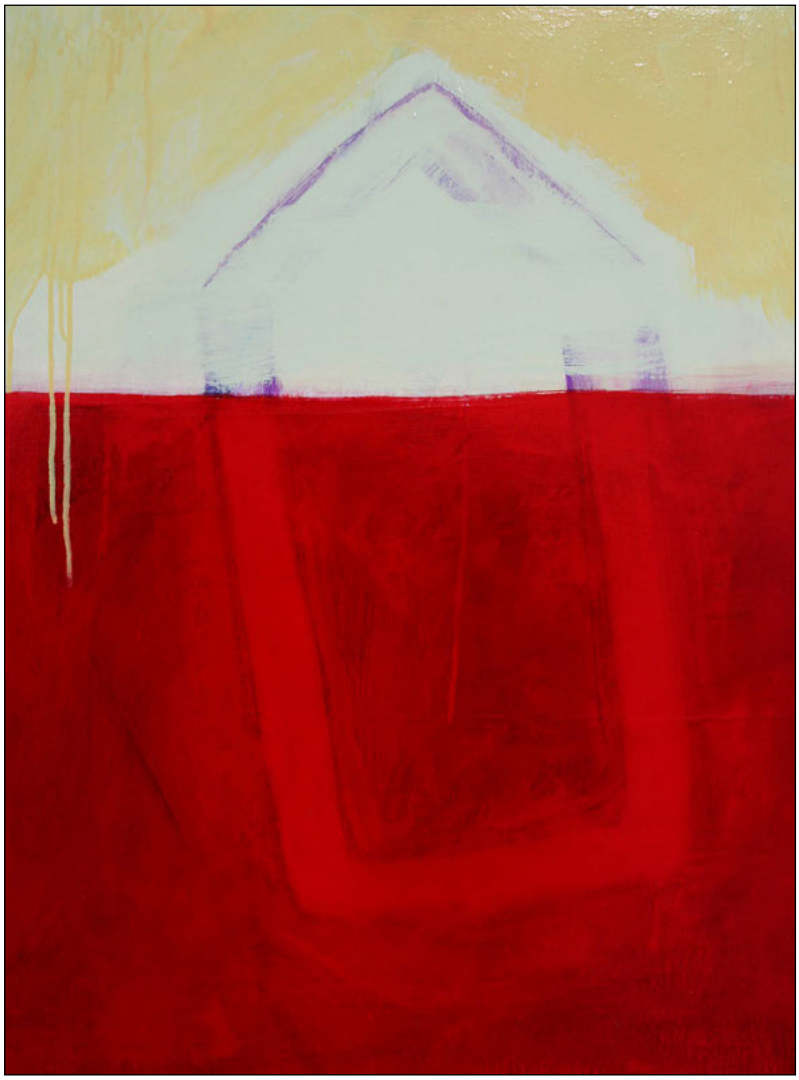
BAR BULLETIN

Official Publication of the State Bar of New Mexico

June 21, 2017 • Volume 56, No. 25



Submergence Red, by Angela Berkson (see page 3) EXHIBIT/208, Albuquerque

Inside This Issue

CLE Planner

Aug. 17–18

Featured CLE • A full 12 credit hours!

10th Annual Legal Service Providers Conference: Fighting Multi-Generational Poverty in New Mexico

10.0 G | 2.0 EP

Thursday, Aug. 17, 2017 • 9 a.m.–4:05 p.m. • Friday, Aug. 18, 2017 – 9 a.m.–4:40 p.m.
State Bar Center, Albuquerque

For too many years, New Mexico has been ranked second highest in the overall poverty rate of any state in the U.S. (behind only Mississippi). While this statistic is frightening, there is another of even greater concern: New Mexico ranks highest in the poverty rate for children. The fight to end children's poverty cannot succeed unless the legal and economic problems of the entire family are addressed. With the reality of cuts to public spending, advocates fighting childhood poverty are challenged to do more with less, making imperative the need for creative and collaborative efforts.

This training is designed to help legal aid staff, pro bono attorneys and other public interest advocates better understand how to spot, respond to and find co-counsel or other expert help for common issues likely to keep a family with children trapped in poverty. In this training, you will also learn about resources and collaborative means which can minimize the impact of poverty and ensure that children in our state are benefitting from every resource our communities can offer. Whether you represent children, parents, grandparents or even great-grandparents, this training will include topics that impact the financial security and well-being of all low-income New Mexico families.

One of our most affordable CLEs!

$165 Standard Fee
A $20 late fee will be assessed for walk-in registrations. Registration and payment must be received in advance to avoid the fee.

Visit www.nmbar.org/CLE to register!

What's included in programs offered by the Center for Legal Education?

Center for Legal Education programs include distinguished faculty with expertise in a vast array of subject matters, relevant program materials, CLE credits filed with New Mexico MCLE within 30 days of the program, morning refreshments and lunch the day of the program.

Why should you attend a CLE program offered by the Center for Legal Education?

- To gain a better understanding of current legal issues in a broad range of practice areas
- Programs include an overview of substantive law, technical skills and ethics and professionalism training
- Networking opportunities and access to on-site legal resources such as New Mexico One-Source

Center for Legal Education programs are designed for:

- In- and out-of-state attorneys
- Paralegals and legal assistants
- Those just learning the basics of a practice area, as well as seasoned professionals looking to keep up on current developments in the legal field

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

State Bar of New Mexico
Center for Legal Education

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

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Meetings

June

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Noon, Lewis Roca Rothgerber Christie

28
Natural Resources, Energy and Environmental Law Section Board
Noon, teleconference

30
Immigration Law Section Board
Noon, teleconference

July

11
Bankruptcy Law Section Board
Noon, U.S. Bankruptcy Court, Albuquerque

11
Committee on Women and the Legal Profession
Noon, Modrall Sperling, Albuquerque

11
Health Law Section Board
10 a.m., State Bar Center

18
Appellate Practice Section Board
Noon, teleconference

Workshops and Legal Clinics

June

28
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

29
Common Legal Issues for Senior Citizens Workshop
Presentation 10–11:15 a.m., Socorro County Senior Center, Socorro, 1-800-876-6657

July

5
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

5
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

11
Common Legal Issues for Senior Citizens Workshop
Presentation 10–11:15 a.m., Mosquero Senior Center, Mosquero, 1-800-876-6657

About Cover Image and Artist: *Submergence Red*, acrylic on canvas, 30 by 24 inches
Angela Berkson is an Albuquerque based artist who works in acrylic medum and encastic (beeswax-based) medium to create a variety of abstract colorful panting. Berkson studied art in Los Angeles, New York and Texas, but returned to her hometown of Albuquerque to pursue her professional art practice. She also works part-time as a legal assistant. Berkson's work is represented in Albuquerque by EXHIBIT/208. More of her work can be viewed at www.angelaberkson.com.

Notices

Court News

New Mexico Supreme Court Board of Legal Specialization

Comments Solicited

The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, attorneys and others are encouraged to comment upon any of the applicant's qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Employment & Labor Law
Laurie A. Vogel

New Mexico Judicial Compensation Committee

Notice of Public Meeting

The Judicial Compensation Committee will meet at 9 a.m.–noon, July 5, in Room 208 of the New Mexico Supreme Court, 237 Don Gaspar, Santa Fe. The Committee will discuss fiscal year 2019 recommendations for compensation for judges of the magistrate, metropolitan and district courts, the Court of Appeals and justices of the Supreme Court. The Commission will thereafter provide its judicial compensation report and recommendation for fiscal year 19 compensation to the Legislature prior to the 2018 session. The meeting is open to the public. For an agenda or more information call Jonni Lu Pool, Administrative Office of the Courts, 505-476-1000.

Sixth Judicial District Court

Notice of Right to Excuse Judge

Governor Susana Martinez appointed Timothy L. Aldrich to fill the vacant position and to take office on June 19 in Division I of the Sixth Judicial District Court. All pending and reopened civil, domestic, domestic violence, guardianship, lower court appeals, abuse and neglect and adoption cases previously assigned to the Hon. Henry R. Quintero, District Judge, Division I, shall be assigned to Hon. Aldrich. All pending criminal, juvenile, mental and probate cases previously assigned to the Hon. Quintero shall be assigned to Hon. J.C. Robinson, District Judge, Division III. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days to excuse Judge Aldrich or Judge Robinson.

Professionalism Tip

With respect to the courts and other tribunals:

I will be a vigorous and zealous advocate on behalf of my client, but I will remember that excessive zeal may be detrimental to my client's interests or the proper functioning of our justice system.

Eighth Judicial District Court

Notice of Destruction of Exhibits

Pursuant to the Supreme Court retention and disposition schedule, the Eighth Judicial District Court, Taos County, will destroy the following exhibits by order of the court if not claimed by the allotted time: 1) all unmarked exhibits, oversized poster boards/maps and diagrams; 2) exhibits filed with the court, in civil cases for the years 1994–2010 and probate cases for the years 1989–2010. Counsel for parties are advised that exhibits may be retrieved through July 31. For more information or to claim exhibits, contact Bernabe P. Struck, court manager, at 575-751-8601. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

State Bar News

Attorney Support Groups

- July 3, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- July 10, 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#.
- July 17, 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.

Animal Law Section

Animal Talk: Protecting Pollinators: Laws, Policies, Action

Join Julie McIntyre, pollinator coordinator for the Southwest Region 2 of U.S. Fish and Wildlife, for an Animal Law Section Animal Talk. McIntyre will discuss the importance of pollinators, along with federal, state and tribal protections for pollinators from noon-1 p.m., June 22, at the State Bar Center and by teleconference. Snacks and refreshments will be provided. Contact Breanna Henley at bhenley@nmbar.org to indicate your attendance or to obtain teleconference information.

Bankruptcy Law Section

Bankruptcy Get-Together

Join the Bankruptcy Law Section for a get-together at 5:30 p.m., July 21, at Monk's Taproom located at 205 Silver Ave. SW, Ste. G in Albuquerque. Drinks and appetizers will be available for purchase. For more information, contact Section Chair-elect Dan White at dwhite@askewmazelfirm.com.

Criminal Law Section

Telling Your New Mexico Legal Story and Getting it Published

Do you have a story that needs telling? The real questions are, "How do you tell your story? How do you get it published and produced and follow the rules of ethical procedure? How do you avoid being sued?" Jonathan Miller has practiced law in New Mexico since 1988 and has appeared in court (as a lawyer) in every judicial district. He is the author of 12 books, including the upcoming *Luna Law: A Rattlesnake Lawyer novel*. Miller will discuss how to get published in today's changing environment and how to protect oneself from the pitfalls. At the end, Miller will discuss attendees' potential ideas if time permits. Join him from 1:30-2:30 p.m., June 24, at the State Bar Center and by teleconference. Contact Breanna Henley at bhenley@nmbar.org to obtain teleconference information and to R.S.V.P. To submit a question for Miller in advance, visit www.nmbar.org/CriminalLaw. Information given during this event is solely the opinion of the presenter. Information given is not deemed to be an endorsement by the State Bar

Announcing the Membership Compensation Survey Results

Visit **www.nmbar.org/nmbardocs/pubres/reports/2017LawyerCompensationSurvey.pdf** to read the summary results of recent membership compensation survey conducted by Research & Polling. In addition to income, billing rates and methods for various types of practice, the results provide information regarding what services are generally charged to clients, perceived barriers to practicing law in New Mexico and career satisfaction. Six lucky survey takers won the drawing for several $200 and $100 gift certificates! For more information about the survey and the results, email rspinello@nmbar.org.

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

of New Mexico or the Board of Bar Commissioners of the views expressed therein.

Young Lawyers Division

Wills for Heroes Events in Roswell and Farmington

YLD is seeking volunteer attorneys for its Wills for Heroes events in Roswell and Farmington. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Join the YLD from 8:30-noon, June 24, at the Roswell Police Department located at 128 W 2nd St in Roswell. Join the YLD from 9 a.m.-noon, July 8, at the 11th Judicial District Attorney's Office located at 335 S Miller Ave in Farmington. Volunteers should arrive at 8 a.m. for breakfast and orientation. Contact YLD Region 3 Director Anna Rains at acrains@sbcw-law.com to volunteer for the Roswell WFH. Contact YLD Region 1 Director Evan Cochnar at ecochnar@da.state.nm.us to volunteer for the Farmington WFH. Please indicate if you are able to bring a Windows laptop or if you will need on provided for you. Paralegal and law student volunteers are also needed to serve at witnesses and notaries.

UNM

Law Library

Hours Through Aug. 20

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.

Holiday Closures

May 29: Memorial Day

July 4: Independence Day

Public Citator Notice

As of July 1, UNM's University Libraries will no longer provide LexisNexis Academic, a publicly accessible version of Lexis that includes Shepard's citator. The UNMSOL Library will continue to provide Westlaw PRO on select library computer terminals. Westlaw PRO is a public patron version of Westlaw that includes KeyCite.

Other Bars

First Judicial District Bar Association

CLE Luncheon with Kevin Washburn

The First Judicial District Bar Association's next luncheon will be noon–1:30 p.m., June 26, at the Santa Fe Hilton. Kevin K. Washburn will present "Enlisting Tribal Governments in Public Lands Management," a discussion of the laws authorizing tribal contracts and the practical challenges for tribes and the federal government in implementing these initiatives in the public lands context. The price of admission is $15 for members and $20 for non-members. Arrive early to get signed in for CLE credit. For more information or to R.S.V.P., contact Mark Cox at mcox@hatcherlawgroupnm.com. R.S.V.P. by June 22 with your bar number.

New Mexico Defense Lawyers Association

Nominations for Annual Awards

The New Mexico Defense Lawyers Association is now accepting nominations for the 2017 NMDLA Outstanding Civil Defense Lawyer and the 2017 NMDLA Young Lawyer of the Year awards. Nomination forms are available on line at www.nmdla.org or by contacting NMDLA at nmdefense@nmdla.org or 505-797-6021. Deadline for nominations is July 28. The awards will be presented at the NMDLA Annual Meeting Luncheon on Sept. 29, at the Hotel Chaco, Albuquerque.

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

Other News

Workers' Compensation Administration

Notice of Vacancy

The Director of the New Mexico Workers' Compensation Administration hereby announces the vacancy of an administrative law judge effective July 1 due to the retirement of Judge David Skinner. The primary location of the position is in Albuquerque with travel throughout the state. The agency is currently accepting applications and will begin the review process June 26. The application process will be ongoing until filled. For additional information about this position, visit www.workerscomp.state.nm.us. The Workers' Compensation Administration is an equal opportunity employer.

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 June 9, 2017

PUBLISHED OPINIONS

No. 35161	1st Jud Dist Santa Fe CV-15-763, M GZASKOW v PERA (affirm)	6/5/2017
No. 33985	12th Jud Dist Otero CR-13-460, STATE v Z MONTGOMERY (reverseand remand)	6/6/2017
No. 33623	2nd Jud Dist Bernalillo CR-01-2738, STATE v F YAZZIE (affirm)	6/7/2017
No. 35064	5th Jud Dist Lea JQ-10-15, CYFD v DONNA E and HARLEY E (reverse and remand)	6/8/2017

UNPUBLISHED OPINIONS

No. 35402	9th Jud Dist Curry CR-14-588, STATE v M MARTINEZ (reverse)	6/5/2017
No. 35838	1st Jud Dist Santa Fe CV-12-2361, CITIMORTGAGE v J GARFIELD (affirm)	6/5/2017
No. 35979	5th Jud Dist Eddy JQ-13-16, CYFD v ELAINE B (affirm)	6/5/2017
No. 35992	11th Jud Dist San Juan CR-16-55, STATE v D WILLIE (reverse)	6/5/2017
No. 36051	3rd Jud Dist Dona Ana CR-15-374, STATE v J DELGADO (affirm)	6/5/2017
No. 36126	11th Jud Dist San Juan CR-15-747, STATE v P VANWINKLE (reverse)	6/6/2017
No. 34502	2nd Jud Dist Bernalillo CR-08-3543, CR-08-4173, STATE v C HERNANDEZ(affirm)	6/7/2017
No. 35166	2nd Jud Dist Bernalillo CV-08-3459, WM SPECIALTY v G JOHNSON (reverse)	6/7/2017
No. 35938	2nd Jud Dist Bernalillo CR-10-4638, CR-13-1248, CR-15-11, STATE v T MONTOYA (affirm)	6/8/2017
No. 35948	2nd Jud Dist Bernalillo CR-12-5868, STATE v K AGUILAR (reverse)	6/8/2017

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

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 company holds an "Excellent (A or A-)" or better rating from A.M. Best Company.

We have all heard advertising slogans like the "you are in good hands" and "like a good neighbor" regarding casualty insurers. The issue of financial stability is also an important factor to consider when purchasing professional liability insurance coverage. A number of us have witnessed the insolvency of professional liability carriers and it is a messy and drawn out process. It is particularly scary for professionals facing a malpractice claim during a period when the insolvency of the insurer is resolved.

To help avoid such eventualities, the State Bar and the LPLI Committee suggest you consider the financial strength of a potential professional liability insurer. To that end, we suggest your professional liability insurer holds an "Excellent (A or A-)" rating or better from A.M. Best.

What is A.M. Best?

According to the A.M. Best website, the A.M. Best Company reports, among other things, on the financial stability of insurers and the insurance industry. It is the oldest and most widely recognized provider of ratings, financial data and news with an exclusive insurance industry focus. A.M. Best rates more than 3,500 companies in over 80 countries worldwide. A.M. Best's Credit Ratings are recognized as a benchmark for assessing a rated organization's financial strength as well as the credit quality of its obligations.

What are A.M. Best ratings regarding insurance companies?

Their website also states, that A.M. Best's Financial Strength Rating ("FSR") is an opinion of an insurer's financial strength and ability to meet its ongoing insurance policy and contract obligations. An FSR is not assigned to a specific insurance policy or contract and does not address any other risk, such as an insurer's claims handling or payment policy or procedure. Below is A.M. Best's explanation its FSR rating scale.

Best's Financial Strength Rating (FSR) Scale

Rating Categories	Rating Symbols	Rating Notches*	Category Definitions
Superior	A+	A++	Assigned to insurance companies that have, in our opinion, a superior ability to meet their ongoing insurance obligations.
Excellent	A	A-	Assigned to insurance companies that have, in our opinion, an excellent ability to meet their ongoing insurance obligations.
Good	B+	B++	Assigned to insurance companies that have, in our opinion, a good ability to meet their ongoing insurance obligations.
Fair	B	B-	Assigned to insurance companies that have, in our opinion, a fair ability to meet their ongoing insurance obligations. Financial strength is vulnerable to adverse changes in underwriting and economic conditions.
Marginal	C+	C++	Assigned to insurance companies that have, in our opinion, a marginal ability to meet their ongoing insurance obligations. Financial strength is vulnerable to adverse changes in underwriting and economic conditions.
Weak	C	C-	Assigned to insurance companies that have, in our opinion, a weak ability to meet their ongoing insurance obligations. Financial strength is very vulnerable to adverse changes in underwriting and economic conditions.
Poor	D	-	Assigned to insurance companies that have, in our opinion, a poor ability to meet their ongoing insurance obligations. Financial strength is extremely vulnerable to adverse changes in underwriting and economic conditions.

**Each Best's Financial Strength Rating Category from "A+" to "C" includes a Rating Notch to reflect a gradation of financial strength within the category. A Rating Notch is expressed with either a second plus "+" or a minus "-".*

Contact with a live representative is available.

When you are shopping for insurance and once you have decided which insurance product you want, it is valuable to be able to speak with a representative of the company to answer your questions. While email is not a poor method to get questions answered, it should not be the only way that an insurance company will communicate and answer your questions.

As important as the method of communication is, whether responses to your questions are timely and accurate is equally as important. In any event, you should insist on being able to meet or talk with an adjustor or other trained claims person to respond to your questions about a potential or actual claim or, possibly, how to deal with a pending situation which could avoid a claim altogether.

LAW DAY 2017

THE 14TH AMENDMENT

TRANSFORMING

AMERICAN DEMOCRACY

LAW DAY is held annually on May 1 to celebrate the rule of law. Law Day underscores how law and the legal process contribute to the freedoms that all Americans share. This year, the American Bar Association chose to celebrate the 14th Amendment with the theme: Transforming American Democracy. The Albuquerque Bar Association celebrated the occasion with their annual luncheon on May 2 at the Hyatt Regency Albuquerque. Hon. M. Christina Armijo, Chief Judge of the U.S District Court for the District of New Mexico, was the keynote speaker. She led the audience through several interesting cases where the 14th Amendment has been instrumental.

Chief Judge M. Christina Armijo

Through the theme, Armijo explored its origins, evolution and current application. In addition to celebrating this year's theme, the Law Day luncheon always includes a remembrance of attorneys who have passed in the last year. Hon. Justice Charles W. Daniels, then-Chief Justice of the New Mexico Supreme Court, read the list of In Memoriam.

Front row: Sitara Haynes, Juliette Wheelock, Natalia Corwell, Karla Poblano-Rodriguez. Back row: David Berlin (attorney coach), Cariann Lee, Lexxus Salazar, Jacob Millen, Douglas Goodfellow (teacher sponsor), and Robert Berlin (assistant coach)

In addition to exploring important law topics, the luncheon is an opportunity to celebrate young minds. The 2017 Gene Franchini Mock Trial Champions from Volcano Vista High School in Albuquerque were recognized. Kristen Leeds, director of Center for Civic Values, and David Berlin, Albuquerque attorney and one of the team's attorney coaches, spoke on behalf of the team. The team competed in the national championship in May.

Learn more at **www.civicvalues.org**.

Back row: essay contest author Ian Bezpalko, contest judges Hon. Mateo S. Page and Hon. Frank A. Sedillo, and teacher winner Trey Smith. Front row: student winners Gina Sanchez, Olivia Taylor, and Maya Handly.

Next, Sean FitzPatrick, chair-elect of the Young Lawyers Division, introduced the State Bar Student Essay Contest. This year's theme mirrored the Law Day theme and students discussed the constitutionality of a mandatory camp for high school dropouts. Modrall Sperling Roehl Harris & Sisk PA sponsors the contest each year and the firm's Treasurer Earl DeBrine presented the prizes to the winners: first place winner Gina Sanchez and Teacher winner Trey Smith, East Mountain High School in Sandia Park; second place winner Olivia Taylor, Los Alamos High School; and third place winner Maya Handly, Centennial High School in Las Cruces.

Read the winning essays at **www.nmbar.org/EssayContest**.

From left to right: Hon. Frank A. Sedillo, student winner Armand Martinez and teacher Rebekah Weems, student winners Caleb Schuh, Shanti Rosen, Claire Mirkes, Zack Ifverson, teacher sponsor Andrew Barrow, and Rory Dunagan.

Finally, Bernalillo County Metropolitan Court's Judge Frank Sedillo presented the winners of the Breaking Good Video Contest. The video contest is presented by the State Bar Legal Services and Programs Committee. Students submitted videos demonstrating who needs legal services in our community and why. Prizes were presented to: first place winner Armand Martinez,and teacher winner Su Hudson, Public Academy for the Performing Arts in Albuquerque; second place winner Joshua Galovin, Mayfield High School in Las Cruces; and third place winning team "Barrow's Little Achievers," Media Arts Collaborate Charter School in Albuquerque.

Watch the winning videos at **www.nmbar.org/BreakingGood.**

Community Veterans Court Open House

Join the Bernalillo County Metropolitan Community Veteran's Court team for an informational luncheon. Learn about the collaborative effort of court supervision and treatment providers who work together to assure the best possible outcome for Veterans and the community.

Thursday, June 22, 2017
Noon–1 p.m.
Bernalillo County Metropolitan Court
3rd Floor – Courtroom 300
Refreshments will be provided

Legal Education

June

27 **Complete Trust Course**
7.0 G
Live Seminar, Albuquerque
Halfmoon Education
www.halfmoonseminars.com

28 **DTSA: Protecting Employer Secrets After the New Defend Trade Secrets Act**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Best and Worst Practices in Ethics and Mediation (2016)**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **The Rise of 3-D Technology - What Happened to IP? (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

July

2–6 **CLE at Sea**
10.0 G, 2.0 EP
Live Seminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Protecting Consumers Against Fraudulent or Unfair Practices**
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

12 **Technical Assistance Seminar**
6.0 G
Live Seminar, Albuquerque
U.S. Equal Employment Opportunity Commission
602-640-4995

18 **Techniques to Restrict Shareholders/LLC Members: The Organizational Opportunity Doctrine, Non-Competes and More**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Natural Resource Damages**
10.0 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

20 **Default and Eviction of Commercial Real Estate Tenants**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Annual Rocky Mountain Mineral Law Institute**
13.0 G, 2.0 EP
Live Seminar, Santa Fe
Rocky Mountain Mineral Law Foundation
www.rmmlf.org

21 **Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice and More**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Commercial Paper: Drafting Short-Term Notes to Finance Company Operations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Current Developments in Employment Law**
17.5 G, 1.0 EP
Live Seminar, Santa Fe
ALI-CLE
www.ali-cle.org

27 **Evidence and Discovery Issues in Employment Law**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27-29 **24th Annual Advanced Course: Current Developments in Employment Law**
17.5 G, 1.0 EP
Live Webcast/Live Seminar, Santa Fe
American Law Institute
www.ali-cle.org/CZ002

27–29 **2017 Annual Meeting—Bench & Bar Conference**
12 total CLE credits (with possible 8.0 EP)
Live Seminar, Mescalero
Center for Legal Education of NMSBF
www.nmbar.org

August

4 **Drugs in the Workplace (2016)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Effective Mentoring—Bridge the Gap (2015)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **2017 ECL Solo and Business Bootcamp Parts I and II**
3.4 G, 2.7 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **2016 Trial Know-How! (The Reboot)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Lawyers Ethics in Employment Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Tricks and Traps of Tenant Improvement Money**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Gross Receipts Tax Fundamentals and Strategies**
6.0 G
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com

11 **Diversity Issues Ripped from the Headlines (2017)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **Attorney vs. Judicial Discipline (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **New Mexico DWI Cases: From the Initial Stop to Sentencing (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

14 **Traffic Law**
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davidmiles.com

17 **10th Annual Legal Service Providers Conference**
10.0 G, 2.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **The Use of "Contingent Workers"—Issues for Employment Lawyers**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

September

8 **Practical Succession Planning for Lawyers**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Techniques to Avoid and Resolve Deadlocks in Closely Held Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **The Ethics of Representing Two Parties in a Transaction**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Ethical Considerations in Foreclosures**
1.0 EP
Live Seminar, Albuquerque
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w

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Dated June 9, 2017

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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
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective June 21, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

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		
5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123	Public inspection and sealing of court records	03/31/2017
5-204	Amendment or dismissal of complaint, information andindictment	07/01/2017
5-401	Pretrial release	07/01/2017
5-401.1	Property bond; unpaid surety	07/01/2017
5-401.2	Surety bonds; justification of compensated sureties	07/01/2017
5-402	Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
5-403	Revocation or modification of release orders	07/01/2017
5-405	Appeal from orders regarding release or detention	07/01/2017
5-406	Bonds; exoneration; forfeiture	07/01/2017
5-408	Pretrial release by designee	07/01/2017
5-409	Pretrial detention	07/01/2017
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
6-401	Pretrial release	07/01/2017
6-401.1	Property bond; unpaid surety	07/01/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-403	Revocation or modification of release orders	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017
6-408	Pretrial release by designee	07/01/2017
6-409	Pretrial detention	07/01/2017
6-506	Time of commencement of trial	07/01/2017
6-703	Appeal	07/01/2017
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
7-401	Pretrial release	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017
7-406	Bonds; exoneration; forfeiture	07/01/2017
7-408	Pretrial release by designee	07/01/2017
7-409	Pretrial detention	07/01/2017
7-506	Time of commencement of trial	07/01/2017
7-703	Appeal	07/01/2017

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
8-401	Pretrial release	07/01/2017
8-401.1	Property bond; unpaid surety	07/01/2017
8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
8-403	Revocation or modification of release orders	07/01/2017
8-406	Bonds; exoneration; forfeiture	07/01/2017
8-408	Pretrial release by designee	07/01/2017
8-506	Time of commencement of trial	07/01/2017
8-703	Appeal	07/01/2017

Criminal Forms

9-301A	Pretrial release financial affidavit	07/01/2017
9-302	Order for release on recognizance by designee	07/01/2017
9-303	Order setting conditions of release	07/01/2017
9-303A	Withdrawn	07/01/2017
9-307	Notice of forfeiture and hearing	07/01/2017
9-308	Order setting aside bond forfeiture	07/01/2017
9-309	Judgment of default on bond	07/01/2017
9-310	Withdrawn	07/01/2017
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

12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017
12-205	Release pending appeal in criminal matters	07/01/2017
12-307.2	Electronic service and filing of papers	07/01/2017*
12-314	Public inspection and sealing of court records	03/31/2017

* Voluntary electronic filing and service in any new or pending case in the Supreme Court may commence on May 1, 2017.

Disciplinary Rules

17-202	Registration of attorneys	07/01/2017
17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service.	07/01/2017

Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	07/01/2017

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.

FILED

U.S. Court of Appeals
10th Circuit

June 7, 2017

Elisabeth A. Shumaker
Clerk of the Court

In re STEPHEN D. AARONS

No. 17-813

ORDER

Before TYMKOVICH, Chief Judge,
KELLY, and PHILLIPS, Circuit Judges.

This matter is before us on Attorney Stephen D. Aarons' *Motion to Reconsider Order*. On May 31, 2017, the court ordered Mr. Aarons disbarred following his removal as counsel of record from Appeal No. 17-2032 based on his failure to competently represent his client and to comply with the court's rules and directives in that appeal. He did not timely respond to the court's order to show cause in this disciplinary proceeding and the matter was adjudicated as uncontested. *See* 10th Cir. R. Addendum III § 7. On May 31, 2017, Mr. Aarons filed his motion to reconsider, requesting reconsideration of the disbarment order based on his mistaken belief that he had timely responded to the disciplinary show cause order.

Upon consideration of the *Motion to Reconsider*, and in light of the unusual circumstances in this case, we grant the *Motion to Reconsider*, direct the clerk to file Mr. Aarons' response to the disciplinary show cause order, and vacate the order of disbarment. However, upon consideration of Mr. Aarons' response to the show cause order, we continue to be of the view that discipline is warranted.

Mr. Aarons was retained counsel for the appellant in Appeal No. 17-2032 but did not pay the $505.00 filing fee by the deadline. He did later file a motion on behalf of his client for permission to appeal *in forma pauperis*, which he also docketed as a motion to appoint counsel. Given the incongruence between the presence of retained counsel and a request to proceed *in forma pauperis*, and in an attempt to decipher Mr. Aarons' intent in filing the pleading, the court directed him to pay the filing fee or file a compliant motion to withdraw with clarification regarding the appellant's financial circumstances so the court could consider the appointment of counsel. Mr. Aarons failed to respond to this order and to the follow-up order warning him that failure to respond would result in the issuance of a disciplinary show cause order.
In his response to the disciplinary show cause order, Mr. Aarons contends that he was competently representing his client because he did not intend to withdraw and was focusing on drafting the opening brief. But the fact remains that Mr. Aarons completely failed to respond in any way to two explicit orders of the court, and he never addressed payment of the filing fee.

Ignoring a court directive is never a viable course of action and, Mr. Aarons' protestations to the contrary notwithstanding, failure to respond to a court order is not competent representation. Mr. Aarons has a disciplinary history in this court, this being the third time he has been referred to discipline for issues involving his failure to competently represent his clients and to timely comply with the court's rules and directives.

In light of this history, we hereby reprimand Mr. Aarons and order him to pay a monetary sanction on disciplinary grounds of three times $505.00 for a total of $1515.00. This sanction is Mr. Aarons' personal responsibility. It shall not be reimbursed by the appellant in Appeal No. 17-2032, directly or indirectly. *See* 10th Cir. R. Addendum III, § 3.3. The sanction is payable by check to "Elisabeth A. Shumaker, Clerk," should identify this case number and name, and must be received in the office of the clerk **within 14 days** of the date of this order. Mr. Aarons shall not be permitted to appear as counsel of record in any proceeding in this court until the sanction is paid in full.

Mr. Aarons' request to be reinstated as counsel of record in Appeal No. 17-2032 is denied.

The clerk is directed to provide a certified copy of this order to the New Mexico Supreme Court and to the United States District Court for the District of New Mexico. The clerk shall also provide a copy of this order to the appellant in Appeal No. 17-2032.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Jane K. Castro
Counsel to the Clerk

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-030

No. 34,253 (filed December 1, 2016)

L.D. MILLER CONSTRUCTION, INC.,
Plaintiff-Appellee,
v.
STEPHEN KIRSCHENBAUM and BARBRO KIRSCHENBAUM,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
FRANCIS J. MATHEW, District Judge

THOMAS E. CHISM
Albuquerque, New Mexico
for Appellee

TODD A. COBERLY
COBERLY & MARTINEZ, LLLP
Santa Fe, New Mexico
for Appellants

Opinion

M. Monica Zamora, Judge

{1} In this case, we are presented with the question—can an arbitrator designated by the parties to conduct an arbitration be disqualified by the American Arbitration Association (AAA) for cause if the parties do not also explicitly agree in writing that the arbitrator shall function as a non-neutral arbitrator? The district court ruled that he could be disqualified. We affirm.

I. PROCEDURAL AND FACTUAL BACKGROUND

{2} In the fall of 2011, Stephen and Barbro Kirschenbaum hired L.D. Miller Construction Company (Miller) to do concrete and framing work for a garage and run-in shed on the Kirschenbaums' property in Santa Fe, New Mexico. Miller contends the construction project was finished in late fall. However, the Kirschenbaums were apparently unsatisfied with the work and hired other contractors to correct Miller's work.

{3} On December 2, 2011, Miller presented the Kirschenbaums with an invoice for $28,576.46, for its work on their property. The Kirschenbaums paid Miller $15,000 toward the balance owed, leaving an outstanding balance of $13,576.46, which the Kirschenbaums refused to pay. There is an allegation that the Kirschenbaums also kept possession of a table saw, tools, and other building materials belonging to Miller valued at approximately $800.

{4} On December 20, 2011, Miller and the Kirschenbaums entered into a written Arbitration Agreement. The full text of the Agreement is:

> Contractor and Owner agree to binding arbitration under AAA (American Arbitration Association) for any dispute (claim, work, material, etc.) between Contractor and Owner at the following location:
> Hacienda del Cerezo
> 100 Camino del Cerezo
> Santa Fe, New Mexico 87506
> (And including or for: Hacienda del Cerezo, Ltd., Stephen/Barbro Kirschenbaum)
> Contractor and Owner agree that the designated arbitrator shall be Roger Lengyel [(Lengyel)].

{5} In April 2013 Miller filed a complaint in the First Judicial District Court against the Kirschenbaums for debt and money due concerning its work on the Kirschenbaums' property. The Kirschenbaums were served with a summons by certified mail. Though the Kirschenbaums responded informally to Miller's counsel, they did not enter a timely appearance or file a timely answer or other responsive pleading with the district court. In June 2013 Miller filed a motion for default judgment. No response to the motion was filed by the Kirschenbaums and as a result, the district court issued an order granting Miller's motion for default judgment, finding the Kirschenbaums liable for $16,153.98.

{6} Represented by counsel, the Kirschenbaums promptly filed an answer to Miller's original complaint alleging as an affirmative defense that Miller's court action was barred by the Arbitration Agreement. The Kirschenbaums also moved to compel arbitration and to vacate the default judgment. In November 2013, the court issued an order granting the Kirschenbaums' motion to vacate the default judgment and granting their motion to compel arbitration. In particular, the order stated:

> [T]he [o]rder of [d]efault [j]udgment entered on July 2, 2013[,] is vacated, these proceedings are stayed, and that the parties are compelled to arbitrate this matter pursuant to the terms of the December [20,] 2011[, A]rbitration [A]greement, requiring binding arbitration under the [AAA] with . . . Lengyel as the designated arbitrator.

{7} Apparently the arbitration did not progress smoothly. On January 22, 2014, Miller sent a letter to AAA requesting disqualification and removal of Lengyel as arbitrator "pursuant to [AAA] Rule []20" for refusing to perform his duties pursuant to required procedures, as well as for lack of independence, i.e., non-neutrality, which was not part of the parties' agreement. In particular, Miller alleged that "ground rules" set by Lengyel to govern the arbitration were mere "recitals" of the Kirschenbaums' desire to delay the arbitration process, exclude AAA intervention, and limit communication between the parties and Lengyel. Miller also asserted that it had become apparent that Lengyel was having ex parte communications with the Kirschenbaums.

{8} In response, the Kirschenbaums sent a letter to the AAA contending that Lengyel could not be disqualified pursuant to the district court's order compelling arbitration and designation of Lengyel as the parties' arbitrator. In addition, the Kirschenbaums argued that the parties intended to appoint a non-neutral arbitrator not subject to AAA Rule 20.

{9} AAA responded to Miller's complaint stating: "[i]n light of the [c]ourt [o]rder requiring binding arbitration under the [AAA] with . . . Lengyel as the designated arbitrator, [Miller] may seek clarification from the [c]ourt as to AAA's authority to address this request for removal." Miller filed a motion

with the district court seeking clarification of its order, arguing that all AAA rules had been incorporated into the Arbitration Agreement. At the hearing on Miller's motion to clarify, the court observed:

> When I look at the contract that the parties entered into for the purpose of arbitration, I note that Mr. [Lengyel] is designated but not required [to serve as arbitrator]. What is required is that the parties arbitrate under the rules of AAA. . . .
>
> If it were the other way around then potentially the AAA rules would have no meaning. If the arbitrator could as a designated arbitrator . . . ignore or avoid those rules at his discretion then that would put at issue the AAA rules and their requirement of the AAA rules under the parties' agreement.

{10} The court issued an order on June 4, 2014,[1] concluding that "it was the parties' intent that the arbitration between them would be subject to all the rules and procedures of the [AAA], including the rule regarding disqualification of an arbitrator[,]" and ordered that AAA "has the authority to disqualify designated arbitrator . . . Lengyel, if the AAA determines that such a disqualification is warranted under its rules and procedures."

{11} On July 17, 2014, the Kirschenbaums moved, pro se, for reconsideration of the June 4 order. In pertinent part, the Kirschenbaums argued, "[n]ot disclosed by prior counsel was that both parties specifically discussed and agreed to use . . . Lengyel, an architect very well known to them both—which was paramount to anything else. Using the procedures of the AAA was merely an adjunct to their desire to have Mr. Lengyel decide any dispute." The Kirschenbaums requested an order finding the AAA rule providing for the removal and substitution of an arbitrator did not apply to the parties' arbitration and order the parties to arbitrate with Lengyel serving as arbitrator. In September 2014 AAA decided to remove Lengyel from the parties' case.

{12} Two months later, in November 2014, the court denied the Kirschenbaums' motion for reconsideration. The Kirschenbaums filed their notice of appeal on November 14, 2014.

II. DISCUSSION

A. The Kirschenbaums' Appeal of the District Court's Order Denying Their Motion for Reconsideration Was Timely Filed

{13} The Kirschenbaums themselves note a potential problem with the timeliness of their appeal and the related issue of the scope of our review. The Kirschenbaums' motion for reconsideration was filed more than thirty days after the order it addressed. As such, the motion was filed after the deadline for filing an appeal to this Court from the district court's order. *See* Rule 12-201(A)(2) NMRA. Our case law is clear that Rule 1-060(B) NMRA motions brought "to correct an error of law by the district court must be filed before the expiration of the time for appeal." *Deerman v. Bd. of Cty. Commr's*, 1993-NMCA-123, ¶ 16, 116 N.M. 501, 864 P.2d 317; *see Resolution Tr. Corp. v. Ferri*, 1995-NMSC-055, ¶ 9, 120 N.M. 320, 901 P.2d 738. *Deerman* held that district courts lack authority to grant relief pursuant to a "belated" Rule 1-060(B) motion, absent extraordinary circumstances. *Deerman*, 1993-NMCA-123, ¶¶ 21, 23-24. Given the holding of *Deerman*, Miller argues that the Kirschenbaums' notice of appeal is too late to capture the order entered in June 2014 and the appeal should thus be dismissed as untimely. We disagree.

{14} As we noted in *Wells Fargo Bank, N.A. v. City of Gallup*, 2011-NMCA-106, ¶ 8, 150 N.M. 706, 265 P.3d 1279, the rule stated in *Deerman* is not absolute. In *Wells Fargo Bank*, we made clear that the rule in *Deerman* should be applied "only when the [Rule 1-060(B)(1)] motion is used as a substitute for a direct appeal or as a means of circumventing the time period allowed for a direct appeal." *Wells Fargo Bank*, 2011-NMCA-106, ¶ 8.

{15} The timeliness of the Kirschenbaums' motion for reconsideration was not litigated below. We are left with the real-world circumstance that the district court considered the motion and denied it on its merits. Part of the Kirschenbaums' motion for reconsideration detailed the breakdown of their relationship with the attorney who represented them at the hearing on Miller's motion, and their unsuccessful efforts to hire new counsel before they filed their pro se motion. Given their unrebutted circumstance, the district court would have been within its discretion to determine that the late motion was not simply an attempt to evade the time for appeal. Applying our presumption in the correctness of district court actions, we will not engage an independent assessment of the Kirschenbaums' motives. *Cf. Farmers, Inc. v. Dal Mach. & Fabricating, Inc.*, 1990-NMSC-100, ¶ 8, 111 N.M. 6, 800 P.2d 1063 ("The presumption upon review favors the correctness of the [district] court's actions."). This approach also furthers our policy of construing our appellate rules liberally so as to determine appeals on their merits. *See Wakeland v. N.M. Dep't of Workforce Solutions*, 2012-NMCA-021, ¶ 7, 274 P.3d 766 (noting that this Court has adopted a "liberal approach" to the interpretation of the Rules of Appellate Procedure "in order to further a policy of hearing appeals on their merits rather than dismissing them on technical grounds").

{16} "Appellate courts will not interfere with the action of the [district] court in vacating a judgment [under Rule 1-060(B)]" or with an appeal from the denial of a Rule 1-060(B) motion, except upon a showing of abuse of discretion by the district court. *Phelps Dodge Corp. v. Guerra*, 1978-NMSC-053, ¶ 20, 92 N.M. 47, 582 P.2d 819; *James v. Brumlop*, 1980-NMCA-043, ¶ 9, 94 N.M. 291, 609 P.2d 1247. The district court did not abuse its discretion in ruling on the Kirschenbaums' motion to reconsider under Rule 1-060(B). For the foregoing reasons, we hold the Kirschenbaums timely appealed the district court's denial of their motion to reconsider.

B. The District Court Did Not Abuse Its Discretion in Denying the Kirschenbaums' Motion to Reconsider

1. Standard of Review

{17} Generally, we review a district court's ruling under Rule 1-060(B) for abuse of discretion. *Edens v. Edens*, 2005-NMCA-033, ¶ 13, 137 N.M. 207, 109 P.3d 295 (holding that to reverse the district court under an abuse of discretion standard "it must be shown that the court's ruling exceeds the bounds of all reason or that the judicial action taken is arbitrary, fanciful, or unreasonable" (omission, internal quotation marks, and citation omitted)). However, insofar as determining whether the district court abused its discretion in denying the Kirschenbaums' Rule 1-060(B) motion requires construction of the Arbitration Agreement, we

[1]On June 2, 2014, the court issued an order permitting counsel for the Kirschenbaums to withdraw from the case for professional reasons.

proceed de novo. *See Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 27, 150 N.M. 398, 259 P.3d 803 (noting that the interpretation of an arbitration agreement is an issue the appellate courts review is de novo); *W. Farm Bureau Ins. Co. v. Carter*, 1999-NMSC-012, ¶ 4, 127 N.M. 186, 979 P.2d 231 (recognizing that the contract interpretation is a matter of law reviewed de novo).

{18} Arbitration agreements are a species of contract, subject to the principles of New Mexico contract law. *Horne v. Los Alamos Nat'l Sec., L.L.C.*, 2013-NMSC-004, ¶ 16, 296 P.3d 478. Accordingly, we apply New Mexico contract law in interpretation and construction of the Arbitration Agreement. We note that the parties do not argue that the Arbitration Agreement is ambiguous. Neither of them provided any testimony as to their intent or thoughts with regard to the wording of the Agreement. As such, our job is a pure legal question of interpretation and construction: what do the words of the Agreement mean and what is their legal effect? *See Fashion Fabrics of Iowa, Inc. v. Retail Inv'rs Corp.*, 266 N.W.2d 22, 25 (Iowa 1978) (noting that the "[i]nterpretation involves ascertaining the meaning of contractual words; construction refers to deciding their legal effect").

2. Rivera Does Not Control

{19} The Kirschenbaums contend that pursuant to the *Rivera* "integral[-]ancillary" test, the second clause of the Arbitration Agreement, designating Lengyel "shall" serve as the parties' arbitrator, is integral, while the first clause, providing the parties agree to arbitrate "under AAA" unmodified by mandatory contractual language like "must" or "shall," is ancillary. We disagree.

{20} The Supreme Court's application of the "integral[-]ancillary" test in *Rivera* was limited to the fact-specific issue of the unavailability of a designated institutional arbitration provider that the parties clearly intended to use exclusively in resolving disputes between them. *Rivera* addressed a consumer dispute arbitration agreement involving the National Arbitration Forum (NAF) in the wake of the dissolution of its consumer dispute division. 2011-NMSC-033, ¶ 20. The language of the parties' agreement demonstrated an intent to designate NAF as the arbitration provider and to arbitrate exclusively under NAF's rules and procedures. *Id.* ¶¶ 3, 29 (noting that the agreement provided the parties "shall" agree they arbitrate under NAF rules and procedures). The NAF rules and procedures included a rule providing that only an NAF arbitrator could administer the NAF rules and procedures. *Id.* ¶ 35. The Court reasoned that the parties' intent and the fact that only an NAF arbitrator could administer the NAF rules demonstrated that arbitration under NAF was integral to the parties' agreement. *Id.* ¶ 38. However, because of NAF's consumer dispute division's dissolution, it was impossible for the parties to arbitrate under NAF's rules and procedures. *Id.* ¶ 35. As a result, the Court determined it would violate an integral term of the parties' agreement to compel them to arbitrate disputes under an arbitration provider other than NAF and the NAF rules and procedures. *Id.* ¶¶ 55-56 (striking the parties' arbitration provisions in their entirety).

{21} *Rivera* did not consider the fact-specific issues presented in this case: interpretation of arbitration agreement terms naming an individual arbitrator to resolve the parties' disputes "under AAA," an existing institutional arbitration provider with a set of rules controlling proceedings held under its auspices. In contrast, only one material provision was at issue in *Rivera*—NAF "shall" serve as the parties' arbitration provider. A particular arbitrator was not named in the agreement to serve as the parties' designated arbitrator, and so the Court did not consider this variable in *Rivera*. Here, AAA is available to administer the parties' arbitration, unlike *Rivera*. Also, the AAA rules provide that in certain circumstances, a designated arbitrator may be disqualified and replaced. Interpretation of the Arbitration Agreement in this case goes beyond the scope of the Court's analysis in *Rivera*. *See State v. Sanchez*, 2015-NMSC-018, ¶ 26, 350 P.3d 1169 (holding that "cases are not authority for propositions not considered" (internal quotation marks and citation omitted)). Accordingly, we decline to adopt the Kirschenbaums' interpretation of the Arbitration Agreement under *Rivera*. To do so would unreasonably treat as equivalent an unavailable arbitration provider and a disqualifiable arbitrator. *State ex rel. Udall v. Colonial Penn Ins. Co.*, 1991-NMSC-048, ¶ 30, 112 N.M. 123, 812 P.2d 777 ("In construing a contract, the law favors a reasonable rather than unreasonable interpretation.").

{22} In addition, *Rivera* did not use the integral-ancillary test in *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000), to gauge the relative importance of two contract provisions; rather, it used it to determine whether a contract condition was so central to the parties' intent in contracting that to arbitrate without it would be to "eviscerate the core of the parties' agreement." *Rivera*, 2011-NMSC-033, ¶ 38 (internal quotation marks and citation omitted). Interpretations of the meaning and relative value of contract provisions is best left to established contract interpretation and construction doctrines, with their overarching goal of enforcing contracts according to their terms, and eschewing the nullification of provisions.

C. The District Court Correctly Interpreted the Terms of the Arbitration Agreement

{23} The district court found in its June 4, 2014, order "[t]hat it was the parties' intent that the arbitration between them would be subject to all the rules and procedures of the [AAA], including the rule regarding disqualification of an arbitrator." We agree with the district court that this is the legal effect of the parties' chosen language.

{24} The first clause of the Arbitration Agreement provides: "Contractor and Owner agree to binding arbitration under AAA." The most reasonable construction of this language is that "under AAA" incorporates all of the AAA rules normally applicable to proceedings held under AAA's auspices. *See ConocoPhillips Co. v. Lyons*, 2013-NMSC-009, ¶ 67, 299 P.3d 844 (holding that a court may "impl[y] a reasonable term to cover" an omitted logistical issue if the implied term is consistent with the language of the agreement (internal quotation marks and citation omitted)); Am. Arb. Ass'n, Rule 2 (2009) (providing when parties agree to arbitrate under the AAA "[r]ules, or when they provide for arbitration by the AAA and an arbitration is initiated under th[e AAA r]ules, they thereby authorize AAA to administer the arbitration"). Additionally, there is no language of limitation in the Arbitration Agreement demonstrating intent to limit the scope of the AAA rules' application to the parties' arbitration. *Cf. Centex/Worthgroup, LLC v. Worthgroup Architects, L.P.*, 2016-NMCA-013, ¶ 18, 365 P.3d 37 (holding that "where a subcontract contains words of definite limitation, those words are given effect and the incorporation of the prime contract is limited accordingly" (internal quotation marks and citation omitted)). As a result, the language of the Arbitration Agreement reasonably demonstrates an intent to arbitrate under all of the AAA rules.

{25} The second clause of the Arbitration Agreement provides: "Contractor and Owner agree that the designated arbitrator shall be . . . Lengyel." Employment of the language that the parties agree they shall designate Lengyel as their arbitrator is strong evidence of intent to appoint the specified person. *See Rivera*, 2011-NMSC-033, ¶ 31; Am. Arb. Ass'n, Rule 15(a) (2009) (providing that "[i]f the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed"). However, there is no indication in the language of the Arbitration Agreement that the parties intended that Lengyel would serve as a non-neutral arbitrator contrary to American Arbitration Association, Rule 20 (2009). *See ConocoPhillips*, 2013-NMSC-009, ¶ 67 (recognizing that the "[c]ourts cannot create a new agreement for the parties" (internal quotation marks and citation omitted)). Under the AAA rules, arbitrators are required to adhere to all of the AAA rules generally. Am. Arb. Ass'n, Rule 8 (2009). Arbitrators, including arbitrators specifically designated by the parties, are presumed and expected to function as neutral arbitrators, unless the parties specifically agree in "writing" that a specifically designated arbitrator shall function as a non-neutral arbitrator. Am. Arb. Ass'n, Rule 20(a) (2009). In all other circumstances, an arbitrator, including an arbitrator specifically designated by parties in an agreement, may be disqualified under the AAA rules for non-neutrality. Am. Arb. Ass'n, Rule 20 (2009). As recognized by the district court, "[i]f the arbitrator could . . . ignore or avoid [the] rules at his discretion then that would put at issue the AAA rules" and potentially cause them to have no meaning. Lengyel should thus be treated as a neutral arbitrator based on the absence of an explicit agreement to appoint him as a non-neutral arbitrator.

{26} The Kirschenbaums argue the parties intended to designate Lengyel as a non-neutral arbitrator based on both parties' long relationships with him, his background as an architect, and his lack of legal or mediation training. However, there is simply no evidence in the record and no indication in the Arbitration Agreement that such a proposition made it into the final agreement. Accordingly, Lengyel will be treated as a neutral arbitrator. Lengyel was not explicitly denominated as a non-neutral arbitrator, and the Kirschenbaums failed to demonstrate by clear and convincing evidence he was intended to serve as a non-neutral arbitrator. *See Borst v. Allstate Ins. Co.*, 2006 WI 70, ¶ 43, 717 N.W.2d 42 (holding that the arbitrators—whether designated by the parties or not—are presumed to be neutral and impartial in the absence of clear and convincing evidence in the parties' agreement to the contrary).

D. The District Court's Denial of the Kirschenbaums' Motion for Reconsideration Was Not Unreasonable, Arbitrary, or Fanciful

{27} The most natural construction of the Arbitration Agreement is that the parties intended to arbitrate disputes between them concerning Miller's construction work under all of the AAA rules, with Lengyel serving as a neutral arbitrator. To interpret the Arbitration Agreement designating Lengyel to trump the AAA rule permitting replacement of a neutral arbitrator in certain circumstances would risk rendering the AAA Rules meaningless. Accordingly, we hold that the district court did not act unreasonably, arbitrarily, or fanciful in denying the Kirschenbaums' motion for reconsideration. *See Edens*, 2005-NMCA-033, ¶ 13.

III. CONCLUSION

{28} For the foregoing reasons, we affirm.

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

M. MONICA ZAMORA, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
LINDA M. VANZI, Judge

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-031

No. 34,321 (filed December 7, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MANUEL GALLEGOS-DELGADO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
STAN WHITAKER, District Judge

HECTOR H. BALDERAS
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MARIS VEIDEMANIS
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Santa Fe, New Mexico
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L. HELEN BENNETT
L. HELEN BENNETT, P.C.
Albuquerque, New Mexico
for Appellant

Opinion

Linda M. Vanzi, Judge

{1} Defendant Manuel Gallegos-Delgado is an undocumented immigrant who pled guilty to drug possession and driving while under the influence of alcohol in exchange for the State agreeing not to oppose a conditional discharge of the drug charge. Federal removal proceedings were then initiated against Defendant, pursuant to the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101-1537 (2012), and he was permanently deported. Defendant subsequently filed a motion to withdraw his guilty plea, arguing that his attorney had only advised him that a possible consequence of pleading guilty would be deportation, not that he would be barred re-entry into the United States forever. The district court's denial of Defendant's motion to withdraw his plea is the subject of this appeal. The question presented to this Court is whether Defendant's attorney rendered deficient representation by failing to advise him of the specific immigration consequences that would follow as a result of his guilty plea, and if so, whether Defendant was prejudiced by her deficient performance. We answer these questions in the affirmative and, accordingly, reverse and remand.

BACKGROUND

{2} On May 30, 2013, Defendant pleaded guilty to possession of cocaine and driving while under the influence of alcohol in exchange for dismissal of other charges against him and a probated sentence. Part of the plea agreement was that the State would not oppose a conditional discharge of the possession charge. After pleading guilty, Defendant received a conditional discharge of the possession charge, was placed on supervised probation, and received a deferred sentence. At the plea and sentencing hearing, during the plea colloquy, the district court judge inquired as to whether there were any immigration issues, and Defendant's attorney said she "explained [the] immigration consequences for [Defendant and the] possibility of deportation" and that he had consulted with an immigration attorney. The judge then specifically asked Defendant if his attorney had explained the immigration consequences of entering the guilty plea and that he may be deported. Defendant said that she had and that he nevertheless wanted to go forward with the plea. Defendant additionally stated that he had an opportunity to discuss the terms and conditions of the plea agreement with a separate immigration attorney. The judge explained to Defendant that if he successfully completed the terms of his probation, the possession charge would be discharged and he would no longer have it on his record. Of note, a conditional discharge operates like a conviction under federal immigration law, *see* 8 U.S.C. § 1101(48)(A), unlike in New Mexico, where a conditional discharge is not an adjudication of guilt. NMSA 1978, § 31-20-13(A) (1994).

{3} Defendant subsequently violated the terms of his probation, and the State moved to revoke Defendant's probation. The district court appears to have retracted the conditional discharge for the possession charge, and an amended judgment and sentence was entered on November 20, 2013.

{4} Because Defendant violated New Mexico law, he was subject to deportation under the INA. *See* 8 U.S.C. §§ 1182(a)(2)(A), 1226(a)(1), 1227(a)(1)(B). On November 25, 2013, Defendant was taken into custody by the Department of Homeland Security (DHS), and removal proceedings were initiated against him. An Immigration Judge (IJ) determined that Defendant was ineligible for cancellation of removal and adjustment of status under the INA because of his possession conviction. The IJ also denied Defendant's request for voluntary removal because Defendant's controlled substance conviction prohibited Defendant from ever lawfully returning to the United States.

{5} Defendant then filed a motion for relief from judgment and to withdraw his guilty plea. In the motion, Defendant alleged that he was not advised that he would be deported as a result of his guilty plea and stated that he would not have entered into the plea agreement if he had known the specific immigration consequences of his plea. The district court held a hearing on the motion on October 20, 2014. At the hearing, Defendant testified that he had already been deported and he was currently in the custody of the United States Immigrations and Customs Enforcement (ICE). Defendant further testified that he would not have entered the guilty plea had he known all the immigration consequences. On cross-examination, Defendant admitted that his attorney told him he "would" be deported, despite asserting in an affidavit she said he "might" be deported. On re-direct, Defendant confirmed that he knew he was going to be deported but said he did not know about the other immigration consequences that would result from the plea, such as being forbidden from ever returning to the United States. During his testimony, Defendant clarified that he never had actually hired an immigration attorney; he had only spoken to one briefly on the phone, and she had not discussed the specific consequences that might emerge from pleading guilty because she had not reviewed his case.

{6} Defendant's trial attorney, who had since withdrawn as Defendant's counsel, also testified at the hearing, and she said that the evidence against Defendant was "strong" and he was "adamant" in taking the plea. Furthermore, she testified that she specifically told Defendant that the conditional discharge "would not have the same effect with immigration" as it would with other clients. However, she could not remember the exact language she used and whether she told Defendant "he would most definitely, to a certainty, be deported" or whether he "can be deported." The following is additional relevant testimony from Defendant's trial attorney, Courtney Aronowsky, at the hearing:

> [Prosecutor:] Ms. Aronowsky, you're aware that since 2004, you are required to advise your clients of the specific immigration consequences of each charge to which they're pleading; isn't that correct?
> [Ms. Aronowsky:] Yes.
> [Prosecutor:] But you did not do that in this case?
> [Ms. Aronowsky:] Yes, right.
> . . . .
> [Mr. Shattuck:] Were you aware that he would be denied . . . bond while he was going through a removal proceeding?
> [Ms. Aronowsky:] No.
> [Mr. Shattuck:] As result of this plea?
> [Ms. Aronowsky:] No.
> [Mr. Shattuck:] Were you aware that he would be denied the right for voluntary removal and to return to the country as result of this plea?
> [Ms. Aronowsky:] No.
> [Mr. Shattuck:] Were you aware that he would be denied any attempts to adjust his status as a result of entering this plea?
> [Ms. Aronowsky:] No.
> [Mr. Shattuck:] And were you aware that he would never be able to reapply for reentry into this country?
> [Ms. Aronowsky:] No.
> [Mr. Shattuck:] And since you were not aware of those issues, were you able to discuss them with him?
> [Ms. Aronowsky:] No.

{7} Ultimately, the district court denied Defendant's motion, finding that Defendant had been advised of the consequences of entering the guilty plea and that there was no evidence Defendant had wanted to go to trial. The district court also found that "[D]efendant's trial counsel was not deficient in her representation[,]" and that the "record fails to provide any proof that [D]efendant was either leaning toward trial by any pre-conviction statements or actions, or that it was a viable option he was considering." This appeal followed.

DISCUSSION

Jurisdiction

{8} We begin by addressing whether this Court has jurisdiction in the present matter. We conduct our review of the jurisdictional issue de novo. *State v. Gutierrez*, 2016-NMCA-077, ¶ 17, 380 P.3d 872. Defendant requested appellate relief under Rule 1-060(B)(4) NMRA, which is the proper procedural mechanism for a person no longer in state custody to appeal an allegedly void judgment. *See State v. Tran*, 2009-NMCA-010, ¶ 16, 145 N.M. 487, 200 P.3d 537. We have previously held that this Court has jurisdiction when a defendant wishes to "challenge his underlying criminal conviction when in the custody of ICE" if the Defendant has filed a Rule 1-060(B)(4) motion. *State v. Favela*, 2013-NMCA-102, ¶ 11, 311 P.3d 1213, *aff'd*, 2015-NMSC-005, 343 P.3d 178 (*Favela II*). Although a conditional discharge is not a conviction under New Mexico law, *see* § 31-20-13(A); *State v. Harris*, 2013-NMCA-031, ¶ 6, 297 P.3d 374, it has that effect under federal immigration law when an alien has pled guilty and a judge has ordered some type of punishment, even if a formal adjudication of guilt has been withheld. 8 U.S.C. § 1101(48)(A).

{9} Defendant was in ICE custody at the time he filed this appeal and alleges that the judgment entered against him is void. Because Defendant's guilty plea to the possession charge operated as a conviction under federal law and was thus the basis for the IJ finding that he was ineligible for cancellation of removal, adjustment of status, voluntary removal, and that Defendant could never lawfully return to the United States, we conclude that this Court has jurisdiction pursuant to Rule 1-060(B).

The Motion to Withdraw the Guilty Plea

{10} Defendant claims that the district court abused its discretion in denying his motion to withdraw his guilty plea because his attorney rendered deficient representation by not advising him of the specific immigration consequences and, as a result, he was prejudiced. A district court's denial of a defendant's motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. Tejeiro*, 2015-NMCA-029, ¶ 4, 345 P.3d 1074, *cert. denied*, 2015-NMCERT-005, 367 P.3d 440. An abuse of discretion happens "when a district court's ruling is clearly erroneous or based on a misunderstanding of the law[.]" *Id.* (internal quotation marks and citation omitted). The district court also abuses its discretion"when the undisputed facts establish that the plea was not knowingly and voluntarily given." *State v. Paredez*, 2004-NMSC-036, ¶ 5, 136 N.M. 533, 101 P.3d 799 (internal quotation marks and citation omitted).

{11} Under the Sixth Amendment of the United States Constitution, defendants in criminal cases have the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686-88 (1984). This right extends to plea negotiations. *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 16, 130 N.M. 179, 21 P.3d 1032; *see Hill v. Lockhart*, 474 U.S. 52, 56 (1985). In order to be valid, a guilty plea must be voluntary and intelligent. *State v. Garcia*, 1996-NMSC-013, ¶ 9, 121 N.M. 544, 915 P.2d 300. If a defendant pleads guilty based on the advice of his or her attorney, whether the plea was voluntary and intelligent depends on whether the attorney's assistance in counseling the guilty plea was ineffective. *Tejeiro*, 2015-NMCA-029, ¶ 5. Because a motion to withdraw a guilty plea connected to an allegation of ineffective assistance of counsel is a mixed question of law and fact, we review Defendant's claim de novo. *See id.*; *see also Gutierrez*, 2016-NMCA-077, ¶ 33.

{12} In *Strickland*, the United States Supreme Court adopted a two-part test applicable to ineffective assistance of counsel claims. Under the test, a defendant seeking to make a claim for ineffective assistance of counsel has the burden of demonstrating: (1) "counsel's performance was deficient[,]" and (2) "the deficient performance prejudiced the defense." 466 U.S. at 687; *State v. Hester*, 1999-NMSC-020, ¶ 9, 127 N.M. 218, 979 P.2d 729. To prevail on an ineffective assistance of counsel claim, both prongs of the *Strickland* test must be met. *Tejeiro*, 2015-NMCA-029, ¶ 6.

1. Deficient Performance

{13} With respect to guilty pleas that have deportation and other immigration consequences, our Supreme Court held in *Paredez* that "an attorney's non-advice to an alien defendant on the immigration consequences of a guilty plea would . . . be deficient performance." 2004-NMSC-036,

¶ 16. The *Paredez* Court further held:

If a client is a non-citizen, the attorney must advise that client of the *specific immigration consequences* of pleading guilty, *including* whether deportation would be virtually certain. Proper advice will allow the defendant to make a knowing and voluntary decision to plead guilty. . . . An attorney's failure to provide the required advice regarding immigration consequences will be ineffective assistance of counsel if the defendant suffers prejudice by the attorney's omission.

Id. ¶ 19 (emphases added).

{14} Since *Paredez*, this Court has interpreted the law as "requir[ing] criminal defense counsel . . . to read and interpret federal immigration law and specifically advise the defendant whether a guilty plea will result in almost certain deportation." *State v. Carlos*, 2006-NMCA-141, ¶ 14, 140 N.M. 688, 147 P.3d 897. It is not sufficient to advise a client that he or she will be deported, but rather, the criminal defense attorney must inform the client with specificity what the immigration consequences might be. *See Tejeiro*, 2015-NMCA-029, ¶ 7 ("An attorney who failed to meet his affirmative burden in providing his client with information about deportation risks would thus necessarily satisfy the first prong of the *Strickland* analysis.").

{15} In the instant case, the record is not illuminating on the question of whether Defendant's trial attorney informed him that it was a virtual certainty he would be deported. Defendant alleges that his attorney only told him he "could" be deported. But during the hearing on the motion to withdraw his guilty plea, Defendant testified both that his attorney told him he "would" be deported and that he "possibly" would be deported. To complicate matters, Defendant's trial attorney testified that she could not recall the precise language used, i.e., whether she said he would definitely be deported or whether he could be deported. Because of the ambiguous evidence, we are unable to conclude whether Defendant's attorney properly advised him it was a virtual certainty he would be deported. However, that is not the end of our inquiry.

{16} *Paredez* not only requires defense attorneys to advise their clients if they will be deported but also demands that attorneys "conduct an individualized analysis of the apparent immigration consequences for [a d]efendant." *See Carlos*, 2006-NMCA-141, ¶ 15. Here, the specific immigration consequences confronting Defendant, in addition to the risk of deportation, are substantial. For example, as a general rule, the Attorney General "may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien . . . has not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3). However, Defendant's controlled substance conviction limits the application of this section. *See United States v. Valenzuela-Escalante*, 130 F.3d 944, 945-46 (10th Cir. 1997) (holding that possession of a controlled substance is an "aggravated felony" as defined by 18 U.S.C. § 924(c)(2) and 8 U.S.C. § 1101(43)(B)). Similarly, the Attorney General's ability to adjust Defendant's residency status under 8 U.S.C. § 1255a(b)(1)(C)(ii) is negated by a felony conviction. *See id.* ("The Attorney General shall adjust the status of any alien provided lawful temporary resident status under subsection (a) of this section to that of an alien lawfully admitted for permanent residence if the alien . . . establish[es] that he . . . has not been convicted of any felony . . . in the United States.").

{17} Furthermore, Defendant would generally be allowed to voluntarily depart the United States at his own expense rather than being subject to removal proceedings. 8 U.S.C. § 1229c(a)(1). However, Defendant's controlled substance conviction renders him "deportable" under Section 1229c(a)(1), thus limiting this option. *See id.* (limiting the option to self-deport to aliens "not deportable under [8 U.S.C. S]ection 1227(a)(4)(B)").

{18} Most significantly, Defendant's controlled substance conviction results in a permanent bar to reentry to the United States. 8 U.S.C. § 1182(a) provides, in pertinent part, that "aliens who are inadmissible . . . are ineligible to receive visas and ineligible to be admitted to the United States. 8 U.S.C. § 1182(a)(2)(A)(i)(II) provides that an alien "convicted of . . . a violation of . . . any law or regulation of a State . . . relating to a controlled substance . . . is inadmissible." *See Berrum-Garcia v. Comfort*, 390 F.3d 1158, 1165 (10th Cir. 2004) (stating that "aliens [that] are deemed 'inadmissible' [are] ineligible even to apply for a visa that would permit them to legally enter the United States"); *People v. Am. Sur. Ins. Co.*, 92 Cal. Rptr. 2d 216, 219 (Cal. Ct. App. 2000) (applying 8 U.S.C. § 1182(a)(2) and noting that "review of present federal immigration law indicates that the statutory bars to legal reentry are nearly, if not flatly, impregnable for a convicted drug trafficker"). As discussed above, the conditional discharge of Defendant's drug possession charge operates as a conviction under federal law. *See* 8 U.S.C. § 1101(48)(A)(i) ("The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where . . . the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt[.]"). Defendant's attorney acknowledged that she did not advise Defendant of these additional immigration consequences. Indeed, Defendant testified that at the time of his guilty plea he was not aware that deportation would be permanent or that he would suffer other severe immigration consequences. Therefore, Defendant's guilty plea was not voluntary and intelligent as required by the Sixth Amendment. *See Garcia*, 1996-NMSC-013, ¶ 9; *see also Favela II*, 2015-NMSC-005, ¶ 14 ("It is imperative that every defendant entering into a plea agreement which could result in immigration consequences possesses a clear understanding of those immigration consequences.").

{19} In addition, in its order denying Defendant's motion, the district court found that "[D]efendant testified that his trial attorney advised him of the specific consequence of deportation." As previously discussed, however, Defendant's attorney was required to advise him, not only of the consequence of deportation, but also of other immigration ramifications. *See Carlos*, 2006-NMCA-141, ¶ 15 ("We read *Paredez* to require *at a minimum* that the attorney advise the defendant of the specific federal statutes which apply to the specific charges contained in the proposed plea agreement and of consequences, as shown in the statutes, that will flow from a plea of guilty."). But Defendant's attorney testified that she was not aware of the full breadth of immigration consequences Defendant faced. As such, she was unable to give Defendant advice regarding the relevant federal statutes and such non-advice constituted deficient performance. *See Paredez*, 2004-NMSC-036, ¶ 16; *see also Carlos*, 2006-NMCA-141, ¶ 16 (explaining that a resident alien's defense attorney "should have analyzed and discussed with [the d]efendant the federal statute relating to cancellation of removal" and other immigration consequences beyond the issue of deportation). Defendant has thus met the first prong of the ineffective assistance of counsel test.

2. Prejudice

{20} The second prong of the *Strickland* test requires Defendant to demonstrate that his "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Paredez*, 2004-NMSC-036, ¶ 20 (internal quotation marks and citation omitted). In order to establish such prejudice, the defendant must show that there is a "reasonable probability" he would not have taken the plea had the attorney's representation regarding the specific immigration consequences been constitutionally adequate. *Id.* (internal quotation marks and citation omitted). "Our recent jurisprudence adopts 'a broad approach to how a defendant can demonstrate prejudice.' " *Tejeiro*, 2015-NMCA-029, ¶ 14 (quoting *Favela*, 2013-NMCA-102, ¶ 20). The approach used by this Court is not mechanical, but rather, is determined by the facts of each case. *Favela*, 2013-NMCA-102, ¶ 19.

{21} To show that a defendant would have rejected a plea deal had his attorney advised him of the specific immigration consequences beyond deportation, a defendant must show that his decision to decline the plea bargain "would have been rational under the circumstances." *Tejeiro*, 2015-NMCA-029, ¶ 14 (internal quotation marks and citation omitted). Generally, however, prejudice may not be shown by the defendant's self-serving statements alone and requires some corroborating evidence. *Id.* ¶ 15. Corroborating evidence may include: (1) the defendant's pre-conviction statements or actions that indicate the defendant preferred to go to trial, *Patterson*, 2001-NMSC-013, ¶ 30; (2) the strength of the State's case, *id.* ¶ 31; (3) evidence of a defendant's connections to the United States, *see Carlos*, 2006-NMCA-141, ¶ 21; and (4) the defendant's post-conviction behavior that demonstrates he probably would not have pled guilty had he received competent advice, *see Tejeiro*, 2015-NMCA-029, ¶¶ 15, 28-30. However, these factors are not exclusive. *Id.* ¶ 15 ("Our courts have placed no limit on the types of relevant evidence a defendant may provide to demonstrate that he would have rejected the plea if given appropriate advice.").

{22} In denying Defendant's motion to withdraw his guilty plea, the district court found that there was no pre-conviction evidence that demonstrated Defendant wanted to proceed to trial. To the contrary, however, Defendant's pre-conviction efforts to engage an immigration attorney demonstrated Defendant's intent to avoid immigration consequences. Moreover, upon the advice of the immigration attorney, Defendant got married specifically in an attempt to avoid deportation. Had Defendant been properly advised, therefore, there is a "reasonable probability" he would have rejected the plea deal, *see Paredez*, 2004-NMSC-036, ¶ 20 (internal quotation marks and citation omitted), as evidenced by his pre-conviction actions that show he was concerned about the immigration consequences of his case and actively took steps aimed at reducing the consequences. *See Tejeiro*, 2015-NMCA-029, ¶ 27 (stating that a defendant's pre-conviction efforts to make the district court aware of his immigration situation strongly supported the proposition that the defendant would have rejected the plea deal if his counsel's representation had been constitutionally adequate).

{23} Although the strength of the State's case appears to have been "strong," the district court did not consider the harshness of the consequences Defendant was confronted with as a result of his guilty plea, *see Paredez*, 2004-NMSC-036, ¶ 22, which likely would have informed Defendant's decision to proceed to trial had he known the full scope of immigration ramifications. The district court placed particular emphasis on the fact that Defendant had consulted an immigration attorney who had advised him not to plead guilty and he nevertheless decided to take the plea deal, presumably because of the strength of the State's case against him. Defendant, however, testified that he had not actually hired the immigration attorney and that she did not know the specific circumstances of his case. More importantly, Defendant very well may have made a strategic decision to go against the non-individualized advice of the immigration attorney in order to avoid being subjected to both incarceration and deportation. *See id.* ("It is conceivable that a non-citizen might opt to plead guilty and accept deportation to avoid serving a prison sentence, rather than face the possibility of both incarceration and deportation."). But had Defendant's attorney properly advised him of the severe and specific immigration consequences beyond deportation, it "would have been rational under the circumstances" for Defendant to reject the plea deal so that he could have an opportunity to be acquitted and, therefore, an opportunity to avoid the harsh immigration consequences that awaited him. *See Tejeiro*, 2015-NMCA-029, ¶ 14 (internal quotation marks and citation omitted).

{24} With respect to the evidence of Defendant's connections to the United States, Defendant has a wife and young child here. The record also indicates that Defendant alleges that he came to the United States in 1998 as a child and has lived here continuously since then. Defendant's connections to the United States and the fact that he has lived here his entire adult life could have been deciding factors in his decision to plead guilty given he was unaware of the more severe immigration consequences he faced. *See Carlos*, 2006-NMCA-141, ¶ 21. Such evidence of attachment to this country may further corroborate Defendant's claims. *See Tejeiro*, 2015-NMCA-029, ¶ 24 (explaining that where a defendant had lived with his family in the United States for over a decade, such connection to this country provided corroborating evidence that the defendant would not have accepted a plea deal had he known the immigration consequences).

{25} Finally, we note that the district court did not consider Defendant's post-conviction behavior, which suggests that Defendant would not have taken the plea deal had he fully known the immigration consequences he faced. Our jurisprudence recognizes that a defendant's post-conviction behavior may be relevant in the prejudice analysis. *Id.* ¶ 28. "In *Paredez*, our Supreme Court held that the speed of a defendant's post-conviction reaction upon discovering the adverse immigration consequences of his guilty plea could be considered when weighing the reasonable probability that he would have acted differently with competent advice." *Tejeiro*, 2015-NMCA-029, ¶ 28. Here, Defendant's appeal to the Board of Immigration Appeals was remanded on May 27, 2014. Two days later Defendant signed an affidavit stating, "[H]ad [I] know[n] that I would surely face immigration consequences and be stripped of any rights to contest deportation [or] removal, I would not have entered into the [plea] agreement and would not have [pled] guilty." Less than a month later, on June 24, 2014, Defendant filed his motion for relief from judgement and to withdraw his guilty plea with the district court. Defendant's post-conviction actions, although not conclusive, *see id.* ¶ 29, strongly indicate that Defendant would have rejected the plea deal if his attorney had not provided deficient representation. Indeed, Defendant's continued effort to fight the immigration consequences,

including this very appeal, further supports the conclusion that Defendant was prejudiced.

{26} In sum, we hold that Defendant's attorney rendered deficient performance by not informing Defendant of the specific immigration consequences, beyond deportation, that would arise from his guilty plea. We further hold that the constitutionally inadequate representation prejudiced Defendant because he would not have taken the plea deal had he known the full scope of severe immigration consequences he faced as a result of pleading guilty.

CONCLUSION

{27} For the foregoing reasons, we reverse the district court's denial of Defendant's motion to set aside his guilty plea and remand for further proceedings consistent with this opinion.

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

LINDA M. VANZI, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
J. MILES HANISEE, Judge

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-032

No. 34,662 (filed December 29, 2016)

JEFFREY MARTINEZ,
Petitioner-Appellant/Cross-Appellee,
v.
ANGELA MARTINEZ,
Respondent-Appellee/Cross-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
MATTHEW J. WILSON, District Judge

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Santa Fe, New Mexico

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Opinion

Jonathan B. Sutin, Judge

{1} Husband Jeffrey Martinez and Wife Angela Martinez were divorced in May 2011. In the years following the divorce, the parties have engaged in a protracted and bitter dispute over alleged violations relating to court orders, spousal support, child support, property division, and attorney fees. Husband appeals (1) a contempt order entered by the district court in connection with enforcement of a spousal support award to Wife and awarding attorney fees to Wife, (2) the admission of certain evidence during the hearing on spousal support, and (3) the denial of Husband's request for additional time to file proposed findings of fact and conclusions of law and a motion to reconsider. Wife cross-appeals a grant of summary judgment denying her community property interest in settlement proceeds Husband obtained in an insurance bad faith action that alleged the mishandling of a claim involving community property insured with community funds. **{2}** We reverse and remand based on Wife's cross-appeal and hold that the district court erred in categorizing the settlement proceeds as Husband's separate property. Because our decision regarding the cross-appeal necessarily impacts the parties' respective finances, we similarly reverse the spousal support award and remand for further proceedings. Although our reversal obviates the need to address Husband's first and third issues on appeal, we address these arguments regarding certain discretionary matters for clarity on remand.

BACKGROUND

{3} Because our opinion focuses primarily on Wife's claim that she is entitled to a share of the settlement proceeds as community property, we limit our recitation of the facts in this background section to those necessary for narrative clarity and to address the relevant issues. Additional facts will be discussed throughout as needed.

{4} Husband filed for divorce from Wife in April 2010. In the months following Husband's filing, the parties made numerous allegations against each other. Husband alleged, among other averments, that Wife violated the temporary domestic order (1) when she took Husband's clothes to Goodwill, (2) when Wife and the parties' son allegedly assaulted Husband's parents, and (3) when Wife and their children broke a television and left it outside of the marital residence. Wife alleged, among other averments, that Husband (1) abused her and their children, (2) removed community property from the marital home while she and the children were not present, and (3) misconstrued the altercation between their son and Husband's parents and that, in fact, their son was defending himself and Wife.

{5} During this same tumultuous time frame, in June 2010, Husband's truck, which was community property, was destroyed in a fire. Husband made a claim with Allstate Insurance Company, which was denied. Thereafter, Husband filed a bad faith claim against Allstate, *see State Employees Credit Union v. Martinez and Martinez v. Allstate Insurance Co.*, No. D-101-CV-2011-00694, which ultimately settled on September 7, 2011.

{6} During the course of this case, Wife had numerous attorneys and, at times, appeared pro se. When appearing pro se, Wife struggled to comply with the Rules of Evidence and Rules of Civil Procedure, and the district court attempted to explain concepts and otherwise accommodate Wife when possible. An initial merits hearing spanned four days, in part to give Wife an opportunity to review documents and consult with an attorney.

{7} After a hearing in May 2011, the district court entered a decree of dissolution of marriage and entered an order on the distribution of community assets, community personal property, child support, and spousal support. In the order, filed in June 2011, the court addressed the marital residence, college fund accounts, certain debts and offsets, tax refunds, when the parties may respectively claim their minor son as a dependent, and a retirement account. The court took under advisement the child support and spousal support issues.

{8} In July 2012 Wife filed a motion to impose a constructive trust on insurance proceeds and to set child and spousal support. In the motion, Wife addressed a $250,000 insurance check from Allstate in settlement of Husband's bad faith claim and for damage to his truck. Wife argued that the truck was community property, that the settlement proceeds were community property, and that one-half of those proceeds should have been awarded to her. She sought a constructive trust for one-half of the insurance proceeds, minus attorney fees, and requested that those funds be placed in the court registry. In her motion, Wife also sought spousal and child support awards in appropriate amounts and asked that those awards be retroactive.

{9} In response to Wife's motion, Husband argued that Wife "actively conspired with Allstate and, as a result, her conduct, in part, played a significant part in the

decision by Allstate to wrongfully deny [Husband's] property damage claim under his Allstate automobile policy." Husband accused Wife of committing "deceptive actions against the community" as evidenced by a letter from Allstate to Wife regarding Husband's claim. In the letter, Allstate employee Bruce Zinzer sent Wife a copy of an inventory submitted by Husband with a note to Wife that stated, "Let me know what you think." Husband also asserted that Wife, when interviewed by Allstate's counsel regarding Husband's insurance claim,[1] stated that Husband was making a fraudulent claim for personal property damages. Husband argued that Wife's conduct was aimed at denying the community the benefit of insurance coverage under the Allstate policy, and thus she should not be rewarded with any interest in the proceeds.

{10} Husband's arguments related to the insurance proceeds dispute rested primarily on *Delph v. Potomac Insurance Co.*, 1980-NMSC-140, 95 N.M. 257, 620 P.2d 1282. In *Delph*, the husband and the wife owned a residence as community property. *Id.* ¶ 1. The residence was insured, and both the husband and the wife were named on the policy. *Id.* The wife moved out of the residence and sought a dissolution of marriage. *Id.* ¶ 2. The wife was granted a divorce and was awarded the residence. *Id.* However, prior to entry of the divorce decree, the husband intentionally set fire to the residence. *Id.* ¶ 3. The wife sought to recover proceeds under the insurance policy for damages caused by the fire, but the insurer refused to pay her, contending that "[the] husband's arson constituted 'fraud' by the 'insured' and that the policy coverage was vitiated by the fraud." *Id.* ¶ 4. The wife brought suit against the insurer, the district court granted summary judgment in favor of the insurer, and the wife appealed. *Id.* ¶ 5. On appeal, our Supreme Court considered "whether the intentional burning of a community residence by one spouse will bar recovery by an innocent spouse under a fire insurance policy issued to the community." *Id.* ¶ 6.

{11} In resolving the question on appeal, the Court in *Delph* first held that the residence as well as the insurance policy were community property. *Id.* ¶ 9. The Court, however, noted that "New Mexico courts have segregated out the interests of spouses in community property when it has been necessary to do so in order to avoid injustice." *Id.* ¶ 10. Because the parties' interests were capable of being segregated, the Court held that "both logic and justice mandate[d] that the [wife] should be entitled to recover up to one-half of the policy limits in order to compensate for the damages resulting from the fire." *Id.* ¶ 11. The Court stated that in New Mexico a "spouse who commits a separate tort is individually liable for damages arising out of the tort and that the separate (or segregable) assets of the innocent spouse may not be reached to satisfy the liability arising out of the tort." *Id.* ¶ 13. In deciding whether the husband's act of arson was a "community" or "separate" tort, the *Delph* Court considered "whether the act in which the spouse was engaged at the time of the tort was one which was of actual or potential benefit to the community." *Id.* ¶ 14. According to the Court, "[i]f it was of benefit, the tort is a 'community' tort, and thus a community debt. If the activity in which the tortfeasor spouse was engaged was of no benefit to the community, the tort is a 'separate' tort and thus a separate debt." *Id.* Ultimately, the Court held that the husband did not engage in an act that could be of benefit to the community, and thus his responsibility for the fraud was separate. *Id.* While the husband's actions could void his own interest in the policy, his fraud "[did] not void the policy as to [the wife]." *Id.*

{12} Husband argued that *Delph* controlled the issue in this case because Wife's alleged scheming with Allstate could not be construed to benefit the community. He argued that Wife had a bad motive, and her sole purpose in "surreptitiously communicating" with Allstate was to harm Husband. Husband's position was that Wife's actions voided her interest in the Allstate policy, and thus voided her interest in the settlement proceeds.

{13} In her reply, Wife admitted that she informed Allstate of Husband's practice of forging documents, but also asserted that Husband had initially told authorities that Wife and/or the parties' sons were responsible for having damaged the truck. She argued that because neither party was ultimately found to have caused the loss to the property and because Wife did not commit a tort, *Delph* did not apply.

{14} The district court issued an order on Wife's motion regarding the settlement proceeds in November 2012. The court found that the truck was a community asset but did not have sufficient information regarding whether Wife's conduct contributed to Allstate's decision to deny Husband's property damage claim. The court continued taking the matter of spousal support under advisement pending a decision regarding the Allstate proceeds. At the same time, the court stated that "[a]s a separate issue and regardless of whether [Wife] has a right to share in the Allstate proceeds, the [c]ourt is not foreclosing spousal support, pending testimony of [Wife's] treating doctors as to her physical condition and her ability to earn income."

{15} Thereafter, in May 2013, Wife filed a motion for summary judgment on division of the Allstate settlement funds. Wife set out fifty-four statements of fact. Among those facts were the following. The truck was bought with community funds, was insured with community funds, and both Husband and Wife were named insureds. Bruce Zinzer, the Allstate employee who handled the personal property damage aspect of the claim, reached out to Wife because she was a named insured. When asked about Husband's reputation for honesty, Wife gave her "candid opinion of [Husband's] historical lack of truthfulness, based on examples from her life with [Husband]." Allstate provided Wife with Husband's inventory of items in the truck, and Wife informed Allstate that some of the items would not have been in the truck and that others did not have the value claimed by Husband. When asked by Allstate's attorney, Mark Klecan, during an examination under oath about Husband's reputation for honesty, Wife answered the question by referencing "police reports and an event involving [Husband's] lying to his probation officer." When asked for any other examples or instances of Husband's reputation for honesty or truthfulness, Wife referenced instances where Husband allegedly stole inventory from his employers. Although Klecan stated under oath that Wife's position was the primary reason for the delay in payment, Zinzer did not believe that Wife's input caused the denial of the claim. Wife also highlighted a number of other errors and omissions by Allstate in handling the claim, including Allstate's failure to hire a fire investigator, failure to independently obtain the police report, and failure to respond to Husband's attorney's letters.

[1] In the briefing, Wife refers to her interview as a "statement under oath." In the district court, the interview was referred to as an "examination under oath" or a "statement under oath."

{16} Further, Wife denied playing a significant role in Allstate's denial of the claim and argued that it would be against public policy to force her to unconditionally support Husband's claims in order to be entitled to her share of the proceeds, even when she suspected Husband's claim to be fraudulent. She also argued that Allstate denied the claim because it suspected fraud based on Husband's actions and that any bad faith claims handling by Allstate was largely due to Allstate's failure to adhere to accepted claims-handling protocols in a timely manner. Lastly, Wife argued that *Delph* did not apply because her candor and truthfulness to Allstate is not a deliberate tort that failed to benefit the community.

{17} Husband responded that many of Wife's "facts" were immaterial because Zinzer handled the claim related to the property inside of the truck, not the claim regarding damage to the truck itself. Husband highlighted testimony from Zinzer that Zinzer believed that Wife was "actively working with [him] to get this claim denied[.]" Husband, again relying on *Delph*, argued that the settlement proceeds were not a community asset because Wife's wrongful conduct was intended to deny the community a benefit under the Allstate insurance policy.

{18} In August 2013 the district court denied Wife's motion for summary judgment regarding the settlement proceeds, finding that, but for Wife's actions, Allstate would have had a different take on how to address the claim. It held that because of Wife's cooperation and statements to Allstate, Allstate chose to deny Husband's claim that gave rise to the bad faith action against Allstate. According to the court, a bad faith claim did not exist before Wife's participation, and the bad faith claim arose because of Wife's willing participation. Shortly afterward, in October 2013, the case was reassigned to another district court judge who handled the case up to this appeal.

{19} Husband filed a motion for summary judgment in February 2014 on the Allstate settlement proceeds. In support of his motion, Husband stated that the district court entered an order denying Wife's motion for summary judgment on division of the settlement proceeds, and Husband specifically outlined the findings of the court. Husband again argued that Wife's bad actions prohibited her from claiming a portion of the settlement proceeds. Alternatively, Husband argued that the settlement proceeds were separate property under NMSA 1978, Section 40-3-8(A) (1990). In response, Wife did not dispute Husband's material facts but argued that those facts were not sufficient to give Husband unfettered access to the funds. She incorporated by reference her arguments in her motion for summary judgment as to why the funds should be treated as community property and again disputed the relevance of *Delph*. She argued that while she "respectfully disagreed with the [court's] determination [on her motion for summary judgment], she did not appeal the determination because the funds would be the only source available to satisfy a lump sum [spousal support] award." She also argued that, even accepting Husband's contention that the funds were his separate property by virtue of the court's ruling on Wife's motion for summary judgment as true, the funds could and should be used in granting lump sum spousal support.

{20} During the hearing on spousal support, child support, and the allocation of the settlement proceeds, before the judge to whom the case was reassigned, Wife's attorney indicated that there was no contest as to the nature of the proceeds because "[the original judge] clearly [set] the money over to [H]usband." She stated that, although she thought the prior ruling on the settlement proceeds was "mind-boggling[,]" she did not appeal it because any lump sum spousal support would "have to come from somewhere if [it was] to be made at all." In light of the prior ruling, Wife did not object to the proceeds being treated as Husband's separate property based on the expectation that she would be receiving a lump sum spousal support payment from the proceeds. The court subsequently granted Husband's motion for summary judgment on the settlement proceeds essentially on the same grounds used to deny Wife's motion for summary judgment, adding a handwritten caveat that the proceeds not be used pending the court's decision on spousal support.

{21} After the court took evidence de novo from the parties on the matter of spousal support in August 2014, the court, in November 2014, ordered that Husband pay Wife a lump sum of $42,000 in spousal support, less amounts previously paid, plus $1,000 per month until further order of the court. In December 2014 the district court declined to stay its order awarding spousal support or to grant an extension for Husband to file a motion for reconsideration and requested findings of fact and conclusions of law. In March 2015 the district court entered an order of contempt after granting Wife's motion to show cause for Husband's failure to comply with the court's order for spousal support. Also, in March 2015, the court ordered Husband to pay $10,000 in attorney fees and costs in addition to the attorney fees previously paid by Husband. This appeal followed.

DISCUSSION

I. The Settlement Proceeds

{22} As already indicated, we begin by addressing Wife's cross-appeal because the designation of the settlement proceeds as separate or community property necessarily impacts the appropriateness of the district court's spousal support award, which should be based in part on the parties' relative assets and needs. *See* NMSA 1978, § 40-4-7(E)(2), (4), (6), (7) (1997) (stating that when determining spousal support, the court must consider, in relevant part, "the current and future earnings and the earning capacity of the respective spouses[,]" "the reasonable needs of the respective spouses[,]" "the amount of the property awarded or confirmed to the respective spouses," and "the type and nature of the respective spouses' assets").

{23} The standard of review in this case is complicated. We note that the orders from which Wife appeals are related to summary judgment as to the Allstate settlement proceeds, which we review de novo. *See Beggs v. City of Portales*, 2009-NMSC-023, ¶ 10, 146 N.M. 372, 210 P.3d 798. In general, we review the district court's equitable distribution of assets and liabilities for abuse of discretion. *See Arnold v. Arnold*, 2003-NMCA-114, ¶ 6, 134 N.M. 381, 77 P.3d 285. However, even when the appellate courts "review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo. Accordingly, we may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (alteration, internal quotation marks, and citations omitted). Additionally, while the district court has broad discretion to divide community property, the threshold question of whether settlement proceeds are community property is a question of law that we review de novo. *See Arnold*, 2003-NMCA-114, ¶ 6 ("[T]he threshold question of whether [the h]usband's accumulated vacation leave and sick leave

are community property is a question of law, which we review de novo.").

{24} As we more fully discuss later in this opinion, the district court erred as a matter of law in misapprehending and misapplying *Delph* to the facts of this case and in determining that the settlement proceeds were separate and not community property. Wife, as a co-insured, responded to Allstate's investigative questioning. Nothing in the record, including the court's findings, shows or permitted a rational, reasonable inference that in doing so Wife acted with a malicious or otherwise tortious wrongful intent or motive to deprive the community of a community asset.

A. The Parties' Arguments

{25} We focus on Wife's argument on cross-appeal that as a matter of law her conduct did not deprive her of her community interest in the settlement proceeds.

{26} In arguing that insurance and community property law support her right to share in the bad faith settlement proceeds, Wife points to case law addressing community interests in insurance proceeds. *See Harris v. Harris*, 1972-NMSC-005, ¶¶ 8, 10, 83 N.M. 441, 493 P.2d 407 (holding that "the policy itself, including the right to receive the sum named therein . . . was community property during coverture" and that "[d]ecedent[-husband], being the owner of half of the policies, had the right to dispose of his half interest in the proceeds as he pleased"); *Hickson v. Herrmann*, 1967-NMSC-083, ¶¶ 8, 18, 77 N.M. 683, 427 P.2d 36 (holding that an insurance policy on the life of the parties' minor child bought with community funds during the marriage, though the husband continued to make payments on the policy after divorce, was community property and noting that while "[t]he proceeds were not paid during marriage[,] . . . the right to the proceeds was obtained during marriage[, and that] right was not changed and was not divided upon the divorce"); *In re Miller's Estate*, 1940-NMSC-021, ¶ 12, 44 N.M. 214, 100 P.2d 908 (holding that "the proceeds of an insurance policy obtained after marriage and payable to the estate of the husband is community, because [it was] paid for out of the community funds"); *Dydek v. Dydek*, 2012-NMCA-088, ¶¶ 42, 59, 62, 288 P.3d 872 (holding that the former wife had a sufficient interest in the husband's bad faith claim to justify her request for the court's appointment of a receiver but did not address whether a bad faith action was separate or community property). Wife argues that "insurance law generally holds [that] insurance proceeds arising from a policy owned by both parties belong to the parties equally." She asserts that "because the truck and policy insuring it were both community assets, any recovery for bad faith claims handling likewise derived from the breach by Allstate of a contractual duty owed to the community and should therefore be deemed a community asset."

{27} Wife then argues that even if her communications to Allstate contributed to Allstate's denying payment as to the truck, she is entitled to a community property share in the settlement funds because community property assets are divisible without regard to a respective spouse's fault. She relies on *Medina v. Medina*, 2006-NMCA-042, ¶ 13, 139 N.M. 309, 131 P.3d 696, which held that injecting "an element of moral fault into the rules governing the distribution of community property on divorce might be inconsistent with New Mexico's system of no-fault divorce." Wife also argues that Husband's reliance on *Delph* is misplaced because it is factually distinct from the present case. Specifically, she argues that the co-insured spouse's deliberate act of destruction in *Delph* is different from her warning Allstate as to Husband's dishonesty.

{28} In response, Husband contends the settlement funds are his separate property under Section 40-3-8(A) but that, even if the funds are community property, community property is subject to equitable division. He also argues that the no-fault divorce concept is unrelated to community property division. Husband argues that the cases relied upon by Wife—*Harris*, *Hickson*, and *In re Miller's Estate*—are distinguishable from the present case because they involved life insurance policies whose proceeds were anticipated by the insurance contract, as opposed to car insurance. He also argues that *Dydek* is inapplicable because this Court did not decide whether the bad faith claim in that case was separate or community property, and because, in this case, Wife actively participated with Allstate to defeat Husband's claim. According to Husband, Wife received her community interest in the insurance policy (i.e., one-half the value of the vehicle), but the settlement proceeds were separate property because the settlement was finalized after the entry of the divorce decree.

{29} As to his "equitable division" point, Husband argues that should we determine that the Allstate proceeds are community property, equity must be taken into account, and we must determine that, based on equitable considerations, Wife is not entitled to any part of the beneficial resolution of the insurance claim. He relies on *Delph* and the equitable underpinnings of *Delph* to support his assertion that to permit Wife to benefit from her wrongdoing and receive a share of the settlement funds in any form of an award in the divorce action would be contrary to and thwarts New Mexico public policy. He also responds to Wife's no-fault divorce argument by arguing that no-fault divorce is unrelated to post-petition spousal behavior. According to Husband, Wife conflated the "fault" of the parties in the dissolution of the marriage and the equitable fault the district court assigned to Wife for her post-petition role in defeating Husband's insurance claim. Husband acknowledges that pre-divorce-petition behavior does not impact the division of community property, but argues that Wife's post-petition behavior should be considered in the equitable balance for spousal support.

B. Analysis

{30} We agree with Wife that the law regarding community property supports her assertion that the settlement proceeds are community property. In determining whether Wife is entitled to a portion of the settlement proceeds as community property, it is useful to begin by establishing that the settlement proceeds are presumptively community property and that the statutes do not support Husband's argument that the proceeds are separate property.

{31} "Community property" is defined as "property acquired by either or both spouses during marriage which is not separate property." Section 40-3-8(B). "Separate property" is defined, in relevant part, as "property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage[.]" Section 40-3-8(A)(1). In New Mexico, "[p]roperty acquired during marriage by either husband or wife, or both, is presumed to be community property." NMSA 1978, § 40-3-12(A) (1973). "The party asserting that property acquired during marriage is separate bears the burden of presenting evidence that would rebut the presumption by a preponderance of the evidence." *Hodges v. Hodges*, 1984-NMSC-031, ¶ 6, 101 N.M. 67, 678 P.2d 695.

{32} Husband argues that, regardless of Wife's involvement in the bad faith claim, the settlement proceeds are separate property because he actually received the

proceeds approximately four months after the divorce decree was entered, and thus the property was separate under Section 40-3-8(A)(1). However, Husband's characterization of the settlement proceeds as separate property under the statute is inaccurate under New Mexico law. As highlighted by Wife, insurance proceeds that are paid as a result of a policy that is community property, where that policy was paid for with community funds, are community property. *See Russell v. Russell*, 1990-NMCA-080, ¶¶ 3, 12, 111 N.M. 23, 801 P.2d 93 (holding that, in the context of the wife's personal injury claim and recovery for medical expenses, "the community has an interest in the proceeds of the policy as well as in any recovery from the tortfeasor"); *see also Harris*, 1972-NMSC-005, ¶¶ 6, 9 (holding that "[a]n insurance policy and rights incident thereto (including a right to the proceeds) is property" and noting the parties' agreement that "since the insurance policies were acquired with community funds, they therefore became community property"); *Hickson*, 1967-NMSC-083, ¶¶ 3, 10, 22 (holding that the divorced wife "owned the right to receive the proceeds of [a policy insuring the life of the parties' minor child] as community property" even though the minor child died after the parties were divorced, the husband was named as the first beneficiary in the policy, and the husband paid the premiums from the policy from his separate funds after the divorce); *In re Miller's Estate*, 1940-NMSC-021, ¶ 30 ("The policy of insurance, being acquired subsequent to marriage was unquestionably community property. It was kept alive by the payment of the premiums with community funds, and the proceeds resulting from such contract . . . remain as community property to be distributed as such.").

{33} Allstate's alleged bad-faith-claim handling occurred while the parties were married and impacted both parties, who undisputedly had a community interest in the truck. Thus, the settlement proceeds are presumptively community property. With the understanding that the settlement proceeds are presumptively community property, we turn our focus to Husband's position that, regardless of our interpretation of the property as community or separate property under the statutes, the settlement proceeds are nevertheless separate under *Delph*. Husband argues that, per *Delph*, Wife is not entitled to any portion of the settlement proceeds because she did not act to benefit the community when she told Allstate that Husband was dishonest. We hold that *Delph* is distinguishable from the present case and does not form a basis for overcoming New Mexico's presumption in favor of community property. And we hold that the district court erred in denying Wife's community property interest in the settlement proceeds.

{34} As indicated earlier in this opinion, in *Delph*, the husband intentionally set fire to the property, prior to entry of the divorce decree. 1980-NMSC-140, ¶ 3. The specific issue presented on appeal was "whether the intentional burning of a community residence by one spouse will bar recovery by an innocent spouse under a fire insurance policy issued to the community." *Id.* ¶ 6. The Court held that it was clear that both the residence and the insurance policy were community property. *Id.* ¶ 9. However, the law in New Mexico also clearly states that "a spouse who commits a separate tort is individually liable for damages arising out of the tort and that the separate (or segregable) assets of the innocent spouse may not be reached to satisfy the liability arising out of the tort." *Id.* ¶ 13. Because the husband's arson could not be construed to be a benefit to the community, the responsibility for the fraud was separate rather than community and could not be used to void the entire insurance policy. *Id.* ¶ 14.

{35} The holding in *Delph* cannot be used to deny Wife's community interest in the settlement proceeds because the circumstances here are entirely different from the circumstances in *Delph*. In *Delph*, the Court considered the impact of an intentional tort on an innocent spouse. In this case, there was no ruling that Wife committed an intentional tort, or for that matter, any tort. Although the district court opined in a hearing that Wife's actions "may be tantamount to" the tort of interference with contractual relations, there was never an argument or ruling that Wife actually tortiously interfered with Husband's contract. In fact, Husband failed to present evidence or elicit necessary findings that would support a tortious interference with contract claim, which would require proof in relevant part that "[t]here . . . be some voluntary conduct on the part of [Wife]," *Bynum v. Bynum*, 1975-NMCA-005, ¶ 7, 87 N.M. 195, 531 P.2d 618 (internal quotation marks and citation omitted), and that "the contract interference [was] without justification or privilege[.]" *M & M Rental Tools, Inc. v. Milchem, Inc.*, 1980-NMCA-072, ¶ 17, 94 N.M. 449, 612 P.2d 241 (internal quotation marks and citation omitted); *see also Lenscrafters, Inc. v. Kehoe*, 2012-NMSC-020, ¶ 40, 282 P.3d 758 (stating that a plaintiff seeking to prove tortious interference with contract must prove that "the defendant induced the breach without justification or privilege to do so"). There is also no finding by the district court that Wife acted "either with an improper motive or by use of improper means[,]" as required for a tortious interference with contract claim. *Ettenson v. Burke*, 2001-NMCA-003, ¶ 14, 130 N.M. 67, 17 P.3d 440. To the contrary, the evidence presented indicated that, in expressing her opinion as to Husband's dishonesty, Wife was responding to questions posed by Allstate about Husband's credibility and reputation for honesty and truthfulness. Allstate also sent a copy of Husband's inventory to Wife, and she was specifically told to let Allstate know what she thought about the inventory. She was correct to answer those questions as a co-insured and was required to give her honest and accurate answers as an individual who was duly sworn under oath. *See* NMSA 1978, § 30-25-1 (2009) (identifying "perjury" as a fourth degree felony and consisting of "making a false statement under oath"); 14 Steven Plitt et al., *Couch on Insurance* § 199:3 (3d ed. 2016) ("Most insurance policies, whether they are liability or indemnity policies, include what is commonly referred to as a 'cooperation clause.' In instances where a policy does not include such a clause, one has been implied in law." (footnotes omitted)).

{36} Additionally, despite Husband's assertions that Wife's accusations were false, there was no evidence or finding by the district court that her responses to Allstate's questions were dishonest or inaccurate. There is no evidence in the record that Wife volunteered information that was harmful to Husband before she was asked to give information, as a co-insured. There is no evidence from which the district court could reasonably infer, find, or conclude that Wife did anything more than cooperate, as she was required to do, or that she gave information beyond the information required in response to Allstate's questions in connection with its investigation of possible fraud.

{37} Although Husband argued to the district court that Wife "actively conspired with Allstate[,]" that her conduct was aimed at getting Husband's claim denied,

and that she had a bad motive, the district court issued no findings as to Wife's motive. There was nothing in the record, aside from Allstate's speculation, to affirmatively establish that Wife conspiratorially, with an improper motive, acted with an intent to deny a benefit to the community. The district court did find that "but for" Wife's actions, Allstate would have had a different take on how to address the claim and that the bad faith claim arose because of Wife's input; however, those findings do not, on their own, prove intentional, tortious conduct. Because there was no evidence or findings that would indicate that Wife's conduct was intentional and tortious, unlike in *Delph*, *Delph* is not analogous, does not apply, and cannot be relied upon to deny Wife her community interest in the settlement proceeds.

{38} Husband essentially is asking this Court to look at *Delph* so broadly that any time a spouse fails to act for the benefit of the community, that spouse's interest in the community property is at risk. But vague notions of wrongful conduct by a spouse cannot be the test for determining whether a spouse's interest in community property should be voided. *Delph* applies in instances in which a spouse is proved to have intentionally and tortiously caused damage to community property. We do not approve of an expansion of *Delph* which would allow a party to generally allege that a spouse behaved badly, absent proof of an intentional tort, and then use those allegations to effectively void the spouse's interest in community property. To affirm and approve of such a broad use of *Delph* would almost certainly, in the oft-quoted words of former New Mexico Governor Bruce King, "open up a whole box of Pandoras."

{39} Because neither the statutes nor *Delph* provides a basis under which to deny Wife's community interest in the settlement proceeds, Husband has failed to overcome the presumption in favor of community property. *Hodges*, 1984-NMSC-031, ¶ 6 ("The party asserting that property acquired during marriage is separate bears the burden of presenting evidence that would rebut the presumption by a preponderance of the evidence."). We therefore hold that the district court erred in denying Wife's community share of the settlement proceeds.

II. Remaining Matters Within the District Court's Discretion

{40} Because we reverse and remand on the ground that the settlement proceeds were improperly determined to be separate property, we choose not to address Husband's arguments on appeal regarding spousal support and the district court's rejection of a time extension. As indicated earlier, because the settlement proceeds are community property and not separate property, the relative assets of the parties are likely to be viewed differently on remand, and the proceeds are likely to be allocated differently. Thus, the spousal support awarded by the district court will likely need to be re-evaluated.

{41} Although we do not address Husband's arguments regarding spousal support, for the sake of clarity and guidance on remand, we address Husband's arguments that (1) the district court abused its discretion when it allowed additional, de novo proceedings after Wife failed to offer evidence during the initial merits hearing on spousal support; (2) the district court abused its discretion when it admitted Dr. Amer's testimony and when it relied on that testimony in coming to the conclusion that Wife could not work; and (3) the district court improperly awarded attorney fees. The parties agree that we review these points for abuse of discretion. *See Riggs v. Gardikas*, 1967-NMSC-120, ¶ 8, 78 N.M. 5, 427 P.2d 890 (stating that the district court's decision to not re-open a case and hear additional evidence is reviewed for abuse of discretion); *Roark v. Farmers Grp., Inc.*, 2007-NMCA-074, ¶ 20, 142 N.M. 59, 162 P.3d 896 (recognizing that the admission of evidence is reviewed for abuse of discretion); *Garcia v. Jeantette*, 2004-NMCA-004, ¶ 15, 134 N.M. 776, 82 P.3d 947 ("The decision whether to grant or deny a request for attorney fees rests within the sound discretion of the district court."). An abuse of discretion occurs when "the court's ruling exceeds the bounds of all reason" or "is arbitrary, fanciful, or unreasonable." *Clark v. Clark*, 2014-NMCA-030, ¶ 8, 320 P.3d 991 (internal quotation marks and citation omitted).

A. Additional Proceedings

{42} Husband argues that it was error for the district court to permit additional discovery and take new evidence concerning Wife's health condition more than a year after the initial trial on the merits. Husband argues that Wife's pro se status did not entitle her to a second chance at offering evidence and argues that the second trial constituted an abuse of discretion because there had been no change in circumstances relating to Wife's health between the first and second trials. Husband also argues that, after improperly reopening the proceedings, the court arbitrarily refused to consider the whole record to determine spousal support. Husband highlights statements by the judge who initially presided over the case regarding Wife's "signs of malingering to influence [the] court and to avoid being present at hearings scheduled by [the] court and for which she had proper notice." Husband argues that the district court did not consider "all relevant factors" relating to the reopening of the evidence as outlined in *Sena v. New Mexico State Police*, 1995-NMCA-003, ¶ 12, 119 N.M. 471, 892 P.2d 604, including the reasons for Wife's failure to present or obtain the evidence at trial, the prejudice to Husband, the delay in the proceedings, the importance of the evidence to Wife, and whether reasons existed to deny the request for more discovery and evidence. He argues that the court abused its discretion when it refused to listen to and incorporate the previous record when Wife was pro se.

{43} While it is true that pro se parties are held to the same standards as represented litigants, we conclude there was no abuse of discretion in this case. *See Woodhull v. Meinel*, 2009-NMCA-015, ¶ 30, 145 N.M. 533, 202 P.3d 126 (holding that pro se litigants "will not be treated differently than litigants with counsel"). Here, the district court neither re-opened a case per *Sena*, 1995-NMCA-003, ¶ 12, modified an existing award per Section 40-4-7(B)(2)(a), nor provided a new trial as contemplated under Rule 1-059 NMRA. Here, the original judge chose not to rule on spousal support and instead took the matter under advisement. Thus, because spousal support had not been awarded, the newly assigned judge could revisit the issue. Husband glosses over the fact that the district court had continuing jurisdiction over support issues, and the court specifically declined to issue a ruling on support until evidence was presented from Wife's treating doctors regarding her physical condition and ability to earn income.

{44} Similarly, the district court did not abuse its discretion when it decided to take new evidence and not listen to the trial that occurred in 2011. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *State v. Layne*, 2008-NMCA-103,

¶ 6, 144 N.M. 574, 189 P.3d 707 (internal quotation marks and citation omitted). In this case, the judge, to whom the case was reassigned, appears to have questioned his ability to determine the veracity of the witnesses based on a recording and informed the parties that he would review the evidence from the beginning. Both parties were given the opportunity to present evidence. Husband fails to show how the court's decision is clearly untenable or not justified by reason, and we hold that the court did not abuse its discretion.

B. Medical Testimony

{45} Husband next argues that the testimony offered by Wife's treating physician about her condition and level of disability was admitted without foundation and did not support a finding that her medical condition caused her inability to earn income. He argues that "[e]xpert testimony founded upon mere surmise, guess[,] or conjecture is not substantial to support a finding of fact." *Fitzgerald v. Fitzgerald*, 1962-NMSC-028, ¶ 2, 70 N.M. 11, 369 P.2d 398. He then argues that, in general, "to have adequate foundation, a medical expert must testify to a reasonable medical probability regarding causation." In support of his position, Husband looks to case law regarding the "reasonable degree of medical probability" standard in negligence and workers' compensation cases that require plaintiffs to establish a causal connection between the defendant's act or omission and the medical harm. *See, e.g.*, *Alberts v. Schultz*, 1999-NMSC-015, ¶ 29, 126 N.M. 807, 975 P.2d 1279; *Baer v. Regents of the Univ. of Cal.*, 1999-NMCA-005, ¶¶ 21-22, 126 N.M. 508, 972 P.2d 9; *Medina v. Original Hamburger Stand*, 1986-NMCA-107, ¶¶ 1-3, 105 N.M. 78, 728 P.2d 488. Husband generally acknowledges that lay testimony is acceptable to establish the medical condition of a spouse in support proceedings, *see Russell v. Russell*, 1984-NMSC-010, ¶¶ 7, 10, 101 N.M. 648, 687 P.2d 83, but argues that this Court should apply a reasonable medical probability standard to a medical professional's testimony when that professional is offered to establish a causal link between a medical diagnosis or condition and an inability to work. Importantly, Husband is not disputing the existence of Wife's medical conditions or the ability of her treating physician, Dr. Amer, to testify about those conditions. Rather, Husband focuses on the fact that Dr. Amer did not say Wife's medical conditions caused her to be unable to work with a "reasonable [degree of] medical probability."

{46} Husband's arguments are unconvincing. Two of Husband's cited cases focus on what medical experts must opine in order to establish causation in negligence cases. *Alberts*, 1999-NMSC-015, ¶ 29 ("If testimony is introduced to establish proximate cause, the evidence thus introduced must show to a reasonable degree of medical probability that the defendant's negligence caused the loss of the chance of a better result."); *Baer*, 1999-NMCA-005, ¶¶ 21-22 (addressing the standard in proving proximate cause in a medical negligence case). The third case cited by Husband interprets a provision of the Workers' Compensation Act that specifically requires that "where the defendants deny that an alleged disability is a natural and direct result of the accident, the workman must establish that causal connection as a *medical probability by expert medical testimony*." *Medina*, 1986-NMCA-107, ¶¶ 1-3 (internal quotation marks and citation omitted).

{47} In this case, neither liability based on medical negligence nor benefits under the Workers' Compensation Act is at issue. Here, Dr. Amer did not opine as to whether an injury was caused by a particular act of negligence or an accident that occurred during employment. Dr. Amer's testimony about Wife's functional limitations for the purposes of a spousal support calculation is notably different from a medical expert giving an opinion about what caused a patient's medical decline. We decline to extend Husband's proposed negligence standard to instances where the testifying provider is not opining as to the cause of a party's injury, but rather is simply describing limitations associated with a particular patient's illness and treatment. The district court did not abuse its discretion when it did not apply the reasonable medical probability standard as requested by Husband.

{48} Furthermore, although Husband argues on appeal that Dr. Amer was testifying as an expert witness under Rule 11-702 NMRA, the nature of the testimony highlighted by Husband suggests that in this particular case, and as to his particular statements about Wife's disability, Dr. Amer was testifying as a lay witness under Rule 11-701 NMRA. To lay a foundation for the admission of Rule 11-701 testimony, the witness must be shown to have "first-hand information" that is "rationally connected to the opinion formed." *Sanchez v. Wiley*, 1997-NMCA-105, ¶ 17, 124 N.M. 47, 946 P.2d 650. Here, Wife's counsel elicited testimony from Dr. Amer that he was Wife's treating physician and was familiar with her medical condition, history, and treatment, such that he had first-hand knowledge of those issues. Dr. Amer was not tendered as an expert witness, and the district court only allowed him to testify as to conditions for which he was treating Wife, despite Wife's attempts to elicit broader testimony. We hold that Dr. Amer's testimony was appropriate under Rule 11-701 and that the "reasonable medical probability" standard that applies to medical experts in medical negligence and workers' compensation cases does not apply.

{49} *Russell*, which considered non-expert testimony about a spouse's medical situation during support proceedings, is instructive. In *Russell*, the district court accepted the wife's testimony as to her state of health, which included a "recent history of serious medical problems including toxic shock syndrome, respiratory failure and cardiac arrest." 1984-NMSC-010, ¶ 6. Our Supreme Court determined that allowing the wife's testimony was not an abuse of discretion because the testimony constituted appropriate non-expert testimony, and the district court had "ample opportunity to observe and question the witness and make a determination as to her credibility and knowledge." *Id.* ¶¶ 7-10. Here, as in *Russell*, the testimony offered by Wife and Dr. Amer regarding Wife's medical conditions and disability was based on their perception and was helpful in determining a fact at issue. *See* Rule 11-701 (A), (B). While Dr. Amer did testify that he felt Wife was 100 percent disabled and could not reliably hold down a job, that opinion was based on his knowledge about Wife's functional physical limitations.

C. Attorney Fees

{50} "The decision whether to grant or deny a request for attorney fees rests within the sound discretion of the district court." *Garcia*, 2004-NMCA-004, ¶ 15. "Thus we review the district court's ruling on attorney fees only for an abuse of discretion." *Id.* To award fees in a domestic relations proceeding, the court must consider relevant factors presented by the parties, including: (1) "disparity of the parties' resources, including assets and incomes"; (2) "prior settlement offers"; (3) "the total amount of fees and costs expended by each party, the amount paid from community property funds, any balances due and any interim advance of funds ordered by the court"; and (4) "success on the merits." Rule 1-127 NMRA. "In determining

whether to award attorney fees, a showing of economic disparity, the need of one party, and the ability of the other to pay, has been characterized as the primary test in New Mexico." *Quintana v. Eddins*, 2002-NMCA-008, ¶ 33, 131 N.M. 435, 38 P.3d 203 (internal quotation marks and citation omitted); *see also Alverson v. Harris*, 1997-NMCA-024, ¶ 26, 123 N.M. 153, 935 P.2d 1165 ("The most important factor the trial court considers in deciding whether to award attorney fees is economic disparity between the parties." (internal quotation marks and citation omitted)).

{51} Husband argues that the district court abused its discretion in awarding attorney fees to Wife because the court did not consider the factors outlined in Rule 1-127. Here, there is no doubt that there was a substantial economic disparity. Wife had minimal assets and income. Although she initially attempted to proceed pro se, she ultimately incurred over $41,000 in attorney fees. Husband had more income and had even more income when considering the settlement proceeds. However, given our holding that the settlement proceeds are community property, the disparity between the parties' resources will likely change, and thus the parties' ability to pay may have changed. We therefore remand the issue of attorney fees for further consideration. *See Klinksiek v. Klinksiek*, 2005-NMCA-008, ¶ 29, 136 N.M. 693, 104 P.3d 559 ("We have partially affirmed and partially reversed the district court order. Under these circumstances, while we affirm the award of attorney fees, we hold that it is appropriate for the district court to reconsider the amount of the attorney fees.").

CONCLUSION

{52} The district court's ruling regarding the insurance settlement proceeds is reversed, and the matter is remanded for further proceedings in accordance with this opinion.

{53} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
MICHAEL E. VIGIL, Chief Judge
LINDA M. VANZI, Judge

Classified

Positions

Trial Attorney
Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney's Office, which includes Curry and Roosevelt counties. Employment will be based primarily in Curry County (Clovis). Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Ninth District Attorney's Office, Attention: Steve North, 417 Gidding St. Suite 200, Clovis, New Mexico 88101.

Attorney
The Fifth Judicial District Attorney's office has an immediate position open to a new or experienced attorney. Salary will be based upon the District Attorney Personnel and Compensation Plan with starting salary range of an Associate Trial Attorney to a Senior Trial Attorney ($41,685.00 to $72,575.00). Please send resume to Dianna Luce, District Attorney, 301 N. Dalmont Street, Hobbs , NM 88240-8335 or e-mail to DLuce@da.state.nm.us.

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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.

CYFD Attorneys
Las Vegas, New Mexico and Alamogordo, New Mexico
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Senior Trial Attorney/Deputy Trial Union County

The Eighth Judicial District Attorney's Office is accepting applications for a Senior Trial Attorney or Deputy District Attorney in the Clayton Office. The position will be responsible for a felony caseload and must have at least two (2) to four (4) years as a practicing attorney in criminal law. This is a mid-level to an advanced level position. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send interest letter/resume to Suzanne Valerio, District Office Manager, 105 Albright Street, Suite L, Taos, New Mexico 87571 or svalerio@da.state.nm.us. Deadline for the submission of resumes: Open until position is filled.

Senior Trial Attorney

Senior 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 range: $59,802 - $80,000. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and be 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.

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.

Attorney

Blackburn Law Offices, an established Albuquerque criminal defense and racetrack/casino litigation law firm, is seeking a full time attorney to assist in all areas of our practice. Candidates should have strong writing and analytical skills. Please submit a letter of interest and resume to Denise@BBlackburnLaw.com or Blackburn Law Offices, 1011 Lomas NW, Albuquerque, NM 87102.

Attorney-Advanced Position

The New Mexico Department of Health's Office of General Counsel seeks applicants for an Attorney-Advanced position, which requires at least a Juris Doctorate degree from and accredited school of law and five years of experience in the practice of law. This position will represent the Department in administrative and district court hearings, mediations, and arbitrations and will provide legal opinions and recommendations to Department personnel based on legal research and analysis. The attorney will advise about, draft, and edit agency policies, rules, and regulations; review state contracts; and participate in the New Mexico legislative session. This position works independently as the lead or assistant counsel for Department-run health facilities and/or divisions and spanning numerous areas of state and federal law. The New Mexico Department of Health is the largest State agency in New Mexico and, in addition to providing traditional public health services and programs such as epidemiology and public health offices, it operates seven 24-hour health facilities, the medical cannabis program, the developmental disabilities supports program, and the licensing division for health facilities. The Department also licenses certain health care professionals. The Department's Office of General Counsel is based in Santa Fe, New Mexico and includes a small team of attorneys and support staff, along with the Office of the Chief Privacy Officer/Chief Records Custodian. This position is a Pay Band 80. For more information about this position, contact the Office Administrator, Ann Pacheco at 505-827-2988. Applications must be submitted via the State Personnel Office's website: https://www.governmentjobs.com/careers/newmexico. The State of New Mexico hires without regard to race, color, religion, national origin, sex, sexual orientation, gender identity or expression, age, disability or any other characteristic protected by federal, state or local law. Reasonable accommodations provided to known disabilities of individuals in compliance with the Americans with Disabilities Act . For accommodation information, please contact Andrea Rivera-Smith, Career Services Division Director @ 505-695-5606.

Associate Attorney

Associate Attorney wanted for a small well established busy AV rated downtown Albuquerque law firm that specializes in both criminal defense and civil litigation. Please send a resume with your salary request and a writing sample to POB 92860, ABQ, NM 87199-2860. Attn: Box A. All replies will be kept confidential.

Chief Operating Officer Position

The Isleta Business Corporation is currently seeking a Chief Operating Officer (COO). The COO will provide the necessary leadership, management, and vision to ensure that the Isleta Business Corporation has the proper operational controls, administrative and reporting procedures, people, and systems in place to effectively grow the organization and to ensure financial strength and operating efficiency. An MBA or JD with at least 7+ years in progressively responsible executive level leadership roles in business management, finance, legal, personnel management, sales and marketing is preferred. TO APPLY: Visit isletapueblo.com/careers.html (include resume and cover letter with Application submission).

New Mexico Legal Aid seeks Managing Attorney for Native American Program

New Mexico Legal Aid seeks an experienced attorney with at least 10 years of experience working in Pueblo Indian or other tribal communities to lead our statewide Native American Program. The Native American Program provides free legal services to low-income people living on or near 19 Pueblo Indian communities in New Mexico, plus outreach services to the Mescalero Apache community. The Managing Attorney should have experience in supervising legal advocacy and cases in Federal, State and Tribal Court. Candidates must be an NM licensed attorney with at least 5 years of litigation experience, preferably including poverty law issues in Tribal and Federal Indian law cases. See additional details on our web site: http://www.newmexicolegalaid.org/node/17. Send a resume and letter of interest explaining what you would like to accomplish if you are selected for this position to: jobs@nmlegalaid.org. Salary: DOE. NMLA is an EEO Employer. Deadline: July 14, 2017.

Litigation Secretary

Lewis Brisbois Bisgaard & Smith LLP is seeking a full-time Litigation Secretary to join our Albuquerque office. Eligible candidates must have a minimum of three years of civil litigation experience, and will have the following qualifications: Experience in State, Federal and Appellate courts, including knowledge of CM/ECF e-filing procedures; civil litigation experience in a heavy motion practice, including trial preparation experience; proficiency in Microsoft Office 2010 applications, specifically Word, Excel, and Outlook; outstanding organizational skills, attention to detail, ability to multi-task and work under short deadlines; initiative and willingness to be a team player. This is a full-time position requiring 40 hours per week. Please submit your resume to stephanie.reinhard@lewisbrisbois.com.

Legal Assistant Part-Time
Small commercial law firm downtown seeks part-time Legal Assistant. Position is a job-share arrangement to work 2 days per week. Successful candidate will possess prior legal assisting experience, be able to work quickly and efficiently, and be proficient with MS Word and the Odyssey e-filing system. Please submit cover letter, resume and salary requirements in .pdf format to Spann, Hollowwa & Artley via e-mail: jkhollowwa@shha.net.

Experienced Paralegal/Legal Assistant
Busy Plaintiff's PI Firm currently looking for an experienced paralegal/legal assistant. Skills include handling of PI/Bad faith Claims from initial intake through litigation, including resolution of subrogation and Medicare issues. Spanish-speaking a plus but not required. Candidate must have excellent organizational skills and attention to detail with strong litigation experience. Competitive salary and benefits. Email your resume, salary requirements and references to dmh@carterlawfirm.com

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@gmail.com

Litigation Secretary
We are seeking a strong litigation secretary to join our Albuquerque office. Eligible candidates will have the following qualifications: Both State, Federal & Appellate court experience, including knowledge of CM/ECF e-filing procedures; Litigation experience; Heavy law and motion practice, with knowledge of trial preparation helpful; Proficiency in Microsoft Word, Excel and Outlook; Skills will include being organized, reliable, good attention to detail, and ability to work under short deadlines; Initiative and willingness to be a team player are important assets for this extremely busy and high profile desk. Salary commensurate with experience. Please send cover letter, resume and desired salary to NMHiring@aol.com.

Legal Assistant/Paralegal
Albuquerque law firm focused on civil catastrophic injury litigation seeking a full-time paralegal/legal assistant to join our team. Legal experience preferred. Candidate should have strong organizational skills and a positive attitude. Please send resume and desired salary to NMHiring@aol.com

Positions Wanted

Legal Assistant for Hire
PI, Ins. Def., CV Litigation, WC, Transcription, Odyssey-CM/ECF, Prepare/Answer Discovery, Med. Rec. Reqts, Notary. MS Office, Calendar, Hard-Working, Attn to detail, Strong work ethic. Please email me for resume, salary requirements at legalassistantforhire@gmail.com.

Services

Experienced Contract Paralegal
Experienced contract paralegal available for help with your civil litigation cases. Excellent references. civilparanm@gmail.com

Nurse Paralegal
Specialist in medical chronologies, related case analysis/research. Accurate, knowledgeable work product. For resume, work samples, references: maryjdaniels68@gmail.com

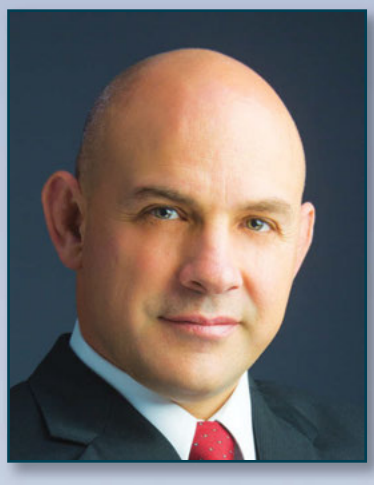
Office Space

Downtown Office Space For Rent
Approx 1500 sq. ft. casa with 4 offices. Walking distance to courthouses. Includes free parking in private lot. $1500/mo. Call Ken Downes 238-0324

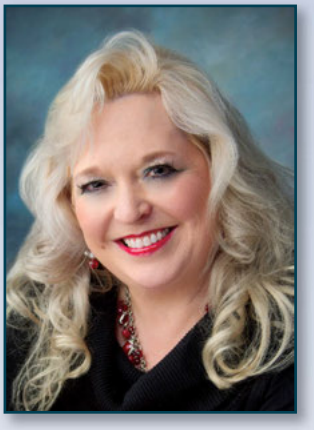
Miscellaneous

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

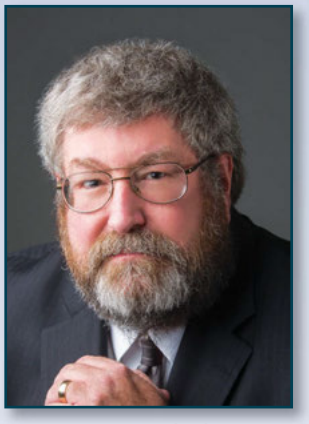
For Sale
New Mexico Reporters Volumes 78-150, Federal Practice by Wright, (needs updating), West New Mexico Statutes. Best offer accepted. Please direct all queries to Randal W. Roberts at (505) 298-9400.



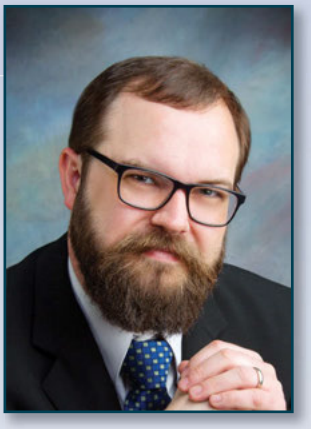
Attorney Bert Parnall
and the Parnall Law team.



Cynthia Braun



Greg Abel



Pete Grueninger

Una Campbell

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