage staff. When do you take time or have access to a confidential brainstorming partner who can help you think about your own thinking? Uncovering patterns, exploring roadblocks and finding clarity in areas where you are stuck are the building blocks of coaching.

## What Got Us Here, And The Need For Improvement

Why is it important to develop our skills and improve our performance? First, we are achievers who take pride in our profession. Second, we invest a lot of time, money and work into our path to becoming a lawyer and/or a judge and would like to ensure that we are not only upholding our oath, but also striving to become leaders in the profession. Lastly, the positive impact that coaching has on our professional life flows into our personal life so that we feel like we are thriving, not just surviving.

The law and its practices and traditions are ever-changing in this new paradigm, and we do not want to be left behind with outdated modalities and practices that no longer fit. Working with a coach can help you find ways to unleash your potential and build stronger skills that in turn cause less stress in your job and more efficient ways of taking action when any roadblocks appear.

## Finding The Right Coach

You will see different types of coaching; it will be important to be clear about what you are looking for.

There are executive coaches that specialize in performance improvement, confidence building, skills development, career planning, transformational practices, organizational management, leadership development and even team and group coaching for firms.

It is important to find a coach that fits your style and meets your needs, so think about what you want to explore in the relationship.

I coach many professionals and some of the common themes we discuss revolve around job performance, how

to perform better as a leader, how to find the confidence, and building skills and aptitude to be an effective communicator in those times where they feel less than.

How many times have you argued for your client in court, only to walk away second guessing yourself on how you handled a witness or your client? Or how you struggled to have a difficult conversation with your client, wanting to avoid conflict and disappointment? How many times have you seen a colleague perform at a higher level and wondered what it would take to get there? Have you ever imagined using your legal skills in new and innovative ways, but were not sure where to start?

A coach can partner with you to tackle and strategize around these areas of interest. We also can help you with the softer skills needed for maintaining your balance when you are juggling a heavy case load and a family with soccer games, school meetings and elder family issues. Where is your time for exercise, downtime, sports, concerts, even just finding the time for making a doctor's appointment to get that thing checked out that you have been worrying about?

Coaches are well equipped to help you discover new ideas, powerful clarity, awareness and more efficient paths moving forward. They will challenge you and identify patterns that you are employing that may no longer serve you. They can assist you in finding different perspectives and hold you accountable to the goals you want to achieve in your career, and ultimately, your life.

## Where Do I Find A Coach?

The State Bar of New Mexico has compiled a list of certified coaches on their website who are waiting to be retained by you to provide this powerful service. Visit the website link at <https://www.sbnm.org/Member-Services/Professional-Development-Program/Certified-Professional-Coaching>.

What are you waiting for? A confidential executive coach is waiting in the wings to support you and help you develop into the legal professional and human you dream to be. ■

*Judge Sandra Engel (ret.), Associate Certified Coach (cert by ICF) High Road to Success Coaching, State Bar of New Mexico Judicial Wellness Program Manager.*

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## Endnotes

<sup>1</sup> Goldsmith, Marshall. *What Got You Here Won't Get You There: How successful people become even more successful.* United Kingdom, London, Profile Books Ltd., 2008.

<sup>2</sup> International Coaching Federation. "Definition of coaching." [Coachingfederation.org](https://www.coachingfederation.org). accessed April 15, 2024.

<sup>3</sup> Wolfgang Saxon, Leonard Cohen, 47, Teacher of Business Coaching, *The New York Times*, February 25, 2003, <https://www.nytimes.com/2003/02/25/business/thomas-joseph-leonard-47-teacher-of-business-coaching.html>

**How has a State Bar of New Mexico well-being resource or service through the New Mexico Lawyer Assistance Program (NMLAP) or The Solutions Group Employee Assistance Program (EAP) benefitted you?**

“

“It is hard to put into words what LAP has done for me. I do not believe I would have made it to the other side without LAP. My biggest surprise was that LAP was not punitive. Pam Moore, Tenessa Eakins, and volunteers truly understood my plight and sincerely wanted my success. Thanks to LAP, I have a great support system, good friends who actively enjoy recovery and helping others, and I get to do what I love, practice law.”

— Renee Lewis

“

“Practicing law can be grueling. And maintaining recovery is a lifelong endeavor. LAP has provided me with a network of resources and support I can use to navigate the ups and downs of both. Most importantly, LAP is a community where I am not unique or alone, and where paying the gifts of recovery forward is part of the process.”

— Anonymous

“

“LAP served as an invaluable resource of people who genuinely cared. Although I felt so very alone in my struggle with alcohol, I quickly learned that I was one of many. Thanks to the help provided by LAP, I am living a balanced and fulfilling life that I did not know was possible.”

— Anonymous

“

“Being persistent while calm, resilient while engaged. Dropping work for fun or providing service that fills my heart, and returning to work when it's time.”

— Brian Nichols.

**What do you find valuable about the Judicial Wellness Program?**

“

“Our JWell Program provides all levels of judges in New Mexico with professional and personal connections. The Bench and Chambers can be lonely places for judges. Judges often feel as though there is no one that we can talk to about the pressure that lies on our shoulders when we make life-altering decisions. Aside from the variety of resources that are provided to us, JWell also provides a valuable safe harbor for judges to get together and talk about how our job affects our day-to-day lives.”

— Honorable Curtis R. Gurley,  
Chief Judge, Eleventh Judicial District,  
Division IV

“

“The challenges of serving as a judge are unique to the legal profession, and every judge needs support to ensure they are able to perform their duties effectively. JWELL has been a vital resource for me to understand how to address the demands of my role, balance my physical and mental health, and develop effective strategies to serve the people of New Mexico. JWELL's work will continue to improve our judicial officer's ability to serve our communities, and I encourage the legal community to support JWELL's efforts.”

— Robert Lara, District Court Judge,  
Division II, Third Judicial District Court



# Advance Opinions

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

From the New Mexico Supreme Court

From the New Mexico Supreme Court

**Opinion Number: 2024-NMSC-003**

No: S-1-SC-39355 (filed January 16, 2024)

**STATE OF NEW MEXICO,**

Plaintiff-Respondent,

v.

**RAMON LORENZO,**

Defendant-Petitioner.

**ORIGINAL PROCEEDING ON CERTIORARI**

Amanda Sanchez Villalobos, District Judge

Bennett J. Baur, Chief Public Defender  
Kimberly Chavez Cook,  
Appellate Defender  
Mark A. Peralta-Silva,  
Assistant Appellate Defender  
Santa Fe, NM  
  
for Petitioner

Hector H. Balderas, Attorney General  
Maris Veidemanis,  
Assistant Attorney General  
Santa Fe, NM  
  
for Respondent

## OPINION

### THOMSON, Justice.

{1} We consider whether convictions of both the armed robbery of a diner and the aggravated battery of the diner's owner violate a defendant's right to be free from double jeopardy. We conclude that the conduct underlying both charges was unitary and that the State used evidence of the same force—a shooting which occurred during the robbery—to prove both convictions. Because the Legislature did not intend to allow multiple punishments for the same conduct, we hold that the convictions violate double jeopardy.

#### I. BACKGROUND

{2} On March 23, 2013, in Milan, New Mexico, there was a knock on the back door of the WOW Diner shortly after closing time. The owner, Richard Rivard (Victim), answered the door and was confronted by two former employees, Ramon Lorenzo (Defendant) and Leo Galindo, both holding guns. Victim tried to close the door, but the intruders overpowered him, pushing him back about ten feet. Defendant pointed a gun between Victim's eyes and said, "Where's the money?" Looking down the gun's barrel, Victim saw the hammer cocked back with Defendant's finger on the trigger. Victim "grabbed the gun, pulled [his] head back [, but] the gun went off," shooting him in the face. He fell to the ground. Defendant and Galindo demanded to know where they would find the money as they searched the nearby of-

fice. They fled with about \$1,800. Victim survived the shooting.

{3} A grand jury indicted Defendant on charges of armed robbery, conspiracy to commit armed robbery, aggravated burglary, conspiracy to commit aggravated burglary, aggravated battery by a deadly weapon, conspiracy to commit aggravated battery by a deadly weapon, tampering with evidence, and conspiracy to commit tampering with evidence. A felony failure to appear (FTA) charge was added when Defendant did not show up to his first trial date. A jury convicted Defendant of all counts except tampering with evidence and conspiracy to commit tampering with evidence, resulting in a sentence of twenty-six and one-half years.

{4} Defendant appealed, raising seven issues. *State v. Lorenzo*, A-1-CA-36648, mem. op. ¶ 2 (N.M. Ct. App. Mar. 24, 2022) (nonprecedential). The Court of Appeals rejected six of Defendant's arguments, but reversed and remanded to the district court to vacate two of the conspiracy convictions on double jeopardy grounds. *Id.* Defendant appealed to this Court, asserting for the first time that his convictions of aggravated battery and armed robbery violate his right to be free from double jeopardy.<sup>1</sup> It is troubling to this Court that this second double jeopardy claim was not recognized until the petition for writ of certiorari.<sup>2</sup> Fortunately for Defendant, double jeopardy is not waivable and may be raised at any stage of a criminal case, including after judgment. *State v. Martinez*, 2007-NMCA-160, ¶ 5, 143 N.M. 96, 173 P.3d 18.

#### II. DOUBLE JEOPARDY PROHIBITS MULTIPLE PUNISHMENT IN THIS CASE

{5} Double jeopardy "is a constitutional question of law which we review de novo." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747; U.S. Const. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."); N.M. Const. art. II, § 15 ("[N]or shall any person be twice put in jeopardy for the same offense."). When a single course of conduct results in multiple charges under separate criminal statutes,

<sup>1</sup> Defendant raised, and we granted certiorari on, seven issues: (1) ineffective assistance of counsel resulting from the State's use of trial counsel's statements at the first trial date for which Defendant failed to appear as evidence of his FTA charge, (2) improper joinder and failure to sever the FTA charge from the initial charges, (3) speedy trial, (4) questioning of a witness about her medicinal marijuana use, (5) sufficiency of the evidence of FTA, (6) implied juror bias, and (7) double jeopardy for the armed robbery and aggravated battery with a deadly weapon convictions. We quash the first six issues as improvidently granted and address only the double jeopardy issue.

<sup>2</sup> The double jeopardy issue now presented is different from the one considered by the Court of Appeals and is raised for the first time here. *Lorenzo*, A-1-CA-36648, mem. op. ¶ 44 ("remand[ing] to the district court to vacate Defendant's conviction for fourth degree conspiracy to commit aggravated battery and one of his convictions for third degree conspiracy").

one of the charges may be barred by double jeopardy. *State v. Bernal*, 2006-NMSC-050, ¶ 7, 140 N.M. 644, 146 P.3d 289. We term this a double-description double jeopardy violation. *Id.* In reviewing a double-description challenge, we first determine “whether the conduct underlying the [two] offenses is unitary, i.e. whether the same conduct violates both statutes.” *Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223. If the conduct is not unitary, the analysis is complete because the acts are discrete and no violation of the defendant’s right against double jeopardy is possible. *Id.* ¶ 26. If the conduct is unitary, we must next determine whether the Legislature intended for the unitary conduct to be punished as separate offenses. *Id.* ¶ 25. “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 punishments in the same trial.” *Id.*

#### A. The Conduct Underlying Both Charges Was Unitary

{6} The unitary conduct analysis turns on whether the acts underlying the two offenses are separated by “sufficient indicia of distinctness.”<sup>3</sup> *Id.* ¶ 26. In determining sufficiency, “we . . . look[] to the elements of the charged offenses, the facts presented at trial, and the instructions given to the jury.” *State v. Sena*, 2020-NMSC-011, ¶ 46, 470 P.3d 227. When examining the factual record, courts “consider such factors as whether [the] acts were close in time and space, their similarity, the sequence in which they occurred, whether other events intervened, and the defendant’s goals for and mental state during each act.” *State v. Franco*, 2005-NMSC-013, ¶ 7, 137 N.M. 447, 112 P.3d 1104. Looking at the totality of the circumstances, “if it reasonably can be said that the conduct is unitary, then we must conclude that the conduct was unitary.” *State v. Porter*, 2020-NMSC-020, ¶ 12, 476 P.3d 1201 (text only)<sup>4</sup> (quoting *Swafford*, 1991-NMSC-043, ¶ 28).

{7} Here, the acts were close together in time and space. The entire episode, from the time Victim opened the door to the time Defendant and Galindo left, was described by Victim as “seven or eight minutes tops.” The altercation was also contained spatially, taking place in the kitchen area of the restaurant.

{8} The course of conduct underlying both offenses was also similar. *Franco*, 2005-NMSC-013, ¶ 7 (“The proper analytical framework is whether the facts presented at trial establish that the jury reasonably could have inferred indepen-

dent factual bases for the charged offenses.” (internal quotation marks and citation omitted)). Each conviction was based on Defendant’s use of the gun. First, the gun was the means used to gain entry to the diner and rob Victim. Second, the gun was the weapon that assaulted Victim. Further, the acts were not interrupted by an intervening event.

{9} The State argues that Defendant’s conduct was nonunitary because “the force necessary to accomplish the robbery had already been threatened well before the shot was fired.” The State’s view of the conduct is that Defendant’s act of displaying the gun satisfied the threatened force element of armed robbery. Therefore, the gunshot after the struggle was a different use of force that satisfied the aggravated battery. However, there are two distinct issues with the State’s argument.

{10} First, the armed robbery was not complete with the threatened use of force. The commission of the armed robbery began when Defendant and Galindo displayed their guns and forcefully entered the diner. The robbery was not complete until they took possession of the money. See *NMSA 1978, § 30-16-2 (1973)* (“Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence.” (emphasis added)). The events between the initiation and completion of the robbery were part of a single course of conduct that occurred closely in time and space. See *State v. Torres*, 2018-NMSC-013, ¶ 19, 413 P.3d 467 (“When determining whether a defendant’s conduct is unitary, we have looked for an identifiable point at which one of the charged crimes had been completed and the other not yet committed.” (text only) (citation omitted)). The State would have us parse out each act by Defendant as an intervening event without looking for indicia of distinctness. This obstructs the purpose of the double jeopardy clause to guard against multiple punishments for the same conduct. “The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.” *State v. Frazier*, 2007-NMSC-032, ¶ 23, 142 N.M. 120, 164 P.3d 1 (quoting *Brown v. Ohio*, 432 U.S. 161, 169 (1977)).

{11} Second, the State’s presentation on appeal does not match its presentation at trial. We note that, had the State opted for a different presentation at trial, it is possible that the jury could have decided that dif-

ferent uses of force satisfied the elements of each crime. For example, if the jury had determined that the threatened use of the gun was sufficient for the robbery and separately that the discharge of the gun satisfied the aggravated assault, then our analysis might be different. However, as described in Part B.3, *infra*, the State’s legal theory, as presented in its closing argument, relies on the shooting of Victim to prove both offenses. The State may not now argue in the abstract about what it could have asked the jury to decide.

{12} We look finally to Defendant’s mental state during each act. *Franco*, 2005-NMSC-013, ¶ 7 (“To determine whether a defendant’s conduct was unitary, we consider . . . the defendant’s goals for and mental state during each act.”). Nothing in the record suggests that Defendant’s actions, including gaining entry into the diner, pushing Victim back from the door, and shooting Victim in the face, were driven by anything other than the desire to steal money from the diner. Thus, none of the *Franco* factors support the notion that the acts were “separated by sufficient indicia of distinctness.” *Swafford*, 1991-NMSC-043, ¶ 26. We therefore conclude that the conduct was unitary.

#### B. The Legislature Did Not Intend to Permit Multiple Punishments Under These Two Statutes for the Same Conduct

{13} When conduct is unitary, we must next decide “whether the Legislature intended to permit multiple punishments” for the charged crimes. *Porter*, 2020-NMSC-020, ¶ 15; see also *Torres*, 2018-NMSC-013, ¶ 21 (acknowledging that legislative intent is the touchstone for whether multiple punishments are permissible). “In analyzing legislative intent, we first look to the language of the statute[s]” to determine whether the Legislature explicitly authorized multiple punishments for unitary conduct. *Torres*, 2018-NMSC-013, ¶ 21. Neither the armed robbery nor the aggravated battery statute explicitly authorizes multiple punishments, so an analysis of the plain language of the statute does not resolve the issue. See § 30-16-2; *NMSA 1978, § 30-3-5(A), (C) (1969)*; *Porter*, 2020-NMSC-020, ¶ 16. Thus, we must attempt to discern intent through other canons of construction. *Torres*, 2018-NMSC-013, ¶ 21.

{14} Early in our jurisprudence, we applied the statutory construction rule from *Blockburger v. United States*, 284 U.S. 299 (1932). *State v. Blevins*, 1936-NMSC-052, ¶ 10, 40 N.M. 367, 60 P.2d 208; see also

<sup>3</sup> The Court of Appeals, in its double jeopardy analysis of the conspiracy convictions, assumed without discussing that the acts were unitary. *Lorenzo*, A-1-CA-36648, mem. op. ¶¶ 41-44. We complete the analysis here.

<sup>4</sup> “(Text only)” indicates the omission of nonessential punctuation marks—including internal quotation marks, ellipses, and brackets—that are present in the text of the quoted source, leaving the quoted text otherwise unchanged.

Blockburger, 284 U.S. at 304 (holding a double jeopardy violation did not occur if each statute contained an element of proof not required by the other). This Court has augmented the original mechanistic application of Blockburger “to be more in line with United States Supreme Court precedent.” Swick, 2012-NMSC-018, ¶ 21. Rather than a strict elements test, the “analysis demands that we compare the elements of the offense, looking at the State’s legal theory of how the statutes were violated.” Porter, 2020-NMSC-020, ¶ 8.

{15} {15} Here, both statutes allow for alternative conduct, so comparing the elements of the offenses is inconclusive. An aggravated battery may be effectuated through an “unlawful touching or application of force” that “inflict[s] great bodily harm or does so with a deadly weapon or . . . in any manner whereby great bodily harm or death can be inflicted.” Section 30-3-5(A), (C). Similarly, an armed robbery occurs when a theft results from the “use or threatened use of force or violence.” Section 30-16-2. At first inspection, both aggravated battery and armed robbery involve the use of force, so the two crimes share a common element. However, this abstract commonality is not enough to declare that one crime subsumes the other because the two statutes could be violated by different conduct. For example, Defendant’s threatened use of force could be sufficient to violate the armed robbery statute, while the shooting could be the force used to prove aggravated battery. To establish a double jeopardy violation, the jury must have found that Defendant violated both statutes with the same use of force. We must, therefore, determine which alternative conduct the State actually proved by examining the statute, indictment, and jury instructions. Porter, 2020-NMSC-020, ¶ 19 (“When a defendant is charged with violating statutes that are vague, unspecific, or written in such a way that a defendant could be convicted based on alternative conduct, we review the statutory language, charging documents, and jury instructions used at trial to ascertain the state’s legal theory.”).

{16} We turn then to “the state’s legal theory of the case applied to the statutes at issue to determine the elements of each offense the defendant committed. This requires us to identify how the state alleged that a defendant violated the statutes at issue.” Id. ¶ 18 (citation omitted). “[I]f we determine that one of the offenses subsumes the other offense, ‘the double jeopardy prohibition is violated, and punishment cannot be had for both.’” Id. ¶ 20 (quoting Swick, 2012-NMSC-018, ¶ 27). In this case, the armed robbery offense subsumes the aggravated battery conviction because the same evidence, the shooting, was used to prove each element of force.

### 1. The armed robbery conviction

{17} As is true of most modern statutes, armed robbery is a multipurposed statute that may be accomplished through alternative conduct. Here, Defendant could have violated the armed robbery statute under either of two theories: (1) by robbing the diner with force, through pushing or shooting Victim or (2) with the threatened use of force, by wielding the firearm or pointing the gun at Victim’s head. Because there are multiple acts that the State could have used to prove either theory of armed robbery, we look to the indictment and jury instructions. See Porter, 2020-NMSC-020, ¶ 19 (“[W]e review the statutory language, charging documents, and jury instructions used at trial to ascertain the state’s legal theory.”).

#### a. Grand jury indictment

{18} The grand jury indictment reads:

Count I: Armed Robbery, . . . on or about March 23, 2013, [D]efendant did take and carry away money, which had some value, from Richard Rivard[s] immediate control, intending to permanently deprive Richard Rivard of the property, and the [D]efendant was armed with a handgun, a deadly weapon or an instrument or object which, when used as a weapon, could cause death or very serious injury, and [D]efendant took the property by use or threatened use of force or violence, a second degree felony, contrary to Section 30-16-2,(F) [sic] Section 31-18-16 NMSA 1978.

While the indictment specifies that Defendant was armed with a handgun and that he “took the property by use or threatened use of force or violence,” it does not specify the force used or specifically whether the use of the handgun satisfied the use of force element. We next examine the jury instructions for possible guidance.

#### b. Jury instructions

{19} The jury instruction read:

Instruction 7: For you to find [D]efendant guilty of Armed Robbery as charged in Count 1 the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [D]efendant took and carried away monies, from Richard Rivard, or from his immediate control intending to permanently deprive Richard Rivard of the monies; the property had some value;
2. [D]efendant was armed with a handgun;

3. [D]efendant took the monies by force or violence or threatened force or violence;

4. This happened in New Mexico on or about the 23rd day of March, 2013.

Like the charging document, the instruction includes both use of force and threatened use of force. The instructions do not clarify which conduct the jury found sufficient for the conviction. However, it does indicate the force or threatened use of force was predicated on use of the handgun.

### 2. The aggravated battery conviction

{20} Like the armed robbery statute, a defendant may accomplish a third-degree aggravated burglary violation through alternative forms of conduct if the defendant (1) “inflict[s] great bodily harm,” (2) commits aggravated battery “with a deadly weapon,” or (3) “commits aggravated battery . . . in any manner whereby great bodily harm or death can be inflicted.” Section 30-3-5. We, therefore, look again to the grand jury indictment and jury instructions to understand which theory the State used to prove its case.

#### a. Grand jury indictment

{21} The aggravated battery with a deadly weapon indictment is more specific than that of armed robbery:

Count V: Aggravated Battery (Deadly Weapon), . . . on or about March 23, 2013, [D]efendant did touch or apply force to Richard Rivard, with a handgun or an instrument or object which, when used as a weapon, could cause death or very serious injury, and the defendant intended to injure or [sic] another, a third degree felony, contrary to Section 30-3-5(A)(F)&(C) [sic], Section 31-18-16 NMSA 1978.

Though the aggravated battery indictment specifies that the force used was with the handgun, it also leaves room for another object that could cause death or serious injury. We turn then to the jury instructions.

#### b. Jury instructions

{22} The aggravated battery jury instruction read:

Instruction 12: For you to find [D]efendant guilty of Aggravated Battery as charged in Count V, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [D]efendant touched or applied force to Richard Rivard by shooting him with a deadly weapon.
2. [D]efendant intended to injure Richard Rivard;
3. This happened in New Mexico on or about the 23rd day of March, 2013.



{23} Unlike the armed robbery conviction, only one conduct was sufficient to prove Defendant violated the aggravated battery statute: shooting Victim in the face. Thus, Defendant's act of shooting Victim is sufficient to violate both statutes, so it is possible that "one offense subsumes the other." Porter, 2020-NMSC-020, ¶ 21. However, it is also conceivable that the two statutes are violated by different forces so that neither offense is subsumed. Because "the state's legal theory cannot be ascertained using the charging documents and jury instructions, we also review testimony, opening arguments, and closing arguments to establish whether the same evidence supported a defendant's convictions under both statutes." See Porter, 2020-NMSC-020, ¶ 19.

### 3. The State's closing argument reveals that it relied on the same use of force for both crimes

{24} The State's closing argument reveals its reliance on Defendant's shooting of Victim as the legal theory supporting the conviction of both offenses. First, the State argued that the shooting was the required force for an armed robbery conviction:

[Y]ou also have an instruction on armed robbery. In order to . . . prove that offense, you must find the evidence sufficient to show that the Defendant took money away from Mr. Rivard[,] that he was armed with a handgun[,] and that he used force or threaten[ed] to use force in order to take the money. Obviously Mr. Rivard was unable to keep the men from taking the money because he was shot. That was the use of force.

(Emphasis added.) The State then argued that the use of force for the aggravated battery was also the shooting:

The next element's instruction you have has to do with aggravated battery and in this case what is required is that the evidence prove that the Defendant injured Mr. Rivard by shooting him. . . . The Defendant had to pull the trigger to shoot Mr. Rivard. He had to put the gun into firing position.

(Emphasis added.) Under the State's legal theory presented to the jury, the conduct proving the armed robbery, the shooting, would always prove the aggravated assault.

{25} Finally, this Court has noted in the past that when "one statutory provision incorporates many of the elements of a base statute, and extracts a greater penalty than the base statute, it may be inferred that the legislature did not intend punishment under both statutes." Swafford, 1991-NMSC-043, ¶ 33. A first offense of armed robbery is a second-degree felony carrying a nine-year basic sentence. NMSA 1978, § 31-18-15(A) (2007, amended 2022). By comparison, both aggravated battery with a deadly weapon and robbery (without a deadly weapon) are third-degree felonies requiring three years imprisonment. *Id.* We recognize that the relationship between standards of punishment is not a dispositive factor. Swick, 2012-NMSC-018, ¶ 9 n.1 ("This Court and the Court of Appeals have used the quantum of punishment to support the proposition that the Legislature did not intend to punish the two crimes separately, both when the amount of punishment is the same and when the amount differs."); *State v. Caldwell*, 2008-NMCA-049, ¶ 19, 143 N.M. 792, 182 P.3d 775 ("[T]his Court and our Supreme Court have previously noted that a difference in the quantum of punishment alone is insufficient to overcome other indicia of legis-

lative intent."). However, here, only one element separates a violation of a simple robbery from an armed robbery—the use of a deadly weapon. See § 30-16-2. The particular use relied on by the State to prove the armed robbery was the shooting; that is, the shooting enhanced the punishment from a third-degree to a second-degree felony. But the shooting was also used by the State to prove the aggravated battery. Under the facts of this case, the aggravated battery, as a third-degree felony, functions as the "base statute" for the armed robbery. See Swafford, 1991-NMSC-043, ¶ 33. This further supports the inference that the Legislature did not intend multiple punishments under both statutes for the same conduct.

{26} Because the shooting was the sole force used to prove the aggravated battery and armed robbery offenses, we hold that the aggravated battery conviction is subsumed in the armed robbery conviction, violating Defendant's right to be free from double jeopardy. See Porter, 2020-NMSC-020, ¶ 20.

### III. CONCLUSION

{27} For the foregoing reasons, we remand to the district court to vacate Defendant's conviction for aggravated battery as it carries the shorter sentence. See Torres, 2018-NMSC-013, ¶ 28 ("When double jeopardy protections require one of two otherwise valid convictions to be vacated, we vacate the conviction carrying the shorter sentence.").

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

**DAVID K. THOMSON, Justice**  
**WE CONCUR:**

**C. SHANNON BACON, Chief Justice**  
**MICHAEL E. VIGIL, Justice**  
**JULIE J. VARGAS, Justice**  
**BRIANA H. ZAMORA, Justice**

# FORMAL OPINION

Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

**Filing Date: 4/10/2024**

**No. A-1-CA-41177**

**TODD LOPEZ, Personal Representative of the Wrongful Death Estate of RICHARD PAIZ and**

**LORETTA PAIZ, individually,**

Plaintiffs-Appellants,

v.

**PRESBYTERIAN HEALTHCARE SERVICES;  
HOSPITALIST MEDICINE PHYSICIANS OF TEXAS,  
PLLC d/b/a SOUND PHYSICIANS HOLDINGS LLC;**

**KENNETH DALE; and KARAN MAHAJAN,**

Defendants-Appellees.

**APPEAL FROM THE DISTRICT COURT  
OF SANTA FE COUNTY**

Francis J. Mathew, District Court Judge

Bruce E. Thompson Law Firm, P.C.

Bruce E. Thompson

Albuquerque, NM

The Law Office of Amalia S. Lucero, L.L.C.

Amalia S. Lucero

Placitas, NM

for Appellants

Rodey, Dickason, Sloan, Akin & Robb, P.A.

Jocelyn Drennan

Jeffrey M. Croasdell, Et al.

Albuquerque, NM

for Appellee Presbyterian Healthcare Services

## ► Introduction of Opinion

This case involves the relationship between the appointment of a personal representative (PR) under the Wrongful Death Act (WDA), see NMSA 1978, §§ 41-2-1 to -4 (1882, as amended through 2001); *Chavez v. Regents of the Univ. of N.M.*, 1985-NMSC-114, 103 N.M. 606, 711 P.2d 883; see also Rule 1-017(B) NMRA, and statutory standing as a jurisdictional prerequisite to bringing a cause of action in New Mexico state court, see *Deutsche Bank Nat 'l Tr. Co. v. Johnston*, 2016-NMSC-013, 11, 369 P.3d 1046. Plaintiffs Loretta Paiz, individually, and Todd Lopez, as the PR of the "Wrongful Death Estate of Richard Paiz," (collectively, Plaintiffs) filed claims, including a wrongful death action, against Defendants Presbyterian Healthcare Services, Sound Physicians Holdings LLC, Kenneth Dale, and Karan Mahajan (collectively, Defendants). Plaintiffs, however, did not seek the appointment of Mr. Lopez as the PR under the WDA until months into the litigation. The district court determined that Plaintiffs' late request to appoint a PR deprived the court of jurisdiction over the wrongful death action and dismissed the wrongful death claim with prejudice. **View full PDF online.**

Katherine A. Wray, Judge

WE CONCUR:

Shammara H. Henderson, Judge

Michael D. Bustamante, Judge, retired,

Sitting by designation, specially concurring

To read the entire opinion, please visit the following link: <https://bit.ly/A-1-CA-41177>

# FORMAL OPINION

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**Filing Date: 4/16/2024**

**No. A-1-CA-41120**

**BRAD BOLEN a/k/a BRADLEY CARROL BOLEN,**  
Plaintiff-Appellee,

v.

**NEW MEXICO RACING COMMISSION;  
and FABIAN LOPEZ, Records Custodian for  
New Mexico Racing Commission,**  
Defendants-Appellants.

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

Joshua A. Allison, District Court Judge

Western Agriculture, Resource and  
Business Advocates, LLP  
A. Blair Dunn  
Jared R. Vander Dussen  
Albuquerque, NM

for Appellee

Jackson Loman Stanford Downey  
& Stevens-Block, P.C.  
Eric Loman  
Albuquerque, NM

for Appellants

## ► Introduction of Opinion

This case requires us to interpret, for the first time, whether judicial immunity is a defense available to a “public body” under the New Mexico Civil Rights Act (CRA), NMSA 1978, §§ 41-4A-1 to -13 (2021). Defendant, the New Mexico Racing Commission (NMRC)<sup>1</sup> filed a motion for summary judgment in the district court, which argued, in relevant part, that NMRC has absolute quasi-judicial immunity from suit for its decision to initiate and prosecute an administrative disciplinary proceeding against Plaintiff Brad Bolen. The district court denied NMRC’s motion for summary judgment, concluding that because judicial immunity applies only to individuals, NMRC is not immune from suit under the CRA. On appeal, NMRC argues that the district court erred in denying its motion because judicial immunity is expressly preserved under Section 41-4A-10 of the CRA and, under the facts of this case, it is entitled to quasi-judicial immunity. We agree with NMRC that the district court erred and therefore reverse and remand with instructions to grant summary judgment in favor of NMRC.

Kristina Bogardus, Judge  
WE CONCUR:  
Shammara H. Henderson, Judge  
Katherine A. Wray, Judge

To read the entire opinion, please visit the following link: <https://bit.ly/A-1-CA-41120>



# MEMORANDUM OPINION

*This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.*

**Filing Date: 4/10/2024**

**No. A-1-CA-40322**

**STATE OF NEW MEXICO,**

Plaintiff-Appellant,

v.

**BRYAN SCHUSTER,**

Defendant-Appellee.

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

Melissa A. Kennelly, District Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

Michael J. Thomas, Assistant Attorney General

Albuquerque, NM

for Appellant

Bennett J. Baur, Chief Public Defender

MJ Edge, Assistant Appellate Defender

Santa Fe, NM

for Appellee

► **Introduction of Opinion**

The State appeals the district court's order granting Defendant Bryan Schuster's motion to dismiss for violating his speedy trial rights. We reverse.

Zachary A. Ives, Judge

WE CONCUR:

Megan P. Duffy, Judge

Shammara H. Henderson, Judge

To read the entire opinion, please visit the following link: <https://bit.ly/A-1-CA-40322>

# MEMORANDUM OPINION

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**Filing Date: 4/10/2024**

**No. A-1-CA-40135**

**BENAVIDEZ CONSTRUCTION LLC,**

Plaintiff-Appellee,

v.

**PAUL LEWICKI; ELIZABETH PHILLIP;**

**STREAMLAND LLC; a Delaware limited liability company; and ROSENALM WILDLIFE INSTITUTE**

**LLC, a Delaware limited liability company,**

Defendants-Appellants.

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

Emilio Chavez, District Court Judge

Arnold Padilla  
Albuquerque, NM

for Appellee

Sheri A. Raphaelson  
Española, NM

for Appellants

## ► Introduction of Opinion

Defendants Paul Lewicki, Elizabeth Phillip, Streamland LLC, and Rosenalm Wildlife Institute LLC appeal the district court’s judgment in favor of Plaintiff Benavidez Construction LLC, which was owned by Manuel Benavidez. This case involves a contract dispute over payment for the construction and renovation of Defendants’ Paul Lewicki and Elizabeth Phillip’s home. As both parties and the district court acknowledged, no written contract governed the parties’ expectations for the project. Instead, the parties agreed that Defendants hired Plaintiff for “construction and renovation work,” and Defendants paid invoices as Plaintiff submitted them. Disputes arose, however, about payment for “extras”—work Defendants maintained they did not approve in advance. After more than three years, Plaintiff stopped all activity on the property and filed a complaint against Defendants. Following a six-day bench trial, the district court entered judgment in favor of Plaintiff for breach of contract. On appeal, Defendants contend that the damages awarded are unsupported by any enforceable contract. We affirm.

Katherine A. Wray, Judge

WE CONCUR:

Megan P. Duffy, Judge

Zachary A. Ives, Judge

To read the entire opinion, please visit the following link: <https://bit.ly/A-1-CA-40135>

# MEMORANDUM OPINION

*This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.*

**Filing Date: 4/10/2024**

**No. A-1-CA-40124**

**ALICE T. KANE, as Superintendent of Insurance  
for the State of New Mexico and as  
Custodian of the New Mexico Patient's  
Compensation Fund,**

Plaintiff-Appellee,

v.

**JAMES H. WOOD, Et al.**

Defendant-Appellee,

**APPEAL FROM THE DISTRICT COURT  
OF SANTA FE COUNTY**

Francis J. Mathew, District Court Judge

Cassandra Brulotte  
Albuquerque, NM  
for Appellee Alice T. Kane,  
Superintendent of Insurance

Law Office of James H. Wood, PC  
Zachary E. Wilson-Fetrow  
James H. Wood  
Albuquerque, NM

for Appellee James H. Wood

Rodey, Dickason, Sloan, Akin & Robb, P.A.  
Kip Purcell  
Albuquerque, NM

for Appellant Presbyterian Healthcare Services

► **Introduction of Opinion**

This case involves the Inspection of Public Records Act (IPRA), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2023). Defendant-Appellant Presbyterian Healthcare Services (Presbyterian) appeals the district court's findings of fact, conclusions of law, and decision regarding disclosure of Presbyterian's records as held by Plaintiff-Appellee Alice Kane, in her official capacity as Superintendent of Insurance for the State of New Mexico (the Superintendent). For the reasons that follow, we reverse.

J. Miles Hanisee, Judge

WE CONCUR:

Katherine A. Wray, Judge

Michael D. Bustamante, Judge, retired,  
Sitting by designation

To read the entire opinion, please visit  
the following link: <https://bit.ly/A-1-CA-40124>



# MEMORANDUM OPINION

*This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.*

**Filing Date: 4/10/2024**

**No. A-1-CA-41032**

**VALENTINA E. WALKER n/k/a**

**VALENTINA E. BASILE,**

Petitioner-Appellant,

v.

**JOSEPH C. WALKER,**

Respondent-Appellee.

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

Debra Ramirez, District Court Judge

Law Office of Augustine M. Rodriguez, LLC

Augustine M. Rodriguez

Albuquerque, NM

for Appellee

Durham, Pittard & Spalding, LLP

Caren I. Friedman

Philip M. Kovnat

Santa Fe, NM

for Appellee

► **Introduction of Opinion**

Petitioner Valentina E. Walker n/k/a Valentina E. Basile, appeals the district court's final order on Respondent Joseph C. Walker's objections to the hearing officer's child support modification award. The hearing officer reached its modified child support award based in part on a calculation that included the cost of sending the parties two minor children to private school. Sending children to private school was not the status quo and was Petitioner's unilateral decision. In its order, the district court held that any cost or expense for sending children to private school is Petitioner's responsibility and that those costs and fees would "not be considered on any child support worksheet." The district court's order also held that Petitioner would have to reimburse Respondent for a series of child support overpayments. We affirm.

Jacqueline R. Medina, Judge

WE CONCUR:

Kristina Bogardus, Judge

Michael D. Bustamante, Judge, retired,

Sitting by designation

To read the entire opinion, please visit the following link: <https://bit.ly/A-1-CA-41032>

# MEMORANDUM OPINION

*This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.*

**Filing Date: 4/11/2024**

**No. A-1-CA-40700**

**PERLA A. MONTES,**  
Petitioner-Appellant,

v.

**LUIS URIEL MANRIQUEZ,**  
Respondent-Appellee.

## **APPEAL FROM THE DISTRICT COURT OF LEA COUNTY**

Michael H. Stone, District Court Judge

Law Office of Ross R. Bettis  
Ross R. Bettis  
Hobbs, NM

for Appellant

The Sawyers Law Group, LLC  
Melissa A. Sawyers  
Hobbs, NM

for Appellee

## **► Introduction of Opinion**

In this divorce case, Petitioner Perla A. Montes (Mother) appeals from the district court's initial custody determination and the parenting plan concerning the parties' two children (collectively, Children). Mother filed for divorce from Respondent Luis Uriel Manriquez (Father) in October 2021. Because custody of Children was contested, the district court appointed a guardian ad litem (GAL) in January 2022, under Rule 1-053.3 NMRA, to conduct an investigation and to provide the court with recommendations on custody and a parenting plan that would be in Children's best interest. The GAL recommended that the parties share joint legal custody of Children, with Father having primary physical custody and Mother having substantial periods of responsibility for Children's care. In August 2022, the district court held an evidentiary hearing to consider the parties' objections to the GAL's recommendations. Both parents and the GAL testified at that hearing and the GAL's report and recommendations were introduced into evidence. At the conclusion of the hearing, the district court made oral findings, explaining the court's reasons for adopting the GAL's recommendations, and issued a written decree of dissolution that included a parenting plan and child support. Mother appeals. **View full PDF online.**

Jane B. Yohalem, Judge

WE CONCUR:

Jacqueline R. Medina, Judge

Zachary A. Ives, Judge

To read the entire opinion, please visit  
the following link: <https://bit.ly/A-1-CA-40700>

# MEMORANDUM OPINION

*This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.*

**Filing Date: 4/16/2024**

**No. A-1-CA-39039**

**PHILIP ESLIN and REBECCA ESLIN,**

Plaintiffs-Appellees,

v.

**PAUL LEVY, M.D. and NEW MEXICO**

**HEART INSTITUTE, P.A.,**

Defendants-Appellants.

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

Lisa Chavez Ortega, District Court Judge

Hinkle Shanor LLP

Dana S. Hardy

Kathleen M. Wilson

Hari-Amrit Khalsa

Santa Fe, NM

Dickinson Wright PLLC

Bennett Evan Cooper

Phoenix, AZ

Lorenz Law

Alice T. Lorenz

Albuquerque, NM

for Appellees

Curtis & Co.

Lisa K. Curtis

Luke W. Holmen

Albuquerque, NM

for Appellants

## ► Introduction of Opinion

This appeal arises from a medical malpractice claim and a jury's award of damages. Plaintiffs Philip and Rebecca Eslin argue that the district court erred by (1) entering a judgment that applied the Medical Malpractice Act's (MMA) statutory cap on damages, see NMSA 1978, § 41-5-6 (1992, amended 2023), rather than solely reflecting the jury's verdict; (2) refusing to grant Plaintiffs' request for an evidentiary hearing in support of their arguments that the MMA's statutory cap on damages is unconstitutional; (3) enforcing the MMA's statutory cap on damages because it violates the right to trial by jury, the separation of powers, equal protection, and due process, and (4) denying Plaintiffs' request for prejudgment interest, based on their Rule 1-068(C) NMRA offer of settlement. We affirm.

Michael D. Bustamante, Judge, retired,  
Sitting by designation.

WE CONCUR:

Zachary A. Ives, Judge

Shammara H. Henderson, Judge

To read the entire opinion, please visit  
the following link: <https://bit.ly/A-1-CA-39039>



# MEMORANDUM OPINION

*This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.*

**Filing Date: 4/16/2024**

**No. A-1-CA-40903**

**RUTH GARCIA ARAGON,**

Plaintiff-Appellant,

v.

**FORREST BRUNSON; BRUNSON ELECTRICAL;**

**and BRECCO, INC,**

Defendants-Appellees.

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

Daniel A. Bryant, District Court Judge

Marshall Law, P.C.  
Stephen R. Marshall  
Albuquerque, NM

King Law Firm  
Ian F. King  
Albuquerque, NM

for Appellant

Civerolo, Gralow & Hill  
Justin L. Robbs  
Hannah R. Jiacoletti  
Albuquerque, NM

The Law Offices of Montoya & Murphy-Kollar  
Gino L. Montoya  
Oklahoma City, OK

for Appellees

► **Introduction of Opinion**

Plaintiff Ruth Aragon appeals the district court's order dismissing her complaint against Defendants Forrest Brunson (individually), Brecco, Inc., and Brunson Electrical because Plaintiff failed to serve Defendants with reasonable diligence under Rule 1-004(C) NMRA. Plaintiff argues that the district court erred because (1) Plaintiff served the complaint within a reasonable time after the statute of limitations expired; and (2) Defendants were not prejudiced by the delay in service. Plaintiff also argues that the district court's decision denied her equal protection under the law by improperly limiting her access to the court system. We affirm.

Jacqueline R. Medina, Judge  
WE CONCUR:  
J. Miles Hanisee, Judge  
Katherine A. Wray, Judge

To read the entire opinion, please visit the following link: <https://bit.ly/A-1-CA-40903>

# MEMORANDUM OPINION

*This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.*

**Filing Date: 4/17/2024**

**No. A-1-CA-40514**

**STATE OF NEW MEXICO,**

Plaintiff-Appellant,

v.

**JOSEPH MARTINEZ,**

Defendant-Appellee.

**APPEAL FROM THE METROPOLITAN COURT  
OF BERNALILLO COUNTY**

Michelle Torres, Metropolitan Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

John Kloss, Assistant Attorney General

Albuquerque, NM

for Appellant

Bennett J. Baur, Chief Public Defender

Caitlin C.M. Smith, Assistant Appellate Defender

Santa Fe, NM

for Appellee

► **Introduction of Opinion**

The State appeals the metropolitan court's order dismissing the State's criminal complaint against Defendant Joseph Martinez. The metropolitan court dismissed the complaint based on the officer's lack of reasonable suspicion to expand an investigatory stop into a DWI investigation. The State argues that the metropolitan court erred in dismissing the complaint by (1) misapplying an adverse inference under *State v. Ware*, 1994-NMSC-091, 118 N.M. 319, 881 P.2d 679, and (2) determining that the officer lacked reasonable suspicion to expand the encounter into a DWI investigation. We conclude that the officer did have reasonable suspicion to expand the encounter, and we therefore reverse.

Shammara H. Henderson, Judge

WE CONCUR:

J. Miles Hanisee, Judge

Jane B. Yohalem, Judge

To read the entire opinion, please visit the following link: <https://bit.ly/A-1-CA-40514>



13<sup>th</sup> DISTRICT ATTORNEY  
**BARBARA ROMO**

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\*HR2S is not affiliated with the SBNM or Judge Engel's role as the JWELL Program Manager.



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### Entry Level and Experienced Attorneys

The Thirteenth Judicial District Attorney's Office is seeking both entry level and experienced 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 offers flex schedules in a family friendly environment. Competitive salary starting @ 83,000+ depending on experience. Contact Krissy Fajardo @ [kfajardo@da.state.nm.us](mailto:kfajardo@da.state.nm.us) or visit our website for an application @ <https://www.13th.nmdas.com/> Apply as soon as possible. These positions fill fast!

### Attorney for the Juvenile Unit

The Third Judicial District Attorney's Office in Las Cruces is seeking an Attorney for the Juvenile Unit. 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](mailto:wsafranek@da.state.nm.us)

## Classified

### Positions

#### Associate Attorney (Business and Corporate Law)

Sutin, Thayer & Browne APC is looking to hire a full-time Associate Attorney with an interest in Business and Corporate Law with 1-3 years of experience, whether it be through educational or working knowledge; Tax Law knowledge is also preferred. Please visit our website at [sutinfirm.com](http://sutinfirm.com) for full job description and application instructions.

#### Judge

Pueblo of Laguna, NM – Great employer and benefits, competitive pay DOE! Seeking full-time Judge for the Pueblo's Court with at least 5 years of legal experience to adjudicate criminal and civil cases. Professional atmosphere and leisurely commute from Albuquerque metro, Los Lunas, or Grants. Apply by June 1 for best consideration. Application instructions and position details at: [Employment | Pueblo of Laguna \(lagunapueblo-nsn.gov\)](http://Employment|PuebloofLaguna(lagunapueblo-nsn.gov))



### Senior Trial Attorneys, Trial Attorneys, and Assistant Trial Attorneys

The Eleventh Judicial District Attorney's Office, Div. II, in Gallup, New Mexico, McKinley County is seeking applicants for Assistant Trial Attorneys, Trial Attorneys and Senior Trial Attorneys. You will enjoy working in a community with rich culture and history while gaining in-valuable experience and making a difference. The McKinley County District Attorney's Office provides regular courtroom practice, supportive and collegial work environment. You are a short distance away from Albuquerque, Southern parts of Colorado, Farmington, and Arizona. We offer an extremely competitive salary and benefit package. Salary commensurate with experience. These positions are open to all licensed attorneys who are in good standing with the bar within or without the State of New Mexico. Please Submit resume to District Attorney Bernadine Martin, 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 open until filled.

### Bernalillo County Hiring 20 Prosecutors

Are you ready to work at the premiere law firm in New Mexico? The Bernalillo County District Attorney's Office is hiring 20 prosecutors! Come join our quest to do justice every day and know you are making a major difference for your community. We offer a great employment package with incredible benefits. If you work here and work hard, you will gain trial experience second to none, collaborating with some of the most seasoned trial lawyers in the state. We are hiring at all levels of experience, from Assistant District Attorneys to Deputy District Attorneys. Please apply to the Bernalillo County District's Attorney's Office at: <https://berncoda.com/careers-internships/>. Or contact us at [recruiting@da2nd.state.nm.us](mailto:recruiting@da2nd.state.nm.us) for more information.

### Attorney Associate

The Third Judicial District Court in Las Cruces is accepting applications for a Full-Time At-Will Attorney Associate. Requirements include admission to the NM State Bar plus a minimum of three years experience in the practice of applicable law, or as a law clerk. Under general direction, as assigned by a judge or supervising attorney, review cases, analyze legal issues, perform legal research and writing, and make recommendations concerning the work of the Court. For a detailed job description, requirements and application/resume procedure please refer to <https://www.nmcourts.gov/careers.aspx> or contact Briggett Becerra, HR Administrator Senior at 575-528-8310. Open until filled.

### Assistant Attorney Generals

The New Mexico Department of Justice is committed to recruiting high quality assistant attorney generals who are passionate about serving the citizens of New Mexico. There are opportunities in the following divisions: Civil Rights, Consumer Protection, Environmental Protection, Special Prosecutions, Criminal Appeals, Civil Appeals, Government Litigation and Government Counsel and Accountability. The New Mexico Department of Justice is an equal opportunity employer, and we encourage applicants from all backgrounds to apply. To apply please visit the State Personnel website at [www.spo.state.nm.us](http://www.spo.state.nm.us). For additional job opportunities please visit our website at [www.nmag.gov](http://www.nmag.gov). If you have questions, please reach out to Dean Woulard at [dwoulard@nmag.gov](mailto:dwoulard@nmag.gov).

### Now Hiring

#### New Mexico Department of Justice

The New Mexico Department of Justice is committed to recruiting high quality Deputy Directors who are passionate about serving the citizens of New Mexico. There are opportunities in the Consumer Protection and Criminal Appeals. The New Mexico Department of Justice is an equal opportunity employer, and we encourage applicants from all backgrounds to apply. To apply please visit the State Personnel website at [www.spo.state.nm.us](http://www.spo.state.nm.us). For additional job opportunities please visit our website at [www.nmag.gov](http://www.nmag.gov). If you have questions, please reach out to Tim Maestas at [tmaestas@nmag.gov](mailto:tmaestas@nmag.gov).

#### RFP-Contract Counsel

The New Mexico Law Offices of the Public Defender (LOPD) provides legal services to qualified adult and juvenile criminal clients in a professional and skilled manner in accordance with the Sixth Amendment to United States Constitution, Art. II., Section 14 of the New Mexico State Constitution, *Gideon v. Wainwright*, 372 U.S. 335 (1963), the LOPD Performance Standards for Criminal Defense Representation, the NM Rules of Professional Conduct, and the applicable case law. Contract Counsel Legal Services (CCLS) is seeking qualified applicants to represent indigent clients through-out New Mexico, as Contract Counsel. The LOPD, by and through CCLS, will be accepting Proposals for the November 1, 2024 – October 31, 2025 contract period. All interested attorneys must submit a Proposal before July 8, 2024 at 4:00 p.m. (MDT) to be considered. For additional information, attorneys are encouraged to search the LOPD website (<http://www.lopdnm.us>) to download the Request for Proposals, as well as other required documents. Confirmation of receipt of the Request for Proposals must be received by email ([ccls\\_RFP\\_mail@ccls.lopdnm.us](mailto:ccls_RFP_mail@ccls.lopdnm.us)) no later than midnight (MDT) on June 3, 2024.

### Division Director for Civil Rights New Mexico Department of Justice

The New Mexico Department of Justice is seeking a dynamic and experienced individual to join our team as the Division Director for Civil Rights. The Director will be responsible for overseeing and managing legal matters related to civil rights enforcement and protection. Their primary focus is promoting equality, combating discrimination, and upholding constitutional and statutory rights. The Director will work closely with the Attorney General, Chief Deputy Attorney General, and Deputy Attorney General for Affirmative Litigation and collaborate with a team of attorneys and legal professionals to develop and execute strategic litigation initiatives. Qualifications include having a Juris Doctor (J.D.) degree from an accredited law school; Admission to the New Mexico state bar and in good standing or the ability to acquire a limited law license; Strong knowledge of civil rights law, and other relevant legal areas; Proven track record of developing and executing successful litigation strategies; Excellent leadership and management skills, with the ability to inspire and motivate a team of attorneys and legal professionals; Outstanding legal research, writing, and oral advocacy skills; Strong analytical and problem-solving abilities; Ability to work effectively under pressure, prioritize tasks, and meet deadlines; Exceptional interpersonal and communication skills, with the ability to collaborate effectively with diverse stakeholders; Demonstrated commitment to social justice, equality, and public interest law; 6 years of experience in litigation, with a demonstrated focus on affirmative litigation and 3 years of management experience preferred. To apply please submit the following documents to Tim Maestas at [recruiting@nmag.gov](mailto:recruiting@nmag.gov): Cover letter detailing your interest in the role and your relevant experience; Resume/CV with a detailed overview of your educational and professional background; Writing samples showcasing your legal research and writing abilities; Contact information for three professional references. Applicants are also encouraged to visit the State Personnel website at [www.spo.state.nm.us](http://www.spo.state.nm.us), or our website at [www.nmag.gov](http://www.nmag.gov) for additional job opportunities. If you have questions, please reach out to Tim Maestas at [tmaestas@nmag.gov](mailto:tmaestas@nmag.gov).

### Associate Attorney

Mid-size downtown Defense litigation firm looking for associate with 3-5 years to do litigation including depositions and trials. Pay range varies with experience \$70,000. To \$120,000. Congenial and easy-going firm. Please contact Karen Arrants at Stiff, Garcia & Associates, [karrantas@stiffllaw.com](mailto:karrantas@stiffllaw.com)

## Various Assistant City Attorney Positions

The City of Albuquerque Legal Department is hiring for various Assistant City Attorney positions. Hybrid in person/remote work schedule available. The Legal Department's attorneys provide a broad range of legal services to the City and represent it in legal proceedings in court and before state, federal and administrative bodies. Current open positions include: Litigation Division: The City is seeking attorneys to join its in house Litigation Division, which defends claims brought against the City; Employment/Labor: The City is seeking an attorney to represent it in litigation related to employment and labor law in New Mexico State and Federal Courts, before the City of Albuquerque Personnel Board, and before the City of Albuquerque Labor Board; Utilities/PRC: The City is seeking an attorney to represent it in matters regarding franchise and right of way agreements, public utilities, broadband and telecommunications, and will appear before the Public Regulation Commission ("PRC"); City Clerk General Counsel: The City is seeking an attorney to be general counsel for the City Clerk's Office. Responsibilities include advising on a broad range of IPRA and OMA issues, contract review, and other duties as assigned; Air Quality: The City is seeking an attorney to serve as general counsel to the City's Environmental Health Department ("EHD") regarding Air Quality issues throughout Bernalillo County including at federal and state facilities. Responsibilities include participating in rulemaking and appeals, enforcement actions, and other duties as assigned; Health, Housing and Homelessness and Youth and Family Services General Counsel: The City is seeking an attorney to serve as general counsel to the Department of Health, Housing and Homelessness and the Department of Youth and Family Services for contract review, and a broad range of general legal issues, including federal grant compliance, procurement, rulemaking and interpretation, and other duties as assigned; General Counsel to APD: The City is seeking an attorney to advise APD regarding policies, procedures and training, review and negotiate contracts, review uses of force, draft legal opinions, review and draft legislation and administrative instructions. Additional duties may be assigned based on experience. Attention to detail and strong writing and interpersonal skills are essential. Preferences include: Three (3)+ years' experience as a licensed attorney; experience with government agencies, government compliance, litigation, contracts, and policy writing. Salary based upon experience. For more information or to apply please send a resume and writing sample to Angela Aragon at amaragon@cabq.gov.

## Contract Prosecutor

The Eleventh Judicial District Attorney's Office, Div. II, in Gallup, New Mexico, McKinley County is seeking applicants for a Contract Prosecutor to assist in the prosecution of criminal misdemeanor cases, felony cases and conflict of interest cases. The Contract Prosecutor position requires substantial knowledge and experience in criminal prosecution, rules of evidence and rules of criminal procedure; trial skills; the ability to draft legal documents and to re-search/analyze information and situations and the ability to work effectively with other criminal justice agencies and Law Enforcement. This position is open to all attorneys who have knowledge in criminal law and who are in good standing with the New Mexico Bar. Limited License is okay. Salary will result in a contractual agreement between the contract prosecutor and the District Attorney. Submit letter of interest and resume to District Attorney Bernadine Martin, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter to bmartin@da.state.nm.us.

## Attorney With At Least 2 Years of Experience

Senior Citizens' Law Office, Inc. (SCLO) seeks an attorney with at least 2 years of experience to provide free legal services to low-income seniors aged 60 and older in a variety of areas of elder law. The ideal candidate should be patient with and sensitive to seniors. The position is full-time (36 hours a week). Salary is dependent on experience with a generous benefits package. See SCLO's website at [www.sclonm.org](http://www.sclonm.org) for the full ad.

## Associate Attorney

Quiñones Law Firm LLC is a well-established defense firm in Santa Fe, NM in search of a full-time associate attorney with minimum 5 years of legal experience and willing to work minimum of 30 hours per week. Generous compensation and health benefits. Please send resume to [quinoneslaw@cybermesa.com](mailto:quinoneslaw@cybermesa.com)

## Regulation and Licensing Department

### Deputy General Counsel

This position assists the Department's Chief General Counsel in providing legal advice and services to the Superintendent and all eight (8) Divisions of the New Mexico Regulation and Licensing Department (RLD) in the regulation of multiple highly diverse industries and professions. Provides legal advice, research, analysis, and prepares legal and policy documents and resources, including procedures and training, related to the operation of the Department. For more information visit the NM State Personnel Office website at <https://www.spo.state.nm.us> for more information

## Full Time, At-Will position: Domestic Relations Hearing Officer Job ID: 10111171

The Fourth Judicial District & Magistrate Court in Las Vegas, NM is currently recruiting for the following Full Time, At-Will position: Domestic Relations Hearing Officer; Job ID: 10111171. General Statement of Duties. This position is under the supervision of the presiding Chief District Judge. The successful candidate will serve as a domestic relations hearing officer pursuant to Rule 1-053.2 NMRA, for matters pending in the Fourth Judicial District Court. The domestic relations hearing officer shall provide services in domestic relations proceedings necessary to review petitions for indigency; conduct hearings on all petitions and motions, both before and after entry of the decree; in a child support enforcement division case, carry out the statutory duties of a child support hearing officer; carry out the statutory duties of a domestic violence special commissioner and utilize the procedures as set forth in Rule 1-053.1 NMRA; assist the court in carrying out the purposes of the Domestic Relations Mediation Act, Sections 40-12-1 to -6 NMSA 1978; and prepare recommendations for review and final approval by the district court. For full job description and to apply go to: <https://www.nmcourts.gov/careers.aspx>

## Appellate Attorney

Appellate boutique Durham, Pittard & Spalding LLP is looking for bright, motivated, and talented lawyers to join our growing and successful team in our office in Santa Fe. Our firm specializes in civil appeals and provides trial support to some of the best trial lawyers in New Mexico and throughout the country in high-stakes, complex litigation on behalf of plaintiffs. Our practice is heavily focused on catastrophic injury and wrongful death litigation, including product liability, toxic tort, medical malpractice, and trucking, but our attorneys also handle a wide variety of other civil matters including civil rights, employment, and the occasional domestic relations or criminal appeal. We are looking for candidates who enjoy researching, writing, and presenting oral argument to trial and appellate courts. The position offers the opportunity to learn from experienced practitioners and to develop the skills of a top-notch appellate attorney. If interested, please send a cover letter, resume, and writing sample to: [jkaufman@dpslawgroup.com](mailto:jkaufman@dpslawgroup.com).

### Administrative Hearing Officer

The University of New Mexico is seeking an Administrative Hearing Officer to lead a diverse team in the administration of the University's hearing procedures. This is a full time benefits eligible position, pay \$6,548.53 - \$9,373.87 monthly. For more information about this position and to apply, go to [unmjobs.unm.edu](http://unmjobs.unm.edu) and search for req29201. EEO/AA/Minorities/Females/Vets/Disabled/ and other protected classes.

### 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, work from home flexibility, 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: [hireing@madisonlaw.com](mailto:hireing@madisonlaw.com). Please include "Associate Attorney position" in the subject line. CVs can also be mailed to: Hiring Director, P.O. Box 25467, Albuquerque, NM 87125-5467.

### Attorney – State Personnel Office

The State Personnel Office is hiring an Attorney in the Santa Fe office. The attorney serves as an Administrative Law Judge who conducts administrative hearings on behalf of the State Personnel Board on state employee's appeals of disciplinary actions (dismissals, demotions, and suspensions) and separations imposed on the employee by their state agency. The Administrative Law Judge determines whether the state agency had just cause to discipline or separate an employee and drafts a recommended decision for the State Personnel Board. The ideal candidate will have employment law, civil litigation, and/or administrative law experience. Interested candidates must apply through <https://careers.share.nm.gov> and submit your application for position #65790.

### Multiple Attorneys

The Rio Rancho City Attorney's Office is hiring multiple attorneys. We offer a rewarding work environment with outstanding benefits and great work-life balance! Responsibilities may include: representing the City in civil litigation and criminal prosecutions; providing advice to City departments regarding legal issues, policies, trainings, and contracts; and drafting legislation and ordinances. Additional duties may be assigned as necessary. Salary and position will be based on experience. To learn more about these opportunities, and to submit your application, please visit [rrnm.gov/jobs](http://rrnm.gov/jobs).

### Employment Attorney – IRC129778

The Los Alamos National Laboratory Office of General Counsel seeks an experienced employment law attorney to perform legal work on a wide variety of personnel issues, including civil rights and employment discrimination matters and disciplinary matters; benefits and immigration issues; training management on legal matters relating to personnel issues; advising Triad in connection with labor matters, including collective bargaining and day-to-day labor disputes; and providing legal advice to management on other personnel-related legal issues. Qualified candidates will be in good standing with the New Mexico Bar or another state bar, with the expectation of being licensed in New Mexico within a year of hire. This position also requires the ability to obtain a DOE security clearance. Please see our job posting at [www.lanl.jobs](http://www.lanl.jobs) for the minimum and desired qualifications. Los Alamos National Laboratory is more than a place to work. It is a catalyst for discovery, innovation, and achievement. It's one of the reasons we attract world-class talent who contribute greatly to our outstanding culture. Professional development, work/life balance and a diverse and inclusive team foster lasting career satisfaction. Our onsite cafeterias and medical, fitness and breastfeeding facilities, education assistance and generous compensation and benefits reflect our commitment to providing our people with all they need for personal and professional growth. Apply now: <https://lanl.jobs/search/jobdetails/employment-attorney-34/8c8f2dfd-38f7-4431-94da-cc1f9772a4dc> or go to [www.lanl.jobs](http://www.lanl.jobs) and search IRC129778. Los Alamos National Laboratory is an equal opportunity employer and supports a diverse and inclusive workforce.

### Director

The New Mexico Legislative Council Service (LCS) seeks a director to oversee the permanent, nonpartisan legislative agency serving all members of the Legislature. LCS drafts bills for Legislative members and coordinates the legislative branch's budget. It provides impartial and accurate information, reports, and provides oversight for the Capitol building and grounds, including safety and preservation of the Capitol complex. The director serves in a non-partisan capacity and must maintain confidentiality. Juris doctorate is required with ten years of relevant experience preferred. Annual compensation is \$114,000 to \$221,000, including a comprehensive benefits package. For more information visit [nmlegis.gov/lcsdirectorsearch](http://nmlegis.gov/lcsdirectorsearch). To apply send a cover letter, CV and three references to [lcsdirectorsearch@nmlegis.gov](mailto:lcsdirectorsearch@nmlegis.gov) by May 31, 2024.

### Division Director for Medicaid Fraud - New Mexico Department of Justice

The New Mexico Department of Justice is seeking a well-rounded and experienced individual to join our team as the Division Director for the Medicaid Fraud and Elder Abuse Division. The Director will be responsible for overseeing and managing a multidisciplinary team of dedicated professionals. The primary focus of the Division is to pursue the investigation and criminal prosecution or civil litigation of fraud of the Medicaid program by healthcare providers, as well as the abuse, neglect and/or financial exploitation of residents in care facilities. The Director will work closely with the Attorney General, Chief Deputy Attorney General, and Deputy Attorney General for Criminal Affairs. Qualifications include having a Juris Doctor (J.D.) degree from an accredited law school; Admission to the New Mexico state bar and in good standing or the ability to acquire a limited law license; 6 years of experience in criminal prosecution or defense of white-collar crimes and offenses against vulnerable populations, and/or experience with civil litigation in the healthcare field. Demonstrated skills and experience in related fields will be considered; Minimum of 3 years of management experience preferred; Federal grant management and administration experience preferred, but not required; Proven track record of developing and executing successful investigation and prosecution/litigation strategies; Excellent leadership and management skills, with the ability to inspire and motivate a team of attorneys and legal professionals; Outstanding legal research, writing, and oral advocacy skills; Strong analytical and problem-solving skills; Ability to work effectively under pressure, prioritize tasks, and meet deadlines; Exceptional interpersonal and communication skills, with the ability to collaborate effectively with government agencies, as well as a group of diverse private and public-interest stakeholders. To apply please submit the following documents to [Tim Maestas at recruiting@nm DOJ.gov](mailto:recruiting@nm DOJ.gov): Cover letter detailing your interest in the role and your relevant experience; Resume/CV with a detailed overview of your educational and professional background; Writing samples showcasing your legal research and writing abilities; Contact information for three professional references. If you have questions, please reach out to Tim Maestas at [tmaestas@nm DOJ.gov](mailto:tmaestas@nm DOJ.gov).



### **Deputy Director for the Administrative Office of the Courts**

You are invited to join the AOC team in the challenging and rewarding work done by the New Mexico Judiciary! The New Mexico Judicial Branch is recruiting for a Deputy Director for the Administrative Office of the Courts (AOC) to oversee statewide judiciary operations. The Deputy Director works closely with the Director under the guidance of the New Mexico Supreme Court to manage all aspects of court operations. AOC responsibilities include oversight of court budgets that exceed \$200 million annually, personnel rules and actions statewide, court services and programs, and technology that include a statewide case management system and electronic filing. Duties include frequent contacts with executive and legislative agencies as well as active involvement with legislative initiatives before and during the annual legislative session. This position would serve as the AOC representative staffed to, and supporting many judicial committees that develop and administer judicial policies. Office locations in Alb. or Santa Fe, NM with occasional statewide travel. For more information or to apply to go to the Judicial Branch web page at [www.nmcourts.gov](http://www.nmcourts.gov) under Career Opportunities. Equal Opportunity Employer

### **Associate Attorney**

Civerolo, Gralow & Hill, P.A. seeks an associate attorney to join our fast paced, well established civil litigation defense firm. This is a great opportunity to grow your talent in a collaborative environment. Salary DOE, generous benefits including health, dental & life insurance and 401K match. Please email your resume to [custardh@civerolo.com](mailto:custardh@civerolo.com). Inquiries kept confidential.

### **Experienced Civil Litigation**

#### **Paralegal Needed:**

Albuquerque Plaintiffs firm with a significant focus on medical malpractice seeking experienced civil litigation paralegal. Upon hiring, the paralegal will be involved in all stages of litigation from discovery to trial prep/assistance. Ideal candidate will have seven years of prior experience in civil litigation with knowledge of State and Federal District Court rules and filing procedures, factual and legal online research and document management and processing. Remote work allowed. All inquiries confidential. Salary DOE, benefits included. Email resume and cover letter to: [info@collinsattorneys.com](mailto:info@collinsattorneys.com)

### **Paralegal New Mexico Mutual, Albuquerque, NM**

The Paralegal is responsible for providing substantive professional legal, professional business support, and administrative services on assigned matters under the supervision of the Vice President-General Counsel and in-house counsel. This position ensures confidentiality and privilege are preserved and applies independent judgment and discretion as defined by role or task. The Paralegal performs duties in a professional, timely, efficient, and quality manner in accordance with corporate and department policy. Essential Functions: Professional Legal Services: Prepares legal documents, proofs, processes, and files with courts or regulatory agencies; Prepares contracts of medium complexity, performs research and review; Processes legal compliance service requests, prioritizes, and manages requests; Processes, reviews and responds to subpoena, discovery, and other records request (including redaction and privilege log); Performs legislative, regulatory, and industry monitoring, conducts research, and summarizes information for internal compliance communications and trainings; Provides regulatory licensing and compliance assistance for corporate and personnel licensees; Manages the process for litigation and regulatory complaint or inquiry, and provides reporting; Performs legal calendaring and scheduling, matter management, and record management for general and in-house counsel; Maintains agreed upon billable hours on claim litigation cases; and Performs other related professional legal services as assigned. Provides project management on assigned projects; Manages the process for drafting and review of policy, procedure, and communications, and provides support for internal departments; Oversees process for outside counsel authorization, management, and legal bill auditing and reporting; Administers insurance fraud prevention plan, including processing, investigation, and referral filings, awareness messaging, and assessments; Provides analysis and prepares reports on compliance, corporate governance, and board matters; and Performs other related professional business support and administrative services as assigned. Relation Support: Facilitates, supports, and assures professional and cooperative relations between the Corporate Governance Department and internal business clients, customers, and stakeholders of the Company in accordance with the Code of Conduct and corporate Values with emphasis on Trust. Job Qualifications: Education: Formal paralegal education (PCCE or PACE credentialing preferred), Bachelor's degree, or equivalent through combination of experience and relevant coursework. Experience: A minimum of

three years of paralegal experience (litigation, corporate, workers' compensation insurance, and/or medical records experience a plus). Required Skills/Abilities: Attention to detail and accuracy; Excellent written and verbal communication skills; Proven ability to: think critically/analytically, identify issues and outline solutions; Ability to work on a team or independently; Skilled in managing multiple tasks, prioritizing, and delivering timely, consistent, and high-quality work; Committed to Service Excellence in all aspects of work and embodies qualities of professionalism, positivity, personability, and eagerness to learn; Ability to build and maintain relationships across the business and corporate department. Specialized Knowledge, Licenses, etc.: Proficiency with software and court e-filing systems (MS Outlook, Word, Excel, Power Point, Secured Odyssey Public Access (SOPA) and Odyssey e-filing; MS Office (Word, Advanced Excel, PowerPoint, Outlook). If interested, please apply at <https://recruiting.paylocity.com/recruiting/jobs/All/8b50cc02-380c-4430-91f5-4b57ff436316/New-Mexico-Mutual-Casualty-Company>

### **Court of Appeals - Appellate Technical Legal Editor**

The New Mexico Court of Appeals seeks an appellate technical legal editor. The position may be located in either Albuquerque or Santa Fe. As an appellate technical legal editor, you will perform technical analyses, editing, proofreading and formatting of Court opinions. This entails citation checks, ensuring cited cases stand for the stated proposition, and ensuring record citations accurately represent the facts. You will be part of a team that works to issue high quality opinions and orders in a timely fashion. You may also provide administrative support to judges and/or attorneys and draft and docket legal documents. Excellent writing skills, knowledge of legal terminology, and attention to detail are essential. Current annual salary is \$77,396 with generous benefits. To apply and see the full job posting, including educational and experience requirements, go to: [www.nmcourts.gov/careers](http://www.nmcourts.gov/careers) and click on the Court of Appeals "Appellate Technical Legal Editor" listing.

### **Legal Assistant**

Pueblo of Laguna, NM - Great employer and benefits, competitive pay DOE! Seeking full-time Legal Assistant for the Community Legal Services Office to assist with administration of criminal or civil cases. Leisurely commute from Albuquerque metro, Los Lunas, or Grants. Apply by or before June 1 for best consideration. Application instructions and position details at: [Employment | Pueblo of Laguna \(lagunapueblo-nsn.gov\)](http://Employment|PuebloofLaguna(lagunapueblo-nsn.gov))



**Legal Assistant**

DeLara | Supik | Odegard P.C. is seeking a legal assistant for its Plaintiff's litigation practice. The position requires someone who can communicate with potential and existing clients, manage case files, calendar, file legal documents with the courts, and perform other administrative tasks. Retirement, health insurance, paid time off, and sick leave available. Part-time and full-time availability. Salary dependent on experience and background. Send resume to odegard@delaralaw.com.

**Experienced Legal Assistant**

Seeking motivated experienced Legal Assistant to work in sole practice. Must be familiar with Court e-filing systems, calendaring, pleadings, case management and client communications and provide administrative support to attorney. Please send resume and cover letter to Deborah S. Seligman at seligmanlaw@gmail.com

**Full-Time Paralegal or Legal Assistant**

Santa Fe Law Group seeks a full-time paralegal or legal assistant to support with litigation, real estate, administrative and business transactions and to perform various legal and administrative tasks. Duties include client interaction; preparation and review of documents; case management; and other office duties. The ideal applicant will be a multitasker, have attention to detail, communication skills, and be proficient in Microsoft Office programs, Adobe Acrobat, and various internet platforms. We offer a competitive salary and benefits for qualified candidates. Send resumes to srf@santafelawgroup.com

**Staff Accountant**

The State Bar of New Mexico (SBNM) seeks qualified applicants to join our team as a full-time (40 hours/week) Staff Accountant. The successful applicant will perform general cost accounting functions in the accounting department, including bank reconciliations, accounts receivable, accounts payable, payroll, posting journal entries, performing month-end closing procedures, and producing financial reports. The Staff Accountant will also assist in the annual financial audit process and is responsible for maintaining accounting records and responding to inquiries received by the accounting department. \$50,000/year-\$60,000/year depending on experience and qualifications. Generous benefits package included. This position is eligible for partial telecommuting within NM. Qualified applicants should submit a cover letter and resume to hr@sbnm.org. Visit [www.sbnm.org/SBNMjobs](http://www.sbnm.org/SBNMjobs) for full details and application instructions.

**Part-time Legal Assistant/Paralegal**

Quinones Law Firm LLC is a well-established defense firm in Santa Fe, NM in search of a part-time paralegal with minimum 5 years of Legal Assistant/Paralegal experience. Please send resume to quinoneslaw@cybermesa.com

**Paralegal**

DeLara | Supik | Odegard P.C. is seeking a litigation Paralegal for its Plaintiff's personal injury and civil rights practice. Paralegal will assist in all phases of litigation, including discovery, trial preparation, and post-trial matters. The position is located in Albuquerque but offers flexibility with remote work available. Retirement, health insurance, paid time off, and sick leave available. Salary dependent on experience and background. Send resume to odegard@delaralaw.com.

**Positions Wanted****Virtual Legal Assistant**

Has open slots for new clients. I have over 30 years' experience with top law firms. Full, remote, and affordable services in New Mexico. Please email indigostarsky@gmail.com for more information.

**Office Space****820 Second Street NW**

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

**Uptown Office Suites**

Two separate professional office suites for lease. Executive offices, support stations, and conference room(s). Approx. 1047 sq. ft. and 883 sq. ft. Will consider renting individual offices instead of entire suite. Furnished options available. Can include shared use of three conference rooms and reception services to greet guests and accept documents. Alarm, water, electric, and janitorial included. Exterior signage available. Convenient access to I-40. Contact Bryan (505) 268-700 or bryanf@wolfandfoxpc.com.

## 2024 Bar Bulletin Publishing and Submission Schedule

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

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

**For more advertising information, contact:  
Marcia C. Ulibarri at 505-797-6058 or  
email [marcia.ulibarri@sbnm.org](mailto:marcia.ulibarri@sbnm.org)**

The publication schedule can be found at  
**[www.sbnm.org](http://www.sbnm.org).**



# APPLICANTS WANTED FOR NEW MEXICO STATE ETHICS COMMISSIONER

The State Ethics Commission, an independent state agency, ensures government integrity by enforcing New Mexico's ethics, campaign finance, and procurement laws.

## Qualifications

- **Registered voter:** must be a registered voter in New Mexico.
- **Continuous political affiliation:** may *not* have changed political party registration in the last 5 years.
- **Recently unconflicted:** in the past two years an applicant may *not* have been:
  - a state official, candidate, lobbyist, state employee, or government contractor; or
  - an office holder in a political party at the state or federal level.

## Duties

- **Enforcement authority:** authorizes staff to file and litigate civil enforcement actions.
- **Issue advisory opinions:** reviews and issues staff-authored advisory opinions.
- **Appellate review:** serves as appellate body for administrative cases involving state government.
- **Staff oversight:** meets bi-monthly to review staff operations.
- **Compensation:** per diem and mileage only.

Visit [sec.nm.gov](https://sec.nm.gov) to apply by July 1, 2024



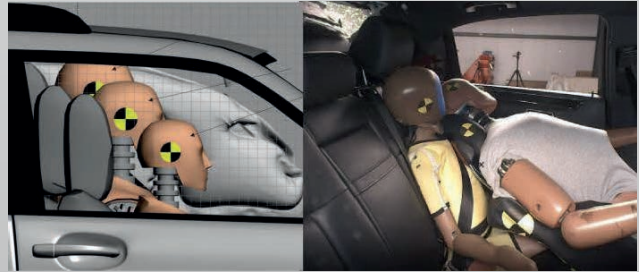
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Maybe not because you may have a **CRASHWORTHINESS** case.



## Crashworthiness

focuses on how the vehicle's safety systems performed, not who caused the accident. At my firm's Crash Lab, we continually study vehicle safety through engineering, biomechanics, physics, testing and innovation.



If you have any questions about a potential case, please call Todd Tracy. Vehicle safety system defects may have caused your client's injury or death.



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