BAR BULLETIN

Official Publication of the State Bar of New Mexico

April 19, 2017 • Volume 56, No. 16

Taos Fields, by John Cogan (see page 3)

Marigold Arts, Santa Fe

Inside This Issue

CLE Planner

April 28

Third Annual Symposium on Diversity and Inclusion: Diversity Issues Ripped from the Headlines

5.0 G | 1.0 EP

Friday, April 28, 2017 – 8:55 a.m.–4:45 p.m.
State Bar Center, Albuquerque

Featured CLE

This program will discuss a multitude of legal issues related to today's headlines including national security and immigration, transgender issues, the future of DACA, and mass incarceration in the U.S. The program will also discuss ethical and constitutional issues related to access to interpreters for Native Americans and the real world impact of all these issues to the legal profession.

Co-sponsors: *State Bar Committee on Diversity in the Legal Profession, State Bar Young Lawyers Division, State Bar Indian Law Section, New Mexico Black Lawyers Association, New Mexico Hispanic Bar Association, New Mexico Gay & Lesbian Lawyers Association, Federal Bar Association, New Mexico Women's Bar Association, Modrall Sperling Roehl Harris & Sisk PA, and State Bar Committee on Women and the Legal Profession*

$99 Non-member not seeking CLE credit
$279 Standard and Webcast Fee
$249 Co-sponsoring section members, government and legal services attorneys, and Paralegal Division members
A $20 late fee will be assessed for walk-in registrations. Registration and payment must be received in advance to avoid the fee.

Professional Development Package

Still buying one CLE class at a time?

Purchase a **Premium Professional Development Package** and receive one complimentary registration for the **2017 Annual Meeting—Bench and Bar Conference!**

Premium Package
$600 includes the following benefits:

- Up to **15 CLE credits** ($720 value) and **Unlimited Audit** ($99 value each)
- One complimentary Annual Meeting registration ($400 value; attend as part of the 15 credits)
- Concierge service (invaluable)
- Credits filed (invaluable)

Basic Package
$450 includes the following benefits:

- Up to **12 CLE credits** ($550 value) and **Unlimited Audit** ($99 value each)
- 10% discount on Annual Meeting registration ($40 value; attend as part of the 12 credits)
- Credits filed (invaluable)

If you plan to use the complimentary or discounted Annual Meeting registration, ***you must contact the Center for Legal Education at 505-797-6020 and purchase the pass prior to registering for the Annual Meeting****. Discount cannot be applied after the fact.*

Register online at **www.nmbar.org** or call 505-797-6020.

State Bar of New Mexico
Center for Legal Education

STATE BAR of NEW MEXICO

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Trial Practice Section Board
Noon, State Bar Center

25
Intellectual Property Law Section Board
Noon, Lewis Roca Rothgerber Christie

26
Natural Resources, Energy and Environmental Law Section Board
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Noon, State Bar Center

28
Immigration Law Section Board
Noon, State Bar Center

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April

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Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

25
Common Legal Issues for Senior Citizens
Presentation, 10 a.m.–noon,
Agnes Kastner Head Community Center, Hobbs, 1-800-876-6657

26
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

26
Common Legal Issues for Senior Citizens
Presentation, 10 a.m.–noon,
Catron County Commission on Aging Senior Center, Reserve
1-800-876-6657

26
Common Legal Issues for Senior Citizens
Presentation, 10 a.m.–noon,
Chavez County J.O.Y. Center, Roswell
1-800-876-6657

About Cover Image and Artist: *Taos Fields*, acrylic on canvas, 11 by 14 inches
John Cogan works in an American tradition of landscape painting dating back to the 1830s and the Hudson River School. Using the beauty of the natural world as a subject in its own right, he captures the particular mystique, the feeling of separateness, of the Southwest in images that represent a traditional American character. Cogan paints as if seeing nature for the first time, engaging the viewer intimately in the drama and limitless sweep of vast spaces, the timelessness and elemental experience of the desert and the superb color, light and serenity of mountains, canyons and hills. For more information about Cogan, visit Marigold Arts in Santa Fe or www.marigoldarts.com.

Notices

Court News

Second Judicial District Court

Abuse and Neglect Brown Bag

An Abuse and Neglect Brown Bag event will be held at noon, April 21, at the Juvenile Justice Center Chama Conference Room. Attorneys and practitioners working with families in child protective custody are welcome to attend. For more information, contact the Children's Court Administration at 505-841-7644.

Third Judicial District Court

Notice of Mass Reassignment

Gov. Susana Martinez has announced the appointment of Conrad F. Perea to fill the vacancy of Division III of the Third Judicial District Court. Effective April 24, Judge Perea will be assigned to family court cases and domestic violence cases previously assigned to Judge Darren M. Kugler. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have 10 days from April 24 to excuse Judge Perea.

State Bar News

Attorney Support Groups

- May 1, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- May 8, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- May 15, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

Alternative Methods of Dispute Resolution Committee

April Committee Meeting and Presentation

Join the ADR Committee from noon-1:30 p.m., April 27, at the State Bar Center for a Committee meeting and presentation by Susan Barnes Anderson on the topic of reflecting and reframing advanced skills practice. The presentation will provide real situations with real-time feedback. All are welcome and lunch will be provided. R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Professionalism Tip

With respect to opposing parties and their counsel:

I will agree to reasonable requests for extensions of time or waivers of formalities when legitimate interests of my client will not be adversely affected.

Committee on Women and the Legal Profession

Professional Clothing Closet

Does your closet need spring cleaning? The Committee on Women seeks gently used, dry cleaned professional clothing donations for their professional clothing closet. Individuals who want to donate to the closet may drop off donations at the West Law Firm, 40 First Plaza NW, Suite 735 in Albuquerque, during business hours or to Committee Co-chair Laura Castille at Cuddy & McCarthy, LLP, 7770 Jefferson NE, Suite 102 in Albuquerque. Individuals who want to look for a suit can stop by the West Law Firm during business hours or call 505-243-4040 to set up a time to visit the closet.

Jackrabbit Bar Conference

Registration Now Open

The Jackrabbit Bar is an association of state bars of the Northwestern Plains and mountains including Idaho, Montana, Nevada, New Mexico, North Dakota, South Dakota, Utah and Wyoming. This year's conference is hosted by the State Bar of New Mexico June 1–3 at the Inn and Spa at Loretto in Santa Fe. The conference is open to anyone and has been approved for up to 7.8 general CLE credits. Call 866-582-1646 to reserve a room at the Inn at Loretto. Rooms under the group rate are $189 (cutoff date: May 2). To register and view a tentative agenda, visit www.nmbar.org/nmstatebar/JBC.aspx. For more information about the conference, contact Kris Becker at 505-797-6083 or kbecker@nmbar.org.

Solo and Small Firm Section

May Presentation Features Gov. Susana Martinez

The Solo and Small Firm Section will host Gov. Susana Martinez from noon-1 p.m., May 9, at the State Bar Center in Albuquerque. Gov. Martinez will speak to State Bar of New Mexico members on any lingering issues from the coming legislative special session and her vision for our state in the remainder of her second term and the future. The Section welcomes all attorneys and judges to its monthly speaker series. The State Bar Center joins the Section in hosting a complimentary luncheon from 1-2 p.m. following Gov. Martinez' presentation. Those interested in attending are encouraged to register as soon as possible by visiting www.nmbar.org/solos. Space is limited and seating will be available on a first come, first served basis.

Young Lawyers Division

Volunteers Needed for Ask-a-Lawyer Law Day Call-in Program

Volunteer attorneys in the Albuquerque and Roswell areas are needed to provide brief legal advice to callers from around the state from 9 a.m.-noon on Saturday, April 29. Volunteers should arrive at the call-in location at 8 a.m. for orientation and breakfast. Questions may include the following areas of the law: family law, landlord/tenant disputes, consumer law, personal injury, collections and more. Attorneys fluent in Spanish are needed. The call-in location will be provided following volunteer sign up. Visit www.nmbar.org/AskALawyer for more information and to volunteer.

UNM

Law Library

Hours Through May 13

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.

Other Bars

Albuquerque Bar Association

2017 Law Day Luncheon

The Albuquerque Bar Association's annual Law Day luncheon will be held

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Legal Education

April

19 **Estate Planning and Elder Law**
5.6 G, 1.0 EP
Live Seminar, Albuquerque
Sterling Education Services, Inc.
www.sterlingeducation.com

19 **Examining the Excessive Cost of Lawyer Stress**
2.0 EP
Live Seminar, Albuquerque
TRT CLE
www.trtcle.com

19 **2017 Health Law Legislative Update**
2.0 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **ECL, Solo and Small Firm Business Bootcamp Part I of II**
3.4 G, 2.7 EP (total)
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Ethics of Representing the Elderly**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Legal Aid Training Seminar**
4.0 G
Live Seminar, Albuquerque
New Mexico Christian Legal Aid
christianlegalaid@hotmail.com

21 **36th Annual Update on New Mexico Tort Law**
6.0 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Trial Lawyers Association
www.nmtla.org

26 **Landlord Tenant Law**
5.6 G, 1.0 EP
Live Seminar, Albuquerque
Sterling Education Services, Inc.
www.sterlingeducation.com

27 **ECL, Solo and Small Firm Business Bootcamp Part II of II**
3.4 G, 2.7 EP (total)
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Settlement Agreements in Employment Disputes and Litigation**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Annual Conference**
13.0 G
Live Seminar, Santa Fe
Transportation Lawyers Association
www.translaw.org

28 **Diversity Issues Ripped From the Headlines**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

May

1 **Ahead of the Curve: Risk Management for Lawyers**
3.0 EP
Live Seminar, Santa Fe
Health Agencies of the West
www.healthagencies.com

2 **Ahead of the Curve: Risk Management for Lawyers**
3.0 EP
Live Seminar, Albuquerque
Health Agencies of the West
www.healthagencies.com

5 **Animal Law Section Legislative Roundup 2017**
2.0 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **32nd Annual Bankruptcy Year in Review (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Deposition Practice in Federal Cases (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **2016 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Lawyer Ethics and Client Development**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **Charitable Estate Planning—What Opportunities Am I Missing?**
2.5 G
Live Seminar, Santa Fe
St. Vincent Hospital Foundation
505-913-5209

9 **Undue Influence and Duress in Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Ethics of Co-Counsel and Referral Relationships**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Legislative Updates to the Probate Code**
1.0 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **Annual Estate Planning Update**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
Wilcox Law Firm
www.wilcoxlawnm.com

May

19 **2016 Administrative Law Institute**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **NM DWI Cases: From the Initial Stop to Sentencing; Evaluating Your Case (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Human Trafficking (2016)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethics in Discovery Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Drafting Gun Wills and Trusts—and Preventing Executor Liability**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Living with Turmoil in the Oil Patch: What It Means to New Mexico (2016)**
5.8 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **27th Annual Appellate Practice Institute (2016)**
6.4 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **Ethics and Artificial Intelligence in Law Practice Software and Tools**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

June

1–3 **2017 Jackrabbit Bar Conference**
7.8 G
Live Seminar, Santa Fe
State Bar of New Mexico
www.nmbar.org/nmstatebar/JBC.aspx

2 **Drafting Employee Handbooks**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Ethics in Civil Litigation Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

7 **2017 Ethics in Civil Litigation Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Gender and Justice (2016 Annual Meeting)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **The Disciplinary Process (2016 Ethicspalooza)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Reforming the Criminal Justice System (2017)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Avoiding Discrimination in the Form I-9 or E-Verify (2017)**
1.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Ethical Issues of Social Media and Technology in the Law (2016)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **The Ethics of Supervising Other Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Representing Victims of Domestic and Sexual Violence in Family Law Cases**
2.0 G
Live Seminar, Albuquerque
Volunteer Attorney Program
505-814-5038

22 **Lawyer Ethics and Credit Cards**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Decanting and Otherwise Fixing Broken Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Copy That! Copyright Topics Across Diverse Fields (2016)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **2016 Real Property Institute**
4.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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11:45 a.m.–1:30 p.m. (arrive at 11 a.m. for networking) on May 2 at the Hyatt Regency Albuquerque. Chief Judge Christina Armijo will present "14th Amendment: Transforming American Democracy." Law Day is celebrated each year on May 1 and, this year, Gov. Susana Martinez has proclaimed May 2 as New Mexico Law Day. Individual and table tickets and sponsorships are available. For more information about the luncheon or to register, visit www.abqbar.org.

National College of Probate Judges

Spring Conference in Santa Fe

The National College of Probate Judges invites members of the State Bar of New Mexico to attend the NCPJ Spring Conference May 17–20 at the Eldorado Hotel in Santa Fe. For more information and to register, visit ncpj.org/2017_spring_conference/.

Women's Bar Association

2017 Henrietta Pettijohn Reception

Join the Women's Bar Association for its annual Henrietta Pettijohn Reception from 6–9:30 p.m., May 4, at Hotel Albuquerque. WBA will honor Judge Wendy York and Shona Zimmerman, Esq., as well as present the 2017 Supporting Women in the Law Award to the University of New Mexico's Office of University Counsel. Hors d'oeuvres will be served and there will be a silent auction with proceeds going to law student bar review scholarships. Tickets are $20 for students, $35 for Women's Bar Association members and $45 for non-members. Visit www.nmwba.org to purchase tickets. On-site childcare will be provided for WBA members. Contact Barbara Koenig at bkoenig617@gmail.com by May 2 to R.S.V.P. for childcare.

Other News

Christian Legal Aid

Training Seminar

New Mexico Christian Legal Aid invites new members to join them as they work together to secure justice for the poor and uphold the cause of the needy. Christian Legal Aid will be hosting a Training Seminar from noon–5 p.m. on April 21 at the State Bar Center. Join them for free lunch, free 4 general CLE credits and training on how to provide legal aid. For more information or to register, contact Jim Roach at 505-243-4419 or Jen Meisner at 505-610-8800 or email christianlegalaid@hotmail.com.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline

Attorneys/Law Students

505-228-1948 • 800-860-4914

Judges 888-502-1289

www.nmbar.org/JLAP

Law Day Call-in Program

NEEDED: **Volunteer attorneys who can answer questions about many areas of law including:**

- Family law
- Landlord/tenant disputes
- Consumer law
- Personal injury
- Collections
- General practice

Saturday, April 29 • 9 a.m. to noon

(volunteers should arrive at 8 a.m. for breakfast and orientation)

Albuquerque and Roswell

Volunteer attorneys will provide very brief legal advice to callers from around the state in the practice area of their choice.
Attorneys fluent in Spanish are needed.

Earn pro bono hours!

For more information or to volunteer, visit www.nmbar.org/AskALawyer

State Bar of New Mexico
Young Lawyers Division

From the Lawyers Professional Liability and Insurance Committee

Good Signs to Look for When Choosing a Professional Liability Insurance Company

These tips are part of a series of good signs to look for when choosing a professional liability insurance company, compiled by the Lawyers Professional Liability and Insurance Committee. Look for a new tip in the third issue of each month. Read the full list of tips and introduction (plus a guidance disclaimer) in the Oct. 19, 2016, (Vol. 55, No. 42) issue of the Bar Bulletin.

The insurance company has at least three different firms on its defense panel.

When searching for malpractice insurance, one important consideration is who will represent you if you get sued. If you get sued, your carrier has the duty to defend under the policy and in accordance with New Mexico law. Most insurance companies have one or more law firms or attorneys who are pre-selected to defend lawyers when suit is filed. Usually, these attorneys have experience in defending professional negligence malpractice claims, but not always. Many companies have three different attorneys or firms from New Mexico on their panel of attorneys.

When shopping for professional malpractice insurance you should consider whether you will have the option of hiring your own counsel or whether the company has the absolute right to decide who will represent you. When you are shopping for insurance, you can (and should) ask your broker what lawyers or law firms the insurance company regularly uses and what, if any, choice you would have in selecting your attorney in the event a claim is made against you. As with hiring any attorney, you should investigate to confirm the experience and expertise held by the panel counsel used by an insurance company.

Some insurance companies will allow you to select the attorney you want to represent you. If you are allowed to choose your attorney, the insurance company will likely require that the attorney have experience in the defense of malpractice cases. Even if you did not investigate this aspect of your policy when shopping for it, once you get sued, the carrier usually will take other considerations into account in assigning defense counsel. You should not be shy about voicing your concerns to get your insurance carrier to hire defense counsel of your choosing. For example, if the carrier assigns defense counsel whose firm may have an existing conflict because of other cases, personal conflicts, lack of expertise, etc., the carrier may be willing to assign different defense counsel.

Additionally, if you believe that defense counsel may not have the reputation or experience to handle a professional malpractice case, you should let the carrier know. Often times the carrier is more interested in holding down costs of defense than hiring top-notch trial attorneys who are experienced in the defense of legal malpractice cases. You and your insurance carrier have a joint interest in keeping defense costs down but you should not do so at the expense of hiring well-qualified defense counsel.

The company offers coverage for firms with one to six attorneys.

Several national studies concerning lawyers professional liability insurance have determined that the majority of law firms that are uninsured are sole proprietors or firms with fewer than six attorneys. And insurance companies seem to treat that class of firms differently.

Some insurance companies providing LPLI coverage provide a different application process for firms with fewer than six attorneys, and those applications may undergo a different underwriting process. In addition, smaller firms may have a more difficult time finding capital to purchase sufficient LPLI coverage than larger firms. Smaller firms should take into account, though, that if and when a claim is filed it may be difficult to raise sufficient money to pay a larger deductible.

Also, it may cost more on the front end, but obtaining a policy with larger limits may pay off in the long run. Talk to potential LPLI carriers and ask about how often and why that carrier may decide to non-renew a firm's policy. Obtaining an adequate policy that is likely to be continued from year-to-year is one way to plan for the longevity of your solo practice or small firm.

Opinions

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

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

Effective April 7, 2017

PUBLISHED OPINIONS

No. 34713	2nd Jud Dist Bernalillo CR-14-746, STATE v M LUCERO (reverse and remand)	4/3/2017
No. 34651	12th Jud Dist Otero CR-13-545, STATE v B LOZOYA (affirm in part, reverse in part and remand)	4/5/2017

UNPUBLISHED OPINIONS

No. 35947	2nd Jud Dist Bernalillo CR-98-1702, CR-99-1771, STATE v D FONT (affirm)	4/3/2017
No. 35707	13th Jud Dist Sandoval DM-12-809, M OLSON v S OLSON (reverse and remand)	4/3/2017
No. 35747	3rd Jud Dist Dona Ana CR-14-913, STATE v C VELASQUEZ (reverse)	4/4/2017
No. 35918	2nd Jud Dist Bernalillo CR-14-4042, STATE v F GONZALES (dismiss)	4/4/2017
No. 35595	3rd Jud Dist Dona Ana CR-14-246, STATE v M FLORES (affirm)	4/5/2017
No. 34613	11th Jud Dist San Juan CR-13-410, STATE v C MARTIN (reverse and remand	4/6/2017
No. 35228	9th Jud Dist Roosevelt CV-12-82, R MARTINEZ v SOUTHWEST CHEESE (affirm)	4/6/2017

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

Clerk's Certificate of Admission

On April 4, 2017:
Alicia Duran
Becker Law Group
1318 Court Street
Pueblo, CO 81003
719-543-0700
719-218-7008 (fax)
alicia.duran@
beckerlawgroup.net

On April 4, 2017:
Travis J. Marston
3505 N.E. Trout Creek
Ashwood, OR 97711
505-670-9371
travismarston@gmail.com

On March 28, 2017:
Mark C. Matula
Harris, Finley & Bogle, PC
777 Main Street, Suite 1800
Fort Worth, TX 76102
817-870-8716
817-333-1189 (fax)
mmatula@hfblaw.com

On April 4, 2017:
TJ Oram
Oram & Houghton, PLLC
38 Mountain Moose Road
Philipsburg, MT 59858
406-859-7005
tj@oram-houghton.com

Clerk's Certificate of Withdrawal

Effective March 28, 2017:
Katherine Constantinova Guevara
12147 Purple Sage Court
Reston, VA 20194

Effective April 3, 2017:
James R. Hawley
111 El Porton
Los Gatos, CA 95032

Effective April 3, 2017:
Barbara Licha Perkins
2034 Quail Run Drive NE
Albuquerque, NM 87122

Effective April 3, 2017:
Gerald A. Sims Jr.
715 W. Rosehill
Kirkwood, MO 63122

Clerk's Certificate of Reinstatement to Active Status

Effective March 27, 2017:
Lana E. Marcussen
4518 N. 35th Place
Phoenix, Arizona 85018
602-635-1500
602-667-3490 (fax)

In Memoriam

As of March 3, 2017:
Richard C. Wade
821 Ford Drive
Gallup, NM 87301

As of March 20, 2017:
David N. Whitham
PO Box 3170
Albuquerque, NM 87190

Clerk's Certificate of Change to Inactive Status

Effective November 1, 2016:
Theodore Marc Kaiman
910 Santa Fe Avenue SW
Albuquerque, NM 87102

Effective December 1, 2016:
John R. Hakanson
307 E. 11th Street
Alamogordo, NM 88310

Effective January 1, 2017:
Lisa Cheng
9423 Lower Azusa Road
Temple City, CA 91780

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
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Effective April 19, 2017

Pending Proposed Rule Changes Open for Comment:

See Proposals 2017-041, -042, -043, and -044 on the Supreme Court's website at the address noted below, regarding pretrial detention, pretrial release, revocation of pretrial release, and exoneration and forfeiture of bond. ***The comment deadline for these proposals is April 17, 2017.***

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-079	Public inspection and sealing of court records	03/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-112	Public inspection and sealing of court records	03/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-112	Public inspection and sealing of court records	03/31/2017
Civil Forms		
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the District Courts		
5-123	Public inspection and sealing of court records	03/31/2017
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the Magistrate Courts		
6-114	Public inspection and sealing of court records	03/31/2017
6-207	Bench warrants	04/17/2017
6.207.1	Payment of fines, fees, and costs	04/17/2017
Rules of Criminal Procedure for the Metropolitan Courts		
7-113	Public inspection and sealing of court records	03/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
Rules of Procedure for the Municipal Courts		
8-112	Public inspection and sealing of court records	03/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
Criminal Forms		
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Children's Court Rules and Forms		
10-166	Public inspection and sealing of court records	03/31/2017
Rules of Appellate Procedure		
12-314	Public inspection and sealing of court records	03/31/2017

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

From the New Mexico Court of Appeals

Opinion Number: 2017-NMSC-005

No. S-1-SC-36142 (filed November 7, 2016)

EDWARD L. HAND, DIANE M. NUNER and JEFFREY SMITH,
Petitioners,
v.
BRAD WINTER, New Mexico Secretary of State,
and STATE CANVASSING BOARD,
Respondents,
and
JAROD K. HOFACKET,
Real Party in Interest.

ORIGINAL PROCEEDING

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Opinion

Edward L. Chávez, Justice

{1} May the Secretary of State place on the general election ballot the names of political party nominees to fill a vacancy created by a district court judge who resigns effective after a primary election but more than fifty-six days prior to the general election? The answer is yes, because under NMSA 1978, Section 1-8-8(A) (2015), the vacancy occurs for a public office that is not included in the governor's election proclamation, and pursuant to Article VI, Sections 35 and 36 of the New Mexico Constitution, the judicial vacancy is required to be filled at the next general election, provided that the political parties file their list of nominees with the Secretary of State more than fifty-six days before the general election.

DISCUSSION

{2} Judge Daniel Viramontes wrote a letter dated March 10, 2016 to Governor Susana Martinez, informing her of his intent to resign as district court judge of Division 4 of the Sixth Judicial District Court, effective August 26, 2016. Judge Viramontes did in fact resign on August 26, 2016. When a metropolitan, district, or appellate court judge resigns his or her position, both the appointment process and the electoral process are implicated. The appointment procedure and its deadlines are governed by Article VI, Sections 35 to 37 of the New Mexico Constitution, and the election procedure and its deadlines are governed by the Election Code, NMSA 1978, Sections 1-1-1 to 1-24-24 (1969, as amended through 2015).

A. Judicial Nominating Procedure

{3} Article VI, Section 36 creates the district court judges nominating committee and incorporates by reference all of the provisions of the appellate judges nominating commission under Article VI, Section 35 except for the committee make-up. Article VI, Section 35 requires the nominating committee to meet within thirty days of an actual vacancy,[1] and within that time frame it must submit to the governor the names of persons qualified and recommended by a majority of the committee to fill the vacancy. The governor may request additional names only once, and absent such a request, the governor must appoint one of the persons nominated by the nominating committee within thirty days after receiving its final nominations or the appointment becomes the responsibility of the Chief Justice of the New Mexico Supreme Court.

{4} The appointee serves until the next general election, which has been interpreted to mean the general election nearest in time to the actual vacancy. *See State ex. rel. Noble v. Fiorina*, 1960-NMSC-107, ¶¶ 3, 5, 6, 17, 67 N.M. 366, 355 P.2d 497 (interpreting "until the next general election" in the antecedent to Article VI, Section 35 to require a judicial appointee to a vacancy occurring after the primary to be placed on the general election ballot of the same year when nominated by a political party). An appointee who is the prevailing candidate in the general election or that appointee's prevailing opponent holds the office until the expiration of the original term of the judge whose resignation created the vacancy.[2] *See State ex. rel King v. Raphaelson*, 2015-NMSC-028, ¶¶ 14-16, 356 P.3d 1096.

{5} With respect to the vacancy created by the resignation of Judge Viramontes, the Sixth Judicial District Court Nominating Committee timely met on September 22, 2016 and submitted the names of Petitioner Edward Hand and Real Party in Interest Jarod Hofacket to Governor Martinez for her consideration. Governor Martinez timely appointed Hofacket by letter dated October 21, 2016, stating that his term would begin on November 4, 2016.[3] Hofacket is to serve until the next general election, which in this case is scheduled for November 8, 2016. Either Hofacket or his successor, whoever is elected during the upcoming general election, will hold office until the expiration of the term held by Judge Viramontes, at which time he or she

[1]The nominating committee may meet after a judge officially announces his or her intent to resign but before the actual vacancy so that the governor may appoint a successor to fill an "impending vacancy." N.M. Const. art. VI, § 35.

[2]After prevailing in the general election, the judge will stand for retention election pursuant to Article VI, Sections 33 and 34 of the New Mexico Constitution.

[3]We do not comment on the propriety of the governor specifying a commencement date for the appointee's term.

will be eligible for a nonpartisan retention election. *See* N.M. Const. art. VI, § 33(A).

{6} Petitioners do not challenge Governor Martinez's appointment of Hofacket. Instead, they filed a petition for writ of mandamus, injunction, and declaratory judgment asking this Court to declare that Secretary of State Brad Winter acted arbitrarily, capriciously, and in violation of law by placing Hofacket on the November 8, 2016 general election ballot. Petitioner Hand, a Republican attorney, was also recommended to Governor Martinez for appointment to the vacancy created by Judge Viramontes's resignation. Petitioner Diane Nuner is a registered Republican in Luna County, and Petitioner Jeffrey Smith is a registered Democrat in Luna County. Hand contends that placing Hofacket on the general election ballot as the only candidate deprives Hand of participating in a partisan election and renders the Governor's appointment moot. Nuner and Smith contend that placing Hofacket on the general election ballot deprives them of the opportunity to vote in both a primary and a general election to fill the vacancy created by Judge Viramontes's resignation.

{7} A writ of mandamus will issue to "compel the performance of a ministerial act or duty that is clear and indisputable," as long as there is not "a plain, speedy and adequate remedy in the ordinary course of law." *New Energy Econ., Inc. v. Martinez*, 2011-NMSC-006, ¶¶ 10-11, 149 N.M. 207, 247 P.3d 286 (internal quotation marks and citation omitted). In this case, Secretary of State Winter had a clear and indisputable duty under Section 1-8-8 to place Hofacket on the general election ballot. We therefore deny the petition for writ of mandamus.

B. The Election Code Governs the Placement of Judicial Appointees on the Ballot

{8} Once Judge Viramontes resigned, Governor Martinez appropriately exercised her authority to appoint Hofacket to serve until the next general election. However, a governor does not have the authority to place his or her appointee on the ballot. The Election Code prescribes how candidates are placed on the ballot. In this case, the vacancy occurred on August 26, 2016, which was after the June 7, 2016 primary election. The vacancy also occurred after March 1, 2016, which was the last day that Governor Martinez could amend the primary election proclamation for elections in 2016. *See* §§ 1-8-12 & -13 (authorizing the governor to issue a primary election proclamation listing the offices for which each political party shall nominate candidates) *and* § 1-18-16 (permitting the governor to amend the proclamation until the first Tuesday in March to include "any existing office [which became] vacant by removal, resignation or death [on or before] the last Friday before the first Tuesday in March").

{9} What happens when a public office is vacated because of a resignation occurring after the governor's deadline for amending the primary election proclamation has expired? The answer is found in Section 1-8-8, which is titled "Vacancy on general election ballot; occurring after primary." Section 1-8-8(A) provides, in relevant part:

> If after a primary election . . . a vacancy occurs because of the resignation . . . of a person holding a public office not included in the governor's proclamation and which office is required by law to be filled at the next succeeding general election . . . the vacancy on the general election ballot may be filled by:
>
> (1) the central committee of the state political party filing the name of its nominee for the office with the proper filing officer when the office is a . . . district office . . . .

District court judges are in the category of a district office which requires nomination by state central committees. *Johnson v. Vigil-Giron*, 2006-NMSC-051, ¶ 9, 140 N.M. 667, 146 P.3d 312. In addition, Section 1-8-8(D) requires the state central committees to file their lists of nominees to fill vacancies at least fifty-six days prior to the general election. For the 2016 general election, this deadline was September 13, 2016. *See* NMSA 1978, § 12-2A-7(A), (H) (1997) (setting forth rules for construing statutory deadlines). The fifty-six day deadline coincides with the date by which ballots for the general election must be prepared. *See* § 1-10-4(B).

{10} All of the relevant elements of Section 1-8-8 are met in this case because (1) Judge Viramontes effectively resigned after the primary election; (2) he held a public office not included in the Governor's proclamation; (3) the vacancy was of an office required by the New Mexico Constitution to be filled at the next general election; and (4) on September 9, 2016, sixty days prior to the general election, the State Central Committee of the Republican Party wrote to Secretary of State Winter nominating Jarod Hofacket to be placed on the November 8, 2016 general election ballot for the Sixth Judicial District, Division 4 judgeship. No other names were submitted to Secretary of State Winter, and therefore Hofacket will be uncontested in the general election. Hand could have sought the nomination of the Republican State Central Committee. However, his only explanation for not doing so is that unbeknownst to him, Hofacket met with the Republican State Central Committee to secure the nomination. The impending resignation of Judge Viramontes was not a secret; he announced his intention to resign by letter dated March 10, 2016. The chair of the judicial nominating committee is responsible for publicly announcing the existence of the vacancy and relevant deadlines. *Rules Governing Judicial Nominating Commissions*, § 2(a) at 2 (2011), *available at* http://lawschool.unm.edu/judsel/ process/rulesgoverningjudicialnominatingcommissions0711.pdf. Ample time was available for both the political parties and any interested candidates to seek a party nomination for this office. Simply because Hofacket is uncontested in the general election does not render Secretary of State Winter's actions arbitrary, capricious, or unlawful. The law does not require parties to nominate candidates, and in this case, Hand does not contend that the Republican State Central Committee somehow violated its rules for complying with Section 1-8-8. For all of these reasons, we deny the petition for writ of mandamus.

CONCLUSION

{11} Because Secretary of State Winter had a clear and indisputable duty to place the name of Jarod Hofacket on the November 8, 2016 general election ballot, the petition for writ of mandamus is without merit and is therefore denied.

{12} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:
PETRA JIMENEZ MAES, Justice
BARBARA J. VIGIL, Justice

From the New Mexico Court of Appeals

Opinion Number: 2017-NMSC-006

No. S-1-SC-35249 (filed December 1, 2016)

WILLIAM E. KIPNIS AND MARCI KIPNIS,
Plaintiffs-Respondents,
v.
MICHAEL JUSBASCHE AND REBECCA MARK-JUSBASCHE,
Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
SARAH C. BACKUS, District Judge

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Opinion

Charles W. Daniels, Chief Justice

{1} Rule 11-410 NMRA of the New Mexico Rules of Evidence provides that evidence of a nolo contendere plea made in settlement of a criminal proceeding is not admissible in a civil proceeding against the defendant who made the plea. *See* Rule 11-410(A)(2). Like the federal counterpart rule from which this rule was taken, the rule is meant to promote the efficient disposition of criminal cases because collateral use of pleas, as admissions of party-opponents under Rule 11-801 NMRA or as other evidentiary implications of guilt, would discourage resolution of criminal proceedings. The only exceptions provided by Rule 11-410 are where "another statement made during the same plea or plea discussions has been introduced, if in fairness both statements ought to be considered together" and "in a criminal proceeding for perjury or false statement." Rule 11-410(B).

{2} In this case, we consider whether evidence of a nolo plea is admissible in a civil case for misrepresentation where the plaintiffs sought to introduce a nineteen-year-old nolo plea of one defendant to support an argument that the defendant fraudulently failed to disclose his nolo plea during the formation of a joint business venture. We hold that evidence of the nolo plea is inadmissible under both the express terms and the underlying purpose of Rule 11-410(A)(2), and we affirm the district court's grant of summary judgment on that basis. We reverse the contrary determination of the Court of Appeals.

I. BACKGROUND

{3} In 2003, Defendants Michael Jusbasche and Rebecca Mark-Jusbasche formed a limited liability corporation (LLC) with Plaintiffs William and Marci Kipnis for the purpose of replacing the Hotel Edelweiss at the Taos Ski Valley with a modern condominium complex. As their part of the initial capital contribution, Plaintiffs deeded the hotel property and transferred the hotel liquor license to the LLC. Defendants contributed an initial capital infusion of $351,000, made loans of several million dollars to the LLC, and retained a fifty-one percent controlling interest. Although it was initially anticipated that the project would generate a three- to four-million-dollar profit, it became clear after a number of setbacks that the venture would not yield a profit, and Defendants, "having a majority share of the voting powers," dissolved the LLC in 2010. Simultaneously, the LLC under Defendants' control transferred several unsold residential units and two commercial units from the condominium development to Defendants for partial loan repayment at dissolution. The lawfulness of those repayment transfers is not before us in this proceeding.

{4} Plaintiffs filed suit for damages against Defendants, alleging fraud, constructive fraud, intentional misrepresentation, and conversion, along with other claims no longer at issue. The thrust of these claims arises from a conversation Plaintiffs claim they had with Defendants prior to forming the LLC. Plaintiffs allege that in 2003 William Kipnis asked Defendants "if there was anything in their personal histories he should know about before going into a business relationship with them," and Defendants answered negatively. For purposes of summary judgment, Defendants conceded that the court could assume the correctness of Plaintiffs' version of that discussion.

{5} In their summary judgment materials, Plaintiffs offered evidence that in 1984 Michael Jusbasche pleaded nolo contendere in a Texas court to theft of trade secrets for purportedly stealing a seismic prospect map from his former employer. Michael Jusbasche was placed in a Texas deferred adjudication program, required to pay a fine, and ordered to serve a five-year probationary period. Because he complied with the terms of the deferred adjudication, he was never convicted of any criminal offense. *See State v. Burk*, 1984-NMCA-043, ¶¶ 6-7, 101 N.M. 263, 680 P.2d 980 (recognizing that under Texas statute, a deferred adjudication is not deemed a conviction); *cf. State v. Harris*, 2013-NMCA-031, ¶ 6, 297 P.3d 374 (clarifying that successful completion of a conditional discharge pursuant to NMSA 1978, Section 31-20-13(A) (1994), New Mexico's deferred adjudication procedure, similarly does not result in a conviction). Plaintiffs have claimed throughout the litigation that Defendants committed fraud by failing to disclose Michael Jusbasche's plea of nolo contendere to the theft of trade secrets charge, alleging that had they known of it they would never have agreed to go into business with Defendants.

{6} Defendants filed a motion for summary judgment arguing in relevant part, as a matter of law, that Rule 11-410(A)(2) categorically prohibited the admission of evidence of the nolo plea and surrounding circumstances. In response, Plaintiffs

contended that whether Defendants had a duty to disclose the plea was a question of fact for a jury and that Rule 11-410 prohibits the admission of evidence of a nolo plea only when offered as an admission or proof of guilt but not for other purposes. Plaintiffs claimed that they did not seek admission of the plea to prove Michael Jusbasche committed the crime charged. Rather, they claimed that the plea was relevant "because knowledge of the plea itself, had [Plaintiffs] possessed it, would have prevented them from going into business with [Defendants]" and that the question of whether Michael Jusbasche was actually guilty played no role in the suit.

{7} The district court ultimately granted summary judgment to Defendants, concluding "that Rule 11-410 precludes introduction of evidence concerning . . . Michael Jusbasche's plea of nolo contendere . . . as a matter of law," thereby "leav[ing] Plaintiffs unable to prove a necessary element of their case." Plaintiffs appealed this decision to the Court of Appeals, stating in their docketing statement that "there was one issue in th[e] appeal" and that it was "purely legal in nature":

> Where the plaintiff in a civil suit seeks to prove that he was fraudulently deceived into entering into a business relationship by the defendant, and the deception was in the form of failure to respond honestly to a question which would reasonably elicit disclosure of a plea of no contest to a criminal charge of dishonesty in business, does Rule 11-410 bar the evidence of the plea?

{8} The Court of Appeals reversed the district court's grant of summary judgment, holding that Rule 11-410 "does not prohibit admission of the plea of nolo contendere and related judgment when they are not offered as proof of guilt." *Kipnis v. Jusbasche*, 2015-NMCA-071, ¶ 1, 352 P.3d 687. The court agreed with Plaintiffs' theory that the Texas nolo plea was admissible "not as evidence of guilt but as evidence of what Defendants failed to tell" Plaintiffs. *Id.* ¶ 27.

{9} We granted Defendants' Petition for a Writ of Certiorari to consider the proper interpretation and application of Rule 11-410 and its underlying policies.

II. DISCUSSION

{10} We review de novo a district court's order granting or denying summary judgment. *See Potter v. Pierce*, 2015-NMSC-002, ¶ 8, 342 P.3d 54. In doing so, this case requires us to interpret a provision of the New Mexico Rules of Evidence, a question of law we also review de novo. *Allen v. LeMaster*, 2012-NMSC-001, ¶ 11, 267 P.3d 806. "When construing our procedural rules, we use the same rules of construction applicable to the interpretation of statutes." *Id.*

{11} We begin by "examin[ing] the plain language of the [rule] as well as the context in which it was promulgated, including the history of the [rule] and the object and purpose . . . ." *Moses v. Skandera*, 2015-NMSC-036, ¶ 15, 367 P.3d 838 (internal quotation marks and citation omitted). To assist in that process, New Mexico courts have concluded that federal interpretations of the Federal Rules of Evidence are instructive when interpreting identical provisions in our rules of evidence. *See State v. Torres*, 1998-NMSC-052, ¶ 13, 126 N.M. 477, 971 P.2d 1267 (relying on federal case law interpreting Fed. R. Evid. 804(b)(3) in analyzing the analogous New Mexico rule), *overruled on other grounds by State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699; *see also State v. Trujillo*, 1980-NMSC-004, ¶ 13, 93 N.M. 724, 605 P.2d 232 (recognizing that because New Mexico Rule 11-410 "was adopted verbatim from the federal version," the federal legislative history was "illuminating" to an analysis of the New Mexico rule).

A. The Language of Rule 11-410(A)(2) Plainly Prohibits Admissibility of a Nolo Plea Against the Pleader in Subsequent Proceedings

{12} Defendants urge that the Court of Appeals erred in holding evidence of Michael Jusbasche's nolo plea admissible under New Mexico Rule 11-410(A)(2), which provides that "[i]n a civil, criminal, or children's court case, evidence of [a nolo plea] is not admissible against the defendant who made the plea or participated in the plea discussions." *See also* Rule 5-304(F) NMRA ("Evidence of . . . a plea of no contest . . . is not admissible in any civil or criminal proceeding against the person who made the plea."). While the rule provides for two limited exceptions pertaining to admissibility of statements made in connections with pleas, neither exception is applicable here. *See* Rule 11-410(B).

{13} This Court first interpreted Rule 11-410 in *State v. Trujillo* and held that Rule 11-410 barred admissibility of an incriminating statement made in connection with a plea negotiation to impeach the pleader in a subsequent criminal proceeding. 1980-NMSC-004, ¶¶ 3, 6 (concluding generally that the rule "excludes statements made in connection with plea negotiations *in any subsequent proceeding*" (emphasis added)). The Court reasoned that "the plain import of the language of Rule 410 [referring to the original promulgation of Rule 11-410] is to prohibit the admissibility of statements made during plea negotiations in any proceeding," noting that other rules of evidentiary exclusion that surround Rule 11-410, including Rules 11-407, 11-408, 11-409, and 11-411 NMRA, "contain express exceptions to the general rule of inadmissibility," with Rule 11-410 "stand[ing] out among these rules because it contains no language which limits its exclusionary effect" within its broad domain of any civil or criminal proceeding. *Id.* ¶ 17 (referring to the original promulgations of the New Mexico Rules of Evidence); *see, e.g.*, Rule 11-411 NMRA (prohibiting evidence that a person was or was not insured against liability to prove the person acted negligently, but allowing its admission "for another purpose"); *see also* Glen Weissenberger & James J. Duane, *Weissenberger's Federal Evidence* § 410.3 at 214 (7th ed. 2011) ("Rule 410[(a)](2) contains no hint that its categorical rule of exclusion has anything to do with the purpose for which the evidence is offered.").

{14} The *Trujillo* Court also grounded its decision in the policy underlying Rule 11-410, recognizing that plea negotiations "are an essential part of our criminal justice system" and that "Rule 410 embodies the public interest in encouraging [plea] negotiations," thereby facilitating the speedy disposition of cases and mitigating burdens on an overloaded criminal justice system. *Trujillo*, 1980-NMSC-004, ¶ 18; *see also* 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 410.03[2] at 410-9 (Mark S. Brodin et al. eds., 2d ed. 2015) ("Rule 410's exclusion of offers to plead guilty (or nolo contendere) represents a substantive policy to promote the disposition of criminal cases by compromise."). Considering this policy objective, the Court concluded that Rule 11-410 "clos[ed] the door on the admissibility of [statements surrounding plea negotiations] as evidence at trial for either substantive or impeachment purposes" and that "a weighing of conflicting policies demonstrates that the balance is tipped in favor of interpreting Rule 410 as the cloak of privilege around plea negotiation discussions." *Trujillo*, 1980-NMSC-004, ¶¶ 19, 21.

{15} The specific policy behind recognition of the nolo plea further supports excluding the plea itself as substantive evidence in subsequent litigation. In New Mexico, a nolo plea has the same effect as a guilty plea for the purpose of entering a judgment and sentence in the case in which the plea is entered, but unlike a guilty plea it is not an express or implied admission of factual guilt. *State v. Baca*, 1984-NMCA-056, ¶ 5, 101 N.M. 415, 683 P.2d 970 (holding that a revocation of probation could not be based on a conviction resulting from a nolo plea); *see also* NMSA 1978, § 30-1-11 (1963) (providing that a person can be convicted of and sentenced for a crime upon "a plea of nolo contendere, accepted and recorded in open court"). Literally meaning "I do not wish to contend," *Black's Law Dictionary* 1210 (10th ed. 2014) (defining nolo contendere), a nolo plea "has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty." *North Carolina v. Alford*, 400 U.S. 25, 35-36 & n.8 (1970).

{16} Because a nolo plea, unlike a guilty plea, has no probative value and is intended to encourage plea negotiations by avoiding collateral evidentiary consequences resulting from guilty pleas, Rule 11-410 specifically prohibits its evidentiary use in any further proceedings. *See* Weissenberger & Duane, *supra*, § 410.3 at 213 ("[T]he nolo contendere plea is 'inconclusive' and has less probative value than a plea of guilty as evidence of the guilt of the one who entered the plea." (footnote omitted) (citation omitted)). The advantage of the plea "is to avoid potential future repercussions which would be caused by the admission of liability, particularly the repercussions in potential future civil litigation." *Lichon v. Am. Universal Ins. Co.*, 459 N.W. 2d 288, 293 (Mich. 1990). "Without a guarantee that the plea would not be used against them, the nolo contendere plea would be of no value to the accused, and would accordingly lose any value to the system of justice in the promotion of plea bargaining." Weissenberger & Duane, *supra*, § 410.3 at 213.

B. Narrow, Judicially Created Exceptions to Rule 11-410 Are Inapplicable

{17} The Court of Appeals in this case considered the *Trujillo* Court's construction of Rule 11-410 and acknowledged its broad exclusionary language but "decline[d] to read into it a blanket prohibition" under the specific facts of this case, stating that "'it is universally agreed that this is one of those rare rules that can't mean what it says, for it would lead to absurd results if read too literally.'" *Kipnis*, 2015-NMCA-071, ¶ 18 (footnote omitted) (internal quotation marks omitted) (quoting Weissenberger & Duane, *supra*, § 410.3 at 214). The Court of Appeals opined that the *Trujillo* Court's policy considerations would not be "unduly hindered by" evidentiary admission of Michael Jusbasche's nolo plea in the context of this litigation. *Id.*

{18} The *Trujillo* Court did not identify any pertinent federal or state cases, observing that similar evidentiary provisions in other jurisdictions were like the New Mexico rule: "of recent vintage and . . . not yet . . . under the judicial microscope." *Trujillo*, 1980-NMSC-004, ¶¶ 11-12. In the thirty-six years since *Trujillo*, many of the state and federal jurisdictions that recognize the nolo plea have had the opportunity to construe similar evidentiary provisions, resulting in case law that considers admitting evidence of a conviction predicated on a nolo plea in certain limited contexts "[d]espite Rule 410's apparent clear command." *Sharif v. Picone*, 740 F.3d 263, 268 (3d Cir. 2014).

{19} While there is no universal agreement on the overall scope of judicial exceptions to Rule 410, *see* Weissenberger & Duane, *supra*, § 410.3 at 212, all jurisdictions generally agree that evidence of both nolo pleas and convictions based on the pleas should be excluded "when offered as substantive evidence of the facts underlying the crime" or as an admission of guilt because of the policies underlying the use of the plea. *See* Weinstein et al., *supra*, § 410.06[3] at 410-14 & n.5 (listing cases where a judgment based on the nolo plea was excluded because it was being offered as an admission of guilt for the underlying crime charged). We have considered the authorities Plaintiffs cite to support their contention that Michael Jusbasche's nolo plea should be admissible in this case, and we conclude that they are not supportive.

{20} In *Olsen v. Correiro*, for example, a civil rights plaintiff challenged a federal district court's decision to admit evidence of his prior conviction and sentence resulting from a nolo plea. *See* 189 F.3d 52, 55 (1st Cir. 1999). The plaintiff was initially convicted of first degree murder and sentenced to life imprisonment. *Id.* Five years later, the conviction was overturned. *Id.* Rather than face another trial, the plaintiff pleaded nolo contendere to a lesser charge of manslaughter, was convicted, and was sentenced to time served. *Id.* He brought a civil rights action seeking damages for the period of his "improper incarceration." *Id.*

{21} In affirming the district court's evidentiary ruling, the First Circuit reasoned that evidence of the conviction and sentence was not offered "to prove that [the plaintiff] actually committed manslaughter, or to suggest that he was actually guilty of a criminal act . . . [but] was primarily offered to counter [the plaintiff's] claim for incarceration-based damages by showing that he was incarcerated for something other than the murder conviction." *Id.* at 61. The court suggested that had the government offered the conviction and sentence for the purpose of demonstrating the pleader's guilt for the crime pleaded to, using the plea "in effect . . . as an admission," the purposes of Rule 410 would have been frustrated. *Id.* at 60.

{22} *United States v. Adedoyin*, 369 F.3d 337 (3d Cir. 2004), which Plaintiffs also cite, is equally instructive. In that case, a foreign national was ordered deported from the United States as a result of his felony conviction based on a nolo plea. *See id.* at 339. Several years later, he reentered the country using another name, falsely denying in his visa application that he had ever been convicted of a felony. *See id.* In a prosecution for that false denial, the Third Circuit affirmed the trial court's admission of a certified copy of defendant's conviction based on the nolo plea because it was not admitted for the purpose of establishing that the defendant committed the underlying crime charged but rather to show only that the denial in his visa application of any felony convictions was false. *See id.* at 339, 344. In reaching its conclusion, the court acknowledged the "clear distinction between pleas of nolo contendere and convictions entered on the basis of such pleas," *id.* at 343, and determined that the nolo plea and resulting conviction were inadmissible for proving that the defendant was guilty of the crime in question but that "convictions based on pleas of nolo contendere are admissible to prove the fact of conviction" where the fact of a prior conviction may have other evidentiary value, *id.* at 344-45.

{23} The New Mexico Court of Appeals has similarly held that evidence of a conviction resulting from a nolo plea accepted and recorded in open court is admissible to prove that a defendant has a prior conviction for purposes of sentencing

enhancement under the habitual offender statute. *State v. Marquez*, 1986-NMCA-119, ¶¶ 2, 7, 11, 105 N.M. 269, 731 P.2d 965. Relying on *Baca*, 1984-NMCA-056, the *Marquez* court distinguished between admission of a nolo plea itself and admission of a conviction based on the plea, not to establish an inference of guilt but to show the fact of conviction where that status is relevant. *Id.* ¶ 9. *Baca* had held that a nolo plea cannot "be used as the sole basis to revoke probation," reasoning that to hold otherwise would undermine "the policy of this [s]tate to promote plea bargaining." *See* 1984-NMCA-056, ¶¶ 1, 9. The *Marquez* Court suggested that if the state in *Baca* had sought to introduce the conviction based on the plea rather than introducing the plea itself, the *Baca* Court might have reached a different result. *See Marquez*, 1986-NMCA-119, ¶ 9; *see, e.g.*, *Town of Groton v. United Steelworkers of Am.*, 757 A.2d 501, 509-11 (Conn. 2000) (holding that a public employer could discharge an employee as a result of a conviction for theft from the employer even though the conviction followed from a nolo plea).

{24} While these authorities certainly support the recognition that a rigid interpretation of the exclusionary stance of Rule 11-410 is inappropriate, they do not support the position Plaintiffs take.

{25} Each of these cases involved a conviction based on a nolo plea rather than a nolo plea in itself. Whether we might recognize a generalized distinction between inadmissibility of the nolo plea and admissibility of the conviction predicated on the plea is not before us in this case. *See, e.g.*, Weissenberger & Duane, *supra*, § 410.3 at 215 (suggesting that making a distinction between admission of a nolo plea and admission of a conviction resulting therefrom based on the rule's literal prohibition against admission of a "nolo contendere *plea*" without mentioning a "*judgment of conviction* based on that plea" would "reduce[] the rule to a meaningless nullity" because "Rule 410(a)(2) could be easily and thoroughly circumvented in *every* case" by revealing the conviction without indicating it was based on a plea); *U.S. v. Nguyen*, 465 F.3d 1128, 1131 (9th Cir. 2006) ("Reading [Rule 410] to preclude admission of a nolo contendere plea but to permit admission of conviction based on that plea produces an illogical result." (italics omitted)).

{26} But we need not address the merits of the competing views on that issue because there was never a conviction that resulted from the nolo plea in this case. Plaintiffs seek only to admit evidence of Michael Jusbasche's nolo plea itself rather than a resulting conviction. Without exception, the plain language of Rule 11-410(A)(2) proscribes admission of the nolo plea itself as substantive evidence against the person who made the plea. Our own precedent and that of the overwhelming majority of jurisdictions construing similar provisions support this interpretation. *See, e.g.*, *Trujillo*, 1980-NMSC-004, ¶ 17 ("Rule [11-]410[(A)(2)] . . . contains no language which limits its exclusionary effect."); *Olsen*, 189 F.3d at 59 (stating that the relevant language of Rule 410 bars admission of the nolo plea itself); *Myers v. Sec'y of Health & Human Servs.*, 893 F.2d 840, 843 (6th Cir. 1990) (noting that Rule 410 and Fed. R. Crim. P. 11(e) prohibit the use of a nolo plea but not a conviction pursuant to such plea).

{27} Even those jurisdictions permitting the introduction of evidence of a conviction predicated on a nolo plea instead of the plea itself often involve proceedings where the fact of the conviction had independent legal significance and was not being offered to create any inference of the pleader's guilt. *See* Wayne R. LaFave et al., 5 *Criminal Procedure* § 21.4(a) at 951-52 (4th ed. 2015) ("Judgment following entry of a nolo contendere plea is a conviction, and may be admitted as such in other proceedings where the fact of conviction has legal significance (e.g., to apply multiple offender penalty provisions . . . .)").

C. The Purpose of Rule 11-410 Would Be Frustrated by Evidentiary Use of the Nolo Plea in This Case

{28} Plaintiffs have acknowledged that Rule 11-410(A)(2) bars evidence of a nolo plea if offered to prove the defendant is guilty of the underlying charge, recognizing the strong public interest in encouraging plea bargains. But they argue that evidence of Michael Jusbasche's nolo plea would support their claim that Defendants withheld material facts, maintaining that "knowledge of the plea itself . . . would have prevented [Plaintiffs] from going into business with [Defendants]."

{29} Despite their arguments to the contrary, Plaintiffs undoubtedly seek to introduce evidence of Michael Jusbasche's nolo plea as an implicit admission that he may have committed the offense to which he pleaded. His nolo plea would be relevant to Plaintiffs' claims of fraud and misrepresentation only if it supported some inference of wrongdoing. Plaintiffs belie their own argument by conceding that information pertaining to Michael Jusbasche's nolo plea would "[o]f course" create a question in the factfinder's mind about whether Michael Jusbasche actually stole the proprietary maps from his former employer. They acknowledge, as the sole basis of their theory that Defendants materially misrepresented their fitness to engage in the joint business venture, the fact that Michael Jusbasche pleaded nolo contendere to a crime of dishonesty and did not defend himself rather than any factual finding of dishonesty by an independent court or other investigative source.

{30} The distinction Plaintiffs seek is a distinction without a principled difference. The attempted use of the nolo plea in this context necessarily depends on asking the factfinder to infer from the nolo plea alone that Michael Jusbasche may in fact have stolen property from the former employer and that if Plaintiffs had known that he may have done so they would not have gone into business with him. This use would not only violate the plain language of Rule 11-410(A)(2) prohibiting evidentiary use of nolo pleas but would also erode the policy objectives underlying the rule. Despite the best efforts of Plaintiffs to maintain that they are not attempting to use the nolo plea as a basis for an inference of wrongdoing, they inevitably are doing so. If Michael Jusbasche had committed no wrongdoing in connection with his prior employment, there would have been no reason for Plaintiffs to be concerned about his background. Yet they offered nothing of any evidentiary value to imply any past wrongdoing other than the simple entry of the nolo plea itself.

{31} We conclude that Rule 11-410(A)(2) barred admission of Michael Jusbasche's nolo plea in the circumstances of this case, and we affirm the district court's grant of summary judgment in Defendants' favor on this ground. We need not reach any other issues.

III. CONCLUSION

{32} We reverse the decision of the Court of Appeals and affirm the district court's grant of summary judgment.

{33} IT IS SO ORDERED.

CHARLES W. DANIELS, Chief Justice

WE CONCUR:
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
BARBARA J. VIGIL, Justice
JUDITH K. NAKAMURA, Justice

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-015

No. 34,254 (filed November 14, 2016)

RENEE WALSH as PERSONAL REPRESENTATIVE OF THE ESTATE OF DONA LU SNYDER and RENEE WALSH, INDIVIDUALLY and GEORGE WALSH, INDIVIDUALLY and as HEIRS and DEVISEES, TO THE ESTATE OF DONA LU SNYDER,
Plaintiffs-Appellants,
v.
ALEXANDRO MONTES,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
JAMES T. MARTIN, District Judge

KENNETH L. BEAL
KENNETH L. BEAL, P.C.
Las Cruces, New Mexico
for Appellants

MICHELE UNGVARSKY
ESTRADA LAW, P.C.
Las Cruces, New Mexico
for Appellee

Opinion

M. Monica Zamora, Judge

{1} Alexandro Montes (Defendant), as the named beneficiary of Dona Lu Snyder's savings and investment plan, received the proceeds of that plan after Snyder's death. Snyder's estate and children (collectively Plaintiffs), brought suit, seeking recovery of the proceeds. The parties reached a stipulated agreement. Subsequently, Defendant moved to strike the stipulated agreement and to dismiss Plaintiffs' action under Rule 1-012(B)(6) NMRA for failure to state a claim on which relief could be granted. The district court found that Plaintiffs' claims were preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 to 1461 (1974, as amended through 2012), and granted both motions. We reverse and remand to the district court for enforcement of the stipulated agreement.

BACKGROUND

{2} Snyder was employed by Raytheon Company beginning in 1979. In 1992, Snyder and Defendant were married and Snyder designated Defendant as the beneficiary on the Fidelity Savings and Investment plan (Fidelity plan), offered through Raytheon. In 1997, Snyder and Defendant divorced. Under their marital settlement agreement, Defendant agreed that Snyder would retain ownership of her retirement benefits. The marital settlement agreement was incorporated by reference into the final divorce decree. However, Snyder never removed or replaced Defendant as the named beneficiary on the Fidelity plan.

{3} Upon Snyder's death in 2013 Defendant received the proceeds of the Fidelity plan. On March 24, 2014, Plaintiffs filed suit in the district court attempting to recover the proceeds. Plaintiffs claimed that they were entitled to the proceeds of the Fidelity plan because (1) Defendant waived his interest in Snyder's retirement benefits in the marital settlement agreement between him and Snyder; (2) under NMSA 1978, Section 45-2-804 (2011), an unaffirmed, pre-divorce beneficiary designation is invalid; and (3) equity justifies the creation of a constructive trust because Defendant was not the intended beneficiary of the Fidelity plan.

{4} On April 21, 2014, the parties filed a stipulated agreement in the district court. Under the agreement, Defendant agreed to transfer the proceeds to Plaintiffs, and Plaintiffs agreed to dismiss their claim. The parties agreed that the proceeds would be transferred to Plaintiffs "collectively or individually as directed by [the district c]ourt." The stipulated agreement was signed by all parties and filed in the district court. Then, in May 2014 Defendant obtained new counsel and moved to strike the stipulated agreement. Defendant also moved to dismiss Plaintiffs' action under Rule 1-012(B)(6) for failure to state a claim on which relief could be granted.

{5} At a hearing on the motions, Defendant argued that Plaintiffs' action was preempted by ERISA and should be dismissed. Defendant claimed that because he did not know that Plaintiffs' action was preempted when he entered into the stipulated agreement, the agreement should be set aside. The district court agreed with Defendant and granted both of Defendant's motions. This appeal followed.

DISCUSSION

Dismissal Pursuant to Rule 1-012(B)(6)

{6} "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for purposes of ruling on the motion, the court must accept as true." *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 2, 134 N.M. 43, 73 P.3d 181 (internal quotation marks and citation omitted). "A district court's decision to dismiss a case for failure to state a claim under Rule 1-012(B)(6) is reviewed de novo." *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917 (internal quotation marks and citation omitted). On review, "we accept all well-pleaded factual allegations in the complaint as true and resolve all doubts in favor of sufficiency of the complaint." *Id.* (internal quotation marks and citation omitted). Under Rule 1-012(B)(6), dismissal is appropriate only if the nonmoving party is "not entitled to recover under any theory of the facts alleged in their complaint." *Delfino*, 2011-NMSC-015, ¶ 12 (internal quotation marks and citation omitted).

{7} Here, Plaintiffs advanced three theories under which they were entitled to relief: (1) waiver of Defendant's right to the Fidelity plan proceeds in the divorce decree; (2) revocation of Defendant's beneficiary designation under Section 45-2-804; and (3) creation of a constructive trust, recognizing Plaintiffs as beneficial owners of the proceeds in equity. The district court found that state law concerning the distribution of the proceeds of the Fidelity plan is preempted by ERISA. Specifically, the district court found that "ERISA preempts the state statute" and that imposing a constructive trust would be an "end run on the federal law." Based on these findings, the district court concluded that, as a matter of law, Plaintiffs could not prevail. We disagree.

{8} Under ERISA, every employee benefit plan must be established and maintained

pursuant to a written instrument that specifies the basis on which payments are made to and from the plan. 29 U.S.C. § 1102(a)(1), (b)(4). ERISA obligates administrators to pay ERISA plan benefits to the named beneficiary. *See* § 1104(a)(1)(D) (requiring ERISA plan administrators to "discharge [their] duties . . . in accordance with the documents and instruments governing the plan"). Under ERISA, any and all state laws are preempted "insofar as they may now or hereafter relate to any employee benefit plan." § 1144(a), (c)(1).

{9} Here, the district court's determination that Plaintiffs' claims were preempted was based on the United States Supreme Court's decision in *Boggs v. Boggs*, that a state law permitting a testamentary transfer of an interest in the undistributed ERISA plan benefits was preempted. 520 U.S. 833, 851-52 (1997). *Boggs* is distinguishable from the case before us. In *Boggs*, the plan participant designated his first wife as the beneficiary of his ERISA plan. *Id.* at 836. His first wife died, bequeathing her community property interest in the undistributed pension plan funds to the couple's sons. *Id.* at 836-37. The participant remarried before retiring. *Id.* at 836. Upon retirement, he received a lump sum distribution of his pension plan, which he rolled over into an IRA; shares of stock from the company's employee stock ownership plan; and a monthly annuity payment. *Id.* at 836. After his death, the participant's sons contested the right of the second wife to the corpus and interest on the IRA, arguing that the earlier testamentary gift from the first wife vested ownership of a portion of the IRA in the sons. *Id.* at 836-37. The Court held that the state law permitting the testamentary transfer of a nonparticipant spouse's community property interest in *undistributed* pension plan benefits was preempted by ERISA, explaining that operation of the state law would have resulted in the diversion of plan benefits without the participant's consent. *See id.* at 851-52. Unlike the case before us, *Boggs* did not involve a beneficiary's waiver of benefits and the Court did not address the issue.

{10} In *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 555 U.S. 285 (2009), the Court considered whether an ERISA plan administrator had a duty, pursuant to ERISA's plan documents rule, to follow the participant's beneficiary designation where the designated beneficiary was the participant's former spouse who signed a waiver of benefits as part of the divorce decree. *See id.* at 300-04. The Court held that ERISA required the plan administrator to distribute the benefits to the named beneficiary in accordance with the plan documents. *Id.* at 304. However, the Court explicitly left open the question of whether, once the benefits are distributed, the participant's estate may enforce the waiver against the beneficiary. *See id.* at 299 n.10 ("[W]e [do not] express any view as to whether the [participant's e]state could have brought an action in state or federal court against [the participant's former spouse] to obtain the benefits after they were distributed."). "[C]ourts interpreting *Kennedy* have observed that the Court may have closed one door to litigation against plan administrators but it may well have opened another to litigation between family or former family members." *Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131, 134 (2012) (internal quotation marks and citation omitted); *see Smalley v. Smalley*, 399 S.W.3d 631, 638 (2013) (same); *see also Staelens ex rel. Estate of Staelens v. Staelens*, 677 F. Supp. 2d 499, 507 (D.Mass. 2010) (same).

{11} Defendant relies on *Hillman v. Maretta*, ___U.S. ___, 133 S. Ct. 1943 (2013), for the proposition that neither state law nor waiver can frustrate a federal choice of beneficiary either before or after distribution, suggesting that the Court answered in *Hillman* the question it expressly left open in *Kennedy*. We are not persuaded. In *Hillman*, the Supreme Court considered whether a post-distribution state law claim was preempted by the Federal Employees' Group Life Insurance Act (FEGLIA), 5 U.S.C. § 8701 (2012). Under FEGLIA, federal employees' life insurance benefits are paid according to a specified "order of precedence[,]" accruing first to the designated beneficiary or beneficiaries, and then, if there is no designated beneficiary, to the employee's widow or widower, children, parents, executor, or other next of kin. 5 U.S.C. § 8705(a). The *Hillman* Court determined that the FEGLIA order of precedence preempted a Virginia statute that allowed the plan participant's new spouse to recover insurance policy proceeds from the plan participant's former spouse who was the named beneficiary. *Hillman*, ___ U.S. at ___,133 S. Ct. at 1948-49, 1953. The Court observed that the state statute "displaces the beneficiary selected by the insured in accordance with FEGLIA and places someone else in her stead[,]" thereby frustrating "the deliberate purpose of Congress to ensure that a federal employee's named beneficiary receives the proceeds." *Id.* at 1952 (internal quotation marks and citation omitted).

{12} Because *Hillman* required an analysis of a post-distribution claim under FEGLIA, it is readily distinguishable. FEGLIA includes a statutory order of precedence, intended by Congress to achieve the substantive goal of making sure that employees enjoy complete freedom in designating a beneficiary to whom death benefits would belong. *Hillman*, ___ U.S. at ___, 133 S. Ct. at 1952. "FEGLIA's implementing regulations further underscore that the employee's right of designation cannot be waived or restricted." *Id.* (internal quotation marks and citation omitted); *see* 5 C.F.R. § 843.205(e) (2016). By contrast, ERISA does not include a statutory order of precedence, and its regulations do not expressly prohibit the waiver or restriction of beneficiary designations. *See* 29 U.S.C. § 1104; 29 C.F.R. § 2590.606-1 (2015). This reflects ERISA's distinct purpose, which is to simply ensure that employers and plan administrators act in accordance with the plan's written terms. *See Kennedy*, 555 U.S. at 301 ("The point is that by giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule: simple administration, avoiding double liability, and ensuring that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules." (alterations, internal quotation marks, and citation omitted)).

{13} Moreover, *Hillman* like *Boggs* involved the preemption of a state statute but did not address whether a waiver of benefits can be enforced against the beneficiary once the ERISA plan benefits are distributed. Thus, it appears that the question of whether Plaintiffs can sue to enforce Defendant's waiver of benefits in the present case is still open. *See Estate of Lundy v. Lundy*, 352 P.3d 209, 213-14 (Wash. Ct. App. 2015) (recognizing that "in the context of waiver by private agreement between the parties[,]" *Kennedy* still "signals that the propriety of postdistribution claims for ERISA benefits is an open question"), *review denied*, 361 P.3d 746 (Wash. 2015).

{14} We conclude that Plaintiffs' theory—that Defendant waived his right to the Fidelity plan proceeds in the divorce decree—remains a viable legal theory and a valid claim against Defendant. Taking all facts in Plaintiffs' complaint as true,

Plaintiffs have stated a claim under their waiver theory on which they can proceed in this case. Accordingly, we conclude that the district court erred in determining that Plaintiffs could not prevail as a matter of law. Because Plaintiffs have stated a claim against Defendant under the waiver theory, which is sufficient to defeat a Rule 1-012(B)(6) motion, we need not address whether Plaintiffs' other asserted theories are viable. *See Delfino*, 2011-NMSC-015, ¶ 12 ("Dismissal on [Rule 1-012(B)(6)] grounds is appropriate only if the plaintiff is not entitled to recover under any theory of the facts alleged in their complaint." (alteration, internal quotation marks, and citation omitted)).

{15} We further conclude that the district court erred in setting aside the parties' stipulated agreement. In support of his motion to strike the stipulated settlement agreement, Defendant asserted that he only entered into the agreement because he believed that Plaintiffs had a viable claim to the Fidelity plan proceeds. The district court found that Plaintiffs' claim was not viable, and as a result, it concluded that the stipulated settlement agreement was based on a mistake of law that rendered the settlement agreement unenforceable and that the agreement lacked consideration. Plaintiffs have stated a valid claim and preemption was not a valid basis to set aside the parties' settlement agreement. We therefore conclude that the district court erred in granting Defendant's motion to strike the stipulated agreement since the sole basis for that decision was the district court's erroneous conclusion that Plaintiffs' stated claim was not viable.

CONCLUSION

{16} For the foregoing reasons, we reverse the district court's dismissal under Rule 1-012(B)(6), and remand to the district court for further proceedings consistent with this Opinion.

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

M. MONICA ZAMORA, Judge

WE CONCUR:
RODERICK T. KENNEDY, Judge
TIMOTHY L. GARCIA, Judge

FREEDMAN BOYD HOLLANDER
GOLDBERG URIAS & WARD P.A.

MEDIATION SERVICES

FREEDMAN + BOYD

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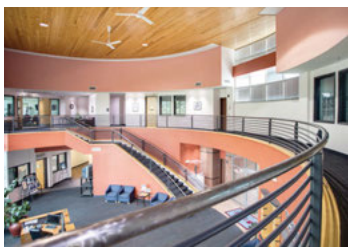

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Positions

Trial Attorney
Trial Attorney wanted for immediate employment with the Seventh Judicial District Attorney's Office, which includes Catron, Sierra, Socorro and Torrance counties. Employment will based primarily in Sierra County (Truth or Consequences). Must be admitted to the New Mexico State Bar and be willing to relocate within 6 months of hire. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Seventh District Attorney's Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park Street, Socorro, New Mexico 87801.

United States District Court, District of New Mexico Courtroom Deputy, Full-time, ABQ
$43,954 to $78,474 DOQ. Assigned to the Honorable James O. Browning. Relocation/recruitment bonus available — see full announcement and application at www.nmd.uscourts.gov/employment. Successful applicants subject to FBI & fingerprint checks. EEO Employer.

Attorney
Respected Albuquerque firm seeks an attorney with at least two years of experience for associate position with future prospects for becoming a shareholder. Our firm offers a wide variety of civil practices areas. Applicants should be interested in serving the needs of our business clientele, and have an interest in litigation. Please visit our website for more information about our practice areas and attorneys. Moses, Dunn, Farmer and Tuthill, P.C. has been serving New Mexico clients for more than 63 years. Please send your resume to Alicia L. Gutierrez, P.O. Box 27047, Albuquerque, NM, 87125.

Associate Attorney
Associate attorney, with 1-5 years of experience, needed. Firm's practice areas include insurance defense, civil rights defense, and commercial litigation. Preference is attorney licensed in New Mexico and Texas. Will consider applicants only licensed in Texas. Salary DOE. Send cover letter, resume, law school transcript, writing sample, and references to bb@hmm-law.com.

Associate Attorney
Albuquerque based plaintiff construction defect law firm, is currently seeking an Associate Attorney (must be admitted to NM bar). The ideal candidate should have at least 3 - 5 years litigation experience and superior academic credentials. This position is not open to attorneys with less than 3 years of experience. Construction defect and construction related experience greatly preferred as well as deposition and trial experience. We are looking for a motivated and aggressive individual with strong analytical and judgment skills who is able to work in teams and individually on case assignments, take depositions, coordinate with experts, as well as conduct case evaluation. Please send resume, salary demands and writing sample demonstrating legal reasoning ability to Denise Ochoa at dochoa@kasdancdlaw.com.

United States District Court, District of New Mexico, Las Cruces - Term Law Clerks
Two full-time Term Law Clerk positions available, $60,210-$131,833 DOQ. See full announcement and application instructions at www.nmd.uscourts.gov. Successful applicants subject to FBI & fingerprint checks. EEO employer.

Entry and Mid-Level Prosecutors
Tired of keeping track of your life in 6-minute increments? Are watching reruns of Law & Order the closest you've come to seeing the inside of a courtroom? If you're ready for a change and want a job where you will truly make a difference in your community, where you seek truth and justice, try cases, and hold criminal offenders responsible for their actions, then come join our team. The Twelfth Judicial District Attorney's Office (Otero and Lincoln Counties) has vacancies for entry and mid-level prosecutors. We try more jury trials per capita than nearly every other judicial district in the state. If you're interested in learning more about the position or want to apply, email your resume and a cover letter to John Sugg at 12thDA@da.state.nm.us or mail to 12th Judicial District Attorney's Office, 1000 New York Ave, Room 101, Alamogordo, NM 88310.

Judicial Law Clerk (half-time)
The United States Bankruptcy Court for the District Of New Mexico is seeking a judicial term law clerk for the Hon. David T. Thuma. This is a half-time position (20 hours/week, Wed. afternoon and all day on Thursday and Friday) to end on or about 9/1/2018. The law clerk will work alongside Judge Thuma, his full-time term clerk, and his courtroom deputy to draft opinions and orders, attend trials and hearings, and coordinate the administrative functions of chambers. Salary ranges from $30,184 to $66,088 annually, depending on qualifications. The complete vacancy announcement and application requirements is available at www.nmb.uscourts.gov/employment. Mail required applications to PO Box 546, Albuquerque, NM 87103 or via e-mail to nmbc_hr@nmb.uscourts.gov.

Associate Attorney

Seeking applicants for Associate Attorney position: you will receive outstanding compensation and benefits as part of a vibrant, growing plaintiffs personal injury practice. Mission: To provide clients with intelligent, compassionate and determined advocacy, with the goal of maximizing compensation for the harms caused by wrongful actions of others. To give clients the attention needed to help bring resolution as effectively and quickly as possible. To make sure that, at the end of the case, the client is satisfied and knows that Parnall Law has stood up for, fought for, and given voice and value to his or her harm. Success: Litigation experience (on plaintiff's side) preferred. Strong negotiation skills. Ability to thrive in a productive and fast-paced work environment. Organized. Detail-oriented. Team player. Willing to tackle challenges with enthusiasm. Frequent contact with your clients, team, opposing counsel and insurance adjusters is of paramount importance in this role. Integrate the 5 values of our team: Teamwork, Talent, Tenacity, Truth, and Triumph. Compelled to do outstanding work. Strong work ethic. Barriers to success: Lack of fulfillment in role. Not enjoying people. Lack of empathy. Not being time-effective. Unwillingness to adapt and train. Arrogance. If you are interested in this position, and you have all the qualifications necessary, please submit your resume detailing your experience, a cover letter explaining why you want to work here, and transcripts of grades. Send documents to Bert@ParnallLaw.com, and type "Mango" in the subject line.

Santa Fe County – Assistant County Attorney

Santa Fe County is seeking qualified individuals to join its team of attorneys. The successful candidate's practice will focus in areas assigned based upon experience, need, and interest. The ideal candidates are those with strong analytical, research, communication, and interpersonal skills, who enjoy working hard in a collaborative, fast-paced environment on diverse and topical issues that directly impact the community in which they live or work. Salary range is from $27.0817 to $40.6226 per hour, depending upon qualifications and budget availability. Applicant must be licensed to practice law in the State of New Mexico and in the New Mexico federal courts and have a minimum of three (3) years of experience practicing law. This position is open until filled, so interested individuals should apply as soon as possible. Individuals interested in joining our team must apply through Santa Fe County's website, at http://www.santafecountynm.gov/job_opportunities.

Real Estate Attorney

Rodey, Dickason, Sloan, Akin & Robb, P.A. is accepting resumes for an attorney with 5-8 years experience in real estate matters for our Albuquerque office. Experience in land use, natural resources, water law, environmental law and/or other real estate related practice areas a plus. Prefer New Mexico practitioner with strong academic credentials and broad real estate background. Firm offers excellent benefit package. Salary commensurate with experience. Please send indication of interest and resume to Cathy Lopez, P.O. Box 1888, Albuquerque, NM 87103 or via e-mail to hr@rodey.com. All inquiries kept confidential.

Associate Attorney

Lorber, Greenfield & Polito, LLP, an AV-rated insurance defense firm, with offices throughout the Western United States, is seeking an Associate Attorney with 3-5 years of recent experience in the area of personal injury to practice in their regional Albuquerque office or move to California to practice in our Southern California office. A New Mexico license is a must and a CA license is a plus. You may be required to travel. Candidates with excellent research and writing skills and strong communication skills, as well as experience writing and defending motions, taking depositions of experts and trial prep will be considered. This firm offers competitive compensation and benefits. Please provide a cover letter, resume, references and a writing sample for consideration to Legal Administrator via e-mail to jyoung@lorberlaw.com .

Assistant City Attorney

City of Albuquerque Assistant City Attorney position available within the Safe City Division, representing the Albuquerque Police Department ("APD") in DWI Vehicle Seizure and Forfeiture cases, which include both administrative and district court proceedings. Additional City and APD duties may be assigned. Applicant must be admitted to the practice of law in New Mexico, be an active member of the Bar in good standing, and have at least one (1) year of attorney experience in New Mexico. Preferred qualification: knowledge of civil and/or criminal practice and procedures. A successful candidate will have strong communication skills, be able to work within a diverse legal team, and interact daily with the public. Salary will be based upon experience and the City of Albuquerque Attorney's Personnel and Compensation Plan with a City of Albuquerque Benefits package. Please submit resume to attention of "Safe City Attorney Application"; c/o Ramona Zamir-Gonzalez; Executive Assistant; P.O. Box 2248, Albuquerque, NM 87103 or rzamir-gonzalez@cabq.gov, no later than May 3, 2017.

First Judicial District Court Child Support Hearing Officer #00000357

Opening Date: 4/5/2017 – Close Date: 4/26/2017; Job Pay Range: Target Pay Range/Rate $45.53 per hour ($94,702.40 annually); The First Judicial District Court is accepting applications for the unclassified (At-Will) full-time, Child Support Hearing Officer Position. Hiring salary is $45.53 per hour ($94,702.40 annually). Performs the duties of a hearing officer as set forth in The Child Support Hearing Officer Act; including reviewing petitions; conducting hearings; prepare recommendations for review and final approval by the court; insuring prompt and full payment by obligated parties of child support obligation for dependent children; insuring that support payments are made in compliance with Federal regulations. Carry out the statutory duties of a Child Support Hearing Officer and utilize the procedures as set forth in Rule 1-053.2 NMRA. Supervises, directs, and evaluates staff on work performance. QUALIFICATIONS: Graduate of a law school meeting accreditation of the ABA; possess a license to practice law in the State of New Mexico; Have at least 5 years of experience in the practice of law, 2 of which must be in family law or domestic relations matters; At least two years of supervisory experience; Ability to establish effective working relationships with judges, the legal community, and staff; and to communicate complex rules clearly and concisely, respond with tact and courtesy both orally and in writing; Extensive knowledge of New Mexico and federal case law, constitution and statutes; court rules, policies and procedures; manual and computer legal research and analysis; A work record of dependability and reliability, attention to detail, accuracy, confidentiality, and effective organizational skills; Ability to successfully pass a background check. TO APPLY: A NM Judicial Branch Employment Application or a Resume and Resume Supplemental Form along with a copy of proof of education and license must be received by mail or hand-delivered by 5:00 p.m. Wednesday April 26, 2017 to: First Judicial District Court, Human Resource Office, 225 Montezuma Ave., P.O. Box 2268, Santa Fe, NM 87504. For a job application, visit the judicial website at: www.nmcourts.gov or call 455-8196. EQUAL OPPORTUNITY EMPLOYER

City Attorney- City of Gallup

The City of Gallup is seeking individual with graduation from accredited law school with a possession of a Juris Doctorate degree, Ten (10) years legal experience in a broad range of legal issues including, purchase of goods and services, contracting, labor & employee relations, land use, utilities, and prosecution of criminal offenses. Ability to draft legal documents including ordinances, resolutions, contracts, joint powers agreements. Salary Negotiable ($90-110K) Valid DL. Contact: adavis@gallupnm.gov. Open Until Filled. Phone: (505) 863-1215. FAX: 505-726-2053, www.gallupnm.gov/jobs online application

Due Process Hearing Officers
The Public Education Department, Special Education Bureau, is seeking licensed New Mexico attorneys to serve as due process hearing officers for disputes between parents and school districts or charter schools under the Individuals with Disabilities Education Act (IDEA). Applicants must have at least five years of current or prior experience in the active practice of law, preferably with a strong emphasis in administrative law or representation of governmental agencies. Knowledge or experience in special education or disability law is highly desirable, as is experience adjudicating contested cases as a hearing officer, special master, administrative review officer or arbitrator, or as an attorney or advocate appearing before such tribunals. The ability to analyze complex legal issues and express clear legal reasoning in written decisions is required. Residents outside the Albuquerque-Santa Fe areas are invited to participate (for a statewide pool). One-year contracts will be awarded, renewable at the Public Education Department's option in one-year increments for three additional years. The Request for Applications (RFA) is available on the Special Education Bureau website at http://ped.state.nm.us/ped/SEB_index.html. Applications must be submitted by U.S. mail or courier service to the Procurement Manager, Special Education Bureau, by 5:00 p.m. (MT) on May 8, 2017.

Associate Attorney
The Spence Law Firm of Jackson Hole, Wyoming, in association with The Wallin Law Office, LLC, is seeking an associate attorney for its new Albuquerque office. The successful candidate must be licensed in New Mexico and have a minimum of 2 years experience with excellent writing skills. Duties would include preparing court pleadings and filings, performing legal research, conducting pretrial discovery, preparing for and attending court hearings, including civil jury trials. The firm practices in the areas of catastrophic injuries, wrongful death, and civil rights litigation. Salary commensurate with experience. Please send your cover letter, resume, writing sample and references to recruiting@spencelawyers.com.

Attorney
Atkinson, Baker & Rodriguez, P.C. seeks attorney with strong academic credentials and 3-8 years civil litigation experience for successful, established complex commercial and tort litigation practice. Excellent benefits. Tremendous opportunity for professional development. Salary D.O.E. All inquiries kept confidential. Send resume and writing sample to Atkinson, Baker & Rodriguez, P.C., Attorney Recruiting, 201 Third Street NW, Suite 1850, Albuquerque, NM 87102.

Paralegal
Full-time paralegal needed for small, two lawyer criminal defense and personal injury firm located downtown. Experience preferred, but willing to train an exceptional candidate. Must have excellent organizational and communication skills, be computer literate, and be able to manage complex cases. Some travel involved (mostly within New Mexico). Competitive salary and benefits. Email cover letter and resume to teri@duncanearnest.com or fax to 505-750-9780. No phone calls please.

Legal Assistant
Small firm looking for legal assistant, full or part time. Bankruptcy experience helpful but not necessary. Must be organized and able to work independently. Good word processing skills required. Good benefits package. Salary DOE. Please send letter of interest and resume to nmattorney192@gmail.com.

Legal Assistant
Legal Assistant for busy NM non-profit children's legal services agency. Heavy client contact; requires experience with Microsoft Office, self motivation & a strong work ethic, previous legal assistant experience required; excellent communication & organizational skills. Must have a sense of humor; be flexible and able to multitask. Must be a team player; Bilingual Spanish/English strongly preferred. Benefits. Please email resume to info@pegasuslaw.org.

Legal Assistant
Downtown law firm seeks experienced Legal Assistant. Excellent salary and benefits. Must have experience in insurance defense or personal injury. Knowledge of billing software a plus. Requires calendaring, scheduling, independent work and client contact. People skills are a must and to be able to effectively work with our team. Send resume and references to resume01@swcp.com.

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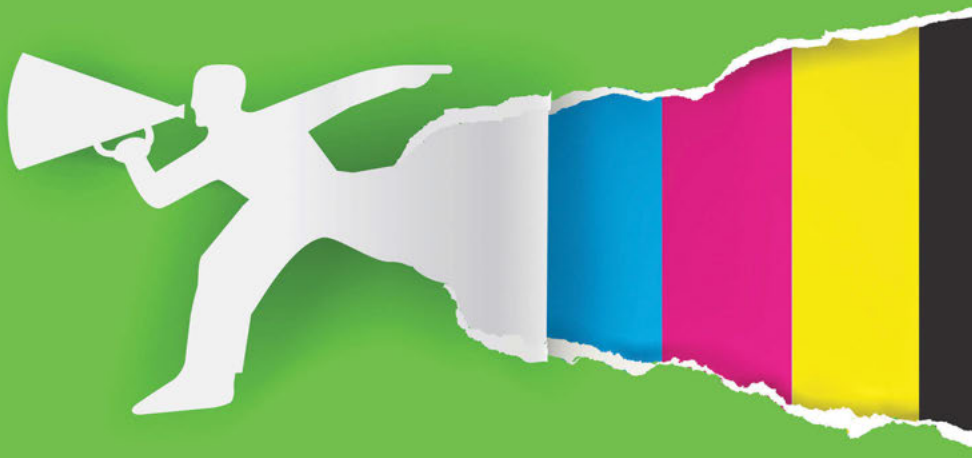

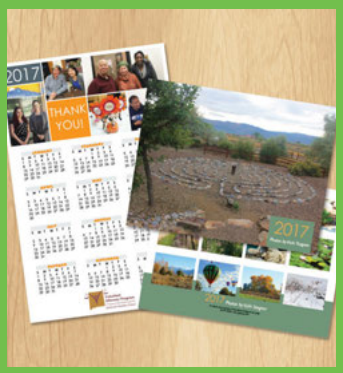

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