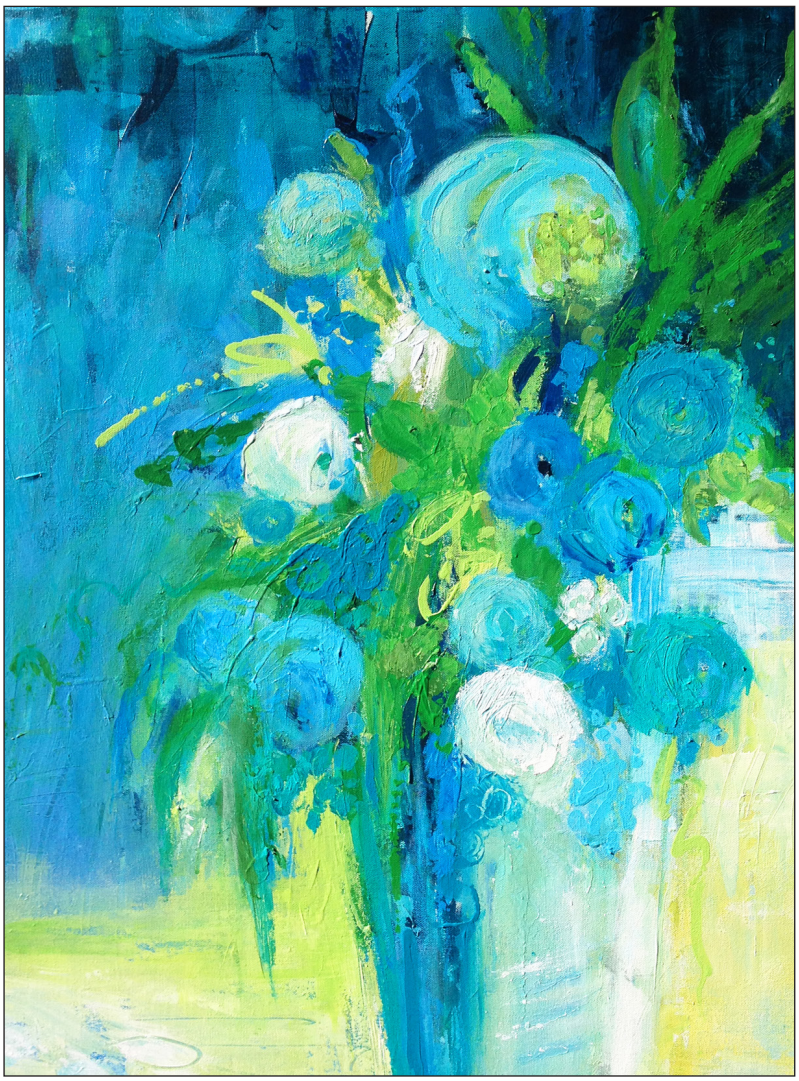
Official Publication of the State Bar of New Mexico

Bar Bulletin

May 9, 2018 • Volume 57, No. 19



Literal Imaginings, by Janet Bothne (see page 3) www.janetbothne.com

Inside This Issue

CLE programming from the Center for Legal Education

Practice Management Skills for Success

Friday, June 15, 2018 • 8:30 a.m.-4 p.m.

5.0 G 1.0 EP

Live at the State Bar Center • Also available via Live Webcast!

Co-sponsor: Young Lawyers Division

$99 Non-member not seeking CLE credit
$209 Early bird fee (Registration must be received by May 15)
$249 Government and legal services attorneys; Paralegal Division members
$279 Standard/Webcast Fee
For those currently enrolled in the Bridge the Gap Mentorship Program, this CLE cost is included in your Mentorship Program fee.

Whether you are recently admitted to the State Bar of New Mexico or established in your practice, practice management skills are necessary to become a successful practitioner. This full day course will cover essential information in practice management, handling client relations, maintaining self-care, cultivating diversity and cultural competence and how the State Bar of New Mexico can support you throughout your career. This program fulfills the Bridge the Gap Mentorship Program requirement for newly licensed attorneys currently enrolled in the program.

Registration and payment for the programs must be received prior to the program date.
A $20 late fee will be incurred when registering the day of the program. This fee does not apply to live webcast attendance.

On-Demand

Purchase self-study on-demand programs at **www.nmbar.org** and complete up to four hours of CLE credits in the comfort of your home office. ***New courses added throughout the year!***

Now available for 2018 CLE credit!

- 1.0 G Rise of 3-D Technology (2016 Annual Meeting)
- 2.0 EP Lawyers' Duties of Fairness and Honesty (2016)
- 2.0 G 1.0 EP Deposition Practice in Federal Cases
- 1.0 EP Conflicts of Interest (2017 Ethicspalooza)
- 1.0 EP Civility and Professionalism (2017 Ethicspalooza)
- 2.0 G Add a Little Fiction to Your Legal Writing (2017)
- 1.0 EP Gender and Justice (2016 Annual Meeting)
- 1.0 EP Ethics of Lawyer Advertisements Using Social Media (2017)
- 3.5 G New Mexico Liquor Law for 2017 and Beyond
- 1.5 EP Legal Malpractice Potpourri (2017)
- 3.0 G 1.0 EP Best and Worst Practices and Ethics in Mediation (2016)
- 2.0 EP 2017 Mock Meeting of the Ethics Advisory Committee
- 1.0 G 1.0 EP Rules of Civil Procedure and Professional Conduct (2017)
- 2.0 EP Strategies for Well-being and Ethical Practice (2017)

New Mexico State Bar Foundation
Center for Legal Education

505-797-6020 • www.nmbar.org/cle
5121 Masthead NE • PO Box 92860, Albuquerque, NM 87199

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

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

May 9, 2018 • Volume 57, No. 19

Table of Contents

Meetings

May

10
Business Law Section
4 p.m., teleconference

10
Elder Law Section
Noon, State Bar Center

10
Public Law Section
Noon, Legislative Finance Committee, Santa Fe

15
Senior Lawyers Division
4 p.m., State Bar Center

16
RPTE: Trust & Estate Division
Noon, State Bar Center

Workshops and Legal Clinics

May

11
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

16
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

23
Consumer Debt/Bankruptcy Workshop
6-9 p.m., State Bar Center, Albuquerque, 505-797-6094

About Cover Image and Artist: Janet Bothne has been passionate about the power of color throughout her life, calling intense color her "natural anti-depressant." Born near Boston, Bothne embraced art at a young age, winning awards and scholarships that brought her to study fine art at the University of Massachusetts at Amherst and the Fuller Museum School and later at UCLA. She's exhibited in numerous shows, including venues such as Los Angeles County Museum's Sales & Rental Gallery and The Santa Monica Art Museum. Her works have become favorites of set designers on television programs such as *Grey's Anatomy, The Mentalist and Better Call Saul*. Bothne relocated to New Mexico in 2013 and now works and teaches from her studio in Los Ranchos. For more of Bothne's work, visit www.janetbothne.com.

Notices

Court News

New Mexico Supreme Court Judicial Standards Commission

Seeking Commentary on Proposed Amended Rules

The Commission has completed a comprehensive review and revision of its procedural rules. Commentary on the proposed amendments is requested from the bench, bar and public. The deadline for public commentary has been extended to May 18. To be fully considered by the Commission, comments must be received by that date and may be sent either by email to rules@nmjsc.org or by mail to Judicial Standards Commission, PO Box 27248, Albuquerque, NM 87125-7248. To download a copy of the proposed amended rules, visit nmjsc.org/recent-news/.

Second Judicial District Court

Notice of Exhibit Destruction

Pursuant to 1.21.2.617 FRRDS (Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy criminal exhibits associated with the following criminal case numbers filed with the Court. Cases on appeal are excluded.

CR-1988-45096; CR-1989-00034; CR-1989-00238; CR-1989-00264; CR-1989-00920; CR-1991-00634; CR-1991-01605; CR-1991-01818; CR-1991-02015; CR-1991-02346; CR-1991-02350; CR-1992-00478; CR-1992-00791; CR-1992-01491; CR-1992-01565; CR-1992-01157; CR-1992-01175; CR-1992-01643; CR-1992-01752; CR-1993-00401; CR-1993-00760; CR-1993-01271; CR-1993-02236; CR-1993-02269; CR-1993-02390; CR-1994-00099; CR-1994-00622; CR-1994-01161; CR-1994-01187; CR-1994-03093; CR-1995-00017; CR-1995-00498; CR-1995-00840; CR-1995-01138; CR-1995-01796; CR-1995-02615; CR-1995-03720; CR-1996-00074; CR-1996-01197; CR-1996-01455; CR-1996-03599; CR-1996-03600; CR-1997-00865; CR-1997-01077; CR-1997-01234; CR-1997-01357; CR-1997-01413; CR-1997-02497; CR-1997-02755; CR-1997-03912; CR-1998-01087; CR-1998-01385; CR-1998-02541; CR-1998-03601; CR-1998-03687; CR-1998-03688; CR-1998-03729; CR-1999-00313; CR-1999-01451; CR-1999-03824; CR-2000-00050; CR-2000-00675; CR-2000-00713; CR-2000-00976; CR-2000-01061; CR-2000-02360; CR-2000-02361; CR-2000-03357; CR-2000-03770; CR-2000-03771; CR-2000-03772; CR-2000-03773; CR-2000-04899; CR-2001-00727; CR-2001-02141; CR-2001-02212; CR-2001-02433; CR-2001-02549; CR-2002-00529; CR-2002-01049; CR-2002-01505; CR-2002-02668; CR-2002-03247; CR-2002-03691; CR-2003-00314; CR-2003-01216; CR-2003-02167; CR-2004-00112; CR-2004-04836; LR-2005-00006; CR-2005-04915; CR-2005-04916; CR-2006-02355; CR-2006-03370; CR-2006-04515; CR-2006-04975; CR-2006-05242; CR-2007-05057; CR-2007-05393; CR-2008-01851; CR-2008-05940; CR-2008-06296

Counsel for parties are advised that exhibits may be retrieved beginning May 6-July 6, Should you have questions regarding cases with exhibits, please call to verify exhibit information with the Special Services Division, at 505-841-6717, from 8 a.m.-4:30p.m., Monday-Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

New Mexico Judicial Compensation Committee Notice of Public Meeting

The Judicial Compensation Committee will meet June 12, from 9:30 a.m.-12:30 p.m., in Room 208 of the New Mexico Supreme Court, 237 Don Gaspar, Santa Fe, to discuss fiscal year 2020 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 FY2020 compensation to the legislature prior to the 2019 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.

Professionalism Tip

With respect to opposing parties and their counsel:

I will be courteous and civil, both in oral and in written communications.

State Bar News

Attorney Support Groups

- May 14, 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 available. Dial 1-866-640-4044 and enter code 7976003#.
- May 21, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- June 4, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert at 505-242-6845.

Appellate Practice Section

Luncheon with Judge Gallegos

Join the Appellate Practice Section for a brown bag lunch at noon, May 18, at the State Bar Center with guest Judge Daniel Gallegos of the New Mexico Court of Appeals. The lunch is informal and is intended to create an opportunity for appellate practitioners to learn more about the work of the Court. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. to Carmela Starace at cstarace@icloud.com.

Board of Bar Commissioners

Risk Management Advisory Board

The president of the State Bar of New Mexico is required to appoint one attorney to the Risk Management Advisory Board for a four-year term. The appointee is requested to attend the Risk Management Advisory Board meetings. A summary of the duties of the advisory board, pursuant to §15-7-5 NMSA 1978, are to review: specifications for all insurance policies to be purchased by the risk management division; professional service and consulting contracts or agreements to be entered

into by the division; insurance companies and agents to submit proposals when insurance is to be purchased by negotiation; rules and regulations to be promulgated by the division; certificates of coverage to be issued by the division; and investments made by the division. Members who want to serve on the board should send a letter of interest and brief résumé by June 1 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Rocky Mountain Mineral Law Foundation Board

The president of the State Bar is required to appoint one attorney to the Rocky Mountain Mineral Law Foundation Board for a three-year term. The appointee is expected to attend the Annual Trustees Meeting and the Annual Institute, make annual reports to the appropriate officers of their respective organizations, actively assist the Foundation on its programs and publications and promote the programs, publications and objectives of the Foundation. Members who want to serve on the board should send a letter of interest and brief résumé by July 2 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

2018 Annual Meeting

Resolutions and Motions

Resolutions and motions will be heard at 1 p.m., Aug. 9, at the opening of the State Bar of New Mexico 2018 Annual Meeting at the Hyatt Regency Tamaya Resort & Spa, Santa Ana Pueblo. To be presented for consideration, resolutions or motions must be submitted in writing by July 9 to Executive Director Richard Spinello, PO Box 92860, Albuquerque, NM 87199; fax to 505-828-3765; or email rspinello@nmbar.org.

UNM School of Law

Law Library Hours

Through May 12

Building and 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.

Notice of Closure

Due to a planned UNM data center outage, the UNM Law Library will be closed to the public Saturday, May 26-28. For more information on Law Library services and hours, please visit our website, lawlibrary.unm.edu or call 505-277-6236.

UNM Law Scholarship Classic presented by U.S. Eagle

Join the UNMSOL and other members of the law school community at 8 a.m., June 8, at the UNM Championship Golf Course to play a part in sustaining over $50,000 in life-changing scholarships for law students. Don't delay! The tournament sells out every year. Register at https://goto.unm.edu/golf.

Utton Center

2018 UNM Water Conference

2018 UNM Water Confernce presents "New Mexico Water: What Our Next Leaders Need to Know" on Thursday, May 17, at 7:30 a.m.-4:30 p.m. This event is being hosted by the Utton Center and the UNM Center for Water & The Environment. Registration will include lunch and parking. Late registration (after April 29): General $50, full time students $20. See program and register online at: http://cwe.unm.edu/outreach-and-education/2018-water-conference.html. This program has been approved by the CLE for 5.5 G CLE credits. For more information, contact Yolanda at 505-277-3222.

Other Bars

New Mexico Defense Lawyers Association

Save the Date - Women in the Courtroom VII CLE Seminar

The New Mexico Defense Lawyers Association proudly presents Part VII of "Women in the Courtroom," a dynamic seminar designed for New Mexico lawyers. Join us Aug. 17, at the Jewish Community Center of Greater Albuquerque for this year's full-day CLE seminar. Registration will be available online at nmdla.org in July. For more information contact nmdefense@nmdla.org.

Expert Essentials CLE

Expert testimony is vital but can be difficult to communicate to a jury of laypersons. To decrease such risks, the New Mexico Criminal Defense Lawyers Association has assembled a robust schedule of experts to explore these issues first-hand.

Sign up for the Expert Essentials CLE on June 8th in Albuquerque. Special guests include Professor Christopher McKee from the University of Colorado and Professor Shari Berkowitz from California State University. Afterwards, NMCDLA members and their families and friends are invited to our annual membership party and silent auction. Visit www.nmcdla.org to join NMCDLA and register for the seminar today.

New Mexico Women's Bar Association

2018 Henrietta Pettijohn Reception

The New Mexico Women's Bar Association invites members of the legal profession to attend its annual Henrietta Pettijohn Reception Honoring the Honorable Sharon Walton. The 2018 Supporting Women in the Law Award will be presented to Little, Gilman-Tepper & Batley, PA. The Exemplary Service Award will be presented to Sarita Nair and the Outstanding Young Attorney Award will be presented to Emma O'Sullivan. The reception will be 6–9:30 p.m., May 10, Hyatt Regency Albuquerque. Tickets are $25 for law students, $50 for members, $60 for non-members. Contact Libby Radosevich, eradosevich@peiferlaw.com to purchase tickets and sponsorships.

The Oliver Seth American Inn of Court

Dinner, Meeting and Trust Accounting CLE Course

Join the Oliver Seth American Inn of Court on May 16, for the requisite one-hour CLE, "Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204." The CLE presentation will

be part of the May meeting and dinner held by Inn of Court at the Hotel Loretto. A cash bar opens at 5:30 p.m. The CLE will begin at 6 p.m. Dinner will be served at 7 p.m. This CLE fulfills the requirement of Rule 17-204 NMRA, effective Dec. 31, 2016, that an attorney take a trust accounting class at least once every three years, or within the first year of being licensed in N.M., and is one of the Disciplinary Board's ongoing programs designed to educate attorneys on proper practices and procedures. This program is presented by the Center for Legal Education. It has been reviewed and approved by MCLE. The cost for the CLE is $55, payable by check made out to Center for Legal Education. The cost for dinner is $30, payable by cash or check made out to Oliver Seth Inn of Court. Registration and payment for the dinner and CLE will be available at the door. However, non-members are welcome to attend this event.

Other News

New Mexico Workers' Compensation Administration

Request for Comments

The Director of the Workers' Compensation Administration, Darin A. Childers, is considering the reappointment of Judge Anthony "Tony" Couture to a five-year term pursuant to NMSA 1978, Section 52-5-2 (2004). Judge Couture's term expires on August 26. Anyone who wants to submit written comments concerning Judge Couture's performance may do so until 5 p.m. on May 31. All written comments submitted per this notice shall remain confidential. Comments may be addressed to WCA Director Darin A. Childers, PO Box 27198, Albuquerque, New Mexico 87125-7198, or emailed in care of Sabrina Bludworth, Sabrina.Bluworth@state.nm.us.

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

Legal Education

May

11 **How Ethics Rules Apply to Lawyers Outside of Law Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Reps and Warranties in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

17 **2018 Wrongful Discharge & Retaliation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

18 **The Basics of Family Law (2017)**
5.2 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **A Little Planning Now, A Lot Less Panic Later: Practical Succession Planning for Lawyers (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Escrow Agreements in Real Estate Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Introduction to New Mexico's Uniform Directed Trust Act**
1.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

23 **The Cyborgs are Coming! The Cyborgs are Coming! Ethical Concerns with the Latest Technology Disruptions (2017)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics and Digital Communications**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **33rd Annual Bankruptcy Year in Review Seminar (2018)**
6.0 G, 1.0 EP
Live Replay, 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

30 **Basics of Cyber-Attack Liability and Protecting Clients**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

June

1 **Choice of Entity for Service Businesses**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **2018 Ethics in Litigation Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2018 Ethics in Litigation Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **Expert Essentials**
5.5 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
, www.nmcdla.org, 505-992-0050, info@nmcdla.org

8 **Text Messages & Litigation: Discovery and Evidentiary Issues**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Closely Held Company Merger & Acquisitions, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

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

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

Effective April 27, 2018

PUBLISHED OPINIONS

A-1-CA-35204	H Balderas v. ITT Educational	Affirm	04/24/2018

UNPUBLISHED OPINIONS

A-1-CA-35689	State v. A Salinas	Affirm	04/23/2018
A-1-CA-36324	P Palacios v. R Palacios	Affirm	04/23/2018
A-1-CA-36705	Uninsured Employers Fund v. G Gallegos	Affirm	04/23/2018
A-1-CA-36597	State v. E Silva	Affirm	04/24/2018
A-1-CA-35432	State v. M Villarreal	Affirm	04/25/2018
A-1-CA-35686	State v. Lisa C	Affirm	04/26/2018
A-1-CA-36317	Bank of NY v. F Rodriguez	Affirm	04/26/2018
A-1-CA-36971	State v. D Ortega	Dismiss	04/26/2018

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

Denise M. Chanez, an attorney with the Rodey Law Firm, was honored by the Mexican American Law Student Association, at its 22nd Annual Fighting for Justice Banquet on April 14. MALSA honored Chanez for her commitment to advancing diversity and inclusion in the legal profession. Chanez, a Director in the Rodey Law Firm, practices primarily in the areas of long term care and medical malpractice. Chanez is a past president and current board member of the New Mexico Hispanic Bar Association. She also co-chairs the State Bar of New Mexico's Committee on Diversity in the Legal Profession. In Feb. 2017 Chanez was named one of the top lawyers under the age of 40 by the Hispanic National Bar Association. The Mexican American Law Student Association (MALSA) focuses on increasing diversity in the legal profession and giving back to the community through service projects.

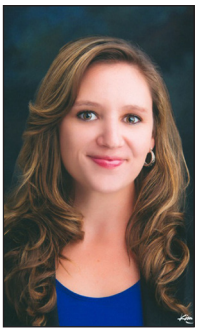
30 Rodey lawyers have been selected as Southwest Super Lawyers for their expertise and experience in particular areas of law. **Leslie McCarthy Apodaca**-Business Litigation; **Rick Beitler**-Medical Malpractice Defense; **Perry E. Bendicksen III**-Mergers & Acquisitions; **David P. Buchholtz**-Securities and Corporate Finance; **John P. Burton**-Real Estate; **Denise M. Chanez**-Medical Malpractice Defense; **Jeffrey M. Croasdell**-Personal Injury Defense: Products; **Jocelyn C. Drennan**-Appellate; **Nelson Franse**–Professional Liability: Defense; **Catherine T. Goldberg**–Real Estate; **Scott D. Gordon**–Employment and Labor; **Bruce D. Hall**–Alternative Dispute Resolution; **Paul R. Koller**-Personal Injury Defense: General; **Jeffrey L. Lowry**-Employment and Labor; **W. Mark Mowery**-Medical Malpractice Defense; **Lisa Chavez Ortega**-Personal Injury Defense: General; **Theresa W. Parrish**–Employment and Labor; **Charles (Kip) Purcell**-Appellate; **Debora E. Ramirez**-Business/Corporate; **Edward R. Ricco**–Appellate; **Brenda M. Saiz**-Medical Malpractice Defense; **Andrew G. Schultz**–Business Litigation; **Seth L. Sparks**-Transportation/Maritime; **Robert M. St. John**–Business Litigation; **Thomas L. Stahl**–Employment and Labor; **Aaron C. Viets**-Employment and Labor; and **Charles J. Vigil** (Photo)–Employment and Labor. Southwest Super Lawyers has designated these Rodey lawyers as Rising Stars: **Cristina A. Adams**; **Tyler M. Cuff**; and **Shannon M. Sherrell**.

Nell Graham Sale has been selected as Southwest Super Lawyers 2018. Sale belongs to Pregenzer, Baysinger, Wideman & Sale, PC. She practices estate planning and probate.

Michael Schwarz has been recognized by the American Bar Association as one of the Top Ten Tips for Lawyers.

Sutin, Thayer & Browne is pleased to announce that three of its lawyers have earned Super Lawyers recognition for 2018. They are Super Lawyer **Benjamin E. Thomas** and Super Lawyer Rising Stars **Katharine C. Downey** and **Tina Muscarella Gooch.**

Ben Thomas is president and CEO of the firm. He practices in Albuquerque and Santa Fe, primarily in commercial litigation, employment law, creditor rights and civil rights litigation, representing businesses and individuals in a broad range of litigation and disputes. Thomas is also the legal instructor for the Western States School of Banking, educating bankers on the basics of banking and foreclosure law. He also teaches seminars to lawyers and creditors on the entire foreclosure process. Thomas has specific experience in guiding banks through the purchase of other financial institutions and transfer of loans.



Katie Downey belongs to the firm's litigation group. She practices primarily in the areas of bankruptcy, commercial litigation, creditor rights, employment law, education law and insurance defense. She has assisted clients in commercial foreclosure matters, has represented financial institutions in lender liability defense cases, and has protected creditors' rights in and out of bankruptcy

Tina Gooch also belongs to the firm's litigation group. She has ten years' experience in New Mexico representing a variety of clients in civil and commercial litigation, including in the practice areas of employment law, surety law, construction law and constitutional law claims.

John J. Duhigg, who helped build both Albuquerque's legal community as a trial lawyer for over 60 years, and the city's population with ten children, 18 grandchildren and nine great-grandchildren, died Tuesday morning. Duhigg, who found particular joy reading novels, walking along ditches with family and friends, and frustrating judges who had, regrettably, less well-rounded understandings of the law, was 89 years old. He was also a frequent ghostwriter and is fondly remembered for epistles described to him by his black labradoodle, Lucy.Duhigg was born in 1929 in Mason City, Iowa, was raised in Emmetsburg and once blew up a tree in the main square (the result of overenthusiastic fireworks) during a Saint Patrick's Day parade. He completed U.S. Marine Corps training in the late 1940s, but wisely declined his commission upon realizing the Corps' unofficial logo, "First In, Last Out", was not a euphemism. He served in the Army during the Korean War and was on a troop carrier, headed to the front lines, when he was ordered off in Japan. To his luck, Duhigg fought for his nation in Tokyo at regional war headquarters. He also participated in humanitarian missions helping local businesspeople avoid unfair currency controls. Upon returning to Iowa, he recognized Horace Greeley's wisdom and took his then-wife, Marjorie (née Kennedy) and children David and Patrick to the southwest in 1956. In a stroke of great fortune for New Mexico, he stopped in Albuquerque and soon established his own firm, first with Pat Sheehan and Paul Cronin, and then other partners including his son, David, and, later, his daughter, Katy. Duhigg and his firm have protected the rights of the poor, injured and dispossessed for over six decades and have fought for democracy, justice and truth in courtrooms throughout the state. Soon after arriving in Albuquerque, Duhigg helped raise other children – Nancy, Cassius, Jacqueline, Sean and Amy – and upon his marriage to Doris (née Drucker), Charles, Daniel and Katy. Duhigg and Doris were married for 46 years. Duhigg practiced law until just a few weeks before his passing. Thousands of New Mexico's residents lead better lives because of his legal creativity and willingness to prosecute cases other lawyers could not even imagine. With his daughter Katy, he recently won a landmark verdict of $2.7 million against Wells Fargo over improper foreclosure claims. During his career, he took in children who had been abandoned, helped elderly clients who could not fend for themselves, defended immigrants hoping to build new lives, made caselaw protecting those in need and helped shield the nation from politicians whose intellectual abilities seemed curiously inverse to the gravitas they hoped to project. (He was particularly amused by our current President and grateful to *The New York Times's* op-ed page.) He was one of the most creative, inventive and courageous lawyers of the past century, a constantly optimistic presence, an unequivocal force for good, a man of enormous generosity who loved his family and community and was always interested in learning something new. He was a Democrat, a reader, an embodiment of the American experiment in opportunity and a wonderful father, husband and friend. He would want you to celebrate his life with a glass of scotch (expensive or cheap, he wasn't certain there was a difference), a relaxing walk amid nature, and a conversation with someone you love. Duhigg is survived by his wife Doris, his dog Lilly, and many, many others who love and will miss him forever.

John Howard, beloved father and spouse, passed away on April 8, 2018, from a suden illness. Howard was born Nov. 23, 1957 ,in Sommers, N.Y. He is preceded in death by his father, John Siwicki. He is survived by spouse of 30 years, Bernard (Bernie) Logue Y. Perea, His 12 year old triplets, daughters Erin and Mia and son Kevin Patrick, His mother Losi Siwicki and wife Lena, as well as his closest cousin, Carol Allen and husband, George. Howard graduated from UNM Law School. He was very proud of his team win of a Moot Competition while completing Law School. Howard worked primarily in the area of personal injury and mass torts, representing victims of defective products. He also acted as class counsel in lawsuits involving reformation of insurance policies to provided retroactive rights to policy holders. Howard continued close friendships with many of his law friends and associates. Howard had a profound love of reading, art and interior design. He loved Bernie and his children very much spending as much quality time with them as possible. He was involved in their lives, focusing on their education and social values. Howard was good man, always honest and moral in everything he did. This could also be seen in his children. His good heart and sensitivity were evident in the way his children mimicked his sense of humor and his love for Motown and The Supremes.

Atrelle Hamilton Jones passed away on April 11, at the age of 60. Jones graduated from the University of New Mexico Law School in 1993. She spent 20 years as an assistant district attorney in N.M. and Colorado Following her legal career, Jones was the Curator of Learning at the Sangre de Cristo Arts Center in Pueblo, Colorado. Jones was a kind, loving and wonderful mother, sister, daughter and friend. She was loved by many and will be deeply missed. Jones is survived by her two children, Bonnie and Michael Sena, her two step-children, Alexandra and Thaddeus (T.J) Jones, her mother, Jane Hamilton and her sister, Hollyce Farrell and her brother, Scott Hamilton. At Jones request, there will be no service.

Robert (Bob) Thomas DeVoe, passed away Feb. 9, in Albuquerque, N.M. He was born Nov. 7, 1951, in Detroit, M.I., to Celia Bell DeVoe and Robert Pierre DeVoe. DeVoe married Pamela Ann Houghton in 1976. In 1979, he earned a Juris Doctor from Cooley Law School. DeVoe practiced criminal defense litigation in London, K.Y. and Jackson, M.I., but spent the majority of his career (33 years) in Roswell, N.M. and Albuquerque. After retiring in Albuquerque in 2004, DeVoe enjoyed investing in stocks and traveling. Friends and family remember DeVoe as a man with a big, booming laugh and a lasting presence. He was extremely insightful, spiritual and a natural teacher. He prized freedom and believed in educating oneself about the wider world. He instilled a strong moral compass in his children. He loved literature and music from genres and cultures across the globe. He was self-taught in many musical instruments, he especially enjoyed blues and classical music. He was awe struck by the ocean and took his family on many vacations to enjoy it with him. DeVoe is survived by his wife, Pamela Ann Houghton DeVoe; two daughters, Christina Rose DeVoe (Jesus Torres) and Meghan Elizabeth DeVoe (Adrien Atallah), his sister, Judith DeVoe, and two nieces, Celia and Olivia DeVoe. He is also survived by eight brothers- and sisters-in-law, their spouses, 11 nieces and nephews, and five grand nieces and nephews.

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF ADDRESS AND/OR TELEPHONE CHANGES

Dennis Colton Boyles
Davillier Law Group, LLC
1100 Sudderth Drive
Ruidoso, NM 88312
208-920-6140
208-920-6130 (fax)
cboyles@davillierlawgroup.com

Mark A. Earnest
Duncan Earnest LLC
515 Granite Avenue, NW
Albuquerque, NM 87102
505-842-5196
mark@duncanearnest.com

Lauren Garrity
PO Box 1686
Cedar Crest, NM 87008
505-917-0300
garrity.la@gmail.com

Cynthia A. Kiersnowski
Leger Law & Strategy, LLC
414 Old Taos Highway
Santa Fe, NM 87501
505-982-3622
505-559-4779 (fax)
cindy@legerlawandstrategy.com

William M. Kinsella Jr.
2082 Fran Drive
Las Cruces, NM 88007
575-647-5798
kinsella1992@yahoo.com

Aaron Weede Martin
Social Security Administration-Oakland OHO
1301 Clay Street,
Suite 200N
Oakland, CA 94612
505-231-4580
aaron.martin@ssa.gov

Paul W. Spruhan
Navajo Nation Department of Justice
PO Box 2010
Window Rock, AZ 86515
928-871-6210
928-871-6177 (fax)
pspruhan@nndoj.org

Jennifer M. Walsh-Hare
The Estate and Long-Term Care Planning Firm, LLC
208 N. Centre Street
Cumberland, MD 21502
301-338-6037
301-338-6040 (fax)
jennifer@eltcplanningfirm.com

CLERK'S CERTIFICATE OF NAME AND CHANGE OF ADDRESS AND TELEPHONE NUMBER

As of January 19, 2018:
Abigail E. Burgess
F/K/A Abigail E. Robinson
Office of the County Attorney
PO Box 898
1400 Highway 180 E. (88061)
Silver City, NM 88062
575-574-0008
575-574-0073 (fax)
aburgess@grantcountynm.com

CLERK'S CERTIFICATE OF NAME CHANGE

As of April 19, 2018:
Ann Maloney Conway
F/K/A Ann M. Conway
Sheehan & Sheehan, PA
PO Box 271
6001 Indian School Rd., NE,
Suite 400 (87110)
Albuquerque, NM 87103
505-247-0411
505-842-8890 (fax)
amc@sheehansheehan.com

As of April 18, 2018:
Asra Imtiaz Elliott
F/K/A Asra Imtiaz Ahmad
New Mexico Court of Appeals
PO Box 25306
2211 Tucker Avenue, NE
(87106)
Albuquerque, NM 87125
505-841-4617
505-841-4614 (fax)
coaaie@nmcourts.gov

As of April 25, 2018:
Dynette C. Palomares
F/K/A Dynette M. Cordova
Roybal-Mack & Cordova, PC
1121 Fourth Street, NW,
Suite 1D
Albuquerque, NM 87102
505-288-3500
505-288-3501 (fax)
dynette@roybalmacklaw.com

CLERK'S CERTIFICATE OF WITHDRAWAL AND CHANGE OF ADDRESS

Effective April 18, 2018:
Harriet Davidson
7707 Wisconsin Avenue
#1102
Bethesda, MD 20814

IN MEMORIAM

As of February 9, 2018:
Robert T. DeVoe
PO Box 13690
Albuquerque, NM 87192

As of April 8, 2018:
John Howard
223 N. Guadalupe St. #533
Santa Fe, NM 87501

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS AND CHANGE OF ADDRESS

Effective January 1:
Shonn Galassini
4504 Rainbow Street, NW
Albuquerque, NM 87114
562-881-7986

CLERK'S CERTIFICATE OF ADMISSION

On April 17, 2018:
Melissa L. Magee
Burns, Figa & Wills, PC
6400 S. Fiddlers Green Circle,
Suite 1000
Greenwood Village, CO
80111
303-796-2626
303-796-2777 (fax)
mmagee@bfwlaw.com

On April 17, 2018:
Michael James Ryan
4505 E. Chandler Blvd.,
Suite 210
Phoenix, AZ 85048
480-656-0460
480-656-0752 (fax)
mryan@holdenarmer.com

On April 17, 2018:
Nathan Scott Ryan
Holden & Armer, PC
4505 E. Chandler Blvd.,
Suite 210
Phoenix, AZ 85048
480-656-0460
480-656-0752 (fax)
nryan@holdenarmer.com

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective April 24, 2018:
Autumn D. Monteau
12228 SE 199th Street
Kent, WA 98031
406-531-3113
autumn.monteau@gmail.com

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective February 1, 2018:
Daniel McMinn Singer
Bighorn Law
3607 Washington Blvd.,
Suite 4
Ogden, UT 84403
801-580-9488
dan.m.singer@gmail.com

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS AND CHANGE OF ADDRESS

Effective April 18, 2018:
Jesse K. Tremaine
1926 Morris Place
Santa Fe, NM 87505
815-997-8735
jesse.tremaine@gmail.com

CLERK'S CERTIFICATE OF ADMISSION

On April 24, 2018:

Alexandria Paige Allen
Law Offices of the Public Defender
505 Marquette Avenue, NW, Suite 120
Albuquerque, NM 87102
505-219-2861
alexandria.allen@lopdnm.us

Kathryn Suzanne Almond
New Mexico Legal Aid, Inc.
PO Box 817
51 Jemez Canyon Dam Road
Bernalillo, NM 87004
505-867-3391
505-227-8712 (fax)
kathryna@nmlegalaid.org

Anna M. Armistead
Mounce, Green, Myers, Safi, Paxson & Galatzan
100 N. Stanton, Suite 1000
El Paso, TX 79901
915-532-2000
armistead@mgmsg.com

Leandro Barrientos Ferrer
3548 W. Belmont Avenue
Phoenix, AZ 85051
623-204-4862
l.barrientos@live.com

Sarah J. Bauer
3509 Central Avenue, NE
Albuquerque, NM 87106
201-281-5567
bauersj@gmail.com

Grant R. Birtcher
Navajo Tribal Utility Authority
405 Coyote Canyon Drive
Gallup, NM 87301
505-979–3541
gbirtcher@hotmail.com

Chandler Piché Carney
Mary Ann Romero & Associates
301 Edith Blvd., NE, Suite 100
Albuquerque, NM 87102
505-796-2024
cpc@marausa.net

Deshawnda Chaparro
9909 Tintara Avenue, SW
Albuquerque, NM 87121
970-347-0555
cha_08@live.com

Alexander Nicholas Cherup
4440 Caliente Street, Apt. C
Las Vegas, NV 89119
248-703-4158
ancherup@gmail.com

Eunjin Choi
351 Monroe Street, NE
Albuquerque, NM 87108
608-512-2594
jinny0619@gmail.com

Lara Christensen
4004 Camino De La Sierra, NE
Albuquerque, NM 87111
505-319-9337
larachristensen88@gmail.com

Jesse D. Clifton
6028 Namath Avenue, NW
Albuquerque, NM 87120
505-615-8403
jessedclifton@gmail.com

Stella M. Conklin
34 Cedar Lane Drive
Moriarty, NM 87035
505-350-7591
stellaconklin@gmail.com

Andrew S. Coon
9180 Coors Blvd., NW, #3726
Albuquerque, NM 87120
817-793-1173
andrew.coon@alumni.law.unm.edu

Mary Elizabeth Courtney
Lynch, Chappell & Alsup
300 N. Marienfeld, Suite 700
Midland, TX 79701
432-688-1309
432-683-8346 (fax)
ecourtney@lcalawfirm.com

Alysha M. Craig
Rose L. Brand & Associates, PC
7430 Washington Street, NE
Albuquerque, NM 87109
505-833-3036
alysha.craig@roselbrand.com

Samuel Christopher DeFillippo IV
Robles, Rael & Anaya, PC
500 Marquette Avenue, NW, Suite 700
Albuquerque, NM 87102
505-379-5382
chris@roblesrael.com

Reyes DeLaCruz
Office of the Thirteenth Judicial District Attorney
101 S. Main Street, Suite 201
Belen, NM 87002
505-861-0311
rdelacruz@da.state.nm.us

Alexandria E. Dell
The Torres Law Firm
661 Quantum Road, NE
Rio Rancho, NM 87124
505-221-6709
ad@torreslawnm.com

Cris Estrada
Jim Darnell PC
310 N. Mesa Street, Suite 212
El Paso, TX 79901
915-532-2442
915-532-4549 (fax)
cestrada@jdarnell.com

Shonnetta R. Estrada
300 Second Street, NW
Albuquerque, NM 87102
505-346-7274
shonnetta.estrada@gmail.com

Curtis Alton Fails
4216 Tahoe Drive
Fort Worth, TX 76119
817-903-5799
cafails@hotmail.com

Michael Flores
Richard S. Lees, PA
1012 Marquez Place, Suite 402
Santa Fe, NM 87505
505-910-4613
michael@leeslawfirm.com

Emmanuel Nelson Gali
31B Dawn Circle
Longview, TX 75605
224-572-3687
emmanuel.n.gali@gmail.com

Talbot W. Gandara
1560 W. Dublin Court
Chandler, AZ 85224
323-945-2556
kutalbot@gmail.com

Lisa Giandomenico
6501 San Antonio Drive, NE, Unit 902
Albuquerque, NM 87109
505-259-7087
lisag123@msn.com

Erick John Giles
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101
207-771-9248
egiles@dwmlaw.com

Nicholas A. Govea
Ortiz & Zamora, Attorneys at Law, LLC
2011 Botulph Road, Suite 200
Santa Fe, NM 87505
505-986-2900
505-986-2911 (fax)
nicholas@ortiz-zamora.com

Paul Saxon Guerriere
Hawkins Parnell Thackston & Young LLP
4514 Cole Avenue, Suite 500
Dallas, TX 75205
214-780-5100
214-780-5200 (fax)
sguerriere@hptylaw.com

Jacqueline F. Hyatt
U.S. Court of Appeals for the Tenth Circuit
1307 W. Seventh Street
Roswell, NM 88201
575-625-2388
jacqueline_hyatt@ca10.uscourts.gov

David Jenkins
1530 Taos Street
Santa Fe, NM 87505
505-699-1010
djenkins01@gmail.com

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 May 9, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2018 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-088.1	Peremptory excusal of a district judge; recusal; procedure for exercising	03/01/2018
Rules of Criminal Procedure for the District Courts		
5-302A	Grand jury proceedings	04/23/2018

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

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-020

No. A-1-CA-34747 (filed November 27, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DENNIS SAMUEL MIERA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Benjamin Chavez, District Judge

HECTOR H. BALDERAS,
Attorney General
MARIS VEIDEMANIS,
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

RICHARD J. MORAN
AHMAD ASSED
ASSED & ASSOCIATES
Albuquerque, New Mexico
for Appellant

Opinion

Julie J. Vargas, Judge

{1} Defendant appeals his conviction for two counts of criminal sexual penetration of a minor (CSPM) (Child under 13), one count of criminal sexual contact of a minor (CSCM) (Child under 13), and one count of bribery of a witness, claiming that the district court erred when it allowed the State to impeach him with a psychological evaluation prepared as part of plea negotiations, that he was entitled to a new trial because the State suppressed evidence, that his counsel was ineffective, and alternatively, that all of these errors, taken together, denied him of his right to a fair trial. While we conclude that the admission of the psychological evaluation does not rise to the level of plain error, and the district court did not abuse its discretion by denying Defendant's motion for a new trial, the district court did err by allowing the State to impeach Defendant with the evaluation. This error, coupled with numerous errors by defense counsel, denied Defendant a fair trial. We reverse and remand for a new trial.

I. BACKGROUND

{2} Defendant Dennis Miera met Margarita Burciaga (Margarita) in 2000. The two began dating, and eventually moved in together. When the relationship ended in the spring of 2003, the couple split amicably, and Defendant continued to babysit Margarita's children. In the summer of 2006, Defendant had agreed to watch G.M., Margarita's eight-year-old daughter. Before the visit took place, however, Margarita's six-year-old son and G.M. both told her that Defendant had sexually molested G.M. during previous visits. Margarita reported her discovery to the police, and G.M. was taken to a safehouse for an interview, where she gave details regarding the alleged sexual abuse. Defendant was arrested and indicted in April 2008. Defendant was initially represented by Joseph Riggs II (Attorney Riggs), who was replaced by Rafael Padilla (Attorney Padilla) in October 2013.

{3} Prior to trial, Defendant attempted to negotiate a plea agreement with the State. In hopes of negotiating a more favorable plea, Defendant met several times with forensic and clinical psychologist, Dr. William Foote, and underwent an evaluation by Dr. Foote (the evaluation). The results of that evaluation were eventually turned over to the State in furtherance of plea negotiations. The negotiations proved unsuccessful, however, and Defendant's case went to trial in December 2014.

{4} The jury found Defendant guilty on all counts charged in the indictment. Three months later in March 2015, Defendant filed a motion for new trial alleging a lack of disclosure of material evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The district court denied the motion and sentenced Defendant. Defendant appeals the judgment against him as well as the denial of his motion for new trial. Defendant's appellate counsel submitted this appeal and filed a substitution of counsel later, in April 2015.

II. DISCUSSION

A. Plain Error

{5} Defendant asserts that the district court committed plain error when it allowed the State the evaluation as impeachment evidence because the evaluation was created as part of plea negotiations. While we agree that the district court's ruling allowing the State to impeach Defendant with the evaluation was in error, we cannot conclude that the State's use of the evaluation, alone, raises grave doubts about the validity of the verdict.

1. Use of Evaluation at Trial

{6} The record is clear that the parties agreed at trial that the evaluation was created and given to the State as part of plea negotiations. The evaluation is "a psychological evaluation of [Defendant, created] to provide the court information regarding his sentencing relative to charges he is facing" and details Defendant's personal history, past occupations, and relationships.

{7} The evaluation contains two damaging components to Defendant's defense. First, the evaluation contains a statement indicating that Defendant admitted that he continued to have overnight visits with G.M. and her brother through the date of the offenses, a fact that Defendant claimed he did not remember during direct examination. Further, the evaluation contains a section entitled "Sex Offender Assessment," in which Dr. Foote appears to recount a series of admissions made by Defendant seeming to admit that he committed the alleged acts and excusing his conduct. Specifically, the evaluation states:

> [Defendant] used a number of different excuses to defend against the accusation he committed the sex offense. For example, he responded in the affirmative to responses such as "a little bit of sex play that happened between that person who accused me was because I'm not perfect" and he reported "the sex play that happened between me and the person who accused me was an

> accident." He also indicated that he believes that the allegations against him have been exaggerated and no one was hurt by what happened. Also, he indicated that this was an accident, that he slipped one time and made a mistake which he regrets.

{8} After the State rested its case but before Defendant testified, the State notified the district court that it intended to use the evaluation to impeach Defendant, conceding that because it was created to assist with sentencing, "it would be inappropriate" to introduce the evaluation during the State's case in chief. Citing *State v. Watkins*, 1979-NMCA-003, 92 N.M. 470, 590 P.2d 169, the State argued that the evaluation was appropriate impeachment evidence. Defense counsel had no immediate response to the State's argument, advising the district court that he had not seen the evaluation.

{9} Noting the general inadmissibility of plea negotiations and the possibility of a doctor/patient privilege or waiver of the privilege related to the evaluation, the district court gave the parties a brief recess to gather "written authorities for use or nonuse of the material if [D]efendant contradicts those statements [in the evaluation.]" After the recess, defense counsel advised the Court that he had no authority to support the exclusion of the evaluation to impeach Defendant and stipulated to its use for that purpose, stating:

> [A]fter reviewing the [evaluation] and also the case that was provided, . . . *Watkins*, my initial reaction to the [c]ourt was since this was submitted to the State as part of plea negotiations, I would have argued that, you know, since it's part of plea negotiations, that that evidence would not be admissible in the evidence. But given the case, I can see where the State's arguing for its admissibility if it is going to impeach [Defendant] on the statements that are anticipated to be made, so we feel that it's probably going to be, you know, used for impeachment purposes. . . . [G]iven the case of . . . *Watkins*[, u]nless that case has been reversed, it seems to me that, you know, the statement could be used for impeachment.

The district court clarified, "so I understand that right now you don't have any authority to support opposition of the use of this information for impeachment purposes, and, therefore, you're submitting none; is that right?" Defense counsel answered in the affirmative, noting that he "had very little knowledge of this report, and [he] certainly didn't have a copy of it[.]" The district court ruled that the evaluation could be used to impeach the Defendant, and offered to "give a limiting instruction, telling the jury that they can only use [the evaluation] for the purposes of credibility and impeachment." Defense counsel never indicated a desire for, nor requested such an instruction.

{10} Following the district court's ruling that the evaluation could be used to impeach Defendant, Defendant took the stand and testified on direct examination that he had no recollection of the children staying overnight at his home and reiterated that testimony on cross-examination, testifying that he did not recall telling Dr. Foote that the children stayed overnight with him. The State attempted to refresh Defendant's memory during cross-examination by allowing him to review the evaluation. Defense counsel did not object, and after reading the document to himself, Defendant stated, "I saw what I read, but to be honest with you, I don't remember stating that. I mean, it's written there, but that doesn't mean that I said it."

{11} Defendant testified on cross-examination that he had never admitted the allegations to anyone. Following Defendant's denial, the State questioned Defendant regarding specific responses Dr. Foote reported Defendant had made to a sex offender assessment completed as part of the evaluation. In doing so, the following exchange occurred:

> Q: In your meetings with Dr. Foote, did you answer in the affirmative . . . to the following statement: "A little bit of sex play that happened between that person who accused me was because I'm not perfect?"
> A: There was a lot more to that statement.
> Q: Respectfully, it's a yes or no question. Did you answer[?]
> A: Well, then, yes. That wasn't a question, that was an answer.
> Q: Did you answer in the affirmative to another—to the next following statement: "The sex play that happened between me and the person who accused me was an accident?"
> A: Yes.
> Q: Did you respond in the affirmative or otherwise indicate that you believed that the allegations against you have been exaggerated?
> A: Yes.
> Q: Did you respond in the affirmative or otherwise indicate that you believed that no one was hurt by what happened?
> A: Yes.
> Q: Did you respond in the affirmative or otherwise indicate that this was an accident?
> A: Yes.
> Q: Did you respond in the affirmative or otherwise indicate that you slipped one time?
> A: Yes.
> Q: Did you respond in the affirmative or otherwise indicate that you made a mistake which you regret?
> A: Yes.

{12} On redirect, Defendant described the format of the evaluation and explained that the statements quoted from the report represented answers that Defendant had chosen from a set of multiple-choice answers. Defendant testified that he completed the sex offender assessment twice, with each assessment taking about four hours to complete. The first time he took the test, Defendant explained, he did not answer the multiple choice questions the State had inquired about because he "felt they led to admitting guilt." Defendant testified that the second time he took the test, "[he] answered the questions the best that [he] could, because [Dr. Foote] said he couldn't do the evaluation . . . . He said he couldn't do the—finish the evaluation without those questions being answered." Defendant explained, "I was asked a question, and then you have a choice of A, B, C and D. And in my opinion, none of them were good, but he said . . . to be able to evaluate me, to evaluate where I was coming from and where I was at in my life, he said you have to answer one of those questions." While the State pressed Defendant to admit on re-cross-examination, that the test was actually in a "true/false" rather than multiple choice format, Defendant insisted that was not the case.

2. Standard

{13} Defendant concedes that his counsel did not object to the State's use of the evaluation as impeachment evidence at trial. Appellate courts review unpreserved evidentiary questions for plain error. *See*

Rule 11-103(E) NMRA; *State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056. Plain error applies only where the substantial rights of the accused are affected, and exists where the admission of the testimony "constituted an injustice that created grave doubts concerning the validity of the verdict." *Montoya*, 2015-NMSC-010, ¶ 46 (internal quotation marks and citation omitted). It is intended to be used sparingly as an exception to the rule requiring objections, which promotes efficient and fair proceedings. *See State v. Paiz*, 1999-NMCA-104, ¶ 28, 127 N.M. 776, 987 P.2d 1163. "[I]n determining whether there has been plain error, we must examine the alleged errors in the context of the testimony as a whole." *Montoya*, 2015-NMSC-010, ¶ 46 (omission, internal quotation marks, and citation omitted).

{14} Rule 11-410(A)(5) NMRA prohibits "a statement made during plea discussions" from being admitted against the defendant where the discussions did not ultimately result in a guilty plea. According to our Supreme Court, the rule prohibits the admission of statements made during plea negotiations "as evidence at trial for either substantive or impeachment purposes." *State v. Trujillo*, 1980-NMSC-004, ¶ 19, 93 N.M. 724, 605 P.2d 232.

3. Use of Evaluation for Impeachment

{15} The State points to *Watkins* as support for its position that its impeachment of Defendant using the evaluation was proper. In *Watkins*, the prosecutor used portions of taped interviews to impeach the defendant during cross-examination after the defendant had introduced the tapes on direct examination in his own case in chief. 1979-NMCA-003, ¶¶ 15-17, 20. This Court concluded that, "[h]aving interjected the tapes into the trial for his own purposes, [the] defendant cannot properly complain of the prosecutor's use of the tapes, on cross-examination, to attack the credibility of [the] defendant's trial testimony." *Id.* ¶ 21. We explicitly limited our holding in *Watkins* to the circumstances of that case. *Id.* Using a previous version of Rule 11-410, which similarly barred the use of statements made in connection with pleas, the defendant asked us to determine whether the tape "was improperly used for impeachment because the statements used were part of plea bargain negotiations." *Id.* ¶ 18. We explicitly declined to address the issue, stating, "We do not decide whether, in the ordinary case, this rule prohibits use of such statements for impeachment purposes." *Id.* Instead, we reiterated the limited the scope of our decision, concluding that "[*u*]*nder the circumstances of th*[*at*] *case*, the rule did not bar the cross examination." *Id.* (emphasis added)

{16} The State suggests that, like the defendant in *Watkins*, Defendant's blanket statement of denial opened the door to the State's impeachment of that denial. *Watkins* carries minimal weight in our analysis of this issue; not only did *Watkins* specifically decline to address the issue presented in this case, it is factually distinguishable. Unlike *Watkins*, Defendant did not offer the evaluation into evidence in his case in chief, requiring that the prosecution respond. The statements set out in the evaluation and attributed to Defendant came in solely as impeachment evidence through cross-examination. We therefore decline the State's invitation to apply *Watkins* here.

{17} This case is more analogous to *Trujillo*. In *Trujillo*, the defendant identified, as part of plea negotiations, a police officer as the person to whom he had sold heroin. 1980-NMSC-004, ¶ 4. During his trial testimony, however, the defendant denied having made the sale entirely. The state used the identification made during plea negotiations to impeach the defendant, but did not proffer it as evidence in its case in chief. *Id.* ¶ 5. Our Supreme Court applied the precursor to Rule 11-410, which prohibited introduction of evidence drawn from plea negotiations. *See Trujillo*, 1980-NMSC-004, ¶ 6. The Court reasoned that the rule's purpose and importance in the justice system was to embody "the public interest in encouraging negotiations concerning pleas between the criminal defendant and the [s]tate." *Id.* ¶ 18. The Court described guilty pleas as "an essential part of our criminal justice system," and explained that "candor in plea discussions aids greatly in the reaching of agreements between the defendant and the [s]tate." *Id.* ¶ 18. The Court reasoned that the parties "need to feel free to discuss the merits of the case, the alternatives for disposition, and the possible concessions each is willing to make." *Id.* ¶ 19. Concluding that Rule 11-410 "clos[es] the door on the admissibility of all these matters as evidence at trial for either substantive or impeachment purposes[,]" *id.*, the Court acknowledged the danger that some individuals may use the rule to testify inconsistently, but ultimately decided that "a weighing of conflicting policies demonstrates that the balance is tipped in favor of interpreting [the rule] as the cloak of privilege around plea negotiation discussions." *Id.* ¶ 21.

{18} In light of Rule 11-410's prohibition against using statements made during plea discussions and *Trujillo*'s application of the rule to statements used for impeachment purposes, the district court erred in allowing the evaluation to be used as impeachment evidence at trial. Nonetheless, while the wrongful admission of the evaluation causes us concern, the error in allowing the State to use the evaluation did not, in our view, rise to the level of plain error requiring reversal. Defendant had an opportunity to explain the answers contained in the evaluation and used to impeach his testimony. Furthermore, while the State read statements attributed to Defendant from the evaluation, the evaluation itself was not introduced as an exhibit and was not provided to the jury. We are mindful that plain error is intended to be used sparingly, *see Paiz*, 1999-NMCA-104, ¶ 28, and cannot conclude that this error alone creates "grave doubts" about the validity of the verdict against Defendant. *Montoya*, 2015-NMSC-010, ¶ 46 (internal quotation marks and citation omitted).

B. Motion for a New Trial Based on Newly Discovered Evidence

{19} Defendant filed a motion for new trial after the guilty verdict was entered against him. In that motion, Defendant claimed that following the completion of his trial, his appellate counsel discovered the State had filed sexual abuse charges against Esteban Burciaga (Burciaga), Margarita's husband and G.M.'s stepfather, based on allegations G.M. made while Defendant's case was pending. G.M. later recanted those accusations, and the State entered a nolle prosequi dismissal of the case. [1]Defendant asserted that G.M.'s recantation constituted impeachment evidence under *Brady* and asked the district court to grant a new trial based on the State's failure to disclose the allegations against Burciaga and G.M.'s subsequent recantation. In light of the district court's

[1]The filed document contains the following language: "[T]he State of New Mexico . . . enters a [n]olle [p]rosequi in the above-captioned cause because the alleged victim recanted the statements made concerning allegations regarding this defendant."

conclusion that defense counsel was aware of the Burciaga case, we affirm the district court's denial of Defendant's motion for a new trial.

1. Evidence of the State's Disclosure of the Burciaga Case Prior to Trial

{20} At the hearing on the motion, Defendant called his two previous attorneys as witnesses. Attorney Riggs, Defendant's first attorney, testified that, while the State had never turned over any information to him regarding Burciaga, Defendant had alerted him that Burciaga was suspected of molesting G.M. Attorney Riggs stated that he conducted a background check on Burciaga in 2009, but because that investigation predated Burciaga's indictment, he found nothing regarding sexual assault, molestation, abuse, or neglect. Attorney Riggs did not investigate the allegations against Burciaga any further.

{21} Defendant's second attorney, Attorney Padilla, testified that he could not remember the State ever informing him of an incident, nolle prosequi, or recantation involving Burciaga, but did acknowledge that he had gotten some "[l]imited" information regarding Burciaga from Defendant, specifically that Burciaga may have gotten into trouble because of his behavior toward G.M. Attorney Padilla had no recollection of having questioned G.M. regarding lying or being molested by Burciaga, and he could not remember questioning Margarita about G.M.'s allegations against Burciaga. Furthermore, Attorney Padilla never investigated pending cases against Burciaga. Attorney Padilla testified, however, that he believed the existence of a similar case against Burciaga was critical to Defendant's case because the State presented no physical evidence, Defendant's guilt was decided based on the credibility of the witnesses, and G.M. recanting similar allegations against a similarly situated individual was relevant to her credibility.

{22} In response to Attorney Riggs' and Attorney Padilla's testimony, the State called Jacob Payne, the prosecutor of both Defendant and Burciaga. Payne testified to a vague memory of a discussion of the nolle prosequi with Attorney Riggs, but could not provide any details regarding that conversation. Payne did, however, have a specific memory of discussing the nolle prosequi informally with Attorney Padilla in the courthouse, in the aisle of a courtroom gallery. During that conversation, Payne testified that Attorney Padilla asked whether Defendant's case would be dismissed as a result of G.M.'s recantation in the Burciaga case. Payne responded that it would not, asking about the feasibility of a plea agreement. Payne acknowledged that he had no written record of notifying defense counsel regarding the recantation. Payne stated that he had no recollection as to whether he discussed the existence of a tape recording of G.M.'s recantation with defense counsel but admitted that he never sent the tape to defense counsel. After viewing G.M.'s taped recantation, the district court summarized her statement as follows:

> [T]he alleged victim stated that Burciaga's actions were an accident, that they occurred while talking, that he had been tickling her, and that he never touched her in the wrong way, essentially. Also that she said that he had done otherwise because she was mad that he was mad at her about some sort of an incident involving nail polish and furniture[.]

{23} At the conclusion of the hearing, the district court found that Attorney Riggs acted with due diligence by conducting a background check on Burciaga in 2009 but was not aware of G.M.'s recantation while representing Defendant. The district court found Attorney Padilla's testimony to be truthful in that he had no recollection of discussing the nolle prosequi and recantation with Payne, but characterized Attorney Padilla's recollection as "attenuated and conditional[,]" noting that it was based not on actual memory but on the absence of actions he believed he would have taken if presented with that information. Payne's testimony, on the other hand, the district court found more persuasive, crediting the "detail, specificity, and exactitude of . . . Payne's memory[.]" Based on these findings, the district court concluded that "the defense was aware of the Burciaga case, the nolle [prosequi], and the recantation." The district court emphasized that it was "confined to review the case as an issue of newly-discovered evidence" and concluded that Defendant had not met four of the six factors necessary to receive a new trial under *State v. Fero*, 1988-NMSC-053, ¶ 12, 107 N.M. 369, 758 P.2d 783 (requiring a showing that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) was discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material; (5) is not merely cumulative; and (6) is not merely impeaching or contradictory). As a result, the district court denied Defendant's motion for new trial.

2. Defendant's Motion

{24} Despite characterizing his motion before the district court as a "*Brady* motion" and focusing his appellate arguments on an analysis under *Brady*, Defendant challenges the district court's denial of his motion for new trial. We review both issues—*Brady* claims and judgments on a motion for new trial—for an abuse of discretion. *See State v. Moreland*, 2008-NMSC-031, ¶ 9, 144 N.M. 192, 185 P.3d 363 ("We will not disturb a trial court's exercise of discretion in denying or granting a motion for a new trial unless there is a manifest abuse of discretion." (alteration, internal quotation marks, and citation omitted)); *Case v. Hatch*, 2008-NMSC-024, ¶ 47, 144 N.M. 20, 183 P.3d 905 (stating that *Brady* challenges are akin to an allegation of prosecutorial misconduct, which is reviewed for an abuse of discretion). "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 determining whether the district court abused its discretion, we defer to the district court's findings of fact if substantial evidence exists to support those findings, but we review the application of the law to the facts de novo. *See State v. Hubble*, 2009-NMSC-014, ¶ 5, 146 N.M. 70, 206 P.3d 579.

{25} The district court analyzes a *Brady* claim differently from a motion for new trial based on newly discovered evidence. *Compare Case*, 2008-NMSC-024, ¶ 44 (requiring a defendant seeking to overturn a conviction under *Brady* to prove three elements: the evidence was suppressed by the prosecution; the suppressed evidence was favorable to the defendant; and the suppressed evidence was material to the defense), *with Fero*, 1988-NMSC-053, ¶ 12 (setting out six requirements to succeed on a motion for new trial based on newly discovered evidence). Regardless of whether we analyze Defendant's argument through the lens of a *Brady* challenge or a motion for new trial, he fails to demonstrate an abuse of discretion.

a. Defendant's *Brady* Claim

{26} Defendant did not demonstrate to the district court that the State suppressed evidence, as required under *Brady*. The district court weighed Attorney Padilla's "attenuated, indistinct, and conditional recollective opinion[,]" against the "detail, specificity, and exactitude" of Payne's testimony to conclude that "the defense was aware of the Burciaga case, the nolle [prosequi], and the recantation." The district court's findings are supported not only by the testimony of Attorney Padilla and Payne themselves, but also by the trial transcript, in which the State mentions the nolle prosequi of Burciaga in Attorney Padilla's presence. Prior to Defendant's commencement of his case in chief, the court questioned the parties, asking "was the stepfather ever investigated for child abuse against [G.M.] or sexual abuse of [G.M.] that anyone knows of?" The State responded, "he was, years later. . . . those charges were dropped; they were nolle'd by the [d]istrict [a]ttorney's [o]ffice. I believe it was in 2010. And, again, they were dropped." Attorney Padilla expressed no surprise and made no indication that he was previously unaware of this information. Payne's testimony and the State's representations regarding the investigation and subsequent nolle prosequi of Burciaga are sufficient to support the district court's factual findings that defense counsel was aware of the Burciaga case. *Brady* does not impose a disclosure obligation where, like here, a defendant already has access to the information or can access it by exercising due diligence. *See State v. Huber*, 2006-NMCA-087, ¶ 32, 140 N.M. 147, 140 P.3d 1096 (citing *State v. Altgilbers*, 1989-NMCA-106, ¶ 31, 109 N.M. 453, 786 P.2d 680 (acknowledging a lessened obligation to disclose where knowledge of recantation "was as available to the defense as it was to the prosecution")); *but see State v. Huerta-Castro*, 2017-NMCA-026, ¶ 36, 390 P.3d 185 (stating that disclosure during trial requires us to examine whether the late tender "impeded the effective use of evidence in such a way that impacts the fundamental fairness of the proceedings"). This is not a case where the defendant did not have access to a witness or did not know the recantation existed. Here, the district court found that Defendant knew that G.M. had made accusations similar to those made in his case and knew the subject of those accusations. Defense counsel could have inquired into the status of the Burciaga case and easily learned of the recantation through the nolle prosequi document itself. Nonetheless, defense counsel neither requested further information, nor sought additional time to look into the matter. Because Defendant did not demonstrate that the State suppressed evidence throughout the trial, we conclude the district court did not abuse its discretion in denying Defendant's motion. *See State v. Rondeau*, 1976-NMSC-044, ¶ 40, 89 N.M. 408, 553 P.2d 688 (interpreting *Brady* "to mean that a convicted defendant would be entitled to a retrial where the prosecution suppressed, *throughout the whole trial*, exculpatory evidence material to the guilt or punishment of the defendant" (emphasis added)).

b. Motion for New Trial—Newly Discovered Evidence

{27} Defendant's argument that the district court abused its discretion under the standards set forth for a motion for new trial fails because Defendant has failed to demonstrate that defense counsel could not have discovered the recantation until after trial. To succeed on a motion for new trial based on newly discovered evidence, a defendant must demonstrate, among other things, that the evidence was discovered after trial and that the evidence could not have been discovered before trial by the exercise of due diligence. *Fero*, 1988-NMSC-053, ¶ 12. According to the district court's findings, defense counsel had knowledge of the recantation before the trial ended, and as discussed above, the district court's findings are supported by the evidence and are entitled to deference.

{28} Indeed, nothing in the record suggests the recantation "could not have been discovered before trial by the exercise of due diligence[.]" *Id.* Burciaga was indicted February 10, 2011, and the nolle prosequi was filed July 31, 2012. The nolle prosequi specifically states that "the alleged victim recanted the statements made concerning allegations regarding [Burciaga.]" Defendant's trial counsel, Attorney Padilla, who was retained by Defendant in 2013 after the Burciaga matter had been concluded, acknowledged that Defendant had informed him that G.M. may have made accusations against Burciaga, but admitted to not having done any investigation as to whether charges had been filed. Defendant was not tried until December 2014; Attorney Padilla therefore had ample time between the time he was retained and the trial in December 2014 to investigate the allegations against Burciaga. Doing so would have revealed the indictment, the nolle prosequi, and recantation. The district court's decision was therefore in accord with the facts of the case. The district court did not abuse its discretion in concluding Defendant did not meet the requirements to prevail on his motion for new trial based on newly discovered evidence.

C. Ineffective Assistance of Counsel

{29} Defendant argues that his trial counsel was ineffective by failing to adequately apprise himself of the applicable legal standards to effectively argue for the exclusion of the evaluation and by failing to investigate G.M.'s allegations against Burciaga. Our review of the record raised additional unexplained incidents that are a source of concern. Taken together, we believe Defendant has presented a prima facie case of ineffective assistance.

1. Standard

{30} The Sixth and Fourteenth Amendments of the United States Constitution guarantee criminal defendants the right to effective assistance of counsel. *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 16, 130 N.M. 179, 21 P.3d 1032. To establish ineffective assistance of counsel, a defendant must show that: "(1) counsel's performance fell below that of a reasonably competent attorney; (2) no plausible, rational strategy or tactic explains counsel's conduct; and (3) counsel's apparent failings were prejudicial to the defense." *State v. Bahney*, 2012-NMCA-039, ¶ 48, 274 P.3d 134. Whether we address a claim of ineffective assistance through direct appeal depends on the completeness of the record. *See State v. Trujillo*, 2012-NMCA-112, ¶ 48, 289 P.3d 238. Where the facts necessary to a full determination of ineffective assistance are not part of the record, but an appellant nonetheless makes a prima facie showing of ineffective assistance of counsel, an appellate court may remand for an evidentiary hearing. *See State v. Roybal*, 2002-NMSC-027, ¶ 25, 132 N.M. 657, 54 P.3d 61; *State v. Cordova*, 2014-NMCA-081, ¶ 7, 331 P.3d 980. Because the trial court's record "may not adequately document the sort of evidence essential to a determination of trial counsel's effectiveness[,]" ineffective assistance of counsel claims are often better adjudicated through habeas corpus proceedings. *State v. Grogan*, 2007-NMSC-039, ¶ 9, 142 N.M. 107, 163 P.3d 494 (internal quotation marks and citation omitted); *Duncan v. Kerby*, 1993-NMSC-011, ¶ 4, 115 N.M. 344, 851 P.2d 466 (acknowledging that habeas corpus proceedings are the "preferred avenue

for adjudicating ineffective assistance of counsel claims"). "We review claims of ineffective assistance of counsel de novo." *State v. Dylan J.*, 2009-NMCA-027, ¶ 33, 145 N.M. 719, 204 P.3d 44.

2. Reasonably Competent Attorney Standard

{31} In determining whether counsel's performance fell below an objective standard of reasonableness, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *State v. Paredez*, 2004-NMSC-036, ¶ 14, 136 N.M. 533, 101 P.3d 799 (internal quotation marks and citation omitted). In order to overcome the presumption that counsel acted reasonably, Defendant must show that the challenged action could not be considered "sound trial strategy." *State v. Hunter*, 2006-NMSC-043, ¶ 13, 140 N.M. 406, 143 P.3d 168 (internal quotation marks and citation omitted).

a. Duty to Apprise Oneself of Legal Standard

{32} It is beyond dispute that "no lawyer should approach any task without knowledge of the applicable statutes, court rules, and case law[.]" *Garcia v. State*, 2010-NMSC-023, ¶ 40, 148 N.M. 414, 237 P.3d 716 (alteration, internal quotation marks, and citation omitted); *State v. Lopez*, 1996-NMSC-036, ¶ 9 n.1, 122 N.M. 63, 920 P.2d 1017 (expressing dismay at the trial court's, prosecutor's, and defense counsel's failure to apprise themselves of the current state of the law three years after case law altered the legal standard, noting that "[a]ttorneys and judges have an obligation to keep abreast of current changes in the law"). In this instance, defense counsel apparently failed to apprise himself of the applicable legal authority governing the admissibility of the evaluation. It is clear from the record that Defendant intended to testify; and, in anticipation of Defendant's testimony, the State alerted the district court and defense counsel of its intent to use the evaluation for impeachment purposes. Notwithstanding the State's notice of its intent to impeach Defendant with the evaluation, Defendant's counsel apparently never took steps to obtain a copy of the evaluation and did not even review it until moments before Defendant took the stand to testify. Though he knew the State considered the evaluation to be inadmissible in its case in chief, defense counsel apparently did no research into the question of whether information gathered through plea negotiations could be used as impeachment evidence. A cursory investigation into Rule 11-410 and its relevant case law leads to *Trujillo*, 1980-NMSC-004, [2]which is directly contradictory to the State's position. Even after the district court recessed specifically to allow him an opportunity to address the State's argument and case law, defense counsel presented no argument to distinguish Defendant's case from *Watkins*, 1979-NMCA-003, and apparently did not seek to ascertain whether *Watkins* had been overruled or limited by subsequent case law. Instead, it appears from the record that defense counsel simply accepted the State's representation that no contrary authority existed.

{33} We next look to whether a "plausible, rational strategy or tactic explains [defense] counsel's conduct[.]" *Bahney*, 2012-NMCA-039, ¶ 48. The statements from the evaluation used by the State to impeach Defendant were tantamount to his repeated admission of guilt. Indeed, the State pointed this out during its argument to the district court. Acknowledging the detrimental nature of the evaluation, the district court offered defense counsel an opportunity to limit the jury's consideration of those statements to impeachment and credibility. Defense counsel did not, however, avail himself of this opportunity or seek to limit the use of the evaluation in any way. We see no reasonable professional calculation that could support Attorney Padilla's failure to conduct any pre-trial investigation into the existence and content of the evaluation. Furthermore, it is inconceivable that defense counsel's total failure to apprise himself of the law governing the use of information gathered during plea negotiations for impeachment might be considered sound trial strategy. *See Garcia*, 2010-NMSC-023, ¶ 40 (concluding counsel did no research to discover an amendment to statute, stating, "[w]e cannot conceive of a strategic reason for [defense counsel's actions]. . . . It is of little comfort that both the prosecution and the trial court appear to have labored under a similar misapprehension of the law").

b. Failure to Investigate Burciaga Case

{34} In addition to apprising himself of the relevant law, counsel has a duty to investigate. *See State v. Barnett*, 1998-NMCA-105, ¶ 30, 125 N.M. 739, 965 P.2d 323 ("Failure to make adequate pretrial investigation and preparation may . . . be grounds for finding ineffective assistance of counsel." (internal quotation marks and citation omitted)). Courts may find counsel's performance deficient where he "fail[s] to investigate a significant issue raised by the client." *State v. Hunter*, 2006-NMSC-043, ¶ 14. However, a "general claim of failure to investigate is not sufficient to establish a prima facie case if there is no evidence in the record indicating what information would have been discovered." *Cordova*, 2014-NMCA-081, ¶ 10.

{35} In this case, defense counsel admitted he had received information from his client that Burciaga had gotten in some trouble because of his behavior toward G.M. but failed to investigate that information. Undoubtedly, allegations of sexual molestation of the victim by another individual around the same time period raise questions about the identity of the actual perpetrator of the molestation. We cannot conceive of a plausible rational strategy or tactic that would explain defense counsel's failure to investigate another possible abuser of G.M.

{36} Defense counsel also made it clear that if he had known of G.M.'s recantation, he would have used it to impeach her credibility during his cross-examination. Indeed, defense counsel stressed the importance of the recantation, stating that it "would have changed the course of the trial." Considering the importance that defense counsel himself assigned to G.M.'s recantation, it is difficult to imagine that defense counsel's failure to discover that information was the result of a tactical decision. Indeed, in a trial involving allegations of sexual abuse, there can be little more probative evidence than that which suggests the possibility that the allegations made by the alleged victim are false; and, evidence of the falsity of prior similar allegations are significant indicia of innocence that any effective attorney knows to pursue.

c. Additional Competence Issues

{37} The record also reveals unexplained instances in which defense counsel's actions may warrant additional evidentiary inquiry. For example, on cross-examination, defense counsel asked one of the investigating officers what information he had gathered that had led him to arrest

[2]We note that annotations of Rule 11-410 reveal clear, unequivocal statements that information gathered during plea negotiations may not be used as impeachment evidence.

Defendant. The officer responded that, "based on his sexual desires, it all fits in with the sexual deviant nature of the individual." To that point, there had been no testimony about Defendant's sexual desires or sexually deviant nature. The officer's response was given without explanation, support or context. Rather than defense counsel moving to strike the officer's statement, it was the State who objected to its own witness's testimony arguing that it was "going to essentially irrelevant consensual sex acts between two adults that don't really bear on this particular issue at all" and that continuing with the line of questioning was likely to result in reversible error. Though the State's objection was sustained, the characterization of Defendant as a sexual deviant went unexplained, and was never limited or stricken from the record. While this line of questioning appears to have been a tactic of defense counsel, one must question the wisdom of pursuing a line of questioning so objectionable that the State intervenes in an attempt to save its case from reversal on appeal.

{38} Defense counsel also sought to admit a Children, Youth, and Families Department (CYFD) report about an incident involving G.M. that was reported around the time of Defendant's arrest. It appears defense counsel did not, however, investigate the circumstances surrounding the report, research its admissibility, or even thoroughly review it before proffering it to the district court. The report resulted from an altogether separate claim made by G.M. that her mother and Burciaga had physically abused her. Defense counsel initially argued to the district court that the report should be admitted to attack G.M.'s credibility because "the report by the alleged victim in this case was found unsubstantiated when she was complaining of, you know, physical abuse by her stepfather and mother." After inquiring as to whether the complaint included allegations of sexual abuse, to which defense counsel responded, "[n]o," the district court denied Defendant's request to admit the CYFD report for the requested purpose.

{39} Following a break, defense counsel later renewed his request to introduce the CYFD report, stating, "But I was looking at the report, and I know the [c]ourt indicated it was not relevant, but I was reading a part of the report, especially one part of it." According to the record, the report stated that during the CYFD investigation, G.M. had been questioned about "good touch and bad touch[,]" that she "was able to give at least two examples of each[,]" and that "she denie[d] that she has ever had a bad touch with anyone." Despite the district court twice asking for authority to support the report's admission, defense counsel offered none. Nothing in the record indicates defense counsel interviewed the caseworker who wrote the report or made arrangements to call any appropriate witnesses to introduce the report or testify about G.M.'s admission that she had never experienced "bad touch." In fact, it appeared that the break in the trial was the first time he had read the portion of the report related to CYFD's investigation into whether G.M. had been touched inappropriately. In a case in which the credibility of one particular witness is of paramount importance, G.M.'s admission to CYFD that she had never experienced "bad touch" was certainly an important piece of evidence that should not, as it appears, have been first considered in the midst of trial.

{40} This is not a case where a defendant makes a vague assertion that his attorney failed to investigate some undisclosed yet pivotal issue. Defendant placed evidence in the record that defense counsel failed to pursue a specific lead given to him by his client that either suggested Burciaga as an alternate perpetrator or called into question G.M.'s credibility. The record further reveals a report in defense counsel's possession prior to trial containing an important admission by the victim that she had not, in fact, been touched inappropriately. Defendant points, with particularity, to the evidence that would have been discovered as a result of thorough investigation of the claims against Burciaga and specifies that the evidence was probative of a key witness's credibility. These matters, along with defense counsel's lack of preparation regarding other substantive and legal issues cannot be construed as plausible or rational strategy. We are satisfied that Defendant has made a prima facie case that defense counsel's performance fell below that of a reasonably competent attorney. *See Bahney*, 2012-NMCA-039, ¶ 48.

3. Prejudice

{41} In addition to showing that defense counsel's performance fell below that of a reasonably competent attorney, Defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Cordova*, 2014-NMCA-081, ¶ 9 (internal quotation marks and citations omitted). In deciding whether Defendant was prejudiced by defense counsel's failures, "we must compare the weight of [the] prejudice against the totality and strength of the evidence of [a d]efendant's guilt and determine if the outcome of the trial has been rendered unreliable." *Roybal*, 2002-NMSC-027, ¶ 26.

{42} Often in ineffective assistance cases, the defendant is not prejudiced by defense counsel's ineffectiveness because the totality and strength of the evidence of the defendant's guilt restores our confidence in the outcome of the trial. *See, e.g.*, *id*. ¶ 28. The State asserts that is the case here. We are not convinced, as the evidence is not so overwhelming or persuasive that it reassures us Defendant received a fair trial.

{43} This case involved competing credibility determinations. No physical evidence was ever presented. Aside from Defendant and G.M., both of whose testimony was tainted by the irregularities discussed above, five people testified—G.M.'s brother, Margarita, two investigating officers, and the safehouse interviewer. Each witness reiterated the allegations of abuse described to them by G.M., or explained the series of events immediately after G.M. made the allegations against Defendant. G.M.'s brother was the only witness to testify to events that were not based entirely on G.M.'s memory and recitations. Although he testified he had walked in on Defendant and G.M. shirtless and under the covers, G.M.'s brother admitted that he had never "seen them together doing it[.]" Furthermore, prior to testifying at trial, G.M.'s brother had never told anyone that he had seen G.M. and Defendant under the covers in the almost seven years between the time of Defendant's arrest and the trial.

{44} This court is reluctant to decide ineffective assistance of counsel claims without first having before us all of the required facts to make an informed decision. *See State v. Swavola*, 1992-NMCA-089 ¶ 3, 114 N.M. 472, 840 P.2d 1238 ("Recent decisions by this [C]ourt have expressed our reservations about deciding claims of ineffective assistance of counsel in the absence of a district court evidentiary hearing on the matter."). "We read our Supreme Court jurisprudence as acknowledging this Court's discretion to remand a case for an evidentiary hearing where a defendant has made a prima facie case of ineffective assistance." *Dylan J.*, 2009-NMCA-027, ¶

42. The number, as well as the nature of the errors and irregularities discussed above appear to have had a considerable impact on this case, as they dealt mostly with the credibility of G.M. and Defendant, upon which this case turns. *See State v. Ortiz-Burciaga*, 1999-NMCA-146, ¶ 9, 128 N.M. 382, 993 P.2d 96 (acknowledging that child abuse cases "turn[] on the jury's determination of the credibility of the defendant and the young victim"). The evidence of Defendant's guilt in this instance is not so overwhelming as to alleviate our concerns regarding the prejudicial effect of defense counsel's deficiencies. We therefore conclude Defendant has demonstrated a prima facie case of ineffective assistance of counsel. Because we find cumulative error, as discussed below, however, it is unnecessary to remand this case for an evidentiary hearing on ineffective assistance of counsel at this time.

D. Cumulative Error

{45} "Cumulative error requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial." *State v. Martin*, 1984-NMSC-077, ¶ 17, 101 N.M. 595, 686 P.2d 937 ("We must reverse any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental right to a fair trial."). The doctrine is strictly applied, however, and "cannot be invoked when the record as a whole demonstrates that the defendant received a fair trial." *State v. Salas*, 2010-NMSC-028, ¶ 39, 148 N.M. 313, 236 P.3d 32 (internal quotation marks and citation omitted).

{46} Although the admission of the evaluation alone does not rise to the level of plain error, we do note that it contained information that was tantamount to an admission of guilt by Defendant. The prejudice of an erroneously admitted apparent admission of guilt by a criminal defendant is obvious, regardless of whether Defendant is given the opportunity to explain his answer. This error, coupled with the numerous errors by Defendant's counsel, including his failure to investigate the sexual molestation charges against G.M.'s stepfather, Burciaga, his failure to discover G.M.'s recantation of her allegations against Burciaga, his failure to move to strike or otherwise remedy the characterization of his client as a sexual deviant, and his failure to review and take steps to properly introduce the CYFD report containing G.M.'s admission that she has never experienced "bad touch" are so numerous and egregious that we are persuaded that Defendant was denied his right to a fair trial. *See, e.g.*, *State v. Wilson,* 1990-NMSC-019, ¶¶ 25, 31, 109 N.M. 541, 787 P.2d 821 (concluding that cumulative error denied defendant fair trial when prosecutor engaged in misconduct, and the trial judge communicated with a juror during trial about an issue in the case without the defendant's participation); *see also Martin*, 1984-NMSC-077, ¶¶ 17-18, 22, 25-26, 30 (concluding that unchallenged inappropriate comments and gestures from the trial judge, along with the defendant's improperly admitted criminal history and the court's refusal to admit films to corroborate the defendant's claim of victim's tendencies toward violent sexual conduct constituted cumulative error requiring a new trial). Although none of the errors discussed above constitute grounds for reversal standing alone, together they deprived Defendant of a fair trial. We therefore reverse.

E. Sufficiency of the Evidence

{47} Having determined that the cumulative error in this case warrants reversal, we next determine whether the State presented sufficient evidence to support Defendant's conviction. *See State v. Post*, 1989-NMCA-090, ¶ 22, 109 N.M. 177, 783 P.2d 487 (requiring consideration of sufficiency of the evidence to prevent courts from running afoul of double jeopardy principles when remanding for retrial). When considering whether sufficient evidence exists to support retrial, we consider all evidence—even that which was wrongfully admitted. *See id.* In reviewing for sufficiency, "we view the evidence in the light most favorable to the verdict and draw all inferences in favor of the verdict to determine whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty" as to each element of the offense. *State v. Suazo*, 2017-NMSC-011, ¶ 32, 390 P.3d 674 (internal quotation marks and citation omitted).

{48} Defendant was convicted of CSPM, CSCM, and bribery of a witness. CSPM is defined as unlawful and intentional "causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another[.]" NMSA 1978, § 30-9-11(A) (2009). When perpetrated on a minor under the age of thirteen, CSP is a first degree felony. NMSA 1978, § 30-9-11(D)(1). CSCM is an unlawful and intentional "touching or applying force to the intimate parts of a minor" or the "causing of a minor to touch one's intimate parts" including "the primary genital area, groin, buttocks, anus or breast." NMSA 1978, § 30-9-13(A) (2003). Bribery of a witness consists of knowingly "intimidating or threatening any person or giving or offering to give anything of value to any person with the intent to keep the person from truthfully reporting . . . information relating to the commission . . . of a felony[.]" NMSA 1978, § 30-24-3(A)(3) (1997).

{49} During trial, G.M. labeled two drawings as Defendant and herself, marked where the penis and vagina were on the corresponding images, and testified that Defendant's penis touched her vagina, and G.M. testified that Defendant had put his penis in her mouth. G.M. also testified that Defendant would sometimes shower with G.M. and G.M.'s brother and that during those showers, she would touch Defendant's penis. G.M. testified that during one of those episodes, Defendant told her "not to tell no one or else he would go to jail." In light of this testimony, and indulging any inferences in favor of the verdict, we conclude that the evidence was sufficient to support a guilty verdict as to each charge.

III. CONCLUSION

{50} We reverse Defendant's conviction, and remand for retrial. Because we remand for retrial, it is unnecessary at this time to order an evidentiary hearing on Defendant's ineffective assistance of counsel claim.

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

WE CONCUR:
JONATHAN B. SUTIN, Judge
J. MILES HANISEE, Judge

Certiorari Denied, January 23, 2018, No. S-1-SC-36811

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-021

No. A-1-CA-34843 (filedNovember 30, 2017)

ADRIAN ALARCON,
Petitioner-Appellee,
v.
ALBUQUERQUE PUBLIC SCHOOLS
BOARD OF EDUCATION and
BRAD WINTER Ph.D.,
SUPERINTENDENT OF
ALBUQUERQUE PUBLIC SCHOOLS,
Respondents-Appellants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Shannon C. Bacon, District Judge

consolidated with

No. A-1-CA-34424

CENTRAL CONSOLIDATED SCHOOL
DISTRICT NO.22,

Petitioner-Appellant,
v.
CENTRAL CONSOLIDATED
EDUCATION ASSOCIATION,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Alan M. Malott, District Judge

J. EDWARD HOLLINGTON
J. EDWARD HOLLINGTON &
ASSOCIATES, PA
Albuquerque, New Mexico
for Appellee Alarcon

NATHAN T. NIEMAN
K. CAMERON JOHNSON
MODRALL, SPERLING, ROEHL, HARRIS & SISK, PA
Albuquerque, New Mexico
for Appellants Albuquerque Public Schools

ARTHUR D. MELENDRES
ZACHARY L. MCCORMICK
MODRALL, SPERLING, ROEHL, HARRIS & SISK, PA
Albuquerque, New Mexico
for Appellant Central Consolidated School District

JERRY TODD WERTHEIM
ROXIE P. RAWLS-DE SANTIAGO
JONES, SNEAD, WERTHEIM & CLIFFORD, PA
Santa Fe, New Mexico
for Appellee Central Consolidated Education Association

Opinion

Michael E. Vigil, Judge

{1} These consolidated cases present us with a common question: whether changes made in 2003 to the Public School Code, NMSA 1978, §§ 22-2-1 to -33-4 (except Article 5A) (1967, as amended through 2017), vest the local superintendent of a school district with plenary power and authority to act on all school personnel matters, to the exclusion of the local school board. The issue is presented in two separate contexts.

{2} In *Alarcon v. Albuquerque Public Schools*, (No. A-1-CA-34843), (the APS appeal), the district court concluded that the discharge hearing for a certified school employee under the School Personnel Act, §§ 22-10A-1 to -39, must be conducted by the school board. The district court issued a permanent writ of mandamus to the Albuquerque Public Schools (APS) and its superintendent, directing that a proposed discharge hearing be conducted by the APS school board.

{3} In *Central Consolidated School District No. 22 v. Central Consolidated Education Association,* (No. A-1-CA-34424), (the School District appeal), the district court affirmed the order of the Public Employee Labor Relations Board (PELRB) that the school board is required to hear and decide appeals from decisions of the school superintendent under grievance procedures set forth in the collective bargaining agreement (CBA) negotiated between the Central Consolidated Education Association (Union) and the Central Consolidated School District (School District) pursuant to the Public Employee Bargaining Act (PEBA), NMSA 1978, §§ 10-7E-1 to -26 (2003, as amended through 2005).

{4} In both cases, the respective school boards asserted that changes made to the Public School Code in 2003 divested school boards of all authority to act on any personnel matters and vested exclusive authority to act on all personnel matters in the local superintendent. The linchpins in both cases are the 2003 revisions made to the Public School Code by H.B. 212 (House Bill 212), 46th Leg., 1st Sess., ch. 153 (N.M. 2003), which require us to engage in statutory interpretation. We first set forth our standard of review, then discuss House Bill 212 in general terms before addressing the specific arguments made in each appeal.

I. STANDARD OF REVIEW

{5} We are required to construe statutes enacted and amended by the Legislature in both appeals. We review questions of statutory construction de novo. *See Weiss v. Bd. of Educ. of Santa Fe Pub. Sch.*, 2014-NMCA-100, ¶ 4, 336 P.3d 388. Our mandated task in construing a statute is to "search for and effectuate" the intent of the Legislature. *Id.* (internal quotation marks and citation omitted). This task begins with an examination of the actual language of the statute, "which is the primary indicator of legislative intent." *Id.* "We look first to the plain language of the statute and give words their ordinary meaning unless the Legislature indicates a different one was intended, and we take care to avoid adopting a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction." *Miller v. Bank of Am. N.A.*, 2015-NMSC-022, ¶ 11, 352 P.3d 1162 (citation omitted). When the Legislature amends a statute, we presume the Legislature is aware of existing law, including opinions of our appellate courts, and we normally presume it intends to change existing law. *Aguilera v. Bd. of Educ.*, 2006-NMSC-015, ¶¶ 19, 24, 139 N.M. 330, 132 P.3d 587.

{6} Because we are reviewing a decision of the PELRB in the School District appeal, there is an additional dimension to our standard of review in that case. Section 10-7E-23(B) of the PEBA provides for judicial review of a final decision of the PERLB, and the standard of review to be applied is as follows:

> A person or party, including a labor organization affected by a final rule, order or decision of the board or local board, may appeal to the district court for further relief. All such appeals shall be based upon the record made at the board or local board hearing. All such appeals to the district court shall be taken within thirty days of the date of the final rule, order or decision of the board or local board. Actions taken by the board or local board shall be affirmed unless the court concludes that the action is:
>
> (1) arbitrary, capricious or an abuse of discretion;
>
> (2) not supported by substantial evidence on the record considered as a whole; or
>
> (3) otherwise not in accordance with law.

Id. In our appellate review of whether the district court erred in affirming the PELRB's decision, we follow the same standard of review used by the district court sitting in its appellate capacity, and at the same time determine whether the district court erred. *N.M. Corr. Dep't v. AFSCME Council 18*, ___-NMCA-___, ¶ 9, ___P.3d ___ (No. A-1-CA-34737, Sept. 5, 2017); *see Paule v. Santa Fe Cty. Bd. of Cty. Comm'rs.*, 2005-NMSC-021, ¶ 26, 138 N.M. 82, 117 P.3d 240 (stating that in administrative appeals the appellate court reviews the administrative decision under the same standard used by the district court while also determining whether the district court erred in its review); *see Regents of Univ. of N.M. v. Fed'n of Teachers*, 1998-NMSC-020, ¶ 17, 125 N.M. 401, 962 P.2d 1236 (applying the general administrative standard of review applicable to appeals from administrative agencies to an appeal from a decision of the PELRB).

{7} Under the terms of the statute, the School Board bears the burden of demonstrating on appeal that the decision of the PELRB is "arbitrary, capricious or an abuse of discretion"; is "not supported by substantial evidence on the record considered as a whole"; or is "otherwise not in accordance with law." Section 10-7E-23(B). Our Supreme Court has recently repeated how these factors are considered on appeal as follows: "An agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand. An agency abuses its discretion when its decision is not in accord with legal procedure or supported by its findings, or when the evidence does not support its findings. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and we neither reweigh the evidence nor replace the fact finder's conclusions with our own." *Albuquerque Cab Co. v. N.M. Pub. Regulation Comm'n*, ___-NMSC-___, ¶ 8 (No. S-1-SC-36169 & S-1-SC-36174, consolidated, Sept. 18, 2017) (alterations, internal quotation marks, and citations omitted). We apply a whole-record standard of review, and we independently review the entire record of the administrative hearing to determine if the School Board has met its burden. *See AFSCME Council 18*, ___-NMCA-___, ¶ 9. While we may give heightened deference to an agency's determination on matters that fall within its special expertise, we still apply a de novo standard of review to statutory construction. *See Albuquerque Cab Co.*, ___-NMSC-___, ¶ 8; *see also AFSCME Council 18*, ___-NMCA-___, ¶ 9 (noting that an appellate court applies a de novo standard of review when reviewing an agency's rulings on statutory construction).

II. HOUSE BILL 212

{8} Prior to the adoption of House Bill 212 in 2003, local school boards were required by Section 22-5-4 (2002), to be involved in the day-to-day operations of school districts on an operational level. For example, school boards were required to "supervise and control" all the public schools in the school district; to apply for waivers of certain provisions of the Public School Code relating to length of school day, staffing patterns, subject area or the purchase of instructional materials; to "supervise and control" all property owned or in the possession of the school district; and to "repair and maintain" all property belonging to the school district. In addition, while the 2002 version of Section 22-5-4 provided in Subsection (C) that the local school board had the powers or duties to "delegate administrative and supervisory functions of the school board to the superintendent of schools[,]" the statute failed to specify what those functions were, and certain administrative and supervisory functions, such as the power to hire, terminate, or discharge employees, could not be delegated. Section 22-5-4 (2002). For completeness, we set forth Section 22-5-4 (2002) as it existed prior to the changes made by House Bill 212.[1]

[1]22-5-4. Local school boards; powers; duties.
A local school board shall have the following powers or duties:
A. subject to the regulations of the state board, supervise and control all public schools within the school district and all property belonging to or in the possession of the school district;
B. employ a superintendent of schools for the school district and fix his salary;
C. delegate administrative and supervisory functions of the local school board to the superintendent of schools; "continued on next page"

{9} Specific to the cases before us here, before House Bill 212 was enacted, Section 22-5-4(D) (2002) provided that a local school board had the "power or duty" to:

> [A]pprove or disapprove the employment, termination, or discharge of all employees and certified school personnel of the school district upon a recommendation of employment, termination or discharge by the superintendent of schools; provided that any employment relationship shall continue until final decision of the board. Any employment, termination or discharge without the prior recommendation of the superintendent is void[.]

Section 22-5-4(D) (2002). Thus, prior to 2003, the school board had the sole power to employ, terminate, or discharge an employee, and the superintendent only had power to recommend the employment, termination, or discharge of an employee. *See Daddow v. Carlsbad Mun. Sch. Dist.*, 1995-NMSC-032, ¶ 28, 120 N.M. 97, 898 P.2d 1235 (noting that under this prior version of the statute, the school board was the only entity with the power to make personnel decisions, and the limited role of the superintendent was to make recommendations before a personnel decision by the board was made).

{10} House Bill 212, sometimes referred to as the Public School Reform Act, made sweeping changes to statutes dealing with public education, and at the same time, enacted many new statutes to reform public education in New Mexico. To this end, House Bill 212 is 107 pages long and consists of 72 sections. In stating its legislative findings and purpose for enacting House Bill 212, the Legislature determined, among other findings, that one of the keys to student success in New Mexico is "a multicultural education system that . . . elevates the importance of public education in the state by clarifying the governance structure at different levels." NMSA 1978, § 22-1-1.2(B)(6) (2015). House Bill 212, section 2 enacted this as Section 22-1-1.2(B)(5). However, in 2007, the Legislature modified S.B. 561 (Senate Bill 561), 48th Leg., 1st Sess., ch. 308, Section 1 (N.M. 2007), added a new Subsection (5) and moved what was originally Subsection (B)(5) to Subsection (B)(6)). To this end:

> The [L]egislature finds further that the public school governance structure needs to change to provide accountability from the bottom up instead of from the top down. Each school principal, with the help of school councils made up of parents and teachers, must be the instructional leader in the public school, motivating and holding accountable both teachers and students. *Each local superintendent must function as the school district's chief executive officer and have responsibility for the day-to-day operations of the school district, including personnel and student disciplinary decisions.*

Section 22-1-1.2(F) (emphasis added). In accordance with these findings, House Bill 212 defined a "local school board" to mean, "the policy-setting body of a school district[,]" and a "local superintendent" to mean "the chief executive officer of a school district[.]" NMSA 1978, Section 22-1-2(H), (I) (2015). Consistent with these findings and definitions, House Bill 212 deleted Subsection (D) from Section 22-5-4 quoted above, and adopted a new statute, Section 22-5-14, setting forth powers and duties of the superintendent. House Bill 212, §§ 21, 25. Section 22-5-14 in pertinent part states:

> A. The local superintendent is the chief executive officer of the school district.
>
> B. The local superintendent shall:
>
> (1) carry out the educational policies and rules of the state board [department] and local school board;
>
> (2) administer and supervise the school district;
>
> (3) employ, fix the salaries of, assign, terminate or discharge all employees of the school district; [and]
>
> . . . .

D. subject to the provisions of law, approve or disapprove the employment, termination or discharge of all employees and certified school personnel of the school district upon a recommendation of employment, termination or discharge by the superintendent of schools; provided that any employment relationship shall continue until final decision of the board. Any employment, termination or discharge without the prior recommendation of the superintendent is void;

E. apply to the state board for a waiver of certain provisions of the Public School Code . . . relating to length of school day, staffing patterns, subject area or the purchase of instructional materials for the purpose of implementing a collaborative school improvement program for an individual school;

F. fix the salaries of all employees and certified school personnel of the school district;

G. contract, lease, purchase and sell for the school district;

H. acquire and dispose of property;

I. have the capacity to sue and be sued;

J. acquire property by eminent domain as pursuant to the procedures provided in the Eminent Domain Code [NMSA 1978, Sections 42A-1-1 to -33 (1974, as amended through 1981)];

K. issue general obligation bonds of the school district;

L. repair and maintain all property belonging to the school district;

M. for good cause and upon order of the district court, subpoena witnesses and documents in connection with a hearing concerning any powers or duties of the local school boards;

N. except for expenditures for salaries, contract for the expenditure of money according to the provisions of the Procurement Code [NMSA 1978, §§ 13-1-28 to -199 (1984, as amended through 2016)];

O. adopt regulations pertaining to the administration of all powers or duties of the local school board;

P. accept or reject any charitable gift, grant, devise or bequest. The particular gift, grant, devise or bequest accepted shall be considered an asset of the school district or the public school to which it is given; and

Q. offer and, upon compliance with the conditions of such offer, pay rewards for information leading to the arrest and conviction or other appropriate disciplinary disposition by the courts or juvenile authorities of offenders in case of theft, defacement or destruction of school district property. All such rewards shall be paid from school district funds in accordance with regulations that shall be promulgated by the department of education.

(5) perform other duties as required by law, the department or the local school board.

{11} House Bill 212 clarified the powers and duties of local school boards and superintendents and structured their relationship in a familiar and well understood framework: the school board enacts policy of the school district and employs a superintendent as the chief executive officer to implement its policies in the day-to- day operations of the school district. That is, the local school board governs the school district through its authority to enact the regulations, standards, and rules under which the school district operates, and it employs the local superintendent as the highest ranking manager of the school district to implement them on an operational level in the day-to-day operations of the local school board. *Cf. Black's Law Dictionary* 289, 1345 (10th ed. 2014) (defining "chief executive officer" as "a corporation's highest-ranking administrator or manager, who reports to the board of directors" and "policy" in part as "a standard course of action that has been officially established"); NMSA 1978, § 21-7-7 (1995) ("The board of regents shall have power and it shall be its duty to enact laws, rules and regulations for the government of the university of New Mexico. The board of regents may hire a president for the university of New Mexico as its chief executive officer and shall determine the scope of the president's duties and authority."); *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 33, 120 N.M. 562, 904 P.2d 11 ("[I]t is the Legislature that creates the law, and the Governor's proper role is the execution of the laws."); *Salazar v. Town of Bernalillo*, 1956-NMSC-125, ¶¶ 8, 11, 62 N.M. 199, 307 P.2d 186 (agreeing that as the chief executive officer of the town, a mayor has power to issue orders necessary or proper for the execution and enforcement of existing ordinances, regulations, and orders of the town council).

III. THE APS APPEAL

{12} This case requires us to determine whether the discharge hearing for a certified school employee under Section 22-10A-27 (Section 27) of the School Personnel Act, Sections 22-10A-1 to -39 must be conducted by the local school board or its superintendent. The district court concluded that the hearing must be conducted by the school board and issued a permanent writ of mandamus to APS and its Superintendent, Brad Winter, Ph.D., directing that a proposed discharge hearing for Adrian Alarcon (Teacher) be conducted by the APS School Board. APS appeals, and agreeing with the district court, we affirm.

A. BACKGROUND

{13} During the 2014-2015 school year, APS notified Teacher, a certified licensed school instructor, of its intent to discharge Teacher from its employment pursuant to Section 27. APS also advised Teacher that he had a right to appeal the intended discharge at a discharge hearing under Section 27, and Teacher filed a timely appeal and request for a discharge hearing. APS scheduled the hearing before an assistant superintendent, and Teacher objected on grounds that he was entitled to a discharge hearing before the school board, not the superintendent. APS responded that under its interpretation of legislative intent and implementation of Section 27, its practice beginning in 2003 was for the superintendent, or the superintendent's designee to conduct the discharge hearing and issue a written decision on the employee's appeal after the hearing. Teacher responded, again objecting to the procedure imposed by APS as contrary to the "clear, specific, and unambiguous" procedures set forth in Section 27, which require the discharge hearing to be held before the school board, and not the superintendent. Teacher said that he had "no choice but to appear at the only hearing provided to him by APS, subject to objections that [the] proceedings are contrary to state law."

{14} Instead of appearing at the hearing under the procedure dictated by APS, and before the hearing was scheduled to be held, Teacher obtained an alternative writ of mandamus from the district court directing that the discharge hearing be held before the school board and not the superintendent, or that APS show cause for its lack of compliance and why the writ should not be made permanent. In its answer to the alternative writ, APS argued in part that the 2003 revisions to the Public School Code by House Bill 212 transferred powers previously exercised by the local school board to the local superintendent, with the result that to the exclusion of local school boards, the local superintendent has the sole authority to discharge employees. After a hearing on the merits, the district court disagreed with APS and issued a permanent writ of mandamus, directing that the discharge hearing be held before the school board, not the superintendent. The district court also ordered that Teacher remain employed by APS with all benefits and that the proposed discharge hearing be stayed during the pendency of the appeal, as stipulated by the parties. APS appeals.

B. ANALYSIS

{15} APS argues three reasons why it contends the district court erred, which we summarize as follows: (1) the permanent writ of mandamus disregards and renders meaningless the legislative intent of the 2003 amendments to the Public School Code, which "explicitly both divested local school boards of the authority to hire and terminate or discharge employees and vested that authority in local superintendents"; (2) the district court erred in issuing the permanent writ of mandamus because APS did not have a clear legal duty to provide Teacher with a discharge hearing before the school board; and (3) the district court erred in issuing the permanent writ of mandamus because Teacher did not exhaust available plain, speedy, and adequate administrative remedies. We address each argument in turn.

1. Legislative Intent

{16} APS argues that the 2003 amendments to the Public School Code reflect a specific legislative intent to vest the local superintendent with plenary authority over all personnel decisions, thereby divesting local boards of authority to hold discharge hearings and the ultimate power to discharge employees. APS argues that this specific legislative intent was expressed when House Bill 212 deleted Subsection (D) from the enumerated powers of local school boards in Section 22-5-4 (providing that a local school board must approve or disapprove the employment, termination, or discharge of all employees of the school district) and simultaneously enacted a new statute, Section 22-5-14(B)(3), vesting the local superintendent with the power and duty to "employ, fix the salaries of, assign, terminate or discharge all employees of the school district." [Emphasis omitted.]

{17} We conclude that APS reads House Bill 212, and the amendments it made to the Public School Code, too narrowly, without taking into account other changes made by House Bill 212 to the Public School Code, or the fact that the Legislature re-codified, but did not repeal Section 27. This case involves the contemplated "discharge" of Teacher, a certified school employee. A "discharge" under the School Personnel Act is "the act of severing the employment relationship with a certified school employee prior to the expiration of the current employment contract[.]"

Section 22-10A-2(A); *see* Section 22-1-2(BB) (defining a "certified school employee" as "a licensed school employee").

{18} House Bill 212 re-compiled, but did not otherwise amend, the procedure for discharging a certified school employee under Section 27 of the School Personnel Act. House Bill 212, Section 72(F) (recompiling former NMSA 1978, Section 22-10-17 (2002) as Section 27). "In the absence of a clear legislative directive to abandon existing law, we continue to apply it." *Aguilera*, 2006-NMSC-015, ¶ 24. Importantly, Section 27(A) explicitly states that a discharge may "only" occur according to the procedure it then sets forth in detail. Equally important, Section 27(A) states that a certified school employee may be discharged only for "just cause," meaning "a reason that is rationally related to an employee's competence or turpitude or the proper performance of the employee's duties and that is not in violation of the employee's civil or constitutional rights." Section 22-10A-2(G); *see Aguilera*, 2006-NMSC-015, ¶¶ 16-25 (discussing "just cause" in the context of a reduction in force policy of a school district).

{19} The requirements for discharging a certified school employee under Section 27 are clear and explicit.[2] Under Section 27, the local school board is vested with the exclusive authority to discharge a certified school employee. Further, the school board can only discharge where "just cause" is proven by the superintendent by a preponderance of the evidence. Procedurally, the superintendent "shall" serve the employee with a written notice of his intent to "recommend" discharge, stating in the notice the cause for his recommendation, as well as informing the employee of his right to a discharge hearing "before the local school board." Section 27(A). The employee "may" exercise his right to a discharge hearing before the school board by giving written notice of that election, Section 27(B), and if the employee makes that election, the school board "shall" hold a discharge hearing. Section 27(C). At the hearing, the superintendent "shall" have the burden of proving that, at the time of the notice of intent to recommend discharge, he "had just cause to discharge the certified school employee." Section 27(G). The superintendent "shall" present his evidence first, followed by the certified school employee's proof. Section 27(H). After hearing and considering the evidence, "the local school board shall render its written decision[.]" Section 27(J); *see Larsen v. Bd. of Educ.*, 2010-NMCA-093, ¶ 7, 148 N.M. 920, 242 P.3d 487 (describing in general terms the statutory process under Section 27 for discharging a certified school employee). This framework is consistent with the roles assigned to school boards and superintendents by House Bill 212, and corresponds with both the duty of the superintendent to carry out the rules of the school board and the power of the school board to adopt and interpret its own rules.

{20} We also note that prior to the adoption of House Bill 212 in 2003, a hearing before the school board was always required for a discharge to take place, because the 2002 version of Section 22-5-4, quoted in footnote 1, directed that the school board had the exclusive authority to employ, terminate, or discharge a school employee, and that "any employment relationship shall continue until final decision of the board." Under Section 22-5-14(B)(3), if a certified school employee does not exercise his right to a hearing, the discharge now becomes effective without the necessity for school board action. In addition, before the Public School Code was amended in 2003 by House Bill 212, *no* employee could be employed, terminated, or discharged without the express approval of the school board. Under Section 22-5-14(B)(3), subject to any other

[2]Section 27 provides:

A. A local school board or the governing authority of a state agency may discharge a certified school employee *only* for just cause according to the following procedure:

(1) the superintendent *shall* serve a written notice of his intent to recommend discharge on the certified school employee in accordance with the law for service of process in civil actions; and

(2) the superintendent *shall* state in the notice of his intent to recommend discharge the cause for his recommendation and *shall* advise the certified school employee of his right to a discharge hearing before the local school board or governing authority as provided in this section.

B. A certified school employee who receives a notice of intent to recommend discharge pursuant to Subsection A of this section *may* exercise his right to a hearing before the local school board or governing authority by giving the local superintendent or administrator written notice of that election within five working days of his receipt of the notice to recommend discharge.

C. The local school board or governing authority *shall* hold a discharge hearing no less than twenty and no more than forty working days after the local superintendent or administrator receives the written election from the certified school employee and *shall* give the certified school employee at least ten days written notice of the date, time and place of the discharge hearing.

D. Each party, the local superintendent or administrator and the certified school employee, may be accompanied by a person of his choice.

E. The parties shall complete and respond to discovery by deposition and production of documents prior to the discharge hearing.

F. The local school board or governing authority shall have the authority to issue subpoenas for the attendance of witnesses and to produce books, records, documents and other evidence at the request of either party and shall have the power to administer oaths.

G. The local superintendent or administrator *shall* have the burden of proving by a preponderance of the evidence that, at the time of the notice of intent to recommend discharge, he had just cause to discharge the certified school employee.

H. The local superintendent or administrator *shall* present his evidence first, with the certified school employee presenting his evidence thereafter. The local school board or governing authority *shall* permit either party to call, examine and cross-examine witnesses and to introduce documentary evidence.

I. An official record *shall* be made of the hearing. Either party may have one copy of the record at the expense of the local school board or governing authority.

J. The local school board *shall* render its written decision within twenty days of the conclusion of the discharge hearing. (Emphasis added.)

laws or requirements that may apply, the superintendent has authority to employ, terminate and discharge all *noncertified* school employees of the school district without school board approval. However, the procedural and substantive rights contained in Section 27 are a legislative expression that the discharge of a certified school employee is anything but a managerial task to be performed by the superintendent in the day-to-day operations of the school district.

{21} Discharging a teacher in the middle of the school year is significant because a teacher may not have an opportunity to find other employment, causing extreme hardship to the teacher. *See Aguilera*, 2006-NMSC-015, ¶ 32. Certified school employees have historically been accorded procedural and substantive rights by the Legislature to encourage individuals to enter the profession of teaching our children and to protect educators in their employment. *See id.* ¶¶ 8-15 (discussing statutory and jurisprudential goals of teachers' tenure statutes). These goals are expressed in the Public School Code, where the Legislature finds that one of the keys to student success in New Mexico is to have a multi-cultural system that "attracts and retains quality and diverse teachers[.]" Section 22-1-1.2(B)(1). In recognition of the realities attending a discharge in the middle of the school year, and consistent with its commitment to protect the rights of certified school employees, we conclude that the Legislature consciously left intact the procedural and substantive protections of Section 27, and that it intended those protections to co-exist with Section 22-5-14.

{22} For all the foregoing reasons, we reject the argument made by APS that there is an irreconcilable conflict between Section 22-5-14 on the one hand, and Section 27, on the other hand. Section 27 under the Personnel Act and Section 22-5-14(B)(3) under the Public School Code can be construed in harmony with each other. *See Miller*, 2015-NMSC-022, ¶ 12 (stating that we consider statutes dealing with the same general subject together, in a way that facilitates the achievement of their respective goals when possible); *Luboyeski v. Hill*, 1994-NMSC-032, ¶ 10, 117 N.M. 380, 872 P.2d 353 ("Whenever possible, we must read different legislative actions as harmonious instead of as contradicting one another."); NMSA 1978, Section 12-2A-10(A) (1997) ("If statutes appear to conflict, they must be construed, if possible, to give effect to each.").

{23} We also reject the argument that House Bill 212 repealed, by implication, Section 27. The repeal of an earlier statute by implication is not favored, and we strive to construe statutes harmoniously with each other when possible. *See State ex rel. Brandenburg v. Sanchez*, 2014-NMSC-022, ¶¶ 11, 17, 329 P.3d 654. There must be more than a mere difference in the provisions in order for a later statute to be construed as repealing an earlier statute. *See Alvarez v. Bd. of Trs. of La Union Townsite*, 1957-NMSC-022, ¶ 10, 62 N.M. 319, 309 P.2d 989. "There must be what is often called such a positive repugnancy between the provisions of the old and the new statutes that they cannot be reconciled and made to stand together." *Id.*; *see Stokes v. N.M. Bd. of Educ.*, 1951-NMSC-031, ¶ 5, 55 N.M. 213, 230 P.2d 243 (stating that a statute is repealed by implication when the latter statute is so inconsistent with and repugnant to the former law on the same subject as to be irreconcilable with it, "and especially does this result follow where the latter act expressly notices the former in such a way as to indicate an intention to abrogate").

{24} In its final argument, APS refers us to two pages from a publication that was apparently issued in June 2003 by the Department of Education (now known as the Public Education Department) and the Legislative Education Study Committee. The document is entitled, "HB 212 Public School Reform[:] Questions & Answers for School Districts and Constituents By Section" and two pages from the document are attached as an exhibit to APS' answer to the alternative writ of mandamus.Therein, an unknown author states that the words "local superintendent" should be substituted for the words "local school board" wherever they appear in Section 22-10-17 (2002), which we have already noted, is now codified as Section 27. While conceding that the document itself is not a formal rule or regulation, APS contends that it is tantamount to an agency rule or regulation entitled to deference in interpreting Section 27. The document was not admitted into evidence at the hearing on the merits, and it is not the subject of any stipulation by the parties. Without any information concerning the document, such as how it came about, why it was published, or who wrote it, we do not further consider the two pages from the document. We would otherwise be speculating on their significance on how they relate to the question of legislative intent before us.

2. Clear Legal Duty to Provide a Hearing

{25} APS argues that the district court erred in issuing the permanent writ of mandamus because "[APS did] not have a clear legal duty to provide [Teacher] with a discharge hearing before the [s]chool [b]oard[.]" *See* NMSA 1978, Section 44-2-4 (1884) (stating that mandamus may issue to a board or person "to compel the performance of an act which the law specially enjoins as a duty"); *see generally Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶¶ 10-15, 140 N.M. 168, 140 P.3d 1117 (describing in general how the statutes governing mandamus operate).

{26} We generally review the granting or denial of a writ of mandamus under an abuse of discretion standard. *See State ex rel. Stapleton v. Skandera*, 2015-NMCA-044, ¶ 5, 346 P.3d 1191. However, within that context, we are required to interpret Section 27, as well as the statutes relating to a writ of mandamus. Our review is therefore de novo. *See Weiss*, 2014-NMCA-100, ¶4.

{27} We begin with Section 27. We have already quoted and described the operation of Section 27. The mandatory obligation given to superintendents and school boards on the procedure to follow before a certified school employee can be discharged could not be more clearly stated. The school board "shall" hold a discharge hearing once a certified school employee demands a hearing. There is no option. And there is no room for interpretation. APS argues that the Legislature "unequivocally divested" and "eradicated" a school board of authority to discharge employees, and invested "exclusive authority" in the superintendent to discharge school personnel such as Teacher. We have already answered those arguments.

{28} For additional support of its argument that it had no clear legal duty to provide Teacher with a discharge hearing before the school board, APS asks us to consider two additional attachments to its answer to the alternative writ. One of the exhibits is a decision and order issued by the secretary of education suspending the "Board of Education of the Questa Independent School District." Nothing in this decision and order requires or allows a certified school employee's discharge hearing to be held before the superintendent. The second exhibit consists of the findings of fact and conclusions of law of an independent arbitrator following a de novo

hearing held under Section 22-10A-28 (providing that an appeal from a discharge hearing before the school board lies with an independent arbitrator who conducts a de novo hearing). A de novo hearing is an entirely new hearing that is conducted as if there had been no prior hearing. *See State ex rel. Bevacqua-Young v. Steele*, ___-NMCA-___, ¶ 9, ___ P.3d ___ (No. A-1-CA-34882, July 17, 2017). Therein, the arbitrator concluded that the procedure utilized by APS to hold a discharge hearing before the superintendent does not violate Section 27, on the basis that Section 27 and 22-5-14 are in "direct conflict" with one another. The arbitrator did no analysis, and again, this decision does not require APS to direct that discharge hearings be held before the superintendent. To the extent APS is arguing that because it previously ordered that the discharge hearing of a certified school employee be conducted by the superintendent, it is now required to do so in all cases, we are not persuaded.

{29} Section 27 is clear in its mandate that a discharge hearing is to be conducted before the school board, where the superintendent has the burden of proving that, at the time of the notice of intent to recommend discharge, the superintendent had just cause to discharge the certified employee. Section 22-5-14 does not unequivocally divest the school board from conducting a discharge hearing, and Section 22-5-14 can be applied harmoniously with Section 27. APS had a clear, legal duty under Section 27 to provide Teacher with a discharge hearing before the school board, and it had no authority by regulation or otherwise, to violate the clear, unequivocal mandate of Section 27. The discretion otherwise afforded the Public Education Department and APS "may not justify altering, modifying or extending the reach of a law created by the Legislature." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 22, 125 N.M. 343, 961 P.2d 768. *See In re Adjustments to Franchise Fees*, 2000-NMSC-035, ¶ 19, 129 N.M. 787, 14 P.3d 525 (stating that "[w]ith respect to the principle of separation of powers, an unlawful conflict or infringement occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own" (internal quotation marks and citation omitted)); *Chalamidas v. Envtl. Improvement Div.*, 1984-NMCA-109, ¶ 13, 102 N.M. 63, 691 P.2d 64 (stating that "[a]n agency cannot amend or enlarge its authority through rules and regulations."). **{30}** We therefore reject the argument of APS that it did not have a clear, legal duty to provide Teacher with a discharge hearing before the school board.

3. Failure to Exhaust Administrative Remedies

{31} For its last argument, APS contends that because Teacher did not attend the discharge hearing before the superintendent, and then appeal, the writ of mandamus was improper because Teacher failed to exhaust the plain, speedy, and adequate administrative remedies available to him. *See* NMSA 1978, § 44-2-5 (1884) ("The writ [of mandamus] shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law."). Because this argument also presents us with a question of statutory construction, our review is de novo. *See Weiss*, 2014-NMCA-100, ¶ 4.

{32} APS argues that because Teacher could appeal an adverse decision from a discharge hearing conducted by the superintendent to an independent arbitrator who hears the case de novo, and from there, to the district court under Section 22-10A-28, Teacher had a plain, speedy, and adequate remedy at law, which he failed to pursue, and Teacher was therefore not entitled to a writ of mandamus. For the same reason, APS argues that the district court was precluded from exercising subject matter jurisdiction over the mandamus action. We disagree with both assertions.

{33} APS' argument overlooks Teacher's assertion from the very beginning: that he was entitled to a discharge hearing before the school board, a substantive and procedural right afforded to all certified public school employees by the Legislature under Section 27. APS was acting ultra vires (unauthorized and beyond its power) in directing Teacher to appear at the discharge hearing before his accuser, the superintendent, rather than before the school board, as required by Section 27. No de novo appeal before an independent arbitrator, and from there, to the district court, will restore Teacher to the substantive and procedural right to a discharge hearing before the school board provided by Section 27.

{34} The constitutional right to a pre-termination hearing afforded all school employees under *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), includes the right of an employee to present his or her side of the case because of its obvious value in reaching an accurate decision on a proposed termination. *See id.* at 543. "Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." *Id.* Under New Mexico law, this means having a fair opportunity to invoke the discretion of the individual or body charged with the pre-termination decision. *See City of Albuquerque v. Chavez*, 1998-NMSC-033, ¶ 15, 125 N.M. 809, 965 P.2d 928. Here, the Legislature has mandated that the discretion lies with the school board, not the superintendent, and with good reason. At the very least, there is an appearance of impropriety in requiring an employee, such as Teacher, to appear before his accuser, the superintendent. The Legislature left this decision to the elected members of the local board of education, who can take a more dispassionate view of the evidence and decide if an employee's conduct warrants a discharge or some lesser sanction. When an employee, such as Teacher, is denied his rights under Section 27, an "impermissibly high risk" exists that the employee will be erroneously terminated. *See Chavez*, 1998-NMSC-033, ¶ 15.

{35} In addition, our case law does not require Teacher to appear in a hearing that is contrary to the requirements of Section 27, and then appeal, in lieu of seeking a writ of mandamus. We begin with our holding that Section 27 absolutely affords Teacher the right to a discharge hearing before the school board. In *Franco v. Carlsbad Municipal Schools*, 2001-NMCA-042, ¶¶ 4, 6-8, 130 N.M. 543, 28 P.3d 531, a tenured, non-certified school employee was terminated, but not advised of his right to appear before the school board at a pre-termination hearing to give the board his explanation of why he should not be terminated. After the employee was awarded damages in a wrongful termination suit, the school district appealed, arguing that the district court erred in allowing the suit to go forward because the employee had failed to exhaust his administrative remedies. *Id.* ¶ 2. Rejecting this argument, this Court said that the issue was not whether the school district would have afforded the employee his right to a hearing before the school board or arbitration had he requested it, but whether the school district "thwarted" the school employee's ability to invoke those rights by not giving him

notice of those rights. *Id*. ¶ 17. What we said in *Franco* applies here:

> Actions to terminate constitutionally protected rights must be conducted with scrupulous fairness. Such was not the case in the matter before us. [The employee] was terminated by the [d]istrict without being afforded the mandatory pre-termination or post-termination process to which he was entitled. Exhaustion of administrative remedies, as a precursor to [the employee's] suit for damages, was not required because the [d]istrict, by its actions, deprived [the employee] of his right to initiate and sustain the administrative process mandated by statute—a process which would have provided him with a meaningful opportunity to challenge the grounds for termination.

Id. ¶ 20 (citation omitted). Here the school district insisted that Teacher not be given the hearing he was entitled to receive under Section 27. Proceeding as the school district insisted would not have restored Teacher to the hearing he was entitled to receive.

{36} *Sanchez v. Board of Education*, 1961-NMSC-081, ¶¶ 1-4, 68 N.M. 440, 362 P.2d 979, involved a dispute between a teacher and the local school board over whether he had been dismissed. The teacher sought a writ of mandamus to compel his reinstatement, which the district court granted. *Id*. ¶ 1. As in this case, the teacher was entitled to be served with a notice of dismissal in which the school board specified its reasons to terminate the teacher, followed by a hearing before the local school board *Id*. ¶ 7. Pertinent to the issue before us here, our Supreme Court said, "It should be apparent that, under the circumstances here present, there must be a notice of dismissal containing the causes therefor, and a hearing in conformity with the law. A refusal to grant him such a hearing would probably warrant the granting of a writ of mandamus to require a hearing, but such was not the relief sought nor granted. Such a remedy may still be available should the board continue to refuse to follow the clear direction of the statute." *Id*. ¶ 8. Because the teacher in *Sanchez* had not followed the required statutory procedure, our Supreme Court concluded that dismissal of the teacher's suit was proper. *Id*. ¶¶ 14, 17. Here, in contrast, Teacher enforced his statutory right to a hearing before the school board as provided by Section 27 by seeking and obtaining a writ of mandamus.

{37} Finally, in *Stapleton v. Huff*, 1946-NMSC-029, ¶ 2, 50 N.M. 208, 173 P.2d 612, *superseded by statute as stated in Sanchez*, 1961-NMSC-081, the teacher had been a certified school employee for twenty-two years. *Stapleton*, 1946-NMSC-029, ¶ 2. After being advised that his contract would not be renewed, the teacher appeared at a hearing before the local school board, then appealed to the state board of education. *Id*. ¶ 3. In neither hearing was the teacher afforded his statutory right to confront and cross-examine the witnesses against him. *Id*. ¶¶ 3-4. After concluding that by appealing to the State Board of Education, the teacher waived the errors committed by the local school board, *id*. ¶ 10, our Supreme Court said that the teacher was deprived of his right to the hearing that was statutorily required before the State Board of Education. *Id*. ¶ 13. Our Supreme Court said, "What the [teacher] has been denied is the hearing before [the] State Board of Education to which he was entitled under the law. This being a clear legal right is enforcible by mandamus[.]" *Id*. ¶ 14. This holding was consistent with *Brown v. Romero*, 1967-NMSC-057, 77 N.M. 547, 425 P.2d 310. In *Brown,* a teacher sued a local school board and the state board of education for breach of tenure rights and for a de novo trial on the issue of her tenure rights, when her own pleadings disclosed that she was denied her statutory rights to a hearing before the local school board and the state board of education. *Id*. ¶¶ 1-5. Our Supreme Court said, "Mandamus was available as a remedy to test [the teacher's] right to a hearing before the governing board." *Id*. ¶ 8.

{38} Teacher had a clear statutory right to a hearing to contest his pending discharge before the School Board just like the teachers in *Stapleton* and *Brown*, and under the circumstances, a writ of mandamus was a proper vehicle for protecting that right. As a result, Teacher was not required to appear at the proposed discharge hearing before the superintendent, and then appeal before an arbitrator for a de novo hearing, followed by a limited appeal to the district court in lieu of seeking and obtaining the writ of mandamus.

C. RESULT

{39} For all the foregoing reasons, we conclude that the district court did not err in issuing the permanent writ of mandamus to APS.

IV. THE SCHOOL DISTRICT APPEAL

{40} Pursuant to PEBA, Sections 10-7E-1 to -26, the Union and the School District entered into a CBA in 2012 to provide terms and conditions of employment for all certified school employees, all transportation employees, and all educational support professionals of the School District (the bargaining unit). This appeal requires us to determine whether the changes made to the Public School Code by House Bill 212 prohibit the school board of the School District from hearing and deciding the Union's grievance pursuant to the grievance procedure negotiated by the parties in the CBA.

A. BACKGROUND

1. Proceedings Before the PELRB

{41} The Union filed a complaint with the PELRB alleging: (1) that the school board of the School District failed and refused to process grievances as required by the CBA in violation of the PEBA (grievance complaint); and (2) that the School District gave certain employees additional work and paid them an additional "foreman" stipend, thereby changing the terms and conditions of their employment without bargaining with the Union as required by the PEBA (foreman stipend complaint). *See* Section 10-7E-9(A)(3) and (F) (providing that the PELRB has the power to enforce the PEBA, and to this end, may establish rules necessary for the filing, hearing of, and determination of complaints of practices prohibited by the PEBA).

{42} In its answer to the grievance complaint, the School District asserted the defense that revisions made in 2003 to the Public School Code by House Bill 212 transferred powers from the school board to the superintendent of the school district, with the result that the school board had no authority to hear and decide grievances. In its answer to the foreman stipend complaint, the School District admitted that three existing employees agreed to take on additional responsibilities for an additional stipend, but denied that there was a PEBA violation because no new foreman positions were created. In addition, the School District argued that if bargaining was required, the Union waived the failure to bargain because it agreed to, and acquiesced in, the School District's long practice of paying additional stipends to employees to perform additional tasks beyond those inherent in their base job.

{43} An evidentiary hearing lasting more than twelve hours was held before the des-

ignated hearing officer, Thomas J. Griego. *See* Section 10-7E-12(C) (providing that the PELRB may appoint a hearing examiner to conduct an adjudicatory hearing in a dispute on whether there has been a violation of the PEBA). After the parties submitted their respective requested findings of fact and conclusions of law, the hearing officer filed a detailed thirty-nine-page report and recommended decision, setting forth his findings of fact, reasoning, and conclusions of law. The hearing officer found in favor of the Union on both complaints. The hearing officer rejected the School District's defenses and concluded that the School District committed prohibited labor practices under the PEBA when: (1) the school board refused to review grievances appealed to the school board pursuant to the negotiated grievance procedure contained in the CBA; and (2) the School District gave three employees in the bargaining unit additional work and paid them an additional "foreman" stipend without bargaining those changes with the Union.

2. The Grievance Complaint

{44} The hearing officer found that the parties negotiated a CBA in which they agreed upon procedures for filing and processing grievances. The grievance procedure has five steps. Each succeeding step is followed if the preceding step does not resolve the issue. We summarize those steps as follows: Step 1: the "discussion level" in which a grievant meets with the immediate supervisor to attempt resolving the issue; Step 2: the "supervisor level" in which a written grievance is submitted to the immediate supervisor, and the supervisor communicates a written decision in writing; Step 3: the "superintendent level" which is invoked by appealing the immediate supervisor's decision in writing to the superintendent who renders a written decision after meeting with the grievant and the supervisor and reviewing the record and information presented; Step 4: the "board level" which is invoked by appealing to the school board through the superintendent; and Step 5: the "arbitration level" after the school board renders its decision, in which the arbitrator conducts a hearing and renders a final and binding decision.

{45} The question before the hearing officer was whether the school board complied with Step 4 at the school board level. The CBA provides that if the Union "is not satisfied" with the superintendent's decision, the Union "may appeal" to the board of education "through the [s]uperintendent." The CBA further specifically provides that at Step 4:

> The [school b]oard will review the grievance and, at the [school b]oard's discretion, the [Union] may be invited to appear before the [s]uperintendent and the [school b]oard at their initial or subsequent meeting to present its position and respond to question[s]. The [Union] shall be advised in writing of the decision of the [school b]oard within thirty (30) days of the [school b]oard's receipt of the request for review.

The hearing officer first rejected the School District's defense that the school board had no authority to hear and decide grievances as required by Step 4 because amendments to the Public School Code enacted by House Bill 212 in 2003 transferred certain duties from the school board to the superintendent. Secondly, the hearing officer found that the School District failed to comply with its duties under Step 4.

{46} The hearing officer found that the school board adopted a blanket policy to send all grievances brought before it back to the superintendent. The hearing officer further found that, consistent with the blanket policy, the School District violated Step 4 multiple times. In one instance, the school board placed a grievance on its agenda but took no action on the grievance and did not issue a written decision concerning the grievance to the Union. In a second instance, the superintendent refused to place a filed appeal on the school board's agenda because he summarily dismissed it himself without advising the board members; and in a third instance, the school board refused to review an appeal because the Union had also filed a prohibited practices complaint regarding the same issue.

{47} The hearing officer concluded that by refusing to review grievances appealed to the school board under Step 4 of the negotiated grievance procedure, the School District committed a prohibited practice in violation of Section 10-7E-19(G) and (H) of the PEBA (providing that it is a violation of the PEBA to "refuse or fail to comply with a provision of the [PEBA] or [PELRB] rule" and to "refuse or fail to comply with a [CBA]").

3. The Foreman Stipend Complaint

{48} The hearing officer found that the School District designated three bargaining employees as "transportation foreman" and made changes to their duties, hours, and pay, without bargaining with the Union, in violation of the PEBA. The hearing officer also rejected the School District's defense that the Union waived the failure to bargain on grounds that the Union had acquiesced in the historical practice of "management unilaterally establishing stipends and to whom they [would] be paid." To the contrary, the hearing officer found, in the CBA, that the Union and the School District had entered into a memorandum of understanding to create a joint committee to review the requirements to be met for an employee's "increment, stipend, or activity allowance."

{49} The hearing officer also made a specific finding that the "facts negate the [School] District's claim of waiver." The hearing officer concluded that evidence presented by the School District established that most of the stipends the School District referred to were of employees outside the Union's bargaining unit. As for those employees who were in the bargaining unit and received stipends, the hearing officer found that "there is no evidence to support the proposition that the [U]nion was made aware of the payment of those stipends and given an opportunity to bargain them, a pre-requisite to waiver."

{50} The hearing officer concluded that by giving three bargaining unit employees additional work and paying them an additional "foreman" stipend without bargaining those changes with the Union, the School District committed a prohibited practice in violation of Section 10-7E-19(F) and (G) of the PEBA (stating it is a violation of the PEBA "[to] refuse to bargain collectively in good faith with the exclusive representative[,]" and "[to] refuse . . . to comply with a provision of the [PEBA] or [PELRB] rule[.]").

{51} The School District appealed from the conclusions of the hearing officer and the findings of fact supporting them to the PELRB. The PELRB voted unanimously to adopt the hearing officer's findings of fact, conclusions of law, and rationale as its own. *See* Section 10-7E-9(D) (providing that the PELRB shall decide issues by majority vote and shall issue its decisions in the form of written orders and opinions).

B. PROCEEDINGS BEFORE THE DISTRICT COURT

{52} The School District next appealed the decision of the PELRB to the district court. *See* Section 10-7E-23(B) (providing that a person or party affected by a final order or decision of the PELRB may

appeal to the district court); Rule 1-074 NMRA (setting forth the procedure for an administrative appeal to the district court). After the School District filed its statement of appellate issues, the Union responded, and the School District filed its reply to the Union's response, the district court held a hearing. Following the hearing, the district court filed a memorandum opinion and order affirming the order of the PELRB.

{53} Like the hearing officer and the PELRB, the district court concluded that the 2003 amendments to the Public School Code did not prohibit the school board from performing its duties at Step 4 of the CBA. The district court further determined that the School District contractually obligated itself to review the superintendent's decision when his decisions were appealed pursuant to Step 4 of the CBA grievance process. Because "[a]n appeal, to be meaningful, involves the exercise of independent judgment as to whether the decision rendered by the superintendent is correct[,]" and the School District failed to point to any evidence that the school board was providing meaningful review at Step 4, the district court concluded that the hearing officer's conclusion (adopted by the PELRB) that the School District violated the CBA was not arbitrary and capricious.

{54} In the district court, the School District no longer argued that it was not required to bargain with the Union the changes it made to the terms and conditions of employment to certain employees by giving them additional duties and paying them an additional foreman stipend. Instead, the Union relied on its defense that the Union had waived the failure to bargain. On this point, the district court found that substantial evidence supported the hearing officer's (and PERB's) finding that there was no waiver by the Union.

{55} The School Board filed a petition for writ of certiorari with this Court, which we granted. *See* Rule 12-505 NMRA (setting forth procedure for review by the Court of Appeals of decisions of the district court from administrative appeals). The issues presented are: (1) whether the 2003 revisions made to the Public School Code by House Bill 212 stripped the school board of authority to hear and decide grievances as provided in the CBA; and (2) whether substantial evidence supports the finding of the PELRB that the Union did not waive its right to bargain the changed terms and conditions of employment of employees who were given additional duties and paid an additional stipend by the School District.

C. ANALYSIS

{56} The School District's argument is grounded on the same amendments made to the Public School Code by House Bill 212 that APS relies on in its appeal. To reiterate, House Bill 212 enacted a new statute, Section 22-5-14 (Section 14) which gives the superintendent the powers to "administer and supervise the school district" and to "employ, fix the salaries of, assign, terminate or discharge all employees of the school district[.]" Section 14(B)(2), (3). Secondly, House Bill 212 deleted Section 22-5-4(D) (providing that a local school board was invested with the "powers or duties" to "approve or disapprove the employment, termination, or discharge of all employees and certified school personnel of the school district upon a recommendation . . . by the superintendent") from the enumerated powers and duties of a school board. The School Board contends that because of the powers given to superintendents, and because the school board is "given no authority with respect to school personnel" that "[t]he Legislature took away the power of school boards to interfere in personnel matters when it enacted [House Bill] 212."

{57} We address the School District's argument within the context of the PEBA, which like House Bill 212, was enacted by the Legislature in 2003. Public Employees were not given the right to engage in collective bargaining until 1992 when the Legislature enacted the PEBA for the first time. 1992 N.M. Laws, ch. 9; *see Regents of Univ. of N.M.*, 1998-NMSC-020, ¶ 3 (noting that with the passage of the PEBA in 1992, public employees in New Mexico were given the right to engage in collective bargaining for the first time). However, the 1992 version of PEBA had a sunset provision that took effect in 1999, seven years later. 1992 N.M. Laws, ch. 9, § 30. Four years later in 2003, New Mexico once again recognized the right of public employees to engage in collective bargaining with the passage of the PEBA for the second time. 2003 N.M. Laws, ch. 4, § 1. (We also note that with the passage of 2003 N.M. Laws, ch. 5, the Legislature also enacted the PEBA again. Several sections of Chapter 5 are identical to those contained in Chapter 4, and these are noted in the Compiler's notes to the statutory sections.) The 2003 version of the PEBA is the current version and is codified at §§ 10-7E-1 to -26. *See* 2005 N.M. Laws, ch. 333, § 1 (adding the statutory reference).

{58} One of the stated purposes of the PEBA "is to guarantee public employees the right to organize and bargain collectively with their employers," Section 10-7E-2. "Collective bargaining" is defined to mean "the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment[.]" Section 10-7E-4(F). The parties to collective bargaining are the "exclusive representative" of the public employees and the "appropriate governing body" of the public employer. Section 10-7E-17(A). The "exclusive representative" is "a labor organization that, as a result of certification, has the right to represent all public employees in an appropriate bargaining unit for the purposes of collective bargaining[.]" Section 10-7E-4(I). "The appropriate governing body of a public employer is the policymaking individual or body representing the public employer[,]" and "[a]t the local level, the appropriate governing body is the elected or appointed representative body or individual charged with management of the local public body." Section 10-7E-7.

{59} Consistent with its definition of "collective bargaining," the PEBA mandates that with the exception of certain retirement programs, exclusive representatives and public employers "shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties[,]" and the parties "shall enter into written collective bargaining agreements covering employment relations." Section 10-7E-17(A)(1), (2). Pertinent here, "An agreement shall include a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters." Section 10-7E-17(F).

1. Authority of the School Board to Hear and Decide Grievances

{60} With the foregoing background in mind, we now examine the School District's arguments in detail. Specifically, the School District argues that under Step 4 of the grievance procedure in the CBA in an appeal from the decision of the superintendent, a school board is impermissibly allowed to overrule the superintendent, contrary to Section 14 which states that "[p]ersonnel decisions are in the domain

of the [s]uperintendent, not the [s]chool [b]oard." Further, the School District asserts, because Section 14 vests all hiring and firing authority with the superintendent, if the school board has authority to overrule the superintendent at Step 4 of the grievance process, "then the actual power to hire and fire was never actually changed." This result, the School District argues, violates two principles of statutory construction: (1) that the Legislature does not intend to enact a nullity when it passes a new law; and (2) that an amendment to an act expresses a legislative intent that the amendment prevails over any remaining contradictory provisions because it is a later declaration of legislative intent, and in adopting the amendment, the Legislature is presumed to have intended to change existing law.

{61} The School District's arguments focus on Section 22-5-4(A), which provides that a local school board has the power or duty, "subject to the rules of the department, [to] develop educational policies for the school district." While conceding that the school board is a "policy-making body," the School District asserts that under the foregoing language, the school board "only has the legal authority to make policies which are . . . subject to the rules of the department, and . . . 'educational.' " Thus, the School District proclaims, the school board "is not given authority to make whatever policies it may choose on whatever subjects it may choose." The School District asserts that because the "policies" involved here—grievances under the CBA—are "labor or personnel matters, not educational issues" and because House Bill 212 "took the local school boards out of the personnel arena, except for one employee—the superintendent[,]" the school board had no authority to negotiate and sign the CBA. We are not persuaded.

{62} The School District's argument overlooks the fact that in addition to other changes discussed above, House Bill 212, Section 3 also enacted Section 22-1-2(H), which defines the school board as the "policy-setting body" of the school district. Simply stated, "policy" means "to organize and regulate the internal order of: Govern." *Webster's Third New Int'l Dictionary* (Unabridged ed. 2002). As we have already pointed out, House Bill 212 reformed and restructured the relationship between the school board and superintendent, and consistent with this purpose, House Bill 212 clarified the respective duties of the school board and the superintendent. Under House Bill 212, the school board governs the school district by exercising its power to enact policy through the adoption of regulations, standards, and rules. At the same time, the school board employs the superintendent as its chief executive officer to implement and carry into effect at an operational level in the day-to-day operations of the school district.

{63} Section 22-5-4 does not alter or limit this relationship. To accept the School District's arguments on their face requires us to conclude that Section 22-1-2(H), defining the school board as "the policy-setting body" of the school district, is mere surplusage to 22-5-4 (A), in providing that among the "powers and duties" of a school board is, "subject to the rules of the department, [to] develop educational policies for the school district[.]" This interpretation violates a fundamental principle of statutory construction, that we are to give effect to all parts of statutes, particularly when they are enacted together. *See Albuquerque Cab Co.*, ___-NMSC-___, ¶ 9 ("We read related statutes in harmony and give effect to all provisions."); *Regents of Univ. of N.M.*, 1998-NMSC-020, ¶ 28 ("We will construe the entire statute as a whole so that all the provisions will be considered in relation to one another."). Following this mandate, we give effect to both statutes, which we conclude are in fact complementary to each other.

{64} The public education department has what appears to be exclusive and plenary control over all education policies of the state. It was created pursuant to Article XII, Section 6 of the New Mexico Constitution. *See* NMSA 1978, Section 9-24-9 (2004). Among its far reaching statutory powers is the power to "determine policy for the operation of all public schools and vocational education programs in the state," to "supervise all schools and school officials coming under its jurisdiction," and to "prescribe courses of instruction to be taught in all public schools in the state, requirements for graduation and standards for all public schools[.]" Section 22-2-2(B), (C), (D). To achieve these ends, the secretary of education "shall have control, management and direction of all public schools, except as otherwise provided by law." Section 22-2-1. These statutes can be read as excluding a local school district from having *any* authority to enact educational policy for its own school district.

{65} However, the purposes of House Bill 212 are to have a "multicultural education system" that "integrates the cultural strengths of its diverse student population into the curriculum[,]" and "recognizes that cultural diversity in the state presents special challenges for policymakers, administrators, teachers and students" and to also change public school governance "from the bottom up instead of from the top down," Section 22-1-1.2(B)(3), (4), and (F). In order to avoid any question and to be consistent with its purposes, House Bill 212 expressly and explicitly states that a local school board has the "powers or duties" to "develop educational policies for the school district" (that are "subject to the rules of the department") in Section 22-5-4(A). Granting a school board such authority is not a limitation, but an express recognition that each local board is a partner with the public education department in making education policy for that particular school district by taking into account the state's multicultural diversity to achieve student success. This authority is not unique to Section 22-5-4(A), as there are other additional express grants of policy-setting authority given to local school boards in the Public School Code. *See, e.g.*, Section 22-5-4.3(A) (directing that a local school board "shall establish student discipline policies"); Section 22-5-4.4(A) (stating that a school employee shall report student drug or alcohol abuse "pursuant to procedures established by the local school board"); Section 22-5-4.7(A) (providing that a school district shall establish a policy providing for the expulsion of a student who knowingly brings a weapon to a school); Section 22-5-6(A) (providing that a "local school board may waive the nepotism rule for family members of a local superintendent"); Section 22-10A-5(C) (requiring a local school board, together with a regional education cooperative, to "develop policies and procedures to require background checks on an applicant who has been offered employment, a contractor or a contractor's employee with unsupervised access to students at a public school"). We therefore conclude that the powers and duties granted to school boards in Section 22-5-4(A) are in addition to, and not a limitation, on the general power to enact policy for the school district recognized in Section 22-1-2(H). "Statutes must be construed so that no part of the statute is rendered surplusage or superfluous." *Regents of Univ. of N.M.*, 1998-NMSC-020, ¶ 28 (internal quotation marks and citation omitted).

{66} We therefore reject the School District's additional assertion that the PELRB and district court erred in determining that the school board is the public employer under the PEBA and that when the school board signed the CBA, it did not have authority to do so. Under the PEBA, the "appropriate governing body" to engage in collective bargaining and enter into a CBA is "the policymaking body representing the public employer" that at the local level is "the elected or appointed representative body . . . charged with management of the local public body." Section 10-7E-7. The school board is the policymaker here, and it satisfies the definition in all other respects. (Members of the school board are elected under Section 22-5-1.1).

{67} Summarizing, the PEBA provides that the locally elected body of the employer, which makes the employer's policies, is the proper party to engage in collective bargaining with a labor organization which has the right to represent all the public employees of the bargaining unit in collective bargaining. Collective bargaining means negotiating for the purpose of "entering into a written agreement regarding wages, hours and other terms and conditions of employment[.]" Section 10-7E-4(F). The wages, hours, and other terms and conditions of employment between a public employer and its public employees without question implicate policies of the employer, and PEBA therefore dictates that the policymaker of the public employer is the proper party to engage in such negotiations and to enter into a CBA agreement. Here, the policymaker and employer is the school board, and it was the proper party to enter into the CBA with the Union.

{68} We note two more facts before concluding our discussion of this issue. By hearing an appeal at Step 4 of the grievance process, the school board is not making personnel decisions on an operational level. We agree, that as the chief executive officer of the school district, these are responsibilities of the superintendent. Moreover, by hearing an appeal at Step 4 of the grievance process, the school board is not "interfering" in personnel matters or "overruling" a personnel decision of the superintendent as suggested by the School District. These assertions overlook what a "grievance" is under the CBA. The CBA defines a "grievance" as "an allegation by an employee, group of employees, or the [Union], that there has been a violation, misinterpretation, or misapplication of a specific provision of the [CBA]." Thus, at Step 4 of the grievance process, the CBA provides that the school board, as the policy maker who negotiated and agreed to the CBA, simply determines whether its own policy (i.e., a specific provision in the CBA) has been violated, misinterpreted, or misapplied. Making such a determination is not "interfering" in personnel matters nor does it constitute "overruling" a personnel decision of the superintendent. Instead, as the Union asserts, because the CBA applies to all employees, the school board is not involved in making a personnel decision on a personal basis, but under the contractual structure of the CBA through which all individual personnel matters are administered.

{69} Finally, the School District's arguments completely overlook the fact that in addition to the president of the school board, the superintendent of the school district signed the CBA on behalf of the school district. While we have placed no weight on this fact in our analysis, even if we agreed with the School District's premise that the school superintendent has the exclusive power under the CBA to hear a grievance, by signing the CBA, the superintendent could be deemed to have delegated that authority to the school board.

2. Waiver of the Union's Right to Bargain for the Stipends

{70} The hearing officer found that the School District unilaterally added duties and responsibilities to three hourly employees in the transportation department, designated them "transportation foreman" and changed their compensation by paying them a stipend of $4,000 per year. The additional duties and responsibilities were different from those usually performed by bargaining unit transportation employees, and would otherwise require overtime pay. Prior to these changes, the position of "[t]ransportation [f]oreman" did not exist. The Union became aware of the increased duties and pay and requested collective bargaining over the changes, but the School District refused. The hearing officer rejected the School District's argument that because it had previously paid stipends to other employees without negotiating them, the Union waived its right to bargain over these changes, and held that the School District violated the PEBA when it refused to bargain over the changes. The hearing officer did not, however, order rescission of the new duties and stipends because the Union did not request it, and because the CBA has in place a mechanism (discussed below) for ongoing discussions that are taking place under the CBA. The district court agreed and affirmed.

{71} The School District states that its argument under this point "is primarily one of law, that is, whether the merger of two unions requires that the custom and practice of the employer and the surviving union continue to be recognized as a custom and practice, or whether the merger is a merger for some purposes but not for all." However, the factual basis for this argument is not clearly presented to us by references to the transcript and record. *See* Rule 12-318(A)(3) NMRA (requiring briefs in chief to contain a summary of the facts that "shall contain citations to the record proper, transcript of proceedings, or exhibits supporting each factual representation"); *Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104 ("We will not search the record for facts, arguments, and rulings in order to support generalized arguments.").

{72} From the briefs of the parties, we gather the following. The Union originally represented only certified academic employees who were paid a salary. Examples are teachers, psychologists, and nurses. The Union expanded the bargaining unit to include hourly paid maintenance and transportation employees, thereby merging two separate bargaining units into one.

{73} Before the bargaining units were merged, when a school required additional services to be performed beyond the salaried position, such as running the science fair, sponsoring the chess club, or coaching cross-country, academic employees were paid stipends for the additional work. The School District would have us consider Exhibit 9 as evidence that "[t]here are, in fact over a thousand such stipends currently in effect." Exhibit 9 is a computer generated document consisting of twenty-four pages with numerous codes, but there is no evidence informing us how to understand the exhibit or what the codes mean. We therefore do not consider Exhibit 9 further). The CBA at issue here is the first CBA in which negotiations for the combined unit had occurred, and during the negotiations, the duties and payment for a maintenance foreman stipend, and an asbestos inspector stipend, and an "on-call" stipend for employees that had just been merged into the unit were negotiated. The additional duties and stipends paid to academic employees before the "merger" had not been negoti-

ated with the Union. The parties therefore also negotiated a memorandum of understanding as part of the present CBA to "examine the minimum requirements to be met for individuals to be eligible to receive their increment, stipend, or activity allowance" to be submitted to the superintendent and the Union for consideration and implementation.

{74} From the foregoing factual summary, gleaned from the briefs, we infer that the School District's argument is that because of its past practice of giving salaried academic employees additional duties and pay in the form of a stipend without negotiating those changes, or an objection from the Union, the Union was bound by that practice with respect to the maintenance and transportation employees that were subsequently added to the bargaining unit. The School District contends that under federal law, which the PELRB looks to in interpreting the PEBA, the prior practice became part of the new CBA. In support of its argument, however, the School District only refers us to cases that apply the concept of the "common law of the shop" to interpreting ambiguous phrases contained in a CBA. *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 581-582 (1960) (holding that the interpretation of contract terms in a CBA "is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally part of the collective bargaining agreement although not expressed in it"); *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1243 (10th Cir. 1998) ("It is well-established that when interpreting the terms of a labor contract, a fact-finder is entitled—and indeed, in some cases required—to look to the past practices of the parties and the 'common law of the shop' to determine the parties' contractual obligations." (footnote omitted)); *Champion Boxed Beef Co. v. Local No. 7*, 24 F.3d 86, 88-89 (10th Cir. 1994) ("It is a well-recognized principle that, except where expressly limited by a labor agreement, an arbitrator may consider and rely upon extrinsic evidence, including negotiating and contractual history of the parties, evidence of past practices, and the common law of the shop, when interpreting ambiguous provisions."). Because the School District neither claims nor presents any evidence of ambiguity in the CBA, these cases are inapplicable.

{75} Further, we conclude that the evidence supports the finding of the hearing officer that the School District failed to prove that the Union waived its right to bargain the transportation stipends. *See Ortiz v. Shaw*, 2008-NMCA-136, ¶ 19, 145 N.M. 58, 193 P.3d 605 ("Waiver is the intentional relinquishment of a known right." (internal quotation marks and citation omitted)); *Magnolia Mountain Ltd. P'ship v. Ski Rio Partners, Ltd.*, 2006-NMCA-027, ¶ 29, 139 N.M. 288, 131 P.3d 675 ("Waiver by acquiescence arises when a person knows he is entitled to enforce a right and neglects to do so for such a length of time that under the facts of the case the other party may fairly infer that he has waived or abandoned such right." (internal quotation marks and citation omitted)); *McCurry v. McCurry*, 1994-NMCA-047, ¶ 8, 117 N.M. 564, 874 P.2d 25 (holding that the party asserting waiver as a defense bears the burden to prove the waiver).

{76} Finally, we agree with the observation made by the district court that it was not arbitrary or capricious for the PELRB to consider differences between paying salaried certified academic employees (white collar) for extracurricular activities such as sponsoring student clubs outside working hours and paying stipends to hourly paid maintenance and transportation employees (blue collar) for bargaining unit work that would otherwise require overtime, in concluding that the Union did not waive its right to bargaining over changes in duties and pay for the transportation employees.

D. RESULT

{77} Having reviewed the administrative record and the School District's arguments, we conclude that the PELRB did not err, nor did the district court err in affirming the

PELRB decision.

V. CONCLUSION

{78} In the APS Appeal, the order of the district court issuing a permanent writ of mandamus to APS is affirmed.

{79} In the School District Appeal, the memorandum opinion and order of the district court affirming the PELRB decision is affirmed.

{80} IT IS SO ORDERED.
MICHAEL E. VIGIL, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
JAMES J. WECHSLER, Judge Pro Tempore

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-022

Nos. A-1-CA-35338 & A-1-CA-35821 (Consolidated)
(filed December 4, 2017)

FRED LOYA INSURANCE COMPANY,
Plaintiff/Counter-Defendant-Appellant,
v.
THOMAS J. SWIECH,
Defendant/Counter-Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Victor S. Lopez, District Judge

RICHARD J. VALLE
MATTHEW J. ZAMORA
CARTER & VALLE LAW FIRM, PC
Albuquerque, New Mexico
for Appellee

ELIZABETH G. HILL
LEONARD R. GROSSMAN
ANDREW B. CURTIS
CRAIG, TERRILL, HALE & GRANTHAM, LLP
Lubbock, Texas
for Appellant

MARK D. STANDRIDGE
JARMIE & ASSOCIATES
Las Cruces, New Mexico
for Amicus Curiae

Opinion

Linda M. Vanzi, Chief Judge

{1} The dispositive issue in these consolidated appeals is whether New Mexico's uninsured/underinsured motorist statute, NMSA 1978, § 66-5-301 (1983) (UM/UIM Act), requires an insurance company to pay punitive damages from the uninsured/underinsured (UM/UIM) bodily injury coverage limits of its insured's automobile insurance policy, where (1) the insured motorist sustained only property damage caused by an uninsured motorist; (2) the insurer paid the full amount of the UM/UIM property damage coverage limits of the policy; and (3) the punitive damages claim arose only from the uninsured motorist's conduct in causing that property damage. We hold that an insurer that has paid the full amount of the policy's UM/UIM property damage coverage limits is not required to pay from the policy's separate and distinct UM/UIM bodily injury coverage limits amounts representing punitive damages arising solely from property damage. Based on this holding, we reverse the district court's contrary ruling and its award of attorney fees to the insured under NMSA 1978, Section 39-2-1 (1977). We also conclude that the district court abused its discretion in denying the insurer's motion to seal confidential mediation communications pursuant to NMSA 1978, Section 44-7B-4 (2007).

FACTUAL BACKGROUND

{2} In the early morning hours of June 21, 2013, Defendant/Counter-Plaintiff Thomas J. Swiech was asleep in his apartment when an uninsured motorist, fleeing from police, struck Swiech's unoccupied 2001 Chevrolet Suburban. The Suburban sustained disabling property damage from the collision. No one was in the vehicle at the time of the accident, and no one—including Swiech—sustained any bodily injury.

{3} Swiech incurred $3,566.24 in property damage to his Suburban and sought UM/UIM property damage coverage from his automobile insurer, Plaintiff/Counter-Defendant Fred Loya Insurance Company (Loya). The declarations page of Swiech's insurance policy with Loya provided the following UM/UIM coverage limits: $25,000 per person/$50,000 per accident for bodily injury and $10,000 for property damage. The policy defines "bodily injury" as "bodily harm, sickness, or disease, including death that results from bodily harm, sickness, or disease." It defines "property damage" as "physical damage to or destruction of a covered vehicle; and . . . physical damage to or destruction of any property owned by an insured person which is contained in the covered vehicle at the time of the accident." Part III of the policy, which specifically pertains to UM/UIM coverage, provides:

> *Subject to the Limits of Liability*, if you pay a premium for [UM/UIM] Motorist Bodily Injury Coverage, we will pay for damages which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle or underinsured motor vehicle *because of bodily injury*:
> 1. sustained by an insured person;
> 2. caused by accident; and
> 3. arising out of the ownership, maintenance, or use of an uninsured motor vehicle or an underinsured motor vehicle.
>
> . . . .
>
> *Subject to the Limits of Liability*, if you pay a premium for [UM/UIM] Motorist Property Damage Coverage, we will pay for damages which an insured person is entitled to recover from the owner or operator of an uninsured motor vehicle *because of property damage*:
> 1. caused by accident; and
> 2. arising out of the ownership, maintenance, or use of an uninsured motor vehicle.

(Emphases added.) The policy, including Part III, is silent as to punitive damages.

{4} Loya paid Swiech the policy's $10,000 coverage limit for UM/UIM property damage: $3,566.24 in property damage actually incurred plus $6,433.76. Swiech thereafter demanded that punitive damages arising from the property damage

be paid from his UM/UIM bodily injury coverage, which Loya denied[1].

PROCEDURAL BACKGROUND

The Summary Judgment Motions and the District Court's Judgment

{5} Following Swiech's demand for payment of punitive damages from his policy's UM/UIM bodily injury coverage, Loya filed a complaint in the district court seeking a declaratory judgment that Swiech was not entitled to any proceeds under the policy beyond the $10,000 UM/UIM property damage coverage limit Loya had already paid. Swiech counterclaimed, alleging that Loya had breached the insurance contract by failing to pay a "first party coverage claim" and had "wrongfully and unlawfully denied UM/UIM coverage." Swiech also sought a declaratory judgment that, among other things, he was entitled to punitive damages and "to recover the entire UM/UIM policy limits." In other words, Swiech sought to recover in excess of the UM/UIM property damage coverage limit by claiming entitlement to the UM/UIM bodily injury coverage limit, despite the fact that he did not sustain any bodily injury.

{6} Loya moved for summary judgment, arguing that it was entitled to judgment as a matter of law because the $10,000 policy limit for property damage coverage had been exhausted, and "there are no genuine issues of material fact as to whether [Swiech] has suffered any bodily injury damages." Swiech did not dispute any material facts, and he admitted that Loya had paid the $10,000 policy limit for UM/UIM property damage coverage but argued that he was entitled to the $25,000 policy limit for UM/UIM bodily injury coverage because (1) the uninsured motorist's conduct warranted punitive damages, (2) the policy did not preclude him from seeking punitive damages, (3) "punitive damages are separate and distinct damages" from actual damages, and (4) New Mexico law provides that punitive damages are included in UM/UIM coverage.

{7} A month later, Swiech filed his own motion for partial summary judgment on the same grounds asserted in his response to Loya's summary judgment motion, arguing that he was entitled to judgment as a matter of law that he "can request punitive damages from the available $25,000.00 in UM/UIM [bodily injury] coverage." Loya countered that the policy's UM/UIM property damage coverage limit complied with NMSA 1978, Section 66-5-215 (1983) of the Mandatory Financial Responsibility Act (MFRA),, and reiterated that Swiech was not entitled to proceeds under the policy's UM/UIM bodily injury coverage because punitive damages derive from actual damages, and Swiech had sustained only property damage.

{8} After an unsuccessful attempt at arbitration, Loya and Swiech renewed their summary judgment motions, relying on the same arguments. After holding a hearing, the district court issued orders denying Loya's summary judgment motion and conditionally granting Swiech's motion, ruling that Swiech's "motion to exceed the [policy] limitation if a punitive damage award is obtained above the $10,000 is, conditionally, GRANTED; provided that a trial will be necessary to determine whether punitive damages are recoverable." In so ruling, the district court noted the following points: (1) the policy delineated specific limits but did not address payment of punitive damages; (2) UJI 13-1827 NMRA, the uniform jury instruction for punitive damages, makes "no distinction . . . between the recovery of bodily injury [versus] property damage"—this notwithstanding that the UJI does not, by its terms, apply specifically to liability insurance policies and the Use Note's caution that the instruction merely "provides a general framework"; (3) Loya "did not explain where the policy language clearly and unambiguously limited punitive damages stemming from a property damage claim to $10,000"—this, despite that the policy expressly stated that any loss "because of property damage" is "subject to the limits of liability" for property damage.

{9} Loya unsuccessfully moved for reconsideration based on *Lucero v. Northland Insurance Co.*, 2015-NMSC-011, 346 P.3d 1154, in which our Supreme Court analyzed an insurance contract under generally applicable contract principles.

{10} After a one-day bench trial, the district court entered judgment in favor of Swiech upon findings of fact and conclusions of law. The court ruled that Loya must pay Swiech $20,000 in punitive damages "over and above the $10,000 amount previously paid for property damage-based compensatory damages," based on its conclusion that "assur[ing] the punishment motive of the law is furthered" demanded "utilizing the higher limits under the policy." Many findings focus on the uninsured's conduct while fleeing from police and during his subsequent arrest. Although these matters have no relevance to the issues in dispute, the district court's conclusion that Loya must pay punitive damages for property damage from the policy's separate UM/UIM coverage limits for bodily injury relies heavily on what the court deemed to be the need to send a "societal" message to punish the tortfeasor and "to deter other drivers from engaging in such dangerous and reprehensible conduct" and the court's view that "the punitive damage purpose logically demands access to the greater policy limits."

{11} According to the court, the insuring agreement's statement that if any policy provision "fails to conform with the legal requirements of the state listed on your application [New Mexico] as your residence, the provision shall be deemed amended to conform with such legal requirements," as "allow[ing] recovery of punitive damages under the insuring agreement by operation of law when combined with current New Mexico law on award of punitive damages in this context." The court did not explain how that language justifies ignoring the policy's unambiguous language stating that UM/UIM bodily injury coverage applied only to the "owner or operator of an uninsured motor vehicle or underinsured motor vehicle because of bodily injury" and limiting UM/UIM recovery for property damage to the stated limit of $10,000.

{12} The court's decision also identifies no law requiring an insurer to pay punitive damages from UM/UIM bodily injury coverage where, as here, the insured motorist sustained only property damage; the insurer paid the full amount of the UM/UIM property damage coverage limits; and the punitive damages arise only from the uninsured motorist's conduct in causing property damage. Nor does it acknowledge that cases holding that UM/UIM coverage in New Mexico includes punitive damages, which recognize that

[1]Although Loya denied in the district court that the additional $6,433.76 it paid to Swiech was for punitive damages, it asserts on appeal that the $6,433.76 was "paid as a credit toward punitive damages." In light of our holding that Loya fulfilled its obligations to Swiech, regardless of whether the $6,433.76 payment was for compensatory or punitive damages, we need not and do not address the discrepancy.

punitive damages are awarded to punish the tortfeasor, also make clear that punitive damages are recoverable only for the conduct that caused actual damages, which in this case is conduct causing property damage only. *See Stewart v. State Farm Mut. Auto. Ins. Co.*, 1986-NMSC-073, ¶ 10, 104 N.M. 744, 726 P.2d 1374 (rejecting the argument that the policy language precluded punitive damages because they do not arise "because of bodily injury" as specious "because punitive damages are predicated upon actual damages, and the actual damages were awarded in this case for the conduct which resulted in the insured's bodily injury"); *Farmers Ins. Co. of Ariz. v. Sandoval*, 2011-NMCA-051, ¶ 8, 149 N.M. 654, 253 P.3d 944 (stating that punitive damages "derive from actual damages").

Attorney Fees

{13} Three months after the district court entered its final judgment, Swiech moved for attorney fees and costs, pursuant to Section 39-2-1, on the ground that Loya "acted unreasonably in failing to pay the claim." The court found that Loya "breached its duty of good faith and fair dealing" and awarded Swiech $12,000 in attorney fees pursuant to Section 39-2-1, but denied Swiech's request for costs.

Settlement Conference and Motion to Seal

{14} Before the bench trial, the parties participated in a confidential court-ordered settlement conference. After the conference, Swiech moved for sanctions against Loya, claiming that Loya did not attend the conference in good faith because it only prepared one offer letter for $2,500 and therefore "fail[ed] to engage in meaningful negotiations." The motion was not filed under seal, although it contained information pertaining to the settlement conference, including copies of emails between the parties' attorneys discussing logistical and substantive matters. Loya subsequently filed an unopposed motion to seal, pursuant to Section 44-7B-4. The district court denied Loya's motion to seal and Swiech's motion for sanctions.

STANDARDS OF REVIEW

{15} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. We review summary judgment decisions de novo. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. "Although we ordinarily review the whole record in the light most favorable to the party opposing summary judgment, we do not do so where pure questions of law are at issue." *Kreutzer v. Aldo Leopold High Sch.*, ___-NMCA___, ¶ 26, ___ P.3d ___ (No. A-1-CA-35286, Aug. 7, 2017). While an order denying summary judgment is generally not reviewable after entry of final judgment, *Chavez v. Bd. of Cty. Comm'rs*, 2001-NMCA-065, ¶ 12, 130 N.M. 753, 31 P.3d 1027, we have reviewed such orders after final judgment where the summary judgment motion presents an issue of law, *Chaara v. Lander*, 2002-NMCA-053, ¶ 22, 132 N.M. 175, 45 P.3d 895. In this case, the material facts grounding the parties' summary judgment motions are undisputed, and the only issue presented (as to the court's decisions on summary judgment and after the bench trial) is the legal question whether an insurer that has paid the full amount of the policy's UM/UIM property damage coverage limits is required to pay from the policy's separate UM/UIM bodily injury coverage limits amounts representing punitive damages arising solely from property damage. This is a legal question that we review de novo. *See BAC Home Loans Servicing, LP v. Smith*, 2016-NMCA-025, ¶ 7, 366 P.3d 714.

{16} A district court's denial of a motion to seal is reviewed for an abuse of discretion. *See State v. Doe*, 1981-NMCA-097, ¶ 14, 96 N.M. 648, 633 P.2d 1246. "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 11, 314 P.3d 688 (internal quotation marks and citation omitted). However, "even when we review for an abuse of discretion," we review de novo the district court's application of the law to the facts, and "we may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." *Harrison v. Bd. of Regents of Univ. of N.M.*, 2013-NMCA-105, ¶ 14, 311 P.3d 1236 (internal quotation marks and citations omitted).

DISCUSSION

{17} Loya challenges the district court's rulings that Swiech was entitled to recover punitive damages from the policy's UM/UIM bodily injury coverage[2] and attorney fees, as well as the court's denial of Loya's motion to seal. We agree with Loya on all issues raised and reverse the district court's rulings otherwise.

Swiech Cannot Recover Punitive Damages Arising From Conduct Causing Property Damage Under His UM/UIM Policy's Bodily Injury Coverage

{18} Punitive damages are "sums awarded in addition to any compensatory or nominal damages, usually as punishment or deterrent levied against a defendant found guilty of particularly aggravated misconduct, coupled with a malicious, reckless or otherwise wrongful state of mind." *Madrid v. Marquez*, 2001-NMCA-087, ¶ 4, 131 N.M. 132, 33 P.3d 683 (internal quotation marks and citation omitted). Our Supreme Court has held that, "under the New Mexico [UM/UIM Act], uninsured motorist coverage includes coverage for punitive damages." *Stewart*, 1986-NMSC-073, ¶ 9; *see also Manzanares v. Allstate Ins. Co.*, 2006-NMCA-104, ¶ 5, 140 N.M. 227, 141 P.3d 1281 ("Punitive damages are . . . included within an insured's [UM/]UIM coverage."); *State Farm Mut. Auto. Ins. Co. v. Progressive Specialty Ins. Co.*, 2001-NMCA-101, ¶ 14, 131 N.M. 304, 35 P.3d 309 (noting that the UM/UIM Act includes coverage for punitive damages).

{19} Our Supreme Court has also made clear, however, that punitive damages are predicated upon actual damages and are properly awarded only for the same conduct that caused the actual damages. *See Stewart*, 1986-NMSC-073, ¶ 10 (punitive damages recoverable under policy's UM/UIM coverage for bodily injury "because punitive damages are predicated upon actual damages, and the actual damages were awarded in this case for the conduct which resulted in the insured's bodily injury"); *see Behrens v. Gateway Court, LLC*, 2013-NMCA-097, ¶ 24, 311 P.3d 822 ("[T]he conduct giving rise to the punitive damages claim must be the same conduct for which actual or compensatory damages were allowed." (internal quotation marks and citation omitted)); *see also Baker v. Armstrong*, 1987-NMSC-101, ¶ 4, 106 N.M. 395, 744 P.2d 170 (stating that "actual bodily injury or property damage is a prerequisite to punitive damages, and the punishment must be reasonably related to the injury or damage"). Moreover, even where "punitive damages are appropriate under the [UM/UIM] provision of an insurance policy, . . . the total amount of damages for which [the insurer] can be

[2]We thank amici for their interest in this matter and have considered their arguments

held liable should not exceed the policy limits" of the coverage provided for the actual damages. *Stewart*, 1986-NMSC-073, ¶ 18.

{20} In *Stewart*, the actual damages at issue fell within the policy's UM/UIM bodily injury coverage, which was limited to $15,000 under the policy. *Id.* ¶¶ 1, 4, 18. Our Supreme Court held that, under the UM/UIM Act, the insured could recover punitive damages arising from actual bodily injury damages under the policy's UM/UIM coverage for bodily injury. *Id.* ¶ 10. The insured could not, however, recover punitive damages arising from bodily injury in excess of the policy's UM/UIM $15,000 limit for bodily injury coverage because the policy provided this amount of bodily injury coverage in exchange for a specific premium and "[t]o require [the insurer] to pay [the insured] in excess of the policy limit extends coverage beyond the terms of the contract, regardless of the premium paid by the insured." *Id.* ¶ 18. Applying *Stewart* to this case, we conclude that punitive damages are potentially recoverable under Swiech's policy only from, and not exceeding, the UM/UIM property damage coverage limits. *Id.* ¶¶ 4, 10, 18.

{21} Nothing in the district court's findings and conclusions, or Swiech's arguments persuades us that a different conclusion is warranted. First, the UM/UIM Act itself requires that UM/UIM coverage be provided

> in minimum limits for bodily injury or death and for injury to or destruction of property as set forth in Section 66-5-215[3] and such higher limits as may be desired by the insured, *but up to the limits of liability specified in bodily injury and property damage liability provisions of the insured's policy*, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles[.]

Section 66-5-301(A) (emphasis added). The New Mexico Administrative Code similarly provides that the insurer's "limit of property damage liability *shall not exceed the amount specified* for unknown motorist/uninsured motorist coverage as stated on the declarations page for all damages in excess of $250 arising out of injury to or destruction of all property of one or more insureds as the result of any one accident." 13.12.3.17(F)(2) NMAC (emphasis added). As discussed, even where punitive damages are appropriate, "any damage award must be within the policy limitations[,]" *Stewart*, 1986-NMSC-073, ¶ 4, and the insurer cannot be liable for punitive damages in excess of the coverage limits for the type of damages actually sustained by the insured. *Id.* ¶¶ 10, 18. Neither the district court nor Swiech cited any law requiring an insurer to do what Swiech sought and the district court ordered here, and we have found none.[4]

{22} We are not alone in holding that policy limits for separate and distinct coverages cannot be used interchangeably without regard to terms of the insurance contract. *See, e.g.*, *Holt ex rel. Holt v. Atl. Cas. Ins. Co.*, 539 S.E.2d 345, 347-48 (N.C. Ct. App. 2000) (holding that medical expenses for bodily injury cannot be recovered under policy's property damage coverage); *Napier v. Banks*, 224 N.E.2d 158, 160, 162 (Ohio Ct. App. 1967) (holding that payment of the policy's $25,000 limit for bodily injury coverage exhausted the policy and rejecting the contention that claim for loss of consortium should have been paid from the policy's $10,000 property damage coverage limit); *Va. Farm Bureau Mut. Ins. Co. v. Frazier*, 440 S.E.2d 898, 901-02 (Va. 1994) (concluding that medical expenses resulting from bodily injury cannot be recovered under the policy's property damage coverage); *see also Am. Int'l Bank v. Fid. & Deposit Co.*, 57 Cal. Rptr. 2d 567, 574 (Cal. Ct. App. 1996) ("[W]here the 'occurrence' giving rise to the claim causes only economic loss, the fact that such intangible losses cause the victim to later suffer emotional distress and attendant physical injury cannot be used to convert an uncovered claim for economic loss into a covered claim for bodily injury. The occurrence itself must directly cause the bodily injury, the injury to tangible property, or the loss of use of the property.").

{23} The Georgia Supreme Court held in a factually similar case that an insured could not recover punitive damages from his policy's bodily injury coverage when he did not sustain any bodily injury and had exhausted the property damage limits of his policy. *Flynn v. Allstate Ins. Co.*, 601 S.E.2d 739, 740-41 (Ga. Ct. App. 2004). There, the insured's property was damaged when a motorist drove his truck into the insured's home, but the insured did not suffer any physical impact or bodily injury. *Id.* at 740. The court framed the issue as whether the insured was "entitled to punitive damages or to any damages under the bodily injury portion of the insurance policy." *Id.* In holding that the insured could not recover under the policy's bodily injury coverage, the court noted that "[n]o personal injury or personal physical impact occurred" and that the insurer had already tendered the policy limits for property damage. *Id.* As in New Mexico, punitive damages in Georgia "are considered 'additional' damages and must attach to either a property damage claim or a personal injury claim." *Id.* In other words, "punitive damages cannot be awarded when there is no entitlement to compensatory damages." *Id.* at 741; *see Baker*, 1987-NMSC-101, ¶ 4 (noting that "[w]ithout bodily injury or property damage, there would be no cause of action" for punitive damages).

{24} We hold, as a matter of law, that if the UM/UIM coverage limit for one kind of loss is exhausted (i.e., property damage) an insured cannot recover additional policy proceeds from the UM/UIM coverage limits for another kind of loss (i.e., bodily injury) when the insured did not suffer that other kind of loss. Accordingly, we reverse the district court's judgment that Swiech could recover punitive damages under his policy's UM/UIM bodily injury coverage when he sustained only UM/UIM property damage and exhausted the coverage limit for UM/UIM property damage. Because we reverse on that issue, there is no basis for the court's award of attorney fees under Section 39-2-1, and so we also reverse the fee award. *See id.* (allowing an insured to recover reasonable attorney fees and costs when the insured has prevailed against an insurer who has not paid a first-party coverage claim).

The District Court Abused Its Discretion in Denying Loya's Motion to Seal

{25} Loya challenges the district court's denial of its motion to seal Swiech's motion for sanctions, which Loya sought

[3]Section 66-5-215 of the MFRA provides the following minimum limits for UM/UIM coverage: $25,000 per person/$50,000 per accident for bodily injury coverage, and $10,000 for property damage coverage. Section 66-5-215(A)(2), (3).

[4]The district court repeatedly refers to the "higher limits" of the policy. But the policy is clear (as is the UM/UIM Act and the MFRA it incorporates) that the coverages for "bodily injury" and "property damages" are separate and distinct coverages. Thus, the policy has no "higher limits."

pursuant to Section 44-7B-4 because the sanctions motion included confidential communications pertaining to the settlement conference. Although he did not oppose the motion to seal, Swiech argues here that Second Judicial District Local Rule LR2-602(I) authorizes disclosure. We disagree.

{26} The New Mexico Mediation Procedures Act (Mediation Act) provides, "Except as otherwise provided in the Mediation . . . Act . . . or by applicable judicial court rules, all mediation communications are confidential, and not subject to disclosure and shall not be used as evidence in any proceeding." Section 44-7B-4. The parties do not dispute whether the emails attached to Swiech's motion for sanctions contained "mediation communications," which NMSA 1978, Section 44-7B-2(B) (2007) defines as communications made "during a mediation [and] made for purposes of considering, conducting, participating in, initiating, continuing or reconvening a mediation." Section 44-7B-2(B). Although Swiech contends that mediation communications must be marked as confidential in order to fall within its ambit, the Mediation Act contains no such requirement.

{27} NMSA 1978, Section 44-7B-5 (2007) of the Mediation Act provides a list of mediation communications that are not confidential, but there is "no [confidentiality] exception for use to determine whether a party participated in the mediation in good faith." *Carlsbad Hotel Assocs., L.L.C. v. Patterson-UTI Drilling Co.*, 2009-NMCA-005, ¶ 31, 145 N.M. 385, 199 P.3d 288. Swiech does not argue that any of Section 44-7B-5's exceptions apply, but contends that LR2-602(I) is an "applicable judicial court rule[]," *see* § 44-7B-4, that permits disclosure of the confidential mediation communications in this case.

{28} LR2-602(I) provides:

> Parties shall participate in good faith in settlement conferences. Good faith participation includes but is not limited to sufficiently preparing for the conference and engaging in meaningful negotiations during the conference. On motion of any party or its own motion, the court may award attorney fees and costs for failure to participate in good faith.

LR2-602(I) neither addresses the expectation of confidentiality in settlement conferences nor authorizes a party to breach the confidentiality of settlement conferences to prove bad faith. No court has construed LR2-602(I) to provide an exception to Section 44-7B-4, and we see no basis to do so here. We are not persuaded by Swiech's contention that the rule's provision for attorney fees and costs would be meaningless if the moving party did not have an opportunity to prove their bad faith claim. The district court obviously could have decided whether sanctions were warranted if the motion had been filed under seal, consistent with the confidentiality provisions of the Mediation Act. The district court abused its discretion in denying Loya's motion to seal.

CONCLUSION

{29} For the reasons stated above, we reverse.

{30} IT IS SO ORDERED.

LINDA M. VANZI, Chief Judge

WE CONCUR:

STEPHEN G. FRENCH, Judge

HENRY M. BOHNHOFF, Judge

Albuquerque Law-La-Palooza

Help us address the needs of low-income New Mexicans!

The Second Judicial District Pro Bono Committee is hosting Law-La-Palooza, a free legal fair, on Thursday, May 31 2018 from 3-6 PM at the Westside Community Center (1250 Isleta Blvd. SW, Albuquerque, NM 87105)

The legal fair will be first come, first served
Spanish language interpreters will be available

We are looking for attorneys who practice in the following areas to give consults:

Divorce	Creditor/Debtor	Powers of Attorney
Custody	Child Support	Public Benefits
Landlord/Tenant	Kinship/Guardianship	Unemployment
Bankruptcy	Wills & Probate	Personal Injury
Contracts	Immigration	Problems with the IRS
SSI/SSDI	Visitation	Name Change

If you would like to volunteer, please register at: https://bit.ly/2HXbujl
For questions, please contact Aja Brooks at (505) 814-5033
or by e-mail at ajab@nmlegalaid.org

Official Publication of the State Bar of New Mexico

BAR BULLETIN

SUBMISSION DEADLINES

All advertising must be submitted via e-mail by 4 p.m. Wednesday, two weeks prior to publication (*Bulletin* publishes every Wednesday). Advertising will be accepted for publication in the *Bar Bulletin* in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.**

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

Classified

Positions

Entry-Level Attorney Position

We have an entry-level attorney position available in Las Vegas, New Mexico. Excellent opportunity to gain valuable experience in the courtroom and with a great team of attorneys. Requirements include J.D. and current license to practice law in New Mexico. Please forward your letter of interest and Resumé to Richard D. Flores, District Attorney, c/o Mary Lou Umbarger, District Office Manager, P.O. Box 2025, Las Vegas, New Mexico 87701; or via e-mail: mumbarger@da.state.nm.us Salary will be based on experience, and in compliance with the District Attorney's Personnel and Compensation Plan.

13th Judicial District Attorney
Senior Trial Attorney, Trial Attorney, Assistant Trial Attorney
Cibola, Sandoval, Valencia Counties

Senior Trial Attorney - Requires substantial knowledge and experience in criminal prosecution, as well as the ability to handle a full-time complex felony caseload. Trial Attorney - Requires misdemeanor and felony caseload experience. Assistant Trial Attorney - May entail misdemeanor, juvenile and possible felony cases. Salary is commensurate with experience. Contact Krissy Saavedra KSaavedra@da.state.nm.us or 505-771-7411 for application.

Trial Attorney

The Third Judicial District Attorney's Office in Las Cruces is looking for: Trial Attorney. Requirements: Licensed attorney in New Mexico, plus a minimum of two (2) years as a practicing attorney, or one (1) year as a prosecuting attorney. Salary Range: $54,122-$67,652. Salary will be based upon experience and the District Attorney's Personnel and Compensation Plan. Submit Resume to Whitney Safranek, Human Resources Administrator at wsafranek@da.state.nm.us. Further description of this position is listed on our website http://donaanacountyda.com/.

PT/FT Attorney

PT/FT attorney for expanding law firm in Santa Fe. Email resume to xc87505@gmail.com. All inquiries are maintained as confidential.

Litigation Attorney

Small litigation firm seeks motivated attorney with 2-3 years of experience. Must have strong research and writing skills. Salary based on experience. Send resume and salary requirements to PO Box 16270, ABQ, NM 87191-6270 or lawfirm9201@gmail.com.

Lawyer

Egolf + Ferlic + Harwood, LLC is looking for a hardworking lawyer to join our practice. The ideal candidate will have private sector litigation experience, including trial practice. She or he will be eager to work hard on cases that will advance the law in New Mexico and produce meaningful results for our clients and our communities. We look forward to welcoming a lawyer who possesses impeccable writing and research skills and who can manage important cases from start to finish. Please be in touch if you think you will be a good candidate for this position, want to enjoy a collegial workplace, seek opportunities for professional advancement, and understand the importance of the Oxford comma. You may send your letter of interest, resume and writing sample to our firm administrator, Manya Snyder, at Manya@EgolfLaw.com. We look forward to you joining our team!

Eleventh Judicial District Attorney's Office, Div II

The McKinley County District Attorney's Office is currently seeking immediate resumes for two (2) Assistant Trial Attorneys and one (1) Senior Trial Attorney. Former position is ideal for persons who recently took the NM bar exam and persons who are in good standing with another state bar. Senior Trial Attorney position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence. Persons who are in good standing with another state bar or those with New Mexico criminal law experience in excess of 5 years are welcome to apply. The McKinley County District Attorney's Office provides regular courtroom practice and a supportive and collegial work environment. Enjoy the spectacular outdoors in the adventure capital of New Mexico. Salaries are negotiable based on experience. Submit letter of interest and resume to Paula Pakkala, District Attorney, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter and resume to PPakkala@da.state.nm.us by 5:00 p.m. June 1, 2018.

Mid-level Associate Attorney

Mid-level Associate Attorney – civil litigation department of AV Rated firm. Licensed and in good standing in New Mexico with three plus years of experience in litigation (civil litigation preferred). Experience in handling pretrial discovery, motion practice, depositions, trial preparation, and trial. Civil defense focus; knowledge of insurance law also an asset. We are looking for a candidate with strong writing skills, attention to detail and sound judgment, who is motivated and able to assist and support busy litigation team in large and complex litigation cases and trial. The right candidate will have an increasing opportunity and desire for greater responsibility with the ability to work as part of a team reporting to senior partners. Please submit resume, writing sample and transcripts to palvarez@rmjfirm.com.

Staff Attorney

New Mexico Center on Law and Poverty (www.nmpovertylaw.org) seeks full-time staff attorney for our Public Benefits Team to provide legal representation, policy advocacy, and community education to address hunger and secure fundamental fairness in the administration of the public safety net for low-income New Mexicans. Required: Law degree and license; minimum two years as an attorney; excellent research, writing, and legal advocacy skills; 'no-stone-unturned' thoroughness and persistence; leadership; ability to be articulate and forceful in the face of powerful opposition; commitment to economic and racial justice. Preferred: knowledge and experience in advocacy, lobbying, legislative and government administrative processes; experience working with diverse community groups and other allies; familiarity with poverty law; Spanish fluency. Varied, challenging, rewarding work. Good non-profit salary. Excellent benefits. Balanced work schedule. Apply in confidence by emailing a resume and a cover letter describing your commitment to social justice and to the mission of the NM Center on Law and Poverty to veronica@nmpovertylaw.org. Please put your name in the subject line. EEOE. People with disabilities, people of color, and people who have grown up in low-income communities are especially encouraged to apply.

Attorney

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

Pueblo of Isleta
Request for Interested Parties
Contract Public Defender – Attorney

The Pueblo of Isleta ("Owner") is seeking to hire a Contract Public Defender for conflict cases. To request further details, please contact both of the following individuals by email: Elaine Zuni, Procurement - Director, Pueblo of Isleta; Email:poi70301@isletapueblo.com; Phone: (505) 869-9738; Sophie Cooper, Public Defender, Pueblo of Isleta; Email: poi09012@isletapueblo.com; Phone: (505) 869-9826

Senior Assistant City Attorney/ Prosecutor, Assistant City Attorney

City of Las Cruces – Senior Assistant City Attorney/Prosecutor; Assistant City Attorney/ Prosecutor. Closing date: Open until filled. Senior Assistant City Attorney salary range: $67,381.64 – $101,072.46 annually. Assistant City Attorney salary range: $58,102.98 - $72,628.73 annually. This posting is for a Municipal Court Prosecutor. Fulltime regular, exempt position. Applicants for this Prosecutor position may also be considered for a position that performs a variety of legal duties to support the City Attorney's office which may include legal assessments and recommendations; factual and legal analysis to determine whether legal issues should be prosecuted or defended based on the facts of law and evidence; preparation and presentation of legal documents, analyses, and City code revisions, and other legal measures. Minimum requirements: Juris Doctor Degree plus one (1) year of experience in criminal prosecution. A combination of education, experience, and training may be applied in accordance with City of Las Cruces policy. Member of the New Mexico State Bar Association, licensed to practice law in the state of New Mexico; active with all New Mexico Bar annual requirements. Valid driver's license may be required or preferred. Visit website http://agency.governmentjobs.com//lascruces/default.cfm for further information, job posting, requirements and online application process.

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 be based primarily in Torrance County (Estancia). Must be admitted to the New Mexico State Bar and be willing to relocate within 6 months of hire. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Seventh District Attorney's Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park Street, Socorro, New Mexico 87801.

Experienced Attorney

Chappell Law Firm seeks an experienced attorney to work in its commercial litigation and transactional practice. Compensation will be considered based upon experience and other factors. Please submit resumes and other requirements to Gwenn Beaver at gwennb@chappellfirm.com. All submissions will be kept confidential.

Assistant City Attorney Positions

The City of Albuquerque Legal Department is hiring multiple Assistant City Attorney positions in the areas of real estate and land use, governmental affairs, immigration and civil rights, general commercial transaction issues, and civil litigation. The department's, team of attorneys provide legal advice and guidance to City departments and boards, as well as represent the City and City Council on complex matters before administrative tribunals and in New Mexico State and Federal courts. Attention to detail and strong writing skills are essential. Five (5)+ years' experience is preferred, must be admitted to the practice of law in New Mexico, and be an active member of the Bar in good standing. Salary will be based upon experience. Please submit resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or amaragon@cabq.gov.

Advertisement for Proposals City of Gallup, New Mexico

Request for Proposals (RFP) NO. 2017/2018/07/P. Public notice is hereby given that the City of Gallup, New Mexico, is accepting proposals for: GENERAL LEGAL SERVICES. As more particularly set out in the RFP documents, copies of which may be obtained from the City of Gallup Purchasing Department, 110 W. Aztec Ave., Gallup, New Mexico 87301; or contact Frances Rodriguez, Purchasing Director at (505) 863-1334; email frodriguez@gallupnm.gov. Copies of RFP may also be accessed at www.gallupnm/bids. Sealed proposals for such will be received at the Office of the Purchasing Department until 2:00 P.M. (LOCAL TIME) on May 24, 2018 when proposals will be received in the City Hall Purchasing Conference Room. Envelopes are to be sealed and plainly marked with the RFP Number. NO FAXED OR ELECTRONICALLY TRANSMITTED PROPOSALS will be accepted, and proposals submitted after the specified date and time will not be considered and will be returned unopened. Dated the 24TH day of April 2018; By: /S/ Jackie McKinney, Mayor; CLASSIFIED LEGAL COLUMN: Bar Bulletin Publishing Date: Wednesday May 9, 2018

Attorney

The Zuni Pueblo is seeking a part-time prosecutor with three years or more trial experience and qualifications sufficient to be admitted to practice before the Zuni Tribal Court in Zuni, New Mexico. Email letter of interest and resume to dfc@catchlaw.com.

Attorney Associate, Unclassified, Full-time, Santa Fe, NM

Perm# 10102423-23100; Opening Date: 04/26/2018 – Close Date: 05/23/2018; Job Pay Range LL: $28.128 - $43.95 per hour; Target Pay Range/Rate: $28.128 - $35.16 per hour; The First Judicial District Court is recruiting for a Full-time, Unclassified "at will" Attorney Associate position in Santa Fe, New Mexico. QUALIFICATIONS; Education: Must be a graduate of a law school meeting the standards of accreditation of the American Bar Association; possess and maintain a license to practice law in the State of New Mexico. Education Substitution: None. Experience: Three (3) years of experience in the practice of applicable law, or as a law clerk. Experience Substitution: None. Other: Completion of a post offer background check may be required. Knowledge: Thorough knowledge of United States and New Mexico constitutions, federal law, New Mexico case law, statutes, rules, policies and procedures; Code of Judicial Conduct; Rules of Professional Conduct; court jurisdiction and operations; manual and computerized legal research; principles of legal analysis and writing, legal proofreading and editing, standard English usage and grammar; and computer software applications (e.g., legal research, word processing, databases, court case management system, e-mail and internet). TO APPLY: A NM Judicial Branch Employment Application or a Resume and Resume Supplemental Form along with a copy of proof of education must be received by mail or hand delivered by 5:00 p.m. Wednesday, May 23, 2018. A legal writing sample must be submitted with the application/resume. First Judicial District Court; Human Resource Office; 225 Montezuma Ave.; P.O. Box 2268; Santa Fe, NM 87504. Please visit the NM Judiciary web-site to view a complete job announcement at: https://nmcourts.gov under careers or call 505-455-8196.

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

City of Albuquerque Request for Letters of Interest - Legal Services

The City of Albuquerque Legal Department is requesting responses to its Request for Letters of Interest - Legal Services. If you are interested in receiving the complete Request for Letters of Interest - Legal Services package, please call (505) 768-3672 and/or submit your written request via U.S. Post to attention of " Letter of Interest--Legal Services "; c/o Cheryl R. Vigil, Fiscal Officer; P.O. Box 2248, Albuquerque, NM 87103. Proposals may be submitted pursuant to this Request on an ongoing basis until further notice.

Full-Time Legal Assistant

Established civil litigation law firm in the Journal Center area is looking for a full-time legal assistant. Must have previous legal experience, be familiar with local court rules and procedures, and be proficient in Odyssey and CM/ECF e-filing. Duties include proof reading pleadings and correspondence, drafting supporting pleadings, and providing support for multiple attorneys. Knowledge of Word, Outlook, and editing documents with Adobe Pro or eCopy software is preferred. Send resume and salary requirements to jyazza@guebertlaw.com.

Paralegal

Well established Santa Fe personal injury law firm is in search of a highly qualified paralegal. The ideal candidate should have at least 3 years litigation experience, preferably in civil law, be friendly, highly motivated, well organized, detail oriented, proficient with computers and possess excellent verbal and written skills. Exceptional individuals with top level skills should apply. We offer an excellent retirement plan completely funded by the firm at 15% of total wages, 100% paid health insurance, paid vacation, and sick leave. Top level salary. Please submit your cover letter and resume to santafelaw56@gmail.com

Paralegal/Legal Asst./ Legal Secretary

Staff Counsel for Fred Loya Ins., is looking to fill several positions for its new location- candidates must have personal injury experience. 3+ yrs. Preferred, bilingual, Microsoft Word, Medical Benefits. Previous employment references and background check will be done when conditional offer of employment is extended. The resumes can be sent to the following email: zalaniz@fredloya.com

Paralegal

Team, Talent, Truth, Tenacity, Triumph. These are our values. (Please read below concerning how to apply.) Mission: To work together with the attorneys as a team to provide clients with intelligent, compassionate and determined advocacy, with the goal of maximizing compensation for the harms caused by wrongful actions of others. To give clients and files the attention and organization needed to help bring resolution as effectively and quickly as possible. To make sure that, at the end of the case, the client is satisfied and knows Parnall Law has stood up for, fought for, and given voice and value to his or her harm. Success: Litigation experience (on plaintiff's side) preferred. Organized. Detail-oriented. Meticulous but not to the point of distraction. Independent / self-directed. Able to work on multiple projects. Proactive. Take initiative and ownership. Courage to be imperfect, and have humility. Willing / unafraid to collaborate. Willing to tackle the most unpleasant tasks first. Willing to help where needed. Willing to ask for help. Acknowledging what you don't know. Eager to learn. Integrate 5 values of our team: Teamwork; Tenacity; Truth; Talent; Triumph. Compelled to do outstanding work. Know your cases. Work ethic; producing Monday – Friday, 8 to 5. Barriers to success: Lack of fulfillment in role. Treating this as "just a job." Not enjoying people. Lack of empathy. Thin skinned to constructive criticism. Not admitting what you don't know. Guessing instead of asking. Inability to prioritize and multitask. Falling and staying behind. Not being time-effective. Unwillingness to adapt and train. Waiting to be told what to do. Overly reliant on instruction. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at www.HurtCallBert.com/jobs. Emailed applications will not be considered.

Receptionist / File Clerk

Small uptown Albuquerque family law firm seeks full-time receptionist / file clerk to join our team M-TH 8:00-5:30, F 8:00-noon. We offer competitive pay, benefits upon hiring, including health insurance and paid sick & annual leave & Simple IRA match, in a positive and friendly workplace. Applicants should be adept in MS Word, Outlook & Excel; legal experience a plus but not required. This position requires strong customer service skills, efficiency, and organization. Please submit resume to info@nmdivorcecustody.com or call Juan Diego at 505-881-2566.

Litigation Secretary – Las Cruces

Farmers Insurance is seeking a litigation secretary for our Las Cruces Branch Legal Office with knowledge of both New Mexico and Texas procedure and 3-5 years of civil litigation support experience. We provide a competitive salary and benefits package, a supportive team environment, and an excellent work-life balance. Please submit your resume to: debra.black@farmersinsurance.com

Legal Assistant/Paralegal

Sole practitioner personal injury law firm in Albuquerque seeks an experienced full-time Legal Assistant/Paralegal (5+ years). The ideal candidate should be highly motivated, well organized, detail oriented, and can work independently. Bilingual (Spanish) preferred, but not required. All responses are strictly confidential. Salary DOE plus benefits. Please submit your letter of interest, resume, references, and salary requirements to: LegalAssistantNM@gmail.com

Legal Assistant

Downtown insurance defense firm seeking FT legal secretary with 3+ yrs. recent litigation experience. Current knowledge of State and Federal District Court rules a must. Prior insurance defense experience preferred. Strong work ethic, positive attitude, superior grammar, clerical and organizational skills required. Good benefits. Salary DOE. Send resume and salary history to: Office Administrator, Madison, Mroz, Steinman & Dekleva, P.A., P.O. Box 25467, Albuquerque, NM 87125-5467 or fax to 505-242-7184.

Positions Wanted

Legal Asst/Paralegal Seeks Immediate FT Employment

Desire to work in Personal Injury area of law. Strong Work Ethic. Integrity. Albq./RR area only. Over 5 yrs exp. E-file in State & Fed Courts. Calendaring skills. Med Rec. Rqsts & Organization. Please contact 'legalassistantforhire2017@gmail.com ' for resume/references.

Experienced Paralegal Seeks Employment In Santa Fe

Highly experienced (20+ years) and recommended paralegal wishes part-time or contract employment in Santa Fe only. For resume and references, please e-mail 'santafeparalegal@aol.com'.

Office Space

Uptown's Best Office Space

2550SF of prime office space located off the second floor lobby with immediate access to elevators and 1st floor staircase, has great presence. High end remodel. Building signage available. Great access to I-40 adjacent to Coronado and ABQ Uptown malls. On site amenities include Bank of America and companion restaurants. Call John Whisenant or Ron Nelson (505) 883-9662 for more information.

Professional Law Offices

Professional law offices for lease adjacent to Santa Fe district court at 311 Montezuma Avenue. $4400/mo for 2505 SF + utilities. 505-629-0825 LNMREB#18556

820 Second Street NW

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

Nob Hill Office Building

Historic remodeled home one block off Central. 1,200 sf with 500 sf partial basement. Two private offices, large staff area, waiting room, full kitchen, 3/4 bath, alarm system. Tree-shaded yard, 6-space parking lot. $1,400 per month with one-year lease. See Craigslist ad for photos. https://albuquerque.craigslist.org/off/d/ne-unm-area-professional/6535481516.htmlCall or email Beth Mason at 505-379-3220, bethmason56@gmail.com

Downtown Las Cruces Office Space 500 North Church Street

Professional office space in Downtown Las Cruces within walking distance of Downtown restaurants and businesses, Federal Court, District Court and Municipal Court. Just completed interior remodel of building. Tenants have access to large reception area, conference rooms, library and kitchen area. Front patio is gated. Receptionist, copy machine, postage machine, utilities and janitorial service are provided. Phone and internet available. Building has refrigerated air. Ample parking for clients. Variable size office spaces are available starting at $550 per month. For more information contact Martha at 575-526-3338 or martha@picklawllc.com.

Office for Lease

804 Sq. Ft. ground floor, excellent NE Heights location with close proximity to NE Heights neighborhoods including Tanoan and High Desert. Walking distance to grocery stores, banks, restaurants, pharmacy, bus service and a fitness center. Please call Kelly today at (505) 299-8383 to schedule a viewing and for more information.

620 Roma N.W.

The building is located a few blocks from Federal, State and Metropolitan courts. Monthly rent of $550.00 includes utilities (except phones), fax, copiers, internet access, front desk receptionist, and janitorial service. You'll have access to the law library, four conference rooms, a waiting area, off street parking. Several office spaces are available. Call 243-3751 for an appointment.

LISTING OR BUYING A HOME IS AS EASY AS 1,2,3!

New Mexico Select
THE STATE'S FINE HOME SPECIALISTS
www.NMSelect.com

The members of **New Mexico Select** are making your next real estate transaction easier than ever, with three informative internet sites. Here's where to find the best brokers, the latest listings and upcoming open houses:

1. Find the state's real estate experts at **www.nmselect.com**
2. Discover their newest listings at the "NM Select" facebook page
3. Use the "Open House New Mexico" facebook page to tour their homes


Aaron Sandoval
505-249-1986


Adrianne Rutledge Baird
505-288-0018


Susan & Alicia Feil
505-690-2225/505-235-9398

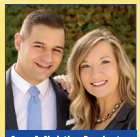

Ann Taylor
505-379-7774

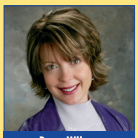

Kelly Hardison & Bryan Lee
505-259-8131


Carol Bouloy
505-450-2574

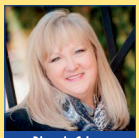

Carol Sauder
505-620-3898


Charissa Grigsby
505-319-3989


Sean & Christine Remington
505-977-2004


Dana Wilson
505-400-4199


David Roybal
505-459-0765


Diana L. Griego
505-238-6478

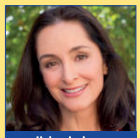

Rachael Flance
505-977-6569


Gary Shaw
505-506-9941


Lynn Johnson
505-350-5966


H. Christensen & L. McGuire
505-220-8370/505-450-6742

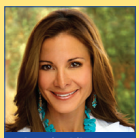

Helen DeMott
505-610-8355


Helen Jackson
505-610-6960


Jan DeMay
505-450-7635


Patty Culp
505-440-9895


Jeanne Kuriyan
505-249-7666


Jeannine DiLorenzo
505-235-5840


Jennifer Wilson
505-440-1256


Jennise Phillips
505-331-2288


Jessica Beecher
505-401-9633


Joan Wagner & Jill Levin
505-220-0060/505-385-7714


Jo Cook
505-379-6099


Joe Maez
505-515-1719


Kate Southard
505-264-9586


Kas MacKenzie
505-205-4375


Joseph C Szklarz
505-269-1819


Kelly Taliaferro
505-270-5552


Linda DeVlieg
505-440-7200


Greg Lobberegt
505-269-4734


Lynn Martinez
505-263-6369


Maggie Ebbens
505-604-4380


Mark Puckett
505-269-6997


Michelle Smith
505-417-1640


Mindy Prokos
505-400-6488


Missy Aschcraft
505-362-6823

Nancy A Montoya
505-480-2121

Naomi Apodaca
505-510-0610

J. Gilmore-Daniels & K. Mosley
505-259-0502

Dominic Serna
505-319-1604

Wende Calvert
505-452-6934

Sandi Reeder
505-269-9498

Sandy Levinson
505-977-3373

Susan Nelson Anderson
505-350-3235

Suzanne Kinney
505-249-1212

Ted Z.
505-239-1500

Terri Sauer Beach
505-250-6411

Veronica Gonzales
505-440-8956

Vicki Criel
505-615-3333

Fidelity National Title of New Mexico Inc

Terris Zambrano
Fidelity National Title
505-967-9408

Jorge Lopez
Fidelity National Title
505-332-6218

Hometrust Mortgage

ACADEMY MORTGAGE CORPORATION
Corp NMLS #3113

See the latest fine home listings on the NM Select Facebook page.

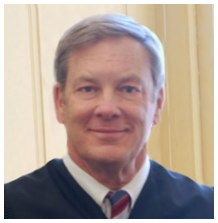
PARTICIPATING REAL ESTATE COMPANIES:

Berkshire Hathaway Home Services 505-977-3373 | Castle Finders Realty 505-238-6478 | Century 21 Champions 505-866-4721 | Champion Properties 505-319-3989
Coldwell Banker Legacy 505-450-2574, 505-292-8900, 505-293-3700, 505-828-1000, 505-898-2700, 505-883-9400 | Corrales Realty 505-890-3131 | Criel and Associates 505-615-3333
ERA Sellers & Buyers Real Estate 505-296-1500 | Kate Southard Real Estate 505-264-9586 | Keller Williams Realty 505-271-8200, 505-897-1100 | La Puerta Real Estate Services LLC 505-867-3388
Lucky Dog Realty, LLC 505-270-5552 | Platinum Properties 505-332-1133 | Q Realty® 505-750-0059 | RE/MAX Select 505-265-5111 | Realty One of New Mexico 505-883-9400, 505-264-9586
Signature Southwest Properties 505-332-8388 | Ten Realty Group 505-205-4375 | Vista Encantada Realtors, LLC 505-884-0200

FEDARB
ADR for Complex Commercial Cases

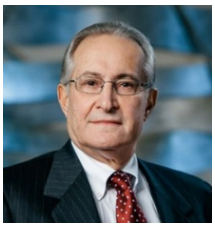
Arbitration & Mediation Expertise
State and Federal Civil Matters

Hon. Bruce Black



- Employment
- Environmental / CERCLA
- Insurance / Reinsurance
- Intellectual Property
- Native American
- Oil, Gas, Energy & Water

Hon. Nickolas Dibiaso



- Construction
- Employment
- Insurance / Reinsurance
- Oil, Gas, Energy & Water
- Product Liability
- Real Estate
- Securities

Hon. Michael Bustamante

- Attorney Fee / Malpractice
- Banking / Lender Liability
- Civil Rights
- Construction / Real Estate
- Employment
- Environmental / CERCLA
- Insurance / Reinsurance
- Oil, Gas, Energy & Water
- Product Liability

Hon. Oliver Wanger

- Banking
- Civil Rights
- Construction
- Employment
- Environmental / CERCLA
- Insurance / Reinsurance
- Malpractice
- Product Liability
- Real Estate
- Securities
- Unfair Competition
- Water Law

About FedArb

For the past decade, FedArb has created a nationwide roster of former federal district court and state court judges, which is augmented by a select cadre of distinguished professors, lawyers and experts. Our administrative team is focused on being responsive to the needs of the parties and enforcing agreed upon deadlines. FedArb also offers moot court exercises and leadership for corporate investigations. Its panelists have expertise in 27 different areas. For a list of judges with expertise organized by areas of expertise, go to https://www.fedarb.com/specialized-panels/

FedArb's case managers may be reached at **650-328-9500 or info@FedArb.com**.