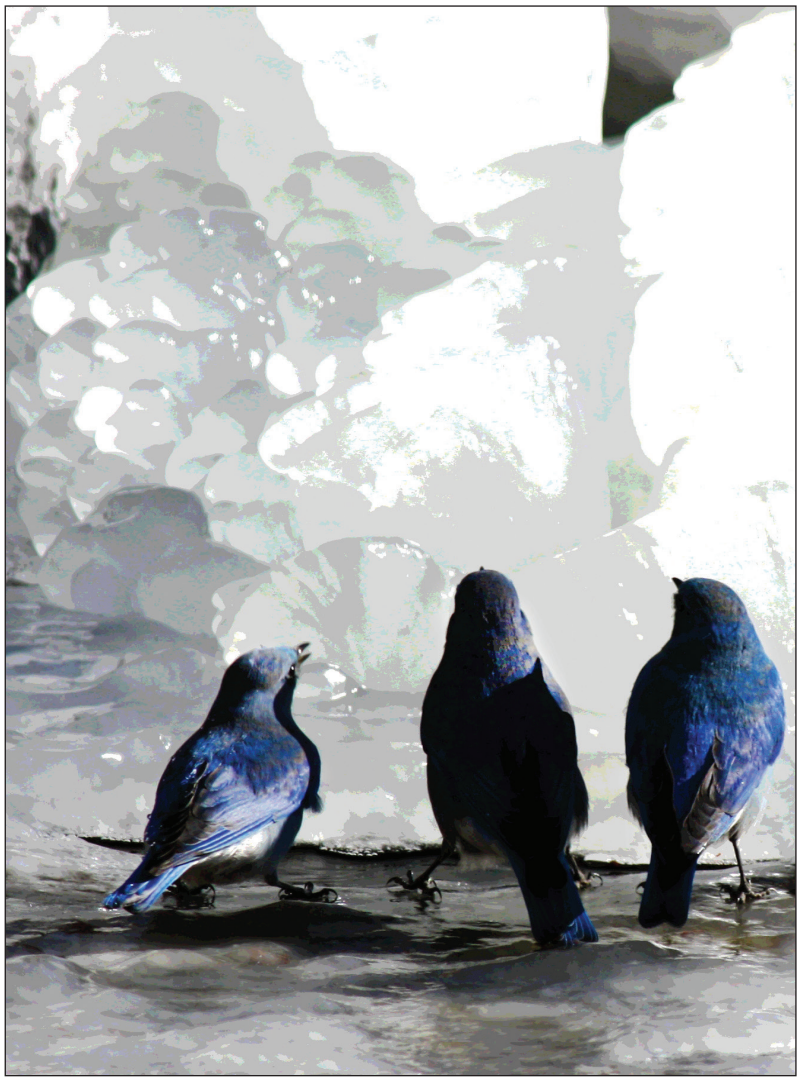
Official Publication of the State Bar of New Mexico

Bar Bulletin

June 20, 2018 • Volume 57, No. 25



Iced Blue Birds, by Valerie Fladager

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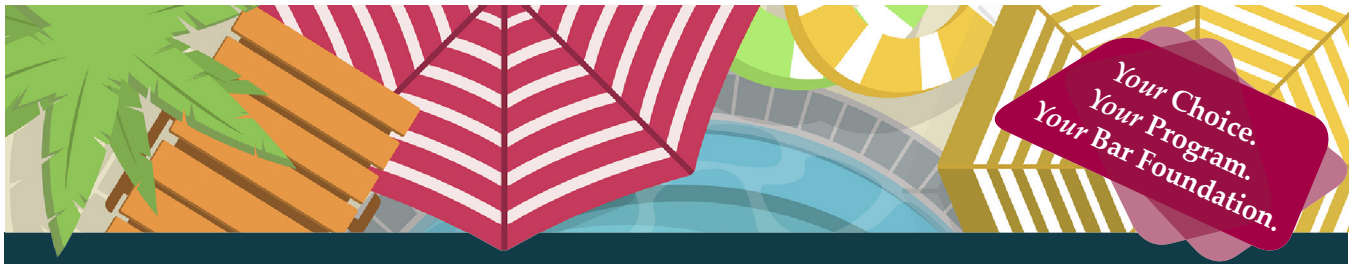

CLE programming from the Center for Legal Education

Webinars—*Earn live CLE credit from your desk!*

Quick and convenient one hour CLEs that can be viewed from anywhere! Webinars are available online only through your computer, iPad or mobile device with internet capabilities. Attendees will receive live CLE credit after viewing.

Disaster Planning and Network Security for a Law Firm

Wednesday, July 18, 2018 • 11 a.m.-Noon

1.0 G

Online only

$89 Standard Fee

Floods, market crashes, hurricanes, fires, personal illness, malicious employees —we live in a troubled world. You probably don't need to protect your firm from extraterrestrials (well … not yet), but you do need to be forearmed against reasonably foreseeable disasters, natural or man-made!

Changing Minds Inside and Out of the Courtroom

Friday, July 20, 2018 • 11 a.m.-Noon

1.0 G

Online only

$89 Standard Fee

How would you like to snap your fingers and instantly have judges, jurors, and clients would agree with your position? It may not be that easy, however you can dramatically improve your chances for success if you understand how people make decisions and what causes them to act. Influence is a dynamic CLE program that draws on the latest scientific research to illustrate how you can ethically influence clients, colleagues, and members of the court to see things your way—all without resorting to manipulation. Best of all, you'll leave this session with practical ideas you can apply right away.

8 Mistakes Experienced Contract Drafters Usually Make

Tuesday, July 24, 2018 • 11 a.m.-Noon

1.0 G

Online only

$89 Standard Fee

How have recent cases influenced best practices in drafting indemnification provisions? What is the distinction between "indemnify," and "hold harmless"? Are your indemnification provisions providing the best possible protections for your client? In this session, we'll consider recent cases and make practical recommendations for improving these high-risk provisions.

Featured CLE

Save the date!

How to Practice Series

Demystifying Civil Litigation Pt II

Thursday, September 13, 2018 • 9 a.m.-4:30 p.m.

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

Look for Part III of Demystifying Civil Litigation later this year. Credit and agenda specifics coming soon!

New Mexico State Bar Foundation
Center for Legal Education

LinkedIn

505-797-6020 • www.nmbar.org/cle

5121 Masthead NE • PO Box 92860, Albuquerque, NM 87199

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

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6
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About Cover Image and Artist: Valerie Fladager has been an avid photographer, painter and potter for many years. She takes multitudes of images and selects the best for their striking design, light, color, or whimsy and transforms them into paintings or augmented photographic images. Her paintings are done in pastels, watercolor and ink, and colored pencils. Her work has been sold through several galleries and fine art and craft venues. She is a member of the National League of American Pen Women. She can be contacted at kvfladager@aol.com.

Notices

Court News

Probate Code related to Adult Guardianship and Conservatorship Cases

On July 1, changes to the Probate Code related to Adult Guardianship and Conservatorship cases will take effect. These changes to the law apply to all adjudicated cases, pending cases and future cases. As a result of these legislative changes, there are new mandatory reporting forms and Supreme Court Rules. For ease of access to these materials visit https://adultguardianship.nmcourts.gov.

First Judicial District Court

Notice to Attorneys and Public

Effective June 11, a mass reassignment of all closed guardianship and conservatorship cases previously assigned to any Judge in the First Judicial District Court occurred pursuant to NMSC Rule 23-109, the Chief Judge Rule. The First Judicial District Court will review all guardianship and conservatorship cases to determine whether the case is "active" and requires ongoing monitoring by the newly assigned judge. 1251 cases will be assigned to each Civil Division judge for review. Division I, Hon. Francis Mathew 1251 cases, from Judge Joe Cruz Castellano Jr., Judge Timothy L. Garcia, Judge Jennifer L. Attrep, Judge James A. Hall, Judge Steve Herrera, Judge Art Encinias and Judge Roger L. Copple. Division II, Hon. Gregory Shaffer 1251 cases from Judge Daniel A. Sanchez, Judge Sheri Raphaelson, Judge Stephen Pfeffer, Judge Petra Jimenez Maes, Judge Bruce Kaufman and Judge Steve Herrera. Division III, Hon. Raymond Ortiz 1251 cases from Judge Patricio M. Serna, Judge Tony Scarborough and Judge Daniel A. Sanchez. Division VI, Hon. David Thomson 1251 cases from Judge Barbara J. Vigil, Judge Michael E. Vigil, Judge Carol Vigil, Judge Sarah M. Singleton, Judge Patricio M. Serna and Judge Tony Scarborough. Parties who have not previously exercised their right to challenge or excuse will have ten (10) days from July 11, to challenge or excuse the newly assigned judge pursuant to Rule 1-088.1.

Second Judicial District Court

Notice to Attorneys and Public

The New Mexico Supreme Court has authorized the Second Judicial District Court Clerk's Office to change its business hours effective July 1. Business hours for the Second Judicial District Court and the court information desk are Monday-Friday from 8 a.m.-5 p.m. The public service windows for the Court Clerk's Office (Children's Court, Criminal Court, Civil Court and Family Court) will be open Monday-Friday from 8 a.m.-4 p.m. The public service windows for the Domestic Violence Division and the Child Support Enforcement Division will be open Monday-Friday from 8 a.m.- noon and 1-5 p.m. The public service windows for the Center for Self Help and Dispute Resolution will be open Monday-Friday 9 a.m.-4 p.m.

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 through July 6. Should you have questions regarding cases with exhibits, 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.

Third Judicial District Court

Opening Clerk's Office During Lunch Hour

The Third Judicial District Court is changing the hours of operation of the Court Clerk's office to improve customer service and meet the needs of the community. Beginning July 2, the Court will remain open during the noon hour from noon-1 p.m. This change will provide public access to the Clerk's office, where visitors may obtain court records, file documents and conduct other business. The Jury Division and Self-Help Division also will be open to the public. The Court's Self-Help Center provides general information - not legal advice - for people representing themselves in civil cases and offers assistance with court forms. The business hours of the Doña Ana County Courthouse will remain 8 a.m.-5 p.m. Monday-Friday, except holidays. To accommodate the change in hours, the Clerk's office will close to the public at 4 p.m. to allow court workers to complete

Professionalism Tip

With respect to opposing parties and their counsel:

I will refrain from excessive and abusive discovery, and I will comply with reasonable discovery requests.

daily administrative duties. The court will make arrangements to accept emergency filings after 4 p.m. and will post instructions on its website as the July 2, effective date nears for the new hours of operation.

Governor Susana Martinez
Appoints Michael Stone to Fifth Judicial District Court

Gov. Susana Martinez has appointed Michael H. Stone to fill the judgeship vacancy in Lea County, Division VII. Effective June 13, a mass reassignment of cases occurred pursuant to NMSC Rule 1-088.1. Judge Michael H. Stone was assigned all cases previously assigned to Judge Gary L. Clingman and/or Division VII of Lea County. Pursuant to Supreme Court Rule 1-088.1, parties who have not yet exercised a peremptory excusal will have 10 days from July 5, to excuse Judge Michael H. Stone.

Sixth Judicial District Court
Judicial Notice of Resignation

The Sixth Judicial District Court announces the resignation of the Hon. Timothy L. Aldrich effective Aug. 10. A Judicial Nominating Commission will be convened in Silver City, New Mexico in August/September to interview applicants for the vacancy. Further information on the application process can be found on the Judicial Selection website (http://lawschool.unm.edu/judsel/index.php). Updates regarding the vacancy and the news release will be posted soon.

State Bar News
Animal Law Section
Animal Talk: Audubon Society

2018 is the 100th anniversary of the enactment of the Migratory Bird Treaty Act and the "Year of the Bird" as declared by the Audubon Society. The MBTA prohibits "take" of protected migratory bird species. Until December 2017, the prohibitions on "take" included incidental take. The U.S. Department of Justice prosecuted individuals and businesses for violations of the MBTA take provisions. On Dec. 22, 2017, the U.S. Department of Interior Solicitor issued an opinion redefining "take" to exclude incidental take. What effect will the opinion have on MBTA enforcement? Join Jonathan Hayes, Executive Director New Mexico Audubon Society, at noon on June 29 at the State Bar Center to learn more. R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Appellate Practice Section
Luncheon with Judge Gallegos

Join the Appellate Practice Section for a brown bag lunch at noon, July 13, 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
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.

Children's Law Section
Tools to Stabilize and Protect Immigrant Clients

Come learn about tools to stabilize and protect immigrant clients and their families who are at risk of deportation during a noon knowledge presentation on July 13, in the Chama Room at Juvenile Court. Jessica Martin will introduce attendees to a holistic approach to serving clients who are immigrants which involves screening for basic forms of immigration relief and educating clients on their rights in the event of contact with or apprehension by Immigration and Customs Enforcement. Guests are invited to bring their own brown-bag lunch.

Committee on Women and the Legal Profession
Nominations Open for 2017 Justice Pamela Minzner Award

The Committee on Women and the Legal profession seeks nominations of New Mexico attorneys who have distinguished himself or herself during 2017 by providing legal assistance to women who are underrepresented or under served, or by advocating for causes that will ultimately benefit and/or further the rights of women. If you know of an attorney who deserves to be added to the award's distinguished list of honorees, submit 1-3 nomination letters describing the work and accomplishments of the nominee that merit recognition to Quiana Salazar-King at Salazar-king@law.unm.edu by June 29. The award ceremony will be held on Aug. 30 at the Albuquerque Country Club. This award is named for Justice Pamela B. Minzner, whose work in the legal profession furthered the causes and rights of women throughout society. Justice Minzner was the first female chief justice of the New Mexico Supreme Court and is remembered for her integrity, strong principals, and compassion. Justice Minzner was a great champion of the Committee and its activities.

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- July 2, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- July 9, 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#.
- July 16, 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#.

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

Young Lawyers Division

Homeless Legal Clinics in Albuquerque and Santa Fe

The Homeless Legal Clinic is open in Albuquerque from 9-11 a.m. (orientation at 8:30 a.m.), on the third Thursday of each month, at Albuquerque Healthcare for the Homeless, located at 1220 First Street NW and in Santa Fe from 10 a.m.-noon each Tuesday, at the St. Elizabeth Shelter, located at 804 Alarid Street in Santa Fe. Volunteer attorneys are needed to staff the clinics, serve as an "information referral resource" and join the pro bono referral list. For those staffing the clinic or providing other services, a trained attorney will assist you until you feel comfortable by yourself. Even if you are a new lawyer, you will be surprised at how much you have to offer these clients and how your help can make such a major difference in their lives. Visit www.nmbar.org/HLC to volunteer. Direct questions to YLD Region 2 Director Kaitlyn Luck at luck.kaitlyn@gmail.com.

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

Summer 2018 Hours
May 12-Aug. 19

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.

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.

First Judicial District Bar Association

Santa Fe Fuego take on the Roswell Invaders

Join the First Judicial District Bar Association on June 28, at 6 p.m., Fort Marcy Ballpark. This evnt is sponsored by FJBA. All members, families and friends are invited to this free game. Come see which member will sing the national anthem and which member will throw the first pitch. R.S.V.P. and FJBA will send you your tickets before the game or provide your tickets at the gate. Check out the santa fe fuego online before the game at http://www.santafefuego.com. To R.S.V.P. or for more information contact Caitlin dupuis at cdupuis@cmtisantafe.com

A MESSAGE FROM YOUR State Bar President

Dear State Bar members:

It is hard for me to believe that we are almost halfway through the year. I write to you now to give you an update on State Bar activities and to remind you of some upcoming events.

First, I would like to mention this year's Annual Meeting which will be held Aug. 9-11 at the Hyatt Regency Tamaya Resort & Spa, Santa Ana Pueblo. We will welcome several national speakers like Michael Morton, who spent 25 years in prison for the murder of his wife of which he was later exonerated; Mark Homer, a well-known technology and marketing consultant; and Stuart Teicher who has spoken at many State Bar events about ethics and writing tips. We also have a great lineup of locals including many sessions by State Bar sections, committees and divisions on topics like immigration issues, legal malpractice, the opioid crisis in New Mexico and an update from the Supreme Court and Court of Appeals of New Mexico.

As always, we will have a variety of events for you and your guests to enjoy including the Annual Awards ceremony and New Mexico State Bar Foundation Fundraising events, including The Challenge Auction and Glitz in a Glass, and the Texas Tech University Red Raider Hospitality Lounge. The Young Lawyers Division and Judges and Lawyers Assistance Program are putting on several wellness events. Choose from meditation, well-being meetings, trail walk and poolside yoga, just to name a few. Of course, we are always grateful for the support of our sponsors, especially our 2018 supporting sponsor, The Spence Law Firm, LLC, who make it possible for us to put on such a great event. Please visit our website at www.nmbar.org/annualmeeting to learn more about the Annual Meeting and sponsorship opportunities and to register. Early registration discounts are in effect until June 29 and our special room rate, starting at $179 per night at the Tamaya closes July 18. I hope to see you there!

Already this year the Board of Bar Commissioners has tackled many issues. As always, the Board is committed to the financial solvency and transparency of the State Bar. At our May meeting, the Board received the 2017 audit draft, prepared by CliftonLarsonAllen LLP which issued an unqualified opinion with no deficiencies or weaknesses in internal controls. I invite you to review the audit and the State Bar and Bar Foundation financials which can be found on our website.

As you may be aware, the Minimum Continuing Legal Education program is transitioning under the State Bar's administration. Staff is working diligently to ensure this transition is smooth and complete prior to the fall when most members interact with MCLE. Look for MCLE at the Annual Meeting this summer and keep an eye out for updates about MCLE in early fall.

You also may have heard that the New Mexico Supreme Court will end its legal specialization program effective Dec. 31, 2018. The Board of Bar Commissioners wishes to explore the value of this type of program. A survey which was sent to current certified specialists suggests that members continue to appreciate a legal specialization program in New Mexico. The Board has referred the issue to its Regulatory Committee which will study the issue and make a recommendation to the Board later this year.

Earlier this spring I had the pleasure of speaking at the swearing in ceremony for new attorneys. I enjoyed meeting our new members and welcoming them into our profession. I am very proud to be not only your President, but a member of the State Bar of New Mexico. I invite you to reach out to me if I can be of service to you in any way.

Sincerely,

Wesley O. Pool
President, State Bar of New Mexico

Regarding

New Mexico Minimum Continuing Legal Education

By New Mexico Supreme Court order

Minimum Continuing Legal Education will transition to State Bar of New Mexico Administration by September 2018.

Through MCLE, the State Bar is committed to

- ✓ Providing exceptional customer service for members and course providers
- ✓ Certifying courses on relevant legal topics and emerging areas of law practice management
- ✓ Investing in new technology to assist members with reporting and tracking CLE credits
- ✓ Encouraging modern training delivery methods

Stay tuned for details!

Check your email and the *Bar Bulletin* for updates about the MCLE transition and please contact us with any questions at:

505-821-1980 • mcle@nmmcle.org
www.nmbar.org/mcle

STATE BAR of NEW MEXICO
MINIMUM CONTINUING LEGAL EDUCATION

Legal Education

June

20 **Director and Officer Liability**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Holding Business Interests in Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **How to Practice Series: Probate and Non-Probate Transfers (2018)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Basic Guide to Appeals for Busy Trial Lawyers (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Strategies for Well-Being and Ethical Practice (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

22 **How to Avoid Potential Malpractice Pitfalls in the Cloud**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

25 **The Ethics of Bad Facts and Bad Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Effective Communications with Clients, Colleagues and Staff**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Ethical Issues and Implications on Lawyers' Use of LinkedIn**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Classes of Stock: Structuring Voting and Non-voting Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Roadmap/Basics of Real Estate Finance, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Roadmap/Basics of Real Estate Finance, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Social Media as Investigative Research and Evidence**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **The Ethics of Social Media Research**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Fourth Annual Symposium on Diversity and Inclusion – Diversity Issues Ripped from the Headlines, II (2018)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

29 **Abuse and Neglect Case in Children's Court (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

Opinions

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

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

Effective June 8, 2018

PUBLISHED OPINIONS

A-1-CA-36351	A Reina v. LIN Television	Reverse/Remand	06/04/2018
A-1-CA-35149	NM HSD v. Counseling Center	Affirm/Reverse/Remand	06/07/2018

UNPUBLISHED OPINIONS

A-1-CA-36929	A-Quality Auto Sales v. R N S Auto Services	Dismiss	06/04/2018
A-1-CA-35047	C Luttrell v. Rosales Law	Reverse/Remand	06/05/2018
A-1-CA-35128	In the Matter of the Estate of H De Graaf	Reverse	06/05/2018
A-1-CA-36512	San Pedro v. SP Overlook	Affirm	06/05/2018
A-1-CA-36877	State v. County of Valencia	Dismiss	06/05/2018
A-1-CA-36950	D Secrist v. New Mexico State Personnel Office	Dismiss	06/05/2018
A-1-CA-37006	State v. S Licon	Affirm	06/07/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

IN MEMORIAM

As of January 30, 2018:
Stephen Charnas
212 High Street, NE
Albuquerque, NM 87102

As of March 9, 2018:
Ramon M. Gonzales
49 Mill Road, NW
Albuquerque, NM 87120

As of May 13, 2018:
Jacob I Rosenbaum
923 Euclid Avenue
Cleveland, OH 44115

As of February 15, 2018:
Carol Lisa Smith
7469 Prairie Road, NE
Albuquerque, NM 87109

CLERK'S CERTIFICATE OF ADMISSION

On May 29, 2018:
Angela Christine Duhon
3150 N. 24th Street,
Suite A200
Phoenix, Arizona 85016
602-699-4949
602-445-9940 (fax)
angela@ateamlawaz.com

On June 5, 2018:
Eric Michael Hokana
Davis, Grass, Goldstein & Finlay
3105 Sedona Court
Ontario, CA 91764
909-476-2662
909-476-2335 (fax)
ehokana@davis-grass.com

On June 5, 2018:
Kathryn Hokom
The Moore Law Group
3710 S. Susan Street,
Suite 210
Santa Ana, CA 92704
800-506-2652 Ext. 179
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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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THE SUPREME COURT OF NEW MEXICO ANNOUNCES

APPROVAL OF NEW AND AMENDED RULES AND FORMS FOR

GUARDIANSHIP AND CONSERVATORSHIP PROCEEDINGS

The Supreme Court has approved new and amended rules and forms for use in guardianship and conservatorship proceedings. The rules and forms take effect on July 1, 2018 and implement and supplement amendments to the Uniform Probate Code (UPC) that take effect on that same date. *See* N.M. Laws 2018, Ch. 10. The rules and forms uniformly apply to all cases filed on or after July 1, 2018; however, they vary in their application to cases filed before July 1, 2018. Please see the history note to each rule and form for further clarification. Due to the number and length of the rules and forms, the actual text will not be published in the Bar Bulletin. The full text of the rules and forms can be viewed on the New Mexico Compilation Commission's website at: http://www.nmcompcomm.us/nmrules/NMRuleSets.aspx.

The new and amended rules and forms fall into two categories. The first category includes amended Rules 1-079 and 1-104 NMRA; new Rules 1-003.2, 1-079.1 and 1-141 NMRA; and new Forms 4-992 and 4-993 NMRA. These rules and forms implement amendments to the UPC that, among other things, affect persons entitled to receive notice, to access court records, and to attend hearings in guardianship and conservatorship proceedings. *See* N.M. Laws 2018, Ch. 10, §§ 4, 5, 8, 9 & 11 (to be codified at NMSA 1978, §§ 45-5-303, -309, -404, -405, and -407).

The second category includes new Rule 1-140 NMRA, which makes the use of new Forms 4-993, 4-994, 4-995, 4-995.1, 4-996, 4-997, and 4-998 NMRA mandatory in guardianship and conservatorship proceedings. Forms 4-994, 4-995, and 4-995.1 implement the UPC's new bonding requirements for conservators. *See* N.M. Laws 2018, Ch. 10, § 14 (to be codified at NMSA 1978, § 45-5-411). Forms 4-996, 4-997, and 4-998 are the mandatory periodic reports that must be filed under Rule 1-140 by a guardian or conservator to inform the court about the status of the protected person, the protected person's estate, the guardianship or conservatorship, and the guardian or conservator. *Accord* N.M. Laws 2018, Ch. 10, § 7 (to be codified at NMSA 1978, § 45-5-314) (providing that a guardian shall file a ninety-day and an annual report); § 12 (to be codified at NMSA 1978, § 45-5-409) (providing that a conservator shall file an annual report); NMSA 1978, § 45-5-418 (providing that a conservator shall file a complete inventory of the protected person's estate within ninety days of the appointment).

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 Supreme Court

Opinion Number: 2018-NMSC-023
No. S-1-SC-34929 (filed March 5, 2018)

JERALD W. FREEMAN, THE TEA LEAF INC., THOMAS NYGARD, INC.,
Plaintiffs-Appellees,
v.
PAUL W. FAIRCHILD, JR.,
Defendant/Cross-Claimant-Respondent,
v.
RICHARD H. LOVE, R.H. LOVE GALLERIES, INC.,
Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
Barbara J. Vigil, District Judge

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Opinion

Petra Jimenez Maes, Justice

{1} Paul W. Fairchild Jr. asked the district court to grant summary judgment on his cross-claims against Defendants Richard H. Love and R.H. Love Galleries, Inc. (collectively Love) on the ground that Love failed to timely file a response to Fairchild's motion for summary judgment and was therefore "in default." Love, whose counsel had withdrawn while the motion was pending, explained that he lacked legal representation and had been experiencing health problems, and he requested an opportunity to submit a late response. The district court did not allow Love additional time to respond and granted Fairchild's motion for summary judgment without considering whether Fairchild had established a prima facie case for summary judgment under Rule 1-056 NMRA.

{2} We hold that the district court erred by granting summary judgment. A district court may not grant summary judgment solely because the non-moving party has failed to file a response. Prior to granting an uncontested motion for summary judgment, the district court must assess whether the moving party has demonstrated that no genuine issue of material fact exists "and that the moving party is entitled to a judgment as a matter of law." Rule 1-056(C). We also hold that the Court of Appeals erred in its application of the right for any reason doctrine to affirm the district court. *See Freeman v. Fairchild*, 2015-NMCA-001, ¶ 32, 340 P.3d 610. We reverse the summary judgment order and vacate the resulting award of damages, and we remand to the district court with instructions to permit Love to file a response to Fairchild's motion for summary judgment and for further proceedings.

I. BACKGROUND

A. Factual Background

{3} Jerald W. Freeman, The Tea Leaf, Inc., and Thomas Nygard, Inc. (collectively Plaintiffs) jointly owned a painting by Albert Bierstadt that they had purchased for $180,000. In October 2002, three transactions involving the Bierstadt painting occurred in quick succession. First, Freeman agreed on behalf of Plaintiffs to sell the painting to Paul Benisek for $240,000, to be paid in twelve monthly installments. Second, Benisek agreed to sell the painting to Love for $300,000, also to be paid in twelve monthly installments. Finally, Love sold the painting to Fairchild for $375,000, which Fairchild paid in full with a combination of cash and the trade-in of three other pieces of artwork.

{4} In accordance with their respective agreements, Love made several payments to Benisek, and Benisek made several payments to Freeman. But in spring 2003, Love experienced financial trouble and stopped making payments to Benisek, who in turn stopped making payments to Freeman. Meanwhile, Fairchild consigned the Bierstadt painting for sale at a gallery in New York City. Freeman, who had not received full payment from Benisek, became aware that the New York gallery was attempting to sell the Bierstadt painting and asked the gallery to ship the painting to Santa Fe for inspection. Freeman obtained possession of the Bierstadt painting and refused to return it to the gallery.

B. Procedural Background

{5} Freeman initiated this lawsuit in June 2005, seeking a declaratory judgment to determine ownership of the Bierstadt painting and asserting other claims against Benisek, Love, and Fairchild. Freeman later amended his complaint to add the other plaintiffs. In May 2006, Fairchild filed counterclaims against Plaintiffs and cross-claims against Love for fraud, negligent misrepresentation, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. Ann. 505/2 (1973) (Illinois Consumer Fraud Act).

{6} Fairchild's cross-claims against Love are the only claims at issue in the appeal before this Court. For over five years, the only litigation that occurred between Fairchild and Love beyond the pleadings consisted of Fairchild's initial set of discovery requests, to which Love responded. During this time, however, extensive litigation and discovery occurred between Plaintiffs and Love and between Plaintiffs and Fairchild, including numerous pretrial motions and depositions in several states. Six different district court judges presided over this case between 2005 and 2010.

{7} On January 28, 2011, Love's New Mexico counsel, who had represented Love in this case for over five years, filed a motion to withdraw, stating that it would be "impossible" to continue representing Love. The district court granted the motion on February 24, 2011. On April 19, 2011, a new attorney entered an appearance to represent Love.

{8} Several weeks later, on May 16, 2011, Fairchild filed a motion for partial summary judgment on his cross-claims against Love for fraud, negligent misrepresentation, and violation of the Illinois Consumer Fraud Act. According to the parties, Fairchild's counsel agreed to give Love's new counsel a two-week extension of time to file a response to Fairchild's motion for summary judgment, but we find no indication in the record that Love's new counsel requested an extension from the district court. In any event, Love's new counsel did not file a response, and on June 9, 2011, less than two months into the representation, Love's new counsel moved to withdraw. The motion to withdraw stated that continuing the representation would risk a conflict of interest, that Love had violated agreements with the attorney's law firm, and that Love had "repeatedly failed to respond to emails, correspondence, and telephone calls." The motion to withdraw listed several upcoming court dates and stated that Love had been informed "of the procedural status of" the case, but the motion did not specifically refer to Fairchild's pending motion for summary judgment. On June 13, 2011, the district court issued an order that granted the motion to withdraw. The order did not identify the pending motion for summary judgment.

{9} On July 12, 2011, Fairchild filed a request for an expedited hearing on his motion for summary judgment against Love. The district court held a hearing on August 2, 2011. At the hearing, Fairchild's counsel asserted that Love had failed to file a response and that the response deadline had "passed by many weeks." Fairchild's counsel offered to address the substance of the motion but argued that Fairchild was entitled to summary judgment as a procedural matter because Love was "in default." Love did not retain counsel prior to the hearing and appeared pro se by telephone from Illinois. Love informed the court that he had not been fully aware of the proceedings because he did not have legal representation and had been experiencing health problems, including hospitalization. Love asserted that his failure to respond had not been intentional, apologized for his lack of awareness, and asked the district court to consider giving him an opportunity to respond. The district court denied Love's request for more time to respond and granted Fairchild's motion for summary judgment on procedural grounds without addressing the substance of the motion, concluding that Fairchild's motion should be granted because Love had failed to file a response.

{10} In early October 2011, the district court held a two-day bench trial to determine the amount of damages Love owed Fairchild. Love had not yet retained counsel and participated pro se by telephone from Illinois. The district court awarded Fairchild $1,942,446 in compensatory damages, which included Fairchild's attorney fees, costs, and prejudgment interest. The district court also awarded Fairchild $9,712,232 in punitive damages, an amount equal to five times the compensatory damages.

{11} Love retained appellate counsel and filed an appeal. The Court of Appeals held "that it was error for the district court to grant Fairchild's motion for summary judgment solely on the basis of Love's failure to respond to the motion." *Freeman*, 2015-NMCA-001, ¶ 32. The Court of Appeals explained that "[t]he district court should have deemed admitted the facts alleged in Fairchild's motion and then determined whether those facts made a prima facie showing of entitlement to summary judgment." *Id.* Despite this error, the Court of Appeals affirmed the district court by determining—in the first instance on appeal—that Fairchild had established "a prima facie case of entitlement to summary judgment." *Id.* In doing so, the Court of Appeals relied on the right for any reason doctrine. *Id.* The Court of Appeals also affirmed the district court's award of damages to Fairchild. *Id.* ¶ 47. The Court of Appeals observed that "it does seem extraordinary that Fairchild should be awarded in excess of $11 million for the fraudulent sale of a painting worth in the neighborhood of $400,000," but the Court declined to "analyze Love's arguments" because "Love failed to preserve his arguments in the district court." *Id.* ¶ 39.

{12} Love filed a petition for writ of certiorari, asking this Court to review two issues: (1) whether the Court of Appeals erred by affirming summary judgment under the right for any reason doctrine without addressing all of the elements of Fairchild's cross-claims, which are grounded in Illinois law; and (2) whether the district court committed fundamental error by awarding Fairchild $11.6 million in a dispute over a painting worth $375,000 where the Illinois statute on which the award was predicated did not allow the requested relief. We granted certiorari under Article VI, Section 3 of the New Mexico Constitution and NMSA 1978, Section 34-5-14(B) (1972).

II. DISCUSSION

A. The District Court Erred by Granting Fairchild's Motion for Summary Judgment on the Ground That Love Failed to Timely File a Response

{13} We first consider whether the district court erred by granting Fairchild's motion for summary judgment against Love. Our analysis includes two components: (1) whether the district court erred by granting summary judgment based solely on Love's failure to timely file a response, and (2) whether the district court erred by denying Love's request for an extension of time to file a response. Love argues that the district court erred by granting summary judgment without following the procedures set forth in *Lujan v. City of Albuquerque*, 2003-NMCA-104, 134 N.M. 207, 75 P.3d 423. Love also contends that the district court failed to give Love a meaningful opportunity to demonstrate that his failure to timely respond was the result of excusable neglect, which justified a time extension. Fairchild argues that the district court complied with the requirements of *Lujan*, 2003-NMCA-104, and that the district court acted within its discretion to deny Love's request for an extension of time.

1. Standard of Review

{14} We review the district court's grant of summary judgment de novo. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. On appeal, we "view the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits." *Id.* (internal quotation marks and citation omitted).

{15} "We generally apply an abuse of discretion standard to determine whether the district court erred in denying [an] extension of time [to file a response] based on an absence of excusable neglect." *Skeen v. Boyles*, 2009-NMCA-080, ¶ 42, 146 N.M. 627, 213 P.3d 531. But "[t]he nature of our review is affected by the nature of the order entered by the district court. Our review is more exacting when the order being reviewed grants some sort of final relief without consideration of the merits of a claim or defense." *Id.* ¶ 43.

2. The District Court Failed to Consider Whether Fairchild Met the Burden Required of the Moving Party Under Rule 1-056

{16} New Mexico courts disfavor summary judgment and "consider it a drastic remedy to be used with great caution."

Encinias v. Whitener Law Firm, P.A., 2013-NMSC-045, ¶ 6, 310 P.3d 611 (internal quotation marks and citation omitted). Despite New Mexico's cautious approach to summary judgment, it is appropriate for the district court to grant summary judgment "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Ciup v. Chevron U.S.A., Inc.*, 1996-NMSC-062, ¶ 7, 122 N.M. 537, 928 P.2d 263; *see* Rule 1-056(C). To obtain summary judgment, the moving party must meet an "initial burden of establishing a prima facie case." *Romero*, 2010-NMSC-035, ¶ 10. A prima facie case is one supported by sufficient evidence "to raise a presumption of fact or establish the fact in question unless rebutted." *Id.* (internal quotation marks and citation omitted). If the moving party establishes a prima facie case, "the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.* (internal quotation marks and citation omitted); *see also* Rule 1-056(E) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."). If the non-moving party "does not so respond, summary judgment, if appropriate, shall be entered" in favor of the moving party. Rule 1-056(E).

{17} Under Rule 1-056 and New Mexico case law, the district court cannot rely on the non-moving party's failure to timely respond as the sole basis for granting a motion for summary judgment. *See Brown v. Taylor*, 1995-NMSC-050, ¶ 8, 120 N.M. 302, 901 P.2d 720 ("The moving party may not be entitled to judgment even if the non-moving party totally fails to respond . . . ."). Before granting summary judgment, "the district court must assess [despite the lack of a response] whether, on the merits, the moving party satisfied the burden under Rule 1-056(C)." *Atherton v. Gopin*, 2015-NMCA-003, ¶ 24, 340 P.3d 630 (alteration in original) (internal quotation marks and citation omitted); *see also Brown*, 1995-NMSC-050, ¶ 8 ("The burden is on the moving party to show an absence of a genuine issue of fact, and that it was entitled as a matter of law to judgment in its favor."). In this case, the district court erred by granting summary judgment as a procedural matter without assessing the merits of Fairchild's motion.

{18} Love argues that under *Lujan*, the district court cannot grant summary judgment in the absence of a response without considering "(1) the degree of actual prejudice to the [opposing party], (2) the amount of interference with the judicial process, and (3) the culpability of the litigant." 2003-NMCA-104, ¶ 12 (alteration in original) (internal quotation marks and citation omitted). We disagree with Love's construction of *Lujan* and take this opportunity to clarify that these factors come into play only if the district court is considering whether to grant a motion for summary judgment as a sanction for abusive litigation conduct.

{19} In *Lujan*, the Court of Appeals recognized that in an extreme case, the district court may grant summary judgment as a sanction. *See id.* ¶¶ 10-11. The defendants filed motions for summary judgment, and the plaintiffs failed to file any response or seek an extension of time. *Id.* ¶ 3. The district court dismissed the plaintiffs' complaint with prejudice, citing the plaintiffs' failure to timely respond as the reason for dismissal. *Id.* ¶ 4. On appeal, the Court of Appeals considered whether it was appropriate for the district court to dismiss the plaintiffs' claims as a sanction for failure to respond. *Id.* ¶¶ 13-14. The Court of Appeals cited an array of New Mexico authority and concluded that the "district court has authority to dismiss claims with prejudice for a party's failure to prosecute or to comply with procedural rules or court orders." *Id.* ¶ 10. Under some circumstances, the Rules of Civil Procedure for the District Courts provide express authority for the district court to sanction a litigant by entering a dismissal or final judgment. *Id.*; *see, e.g.*, Rule 1-037(B)(2)(c) NMRA (permitting the district court to dismiss claims or enter a judgment of default as a sanction for a party's failure to comply with a discovery order); Rule 1-041(B) NMRA (permitting the district court to dismiss the plaintiff's claims for failure "to prosecute or to comply with these rules or any order of court"). And if a party's litigation abuses fall outside the sanction authority expressly set forth in our procedural rules, "the court may rely on its inherent powers" to impose sanctions. *Gonzales v. Surgidev Corp.*, 1995-NMSC-047, ¶ 23, 120 N.M. 151, 899 P.2d 594; *see also State ex rel. N.M. State Highway & Transp. Dep't v. Baca*, 1995-NMSC-033, ¶¶ 11-12, 120 N.M. 1, 896 P.2d 1148 (explaining that the sanction provisions in the procedural rules do not displace the courts' inherent power to impose sanctions "to regulate their docket, promote judicial efficiency, and deter frivolous filings" (internal quotation marks and citation omitted)); *Rest. Mgmt. Co. v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, ¶¶ 13, 20, 24, 127 N.M. 708, 986 P.2d 504 (recognizing the district court's authority to dismiss claims in the exercise of its inherent power).

{20} Although courts have inherent authority to grant summary judgment as a sanction, a sanction resulting in dismissal or final disposition of a claim is severe and "must be reserved for the extreme case and used only where a lesser sanction would not serve the ends of justice." *Lujan*, 2003-NMCA-104, ¶ 11; *see also Baca*, 1995-NMSC-033, ¶ 25 (emphasizing "that a court should invoke its inherent powers sparingly and with circumspection"). The Court of Appeals thus held in *Lujan* that mere failure to respond did not justify the severe sanction of dismissal and reversed the grant of summary judgment. 2003-NMCA-104, ¶¶ 13, 20. Additionally, to assist New Mexico courts in determining whether summary judgment should be granted as a sanction for abusive litigation conduct, *Lujan* adopted the sanction analysis used by the Tenth Circuit Court of Appeals. *See id.* ¶ 12. Specifically, "the district court must consider: (1) the degree of actual prejudice to the opposing party; (2) the amount of interference with the judicial process; and (3) the culpability of the litigant." *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002); *see Lujan*, 2003-NMCA-104, ¶ 12.

{21} New Mexico courts, like federal courts, have two possible alternatives for granting a motion for summary judgment in the absence of a response from the non-moving party. *See Issa v. Comp USA*, 354 F.3d 1174, 1177 (10th Cir. 2003) (summarizing the two options available to the federal district court). First, the district court may grant summary judgment if the moving party has made a prima facie case of entitlement to summary judgment and the non-moving party has failed to respond despite adequate notice and opportunity to be heard. *See id.* (explaining that the federal district court "cannot grant summary judgment unless the moving party has met its initial burden of production under Rule 56"); *Lujan*, 2003-NMCA-104, ¶¶ 17-18 (explaining that notice and opportunity to be heard are "particularly important" because the district court cannot grant summary judg-

ment without determining whether "the moving party satisfied the burden under Rule 1-056(C)"). Alternatively, the district court may grant summary judgment as a sanction for abusive litigation conduct after performing an explicit sanction analysis. *See Issa*, 354 F.3d at 1177 (stating that the federal "district court may grant summary judgment as a sanction . . . only after performing an explicit [sanction] analysis"); *Lujan*, 2003-NMCA-104, ¶ 12 (adopting the sanction analysis used in the Tenth Circuit). If the district court determines that summary judgment should be granted as a sanction, the district court must make specific findings of fact and conclusions of law to support its decision. *See Rest. Mgmt. Co.*, 1999-NMCA-101, ¶¶ 23-24 (explaining that specific findings of fact and conclusions of law are necessary for appellate review of the district court's exercise of its inherent power to impose sanctions); *see also Lujan*, 2003-NMCA-104, ¶¶ 12-13 (concluding that the district court should be reversed because the court failed to provide a sufficient basis for its order of dismissal).

{22} In this case, the district court granted Fairchild's motion for summary judgment as a procedural matter because Love failed to timely file a response. The district court did not consider whether Fairchild met the initial burden of demonstrating that there was "no genuine issue as to any material fact" and that he was "entitled to a judgment as a matter of law." Rule 1-056(C). And neither the expedited hearing transcript nor the summary judgment order indicates that the district court was exercising its inherent power to sanction Love for abusive litigation conduct. The district court did not perform an explicit sanction analysis or make any findings regarding Love's culpability, actual prejudice to Fairchild, or interference with the judicial process. We hold that the district court erred by granting Fairchild's motion for summary judgment based solely on Love's failure to timely file a response.

3. The District Court Failed to Give Love an Adequate Opportunity to File a Late Response or to Demonstrate Excusable Neglect

{23} We next consider whether the district court erred by denying Love's request for an extension of time to file a response to Fairchild's motion for summary judgment. The time limits for filing a response are set forth in the New Mexico Rules of Civil Procedure for the District Courts. Under those rules, a party opposing a motion for summary judgment must file a response within fifteen days after service of the motion. *See* Rule 1-007.1(D) NMRA ("Unless otherwise specifically provided in these rules, any written response and all affidavits, depositions or other documentary evidence in support of the response shall be filed within fifteen (15) days after service of the motion."); Rule 1-056(D)(2) ("A party opposing the motion shall, within fifteen (15) days after service of the motion, submit to the court a written memorandum containing a short, concise statement of the reasons in opposition to the motion with authorities."). If a party requests a time extension after the response deadline has passed, the district court may grant an extension if the party's failure to respond was the result of excusable neglect. *See* Rule 1-006(B)(1)(b); *see also Atherton*, 2015-NMCA-003, ¶ 27 (recognizing that the district court may grant an extension based on excusable neglect).

{24} Although the granting of a time extension is a matter within the district court's discretion, the district court must ensure adequate notice and opportunity to be heard before granting a motion for summary judgment without a response from the non-moving party. In *Lujan*, the Court of Appeals concluded that if the moving party wants the district court to grant summary judgment in the absence of a response, the moving party should file a separate written motion and allow the non-moving party fifteen days to respond. 2003-NMCA-104, ¶ 17. The Court of Appeals adopted this procedure despite language in Rule 1-007.1(D) NMRA (2000), which stated that a failure to timely file a response "constitutes consent to grant the motion, . . . and the court may enter an appropriate order." *See Lujan*, 2003-NMCA-104, ¶¶ 15-17. In 2008, Rule 1-007.1(D) was amended to provide that "[i]f a party fails to file a response within the prescribed time period the court may rule with or without a hearing."

{25} Regardless of which version of Rule 1-007.1 applies, we conclude that the procedure set forth in *Lujan* ensures adequate notice and opportunity to be heard prior to the entry of summary judgment in the absence of a response. Rule 1-007.1 must be applied in a manner consistent with Rule 1-056 and New Mexico's strong preference for resolving cases on their merits. *See Lujan*, 2003-NMCA-104, ¶ 17; *see also Blauwkamp v. Univ. of N.M. Hosp.*, 1992-NMCA-048, ¶ 10, 114 N.M. 228, 836 P.2d 1249 ("Summary judgment is a drastic remedial tool which demands the exercise of caution in its application."). If the non-moving party receives adequate notice and opportunity to be heard and either (1) fails to request a time extension, or (2) requests an extension but fails to demonstrate excusable neglect under Rule 1-006(B)(1)(b), then the district court may rule on the uncontested motion for summary judgment by determining whether the moving party has made a prima facie showing under Rule 1-056.

{26} In this case, Fairchild did not follow the procedure set forth in *Lujan* for ensuring that Love had adequate notice and an opportunity to be heard prior to the entry of judgment. Instead, Fairchild requested an expedited hearing, and at the hearing, Fairchild asked the district court to enter a "default" judgment. Love responded that he lacked legal representation and had not been aware of the proceedings because he had been in the hospital and had not been receiving mail on a regular basis. Love admitted "to some kind of negligence . . . by not being more receptive to what was going on," but explained that he "had open heart surgery and found it difficult to be receptive to what the rest of the world was doing." Love acknowledged that he was "not speaking eloquently as an attorney" but explained that it was "disconcerting to have summary judgment brought against you and not realize how it all came about." In reply, Fairchild's counsel argued that Love had been served with all of the relevant papers and that Love's heart surgery was not "a legitimate issue" because it had occurred months earlier. Fairchild's counsel complained that Fairchild had "been suffering through this [case] for almost six years" and that it was "time to bring liability to a head." Love attempted to speak further but was silenced by the district court judge. Without further presentation from the parties, the district court ruled as follows:

> I find that this case has been pending for approximately six years, over six years. Throughout these proceedings there have been numerous hearings, pleadings, positions presented to the Court. Time has come now to rule on Mr. Fairchild's Motion for Summary Judgment against Love
>
> I find that there is not a sufficient basis upon which to allow Mr. Love additional time in which to respond. Because there has not been a substantive response to the motion, under the Rules [of Civil Procedure for the District Courts] I find that the motion shall be granted.

{27} We conclude that Love should have been afforded more time to respond prior to any entry of judgment. Love's counsel, who entered this case less than a month before Fairchild filed his motion for summary judgment, failed to timely file a response or to move the district court for an extension of time. After the response deadline passed, Love's counsel sought and obtained leave of court to withdraw from this case. Neither the motion to withdraw nor the order permitting withdrawal referenced or made provisions for responding to the pending summary judgment motion. *See generally* Rule 1-089(B) NMRA (stating that the district "court may place conditions on an order approving withdrawal as justice requires"). After the district court granted Fairchild's motion for summary judgment, Love explained that he had been trying to retain substitute counsel but that several attorneys had told him that his case was "too large and complex for anyone to take on immediately." Additionally, the record on appeal confirms that Love had a variety of health problems in 2010 and 2011, including Parkinson's disease and multiple surgeries and hospitalizations. Finally, although the district court was justifiably concerned that this case had been pending for over six years, the vast majority of the litigation did not involve Fairchild's cross-claims against Love, and Fairchild's motion for summary judgment against Love had been pending for only a couple of months. We hold that the district court should have granted Love an extension of time to file a response or, at a minimum, an opportunity to substantiate his claim that his failure to respond was the result of excusable neglect.

B. The Court of Appeals Erred by Affirming the District Court

{28} Having concluded that the district court erred by granting summary judgment based solely on Love's failure to file a response, we consider whether the Court of Appeals erred by holding that Fairchild established "a prima facie case of entitlement to summary judgment" and affirming "on the ground that the district court was right for another reason." *Freeman*, 2015-NMCA-001, ¶ 32. Fairchild argues that it was proper for the Court of Appeals to apply the right for any reason doctrine and that by doing so, the Court of Appeals cured any error in the district court. Love argues that the Court of Appeals erred by relying on the right for any reason doctrine.

1. Standard of Review

{29} We review the Court of Appeals' application of the right for any reason doctrine for abuse of discretion. *See Beggs v. City of Portales*, 2013-NMCA-068, ¶ 32, 305 P.3d 75. We will find an abuse of discretion if a court's ruling "is clearly untenable or contrary to logic and reason." *State ex rel. King v. B & B Inv. Group, Inc.*, 2014-NMSC-024, ¶ 28, 329 P.3d 658 (internal quotation marks and citation omitted). Additionally, a court abuses its discretion if it "applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." *Mintz v. Zoernig*, 2008-NMCA-162, ¶ 17, 145 N.M. 362, 198 P.3d 861 (internal quotation marks and citation omitted); *see also N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (stating that a decision premised on a misapprehension of the law may be characterized as an abuse of discretion).

2. The Court of Appeals' Application of the Right for Any Reason Doctrine Constituted an Abuse of Discretion

{30} Under the right for any reason doctrine, an appellate court may affirm a district court ruling on a ground not relied upon by the district court if (1) "reliance on the new ground would [not] be unfair to [the] appellant," and (2) there is substantial evidence to support the ground on which the appellate court relies. *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (internal quotation marks and citation omitted). "When applying the right for any reason rationale, appellate courts must be careful not to assume the role of the trial court [by delving] into fact-dependent inquiries." *Atherton*, 2015-NMCA-003, ¶ 36 (internal quotation marks and citation omitted).

{31} Love argues that the Court of Appeals erred by concluding that Fairchild established a prima facie case of entitlement to summary judgment on his cross-claims, which arise under Illinois law. Regarding Fairchild's claims for fraud and negligent misrepresentation, Love argues that Fairchild failed to assert facts demonstrating that Fairchild was justified in relying on Love's alleged misrepresentation. *See Schrager v. N. Cmty. Bank*, 767 N.E.2d 376, 386 (Ill. App. Ct. 2002) ("Failure to prove justifiable reliance is fatal to claims of fraudulent misrepresentation, negligent misrepresentation and fraudulent concealment of material fact."). Regarding Fairchild's Illinois Consumer Fraud Act claim, Love argues that Fairchild failed to demonstrate that his claim falls within the scope of the Act by satisfying the "consumer nexus test." *See Brody v. Finch Univ. of Health Sci./The Chicago Med. Sch.*, 698 N.E.2d 257, 268-69 (Ill. App. Ct. 1998) (explaining that the Illinois Consumer Fraud Act does not "encompass all commercial transactions" and that in some cases the plaintiff must satisfy "the consumer nexus test" to demonstrate that the claim "implicates consumer protection concerns" (internal quotation marks and citation omitted)).

{32} Love also argues that the Court of Appeals failed to acknowledge that the record on appeal contains disputed issues of material fact that should have foreclosed summary judgment on Fairchild's cross-claims against Love. Specifically, at a summary judgment hearing in 2010, the district court found that the following material facts pertaining to Love's relationship with Fairchild were in dispute:

> What is Mr. Fairchild's status as a collector or a dealer; whether there was honesty, in fact, in [the] transaction [between Mr. Love and Mr. Fairchild]; what is [Mr. Fairchild's] role with Mr. Love, whether that was a joint venture, an agency relationship, a partnership; and did [Mr. Fairchild] have a duty to investigate the ownership of the painting in being an art collector; and what was the value, actually, given by Mr. Fairchild when he considered the price of the painting and what he paid for it?

Love asserts that these disputed issues of fact are material to whether Love can be held liable to Fairchild for fraud or negligent misrepresentation and that these disputed issues of fact directly implicate the elements required to satisfy the consumer nexus test under the Illinois Consumer Protection Act.

{33} We conclude that the Court of Appeals erred by applying the right for any reason doctrine to affirm summary judgment in Fairchild's favor. First, the Court of Appeals applied incorrect substantive law to Fairchild's cross-claims for fraud and negligent misrepresentation. To determine whether a party has made a prima facie showing of entitlement to summary judgment, "the court must look to the substantive law governing the dispute." *Romero*, 2010-NMSC-035, ¶ 11 (internal quotation marks and citation omitted).

In his motion for summary judgment, Fairchild asserted that Illinois law applied to his cross-claims against Love because all of the events giving rise to the cross-claims occurred in Illinois. *See generally Terrazas v. Garland & Loman, Inc.*, 2006-NMCA-111, ¶ 12, 140 N.M. 293, 142 P.3d 374 ("In determining which jurisdiction's law should apply to a tort action, New Mexico courts follow the doctrine of *lex loci delicti commissi*—that is, the substantive rights of the parties are governed by the law of the place where the wrong occurred."). On appeal, the parties agree that Illinois law applies to Fairchild's cross-claims. But the Court of Appeals applied New Mexico law, not Illinois law, to Fairchild's cross-claims for fraud and negligent misrepresentation. *See Freeman*, 2015-NMCA-001, ¶¶ 33-35. The application of incorrect substantive law constituted an abuse of discretion. *See N.M. Right to Choose/NARAL*, 1999-NMSC-028, ¶ 7.

{34} Additionally, Love did not have an opportunity to controvert the facts in Fairchild's motion because the district court denied his request for an extension of time and failed to give him an adequate opportunity to substantiate his claim of excusable neglect. The Court of Appeals considered a similar situation in *Atherton*. In *Atherton*, the defendant sought an extension of time to respond to a motion for summary judgment, explaining that he failed to timely respond because he "had been seeking counsel and insurance coverage." 2015-NMCA-003, ¶ 8. The district court denied the extension because the court thought that *Lujan*, 2003-NMCA-104, precluded the court from considering the reasons for the defendant's failure to timely respond. *Atherton*, 2015-NMCA-003, ¶¶ 8, 22. On appeal, the Court of Appeals concluded that the district court misinterpreted *Lujan* and clarified that *Lujan* did not "negate the applicability of our concept of excusable neglect." *Atherton*, 2015-NMCA-003, ¶¶ 22, 27. The Court of Appeals explained that a failure to timely respond does not result in a waiver of the right to respond under New Mexico law, *id.* ¶¶ 25-26, and that such a "draconian procedure . . . would be antithetical to our strong bent in favor of deciding matters on their merits," *id.* ¶ 27. The Court of Appeals reversed the grant of summary judgment without examining the rest of the record. *Id.* ¶ 32. The Court of Appeals declined to apply the "right for any reason rationale" because doing so would require the Court "to speculate that there was no factual presentation [the non-moving party] could have made in response to the motion for partial summary judgment that could have swayed the district court." *Id.* ¶ 37. In this case, as in *Atherton*, we conclude that it would be unreasonable and unfair to Love to consider the merits of Fairchild's motion for summary judgment in the first instance on appeal without giving Love an opportunity to dispute the facts alleged in the motion. "If there is the slightest doubt as to the existence of material factual issues, summary judgment should be denied." *Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, ¶ 7, 130 N.M. 25, 16 P.3d 1084.

{35} Finally, we conclude that this case is not well-suited to application of the right for any reason doctrine due to the voluminous record on appeal and the fact-dependent nature of Fairchild's cross-claims. *See Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 9, 335 P.3d 1243 (explaining that in the summary judgment context, the appellate court considers "the whole record on review, considering the facts in a light most favorable to the nonmoving party and drawing all reasonable inferences in support of a trial on the merits"). The appellate court would need to undertake a fact-dependent inquiry to accurately determine whether Fairchild made a sufficient prima facie showing under Illinois law. *See Meiboom*, 2000-NMSC-004, ¶ 20 (stating that the appellate court should not delve into fact-dependent inquiries). The district court is the appropriate forum to determine the merits of Fairchild's motion for summary judgment in the first instance. *See Atherton*, 2015-NMCA-003, ¶¶ 33-39 (declining to "comb the record" and concluding that the district court was best situated to consider the plaintiffs' claims on a fuller record).

{36} We hold that the Court of Appeals abused its direction in applying the right for any reason doctrine to affirm the district court. Accordingly, we reverse the grant of summary judgment and remand to the district court for further proceedings. On remand, the district court is instructed to grant Love an appropriate amount of time to file a response to Fairchild's motion for summary judgment. *Cf.* Rule 1-056(D)(2) (providing that a response shall be filed within fifteen days after service of the motion).

C. We Vacate the Damages Award that Resulted from the Erroneous Grant of Summary Judgment

{37} The district court awarded Fairchild $1,942,446 in compensatory damages and $9,712,232 in punitive damages. The compensatory damages award did not include compensation for the loss of the Bierstadt painting because Fairchild had already received payment for the painting under a settlement agreement with Plaintiffs.[1] Instead, the compensatory damages award included (1) the potential interest that Fairchild could have earned on the cash and trade-ins that he used to buy the Bierstadt painting, compounded at a rate of 9.6% per year; (2) compensation for 1000 hours that Fairchild personally spent working on this case, calculated at a "paralegal rate" of $75 per hour for a total of $75,000; (3) attorney fees and costs incurred by Fairchild's New Mexico counsel and by a law firm in Chicago; and (4) the potential interest that Fairchild could have earned on the money he used to pay attorney fees and costs, compounded at a rate of 9.6% per year.

{38} Love contends that the district court erred by awarding Fairchild $11.6 million in damages when the Bierstadt painting was worth only $375,000. Love's primary argument on appeal is that the district court committed fundamental error by awarding Fairchild attorney fees for work performed by the Chicago law firm on matters entirely separate from this case. At the damages trial, Fairchild presented testimony from Chicago attorney Ellen Robins. Robins testified that her law firm performed work for Fairchild pertaining to a total of "20 paintings that Mr. Love had sold Mr. Fairchild" and "an FBI investigation of Mr. Fairchild related to the Love transactions." Based on this testimony, Fairchild argued that the district court should award all of his attorney fees because the work performed by the Chicago law firm on other matters was "all kind of intertwined" with this litigation, including the "FBI portion." The district court granted Fairchild's request for all of his attorney fees.

{39} Love argues that Fairchild based his claim for attorney fees on the Illinois Consumer Fraud Act, but that neither the Illinois Consumer Fraud Act nor any other

[1]In July 2011, Plaintiffs and Fairchild dismissed their claims against each other based on a settlement agreement under which Freeman retained possession of the Bierstadt painting in exchange for paying Fairchild $312,500.

provision of law allows the recovery that Fairchild received. Love acknowledges that the Illinois Consumer Fraud Act permits an award of "reasonable attorney's fees and costs to the prevailing party." 815 Ill. Comp. Stat. Ann. 505/10a(c) (2000), *held unconstitutional on other grounds by Allen v. Woodfield Chevrolet, Inc.*, 802 N.E.2d 752 (Ill. 2003). Love argues, however, that the Illinois Consumer Fraud Act does not allow a litigant to recover fees pertaining to non-Act claims, even when the claims occur within the same litigation. *See Huss v. Sessler Ford, Inc.*, 799 N.E.2d 444, 450 (Ill. Ct. App. 2003) ("The law is clear, under the Illinois Consumer Fraud Act, that a plaintiff is entitled only to reasonable attorney fees and costs and this entitlement is limited to only those fees incurred by the plaintiff that were for work specifically related to the consumer fraud claim." (citations omitted)). *But see Dubey v. Pub. Storage, Inc.*, 918 N.E.2d 265, 283 (Ill. App. Ct. 2009) (stating that "plaintiffs may also recover fees incurred for work on non-[Illinois Consumer Fraud] Act claims when the Act claim is so inextricably intertwined with the non-Act claims that it cannot be distinguished"). Love contends that the overwhelming majority of Fairchild's compensatory damages award was made up of attorney fees that lacked any basis in law. Love further argues that the punitive damages award must be vacated because it was based on the defective compensatory damages award. *See generally Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 36, 140 N.M. 478, 143 P.3d 717 ("[T]he relationship between punitive and compensatory damages is one of the factors we consider in assessing the constitutionality of a punitive damages award.").

{40} Love concedes that he did not preserve these arguments in the district court but asks this Court to vacate the damages award based on the fundamental error doctrine. *See* Rule 12-321(B)(2)(c) NMRA (stating that a party may raise an issue for the first time on appeal if the issue involves fundamental error); *see also Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, LLC*, 2012-NMSC-004, ¶ 33, 274 P.3d 97 (noting that "this Court has applied the doctrine in civil cases under the most extraordinary and limited circumstances"); *State v. Cunningham*, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176 ("Parties alleging fundamental error must demonstrate the existence of circumstances that shock the conscience or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked." (internal quotation marks and citation omitted)). Love argues that it is fundamental error to award damages based on a statute that does not allow for the relief granted. *See Gracia v. Bittner*, 1995-NMCA-064, ¶ 26, 120 N.M. 191, 900 P.2d 351 ("When a statute does not grant a right to relief in a particular situation, it is fundamental error to grant relief based on the statute."); *see also Jaffa v. Lopez*, 1934-NMSC-003, ¶ 30, 38 N.M. 290, 31 P.2d 988 (explaining that this Court had a duty to consider an argument not raised in the district court because it would be fundamental error to allow recovery not permitted by the applicable statute). Finally, Love argues that allowing Fairchild's exorbitant judgment to stand would encourage attorneys to mislead courts concerning the controlling law when the opposing party is not represented by counsel.

{41} We agree with the Court of Appeals' observation that Fairchild's damages award seems "extraordinary." *See Freeman*, 2015-NMCA-001, ¶ 39. Despite our concerns, we do not reach the merits of Love's arguments because we reverse the summary judgment order that established Love's liability to Fairchild. We vacate the damages award because the award was dependent on the grant of summary judgment.

III. CONCLUSION

{42} We hold that the district court erred by granting Fairchild's motion for summary judgment and that the Court of Appeals erred by affirming the district court under the right for any reason doctrine. We reverse the summary judgment order and vacate the resulting award of damages, and we remand to the district court with instructions to permit Love to file a response to Fairchild's motion for summary judgment and for further proceedings consistent with this opinion.

{43} IT IS SO ORDERED.
PETRA JIMENEZ MAES, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice

JANE SHULER GRAY, Judge, sitting by designation

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-024
No. S-1-SC-35697 (filed March 5, 2018)

NEW ENERGY ECONOMY, INC.,
Appellant,
v.
NEW MEXICO PUBLIC REGULATION COMMISSION,
Appellee,
and
PUBLIC SERVICE COMPANY OF NEW MEXICO,
NEW MEXICO INDUSTRIAL ENERGY CONSUMERS, and
WESTERN RESOURCE ADVOCATES,
Intervenors-Appellees.

In the Matter of the Application of
Public Service Company of New Mexico for
Approval to Abandon San Juan Generating
Station Units 2 and 3, Issuance of Certificates
of Public Convenience and Necessity for
Replacement Power Resources, Issuance of
Accounting Orders and Determination of
Related Rate-Making Principles and Treatment,
NMPRC Case No. 13-00390-UT

APPEAL FROM THE NEW MEXICO PUBLIC REGULATION COMMISSION

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Opinion

Judith K. Nakamura,

Chief Justice

{1} New Energy Economy, Inc. (NEE) appeals from a final order issued by the New Mexico Public Regulation Commission (PRC). NEE contends that the PRC violated New Mexico law by approving a contested stipulation granting the Public Service Company of New Mexico (PNM) certificates of public convenience and necessity (CCNs) to acquire new generation resources and by filing a notice proposing to dismiss the protests to PNM's 2014 integrated resource plan (IRP). NEE's arguments are predicated on a mistaken understanding of the law and ask us to accept factual assertions that were rejected below. We affirm the PRC's final order.

I. BACKGROUND

{2} The record in this case is comprised of seventy-six volumes that contain nearly 50,000 pages. It is, as PNM points out, "massive." Any attempt at a comprehensive account of the background of this direct appeal would be unproductive. A brief overview of the facts and procedure follows immediately below. Supplemental facts are provided as necessary in the course of our discussion.

{3} The federal Clean Air Act (the Act) includes provisions designed to preserve visibility standards by imposing limitations on haze-causing emissions. 42 U.S.C. §§ 7410, 7491-92 (2012); *see generally Arizona ex rel. Darwin v. U.S. E.P.A.*, 815 F.3d 519, 524-28 (9th Cir. 2016) (summarizing the legislative and regulatory framework underlying the federal government's efforts to address regional haze). The Act and the regulations adopted by the Environmental Protection Agency (EPA) to enforce it require states to develop state implementation plans to control and minimize sources of haze-causing emissions. *See generally Arizona*, 815 F.3d at 524-27 (discussing the responsibilities placed upon the states by the Act). If a state fails to submit a state implementation plan or submits a plan that is inadequate, the Act permits the EPA to impose a federal implementation plan. 42 U.S.C. § 7410(c)(1); *see generally Arizona*, 815 F.3d at 524-27.

{4} PNM is a part-owner of the San Juan Regional Generation Station (San Juan), a four-unit, coal-fired power plant near Farmington, New Mexico that is a source of emissions that cause or contribute to

haze. The EPA rejected New Mexico's state implementation plan to control and minimize haze-causing emissions at San Juan and proposed a federal implementation plan that would require PNM to install "extremely costly" emission controls on all four of the San Juan units.

{5} Various stakeholders, including several New Mexico state agencies, the Governor of New Mexico, tribal leadership, and PNM, engaged in discussions and held open public meetings to identify an alternative to the federal implementation plan that would ensure New Mexico's compliance with the federal haze standards. Ultimately, an agreement was reached and a revised state implementation plan was submitted to the EPA proposing the following course of action: PNM would retire San Juan Units Two and Three, install less-costly pollution controls on San Juan Units One and Four, and replace the lost generation capacity from the retirement of San Juan Units Two and Three with generation from other resources that minimize impacts on visibility. The EPA accepted the revised state implementation plan. *Approval and Promulgation of Implementation Plans New Mexico*, 79 Fed. Reg. 26909, 26909-21 (May 12, 2014). In the wake of the EPA's acceptance, the focus of the various stakeholders turned to what resources PNM would utilize to replace the generation capacity lost as a consequence of the retirement of the two units. This question was extensively litigated before the PRC as PNM is required to obtain PRC approval to abandon, acquire, or construct generation resources. NMSA 1978, § 62-6-12(A)(4) (1989); NMSA 1978, § 62-9-1(A) (2005); NMSA 1978, § 62-9-5 (2005). These statutes governing the PRC's oversight of generation resources are examined more closely in our discussion.

{6} In December 2013, PNM filed an application with the PRC to retire San Juan Units Two and Three and for CCNs to utilize two sources to replace the generation capacity lost from the retirement of the two units: Palo Verde Nuclear Generating Station (Palo Verde) Unit Three and additional generation capacity from San Juan Unit Four.[1] The PRC appointed a hearing examiner (HE) to address the merits of PNM's applications. *See* 1.2.2.29(B) NMAC ("In all proceedings, the [PRC] may designate a hearing examiner . . . to preside over the proceeding."); 17.1.2.9(C) NMAC ("The [PRC], upon receipt of an application for a certificate of public convenience and necessity, shall fix a time for a public hearing."). NEE and sixteen other parties, including several New Mexico governmental agencies, environmental advocates, and industrial and consumer advocates, joined the proceedings as intervenors.

{7} In October 2014, after discovery had been provided and numerous witnesses and subject-matter experts testified at multiple hearings, PNM, along with several parties, submitted a stipulation that proposed a resolution to the proceedings. NEE and several other parties contested the stipulation. Additional hearings were conducted and the HE issued a thorough and detailed recommendation advising the PRC to reject the stipulation.

{8} The HE concluded that the stipulation was fatally flawed because PNM had not shown that San Juan Unit Four was a reliable replacement generation resource. Nevertheless, the HE concluded that PNM should receive a CCN to obtain replacement generation from Palo Verde Unit Three and determined that the stipulation as a whole should be approved if PNM and the other stipulating parties demonstrated that San Juan Unit Four could be relied upon as a replacement generation resource. PNM and the other stipulating parties acted on the HE's guidance and submitted a supplemental stipulation in August 2015 that addressed the HE's concerns. NEE contested the supplemental stipulation, but this time was joined by only one other party.

{9} Hearings were again conducted and the HE issued another thorough and detailed recommendation in which all of NEE's objections to the supplemental stipulation were addressed. The HE was satisfied that PNM had demonstrated that it had adequate replacement resources and had resolved the issues that had previously concerned the HE with respect to San Juan Unit Four. The HE recommended that the PRC accept the supplemental stipulation with minor modifications that are not relevant here. The HE also recommended that the PRC accept a provision within the supplemental stipulation stating that "protests of PNM's 2014 IRP should be closed without further [PRC] action in that docket."

{10} The PRC issued a final order on December 16, 2015 accepting the HE's recommendations. NEE appeals the PRC's final order. We have jurisdiction over the appeal under NMSA 1978, Section 62-11-1 (1993) ("Any party to any proceeding before the commission may file a notice of appeal in the supreme court asking for a review of the commission's final orders.").

II. DISCUSSION

{11} NEE argues that "[t]he PRC's order violates NM statutes and PRC regulations" because "[t]he PRC accepted PNM's limited alternatives in violation of the law." In support of its position, NEE makes many arguments that this Court finds are unpersuasive or entirely without merit. We begin our discussion by examining the applicable statutory and regulatory standards implicated by NEE's arguments. We then review the administrative record and describe how these standards were applied in this case. Next, we identify the standard of review that governs our review of NEE's arguments and clarify what we meant when we explained in the collateral mandamus proceeding NEE initiated that we would review this appeal with "heightened scrutiny." Finally, we turn to NEE's specific arguments.

A. Statutory and Regulatory Standards

1. IRPs

{12} The Efficient Use of Energy Act, NMSA 1978, §§ 62-17-1 to -11 (2005, as amended through 2013), requires "public utilities supplying electric or natural gas service to customers [to] periodically file an [IRP] with the [PRC]." Section 62-17-10; *see also* § 62-17-2(I) ("[P]ublic utility resource planning to meet New Mexico's energy service needs should be identified and evaluated on an ongoing basis in accordance with the principles of integrated resource planning."). These IRPs

> shall evaluate renewable energy, energy efficiency, load management, distributed generation and conventional supply-side resources on a consistent and comparable basis and take into consideration risk and uncertainty of fuel supply, price volatility and costs of anticipated environmental regulations in order to identify the most cost-effective portfolio of resources to supply the energy needs of customers.

[1] PNM indicated that it could also utilize solar and gas resources and filed separate independent applications with the PRC to construct a solar photovoltaic facility and a gas peaking plant to make up for the capacity lost due to the retirement of the units at San Juan.

Section 62-17-10. "The preparation of resource plans shall incorporate a public advisory process." *Id.* The PRC has promulgated regulations to effectuate the IRP provisions. 17.7.3 NMAC (04/16/2007, as amended through 08/29/2017).

{13} Under 17.7.3.9 NMAC, utilities must file an IRP with the commission every three years. Each IRP is to employ a twenty-year planning horizon. 17.7.3.7(K) NMAC. An IRP should seek to identify "resource options" and determine "the most cost effective resource portfolio and alternative portfolios[.]" 17.7.3.9(B)(4),(7) NMAC. Additionally, 17.7.3.9(G)(1) NMAC provides as follows:

> To identify the most cost-effective resource portfolio, utilities shall evaluate all feasible supply, energy storage, and demand-side resource options on a consistent and comparable basis, and take into consideration risk and uncertainty (including but not limited to financial, competitive, reliability, operational, fuel supply, price volatility and anticipated environmental regulation). The utility shall evaluate the cost of each resource through its projected life with a life-cycle or similar analysis. The utility shall also consider and describe ways to mitigate ratepayer risk.

Other statutes govern the circumstances under which a utility may procure, construct, or abandon generation resources.

2. CCNs

{14} Utilities must obtain PRC approval whenever they seek to acquire an existing generation resource or abandon a generation resource. Section 62-6-12(A)(4) ("With the prior express authorization of the commission, but not otherwise . . . any public utility may sell, lease, rent, purchase or acquire any public utility plant or property constituting an operating unit or system or any substantial part thereof[.]"); Section 62-9-5 ("No utility shall abandon all or any portion of its facilities . . . without first obtaining the permission and approval of the commission. The commission shall grant such permission and approval, after notice and hearing, upon finding that the continuation of service is unwarranted or that the present and future public convenience and necessity do not otherwise require the continuation of the service or use of the facility[.]"). Utilities must obtain a CCN from the PRC to construct or operate any new generation resource. Section 62-9-1(A) ("No public utility shall begin the construction or operation of any public utility plant or system . . . without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction or operation."). The PRC has interpreted "public convenience and necessity" to entail a net public benefit. *In re Valle Vista Water Util. Co.*, 212 P.U.R. 4th 305, 309 (2001).

{15} Throughout its briefing, NEE cites to the statutes and administrative regulations governing the IRP process as support for its arguments that the HE and PRC committed error in the stipulation and supplemental stipulation proceedings, which were initiated to resolve PNM's CCN applications. NEE provided no explanation why it was citing the IRP regulations in its challenge to the conclusions reached in the CCN proceedings. It was only after we reviewed the administrative records in the proceedings arising from PNM's 2011 and 2014 IRPs that we understood why NEE points to the IRP standards as grounds to object to the CCN determination. NEE did not direct us to these records and, yet, they are essential to understanding NEE's arguments and the proceedings below. The agreements PNM and the stipulating parties reached in the CCN proceedings to ensure compliance with the revised state implementation plan proposed to resolve the 2014 IRP protests. We now review those records and the administrative proceedings.

B. The Administrative Record

{16} PNM filed its 2011 IRP with the PRC in July 2011. NEE and several of the intervenors in the present appeal filed protests, and in August 2011 the PRC set hearings on those protests. At a prehearing conference, PNM and several other parties made a request for mediation, which was granted. Mediation was scheduled for June 2012; however, at the end of May 2012, PNM and several of the protestors filed an unopposed motion to vacate the mediation. The motion explained that "continuation of the mediation process at this time would not be productive." The movants asked NEE its position on the motion and NEE did not oppose it.

{17} In September 2013, PNM filed a notice of material change with the PRC. *See* 17.7.3.10 NMAC ("The utility shall promptly notify the commission and participants of material events that would have the effect of changing the results of the utility's IRP had those events been recognized when the IRP was developed."). PNM stated that the EPA's acceptance of the revised state implementation plan constituted "a material change in circumstance that has the effect of changing certain results of the 2011 IRP." PNM further stated that the material change prompted it to "accelerate[] aspects of the development of its 2014 IRP" and to seek approval of a "regulatory plan to comply with the [revised state implementation plan], including any needed revisions to the four-year action plan in the 2011 IRP." Two days after PNM filed this notice of material change, the PRC (upon its own motion) filed a notice proposing to dismiss the 2011 IRP protest proceedings for lack of activity. The parties protesting the 2011 IRP were permitted an opportunity to file a motion explaining why the 2011 IRP protest docket should remain open, but no such motion was filed and the 2011 IRP hearings were closed.

{18} The CCN proceedings from which NEE pursued this present appeal began in December 2013 when PNM filed its application for the CCNs required to comply with the revised state implementation plan. PNM submitted its 2014 IRP to the PRC in July 2014, while the CCN proceedings were ongoing. NEE and several of the intervenors in this present appeal filed protests to PNM's 2014 IRP. NEE's protest acknowledged the overlap between the issues in the CCN proceedings and the 2014 IRP protest proceedings and contended that the public's interest in efficient adjudication would be best served by addressing the 2014 IRP matters after the CCN case was resolved. The PRC agreed and concluded that the 2014 IRP protest hearings would be held in abeyance until the CCN proceedings were finalized.

{19} At the conclusion of the CCN proceedings, the HE determined that the replacement generation resource portfolio identified in the supplemental stipulation provided a net public benefit—the applicable standard PNM had to satisfy to receive a CCN. The modified stipulation

(1) allows PNM and the state of New Mexico to comply with federal law by retiring San Juan Units Two and Three;

(2) eliminates a significant amount of coal-fired generation at San Juan—half the power plant's capacity—thereby cutting greenhouse gas emissions, dust emissions, and water use in half;

(3) saves PNM customers approximately $340 million by incorporating new

ownership and coal supply agreements;

(4) yields additional savings for ratepayers of up to $38 million due to an agreed reduction in the rate-base value of Palo Verde Unit Three;

(5) utilizes existing resources to maintain the reliability of PNM's system;

(6) commits PNM to incorporating more renewable energy production in its energy supply and requires PNM (starting in 2020) to acquire solar or wind credits or allowances, which will help satisfy requirements of both the federal Clean Power Plan and New Mexico Renewable Energy Act, NMSA 1978, Section 62-16-1 to -10 (2004, as amended through 2014);

(7) requires PNM to issue and evaluate a request for proposals for all energy sources identified in the 2017 IRP using a hypothetical assumption that San Juan will no longer operate after 2022;

(8) provides for a 2018 PRC review of the future of San Juan in New Mexico's energy supply that will allow for the resolution of uncertainties regarding longer-term coal costs, environmental regulations, and San Juan ownership interests beyond the expiration of the current ownership commitments in 2022;

(9) requires PNM to obtain firm pricing and other terms before extending its existing coal-supply agreement beyond 2022;

(10) minimizes the impact closing San Juan will have on San Juan County and northwest New Mexico, which depend on San Juan as a source of employment by "provid[ing] an additional 4 1/2 years beyond the 2017 [partial] closure for the region and PNM customers to economically prepare and adjust" in the event that PNM shuts down, or partially shuts down, the remaining San Juan units; and

(11) requires PNM to contribute $250,000 at shareholder expense rather than ratepayer expense to a Good Neighbor Fund that assists low-income customers with their utility bills.

{20} The HE also recommended that the PRC approve the provision in the supplemental stipulation recommending dismissal of the 2014 IRP protest proceedings and stated "that there will likely be no valid purpose to proceed with the 2014 IRP proceeding." This determination is supported by several findings: (1) "[e]ach of [PNM's] 20-year analyses showed that the replacement [generation] power portfolio that includes the 134 MW of Palo Verde Unit 3 and the additional 132 MW of San Juan Unit 4 is the most cost effective portfolio of the alternatives analyzed"; (2) "the review conducted for the CCNs requested in this proceeding has been equivalent to an IRP review"; (3) the CCNs at issue in PNM's application "resolve PNM's new resource needs for the four year period of the action plan in the 2014 IRP"; and (4) the supplemental stipulation requires PNM to commit to certain future resource planning obligations. These future obligations will require PNM to file "with the [PRC, after July 1, 2018 but no later than December 31, 2018,] to determine the extent to which the San Juan station should continue serving PNM's retail customers' needs after June 30, 2022[,]" and will require PNM to conduct a request for proposals as soon as practicable after the filing of its 2017 IRP to identify the most cost-effective resource portfolio using the assumption that San Juan *will not* continue to operate beyond 2022. These future obligations are imposed upon PNM not because the stipulating parties wished to delay review, but because crucial information regarding the future of coal supply for San Juan would likely be resolved by 2018 and this, in turn, would permit the multiple owners of San Juan to have a far clearer sense about whether they each, individually, wish to continue operation of San Juan.

{21} Despite the abundance of evidence supporting closure of PNM's 2014 IRP, the HE emphasized that "the [PRC] cannot properly act in this [CCN] docket to close a separate docket" and instead recommended "that the [PRC], based upon the approvals it will have granted here, issue a Notice of Proposed Dismissal in the 2014 IRP docket, as it did in the 2011 IRP case." The PRC accepted this recommendation and a notice of proposed dismissal was filed in the 2014 IRP docket. NEE filed a request to hold the 2014 IRP proceedings in abeyance or dismiss them without prejudice, but the PRC has not filed an order granting or denying this request. The last filing in the 2014 IRP docket was a notice of material event filed by PNM in July 2016.

C. Standard of Review

{22} This appeal arises from a final order approving a contested supplemental stipulation. The New Mexico Administrative Code identifies the procedures the PRC must follow when adjudicating a contested stipulation. 1.2.2.20(B) NMAC. Our case law provides the substantive legal standards that must be met to permit the PRC to approve a contested stipulation. Our case law instructs that the PRC

> can adopt a contested stipulation by, first, affording any non-stipulating party an opportunity to be heard on the merits of the stipulation . . . and second, making an independent finding, supported by substantial evidence in the record, that the stipulation does indeed resolve the matters in dispute in a way that is fair, just and reasonable and in the public interest.

Attorney Gen. v. N.M. Pub. Serv. Comm'n, 1991-NMSC-028, ¶ 15, 111 N.M. 636, 808 P.2d 606. The hearings below were conducted in conformity with the governing regulation and the HE correctly identified the substantive legal standards necessary to resolve the merits of the contest and determined that both prongs of the two-part test were met. The PRC accepted the HE's determination.

{23} NEE does not argue that it was denied an opportunity to be heard on the merits of the contested supplemental stipulation, and this is for good reason. All interested stakeholders were given more than adequate opportunity to participate in the extensive administrative proceedings below. NEE's arguments are directed solely at the factual basis upon which the HE's and PRC's decisions rest and the lawfulness of the PRC's decision to accept the HE recommendation to approve the contested supplemental stipulation. The standards we apply to these types of arguments are well-settled.

{24} Generally speaking, we review the PRC's determinations to decide whether they are "arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law, with the burden on the appellant to make this showing[.]" *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n (NMIEC)*, 2007-NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105 (internal quotation marks and citation omitted); *see* NMSA 1978, § 62-11-4 (1965). This general rule is subject to further refinement.

{25} We must assess whether the PRC's decision presents a question of fact, a question of law, or some combination of the two. *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n (ABCWUA)*, 2010-NMSC-013, ¶ 17, 148 N.M. 21, 229 P.3d 494. "With respect to questions of fact, we look to the whole record to determine whether substantial evidence supports the Commission's

decision." *NMIEC*, 2007-NMSC-053, ¶ 24. "We view the evidence in the light most favorable to the [PRC's] decision and draw every inference in support of the [PRC's] decision[.]" *Id.* (citation omitted). When fact finding is necessarily predicated on matters requiring expertise, our deference is substantial. *See ABCWUA*, 2010-NMSC-013, ¶ 50 ("The PRC's decisions requiring expertise in highly technical areas, such as utility rate determinations, are accorded considerable deference." (internal quotation marks and citation omitted)). As to matters of law, if it is clear that our Legislature delegated to the PRC (either explicitly or implicitly) the task of giving meaning to interpretive gaps in a statute, we will defer to the PRC's construction of the statute as the PRC has been delegated policy-making authority and possesses the expertise necessary to make sound policy. *See generally* I Richard J. Pierce, Jr., *Administrative Law Treatise* §§ 3.2-3.3, at 159-61 (5th ed. 2010) (describing the nature of judicial review of agency policy decisions); *accord City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003-NMSC-028, ¶ 16, 134 N.M. 472, 79 P.3d 297 ("[I]t is presumed, in the context of administrative matters that the Legislature has delegated to an agency, that the Legislature intended for the agency to interpret legislative language, in a reasonable manner consistent with legislative intent, in order to develop the necessary policy to respond to unaddressed or unforeseen issues."). "However, we are not bound by the [PRC's] interpretation and we may substitute our own independent judgment for that of the [PRC] if the [PRC's] interpretation . . . is unreasonable or unlawful." *ABCWUA*, 2010-NMSC-013, ¶ 51 (omission in original) (internal quotation marks and citation omitted).

{26} NEE's arguments require us to overlay these well-settled standards to the PRC's determination to accept the contested stipulation. In practical terms and as will be made evident in the course of our discussion of NEE's specific arguments, this means we must determine whether the findings that prompted the PRC to accept the contested stipulation are supported by substantial evidence and whether the PRC's decision to accept the contested stipulation as a reasonable and just resolution of the CCN proceedings was a lawful and permissible exercise of its discretion. One final preliminary matter requires our attention before turning to NEE's arguments: our statement that we would review this case with "heightened scrutiny."

{27} During the course of the administrative proceedings, NEE filed a petition for a writ of mandamus asking this Court to order several of the PRC Commissioners to recuse themselves from participation in the CCN proceedings on grounds that the commissioners allegedly engaged in inappropriate ex parte communications with PNM and were purportedly biased in favor of PNM. We rejected NEE's petition, did not accept its contention that the commissioners were biased, but nevertheless indicated that we would review the record in the stipulation proceedings, when and if an appeal was taken, with "heightened scrutiny." We have done just that.

{28} NEE's arguments and the factual predicates upon which those arguments are based have been carefully scrutinized. NEE is entitled to nothing more. NEE is mistaken when it suggests that our decision to apply "heightened scrutiny" shifted the burden in this appeal to PNM and the PRC to demonstrate the validity of the administrative action. This is not the case. Similarly, NEE's assertion that we will not, in this case, "accord the deference traditionally accorded" to the PRC is also incorrect.

D. NEE's Arguments

1. PRC Oversight

{29} NEE contends that "[t]he final order that approved the modified stipulation was arbitrary and capricious because it removed PRC oversight or postponed it." More specifically, NEE protests that the PRC impermissibly "treated the CCN hearing as a replacement for the required IRP stakeholder engagement and resource evaluation process." NEE objects that this amounts to little more than "an end run around the law." These claims do not withstand scrutiny.

{30} The IRP provisions require PNM to demonstrate the merits of its 2014 IRP as measured by the standards articulated in Section 62-17-10 and clarified in the applicable provisions of the administrative code and require the PRC to permit public participation in its review of PNM's 2014 IRP. Section 62-17-10; 17.7.3.9(H) NMAC. In the CCN proceedings, the HE expressly determined that the replacement generation resource portfolio identified in the supplemental stipulation satisfied the statutory and regulatory IRP standards and the process by which this determination was made incorporated ample public participation. The PRC did not violate or shirk its statutorily-imposed responsibilities by proposing, in the CCN proceedings, to dismiss the protests to PNM's 2014 IRP. All parties recognized that the issues addressed in the CCN proceedings were the very same issues at the heart of the 2014 IRP protest proceedings. NEE gives us no reason to conclude that the PRC was required to hold duplicative proceedings. The final order did not "remove" or "postpone" the PRC's review of PNM's 2014 IRP.

2. Strategist

{31} NEE argues that the HE erred in determining that the replacement generation resource portfolio identified in the supplemental stipulation was the most cost effective because the HE relied on data from PNM that was in turn produced by PNM's alleged manipulation of Strategist, the software suite PNM used to determine the most cost-effective replacement generation resource portfolio. NEE insists that "[i]t is impossible to examine PNM's submissions and find any explanation or quantification of the relative costs of feasible resources, as the law requires." These claims are inconsistent with the record.

> The HE found that
>
> PNM's Strategist analyses in the January and October hearings assessed the costs to operate and maintain a large number of potential resource portfolios to replace San Juan Units 2 and 3. [PNM's expert witness] Mr. O'Connell stated that the Strategist modeling considered solar, wind, natural gas, coal and nuclear generation alternatives and assumed the continued growth of PNM's energy efficiency and distributed generation programs. He said the Strategist modeling evaluated thousands of potential combinations of these resources. PNM's Strategist runs also evaluated replacement power portfolios for a three- and four-unit shutdown. The evaluation of the three-unit shutdown was performed in response to a bench [memorandum] request issued during the January hearings.

The HE specifically listed each of the varying types of resources PNM considered in its modeling. The HE's findings were supported by the testimony of Patrick J. O'Connell, PNM's director of planning and resources. The HE had the discretion to accept or reject Mr. O'Connell's testimony and his determination that the replacement generation resource portfolio was the most cost effective was supported by

substantial evidence in the record.

{32} NEE also argues that PNM utilized Strategist to evade the requirement that it consider the cost of resources on a "consistent and comparable" basis. NEE contends that PNM used differing values for Palo Verde Unit Three in different Strategist evaluations and that the HE erred by accepting these evaluations. We reject this claim. The HE accepted PNM's use of different values for different Strategist runs because he concluded that "it was reasonable to consider cost savings realized under the stipulations solely for the stipulation portfolio." The HE's determination that PNM's Strategist modeling correctly included the cost savings is a determination requiring expertise and technical competency we are in no position to second-guess.

3. Consideration of Renewable Resources

{33} NEE argues that "PNM failed to consider or reasonably assess resources such as wind, solar and gas, which are less costly and less risky than coal or nuclear[,]" and contends that solar and wind are less expensive resources than either the nuclear power produced by Palo Verde or the coal power produced by San Juan. As the discussion in the previous section shows, PNM did consider renewable resources when attempting to determine the most cost-effective replacement generation resources. The evidence presented persuaded the HE that utilizing Palo Verde Unit Three and obtaining additional power from San Juan Unit Four was the most cost-effective choice. We will not second-guess this determination.

4. Resource Costs

{34} NEE argues that "solar and wind generation facilities produce energy at a lower cost than coal-fired and nuclear power plants[.]" NEE then discusses what costs should have been assigned to varying resources at a "levelized cost" to establish that "wind, solar and gas . . . are less costly . . . than coal or nuclear." PNM responds that levelized cost analyses are inappropriate "when comparing technologies with different production profiles, such as dispatchable generation to variable or intermittent generation." The question of what cost the HE should or should not have assigned to any given resource is a paradigmatic fact inquiry that requires technical expertise to comprehend and resolve. NEE's arguments give us no reason to second-guess the HE's cost assessment for any given resource.

5. Van Winkle

{35} NEE argues that the "only cogent, accurate and understandable assessment of relative generation resource costs on a consistent and comparable basis in the record was provided by NEE's David Van Winkle." This argument ignores the fact that the HE expressly determined that Van Winkle's opinion is "not convincing" and that his analysis "over-simplif[ied] the resource selection process and exclude[d] significant costs." The HE went further and expressly noted that, while

> NEE witness, Mr. Van Winkle has educational and work experience in electrical engineering and an impressive familiarity with PNM's finances and generation resources[, h]e does not have professional experience in the electric power industry planning . . . such that the depth of his experience is not sufficient to accept his opinions on the design of a system over the opinions of witnesses with such experience.

The HE also pointed out that "on cross-examination, [Mr. Van Winkle] agreed that his alternatives might not be feasible." The PRC was not bound by Van Winkle's opinion and its decision was otherwise supported by substantial evidence in the record . *See Attorney Gen. v. N.M. Pub. Serv. Comm'n*, 1984-NMSC-081, ¶ 15, 101 N.M. 549, 685 P.2d 957 ("The [PRC] is not bound by the opinions of experts so long as the Commission's ultimate decision is supported by substantial evidence.").

6. Burden Shifting

{36} NEE argues that "the PRC unlawfully shifted the burden of proof." NEE clarifies that the HE "effectively excused PNM's failure to carry its burden of proof regarding cost and feasibility by concluding (incorrectly) that *NEE witness* Van Winkle failed to prove the existence of other feasible [alternatives]." According to NEE, PNM wrongly declined to evaluate Van Winkle's proposed alternatives using Strategist and, in failing to do so, PNM never meaningfully considered the costs of certain alternative energy resources that NEE supported as replacement portfolio candidates. According to NEE, the HE "effectively turned the regulatory process case on its head, making PNM the regulator, by allowing PNM to decide what alternatives it is going to present to the [PRC] and allow it to consider, while dismissing any effort by an intervenor to suggest that other alternatives should be considered." We do not accept this line of reasoning.

{37} PNM was not required to assist the witnesses of its adversary. The HE rejected Van Winkle's opinion and he was free to do so. *See Attorney Gen.*, 1984-NMSC-081, ¶ 15. PNM also proved that there were significant benefits that flowed from the supplemental stipulation and the replacement generation resources identified there. Those many benefits are summarized above and need not be restated. The HE determined that these many benefits established that the CCNs requested by PNM provided a net public benefit. The HE did not turn the regulatory framework on its head.

7. Request for Proposals (RFP)

{38} NEE objects that PNM "unilaterally decided to not investigate the market through an appropriate competitive [RFP] process to identify . . . alternatives [to San Juan Unit Four and Palo Verde Unit Three]." NEE contends that an RFP "is the normal, well-established and Commission-accepted method for utilities to show that their resource proposals are the most cost-effective options available to satisfy a demonstrated service need." NEE further claims that the PRC's decision to not require PNM to conduct an RFP necessarily means that the PRC "lacked reliable and 'substantial evidence' to reasonably conclude PNM['s] proposals were the most cost effective options currently available to satisfy PNM's service needs" and that the PRC "failed to exercise its authority . . . to reasonably protect the public interest." The evidence presented and accepted by the HE and PRC undermines these arguments.

{39} The HE rejected the argument that PNM was required to conduct an RFP and the PRC accepted this determination. The PRC pointed out that NEE had not "cited any law that requires or authorizes the [PRC] to order a utility to issue an RFP." Both the PRC and the HE also determined, based on the testimony presented in the stipulation and supplemental stipulation proceedings, that requiring PNM to conduct an RFP would have been counterproductive and could have steered the parties away from the "most preferable solution." The HE expressly questioned and had doubts about the testimony of Ronald Lehr, NEE's witness and "[t]he primary witness urging the [PRC] to require the use of RFPs."

{40} Lehr, the HE pointed out, had very little knowledge about the details of the resources proposed in the supplemental stipulation, New Mexico law, or the resource needs of PNM's system. The PRC,

in turn, emphasized the testimony of New Mexico Attorney General witness Andrea Crane. Crane testified that it would have been impractical to order PNM to undertake an RFP and NEE's suggestion to the contrary greatly oversimplified the complexity of what PNM and the other parties joining in the stipulation and modified stipulation were trying to achieve. This evidence reflects that the HE and PRC determined that an RFP was neither required nor appropriate. We will not second-guess this determination.

8. Ratepayer Risks

{41} NEE contends that "the PRC did not require PNM to adequately assess and mitigate ratepayer risks[.]" NEE submits that "significant unknowns and unquantified risks that include financial, reliability, operational, and anticipated environmental regulations exist with both San Juan coal and Palo Verde nuclear and were virtually ignored, contrary to NM statute and PRC regulation." These arguments are inconsistent with the record and insist that the PRC embrace policy choices the PRC was free to reject.

{42} The HE explicitly noted the varying mechanisms in the supplemental stipulation that ameliorated the risks associated with nuclear power generation and utilization of Palo Verde Unit Three specifically. It is necessary to reference only a few of those mechanisms. The supplemental stipulation requires PNM to contribute $11 million to the decommissioning trust for Palo Verde Unit Three and addresses how costs will be shared between ratepayers and investors in the event decommissioning costs exceed a certain threshold. It "prohibits PNM from recovering the costs associated with the storage and disposal of spent fuel from the operation prior to January 1, 2018." It also requires PNM to pass along to ratepayers certain refunds PNM receives from the United States Department of Energy. NEE's contention that PNM should not be permitted to derive additional capacity from San Juan Unit Four because there is simply too much risk associated with coal power generation ignores the fact that the reason PNM applied for a CCN for additional power from San Juan Unit Four was to close San Juan Units Two and Three and eliminate the risks and adverse impacts associated with continued use of all four San Juan units.

{43} The HE was free to perform his own calculation of the costs and benefits of the supplemental stipulation and did so. The PRC's decision to accept the HE's cost benefit analysis is a quintessential policy determination with which we will not interfere. *See Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 16, 140 N.M. 6, 139 P.3d 166 ("[T]he PRC has been granted policy-making authority in several areas.").

9. David Rode

{44} NEE contends that the PRC erred when it rejected the testimony of David Rode, a witness called by the PRC staff to testify as to "the risk and portfolio selection analyses prepared by PNM." NEE asserts that "[n]one of [Rode's] challenges to PNM's limited evaluation process and self-serving adoption of [San Juan Unit Four] and [Palo Verde Unit Three] was ever addressed by the [HE] or the [PRC]." This claim is inconsistent with the record.

{45} In its final order, the PRC expressly noted that Rode's pre-filed testimony was prepared prior to the lengthy proceedings that led to the modified stipulation and determined that his testimony was not relevant. Moreover, the record reflects that PNM did consider and address Rode's concerns; in fact, O'Connell addressed Rode's concerns at some length. Ultimately, the PRC was persuaded that, to the extent Rode's testimony was relevant at all, it supported the stipulating parties' assessment that the supplemental stipulation was the best outcome. We will not second-guess this decision.

III. CONCLUSION

{46} The PRC accepted the HE's conclusion that the supplemental stipulation fairly and justly resolved the CCN proceedings. This conclusion was predicated on the HE's finding that the resource portfolio identified in the supplemental stipulation provides a net public benefit. As our discussion shows, this finding was supported by an abundance of evidence. The PRC's decision to file a notice proposing to dismiss the protests to PNM's 2014 IRP was a lawful exercise of the PRC's discretion. The merits of PNM's 2014 IRP, as measured by the appropriate statutory and regulatory standards, were comprehensively considered during the stipulation and supplemental stipulation proceedings and those proceedings were open and accessible to all. The PRC's final order is affirmed.

{47} IT IS SO ORDERED.
JUDITH K. NAKAMURA, Chief Justice

WE CONCUR:
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
BARBARA J. VIGIL, Justice
J. MILES HANISEE, Judge, sitting in designation

SUBMISSION DEADLINE

Holiday Advertising Schedule

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

July 11, 2018 issue:
Advertising submissions due
June 22, 2018

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

Classified

Positions

Child Support Hearing Officer

The 9th JUDICIAL DISTRICT COURT is accepting applications for a full time at-will Child Support Hearing Officer (CSHO). The 9th Judicial District Court has a contract with HSD to administer a CSHO Program serving the 4th, 8th, 9th and 10th Judicial Districts. The CSHO will be an employee of the 9th Judicial District Court with a Post of Duty in Las Vegas, NM and will primarily hear child support cases in the 4th and 8th Judicial Districts, but may also travel to and serve as back-up to the 9th Judicial District Court's CSHO stationed in Portales, NM who primarily hears child support cases in the 9th and 10th Judicial Districts. QUALIFICATIONS pursuant to NMSA 40-4B-4: J.D. from an accredited law school, NM licensed attorney in good standing, NM licensed driver with good record. Minimum of five years of experience practicing law, with at least 20% having been in family law or domestic relations matters. Familiarity with the NM Domestic Relations statutes, Uniform Parentage Act, Child Support Hearing Officer Act, and related statutory law and regulations preferred. Ability to occasionally travel overnight throughout the 4th, 8th, 9th and 10th Judicial Districts. Complete Job Announcement and job application may be viewed at www.nmcourts.gov. Interested applicants should submit a New Mexico Judicial Branch Application for Employment or Resume and Resume Supplemental Form by July 6th to Kevin Spears, Court Executive Officer, Ninth Judicial District Court, 700 N. Main, Suite 16, Clovis, NM 88101.

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Associates Degree in paralegal studies or Bachelor's Degree in business or Health Care Administration. A minimum of 3 years contracting experience preferred. Experience in healthcare desired. Proven superior oral, written, presentation and interpersonal communications skills required. Must also have strong organizational and personal computing skills. Please contact Isaac Gutierrez at igutierre4@phs.org and/or apply online at http://tinyurl.com/y7gubdac

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Position Announcement Assistant Federal Public Defender-Las Cruces 2018-05

The Federal Public Defender for the District of New Mexico is seeking two full time, experienced trial attorneys for the branch office in Las Cruces. More than one vacancy may be filled from this announcement. Federal salary and benefits apply. Applicant must have one year minimum criminal law trial experience, be team-oriented, exhibit strong writing skills as well as a commitment to criminal defense for all individuals, including those who may be facing the death penalty. Spanish fluency preferred. Writing ability, federal court, and immigration law experience will be given preference. Membership in the New Mexico Bar is required within the first year of employment. The private practice of law is prohibited. Selected applicant will be subject to a background investigation. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C. 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. In one PDF document, please submit a statement of interest and detailed resume of experience, including trial and appellate work, with three references to: Stephen P. McCue, Federal Public Defender FDNM-HR@fd.org. Reference 2018-05 in the subject. Writing samples will be required only from those selected for interview. Applications must be received by June 29, 2018. Positions will remain open until filled and are subject to the availability of funding. No phone calls please. Submissions not following this format will not be considered. Only those selected for interview will be contacted.

Lawyer Position

Guebert Bruckner Gentile P.C. seeks an attorney with up to five years' experience and the desire to work in tort and insurance litigation. If interested, please send resume and recent writing sample to: Hiring Partner, Guebert Bruckner Gentile P.C., P.O. Box 93880, Albuquerque, NM 87199-3880. All replies are kept confidential. No telephone calls please.

Position Announcement
Spanish – English Legal Interpreter - Las Cruces
2018-06

The Federal Public Defender for the District of New Mexico is accepting applications for the position of Spanish-English Legal Interpreter for the Las Cruces office. One position is available with a starting salary range of JSP 9-14, currently yielding $50, 598 - $103,106. The Federal Public Defender operates under the authority of the Criminal Justice Act (CJA), 18 U.S.C. §3006A, to provide defense services for indigent persons in federal criminal cases and related matters in the federal courts. The Spanish Interpreter provides oral and written interpretation and translation services (to and from English) between members of a defender organization defense team and its client(s). State Court Certification required; Federal Court Certification preferred. Primary Job Duties: The Interpreter must be able to interpret/translate legal documents, correspondence, transcripts, treaties, psychological, medical and other forensic reports and records, foreign documents, legal provisions and other case related documents; audio and video tape recordings; attorney-client interviews, witness interviews, telephone conversations and jail visits; official court proceedings, pre-sentence interviews and interviews with other government officials, as permitted by the court. The Interpreter must maintain the confidentiality of all interpreted communications and the fact of such communications, at all times; assists the attorney to understand the cultural background of the client, based on the country of origin, as well as his/her level of comprehension with regard to the judicial process of the United States. Helps the attorney establish a professional relationship with the client or witnesses; remains impartial in all situations, interpreting accurately and completely, without regard to the content of the communication; schedules his/her time to accommodate the needs of staff members who require assistance in and out of the office and performs all other duties as assigned. Some travel may be required. Qualifications: Applicants must have a high school degree or equivalent and the requisite experience. State Court Certification required; Federal Court Certification preferred. Ideal applicant will possess a minimum of five years of interpreter experience. The individual must be able to perform each essential job duty satisfactorily. The job requirements are representative of knowledge, skills and/or abilities necessary to perform the essential functions of the job. This is a full-time position with federal salary and benefits. The position is subject to mandatory Electronic Funds Transfer (direct deposit) participation for payment of net pay. Salary commensurate with qualifications and experience. All résumé information and certifications will be verified during the interview process. Final appointment is subject to a satisfactory background investigation. In one PDF document, please submit a statement of interest and detailed résumé of experience with at least three references to: Melissa Read, Administrative Officer; FDNM-HR@fd.org. Reference 2018-06 in the subject. Applications must be received by June 29, 2018. Positions will remain open until filled and are subject to the availability of funding. No phone calls please. Submissions not following this format will not be considered. Only those selected for interview will be contacted.

Attorney

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Position will provide legal advice and services to the New Mexico Corrections Department (NMCD) regarding matters of discipline, employment law, personnel law and labor relations law. The position will review and revise proposed disciplinary actions regarding NMCD employees. Position will review and make recommendations regarding revisions to Office of Personal Standards (OPS) investigative reports pertaining to NMCD employees. Incumbent will represent NMCD management in State Personnel Office (SPO) disciplinary appeals involving disciplined NMCD Employees, in arbitration involving NMCD bargaining units who have been disciplined and in prohibited practices complaint hearings in front of the Public Employee Labor Relations Board (PELRB) and provide regular legal advice to NMCD managers regarding American with Disabilities Act (ADA), Family Medical Leave Act (FMLA) and other areas of employment and personnel law in conjunction with SPO Human Resources (HR) staff. This position will ultimately be a SPO position. SPO will supervise and pay the position but there will be a period of training and orientation by NMCD Office of General Counsel. Applicants must apply with State Personnel Office at www.spo.state.nm.us, position #15797.

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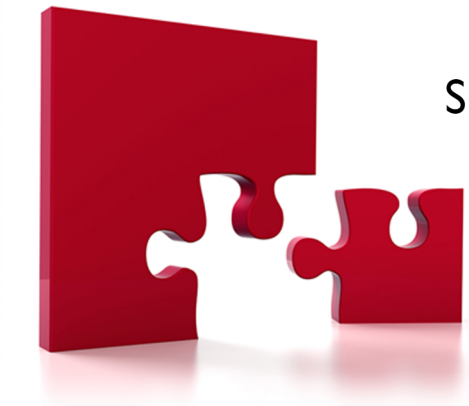

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