



# 2017 Annual Report

NEW MEXICO  
OFFICE OF  
THE ATTORNEY GENERAL

# A MESSAGE FROM THE NEW MEXICO ATTORNEY GENERAL

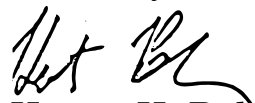
To My Fellow New Mexicans,

My office continues to work tirelessly to uphold our duty to protect New Mexico families. Over the course of 2017, my office made great strides in our efforts to connect with constituents across the state, engage in litigation to protect New Mexico consumers, bring justice to victims, and hold the worst offenders accountable.

I am pleased to present this annual report, which highlights some of our significant achievements from the last year.

I am honored to serve as your Attorney General, and will continue to work diligently to help build safe and prosperous communities in New Mexico.

Sincerely,

A handwritten signature in black ink, appearing to read "Hector H. Balderas".

Hector H. Balderas

Attorney General of New Mexico



# CONTENTS

About the Office of the Attorney General	4
New Mexico Attorney General Hector H. Balderas	5
Deputy Attorneys General	6
Criminal Affairs Work on the Border	7
Consumer and Environment Protection Division	8
Special Prosecutions Division	11
Special Investigations Division	14
Litigation Division	18
Open Government	20
Consumer and Family Advocacy Services Division	22
Treaty of Guadalupe Hidalgo Land Grant Unit	24
Criminal Appeals Division	26
Medicaid Fraud Control Division	29
Victim Services Division	33
Financial Control Division	34
Executive Office	36
Operational Divisions	37

# ABOUT THE OFFICE OF THE ATTORNEY GENERAL

## *Authority*

The Office of the Attorney General is the statutorily created Department of Justice for New Mexico, (NMSA § 8-5-1). The Attorney General's duties include but are not limited to prosecuting and defending all causes in the supreme court and court of appeals in which the state is a party or interested. prosecuting and defending in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor. (NMSA § 8-5-2)

## *Mission*

Our mission is to protect New Mexicans in order to make our communities safer and more prosperous. We prosecute criminal and civil offenses; advocate for consumers and those without a voice; empower the public with education; connect the public to beneficial resources; and serve as legal counsel for the State and its agents.

## *Vision*

We aspire to be an innovative leader in New Mexico, recognized for proactively finding solutions and responding to evolving needs by leveraging partnerships with individuals, community organizations, government agencies, and businesses.

## *Focus*

During my tenure as Attorney General, I have committed myself and my office to protecting New Mexican families by bringing targeted enforcement on behalf of the State. Since taking office, I have focused on three key areas:

- ◆ Protecting children, vulnerable populations and families
- ◆ Targeting violent criminals, and
- ◆ Fighting public corruption.

The programming of these key areas is undertaken by the various Divisions within my office supporting this vision by focusing efforts on:

- ◆ Prevention,
- ◆ Prosecution, and
- ◆ Public awareness.

The Office of the Attorney General worked diligently to protect the safety and well being of all New Mexicans throughout 2017, and many of our greatest successes are highlighted in this Annual Report.



# NEW MEXICO ATTORNEY GENERAL

## HECTOR H. BALDERAS



### **New Mexico Attorney General**

**Hector Balderas** serves as the State's 31st Attorney General. Since he took office in January 2015, Attorney General Balderas has been committed to serving as the people's advocate and voice, working to protect New Mexico's families by focusing on economic security and public safety.

Attorney General Balderas was raised in the rural, isolated village of Wagon Mound, New Mexico. Growing up in a forgotten community, he realized the need to give a voice to underserved, vulnerable New Mexicans.

The Attorney General served in the New Mexico House of Representatives, where he introduced the Truthful Interrogation Bill to prevent police misconduct. He then served two terms as State Auditor, before serving as Attorney General. When Hector was first elected State Auditor he became the nation's youngest Hispanic statewide elected official, and when he was elected as the Attorney General he received more votes than any other candidate on the statewide ballot. Hector's work for reform has been recognized with numerous awards including the New Frontier Award by the Harvard Institute of Politics and John F. Kennedy Library Foundation. As Attorney General, Hector is focused on protecting families and vulnerable populations, and believes that we will not have a prosperous New Mexico until we have safe communities.

# DEPUTY ATTORNEYS GENERAL



*Deputy Attorney General  
for Civil Affairs*

## **Tania Maestas**

**As the Deputy Attorney General** Tania oversees Civil Affairs for Attorney General Hector Balderas.

Before being appointed to her position, Tania held the positions of Assistant Attorney General and Director of the Office's Open Government Division. She has dedicated the majority of her career to government practice, also serving as Chief Legal Counsel for the New Mexico Regulation and Licensing Department. Before moving to New Mexico, Tania worked with the Colorado Office of the Attorney General.

Tania received her J.D. from the University of Denver School of Law and is an instructor for the National Association of Attorneys General Training and Research Institute.



*Deputy Attorney General  
for Criminal Affairs*

## **Sharon Pino**

**As the Deputy Attorney General** Sharon oversees Criminal Affairs for Attorney General Hector Balderas.

Sharon joined the office as an Assistant Attorney General in 2010. She worked in the Special Prosecutions and the Border Violence Divisions until assuming her current position in 2015. Sharon worked as an Assistant District Attorney for the First Judicial District Attorney's Office in New Mexico, she has handled contract domestic violence and sexual assault prosecutions for the Eight Northern Indian Pueblos Inc. while she was in private practice. In 2007, Sharon was appointed as the Domestic Violence Czar for Governor Bill Richardson.

Sharon received her J.D. from the University of New Mexico School of Law, and her Bachelor of Arts degree in Criminology from the University of New Mexico.

Deputy Attorney General Sharon Pino oversees the four Divisions within Criminal Affairs: Special Prosecutions; Special Investigations; Criminal Appeals; and the Medicaid Fraud Control Division, as well as the Victim's Services Unit, which serves all Divisions within Criminal Affairs.

# CRIMINAL AFFAIRS

## WORK ON THE BORDER



It is a priority for the Office of the Attorney General to maintain relationships with our Mexican Partners, with whom we work so closely in the pursuit of justice and thwarting criminal activity along the U.S./Mexican border. To further this work, the Office of the Attorney General has a designated Criminal Affairs Border Liaison. This year, in addition to collaborating on daily cases and projects, on January 27, 2017, our Criminal Affairs Border Liaison attended the Border Violence Protocol Meeting at Clint, Texas along with Law Enforcement Officials from Border Patrol, ICE, Homeland Security, and from Mexico PGR, Mexican Consulate, CISEN, Mexican Federal Police, Chihuahua State Police

On February 8, 2017, our Criminal Affairs Border Liaison met with Juarez Municipal DPS Secretary, Juarez Police Chief of Operations and Juarez Municipal Chief Liaison Officer. The DPS Secretary expressed his appreciation for our continued cooperation





# CONSUMER AND ENVIRONMENT PROTECTION DIVISION



***Cholla Khoury, AAG  
Consumer & Environment  
Protection Director***

**The Consumer and Environment Protection Division (CEPD)** is responsible for protecting New Mexico's residents, economy, environment and natural resources. Many of the civil plaintiffs suits brought on behalf of the State of New Mexico are handled by CEPD. The Division is responsible for investigating and addressing business practices or actions that threaten New Mexico families, legitimate businesses, our environment or natural resources. As the civil law enforcement Division, CEPD brings suit on behalf of the State in areas such as consumer protection, antitrust, charitable solicitations, environmental protection and other areas of civil law. The Division specializes in complex and thorough investigations into some of the biggest companies in the world. The Division serves as the small business and residential consumer advocate in front of the Public Regulation Commission (PRC), litigating against investor owned utilities to keep utility rates low and ensure that New Mexicans have access to clean, affordable energy. Additionally, the Division maintains a registry of charitable organizations that exist operate or solicit in the State of New Mexico.

## ***NEW FOR 2017***

- ◆ CEPD initiated 11 new cases in State or Federal court in New Mexico and in the District of Columbia and two other states. Six of those cases were brought to protect New Mexico's delicate environment while the remaining five cases were brought to protect New Mexican consumers. Besides the new cases filed, CEPD maintained active litigation in nine other consumer protection litigations filed prior to 2017.
- ◆ CEPD has reviewed or initiated investigations involving anticompetitive pricing, healthcare fraud, automotive sales, false advertising, data breaches, real estate fraud, pharmaceuticals, mortgage fraud and financial fraud.
- ◆ Attorneys in CEPD collaborated with Attorneys General from all 50 states and with Federal agencies in multistate investigations into companies operating across state lines who violated consumer protection laws.
- ◆ The utilities section of CEPD participated as consumer advocate in seven cases in front of the PRC. These cases involved administrative rule-making as well as general rate cases and specific project requests.
- ◆ CEPD maintains 9,213 charities registered in its database and has undertaken an in-depth review of every charity's registration status to ensure compliance with state laws. Through registration and enforcement, CEPD has assisted nearly 450 charities in resolving their delinquency issues.

# Consumer and Environment Protection Division cont'd

## KEY OUTCOMES

### ***Takata Airbags***

CEPD brought suit on behalf of New Mexico against Takata the manufacturer of automobile airbags, Takata Corporation, and more than ten auto manufacturers for installing dangerous airbags in cars. New Mexico was one of only three states to file suit against the corporation, which filed bankruptcy in June of 2017.

### ***Dollar General***

The Division brought suit against Dollar General Corporation for selling obsolete motor oil. CEPD's investigation discovered that Dollar General had been selling motor oil that was unsuitable for modern engines without telling consumers. The oil which Dollar General had sold without proper identification cause engine damage and increased emissions

### ***Opioids Manufacturers***

The Division brought an action against opioid manufacturers and distributors for the role they have played in contributing to New Mexico's opioid epidemic. The suit alleges violations of state law including unfair and deceptive trade practices, fraud against taxpayers, Medicaid fraud, and racketeering, as well as statutory and common law public nuisance, negligence and negligence *per se*.

### ***California and New Mexico v. BLM***

In collaboration with the Attorney General of California, the Division

challenged the Trump administration's illegal delay of implementation of the Waste Prevention Rule (regulating methane from oil and gas operations on federal land). On October 4, 2017, the court ruled in favor of the Attorneys General, forcing the administration to immediately implement the rule.

### ***California and New Mexico v. DOI***

In collaboration with the Attorney General of California, the Division Challenged DOI's illegal postponement of valuation reform rule for oil, gas, and coal royalties which would go to increase funding to New Mexico's schools. The Court granted motion for summary judgment in New Mexico's favor, declaring postponement illegal but declining to vacate because repeal of the rule would become effective one week later.

### ***Homeownership Preservation Program***

The Division continued to assist New Mexican consumers facing foreclosure. The Division achieved more than \$2,000,000 in foreclosure assistance to New Mexicans through loan modification or by assisting consumers in stopping or avoiding foreclosure.

### ***Wind Energy Jobs Agreement***

The Division negotiated with Southwest Public Service Company (SPS) and Xcel Energy to drive \$57,000,000 to New Mexico resident businesses during the construction of the Sagamore Wind Project. Besides creating jobs and allowing New Mexico businesses to develop expertise in renewable energy, the agreement provided for a grant to Mesalands Community College's North American Wind Research and Training Center in Tucumcari.

### ***Settlements***

In 2017 CEPD achieved settlements with the following companies in resolution of investigations:

- ◆ Western Union: \$48,946.49
- ◆ Target: \$205,163.99
- ◆ Nationwide: \$113,705
- ◆ My Pillow: \$300,000
- ◆ G M: \$1,315,164.97
- ◆ Johnson & Johnson: \$453,474
- ◆ BIPI: \$158,242.03
- ◆ Western Mortgage: \$375,000



# Consumer and Environment

## Protection Division cont'd

### *Texas v. New Mexico*

Families, businesses and communities all rely upon our limited water resources as an absolute necessity to life and prosperity in New Mexico. Protection of these waters against claims by downstream interests is of paramount importance to continue the historical stewardship of waters to meet our current needs within New Mexico and for the enjoyment of our waters to serve future generations. Attorney General Hector Balderas serves as the "point of the spear" for the protection of New Mexico's lawful use of waters in the Rio Grande Basin against unfounded claims by downstream interests seeking to expand their own water supply to the detriment other individuals, farmers, and commerce in New Mexico.

The State of New Mexico did not seek out the case of *Texas v. New Mexico*. Instead, the case began on January 27, 2014, when the United States Supreme Court allowed the State of Texas to file its complaint against the State of New Mexico, seeking to enforce rights under the Rio Grande Compact, which apportions the waters of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. The State of Texas, seeking to expand its water supply, filed a lawsuit that seeks to limit the lawful use of waters allocated to New Mexico in the Compact and deliver more water to downstream interests in Texas. The United States Supreme Court also invited New Mexico to file a motion to dismiss under the Federal Rule of Civil Procedure 12(b)(6). The United States filed a motion for leave to intervene as a plaintiff and a proposed complaint in intervention based on several distinct federal interests that are at stake in this dispute over the interpretation of the Compact. On March 31, 2014, the Court granted the United States' motion for leave to intervene as a plaintiff.

New Mexico moved to dismiss the complaints filed by Texas and the United States. The First Interim Report of the Special Master recommended that the Court deny New Mexico's motion to dismiss the complaint filed by Texas. As for the United States' complaint in intervention, the Special Master recommended that the Court grant New Mexico's motion to dismiss to the extent the United States asserts claims under the Compact, but deny the motion to the extent the United States asserts claims under federal reclamation law.

The United States, New Mexico, and Colorado filed exceptions to the Special Master's Report. On October 10, 2017, the Court denied New Mexico's motion to dismiss Texas's complaint.

The United States took exception to the Master's recommendation that the United States complaint in intervention should be dismissed to the extent that it asserts claims under the Compact. Colorado's first exception contends that the Court should limit the claims of the United States to those based on the 1906 Convention with Mexico (US/Mexico Treaty). In their reply briefs, Colorado and New Mexico opposed the United States' exception. As sovereign States that are parties to the Compact, both States have a significant interest in the Court's resolution of the United States' exception.

The parties appeared before the United States Supreme Court on January 8, 2018, to present oral argument on the exception of the United States and the first exception of Colorado. Essentially, the argument was limited to the role that the United States, as represented by the Office of the Solicitor General, will play in this litigation going forward. The United States Supreme Court did not request and did not hear arguments related to any other matters at that time. Therefore, the heart of the case--the merits of Texas's allegations against New Mexico--has not yet been argued to the justices of the Supreme Court.

As this summary shows, the case remains at an early stage. Trial, if this case goes to a trial, could be years away. Because Texas, and not New Mexico, initiated the litigation, only Texas has the power to end the case unilaterally by voluntarily dismissal. There is no indication, however, that Texas intends to do anything other than aggressively pursue the course it charted by bringing this suit against New Mexico and its people. As a defendant, New Mexico must continue to defend its rights vigorously under the Rio Grande Compact.

The defense of New Mexico's water allocation is a complex task that is based upon sound scientific and legal principles. Attorney General Balderas continues to fully address the complete spectrum of legal, technical and water administration issues in the Rio Grande Basin that serves the lawful interests of New Mexico citizens. The New Mexico Attorney General's office is developing a robust legal and technical case to protect New Mexico's lawful entitlement to water in the Rio Grande Basin.



# SPECIAL PROSECUTIONS

## DIVISION



*Clara Moran, AAG  
Special Prosecutions  
Director*

**The Special Prosecutions Division** is responsible for prosecuting complex and specialized criminal cases throughout New Mexico. Many of the individual cases the Office of the Attorney General takes on for prosecution are large in scale and require a great number of resources and specialization. The Division specializes in handling cases related to internet crimes against children, child sexual exploitation, violent crimes, fraud, and political corruption. The Division also has a Traffic Safety Resource Prosecution Unit which provides training, education, and technical support to prosecutors and law enforcement agencies throughout the state and a Border Violence Unit which specializes in International extraditions, human trafficking, and money laundering prosecutions. The Division provides technical assistance and trial support to local prosecutors and law enforcement, and it also provides training for federal,

### **NEW FOR 2017**

- ◆ In 2017, the Special Prosecutions Division of the Office of the Attorney General conducted 10 trials throughout the State of New Mexico, while maintaining a caseload of nearly 130 cases, approximately 30 of which were pending trial at a time. Cases tried during 2017 include charges of armed robbery, assault, bribery, child abuse, criminal sexual penetration of an inmate, sexual exploitation of children, tampering with evidence, homicide and charges related to political corruption.
- ◆ In addition to the matters tried in 2017, the Special Prosecutions Division also initiated, reviewed, and resolved cases involving human trafficking, sexual exploitation of children, domestic violence, child solicitation, child abuse, criminal sexual penetration, tax fraud, health care fraud, money laundering, embezzlement, and public corruption.
- ◆ In 2017, attorneys in the Special Prosecutions Division also conducted 43 sex offender parole board hearings, and maintained a caseload of 14 international extraditions while working in conjunction with local law enforcement, district attorney's offices, the U.S. Marshal Service and the U.S. Department of Justice to recover violent fugitives.
- ◆ Our Border Violence Liaison attended nine Border Violence Protocol Meetings. The liaison assists and collaborates with Law Enforcement Officials from the U.S. Marshal Service, FBI, U.S. Border Patrol, ICE, Homeland Security, and from Mexico PGR, Mexican Consulate, CISEN, Mexican Federal Police, Chihuahua State Police (Unica), C4, and Mexican Federal Immigration.
- ◆ The Traffic Safety Resource Prosecution Unit (TSRPU) trained 965 law enforcement officers and prosecutors throughout the State. The TSRPU also conducted one Courts-to-Schools Program with the assistance of Santa Fe Magistrate Judge George Anaya, Jr. for the Santa Fe Master's Program on May 12, 2017.

# Special Prosecutions Division cont'd

## **Mark Webb**

On January 31, 2017, Webb was sentenced to serve seven months in the Bernalillo County Detention Center and upon his release from custody will be placed on supervised probation after being convicted pursuant to a guilty verdict on December 12, 2016, on one count of Voyeurism, one count of Attempt to Commit a Felony to-wit: Voyeurism (Child Under 18), and one count of Battery on a Household Member. He also faces another trial dealing with multiple counts of sexual exploitation of children by manufacture.

## **Barion Solórzano**

On February 10, 2017, Solórzano was sentenced to 30 years in the New Mexico Department of Corrections after being convicted pursuant to a guilty plea on three counts of criminal sexual contact of a minor, one count of sexual exploitation of children by production (child under 13), and one count of sexual exploitation of children (manufacture). Solórzano sexually abused a six-year-old child and photographed her during the sexual abuse.

## **Joseph Apodaca**

On April 28, 2017, Apodaca was sentenced to 36 years in the New Mexico Department of Corrections after being convicted at trial in November 2016, on two counts of Criminal Sexual Penetration in the first degree, and one count of Tampering with Evidence for the extremely violent rape of a young woman he left for dead in Valencia County in 2014. The survivor will suffer medical issues for the rest of her life due to the brutal rape.

## **Lloyd Aguilar**

On June 21, 2017, Lloyd Aguilar was sentenced to 20 years in the New Mexico Department of Corrections followed by eight years of supervised probation after being convicted at trial on March 17, 2017, on one count of Armed Robbery with a one year firearm enhancement (mandatory serious violent offense), one count of Conspiracy to Commit Armed Robbery, three counts of Child Abuse -

Intentional (No Death or Great Bodily Harm) with a one year firearm enhancement (designated as serious violent offense at sentencing), and one count of Tampering with Evidence for robbing a mother and her three children at gunpoint in a Smith's parking lot on the Westside of Albuquerque. This case was jointly prosecuted by the Office of the New Mexico Attorney General and Second Judicial District Attorney's Office.

## **Enock Arvizo**

Former Metropolitan Detention Center (MDC) officer was indicted on several counts of criminal sexual penetration for raping female inmates while working as a correctional officer. Beginning in May 2017, the Special Prosecutions Division began the first of what would eventually be five trials against this defendant. The defendant was convicted of Criminal Sexual Penetration of an Inmate by a Person in a Position of Authority and two counts of Assault.

## **Jeffrey Morrill**

On March 28, 2017, Morrill was sentenced to serve two years in the Bernalillo County Metropolitan Detention Center and four years of supervised probation with lifetime sex offender registration after being convicted at trial on two counts of Sexual Exploitation of Children by Distribution and one count of Sexual Exploitation of Children by Possession. Graphic, sexual images of young girls ranging in age from six to 10 were in Mr. Morrill's possession at the time of his arrest. The defendant was found guilty at trial on the above mentioned counts in December 2016.

## **Christopher Davis**

On July 6, 2017, Davis was sentenced to serve eight years of a 24 year sentence in the New Mexico Department of Corrections and between five and 20 years of supervised probation and sex offender parole with lifetime sex offender registration after being convicted pursuant to a Guilty Plea on February 17, 2017, on nine counts of

Criminal Sexual Penetration of a Minor (Child 13-16) and one count of Sexual Exploitation of Children by Manufacturing and one count of Child Solicitation by Electronic Communication Device (Child 13-16).

## **David Rael**

On November 1, 2017, Rael was sentenced to nine years in prison for three counts of Sexual Exploitation of Children (Manufacture), one count of Sexual Exploitation of Children (Distribution), and one count of Sexual Exploitation of Children (Possession). Rael was found guilty at trial on June 14, 2017 before the Honorable Mary Marlowe Sommer in the First Judicial District Court. Rael committed his crimes in 2013 in Los Alamos County.

## **Phil Griego**

On November 16, 2017, former state senator Phil Griego was found guilty of one count of Violation of Ethical Principles of Public Service, one count of Violation of Ethical Principles of Public Service (Requesting or Receiving Thing of Value), one count of Bribery, Fraud (Over \$20,000), and one count of Unlawful Interest in a Public Contract (Over \$50). The case involves the 2014 sale of a state-owned building in downtown Santa Fe wherein Griego received a \$50,000.00 commission. Griego is facing up to 17 ½ years in prison. Griego's sentencing is scheduled for February 16, 2018. Griego was also indicted on another case in 2017 involving Campaign Finance Violations, among other offenses. That case is pending trial.

## **Xavier Nelson**

Nelson was indicted for vehicular homicide by reckless driving after killing a 10-year-old girl while he is alleged to have been drag racing on Interstate 25 in Albuquerque. This matter was jointly prosecuted by the 2<sup>nd</sup> Judicial District Attorney's Office and the Office of the Attorney General on December 15, 2017 and Nelson was convicted at trial of a felony homicide by vehicle (reckless driving).

# *Special Prosecutions Division cont'd*

## **KEY OUTCOMES**

**Courts to School Program** is designed to bring the courtroom into schools, exposing students to the realities and consequences of drinking while under the influence of drugs and/or alcohol. School gymnasiums and performing arts centers are transformed into courtrooms complete with lawyers and defendants flanking the judge's bench, bailiffs and probation officers.

Prosecutors in the Special Prosecutions Division regularly conducted training for law enforcement and local prosecutors, including over 20 presentations on investigation and prosecution of internet crimes against children, human trafficking, criminal sexual penetration, public corruption, money laundering, driving while intoxicated and traffic offenses, domestic violence, and international extraditions.

**SPD Highlights:** Prosecutors in the Special Prosecutions Division assisted in a week-long training sponsored by the Conference of Western Attorneys General, where the Division trained prosecutors, forensic scientists, and law enforcement from Mexico.

These are just some examples of the remarkable work performed by the Special Prosecutions Division of the Office of the Attorney General. The staff continuously strives to do its absolute best to defend the rights and dignity of the citizens of New Mexico.





# SPECIAL INVESTIGATIONS DIVISION



*Ben Baker,  
Special Investigations  
Director*

**The Special Investigations Division** works to provide a safe environment for New Mexico's most vulnerable populations, including children and the elderly. The Division is responsible for reviewing and investigating crimes that are referred to the Office of the Attorney General, often resulting in the arrest and incarceration of dangerous and corrupt criminal offenders. Additionally, the Division regularly supports efforts to secure restitution for victims of financial crimes and fraud.

The Division is comprised of separate units, each handling investigations in its own specialty area; these units include Special Investigations; Internet Crimes Against Children; Human Trafficking; and the Anti-Money Laundering Unit. The Special Investigations Division also oversees investigations conducted by agents assigned to the Medicaid Fraud Control Division.

## **NEW FOR 2017**

- ♦ 2017 was an especially successful year for the Special Investigations Division (SID), which conducted several significant law enforcement investigations and operations. The first of these successes was the investigation and subsequent criminal conviction of a former State Senator, Phil A. Griego, for fraud and Governmental Conduct Act violations. The Division also conducted numerous search and arrest warrants, as well as outreach and education, all of which strengthened protections for vulnerable New Mexicans.
- ♦ Looking forward, the Special Investigations Division aims to continue to conduct comprehensive criminal investigations in a wide variety of specialty areas throughout the State of New Mexico. We will continue to leverage collaborative partnerships and resources to provide these services to victims in rural

## **KEY OUTCOMES**

2017 Special Investigations Accomplishments:  
(Total for all four Units and Medicaid Fraud Investigations)

- |                                 |                        |
|---------------------------------|------------------------|
| ♦ 248 Case Referrals            | ♦ 197 Arrests          |
| ♦ 677 Closed Cases              | ♦ 618 Search Warrants  |
| ♦ 41 Law Enforcement Trainings  | ♦ 1,315 Open Cases     |
| ♦ 78 Law Enforcement Operations | ♦ 1,084 Reviewed Cases |

# *Special Investigations cont'd*

## *SPECIAL INVESTIGATIONS UNIT*

The Special Investigation Unit (SIU) conducts the widest breadth of criminal investigations within the office ranging from violent crimes to violations of the Governmental Conduct Act.

### *NEW FOR 2017*

In August of 2017, Special Investigations Unit Agents conducted an investigation into an allegation surrounding the criminal sexual conduct of Eli Kronenanker, with a then 17-year-old victim. On August 31, 2017, (in Bernalillo County) Kronenanker was arrested for seven counts of criminal sexual penetration, kidnapping, intimidation of a witness and aggravated assault with a deadly weapon. On September 4, 2017, (in Sandoval County) Kronenanker was arrested for three counts of retaliation against a witness, intimidation of a witness and aggravated assault with a deadly weapon. Subsequent to his arrest by New Mexico Attorney General Special Agents, grand juries in both Bernalillo and Sandoval Counties indicted Kronenanker on the same charges. He is currently awaiting trial in these cases.

### *KEY OUTCOMES*

- ◆ 26 Arrests
- ◆ 32 Search Warrants
- ◆ 530 Open Cases
- ◆ 220 Reviewed Cases
- ◆ 61 Case Referrals
- ◆ 311 Closed Cases

## *INTERNET CRIMES AGAINST CHILDREN UNIT (ICAC)*

The ICAC unit investigates the production, distribution and possession of child pornography within the state of New Mexico. ICAC also leads the statewide effort and is the task force commander for all 87 state, local, federal, tribal and military affiliate law enforcement agencies.

### *NEW FOR 2017*

- ◆ In June of 2017, ICAC agents acted in response to concerned community member's complaints and began an undercover chat via the internet with a subject identified as Otalee Brown (40). Brown believed that he was communicating with a 14-year-old acquaintance when he introduced the subject of sex with the girl into the conversation. Agents arranged a meeting with Brown and he was arrested when he arrived to meet in person the 14-year-old victim. Brown was charged with electronic solicitation of a child and is pending trial.
- ◆ During the months of April and May, 2017, the Office of the Attorney General, ICAC Task Force executed a multijurisdictional-enterprise operation called "Operation Broken Heart IV." This operation concentrated on offenders who: (1) possess, manufacture, and distribute child pornography; (2) engage in online enticement of children for sexual purposes; (3) engage in the commercial sexual exploitation of children (commonly referred to as child prostitution), and (4) engage in child sex tourism (traveling abroad for the purpose of sexually abusing foreign children). During this two-month-long national push to lock up predators, the Office of the Attorney General ICAC Task Force served 110 search warrants, arrested 37 alleged predators, identified 19 child victims, and rescued three more children from further abuse. The initiative also included reaching 8,138 persons on internet-safety education and outreach events in New Mexico.

# *Special Investigations cont'd*

## *INTERNET CRIMES AGAINST CHILDREN UNIT (ICAC) cont'd*

### *KEY OUTCOMES*

During 2017, the ICAC Unit achieved the following statistical outputs:

- ◆ 118 Arrests
- ◆ 489 Search Warrants
- ◆ 680 Open Cases
- ◆ 680 Reviewed Cases
- ◆ 172 Case Referrals
- ◆ 273 Closed Cases
- ◆ 909 Outreach Presentations
- ◆ 11 Law Enforcement Operations
- ◆ 41 Child Victims Identified
- ◆ 589 Cyber Tips Received
- ◆ 1,693 Forensic Exams Completed
- ◆ 32,275 Law Enforcement Personnel Trained
- ◆ 282 other professionals trained

## *HUMAN TRAFFICKING UNIT (HTU)*

**The Human Trafficking Unit** focuses on the investigation of sex and labor trafficking within New Mexico. This unit also leads as the statewide task force commander for the 48 state, local, federal and tribal affiliate law enforcement and regulatory agencies. The increase of outreach, awareness and education about human trafficking are important unit objectives met by training via a multidisciplinary approach.

### *NEW FOR 2017*

- ◆ In July 2017, the Office of the Attorney General-led multijurisdictional task force which conducted an undercover operation targeting solicitation of sex with underage victims. Seven males were arrested as a result of this week long operation, charged with the crime of attempted human trafficking (sex trafficking). All seven suspects are awaiting trial on these charges.
- ◆ In December 2017, the New Mexico Office of the Attorney General entered into an Memorandum of Understanding (MOU) with the U.S. Department of Labor, for the purpose of combatting labor trafficking within the State of New Mexico. This MOU represents the first of its kind with the U.S. Department of Labor.

### *KEY OUTCOMES*

- |                                 |                        |  |
|---------------------------------|------------------------|--|
| ◆ 45 Arrests                    | ◆ 31 Reviewed Cases    | ◆ 5 Reviewed Cases                     |
| ◆ 36 Search Warrants            | ◆ 15 Case Referrals    | ◆ 3 Closed Cases                       |
| ◆ 24 Law Enforcement Operations | ◆ 71 Closed Cases      | ◆ 72 Victims Interviewed               |
| ◆ 105 Sex Trafficking Cases     | ◆ 10 Labor Trafficking | ◆ 34 Law Enforcement/NGO Presentations |
| ◆ 48 Open Cases                 | ◆ 7 Open Cases         |  |



# *Special Investigations cont'd*

## *ANTI-MONEY LAUNDERING UNIT (AMLU)*

The AMLU investigates complex financial crime cases. The Unit is staffed by subject matter experts who regularly fill gaps in specialty law enforcement resources, particularly in rural New Mexico.

### *NEW FOR 2017*

- ♦ In 2017, Agents within the Anti-Money Laundering Unit investigated the criminal financial activity of Edward Boysel. Boysel was alleged to have been conducting fraudulent business practices related to a concealed carry weapons business he owned and operated throughout the state (five total locations in: Bernalillo, Valencia, McKinley, Torrance counties). In October 2017, agents completed their investigation and Boysel was subsequently arrested and indicted by a Bernalillo County grand jury on charges of – Money Laundering; Tax and Medicaid Fraud; Falsification of Public Records; and Abandonment of a Dependent. He is currently awaiting trial on these charges.

### *KEY OUTCOMES*

- ♦ 8 Arrests
- ♦ 61 Search warrants
- ♦ 57 Open Cases
- ♦ 57 Reviewed Cases
- ♦ 19 Closed Cases
- ♦ 7 Law Enforcement Trainings
- ♦ 43 Law Enforcement Operations



*Special Investigations Division Team*

# LITIGATION

## DIVISION



*Litigation Division*

**The Litigation Division** performs two basic functions. The first is the representation of the State of New Mexico in all of its non-tort claim civil litigation, as the State's Risk Management Division typically provides a defense in tort cases. This civil litigation consists primarily of defending the constitutionality of New Mexico's legislative and regulatory enactments and of civil enforcement of various legal mandates. It also includes representation of the judiciary in original writ proceedings initiated in the New Mexico Supreme Court. The second function of the Litigation Division is to prosecute on behalf of the several professional licensing boards in New Mexico. Those prosecutions entail disciplinary action taken against licensed professionals for violations of the Uniform Licensing Act and the regulations adopted by each of those licensing boards. The Litigation Division provides such prosecutorial services for every professional licensing board in New Mexico with the exceptions of the State Bar, the Medical Board, and the Nursing Board.

### **NEW FOR 2017**

The Litigation Division successfully prosecuted over 250 professional licensing cases. Each of those cases represents critical assistance to the Regulation and Licensing Division of its core mission to protect New Mexico citizens from the unscrupulous (or worse) practices of licensed professionals in the State.

### **Tobacco Litigation**

The Litigation Division continued its significant efforts by overseeing and litigating New Mexico's compliance with the Master Settlement Agreement, the landmark 1998 settlement agreement between the nation's largest tobacco manufacturers and 52 states and territories.

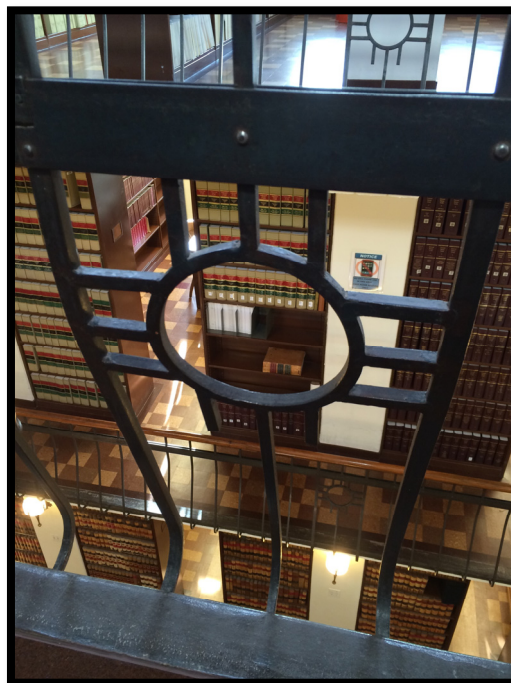
- ♦ Currently there are several civil litigation matters pending in the NM Court of Appeals, including a pending ruling that may favor New Mexico. There is a proposed order of the 2003 arbitration panel and a ruling in the defendants favor requiring New Mexico to participate in a multiparty (rather than single-state) arbitration of the NPM Adjustment dispute and several major tobacco companies. That arbitration concerned the adequacy of New Mexico's efforts to "diligently enforce" our tobacco escrow statute in the year 2004. The statute requires those tobacco companies that did not participate in the Master Settlement Agreement to make payments into an escrow account for the benefit of the State that mirror the payments made to the State by those tobacco companies that did participate in the Master Settlement Agreement. Additionally, a new lawsuit by a non-participating manufacturer, Grand River Enterprises, was filed against New Mexico for them and is listed on the Tobacco Directory. A Motion to Dismiss that lawsuit is still pending. All of these efforts required a substantial portion of the staffing resources in the Litigation Division.

# *Litigation Division Cont'd*

## *KEY OUTCOMES*

The Litigation Division represented the State and its agencies in regard to :

- ◆ Road access to State trust lands used by New Mexican citizens for recreational purposes. That litigation goes to trial in March 2018.
- ◆ The historic Duran consent decree governing prison conditions in certain New Mexico correctional facilities. A number of compliance issues rose throughout this long-dormant case.
- ◆ The State and its agencies against creditors in bankruptcy litigation all across the country. The division successfully handled hundreds of bankruptcy matters on behalf of the State, ensuring that hundreds of thousands of dollars that are owed to the State were paid.
- ◆ Actions filed pursuant to the Fraud Against Taxpayers Act. The qui tam attorneys for the Office of the Attorney General handled matters that returned funds to State coffers. The Litigation Division settled a lawsuit against Presbyterian Health Plan, Presbyterian Network, and Presbyterian Insurance Co., for fraud based on the underpayment of taxes on premiums received or written, for \$18.5 million dollars.
- ◆ The Litigation Division represented judges from nearly every judicial district in various original jurisdiction proceedings before the New Mexico Supreme Court. The division was also involved in several cases brought against State agencies under the Inspection of Public Records Act, including the successful defense of the Attorney General's Office in separate actions filed by healthcare facilities that were targets of the Attorney General's Medicaid Fraud Unit concerning the application of the law enforcement exception to attorney client privilege with outside counsel.



# OPEN GOVERNMENT DIVISION



*Sally Malave, AAG  
Open Government  
Director*

**The Open Government Division** has three primary areas of responsibility. First, it provides legal representation to 80 boards, commissions and state agencies, including nearly three dozen professional licensing and environmental permitting boards, the Human Rights Commission, the Law Enforcement Academy Board, and the Secretary of State's Office, to name a few. As counsel to these entities, the nine dedicated attorneys within the Division routinely travel around the state to attend their clients' regular and special meetings, administrative disciplinary hearings, and rulemaking proceedings to ensure compliance with their clients' enabling legislation and the Open Meetings Act, as well as to provide counsel as needed. The Division also provides representation for clients in front of the State's district and appellate courts. Second, the Division researches and drafts Attorney General opinions and advisory letters in response to requests by state legislators, state officers, and district attorneys. Third, it promotes public transparency by reviewing and responding to complaints alleging violations of the Open Meetings Act (OMA) and Inspection of Public Records Act (IPRA) and by providing state-wide training to governmental bodies, media organizations, and the public regarding their rights and responsibilities under the Acts.

Other Division responsibilities include the review and approval of state professional services contracts for compliance with certain provisions of the Governmental Conduct Act, issuing opinions approving school district general obligation bond issues, approving agreements between local governments and private jail operators and closing agreements from the Taxation and Revenue Department, assisting with review and approval of contracts between the Office of the Attorney General and outside parties, and providing research and bill analysis during the legislative session.

## ***NEW FOR 2017***

- ♦ In 2017, attorneys in the Division attended a total of 798 proceedings, including regular board meetings, disciplinary hearings and rulemaking proceedings. The Division oversaw the successful promulgation of rule changes for various clients after the passage of House Bill 58, amending the State Rules Act. In connection with HB 58, it currently is engaged in promulgating a default procedural rule governing public rules hearings for use by agencies that have not adopted their own procedural rules.
- ♦ The Division continued to experience a substantial litigation caseload in 2017, currently handling approximately 35 judicial appeals and similar court proceedings on behalf of state agencies, boards and commissions.



# Open Government Division cont'd

## NEW FOR 2017

Over the course of the year, the Division capably handled multiple arbitrations and petitions to confirm arbitration awards for the Secretary of State, one of which included a judgement entered in the SOS's favor; a petition for cancellation for *SOS v. Board of County Commissioner for Hidalgo County* where the SOS granted relief for the removal of ineligible voter registration certificates; two affirmative lawsuits for the OAG on which the Division provided assistance, including an IPRA lawsuit in *Attorney General v. Espanola School District*, and A Writ of Quo Warranto for *Attorney General v. Analee Maestas*, which resulted in Maestas stepping down from public office; two state court cases, *Legislative Council v. Governor and Secretary of State*, where a cert was granted to the Supreme Court, and *Cummings v. Lewellen*, an IPRA lawsuit which has since been dismissed; and three Federal Court cases, most notably, *Rocky De La Fuente v. Secretary of State* where the Defendant's motion to dismiss was granted. The division also assisted the Board of Regents for the Museum of New Mexico in overseeing the Centennial Capital Campaign, an effort by the New Mexico Department of Cultural Affairs, the Board of Regents and the Museum of New Mexico Foundation to raise \$10 million to renovate the Halpin Building to be a satellite museum to the NM Art Museum.

## KEY OUTCOMES

The Office of the Attorney General issued six advisory letters in 2017 on a variety of topics, including State liability for Brine Well Remediation; regulation of gambling in the Town of Silver City; transfers from the Enhanced 911 Fund; provision of paid leave to a teacher serving as Legislator; and housing infrastructure and the Anti-Donation Clause. Administrators International; Governmental Conduct Act and OMA training at the OAG Community Summit; and the OAG Continuing Legal Education Leadership for Justice Retention Training. Attorneys also provide training and guidance to Division clients on OMA/IPRA, Governmental Conduct Act, State Rules Act, and other applicable state laws.

The Division supervised the production of 77 OMA/IPRA determinations and answered countless phone calls from public officials and members of the public regarding OMA, IPRA, and other aspects of government practice. It provided 12 statewide trainings on OMA/IPRA compliance, traveling to Alamogordo, Los Lunas, Roswell, Santa Rosa, Estancia, Gallup, Farmington, Carlsbad, Albuquerque, and Tierra Amarilla, as well as Santa Fe. Almost 800 people were reached at these events. The Division houses the records custodian for the OAG, who in 2017 received and responded to 480 requests to inspect public records held by the OAG, a 30% increase from last year.

The Division received and approved 33 school bonds, totaling approximately \$118,470,000.00 and reviewed over 100 contracts for Governmental Conduct Act compliance and Legal Sufficiency, in which OAG was a party in 16. The Division also approved five Closing Agreements negotiated by the Taxation and Revenue Department.

Division attorneys also participated in other related trainings, including individual OMA/IPRA trainings to the New Mexico Association of School Business Officials and the Regulation and Licensing Department; individual IPRA trainings to Secretary of State Office, the New Mexico Municipal League, and the New Mexico Chapter of the Association for Records Managers and During the 2017 Legislative Session, Open Government received, routed and administered 424 requests for bill analysis from the New Mexico Legislative Council Service and others, including drafting 41% of the bill analyses for the OAG.

# CONSUMER AND FAMILY ADVOCACY SERVICES DIVISION



*Jenny Lusk, AAG  
CFASD Director*

**The Consumer and Family Advocacy Services Division (CFASD)** closed the year 2017 having worked on problems presented by almost 5,000 separate New Mexico consumers, working to mediate between them and local and national businesses, helping them find other helpful resources and compiling a powerful database of particularized facts and problems available for use by our litigators at the Office of Attorney General.

Attorney General Balderas has made a commitment to New Mexico consumers that his eight-person advocacy staff will respond to most complaints within 72 hours and has pledged that even when his office receives complaints that go beyond the authority and scope of the office, advocates will attempt to link constituents with other agencies.

The Attorney General's Advocacy Division is the first point of contact for all complaints to the Office of Attorney General. Advocates in the Division answer phones, take in walk-in complaints and respond to complaints filed online at [www.nmag.gov](http://www.nmag.gov), examine and refer them to other OAG Divisions including Medicaid fraud, criminal investigation and Open Government. Advocates work daily to get complainants fair sums due to them through inadvertent or knowing business mistakes, to help them access services in a complicated system of government agencies and to find basic information.

## **NEW FOR 2017**

- ◆ In addition to thousands of telephone calls, during Calendar Year 2017 the Division received, resolved or referred more than 4626 different complaints from consumers by the beginning of December. The complaints included hundreds of merchandise quality problems—lumpy mattresses, substandard new appliances, botched roofing jobs and items returned without a promised refund—to problems with burdensome, unfair or high-interest contracts for solar installations, cell and cable television service, timeshares and other maintenance contracts.
- ◆ Tracking scams across the state—from scammers demanding utility payments by wire transfers when they have no connection to the utilities providers to scammers impersonating wire payments from concerned grandparents—the advocates also collect and broadcast alerts on common consumer fraud techniques.
- ◆ The information collected and documented by advocates resulted in a powerful set of consumer complaints against a high-dollar homebuilder and against a fraudulent construction business as well helping to document violations of the State's new Data Breach Notification Act by a credit reporting agency that lost data on 143 million persons and a ride-hailing firm that paid ransom to hackers rather than reporting the breach of some 57 million files. Among other accomplishments, the Attorney General's consumer advocates also persuaded the landlord of an elderly woman in low-income housing to exterminate the bed bugs that plagued his apartment complex, and intervened to get immediate emergency care for a bed-ridden person with a disability whose caregivers left without notice, leaving the person with no way to get to the toilet.

# *Consumer and Family Advocacy Services Division cont'd*

## *NEW FOR 2017*

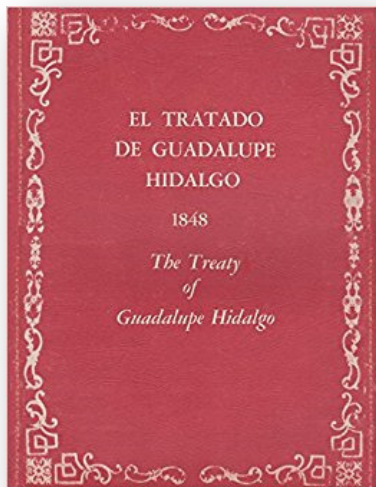
- ◆ By year-end, the advocates were preparing for a significant technology upgrade to aid the Office of Attorney General catalogue, identify and index consumer complaints in a powerful new way. With the new system, effective the first day of 2018, information available through caller ID automatically populates the Attorney General's files, advocates have more uniformity in information gathered so that various consumer complaints can be accurately compared, and web-based complaints are populated by consumers on the spot.

## *KEY OUTCOMES*

- ◆ During the 2017 session, the Office of Attorney General supported the Data Breach Notification Act, sponsored by Rep. Bill Rehm (R-Bernalillo Dist. 31), which passed on its fourth iteration in the New Mexico legislature. Passage of the bill allowed the Attorney General to hold businesses accountable when they collect personally identifiable information but fail to protect the information gathered. Now, New Mexico is among the 48 other states that require timely notification of a breach of personally identifiable information. Because of the passage of the bill now codified at NMSA 1978, Sec. 57-12C-1 through 57-12C-12, for the first time the Attorney General had authority to require timely notification from data collection firm Equifax when some 143 million files were breached. The Attorney General also wrote the ride-hailing firm Uber demanding information on its decision to cover up the breach of some 57 million files rather than to provide legally required notice.
- ◆ The Attorney General's policy shift to emphasize mediation over litigation between consumers and car dealers has had a significant impact in the agency's ability to correct mistakes, right wrongs and prevent lawsuits.
- ◆ Attorney General Balderas established the Immigration Coordinating Council to cope with increasingly vulnerable New Mexico residents and their families. The Council, comprised of representatives of local governments, county detention centers, civil rights and other advocacy and church groups and legal aid organizations, and persons who help African, Asian and Latin American refugees, was responsible for finding support for people in New Mexico facing deportation with the projected demise of the Deferred Action for Childhood Arrivals (DACA) program. Through contacts developed within the Council, the Office of Attorney General was able to identify and enlist the advocacy help of church and university leaders in multi-state litigation challenging the termination of the DACA program without proper notice to the nearly one million recipients of the deferred action status. In addition, the Council identified church and university leaders able and willing to incorporate equal rights protections for DACA recipients into their workplaces.
- ◆ CFASD advocates made themselves available throughout the state to groups of all ages and interests by providing several outreach events and forums during the course of 2017. The Advocates presented to elementary, middle and high school and college students on financial literacy, scams and dating safety as well as appearing at senior centers to warn vulnerable elderly consumers against divulging private financial information requested by scam artists. They presented information on the Attorney General's litigation to persons involved with voter rights and registration, participated with public interest groups to avoid consumer purchasing pitfalls and appeared on television and radio to inform the public of current popular tricks including scams.

# TREATY OF GUADALUPE

## HIDALGO DIVISION



**The Treaty of Guadalupe Hidalgo Division** was created by the New Mexico Legislature in 2003 to “review, oversee and address concerns relating to the provisions of the Treaty of Guadalupe Hidalgo that have not been implemented or observed in the spirit of Article 2, Section 5 of the constitution of New Mexico.” (NMSA 1978 §8-5-18). The Division was formally staffed as of the fall of 2016 through the end of fiscal year 2017. During that period of time, the Division actively reached out to individual land grants throughout the state and the New Mexico Land Grant Council in an effort to develop a work plan to address its statutory mission in support of New Mexico’s community land grants and Acequias who are recognized as a rich and critical part of our State history and remain a vital part of our present day culture.

The Treaty of Guadalupe Hidalgo Division provides legal representation to the New Mexico Land Grant Council and the New Mexico Acequia Association. The Division’s vision is to take a proactive approach to finding solutions and responding to the evolving needs of the Land Grant Community by providing legal support, policy development and outreach.

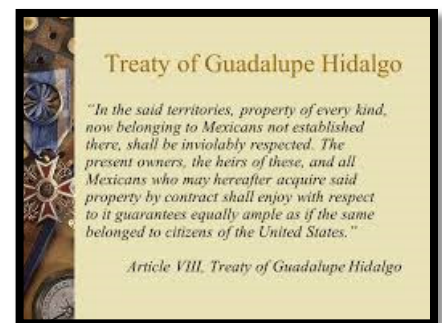
### NEW FOR 2017

#### The Division:

- ◆ Met its goal to build legal and community capacity with the Land Grant Council (NMLCG) by leveraging partnerships, increasing our understanding of the needs of the various land grant communities and developed a knowledge base to begin formulating our legal goals;
- ◆ Performed outreach and attended a multitude of individual community land grant meetings throughout the State;
- ◆ Participated in strategic meetings with members of different community land grants, the NMLGC, state and federal agencies, and representatives of the New Mexico congressional delegation;
- ◆ Actively participated in meetings hosted by the U.S. Forest Service representing the interest of community land grants-Mercedes and acequias during the Carson and Santa Fe Forest Plan Revisions
- ◆ Provided Open Meetings Act and Inspection of Public Records Act training to members of community land grants; and
- ◆ Collaborated with New Mexico Highlands University Southwest Studies Program to educate students on land grants and acequia law. This outreach was extended to students throughout the state.



**Marlo Aragon, AAG  
Open Government**





# Treaty of Guadalupe Hidalgo cont'd

## KEY OUTCOMES

To date, the Division has:

- ♦ met with over eleven (11) land grant communities such as the Cebolleta , Atrisco, Chilili, Santo Domingo de Cundiyo, Cañon de Carnue, Abiquiu, Tierra Amarilla , Tome, Santo Tomas Apostol Del Rio de Trampas, Santa Barbara and Mora;
- ♦ Provided legal research, analysis and review of the Land Grant Support fund contracts awarded by the Land Grant Council which provided direct financial assistance to community land grants;
- ♦ Attended monthly NM Land Grant Council meetings and local land grant meetings.
- ♦ Worked in collaboration with the council to review, analyze and develop state policies, plans and legislation;
- ♦ Reviewed, analyzed and tracked proposed legislation affecting Land Grants and Acequias during the legislative session;
- ♦ Co-sponsored and presented at the State Capitol for the Treaty of Guadalupe Hidalgo Day; and
- ♦ Provided legal research, analysis and oversight of the election process relating to Land Grant Council and Board of trustees.



*La Morada  
Anton Chico Land*



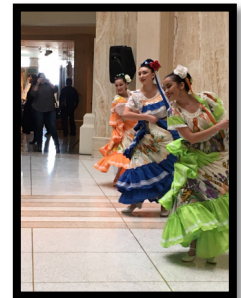
*Anton Chico Land Grant*



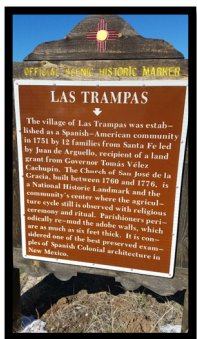
*Old Truchas Mission  
of Holy Rosary  
Built-1764  
Truchas, New Mexico*



*Treaty Day at the  
State Capitol*



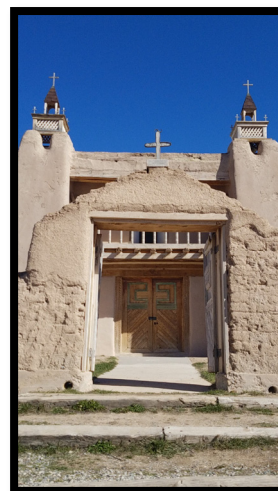
*Treaty Day at the  
State Capitol*



*Las Trampas Official  
Scenic Historical  
Marker*



*Tome Land  
Grant*



*San Jose de Garcia  
Catholic Church*



*Treaty Day at the  
State Capitol*

*Photos courtesy of Britney Martinez*

# CRIMINAL APPEALS

## DIVISION



*Anne Kelly, AAG  
Criminal Appeals  
Director*

**The Criminal Appeals Division** of the Office of the Attorney General represents the State of New Mexico in all cases filed in the New Mexico appellate courts, as well as representing the wardens of various prisons throughout New Mexico in habeas corpus litigation filed by inmates. In addition, the Division represents the wardens in federal habeas corpus litigation. The Division also reviews DNA expungement requests filed by defendants and handles other post-conviction litigation on behalf of the State including requests for DNA testing.

The attorneys in the Criminal Appeals Division routinely consult with and advise various assistant district attorneys around the State. The Division conducts trainings on appellate law and new developments in appellate cases for the District Attorneys' Association and other groups as requested. In 2017, the Division conducted trainings for probation and parole officers, victim advocates, the District Attorneys' Association, and law enforcement.

### **NEW FOR 2017**

- ♦ In mid-2017, the Supreme Court issued new rules to implement the state constitutional amendment that allows pretrial detention of suspects without bond. The Division has been active in litigating the application and contours of the new rules regarding pretrial detention and in defending district court orders to detain suspects without bond. The Division is also represented on the Supreme Court Committee that formulated the rules and that is currently considering amendments to those rules.
- ♦ The Division is litigating two cases on appeal that have highlighted a gap in the juvenile justice system. In both cases, the juvenile was convicted of crimes of extreme violence, but was nevertheless found to be amenable to treatment and therefore could be held under the auspices of the criminal justice system only until the age of 21. Under the current system, a juvenile can be found to be amenable to treatment by one judge at one point in time with no further opportunity for judicial review. This can result in the juvenile being released into the community at 21 years old even if the juvenile has not been fully treated or rehabilitated. The Division is currently seeking to at least have appellate review of these decisions, which can have profound consequences for the safety of the public, as well as the juvenile.
- ♦ The Division also updated a search and seizure manual for the use of lawyers and law enforcement. This manual contains a comprehensive summary of issues relating to search and seizure and the most recent and relevant case law relating to those issues.

# ***Criminal Appeals Division Cont'd***

## ***State v. Benjamin David Baroz III***

### ***New Mexico Supreme Court***

The New Mexico Supreme Court vacated the defendant's felony murder conviction because the predicate felony for the felony murder was shooting at or from a motor vehicle. In *State v. Marquez, 2016-NMSC-025*, the Court held that shooting at or from a motor vehicle is an elevated form of aggravated battery and therefore cannot be a predicate felony for felony murder. However, the Court held Baroz was guilty of second degree murder, even though not charged with that crime, because second degree murder is a lesser included offense of felony murder and there was sufficient evidence for that crime. The Court further held that the district court correctly denied the defendant's self-defense instruction. Finally, the Court upheld the one year firearm enhancement sentence against the claim of double jeopardy. The Court held that legislative intent clearly allows for the enhancement, even if the elements instruction also requires the jury to find a gun was used.

## ***State v. Trevor Begay,*** ***New Mexico Supreme Court***

The New Mexico Supreme Court addressed the meaning of Section 31-20-8 and held that a magistrate court probationer's probation is tolled while the probationer is under a bench warrant. The tolling Section 31-21-15(C), was changed by the Legislature in March of 2016 to include lower court probationers, but the Supreme Court held the issue was still of substantial public interest because it affected a number of cases. The Court agreed with the Office of the Attorney General's argument that allowing a probationer to evade probation and still successfully complete it would be an absurd result.

## ***State v. Carlos Carrillo,*** ***New Mexico Supreme Court***

The New Mexico Supreme Court upheld the defendant's two first-degree murder convictions. Much of the evidence against the defendant was garnered from his cell phone, which both placed him in the area of the murders and showed 75 phone calls between him and one of the victims. The Court held that testimony regarding the call detail report and the cell tower report was testimony regarding the contents and meaning of business records and thus admissible as an exception to the hearsay rule. However, the Court held that further testimony that explains how the cell towers work and how calls can be located would require expert testimony.

## ***State v. Juan Rivas,*** ***New Mexico Supreme Court***

The New Mexico Supreme Court upheld the juvenile defendant's conviction for the stabbing death of an 83-year-old woman. The defendant gave an initial confession to police, after being advised of his rights, and confessed to the crime and said he acted alone. After he was charged, a guardian ad litem was appointed for him, and he gave a second statement giving a different account of the crime saying that others had been involved in the crime. The Court agreed with the Office of the Attorney General that the defendant's statements were properly admitted and that his attorney at trial was constitutionally effective.

## ***State v. Brian Adamo,*** ***New Mexico Court of Appeals***

The Court affirmed the defendant's conviction for possession of child pornography. The evidence showed there were more than 900 downloads of child pornography to the IP address on defendant's computer, that defendant had images of CP on a shared folder on a file sharing network, and an expert was able to

find at least 52 files that had been deleted. The Court held the instructions sufficiently informed the jury of the required mens rea for the crime and rejected the defendant's argument that his deletion of the images meant he could not have possessed them.

## ***State v. Victor Gonzales,*** ***New Mexico Court of Appeals***

The defendant was convicted of criminal sexual contact in metropolitan court and appealed to the district court which affirmed on an on-record review. The Court agreed with the Office of The Attorney General that criminal sexual contact is a crime that, under the applicable statutes, entitles the defendant to only an on-record appeal to the district court. The victim was not related to the defendant in any way, but the Court found that the same principles regarding domestic violence applied.

## ***State v. Benjamin Seigling and*** ***State v. Armando Navarro-*** ***Calzadillas,***

### ***New Mexico Court of Appeals***

The New Mexico court of Appeals considered the intent and meaning of the new case management rule in the Second Judicial District. The Court reversed the district court's orders of exclusion of witnesses and held that Supreme Court authority still binds NM courts to consider lesser sanctions when a party fails to abide by a court order. The Court specifically found that the local rule is not "designed to serve as a technical mechanism by which important witnesses in criminal cases are excluded, core evidence suppressed as a matter of first resort, or cases themselves dismissed with prejudice." However, both cases have been remanded back to the Court of Appeals for a second time to consider the holdings in light of *State v. Ashley LeMier*, in which the Supreme Court upheld a discovery sanction.



# ***Criminal Appeals Division Cont'd***

## ***KEY OUTCOMES***

### ***State v. Marc Tapia,***

#### ***New Mexico Court of Appeals***

In an unpublished opinion, the Court of Appeals affirmed the defendant's convictions for trafficking by prostitution. This case was investigated and prosecuted at the trial court level by the Office of the Attorney General, as part of an office-wide effort to bring human traffickers to justice. The Court of Appeals rejected the defendant's claim of a speedy trial violation and other trial errors in affirming the defendant's conviction and sentence.

### ***State v. Juan Torres Santos,***

#### ***New Mexico Court of Appeals***

Defendant, a pediatrician, was convicted of one count of sexual exploitation of children by possession. He claimed there was insufficient evidence that he intentionally possessed child pornography because he deleted the files after watching them. The Court held the defendant possessed the files by downloading, viewing, and deleting the videos on his computer. The Court also held that it was not error for the State to be allowed to show the videos, despite the defendant's offer to stipulate that they constituted child pornography.

The videos were probative of defendant's intent and to refute his claim that he viewed them only for medical research. This case was jointly investigated and prosecuted at the trial court level by the Office of the Attorney General.

### ***Habeas Corpus and Post-conviction Litigation:***

#### ***Curtis Bloomfield v.***

#### ***Manuel Pacheco,***

#### ***Warden Second Judicial District Court***

Bloomfield pleaded guilty to five counts of first-degree murder and was sentenced to five consecutive life sentences. He filed a habeas corpus petition, claiming that the plea agreement was impacted by prosecutorial misconduct, that he had been promised out-of-state incarceration, and that his attorney was ineffective. The Office of the Attorney General argued that his petition had no merit and that his attorney gave him effective assistance throughout the plea process. The district court agreed and dismissed his petition without a hearing. The New Mexico Supreme Court denied his petition for writ of certiorari in 2017.

### ***Joel Ira v. Paul Janecka,***

#### ***New Mexico Supreme Court***

Ira was convicted in 2002 of multiple brutal acts of rape against his young stepsister. He was sentenced as an adult to consecutive sentences totaling 91 ½ years. In 2015, he pursued a petition for writ of habeas corpus which was denied by the district court. The Office of the Attorney General is currently litigating the issue on certiorari review in the New Mexico Supreme Court arguing that his sentence is not unconstitutional under new United States Supreme Court authority.

### ***State v. New Mexico v.***

#### ***Jacob Duran,***

#### ***Second Judicial District Court***

The Office of the Attorney General is defending a 30-year old murder conviction against petitioner's argument under a 2003 statute that allows for post-conviction DNA testing. The district court granted the petitioner's request for DNA testing on four items of surviving evidence. The results of that testing are not sufficiently exculpatory to warrant relief under the statute. The case is pending in the district court.

## ***2017 Criminal Appeals Accomplishments:***

- ◆ Filed 236 briefs in the New Mexico Court of Appeals and Supreme Court.
- ◆ Filed 48 memoranda in opposition to the Court of Appeals' summary calendar .
- ◆ Conducted 18 oral arguments in the New Mexico Court of Appeals and Supreme Court.
- ◆ Filed 85 petitions for writ of certiorari or responses thereto, and responses to other petitions for extraordinary relief in the New Mexico Supreme Court.
- ◆ Reviewed 12 DNA expungement requests from defendants.
- ◆ Filed 20 responses to appeals regarding pretrial release or denial thereof in the New Mexico Court of Appeals and Supreme Court.
- ◆ Filed 8 other substantive motions in the appellate courts.
- ◆ Conducted 57 hearings in state district court related to habeas corpus litigation and other claims for post-conviction relief.
- ◆ Filed 57 responses or briefs in state district court.
- ◆ Filed 20 answers in federal district court related to federal habeas corpus litigation



# MEDICAID FRAUD CONTROL DIVISION



*Patricia Padrino, AAG  
Medicaid Fraud Control  
Division Director*

**The Medicaid Fraud Control Division (MFCD)** at the Office of the Attorney General implemented a proactive fraud detection approach and obtained a Data Mining Waiver from the federal government, which now allows the Division to directly review Medicaid claims and proactively identify and thwart Medicaid Fraud. The Division's mission is to maintain the integrity and solvency of the Medicaid Program and protect the most vulnerable members of our community from physical or financial harm in New Mexico care facilities.

The Division is uniquely able to investigate these complex cases due to its interdisciplinary personnel structure, which includes attorneys, financial investigators, medical investigators, special agents, IT professionals and legal staff. Unlike some of the other criminal Divisions within Criminal Affairs, the MFCD is able to pursue both criminal and civil actions to fulfill its mission.

## **NEW FOR 2017**

- ♦ **Proactive Fraud Detection and Collaboration:** In July of 2017, Attorney General Balderas hosted stakeholders, including top CEOs from Managed Care Organizations, Cabinet Secretaries and leaders from Executive Agencies and other partners to begin a collaborative dialogue on working together to combat Medicaid Fraud and ensure that these valuable funds were going to the vulnerable populations who rely on them. The Division also launched a public awareness campaign aimed at educating the public to identify signs of Medicaid Fraud and abuse and exploitation in New Mexico care facilities. The campaign includes Public Service Announcement's running throughout New Mexico and handouts to be used at community awareness events.
- ♦ **Data Mining Waiver:** On May 11, 2017, as provided under Federal regulations at 45 CFR §1007.20 (a), the Department of Health and Human Services Office of the Inspector General approved the Medicaid Fraud Control Division's application to conduct data mining. The approval signifies a significant expansion of the Division's authority to conduct proactive investigations in a manner that was previously prohibited.
- ♦ **Intra-Agency Coordination:** Two large scale law enforcement operations were conducted in 2017. The Division demonstrated an ability to partner with local and federal partners and other state agencies to ensure successful operations at multiple locations throughout the state resulting in the seizure of valuable evidence currently being utilized to further investigations intended to protect Medicaid for those vulnerable populations who rely on those resources.

# Medicaid Fraud Control cont'd

## MFCD's 2017 Notable Criminal and Civil Cases

### ***Kathryn Bogin***

Kathryn Bogin moved to Silver City to take care of her dying father. Her father received Medicaid money through Mi Via to provide for personal care services. Kathryn Bogin was her father's Power of Attorney and as the Employer of Record orchestrated a team of at least 5 caregivers in August of 2011. Her father died on September 29, 2011; however, Defendant continued to sign and submit 11 timesheets on behalf of the 5 caregivers after his death. The total amount of Medicaid money paid out after his death is \$7,049.60 based on submission of 11 falsified timesheets. A Plea and Disposition agreement was filed on March 20, 2017, in Silver City for one count of Medicaid Fraud, NMSA 1978 §30-44-7(A)(3), a fourth degree felony offense.

### ***Bertha Martell***

Bertha Martell was a personal care provider employed by Med-Care Personal Assistance in Las Cruces. Martell was hired to provide care to an individual who was incarcerated on three separate occasions from April 2013, through August 2015. During this period of incarceration, Martell is alleged to have submitted 17 falsified timesheets. A Grand Jury Indictment was filed on February 9, 2017, for one count of Medicaid Fraud, NMSA 1978 §30-44-7(A)(3), a fourth degree felony offense, and 17 counts of Falsification of Documents, NMSA 1978 §30-44-4(A)(2), a fourth degree felony offense. A Plea and Disposition agreement was filed on November 28, 2017, in Las Cruces, for one count of Medicaid Fraud and nine counts of Falsification of Documents.

### ***Eileen Avina***

Eileen Avina was a home health care provider. Avina stopped providing care to her client on October 7, 2014, after telling the client that she

wanted to take time off, yet Avina is alleged to have continued to submit timesheets purporting to render home health care to the client. A Grand Jury Indictment was filed on April 13, 2017, for one count of Medicaid Fraud, NMSA 1978 §30-44-7(A)(3), a fourth degree felony offense, and 12 counts of Falsification of Documents, NMSA 1978 §30-44-4(A)(2), a fourth degree felony offense. This matter is pending trial.

### ***Mary Helen Hernandez***

Mary Helen Hernandez submitted timesheets claiming she had provided personal care services to her relative when the relative had been admitted as an inpatient at the hospital. A Plea and Disposition agreement was filed on April 24, 2017 in Carlsbad for one count of Medicaid Fraud, NMSA 1978 §30-44-7(A)(3), a fourth degree felony offense.

### ***JL Jones***

JL Jones was a personal care provider employed by K-Bee Homecare Services in Clovis. JL Jones was hired to provide services for a Medicaid consumer who ultimately became incarcerated. While the consumer was incarcerated, JL Jones still submitted timesheets for payment indicating that personal care services had been provided. On August 25, 2017, the Curry County Grand Jury indicted JL Jones on 1 count of Medicaid Fraud, NMSA 1978 §30-44-7(A)(3), a fourth degree felony offense, and five counts of Falsification of Documents, NMSA 1978 §30-44-4(A)(2), fourth degree felony offenses. It is anticipated that JL Jones will plead guilty to one count of Medicaid Fraud and one count of Falsification of Documents on January 3, 2018.

### ***Aamann Personal Care Services/ Dennis Minidis***

Dennis Minidis owned and operated Aamann Personal Care Services, a PCO services provider. Minidis overbilled Medicaid for multiple consumers, including consumers who had transferred to different agencies, for a consumer residing in a rehabilitation facility, and for a consumer who was already deceased. A civil complaint was filed on August 24, 2017. Defendants failed to respond, and the District Court in Albuquerque entered a default judgment in the amount of \$53,692.66.

### ***Qui Tam Cases***

In 2017 The Medicaid Fraud Control Division obtained settlements in several Qui Tam cases that were resolved successfully. These recovered funds were returned to the federal Medicaid Program to continue to support the vulnerable populations that rely on the Medicaid Program and portions of these settlements constituting the state match were returned to the State General Fund.

### ***El Paraiso***

PCO services provider, El Paraiso Management Services and owner Grace Aragon were accused of submitting billing for the services of a caregiver that no longer worked for El Paraiso. When El Paraiso was reimbursed for these services, they did not pay the caregiver, but instead retained the payment themselves. El Paraiso and Grace Aragon entered into a settlement agreement with the MFCD in the amount of \$7,441.38 to resolve the dispute, and for an additional \$3,000.00 for the investigative costs of MFCD.

# Medicaid Fraud Control cont'd

## MFCD's 2017 Notable Criminal Indictments

### ***Rick Romero***

This referral was received from the New Mexico Human Services Department, which in turn received this referral from Options Home Care. The referral alleged that Rick Romero was billing the Medicaid program for care provided to Romero's relative for times that Romero was actually working as a Taos County Sheriff's Deputy. The Division completed its investigation and a Grand Jury Indictment was filed on April 6, 2017 in Taos for one count of Medicaid Fraud, NMSA 1978 §30-44-7(A)(3), a fourth degree felony offense, 10 counts of Falsification of Documents, NMSA 1978 §30-44-4(A)(2), a fourth degree felony offense, and 10 counts of Perjury, NMSA 1978 §30-25-1, a fourth degree felony offense. This matter is pending trial.

### ***Elizabeth Martinez***

Elizabeth Martinez was a personal care provider employed by Amber care in Las Cruces. During her time of employment, she is alleged to have submitted six different timesheets for services that were never provided. She also clocked in and out indicating that she was at her client's residence, despite GPS data showing that she was not actually at his home. On September 7, 2017, she was indicted by the Dona Ana County Grand Jury on two counts of Medicaid Fraud, NMSA 1978 §30-44-7(A)(3), fourth degree felony offenses, 6 counts of Falsification of Documents, NMSA 1978 §30-44-4(A)(2), fourth degree felony offenses, and 1 count of Computer Access with Intent to Defraud or Embezzle, NMSA 1978 §30-45-3(A), a petty misdemeanor offense. This matter is pending trial.

### ***Maurena Spurlin***

Maurena Spurlin was employed as a personal care provider to consumer Daniel Spurlin through Adaptive Care Personal Services in Los Lunas. During the hiring process, Maurena portrayed herself to Adaptive as Maurena Stull due to regulations that prohibit a spouse from providing personal care services to a consumer. During her period of employment she submitted 40 timesheets under the name Maurena Stull, despite the fact that she was married to the consumer and portrayed herself elsewhere as Maurena Spurlin. On October 5, 2017, Maurena Spurlin was indicted by the Valencia County Grand Jury on one count of Medicaid Fraud, NMSA 1978 §30-44-7(A)(3), a fourth degree felony offense, and 2 counts of Falsification of Documents, NMSA §30-44-4(A)(2), fourth degree felony offenses. This matter is pending trial.

### ♦ 4 Civil Qui Tam

### **Total Medicaid Recovery \$4,560,582.80**

Criminal: \$8,738.97

Civil Non-Qui Tam: \$617,677.35

Civil Qui Tam: \$3,934,166.56

### **17 Search Warrants**

### **44 Regulatory Document Demands**

### **140 Case Referrals (to outside agencies, such as Department of Health and Adult Protective Services)**

### **3 Trainings Conducted**

### **7 Outreach Presentations**

### **Medicaid Fraud Control Division's 2017 Stats**

#### **222 Total Open Cases**

- ♦ 62 Criminal
- ♦ 22 Civil Non-Qui Tam
- ♦ 138 Civil Qui Tam

#### **456 New Referrals received**

- ♦ 44 Criminal
- ♦ 8 Civil Non-Qui Tam
- ♦ 8 Civil Qui Tam
- ♦ 6 Indictments
- ♦ 3 Convictions
- ♦ 60 Cases Opened

#### **14 Civil Actions (Settlements/ Judgments)**

- ♦ 5 Civil Non-Qui Tam
- ♦ 9 Civil Qui Tam
- ♦ 24 Total Closed Cases
- ♦ 13 Criminal
- ♦ 7 Civil Non-Qui Tam

# Medicaid Fraud Control cont'd

## MFCD's Notable Civil Litigation Pending Trial

### *Nursing Home Litigation*

In *State v. Preferred Care, et al.*, the Attorney General is pursuing a fraud case against a chain of nursing homes and their owners and operators from 2007-2012, for billing for care that was not, and could not have been provided. The case arose from numerous complaints from facility employees, residents, and their family members to the Attorney General. Interviews with witnesses and a review of documents presented by the Defendants to the government for payment, all confirm chronic understaffing of the Defendant Nursing Facilities and their failure to provide the Basic Care services that they were paid to provide, including toileting assistance, incontinence care, transferring to and from wheelchair and bed, dressing and personal hygiene, bathing, turning and repositioning, feeding assistance, and range of motion exercises.

Cathedral Rock Corporation sold its New Mexico nursing facilities in 2012 to Texas-based Preferred Care, Inc., following Cathedral Rock's plea bargain and civil settlement of False Claims Act litigation involving its Missouri nursing facilities. The New Mexico facilities have generated hundreds of millions of dollars in revenue since Preferred Care took over, nearly 80% of it paid by Medicare and Medicaid. Many of the services billed and paid for were not provided or were fundamentally worthless.

The nursing facilities completed, certified, and submitted a Minimum Data Set (MDS) for each resident. In the MDS, the Defendant Nursing Facilities assessed the needs and basic care required by each resident, and additionally certified that the level of care required was provided. Using the certified MDS data and nursing homes' own staffing data, the State was able to calculate the number of hours needed to provide the care the residents needed. The results showed it was mathematically and physically impossible for Defendant Nursing Facilities to provide the care they claimed to provide.

Dozens of witnesses have come forward with specific accounts of the impact of short staffing on residents, including residents being left in their own waste for long periods, residents not receiving adequate baths or assistance with personal hygiene, residents falling when they attempted to go to the bathroom on their own because no help was available, and residents not being able to get sufficient foods or liquids because no one was available to help them.

The State seeks to recover damages and civil penalties under the New Mexico Fraud Against Taxpayers Act (FATA), NMSA 1978 §§ 44-9-1 to 44-9-14, New Mexico Medicaid Fraud Act, NMSA 1978 §§ 30-44-1 to 30-44-8, New Mexico Unfair Practices Act (UPA), NMSA 1978 §§ 57-12-1 to 57-12-26, for breach of contract, unjust enrichment, and punitive damages.

In July of 2017, several entities associated with the Cathedral Rock Corporation filed for bankruptcy. These entities are named Defendants in the State of New Mexico's case. Notably however, owner C. Kent Harrington – a named defendant in the State case – has not filed for bankruptcy. This bankruptcy filing created a temporary stay in the State of New Mexico's case, while the Court considers the parties' briefing regarding which Defendants should be included in the stay.

On November 14, 2017, several entities associated with Preferred Care, Inc., who are also Defendants in the State's case, filed for bankruptcy. However, the owner of the corporation, Thomas Scott, has not filed for bankruptcy.

The MFCD is working to represent the state's best interest in the bankruptcy proceedings, and is continuing to pursue a lift in the bankruptcy stay associated with both sets of Defendants. The Division intends to pursue every available remedy to protect the interests of the vulnerable nursing home residents and the citizens of New Mexico.



# VICTIM SERVICES UNIT



*Kathleen Carmona,  
Victim Services Unit  
Manager*

**The Victim Services Unit (VSU)** serves all of the Criminal Affairs Divisions and is staffed by two fulltime victim advocates that are committed to offering resources and support to victims of crime and their families. The VSU works diligently to assist victims of crimes as they navigate the criminal legal process. The Office of the Attorney General recognizes the importance of victims' rights and is committed to working proactively to ensure that those rights are upheld throughout the criminal legal process. The goal of the Unit is to provide comprehensive services in a competent, sensitive, and professional manner. The Office of the Attorney General also recognizes the value of preventing victimization and decreasing criminal behaviors through a holistic approach that includes education, outreach, harm reduction, and access to services. The VSU also responds to mass casualty incidents throughout the state to assist local law enforcement and victim service providers in crisis situations. The VSU relies on a network of service providers across the state to whom victims may be referred for services that fall outside the scope of what the Office of the Attorney General can provide.

## ***NEW FOR 2017***

- ◆ Throughout 2017 the VSU provided assistance and notification to victims/survivors of violent crime, including information regarding medical and crisis intervention services and other case information. Furthermore, the VSU provided notification and assistance to victims and their families during the often lengthy appellate process, including notification of appeal status and accompaniments to scheduled arguments and proceedings.
- ◆ In addition to providing assistance to victims of violent crime and providing information about the appellate process, VSU is also a part of five monthly multi-disciplinary teams (MDT) and three quarterly MDTs. These MDTs span from Taos County to Dona Ana County. With additional

## ***KEY OUTCOMES***

- ◆ Received 454 intake calls from victims and/or constituents who were seeking information, referrals, or services.
- ◆ Mailed 216 notifications to victims related to cases in the New Mexico Court of Appeals.
- ◆ Attended 5 adult sex offender parole board hearings on behalf of victims and/or their families .
- ◆ Assisted 89 victims or victims' family members in cases being prosecuted by the New Mexico Office of the Attorney General.
- ◆ Attended 7 oral arguments on behalf of victims and/or families.
- ◆ Conducted 3 presentations titled, "Victim Services" What we do, and how we can work together. One training titled, "Crime scene safety, making death notifications, and dealing with the media while on scene with multi-disciplinary teams", which consists of law enforcement and victim service providers.
- ◆ Responded to 3 mass casualty situations throughout the state.

# FINANCIAL CONTROL DIVISION



**Natalie Cordova**

Natalie obtained her bachelor's degree from New Mexico State University in Accounting and Economics in 2004 and is an actively licensed Certified Public Accountant (CPA).

*Financial Control Division  
Chief Financial Officer*

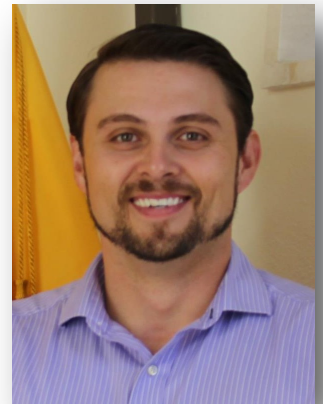
## *FCD Team*



*Teresa Storey,  
FCD Director*



*Nick Eckert,  
Grants Manager*

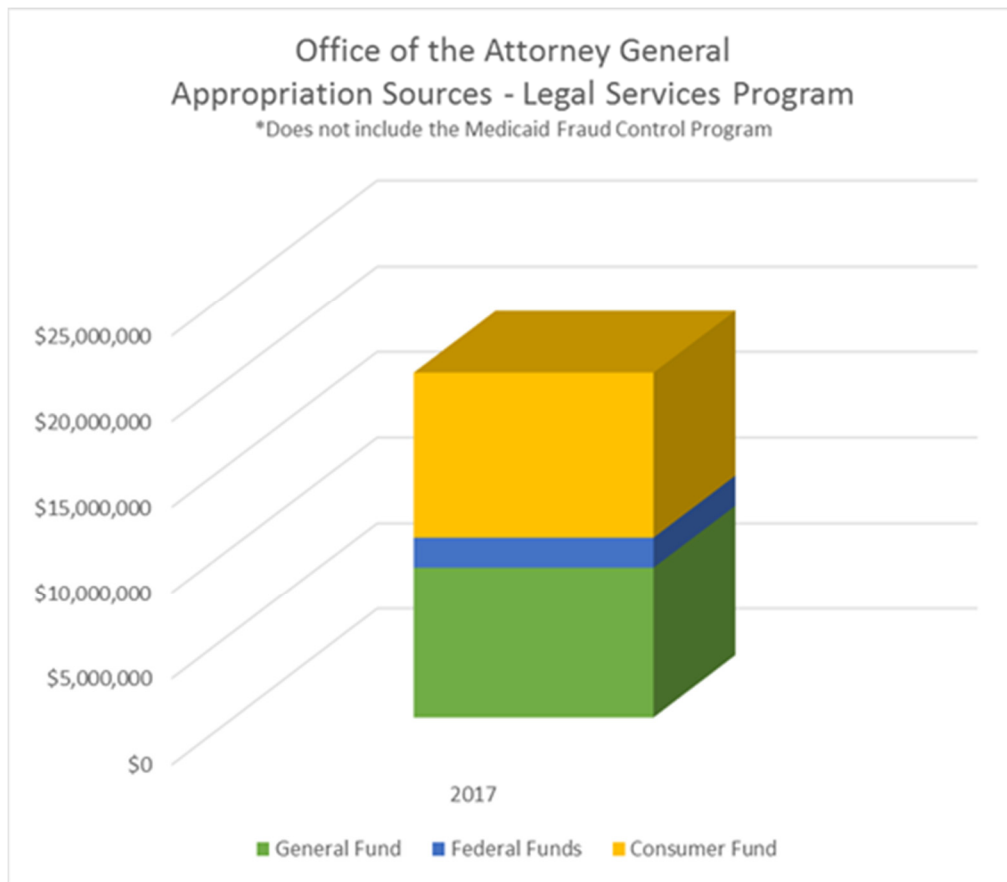


*Karlo Cantu,  
Fleet & Facilities  
Director*

# FINANCIAL CONTROL DIVISION

## Total Fiscal Year 2017

Appropriation: approximately \$22 million  
Federal Funding: approximately \$4 million  
Special Appropriation: \$1 million  
Appropriated Employees: approximately 200



## FCD OVERVIEW

In the most recent fiscal year 2017, NMOAG's external audit received an unmodified (clean) opinion. Zero findings were identified with its state and federal audit.

The New Mexico Office of the Attorney General had a successful FY17 through the oversight of several federal grant programs. In total, over \$4 million of federal money was utilized to support essential programs and staff which include:

- ♦ Internet Crimes Against Children (ICAC)
- ♦ Medicaid Fraud Control Unit (MFCU)
- ♦ Enhanced Collaborative Model (ECM) Human Trafficking Task Force
- ♦ Traffic Safety Resource Program
- ♦ Teen Dating Violence Coordinator
- ♦ Southwest Border Anti-Money Laundering Alliance (settlement funds, not a federal award)

# EXECUTIVE STAFF



***Matt Baca,  
Senior Counsel***

Matt received his B.A. in Organizational Communication from Pepperdine University in 2004 and his Juris Doctorate from the University of New Mexico in 2012.



***Ken Stalter,  
General Counsel***

Ken obtained his B.A. from Cornell University in 2004 and his Juris Doctorate (J.D.) from Harvard Law School in 2008.



***Julia Anderson,  
Policy Director***

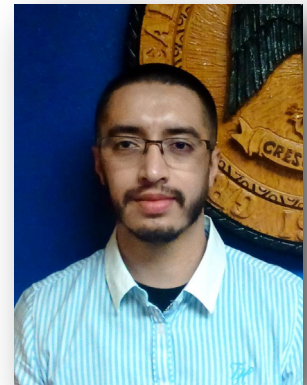
Julia received her B.A. in Sociology/Political Science from the University of New Mexico in 2012 and her Masters in Public Policy & Administration from Northwestern University in 2017.



***Victoria Bransford,  
Administrative Assistant***



***Joshua Hawkes,  
Special Agent for In-  
telligence and Digni-  
tary Protection Unit***



***Richard Gonzales,  
Special Projects  
Coordinator***



# INFORMATION TECHNOLOGY DIVISION



*Scott Stokes,  
Chief Information Officer*

**The Information Technology (IT) Division** safeguards and manages the Information Technology infrastructure and provides service to all employees of the Office of the Attorney General (OAG). The OAG IT Division goals are to:

- ◆ Support the mission and vision of the Office of the Attorney General;
- ◆ Protect New Mexicans;
- ◆ To lead innovatively through technology by proactively finding solutions and responding to the evolving technological needs of the agency.

Investments in information technology are driven principally by the desire to improve the way work is done; to improve decision making; to adhere to various laws, regulations, standards and policies; and to help the agency manage its risks.

In 2017, the OAG devoted substantial resources to the area of Information Technology, updating hardware and software to allow the OAG to work at the forefront of technology. The Information Technology Division pursued the goals of efficiency, security and modernization of the Office's Information Systems.

# TRAINING AND PROFESSIONAL DEVELOPMENT DIVISION



*Tamarra Howard,  
Training & Professional  
Development Director*

**The Training and Professional Development Division** is responsible for the development, implementation and monitoring of training programs within a diverse organization. The Division is responsible for building solid cross-functional relationships within the agency and:

- ◆ Facilitates and tracks continuing legal education (CLE);
- ◆ Provides leadership development education;
- ◆ Provides logistical support, course development, delivery, evaluation, process measurement, and cost management;
- ◆ Evaluates needs of the agency and plans training programs accordingly;
- ◆ Performs frequent local and nationwide research in order to find the most applicable training at little or no cost to the OAG; and
- ◆ Serves as a faculty member for the National Attorneys General Training and Research Institute assisting with developing training goals to ensure the OAG is equipped with education that furthers its ability to support the OAG and its mission; and
- ◆ Ensures mandatory trainings including OSHA, Civil Rights and ADA.

# EXECUTIVE SERVICES

## DIVISION



***Michelle Garrett,  
Executive Services Director***

**The Executive Services Division (ESD)** focuses on improving and maintaining operational excellence by helping the agency to eliminate duplication, waste and inefficiencies. The Division reports to the Deputy Attorney General and acts independently to initiate, implement and document operational excellence activities and coordinate, plan, document and fully manage the implementation of those activities. The Division maintains versatility and responds positively to periodically shifting of project focus and recognition of the importance of maintaining team flexibility vital for success of the OAG.

The primary responsibility of the Executive Services Division is to achieve a comprehensive understanding of all the agency's operations including each Division's connectivity and interdependency. ESD works in collaboration with IT and the functional Divisions in order to be successful.

The Division is heavily involved and focuses on operational excellence through the implementation of new processes, design, and opportunities. Most importantly, the Division helps develop the blueprint for successful implementation that is broadly applied to various initiatives and new agency endeavors.



*Albuquerque Plaza office move*



*Grand Opening of the new Santa  
Fe office storefront*



*Team Leasing Initiative Award*



*2017 Recognition Awards Ceremony  
for successful completion of the Albuquerque Plaza  
Office remodel and move*



*Villagra window & building  
restoration project*



*Albuquerque Plaza remodel and moving  
team: Daniel Rodarte, James Maddox,  
Scott Stokes, Tamarra Howard, Edgar  
Resendiz, Matt Bustos*

# COMMUNICATIONS & HUMAN RESOURCE DIVISIONS



*James Hallinan,  
Communications Director*

**The Communications Division** is focused on transparently informing New Mexicans, communicating quickly and accurately with the media while protecting the integrity of ongoing investigations and litigation, and assisting local law enforcement agencies and municipalities to better communicate with their constituents. In a marked budget decrease from the previous administration, the Division is staffed by only one employee who ensures New Mexicans in all corners of the state are aware of the services available and actions taken by the Office of the Attorney General on their behalf. The Communications Division trains and assists public information officers around the state and supports Joint Information Centers (JICs) during emergencies in New Mexico offering crisis communications expertise to ensure the public is properly informed in a timely fashion to ensure its safety.



*Valerie Martinez,  
Human Resource Director*

**The Human Resource Division** is focused on its employees, who are among the Office of the Attorney General's most valuable and valued resources.

In an atmosphere where we serve and protect New Mexicans, OAG employees are responsible for honorably carrying out the constitutional and statutory responsibilities of the Attorney General. We are proud of our employees, all of whom maintain the highest level of integrity as they perform their job duties.

We are committed to attracting and retaining the best and brightest in the workforce in order to support our mission of excellence.

At the Office of the Attorney General, we aspire to provide a positive work environment that respects all individuals and encourages excellent work performance and high morale. We provide comprehensive benefits that help employees achieve work-life balance and strive to offer programs and services that promote the Office of the Attorney General's commitment to affirmative action, equal employment opportunity, diversity, and inclusion.



# *The New Mexico Office of the Attorney General*



For more information on the New Mexico Office of the Attorney General visit: [www.NMAG.gov](http://www.NMAG.gov)

**Acknowledgments:** Teams and collaboration make it happen at NMOAG—thank you to Scott Stokes, CIO of the IT Division for software printing expertise; authors and editors Jenny Lusk, CFASD Director and Tamarra Howard, T&PD Director; Britney Martinez, Administrative Assistant for photos and to all the individuals who contributed content to this document.

**Editor's Note:** *I hope you will find our Annual Report informative and useful. As you read this report and note the accomplishments and services enumerated herein, the delivery of which are carried out daily by team members whose skills and commitment make NMAG the great agency it is today. I am privileged and honored to be one of the many team members contributing to our success. If you have any questions or comments regarding this document, please contact:*

Michelle Garrett  
Executive Services Director  
Office of the Attorney General  
201 Third Street NE,  
Albuquerque, NM 87102.



STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

TANIA MAESTAS  
Deputy of Civil Affairs

SONYA CARRASCO-TRUJILLO  
Chief of Staff for Policy and Public Affairs

SHARON PINO  
Deputy of Criminal Affairs

January 30, 2017

Hon. Cathrynn N. Brown  
N.M. State Representative, Dist. 55  
1814 North Guadalupe  
Carlsbad, New Mexico 88220

Re: Opinion Request - State Liability for Brine Well Remediation

Dear Representative Brown:

This Office has completed its review of the questions raised in your October 19, 2016 request for an Attorney General opinion relating to House Bill 112 ("HB 112"), introduced during the 2016 regular legislative session and endorsed by the Interim Radioactive and Hazardous Materials Committee. HB 112 proposed creation of the Carlsbad Brine Well Remediation Authority ("CBWRA") to oversee and coordinate remediation of a Carlsbad brine well.<sup>1</sup> Specifically, you have asked:

- (1) whether the State of New Mexico, by creating a political subdivision for the purpose of remediating the site, would assume liability directly or indirectly for any portion of potential damages resulting from its efforts;
- (2) what the federal bankruptcy code says about liability of the owner of record for the brine well, considering its status under the present stage of Chapter 7 proceedings;
- (3) what the further liability is, if any, of the owner of record under the current stage of the bankruptcy case; and
- (4) how the departments and agencies of the state and political subdivisions are insured.

For purposes of this analysis, we grouped questions (1) and (4) as a discussion of the State's potential liability and questions (2) and (3) as a discussion of the liability of the owner of record, given its status in Chapter 7 bankruptcy. Based on our examination of the state constitution, statutes, case law and other information available to us at this time, we conclude that in creating "a political subdivision of the State," the State generally would be immune from liability for attempts to remediate the Carlsbad brine well, unless it expressly waives immunity; and while I&W, Inc., the owner of record, remains liable, it likely is unable to pay any damages assessed against it.

---

<sup>1</sup> An underground cavern created by the brine well operation is reported to be nearing collapse at 3005 S. Canal Street in Carlsbad.

## I. POTENTIAL STATE LIABILITY

The New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -30 (1976, and as amended through 2015) (“TCA”), was enacted in response to the judicial abrogation of sovereign immunity. *Board of County Commissioners v. Risk Management Division*, 1995 -NMSC- 046, ¶11, 120 N.M. 178, 180 (1995) (citation omitted). It restores government immunity while simultaneously creating specific exceptions for which the government might be sued. *Id.* Section 41-4-4(A) of the TCA provides government entities and public employees acting within the scope of their duties with immunity from liability for any tort, except as waived in specific sections of the TCA. *Bierner v. City of Truth or Consequences*, 2004-NMCA-093, ¶10, 136 N.M. 197. Courts have validated such State limitations, citing the legislative declaration in §41-4-2(A) that “the area within which the government has the power to act for the public good is almost without limit, government should not have the duty to do everything that might be done.” *See Marrujo v. New Mexico State Hwy. Transp. Dept.*, 1994-NMSC-116, ¶ 22, 118 N.M. 753.

Under the TCA, a “governmental entity” means “the state or any local public body” as further defined in the TCA. §41-4-3(B). “State” or “state agency” means “the state of New Mexico or any of its branches, agencies departments, boards, instrumentalities, or institutions” and “local public body” means “all political subdivision of the state and their agencies, instrumentalities and institutions and all water and natural gas associations organized under” certain statutes. §41-4-3 (H) and (C). Assuming that the CBRWA is expressly created as a governmental entity, whether as a state agency or a local public body, it will fall under the State’s umbrella of sovereign immunity, except as waived by the TCA. To ensure that the CBRWA shall not be liable for any tort associated with its efforts to remediate the Carlsbad brine well, legislation creating the CBRWA “as a political subdivision of the state” also should provide that “nothing in the [proposed legislation] shall be construed as a waiver or alteration of the immunity from liability granted under the Tort Claims Act and/or as a waiver of any other immunity or privilege under law,” as stated in other provisions of law. *See, e.g.,* § 12-12-20 (2005) of the Hazardous Materials Emergency Response Act.<sup>2</sup>

With respect to insurance for state agencies and political subdivisions of the State, the Risk Management Division of the New Mexico General Services Department (the “Division”) is charged with ensuring that the State has adequate financial protection against tort and other claims. The Division procures insurance against successful claims made against the State, § 15-7-1 (E) (1996), and may provide such coverage for local public bodies, § 41-4-3 (2015), through multi-line insurance coverage. The Division assesses payments from state agencies and cooperating local public bodies, § 15-7-2 (1989), to pay for the insurance coverage it procures and it may transfer funds to maintain financial stability and liquidity of fund, § 15-7-11 (2013). Additional risks may be borne by state agencies and participating educational entities or paid through reserve funds

---

<sup>2</sup> Other statutes limiting the State’s liability for remediation efforts include the Orphan Materials Recovery Fund, § 12-12-29 (2005) (allowing the State board of finance to disburse additional funds when and if the costs of disposing hazardous materials exceeds the fund balance available); the Good Samaritan law, §12-12-28, (exempting most persons from liability for mitigating or attempting to mitigate the effects of an actual or threatened release of hazardous materials); and the Emergency Petroleum Products Supply Act, § 12-12-16 (2005) (limiting punitive damages to three times the amount of actual damages for a willful violation of the Act), among others.

comprised in part from assessments to government entities, *e.g.*, the public property reserve fund, § 13-5-1 (E) (2000). The Division also insures the State against liabilities that are commercially uninsurable through creation of a “liability fund” to which participating entities contribute, proceeds from which may be pro-rated if a claim threatens to exhaust the fund in any single fiscal year. § 41-4-25 (1989).

The Division’s coverage also is limited by exclusions for punitive damages, fines, penalties and sanctions as detailed in a Letter of Administration and Certificate of Liability, which may be reviewed at [http://www.generalservices.state.nm.us/riskmanagement/Resources\\_1.aspx](http://www.generalservices.state.nm.us/riskmanagement/Resources_1.aspx).

#### **I. POTENTIAL LIABILITY OF I & W, Inc.**

Under the U.S. Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, the last owner of record of the Carlsbad brine well, I & W, Inc., remains liable for any damages associated with the sinkhole created by the brine well. Generally, in a Chapter 7 liquidation, 11 U.S.C. §§ 701-766 (1982 & Supp. IV 1986), the assets of the debtor are converted to cash and then distributed to creditors. The Chapter 7 Trustee may “abandon” remaining property that burdens the estate or that is of inconsequential value. Property not otherwise administered at the time of the closing of a case is abandoned to the debtor. 11 U.S.C.A. § 554.

I & W’s Chapter 7 bankruptcy proceeding was made final as of October 21, 2014, after a final decree was entered, the corporate bond cancelled, and the bankruptcy case closed. *See In re: I & W, Inc.*, EIN 85-0129678 (Bankr. D. N.M.), Case No. 7-10-12366-JA. We understand that during the bankruptcy proceeding the Chapter 7 Trustee converted I & W assets to cash, except for the Canal Street property, which not surprisingly was unmarketable as a result of the sinkhole and its associated dangers. *See Trustee’s Final Report, In re: I & W, Inc.*, EIN 85-0129678 (Bankr. D. N.M.), Case No. 7-10-12366-JA, Doc. # 254. Thereafter, the Canal Street property was deemed abandoned by the bankruptcy estate when the case closed in 2014, and full ownership reverted to I & W, Inc., where it remains as the corporation’s only asset. *Id.* Eddy County assessed no value for the property “due to sink hole” as of August, 2016. Eddy County Assessor Book 231, Page 857. The corporation, though not immune from suit, has no marketable assets from which recovery may be made.

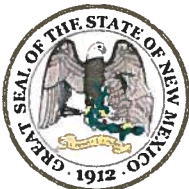
If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General’s opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,



Jennie Lusk  
Assistant Attorney General

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

TANIA MAESTAS  
Deputy of Civil Affairs

SONYA CARRASCO-TRUJILLO  
Chief of Staff for Policy and Public Affairs

SHARON PINO  
Deputy of Criminal Affairs

February 7, 2017

The Honorable Howie C. Morales  
New Mexico State Senator  
4285 North Swan Street  
Silver City, New Mexico 88061

Re: Opinion Request – Regulation of Gambling in the Town of Silver City

Dear Senator Morales:

You requested our advice regarding whether the Charter of the Town of Silver City (“Town”) authorizes the Town to regulate gambling<sup>1</sup> within the Town limits. As discussed below, based on our review of the applicable law, we conclude that the legislature intended current state law to cover the entire subject of gambling oversight and regulation in New Mexico and impliedly repeals the Town’s authority under its Charter to regulate gambling.

The Town’s current Charter was enacted by the territorial legislature in 1878. *See* An Act to Incorporate the Town of Silver City in the County of Grant, N.M. Territory Session Laws 1878, ch. 38. The Town is the only municipality in the state that still operates under its pre-statehood charter.<sup>2</sup> In pertinent part, the Charter provides that the Town Council “shall have power ... to tax,

---

<sup>1</sup> For purposes of this letter, we assume the term “gambling” refers to the same activities as “gaming” under state law. *Compare* NMSA 1978, §§ 30-19-1(B), 30-19-2 (defining “gambling” for purposes of criminal statutes to include “making a bet,” and “bet” as “a bargain in which the parties agree that, dependent upon chance, even though accompanied by some skill, one stands to win or lose anything of value...”) with NMSA 1978, § 60-2E-3(O), (P) (defining “gaming” under the Gaming Control Act as “offering a game for play,” and “game” as “an activity in which, upon payment of consideration, a player receives a prize or other thing of value, the award of which is determined by chance even though accompanied by some skill...”).

<sup>2</sup> Although the Town has a charter, it is not a home rule municipality under Article X, Section 6 of the New Mexico Constitution or the Municipal Charter Act, NMSA 1978, §§ 3-15-1 to -16 (1965, as amended through 1990). *See* N.M. Att’y Gen. Op. No. 87-81 (Dec. 30, 1987) (Silver City is not a home rule municipality); N.M. Att’y Gen. Op. No. 75-56 (Oct. 8, 1975) (“Silver City exists pursuant to a state statute ... and it has only the powers granted to it by the statutes creating it and the general provisions applying to municipalities”). Nevertheless, the Municipal Charter Act permits the charter of a municipality adopted by law of the territorial legislature to be amended or repealed in the same manner as the charters of home rule municipalities. *See* NMSA 1978, § 3-15-16 (1990).



regulate and restrain, prohibit and suppress ... gambling ... to the distance of one mile from the corporate limits of the town.” Charter, art. IV, § 10.

According to your request, the Town Council is considering whether to permit and regulate gambling within the Town under Article IV, Section 10 of the Charter. The request states that the Council “will likely consider an ordinance that will permit a certain degree of gambling under stringent regulations and bring the matter before its citizens and to vote on whether to permit regulated gambling within the Town.”

As noted above, the Town was incorporated under a special act of the territorial legislature. When New Mexico became a state, the state constitution included a provision addressing the continuing validity of territorial laws. *See* N.M. Const. art. XXII, § 4. That provision provides:

All laws of the territory of New Mexico in force at the time of its admission into the union as a state, not inconsistent with this constitution, shall be and remain in force as the laws of the state until they expire by their own limitation, or are altered or repealed....

Article XXII, Section 4 “continues the territorial laws only until they shall be altered or repealed, and the Legislature has full power to repeal all or any of them.” *Herd v. State Tax Comm’n*, 1925-NMSC-042, ¶ 5, 240 P. 988, 989.

As a territorial law, the provisions of the Town’s Charter continue in effect as state law under Article XXII, Section 4 until they are altered or repealed by the legislature. *See Atchison v. Town of Silver City*, 1936-NMSC-036, ¶ 2, 59 P.2d 351, 352 (acknowledging the legislature’s authority to amend or repeal the Town’s Charter). It does not appear that the legislature has expressly repealed the provisions of the Town’s Charter authorizing it to regulate gambling. Under the applicable rules of statutory construction:

Repeals by implication are not favored and will not be resorted to unless necessary to give effect to an obvious legislative intent[.] [T]he enactment of a new and comprehensive law covering the whole subject matter which is inconsistent with and repugnant to the prior law manifests legislative intent to repeal the earlier statute, or so much thereof as may be in conflict with the later one.

*Buresh v. City of Las Vegas*, 1969-NMSC-171, ¶ 7, 463 P.2d 513, 514. In particular, “[a] general statute will not impliedly repeal a prior local law or special statute or charter unless there is such a positive repugnance between the two that they cannot stand together or be consistently reconciled.” *Atchison*, 1936-NMSC-036, ¶ 12, 59 P.2d at 353.

In the decades since the Town’s Charter was enacted, the legislature has passed laws that, with some exceptions, make gambling a crime, *see* NMSA 1978, §§ 30-19-1 to -15 (1963, as amended through 2009), and subject permissible gambling activities to state regulation and oversight. *See State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 37, 904 P.2d 11, 23 (“it is undisputed that New Mexico’s legislature possesses the authority to prohibit or regulate all aspects of gambling on non-

Indian lands”). The current legislation reflects a public policy that “does not favor the accommodation of gambling.” *Citation Bingo, Ltd. v. Otten*, 1996-NMSC-003, ¶ 24, 910 P.2d 281, 287. *See also State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 30, 904 P.2d at 21 (“[t]he legislature ... has unequivocally expressed a public policy against unrestricted gaming...”); *Schnoor v. Griffin*, 1968-NMSC-067, ¶ 27, 439 P.2d 922, 927 (“[e]xcept in very limited circumstances, the public policy of this state is to restrain and discourage gambling”).

As expressed in the Gaming Control Act, NMSA 1978, §§ 60-2E-1 to -62 (1997, as amended through 2010), “the state’s policy on gaming” allows “limited gaming activities ... in the state if those activities are strictly regulated to ensure honest and competitive gaming that is free from criminal and corruptive elements and influences[.]” *Id.* § 60-2E-2(A). The Gaming Control Board is responsible for “implement[ing] the state’s policy on gaming consistent with the ... Gaming Control Act and the New Mexico Bingo and Raffle Act.” *Id.* § 60-2E-7(A).<sup>3</sup>

Under the Gaming Control Act:

Gaming activity is permitted ... only if it is conducted in compliance with and pursuant to:

A. the Gaming Control Act; or

B. a state or federal law other than the Gaming Control Act that expressly permits the activity or exempts it from the application of the state criminal law, or both.

*Id.* § 60-2E-4. Currently, the Gaming Control Act permits limited gaming activity only at racetracks and by certain nonprofit organizations. *Id.* § 60-2E-26(I).

The Gaming Control Act regulates all aspects of permissible gaming in the state, including gaming operators, gaming employees, gaming device distributors and manufacturers, and gaming machines. *See* § 60-2E-14 to -31. The Act authorizes the Gaming Control Board to adopt regulations that, among other things, govern the issuance of licenses and permits, define authorized games and gaming devices, govern the manufacture, distribution and repair of gaming devices, and prescribe accounting and security procedures required of licensees. *See* NMSA 1978, 60-2E-8(C). The Board also may impose civil fines for violations of the Act, conduct investigations and audits, inspect gaming premises, and is required to monitor all activity under the state’s Indian gaming compacts entered into under the federal Indian Gaming Regulatory Act. *Id.* § 60-2E-7(C), (D). The Act imposes a gaming tax “in lieu of all state and local gross receipts taxes” on a licensee’s gross receipts attributable to gaming activities.” *Id.* § 60-2E-47. The Act imposes criminal penalties for violations related to its provisions, *id.* §§ 60-2E-50 to -57, including cheating and underage gaming.

---

<sup>3</sup> The New Mexico Bingo and Raffle Act, NMSA 1978, §§ 60-2F-1 to -26 (2009, as amended through 2011), “authorize[s] and regulate[s] certain games of chance [bingo, raffles and pull tabs] by licensed nonprofit organizations.” *Id.* § 60-2F-2.

licensee's gross receipts attributable to gaming activities." *Id.* § 60-2E-47. The Act imposes criminal penalties for violations related to its provisions, *id.* §§ 60-2E-50 to -57, including cheating and underage gaming.

Based on its provisions, we believe there is little question that the legislature intended the Gaming Control Act to cover all aspects of gaming regulation. By its terms, the Act permits only gaming activity that is conducted under the Act's provisions or under another state or federal law that expressly permits the activity or exempts it from the provisions of the state's criminal laws. The Act expressly provides for a gaming tax that excludes similar taxes by local governments. Virtually all aspects of gaming activity permitted in the state are subject to strict regulation and oversight by the Gaming Control Board. In short, the Act constitutes a "comprehensive law" covering the "whole subject matter" of gaming in the state. Because the Gaming Control Act occupies the entire field of gaming regulation, it "is inconsistent with and repugnant to" the provisions of Article IV, Section 10 of the Town's 1878 Charter authorizing it to "tax, regulate and restrain ... gambling" within and up to one mile outside the Town limits. Consequently, we conclude that, under the rules of statutory construction discussed above, the enactment of the Gaming Control Act "manifests the legislature's intent to repeal" those provisions, and the Town has no power to permit, tax or otherwise regulate gambling.<sup>4</sup>

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

A handwritten signature in black ink that reads "Sally Malave". The signature is fluid and cursive, with a small horizontal line at the end.

Sally Malave  
Assistant Attorney General

---

<sup>4</sup> Our conclusion does not affect the Town's authority under its Charter to "prohibit and suppress" gambling. See Charter, art. IV, § 10. The same authority is provided to all municipalities under the Municipal Code. See NMSA 1978, § 3-18-17(C)(1) (2009).

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

TANIA MAESTAS  
Deputy of Civil Affairs

SONYA CARRASCO-TRUJILLO  
Chief of Staff for Policy and Public Affairs

SHARON PINO  
Deputy of Criminal Affairs

March 15, 2017

Hon. Cathrynn N. Brown  
N.M. State Representative, Dist. 55  
1814 North Guadalupe  
Carlsbad, New Mexico 88220

Re: Opinion Request – Transfers from the Enhanced 911 Fund

Dear Representative Brown:

This Office has completed its review of the question raised in your January 25, 2017 request for an Attorney General opinion as to whether the legislature may legally transfer funds (or “sweep”) non-reverting Enhanced 911 Fund to the general fund to address the state’s current budgetary problems. The short answer is yes.

**Constitutional authority of the legislature**

New Mexico’s State Constitution describes three branches of government—the legislative, executive and judicial. N.M. Const. Art III, § 1. Of those, the legislature is the only branch authorized to appropriate funds, N.M. Const. Art IV, §30 (stating that “[e]xcept interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature”), and the legislature’s duties cannot be delegated to any other branch. *State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, ¶ 3, 120 N.M. 820, 907 P.2d. 1001.

The Constitution instructs the legislature on how to make a proper appropriation, see Art. IV, § 16, (stating in pertinent part that “[g]eneral appropriations bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments, interest, sinking fund, payments on the public debt, public schools and other expenses required by existing laws.... All other appropriations shall be made by separate bills”). It does not, however, specify what procedures must be taken in order for the legislature to transfer funds.

New Mexico courts have recognized that the legislature is the only branch of government authorized to enact legislation, including appropriations bills, *Atkinson v. Maloney*, 1969-NMSC-139, ¶13, 80 N.M. 720 (stating that N.M. Const. Art. IV, § 30 “prohibits expenditure of money unless appropriated by the legislature”), even though the governor retains the negative power to exercise a line item veto of the budget. *Sego v. Kirkpatrick*,



1974-NMSC-059, ¶12, 86 N.M. 359. Reviewing courts require only that a legislative enactment lie within the limits set by the Constitution, and the courts presume the validity and regularity of legislative acts and procedures. See *Dickson v. Saiz*, 1957-NMSC-010, ¶ 16, 62 N.M. 227, 308 P. 2d 205 (stating that a court “should be well satisfied of the invalidity of an act upon constitutional grounds before striking it down” and “if two constructions each equally reasonable should exist, the one sustaining the validity of the act is to be preferred”). The courts remain “respectful of constitutional separation of powers and accordingly prefer to allow the legislative process to play out free from judicial interference, so long as the process is open and transparent.” *State ex rel. Cisneros v. Martinez*, 2015-NMSC-001, ¶ 42, 340 P.3d 597.

### **Statutory limits on the legislature’s authority**

Section 6-4-6 (1991) authorizes the legislature to use the general fund to pay “current expenses and obligations of state government regardless of the specific fund or account to which the accounting records of the state government may show those funds or accounts allocated or appropriated”, so long as the funds are not from the following sources: revenues deposited for credit to any permanent fund; revenues deposited and pledged for the payment of principal and interest on any state indebtedness; federal revenues deposited for payment for a specific program; or income from the permanent fund. §6-4-6 (B) (1991). The legislature has imposed statutory limits on itself, defining the general fund to include only revenues “not otherwise allocated by law.” NMSA 1978, §. 6-4-2 (2016). In theory, it is possible that the authorizing statute for the E-911 fund, § 63-9D-1 through 63-9D-11.1 (1998), could be considered as “otherwise” allocating the fund, as its states:

Money deposited in the fund and income earned by investment of the fund are appropriated for expenditure in accordance with the Enhanced 911 Act and shall not revert to the general fund.

Because the E-911 fund does not represent revenue credited to the permanent fund, deposited and pledged for payment of principal and interest on state indebtedness, federal revenue or income from the permanent fund, it is reasonable to conclude that the fund may be used by the legislature to pay current expenses and obligations of state government.

### **Conclusion**

The State Constitution authorizes the legislature to “sweep” the E-911 fund as it creates and passes an appropriations bill. Further, state law supports the legislature’s ability to sweep even a non-reverting fund, so long as the fund does not fit into any of the four “exceptions” to the legislature’s ability to transfer funds in order to pay current expenses and obligations of State government.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General’s opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing

The Honorable Cathrynn N. Brown

March 15, 2017

Page 3

our legal advice in the form of a letter rather than an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,

A handwritten signature in blue ink that reads "Sally Malave for". The signature is written in a cursive, flowing style.

Jennie Lusk

Assistant Attorney General

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

---

April 27, 2017

The Honorable Mimi Stewart  
New Mexico State Senator  
313 Moon Street, NE  
Albuquerque, NM 87123

Re: Opinion Request – Retroactive Application of Criminal Statute

Dear Senator Stewart:

You requested our advice regarding the effect of the backlog of untested sexual assault evidence kits (“SAEK”) on the viability of criminal sexual assault prosecutions. More specifically, you asked:

(1) Does NMSA 1978, Section 30-1-9.2 (2003), which tolls the statute of limitations for prosecuting criminal sexual penetration in certain circumstances, apply retroactively, and if so, are there any conditions limiting that retroactivity, such as whether the statute of limitations had run at the time Section 30-1-9.2 was enacted?

(2) May a criminal offender be considered “concealing himself” under NMSA 1978, Section 30-1-9(A) until identified by DNA in a SAEK where a victim has a SAEK collected, the victim does not know the offender, the offender has not been identified and the SAEK DNA has not been matched to an individual suspect?

Based on our examination of the relevant New Mexico statutes, case law authorities, and on the information available to us at this time, we conclude:

(1) Section 30-1-9.2 tolls the statute of limitations for commencing a prosecution for criminal sexual penetration under NMSA 1978, Section 30-9-11, regardless of when the alleged crime was committed, unless the applicable limitations period expired on or before Section 30-1-9.2’s effective date of July 1, 2003.

(2) It is unlikely that the facts you posit would be sufficient, by themselves, to support a finding that an offender “concealed himself” for purposes of the tolling provisions of Section 30-1-9(A). A New Mexico court likely would require evidence that an offender took deliberate, affirmative steps to conceal or hide himself or herself after the crime was committed.

As a preliminary matter, there are several rules of statutory construction that guide our analysis. In New Mexico, the legislature directs that “[t]he text of a statute or rule is the primary, essential source of its meaning.” NMSA 1978, § 12-2A-19 (1997). When presented with a question of statutory construction, New Mexico courts begin their analysis “by examining the language utilized by the Legislature, as the text of the statute is the primary indicator of legislative intent.” *Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 40, 320 P.3d 1. “Under the rules of statutory construction, when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.” *Id.* (internal quotation marks and citation omitted); *see also* NMSA 1978, § 12-2A-2 (1997) (“Unless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar and common usage.”). In the event “legislative guidance is absent, New Mexico courts have resorted to judicially created presumptions in order to determine how a statute should be applied.” *Grygorwicz v. Trujillo*, 2006-NMCA-089, ¶ 10, 140 P.3d 550.

1. Retroactive Application of NMSA 1978, Section 30-1-9.2

Section 30-1-9.2(A) provides:

When DNA evidence is available and a suspect has not been identified, the applicable time period for commencing a prosecution pursuant to Section 30-1-8 NMSA 1978 shall not commence to run for an alleged violation of Section 30-9-11 NMSA 1978 until a DNA profile is matched with a suspect.

NMSA 1978, Section 30-1-8 (2009), referenced in Section 30-1-9.2(A), limits the time for commencing prosecution after the commission of a crime. Generally, the periods allowed for prosecution range from one year for a petty misdemeanor to six years for a second degree felony. *Id.* § 30-1-8(A)-(D). There is no limitations period for a capital felony of first degree violent felony. *Id.* § 30-1-8(I). NMSA 1978, Section 30-9-11 (2009), also referenced in Section 30-1-9.2(A), defines the offense of criminal sexual penetration.

Section 30-1-9.2 is a tolling statute. A tolling statute is “a law that interrupts the running of a statute of limitations in certain situations, as when the defendant cannot be served with process in the forum jurisdiction.” Black's Law Dictionary (10th ed. 2014) (definition of “tolling statute”). Generally, a statute is applied prospectively unless the legislature has made clear its intention to apply it retroactively. *State v. Perea*, 2001-NMSC-026, ¶ 4, 31 P.3d 1006; *see also* NMSA 1978, § 12-2A-8 (1997) (“A statute or rule operates prospectively only unless the statute or rule expressly provides otherwise or its context requires that it operate retrospectively.”). Although the presumption of prospective application appears straightforward, confusion often arises as to what retroactivity means. *Gadsden Fed'n of Teachers v. Bd. of Educ.*, 1996-NMCA-069, ¶ 14, 920 P.2d 1052. New Mexico courts consider a statute or regulation retroactive if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions. *Howell v. Heim*, 1994-NMSC-103, ¶ 17, 882 P.2d 541.

In *State v. Morales*, 2010-NMSC-026, 236 P.3d 24, the New Mexico Supreme Court addressed whether a 1997 amendment to Section 30-1-8 abolishing the statute of limitations for capital felony offenses and first degree violent felony offenses applied to offenses committed prior to the



amendment's effective date of July 1, 1997. The limitations period for such crimes before the amendment was 15 years. The Court held that the 1997 amendment applied to criminal conduct that was not time-barred before July 1, 1997. *Id.* at ¶ 20. According to the Court, extending an unexpired limitation period does not impair vested rights acquired under prior law, require new obligations, impose new duties, or affix new disabilities to past transactions. *Id.* at ¶ 1.

The *Morales* Court acknowledged the presumption that the legislature intended the 1997 amendment to operate prospectively, absent clear legislative intent to the contrary. *Id.* ¶¶ 7–8, 13. However, the Court reasoned that because capital felonies and first degree violent felonies committed after July 1, 1982 were not time barred as of the effective date of the 1997 amendment, the legislature intended the 1997 amendment to apply to those crimes. *Id.* at ¶ 1. The Court stated further that “the language and history of the 1997 amendment plainly manifest the legislature’s intent to ensure that the most serious crimes, i.e., capital felonies and first-degree violent felonies, do not escape prosecution based on a mere lapse of time between the commission of the offence and the commencement of the prosecution.” *Id.* ¶ 14.

The question here regarding the retroactive application of Section 30-1-9.2 is similar to the issue faced in *Morales*, i.e., the extension of a statute of limitations by later-enacted legislation. Although the language of Section 30-1-9.2 does not indicate whether the legislature intended the statute to apply to crimes committed before its effective date, we believe, based on *Morales*, that the legislature intended Section 30-1-9.2 to apply to crimes for which the applicable limitations period had not yet expired. That intent is reflected in the express language of the law that enacted Section 30-1-9.2, which provides:

APPLICABILITY.—The provisions of this act are applicable to an alleged violation of Section 30–9–11 NMSA 1978 for which the applicable time period for commencing a prosecution, as provided in Section 30–1–8 NMSA 1978, has not expired as of July 1, 2003.

2003 New Mexico Laws, ch. 257, § 2. *See also id.* § 3 (providing that the effective date of Section 30-1-9.2 is July 1, 2003).<sup>1</sup>

So long as the applicable statute of limitations for a crime committed under Section 30-9-11 has not expired as of July 1, 2003, Section 30-1-9.2 effectively extends the limitations period for the offense “until a DNA profile is matched with a suspect.” Conversely, if the applicable statute of limitations expired prior to July 1, 2003, then Section 30-1-9.2 would not apply.

## 2. Tolling Time for Prosecution under NMSA 1978, Section 30-1-9

NMSA 1978, Section 30-1-9(A) provides:

If after any crime has been committed the defendant shall **conceal himself**, or shall flee from or go out of the state, the prosecution for such crime may be commenced

---

<sup>1</sup> Section 1 of 2003 New Mexico Laws, ch. 257 was codified as NMSA 1978, § 30-1-9.2.

within the time prescribed in Section [30-1-8], after the defendant ceases to conceal himself or returns to the state. (Emphasis added.)

You ask whether a defendant is considered to have “concealed himself” for purposes of Section 30-1-9(A) where a victim has a SAEK collected, the victim does not know the offender, the offender has not been identified and the SAEK DNA has not been matched to an individual suspect.

As an initial matter, we note that in the circumstances you describe, the victim has had a SAEK collected and there has been no DNA match with a suspect. Generally, those facts would toll the statute of limitations under Section 30-1-9.2, discussed above, until the DNA profile was matched with a suspect. Because the limitations period would already be tolled, there would be no need to rely on the separate tolling provisions of Section 30-1-9(A).

Assuming, however, that Section 30-1-9(A) were applied in the circumstances you describe, we believe it is unlikely that the offender could be considered to have “concealed himself” absent evidence that the offender took affirmative steps to hide his identity after the crime was committed. In Section 30-1-9(A), the word “conceal” is used as a verb. When used as a verb, “conceal” is defined as “an affirmative act intended or known to be likely to keep another from learning of a fact of which he would otherwise have learned. Such affirmative action is always equivalent to a misrepresentation and has any effect that a misrepresentation would have.” Black’s Law Dictionary (10th ed. 2014) (definition of “concealment”).

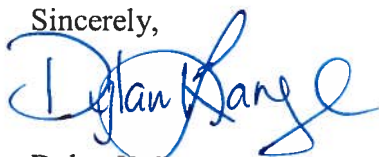
New Mexico courts applying Section 30-1-9(A) have not specifically analyzed the meaning of “conceal himself” as used in the provision. *See, e.g., State v. Cawley*, 1990-NMSC-088, ¶ 7, 799 P.2d 574 (Section 30-1-9(A) was intended “to foreclose the barring of a prosecution due to the voluntary absence from the state by a criminal offender”); *State v. Martinez*, 1978-NMCA-095, ¶ 16, 587 P.2d 438, 441 (Ct. App.) (generally stating that the tolling provisions of a predecessor to Section 30-1-9 applied when a prosecution could not proceed “because of procedural problems ..., such as a defendant’s flight or concealment...”), *cert. quashed*, 586 P.2d 1089 (N.M. 1978).

However, decisions of New Mexico and other states’ courts in analogous situations indicate that affirmative or voluntary action is required to support the finding that a person has concealed himself or herself. *See Clark v. LeBlanc*, 1979 NMSC-034, 593 P.2d 1075 (finding an exception to personal service requirement where defendant was aware that civil action might be instituted against him and deliberately concealed himself to avoid service of process). *See also Moore v. Luther*, 291 F.Supp.2d 1194, 1200 (D. Kan. 2005) (“conceal” for purposes of Kansas statute tolling the limitations period when a cause of action arises against a person who has “concealed himself or herself” means “some action by the defendant, i.e., he used an assumed name, changed his occupation, or acted in a manner which tended to prevent the community in which he lives from knowing who he is or from where he came”) (citations omitted); *McGee v. Hardina*, 140 P.3d 165, 168 (Colo. Ct. App. 2005) (defendant did not conceal herself for purposes of tolling statute of limitations where there was no evidence she took “deliberate action to withdraw herself from the public eye”); *Johnson v. Miller*, 655 P.2d 475, 478 (Kan. Ct. App. 1982) (“[t]he mere inability of a plaintiff to locate a defendant where there has been no attempt by a defendant to conceal himself is not sufficient to establish concealment within the meaning of the tolling statute”).

The determination of when an applicable limitations period is triggered is a factual one. The plain language of Section 30-1-9(A) and the relevant case law authorities suggest that a court will look to the actions of an offender after the crime was committed. In so doing, the court necessarily will have to undertake a fact-specific analysis of whether the offender's actions before, during, and after the offense constituted an affirmative attempt conceal the offender or the offender's identity and are sufficient to trigger the tolling provisions of Section 30-1-9(A).

Your request was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion is a public document. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may make copies of this letter available to the general public.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dylan K. Lange". The signature is fluid and cursive, with the first name "Dylan" and last name "Lange" clearly distinguishable.

Dylan K. Lange  
Assistant Attorney General

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

---

May 31, 2017

The Honorable Nate Gentry  
New Mexico State Representative  
3176 Andrew Drive NE  
Albuquerque, NM 87110

Re: Opinion Request – Provision of Paid Leave to Teacher Serving as Legislator

Dear Representative Gentry,

You requested an opinion regarding a school district's provision of paid leave to a public school administrator or teacher serving in the state legislature. Specifically, you asked:

(1) Does a school district policy that provides paid leave to a school teacher or school administrator serving as a member of the legislature violate Article IV, Section 10 of the New Mexico Constitution, which limits permissible compensation for legislators?

(2) Would the provision of paid leave by a school district to a school teacher or administrator constitute payment to an individual without consideration, in violation of the Anti-Donation Clause of Article IX, Section 14 of the New Mexico Constitution?

(3) Would the receipt of paid leave from a school district render the legislator a lobbyist on behalf of the school district or otherwise create a conflict of interest by improperly influencing the official acts and decisions of the legislator in violation of law?

Based on our review of the applicable law and information available to us at this time, we conclude that (1) paid leave provided to a public school teacher, administrator or other public school employee serving as a member of the legislature would not violate Article IV, Section 10 if the leave was provided as compensation to the employee for the employee's services to the school district; (2) the provision of paid leave to a school employee as compensation for the employee's services to the school district would not violate the Anti-Donation Clause; and (3) the school district's payment of paid leave to a school employee as compensation for the employee's services to the school district, by itself, would not create an unlawful conflict of interest.

Article IV, Section 10

Article IV, Section 10 of the New Mexico Constitution states:



Each member of the legislature shall receive:

A. per diem at the internal revenue service per diem rate for the city of Santa Fe for each day's attendance during each session of the legislature and the internal revenue service standard mileage rate for each mile traveled in going to and returning from the seat of government by the usual traveled route, once each session as defined by Article 4, Section 5 of this constitution;

B. per diem expense and mileage at the same rates as provided in Subsection A of this section for service at meetings required by legislative committees established by the legislature to meet in the interim between sessions; and

C. no other compensation, perquisite or allowance.

N.M. Const. Art. IV, § 10. This constitutional provision permits members of the legislature to receive specified per diem and mileage during legislative sessions and for service on interim legislative committees, and “no other compensation, perquisite or allowance.” It was adopted to “limit[] the compensation legislators may receive, as a means of ensuring that legislators do not act under improper motivations...” *State ex rel. Udall v. Public Employees Retirement Board*, 1995-NMSC-078, ¶ 33, 907 P.2d 190, 197. *See also* N.M. Att’y Gen. Op. No. 93-06 (1993) (provisions like Article IV, Section 10 “reserve directly to the people of the state (through the constitutional amendment process) the power to set legislator compensation and avoid conflict-of-interest problems inherent when legislators are able to decide upon their own compensation and expenses...”). While the per diem and mileage rates have been adjusted from time to time, the prohibition against receiving other compensation has remained unchanged since its initial adoption by the framers of our Constitution in 1911. *State ex rel. Udall v. Public Employees Retirement Board*, 1995-NMSC-078, ¶ 3, 907 P.2d at 191.

The restrictions in Article IV, Section 10 apply to compensation for a legislator’s services as a member of the legislature. They do not restrict a legislator’s compensation for otherwise permissible, non-legislative employment. *See* N.M. Att’y Gen. Op. No. 77-3 (1977) (intent of Article IV, Section 10 “was to limit the compensation to legislators for services performed as legislators” and does not prohibit compensation to which “a person who happens to be a legislator is entitled ... for services performed in a capacity other than as a legislator...”). As such, Article IV, Section 10 would preclude a school district from providing paid leave to a teacher or other school employee serving as a legislator only if the paid leave amounted to compensation for the person’s services as a legislator. And, although it did not address Article IV, Section 10 specifically, the New Mexico Court of Appeals has held that statutory provisions prohibiting a legislator from receiving “compensation for services as an officer or employee of the state except such compensation and expense money as [the legislator] is entitled to receive as a member of the legislature” do not bar school teachers and administrators from serving as legislators. *See State ex rel. Stratton v. Roswell Indep. Schools*, 1991-NMCA-013, 806 P.2d 1085 (interpreting NMSA 1978, §§ 2-1-3, 2-1-4). Similarly, the prohibition in Article IV, Section 10 does not apply to compensation, including paid leave, a legislator receives from a local school district for services

as a teacher or administrator, because it is not compensation for the legislator's services as a member of the legislature.

#### Anti-Donation Clause of Article IX, Section 14

In pertinent part, Article IX, Section 14 prohibits a school district from "directly or indirectly ... mak[ing] any donation to or in aid of any person, association or public or private corporation" unless otherwise authorized by the state constitution. A "donation" for purposes of the Anti-Donation Clause is "a 'gift,' an allocation or appropriation of something of value, without consideration...." *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 36, 303 P.2d 920, 926.

New Mexico courts have consistently held that compensation provided to public employees in exchange for their services is not a donation proscribed by the Anti-Donation Clause. *See, e.g., Treloar v. County of Chaves*, 2001-NMCA-074, ¶ 32, 32 P.3d 803, 812 (severance pay provided under employment contract was "deemed to be in the nature of wages that have been earned" and did not constitute a gift in violation of the Anti-Donation Clause). *See also National Union of Hosp. Employees v. Board of Regents*, 2010-NMCA-102, ¶ 39, 245 P.2d 51, 63 (bonus provision in arbitrator's award did not represent compensation for past or expected work and constituted a retroactive wage contrary to the Anti-Donation Clause). Consequently, we conclude that paid leave provided to a teacher or other school employee serving as a member of the legislature is not an unconstitutional donation if, as discussed above, it is compensation for the employee's services as a teacher or other school employee.

#### Conflicts of Interest Arising When School Employees Serve as Legislators

In *State ex rel. Stratton*, the Court of Appeals acknowledged that "the possible abuse of teachers directly profiting from their term as legislators may be a strong basis for a determination of a prohibitive conflict of interest." 1991-NMCA-013, ¶ 27. 806 P.2d at 1093. Nevertheless, the court concluded:

this determination runs counter to the constituency concept of our legislature in this state, which can accurately be described as a citizen's legislature. In a sparsely populated state like New Mexico, it would prove difficult, if not impossible, to have a conflict-free legislature.

*Id. See also id.* ¶ 52, 806 P.2d at 1098-99 (same concerns regarding conflicting interests that apply to teachers also apply to members of the legislature who are "insurance agents, lawyers, farmers, ranchers and members of other trades and professions").

The Court of Appeals' decision in *State ex rel. Stratton* necessarily leads to the conclusion that a school district's provision of compensation, including paid leave, to a school teacher or administrator serving as a legislator does not, by itself, create an impermissible conflict of interest. A disqualifying conflict would exist only if additional facts established that, rather than compensation, a school district provided paid leave to a school employee to influence the employee's decisions and official actions as a legislator. *See, e.g., NMSA 1978, § 10-16-3(D)* (Governmental Conduct Act provision prohibiting a legislator from receiving money or other thing

of value “that is conditioned upon or given in exchange for the promised performance of an official act”). *See also id.* § 10-16-3(A) (requiring a legislator to “use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests”).

Your request to us was for a formal Attorney General’s opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,



Sally Malave  
Assistant Attorney General  
Director, Open Government Division

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

---

October 31, 2017

Doug Moore, Chair  
Colonias Infrastructure Board  
c/o New Mexico Finance Authority  
2017 Shelby Street  
Santa Fe, NM 87501

RE: Opinion Request – Housing Infrastructure and the Anti-Donation Clause

Dear Mr. Moore:

You requested our advice regarding whether the Anti-Donation Clause of the New Mexico Constitution applies to housing infrastructure projects financed by the Colonias Infrastructure Board (“Board”) and the New Mexico Finance Authority (“NMFA”). Specifically, you discussed the affordable housing exception to the Anti-Donation clause, N.M. Const. art. IX, § 14(E), and whether the Board or NMFA can grant funds to counties or municipalities “to then be granted on to private entities in order to provide infrastructure to the homes of low income residents of the colonias.” As discussed below, we conclude that the Anti-Donation clause is not implicated where the Board and NMFA are providing financial assistance to counties and municipalities because they are political subdivisions of the state. We further conclude that upon receipt of these funds, counties and municipalities may then provide the funds for housing infrastructure projects so long as they conform to requirements of the Affordable Housing Act and the New Mexico Constitution.

The Colonias Infrastructure Act, NMSA 1978, Sections 6-30-1 to -8 (2010) (the “Act”), created the Board for the purpose of providing funding for infrastructure in colonias, which are defined in the Act as a rural community with a population of twenty-five thousand or less located within one hundred fifty miles of the United States-Mexico border that:

- (1) has been designated as a colonia by the municipality or county in which it is located because of a:
  - (a) lack of potable water supply;
  - (b) lack of adequate sewage systems; or
  - (c) lack of decent, safe and sanitary housing.
- (2) has been in existence as a colonia prior to November 1990; and
- (3) has submitted appropriate documentation to the board to substantiate the conditions of this subsection, including documentation that supports the designation of the municipality or county.



See Section 6-30-3(C). The Act further provides specific legislative findings related to colonias and describes the powers of the Board, including evaluating applications by qualified entities for colonias infrastructure projects. Qualified entities are defined as “a county, municipality or other entity recognized as a political subdivision of the state[.]” Section 6-30-3(F). The Act authorizes the Board to evaluate and prioritize qualified projects that are to be provided financial assistance by NMFA. Such projects are defined under the Act to include “a water system, a wastewater system, solid waste disposal facilities, flood and drainage control, roads or housing infrastructure.” Section 6-30-3(G).

The Anti-Donation Clause of the New Mexico Constitution provides, in part, that “[n]either the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation . . . except as provided in . . . this section.” N.M. Const. art. IX, § 14. The Board and NMFA do not violate the Anti-Donation Clause by providing these infrastructure grants to counties and municipalities, even if the grant money is subsequently provided to a private entity, because the financial assistance is being transferred from the Board, an agency of the state, to another political subdivision of the state. See *City of Gallup v. New Mexico State Park and Recreation Commission*, 1974-NMSC-084, ¶ 13, 86 N.M. 745, 527 P.2d 786 (the New Mexico Supreme Court held that the prohibitions of Article IX, Section 14 “are not applicable to a legislatively sanctioned donation by the State or one of its governmental agencies to another such agency”); *Wiggs v. City of Albuquerque*, 1952-NMSC-013, 56 N.M. 214, 242 P.2d 865. See also N.M. Att’y Gen. Op. 81-27 (internal citation omitted) (“[T]he prohibitions of Article IX, Section 14 have been held to be inapplicable to ‘donations’ between the state or one of its governmental agencies to another such agency.”); N.M. Att’y Gen. Op. 86-23 (“Intragovernmental transfers (between one subordinate governmental agency to another), are outside the constitutional prohibition.”).

The Board and NMFA are required to comply with any applicable laws regarding the financing of qualified projects, including any restrictions placed upon that funding. For example, NMSA 1978, Section 7-27-12.5 (2015), authorizes the State Board of Finance to issue severance tax bonds allocated for use by the Board to fund colonias infrastructure projects and states how those bonds shall be issued and sold. Executive Order 2013-006 states that “intended end-users of some state-funded projects are private entities necessitating that such projects receive extra scrutiny and oversight to avoid unconstitutional donations of public capital to private entities.” Where this executive order applies, the Board and NMFA are required to follow it, including the requirement that a grantee of state capital outlay appropriations meet certain audit requirements before receiving funding. A qualified entity then, once it receives financial assistance from the Board, is required to comply with all applicable laws, procedures established by the Board and NMFA, and all terms and conditions of financial assistance from the Board including any repayment obligations.

The Board and NMFA may provide financial assistance to those entities permitted to receive funding; because the qualified entities are, by definition, political subdivisions of the state, the Anti-Donation Clause does not prohibit the Board from providing them financial assistance. However, the Board does not have the authority to provide funds directly to private entities. This does not prohibit a *qualified entity* from providing those funds to a *private entity* so long as it meets the requirements of an exception under the Anti-Donation Clause, such as the sick and indigent or

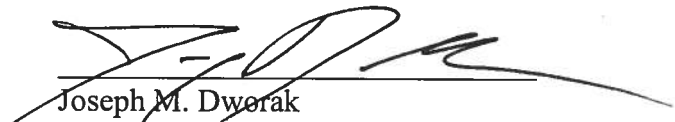
affordable housing exceptions. In this instance, the affordable housing exception to the Anti-Donation Clause provides authorization for the state, counties, and municipalities to finance "infrastructure necessary to support affordable housing projects." N.M. Const. art. IX, § 14(E)(3). Under subsection F of the Anti-Donation Clause, this provision is not self-executing, but rather requires the legislature to create enabling legislation, which it did in the form of the Affordable Housing Act, NMSA 1978, Sections 6-27-1 to -9 (2004, as amended through 2015).

The Affordable Housing Act provides that the state, counties, and municipalities may "provide or pay the costs of financing or infrastructure necessary to support affordable housing projects[.]" Section 6-27-5(C). It defines infrastructure improvement to include "water systems for domestic purposes and sewage systems, as well as transport and dispersal[.]" Section 6-27-3(H)(3). Though the Colonias Infrastructure Act does not specifically reference the affordable housing exception, the similar language regarding infrastructure in both the Affordable Housing Act and the Colonias Infrastructure Act, along with the expressed legislative purposes of these acts, establishes that qualified projects likely would be permissible under the Affordable Housing Act as well. As such, when a county or municipality is a qualified entity and awarded financial assistance by the Board for a qualified project, the entity, under the Affordable Housing Act, could then donate or pay for, among other things, "financing or infrastructure necessary to support affordable housing projects." Section 6-27-5(C). This would require the *qualified entity* to comply with all requirements and procedures under the Affordable Housing Act, including any rules adopted by the New Mexico Mortgage Finance Authority, should it wish to utilize this exception. A qualified entity utilizing this provision would need to ensure that it meets all statutory and constitutional requirements and, in doing so, would not violate the Anti-Donation Clause by providing financial assistance authorized under the Constitution and the Act.

We conclude that the Anti-Donation Clause is not implicated when the Board provides financial assistance to a qualified entity under the Colonias Infrastructure Act, even if, as discussed here, the funds are subsequently provided to a private entity, because the qualified entity is political subdivision of the state. The qualified entity must follow the requirements of the affordable housing exception to the Anti-Donation Clause and the Affordable Housing Act should it wish to grant funding to a private entity for developing colonias infrastructure.

You requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of an advisory letter instead of a formal Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public and will post it to the Office of the Attorney General's website. If we may be of further assistance, or if you have any questions regarding this opinion, please contact our office.

Respectfully,



Joseph M. Dworak  
Assistant Attorney General

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

---

December 12, 2017

The Honorable William R. Rehm  
New Mexico State Representative  
Post Office Box 14768  
Albuquerque, NM 87191

Re: Opinion Request – Exemption from Driving School Licensing Act

Dear Representative Rehm:

You have requested our advice regarding an interpretation of the Driving School Licensing Act, NMSA 1978, Chapter 66, Article 10 (as amended through 2015) (“DSL Act”) by the Department of Transportation, Traffic Safety Bureau (“TSB”). Specifically, you ask:

1. Does TSB have authority under the DSL Act to approve a motor vehicle accident prevention course offered by a for-profit corporation exclusively to drivers who are fifty years old or older?
2. If so, does TSB have a duty to approve such a course, provided the course meets all of TSB’s requirements for the same course offered by a non-profit corporation?

As discussed in detail below, based on our review of the information available to us at this time and the applicable law, we conclude:

1. TSB has authority to approve a motor vehicle accident prevention course offered by a for-profit corporation exclusively to drivers who are at least fifty years old.
2. TSB is constitutionally obligated to apply laws it is charged with administering in an even-handed and fair manner. Absent a rational basis, it may not refuse to allow a for-profit company to offer the same motor vehicle accident prevention courses to drivers age 50 and above that non-profit companies provide.

Applicable Law

TSB’s obligations regarding the motor vehicle accident prevention courses for older drivers are referenced in three statutes. The first is the Motor Vehicle Code, which includes among TSB’s responsibilities the duty “to institute and administer an accident prevention course for elderly

drivers as provided for in Section 59A-32-14.....” NMSA 1978, § 66-7-506(K) (2007). Second, Section 59A-32-14 of the New Mexico Insurance Code, referenced in Section 66-7-506(K), requires a reduction in motor vehicle insurance premium charges for drivers who are fifty-five years or older and who have “successfully completed a motor vehicle accident prevention course approved by [TSB].”

The third statute is the DSL Act, which provides, in pertinent part, that “[n]o person, firm, association or corporation shall operate a driver education school or engage in the business of giving instruction for hire in the driving of motor vehicles” without a license issued by the TSB. NMSA 1978, § 66-10-2. The Act sets out the qualifications applicants must meet to operate a driver education school or to be an instructor. *Id.* §§ 66-10-3, 66-10-4. TSB is required to issue licenses to applicants when it is satisfied that the applicants have met the qualifications required under the DSL Act and, for schools, if they comply with TSB’s minimum driver education program standards. *Id.* § 66-10-5(A). Your request focuses on an exception to the DSL Act, which provides that the Act “shall not apply to nonprofit corporations that provide motor vehicle accident prevention courses approved by [TSB] and that are engaged in providing courses exclusively for drivers who are fifty years of age or older.” NMSA 1978, § 66-10-12.<sup>1</sup>

#### TSB’s Authority to Approve Accident Prevention Courses Offered by For-Profit Entities

As quoted above, Section 66-7-506(K) requires TSB to establish and administer the accident prevention course for older drivers provided for in Section 59A-32-14. According to your request, TSB contends that it does not have authority to approve accident prevention courses provided by for-profit entities to drivers who are age fifty or older. As support, TSB reportedly has relied on the exception for nonprofit corporations in Section 66-10-12 of the DSL and Section 59A-32-14.

Under the rules of statutory construction, the “primary focus is the plain language of the statute.” *Albuquerque Commons P’ship v. City Council*, 2011-NMSC-002, ¶ 13, 248 P.3d 856, 860. A court interpreting a statute “refrain[s] from adding words to the statutory text unless necessary to conform the statute to legislative intent or to prevent an absurd result.” *Id.* See also Uniform Statute and Rule Construction Act, NMSA 1978, § 12-2A-18(A) (statute is construed to “give effect to its objective and purpose” and “avoid an unconstitutional, absurd or unachievable result”), § 12-2A-19 (text of a statute is “the primary, essential source of its meaning”).

The DSL Act prohibits any “person, firm, association or corporation” from operating a driver education school or engaging in the business of teaching people to drive without a license from TSB. See NMSA 1978, § 66-10-2. TSB is required to issue a license if TSB “is satisfied” that the applicant “has met the qualifications required under the [DSL Act] and ... “complies with the minimum driver education program standards established by [TSB].” *Id.* § 66-10-5(A). The DSL Act requires TSB to “prescribe minimum driver training program standards,” *id.* § 66-10-5(B), but leaves the details of the prescribed standards to TSB’s discretion.<sup>2</sup>

---

<sup>1</sup> Before it was amended in 2015, Section 66-10-12, like Section 59A-32-14, referred to drivers age fifty-five and older. The 2015 amendment changed the age requirement in Section 66-10-12 to age fifty and older; see HB 91, 52<sup>nd</sup> Leg., 1<sup>st</sup> Sess., 2015 N.M. Laws, ch. 6. As introduced, HB 91 made a corresponding change in the age requirement in Section 59A-32-14, but that change did not make it into the final version of the bill.



Section 66-10-12 exempts from the DSL Act's requirements "nonprofit corporations" that provide motor vehicle accident prevention courses approved by TSB "exclusively for drivers who are fifty years of age or older." Because the DSL Act primarily governs the licensing of driver education schools and instructors, a reasonable interpretation of Section 66-10-12 is that it exempts from the Act's licensing requirements nonprofit corporations that provide motor vehicle accident prevention courses only to older drivers. Conversely, the provision does not prohibit TSB from issuing licenses to qualified for-profit entities that intend to provide the same courses exclusively to drivers age fifty and older. Section 66-10-12's reference to accident prevention courses suggests that the legislature viewed the courses as appropriately included in the "minimum driver training program standards" prescribed by TSB under the DSL Act.

We are unable to find anything in the DSL Act, including the exemption in Section 66-10-12, that precludes TSB from allowing for-profit entities that qualify for a driver education school license to provide motor vehicle accident prevention courses exclusively for drivers who are at least fifty years old. Section 66-10-12 simply exempts certain nonprofit corporations from the DSL Act's requirements; it does not suggest that TSB may only approve accident prevention courses for older drivers when they are provided by nonprofit corporations. Likewise, Section 59A-32-14 states only that drivers fifty-five years of age or older are allowed an insurance premium reduction if they complete a motor vehicle accident prevention course approved by TSB. Section 59A-32-14 does not address the qualifications of providers of the course or TSB's authority to approve providers.

#### TSB's Duty to Approve Accident Prevention Courses Offered by For-Profit Providers

Section 66-7-506(K) obligates TSB "to institute and administer an accident prevention course for elderly drivers as provided for in Section 59A-32-14...." NMSA 1978, § 66-7-506(K). As discussed above, Section 66-7-506(K) does not require TSB to institute and administer the accident prevention course in any particular manner. The DSL Act requires TSB to license any "person, firm, association or corporation," including for-profit entities, it deems qualified to provide an accident prevention course. It simultaneously exempts from its requirements nonprofit corporations providing the course exclusively to drivers age fifty and older. § 66-10-12.

Regardless of how TSB chooses to institute and administer the accident prevention course for older drivers, neither Section 66-7-506(K) nor the other statutes discussed above authorize TSB to limit its approval of the course to nonprofit corporations. State agencies are "creatures of statute and can act only on matters which are within the scope of authority delegated to them." *Matter of Proposed Revocation of Food & Drink Purveyor's Permit v. Envtl. Improvement Div.*, 102 N.M. 63, 66, 691 P.2d 64 (Ct. App. 1984). *See also Martinez v. N.M. State Eng'rs Office*, 2000-NMCA-74, ¶ 22, 9 P.3d 657, 662 (as a "public administrative body created by statute," the state personnel board "is limited to the power and authority expressly granted or necessarily implied by statute").

---

<sup>2</sup> In addition to driver training, the DSL Act permits licensed driver education schools to offer motorcycle driver education programs and requires TSB to "prescribe minimum motorcycle driver education program standards." NMSA 1978, § 66-10-9(A), (B). In contrast to its provisions governing the minimum driver education program standards, the DSL Act expressly lists topics that must be included in motorcycle driver education programs administered by TSB, including safe driving habits and defensive driving. *Id.* § 66-10-10(D).

Additionally, unless TSB can identify a rational basis for its policy of approving the course only for nonprofit providers, it may be vulnerable to court claims alleging violations of the equal protection clauses of the U.S. and New Mexico Constitutions. *See* U.S. Const. amend. XIV, § 1 (a state shall not “deny to any person within its jurisdiction the equal protection of the laws”); N.M. Const. art. II, §18 (no person “shall ... be denied equal protection of the laws”). *See also Rodriguez v. Brand West Dairy*, 2016-NMSC-029, 378 P.3d 13 (exclusion from Workers Compensation Act for employers of farm and ranch laborers violated the Equal Protection Clause because it made distinctions between similarly situated persons that were not rationally related to a legitimate government purpose).

To summarize, Section 66-7-506(K) requires TSB to implement and administer an accident prevention course for drivers age fifty-five and older, as provided for in Section 59A-32-14. Section 66-10-12 of the DSL Act exempts from the Act’s requirements nonprofit corporations that provide accident prevention courses approved by TSB exclusively to drivers age fifty and older. Neither Section 66-10-12 nor the other applicable statutes discussed above limits TSB’s authority to approve the accident prevention course contemplated under Section 66-7-506(K) and Section 59A-32-14 to non-profit providers only. Consequently, we conclude that, except as provided in Section 66-10-12, TSB may not distinguish between equally qualified providers of accident prevention courses for older drivers based on whether the providers are for-profit or nonprofit entities.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General’s opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

  
\_\_\_\_\_  
Stephen A. Vigil  
Assistant Attorney General

Cc: Tania Maestas, Deputy Attorney General for Civil Affairs

# **NEW MEXICO OFFICE OF THE ATTORNEY GENERAL**

**408 Galisteo Street  
Villagra Building  
Santa Fe, NM 87501**

Toll Free 1-844-255-9210  
Phone: (505) 490-4060  
Fax: (505) 490-4883

**[www.nmag.gov](http://www.nmag.gov)**

## **Albuquerque Office**

**201 3rd St. NW  
Suite 300  
Albuquerque, NM 87102**

Toll Free 1-844-255-9210  
Phone: (505) 717-3500  
Fax: (505) 318-1050

## **Las Cruces Office**

**201 N. Church St.  
Suite 315  
Las Cruces, NM 88001**

Toll Free: 1-844-255-9210  
Phone: (575) 339-1120  
Fax: (575) 339-1122



