

COPY

BEFORE THE DISCIPLINARY BOARD OF
THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

Donald Gallegos, Esq.

Disciplinary No. **10-2014-705**

An Attorney Licensed to
Practice Law Before the Courts
of the State of New Mexico

SPECIFICATION OF CHARGES

1. Rule 17-105(B)(3)(d) NMRA 2014 of the Rules Governing Discipline empowers counsel for the Disciplinary Board to file a Specification of Charges against an attorney with the Disciplinary Board.
2. Donald Gallegos, Esq. is an attorney currently licensed to practice law before the courts of the State of New Mexico having been admitted in 1991.
3. Respondent is the duly elected District Attorney for the Eighth Judicial District.
4. Respondent has direct managerial and supervisory authority over the Assistant District Attorneys working within the Office of the District Attorney for the Eighth Judicial District.
5. The factual allegations set forth in the Specification of Charges state acts of professional misconduct in violation of Rules 16-101, 16-304(A), 16-

304(C), 16-305(C), 16-404(A), 16-501(A), 16-501(B), 16-501(C),
and/or 16-804(D) NMRA 2014 of the Rules of Professional Conduct.

6. Pursuant to Rule 17-309(A) NMRA 2014 of the Rules Governing Discipline, cause exists to conduct a hearing on the following charges so that the Disciplinary Board and the Supreme Court can determine whether further action is appropriate.

COUNT I

7. On or about April 10, 2013, the Kit Carson Electric Cooperative, Inc. in Taos, New Mexico was robbed.
8. Immediately after the crime was reported the Taos Police Department began an investigation.
9. Isaac Martinez (hereinafter "Mr. Martinez") was arrested on or about August 1, 2013.
10. Mr. Martinez was indicted by the grand jury on August 8, 2013 along with one co-defendant. Two additional co-defendants were indicted September 12, 2013.
11. No criminal case had commenced, nor was any attorney in the Office of the District Attorney representing the State as a party until Mr. Martinez and his co-defendants were indicted.

12. The case against Mr. Martinez resulting from the Kit Carson Electric Cooperative, Inc. robbery was assigned a cause number, D-820-CR-201300129 on August 8, 2013.
13. Before an indictment, on or about April 12, 2013, Deputy District Attorney Emilio J. Chavez, hereinafter “ADA Chavez” issued and filed two (2) Subpoenas *Duces Tecum* under the caption, State of New Mexico v. John Doe, using a “cause number” of CS 2013-1 or more fully, D-820-CS-2013-000001.
14. Before an indictment, on or about April 22, 2013, ADA Chavez issued and filed three (3) Subpoenas *Duces Tecum* under the caption, State of New Mexico v. John Doe, using a “cause number” of CS 2013-1 or more fully, D-820-CS-2013-000001.
15. Before an indictment, on or about May 28, 2013, ADA Chavez issued and filed six (6) Subpoenas *Duces Tecum* under the caption, State of New Mexico v. John Doe, using a “cause number” of CS 2013-1 or more fully, D-820-CS-2013-000001.
16. All eleven (11) subpoenas issued were to out-of-state cellular telephone providers to obtain “subscriber/billing information” and in three (3) instances also “Call detail Records, and Text Message Detail”.

17. On or about October 8, 2013, Mr. Martinez' counsel filed an *Expedited Motion to Quash Indictment Due to Gross Prosecutorial Misconduct or in the Alternative to Suppress All Evidence Obtained Through the Prosecution's Unjustifiable Use of Fraudulent Subpoenas* (Hereinafter "*Motion to Quash*").
18. On or about October 23, 2013, with the knowledge and support of Respondent ADA Chavez filed a *Response to Defendant's Motion to Quash Indictment*.
19. On or about November 7, 2013, Mr. Martinez' counsel filed a *Reply to Response to Defendant's Motion to Quash Indictment*.
20. The Court heard oral argument on the *Motion to Quash* on January 8, 2014 and entered its *Decision of the Court on Defendant's "Expedited Motion to Quash Indictment Due to Gross Prosecutorial Misconduct..."* (hereinafter "*Decision*") on April 8, 2014.
21. The *Decision* found that the indictment against Mr. Martinez should be quashed and stated in pertinent part that
 - a. the subpoenas in question were "not in the form approved by the Supreme court",
 - b. that Respondent did "not represent a party, as no criminal case had been commenced",

- c. that the subpoenas were not issued by the grand jury, that the issuance of the subpoenas was not an isolated instance as there were approximately 49 other such subpoenas issued in 2013, mostly by Respondent,
- d. that the Federal Stored Communications Act “does not grant a New Mexico prosecutor authority to issue stand-alone subpoenas” nor does it preempt or supersede “New Mexico state constitutional provisions, statutes and rules of procedure, nor provides an exclusive remedy for violation of state law”,
- e. that, “A stand-alone subpoena, in improper form, issue and signed by a prosecutor in aid of a police investigation, before a criminal cause is properly commenced, as in the instant facts is simply without precedent, analogy or lawful authority in New Mexico law”,
- f. that Respondent had no reasonable basis for his actions and his subjective belief that he was acting “lawfully and properly” is irrelevant,
- g. and that, “It is objectively unreasonable for the prosecutor to believe that his conduct was lawful.”

22. With the knowledge and support of Respondent, ADA Chavez filed a *Notice of Appeal* on April 21, 2014 and a *Docketing Statement* on May 20, 2014.
23. As of the date of this pleading the *Notice of Appeal* is still pending.
24. The eleven (11) subpoenas were not issued by the grand jury.
25. When the eleven (11) subpoenas were issued neither Mr. Martinez nor any of his co-defendants were parties, targets, accused or defendants in relation to the Kit Carson Electric Cooperative, Inc. robbery.
26. The eleven (11) subpoenas did not conform to Rule 5-511 NMSA of the Rules of Criminal Procedure for the District Courts.
27. The eleven (11) subpoenas did not conform to NMRA, Form 9-217.
28. The eleven (11) subpoenas did not conform to the Federal Stored Communications Act, 18 USCA §§2701 through 2712 (“FSCA”).
29. The eleven (11) subpoenas did not conform to any New Mexico state law or federal law.
30. By reason of the aforementioned conduct, Respondent has violated the following provisions of the Rules of Professional Conduct:
 - a. Rule 16-501(A), by having managerial authority over a lawyer and failing to make reasonable efforts to insure that the

subordinate lawyer conformed to the Rules of Professional Conduct;

- b. Rule 16-501(B), by having direct supervisory authority over another lawyer and failing to make reasonable efforts to ensure that the other lawyer conformed to the Rules of Professional Conduct;
- c. Rule 16-501(C), by having knowledge of specific misconduct and ratifying that conduct and having known of the conduct at a time when its consequences could have been avoided or mitigated but failed to take remedial action.
- d. Rule 16-101, by failing to provide competent representation to a client;
- e. Rule 16-304(A) by unlawfully obstructing another party's access to evidence;
- f. Rule 16-304(C) by failing to obey the rules of a tribunal;
- g. Rule 16-305(C) by engaging in conduct disruptive to the tribunal;
- h. Rule 16-404(A) by using methods to obtain evidence that violates the legal rights of a third person; and/or

- i. Rule 16-804(D) by engaging in conduct prejudicial to the administration of justice.

COUNT II

31. The facts as stated in Count I are restated and reincorporated by reference herein.
32. On or about August 2, 2013, a criminal complaint was filed against Mr. Martinez captioned State of New Mexico v. Isaac Martinez, D-820-CS-2013-00126.
33. Despite a criminal complaint being filed on August 2, 2013 and a cause number being assigned, on that same date with the knowledge and support of Respondent, ADA Chavez issued and filed five (5) Subpoenas *Duces Tecum* under the caption, State of New Mexico v. Isaac Martinez, using a “cause number” D-820-CS-2013-000001.
34. All five (5) August 2, 2013, subpoenas issued were to out-of-state cellular telephone providers to obtain,

Subscriber information regarding phone number XXX-XXX-XXXX¹ and all phone calls and/or text messages made from the above listed number from April 4 2013 to April 14, 2013. This information includes the name of the subscriber at that time and the name(s) of people called that are Verizon subscribers.

¹ The telephone numbers were different for each subpoena and have been redacted for privacy.

35. The five (5) August 2, 2013, subpoenas were not served on Mr. Martinez or his counsel and were not uploaded to the Case Management System until August 12, 2013.
36. On or about August 13, 2013, State of New Mexico v. Isaac Martinez, D-820-CS-2013-00126 was dismissed with prejudice on the grounds that Mr. Martinez was indicted on August 8, 2013, on the same charges in D-820-CR-201300129.
37. On or about August 7, 2013, with the knowledge and support of Respondent, ADA Chavez issued and filed two (2) Subpoenas *Duces Tecum* under the caption, State of New Mexico v. Issac Martinez, using a cause number D-820-CS-2013-00126.
38. Both August 7, 2013 subpoenas issued were to out-of-state cellular telephone providers to obtain, "Subscriber/billing/Account information for the time period of 04/09/13 thru 04/11/13" for several telephone numbers.
39. ADA Chavez did not provide a copy of either August 7, 2013 subpoena to Mr. Martinez or his counsel.
40. The August 7, 2013 subpoenas were not uploaded to the Case Management System until almost a month later on September 4, 2013.

41. None of the subpoenas issued either August 2, 2013 or August 7, 2013 (hereinafter collectively “August subpoenas”) conformed to Rule 5-103(A) NMSA of the Rules of Criminal Procedure for the District Courts.
42. None of the August subpoenas conformed to NMRA, Form 9-217.
43. None of the August subpoenas conformed to the Federal Stored Communications Act, 18 USCA §§2701 through 2712 (“FSCA.
44. None of the August subpoenas conformed to any New Mexico state law or federal law.
45. By reason of the aforementioned conduct, Respondent has violated the following provisions of the Rules of Professional Conduct:
 - a. Rule 16-501(A), by having managerial authority over a lawyer and failing to make reasonable efforts to insure that the subordinate lawyer conformed to the Rules of Professional Conduct;
 - b. Rule 16-501(B), by having direct supervisory authority over another lawyer and failing to make reasonable efforts to ensure that the other lawyer conformed to the Rules of Professional Conduct;

- c. Rule 16-501(C), by having knowledge of specific misconduct and ratifying that conduct and having known of the conduct at a time when its consequences could have been avoided or mitigated but failed to take remedial action;
- d. Rule 16-101 by failing to provide competent representation to a client;
- e. Rule 16-304(A) by unlawfully obstructing another party's access to evidence;
- f. Rule 16-304(C) by failing to obey the rules of a tribunal;
- g. Rule 16-305(C) by engaging in conduct disruptive to the tribunal;
- h. Rule 16-404(A) by using methods to obtain evidence that violates the legal rights of a third person; and/or
- i. Rule 16-804(D) by engaging in conduct prejudicial to the administration of justice.

COUNT III

46. In 2013, with the knowledge and support of Respondent, ADA Chavez issued and filed forty-six (46) Subpoenas *Duces Tecum* under the caption, State of New Mexico v. John Doe, using a "cause number" of CS 2013-1 or more fully, D-820-CS-2013-000001 for cell records,

(excluding those issued and filed in relation to the Kit Carson Electric Cooperative, Inc. robbery):

- a. January 3, 2013 – one (1) John Doe subpoena
- b. January 16, 2013 – ten (10) John Doe subpoenas
- c. January 18, 2013 – one (1) John Doe subpoena
- d. January 30, 2013 – seven (7) John Doe subpoenas
- e. March 22, 2013 – one (1) John Doe subpoena
- f. March 28, 2013 – three (3) John Doe subpoenas
- g. April 4, 2013 – one (1) John Doe subpoena
- h. April 26, 2013 – eight (8) John Doe subpoenas
- i. May 21, 2013 – two (2) John Doe subpoenas
- j. July 3, 2013 – seven (7) John Doe subpoenas
- k. August 7, 2013 – one (1) John Doe subpoena
- l. August 15, 2013 – one (1) John Doe subpoena
- m. August 22, 2013 (filed 8/26/13) – one (1) John Doe subpoena
- n. September 13, 2013 – one (1) John Doe subpoena
- o. September 18, 2013 – one (1) John Doe subpoena

47. On April 4, 2013, with the knowledge and support of Respondent, ADA Chavez issued and filed a Subpoena *Duces Tecum* under the caption, State of New Mexico v. Martinez, Edward Sr., using a “cause number”

of CS 2013-1 or more fully, D-820-CS-2013-000001 for Children, Youth and Family records.

48. On June 18, 2013, with the knowledge and support of Respondent, ADA Chavez issued and filed a Subpoena *Duces Tecum* under the caption, State of New Mexico v. Pete J. Mondragon, using a “cause number” of CS 2013-1 or more fully, D-820-CS-2013-000001 for medical records.
49. No criminal case had commenced, nor was any attorney in the Office of the District Attorney representing the State as a party in relation to the issuance of the subpoenas.
50. The subpoenas were not issued by the grand jury.
51. The subpoenas did not conform to Rule 5-511 NMSA of the Rules of Criminal Procedure for the District Courts.
52. The subpoenas did not conform to NMRA, Form 9-217.
53. The subpoenas did not conform to the Federal Stored Communications Act, 18 USCA §§2701 through 2712 (“FSCA”).
54. The subpoenas did not conform to any New Mexico state law or federal law.
55. By reason of the aforementioned conduct, Respondent has violated the following provisions of the Rules of Professional Conduct:

- a. Rule 16-501(A), by having managerial authority over a lawyer and failing to make reasonable efforts to insure that the subordinate lawyer conformed to the Rules of Professional Conduct;
- b. Rule 16-501(B), by having direct supervisory authority over another lawyer and failing to make reasonable efforts to ensure that the other lawyer conformed to the Rules of Professional Conduct;
- c. Rule 16-501(C), by having knowledge of specific misconduct and ratifying that conduct and having known of the conduct at a time when its consequences could have been avoided or mitigated but failed to take remedial action;
- d. Rule 16-101 by failing to provide competent representation to a client;
- e. Rule 16-304(A) by unlawfully obstructing another party's access to evidence;
- f. Rule 16-304(C) by failing to obey the rules of a tribunal;
- g. Rule 16-305(C) by engaging in conduct disruptive to the tribunal;

- h. Rule 16-404(A) by using methods to obtain evidence that violates the legal rights of a third person; and/or
- i. Rule 16-804(D) by engaging in conduct prejudicial to the administration of justice.

COUNT IV

56. In 2012, without the knowledge of Respondent, ADA Chavez issued and filed thirty-four (34) Subpoenas *Duces Tecum* under the caption, State of New Mexico v. John Doe, using a “cause number” of CS 2012-1 or more fully, D-820-CS-2012-000001 for cell records:

- a. August 23, 2012 – one (1) John Doe subpoena
- b. August 27, 2012 – one (1) John Doe subpoena
- c. August 31, 2012 – four (4) John Doe subpoenas
- d. September 4, 2012 – one (1) John Doe subpoena
- e. September 17, 2012 – four (4) John Doe subpoenas
- f. October 4, 2012 – seven (7) John Doe subpoenas
- g. October 9, 2012 – one (1) John Doe subpoena
- h. October 15, 2012 – five (5) John Doe subpoenas
- i. December 17, 2012 – ten (10) John Doe subpoenas

57. On October 31, 2012, without the knowledge of Respondent, ADA Chavez issued and filed a Subpoena *Duces Tecum* under the caption,

State of New Mexico RE: INVESTIGATION OF: AREA TAOS
BURGLARY INVESTIGATIONS, using a “cause number” of CS 2012-
1 or more fully, D-820-CS-2012-000001 for records from Kit Carson
Electric Cooperative (KCEG), Luis Reyes, CEO.

58. No criminal case had commenced, nor was any attorney in the Office of the District Attorney representing the State as a party in relation to the issuance of the subpoenas.
59. The subpoenas were not issued by the grand jury.
60. The subpoenas did not conform to Rule 5-511 NMSA of the Rules of Criminal Procedure for the District Courts.
61. The subpoenas did not conform to NMRA, Form 9-217.
62. The subpoenas did not conform to the Federal Stored Communications Act, 18 USCA §§2701 through 2712 (“FSCA”).
63. The subpoenas did not conform to any New Mexico state law or federal law.
64. By reason of the aforementioned conduct, Respondent has violated the following provisions of the Rules of Professional Conduct:
 - a. Rule 16-501(A), by having managerial authority over a lawyer and failing to make reasonable efforts to insure that the

subordinate lawyer conformed to the Rules of Professional Conduct;

- b. Rule 16-501(B), by having direct supervisory authority over another lawyer and failing to make reasonable efforts to ensure that the other lawyer conformed to the Rules of Professional Conduct; and/or
- c. Rule 16-804(D) by engaging in conduct prejudicial to the administration of justice.

COUNT V

65. On September 17, 2012, without the knowledge of Respondent, ADA Robyn A. Simms (“ADA Simms”), issued and filed two (2) Subpoenas *Duces Tecum* under the caption, State of New Mexico v. John Doe, using a “cause number” of CS 2012-1 or more fully, D-820-CS-2012-000001 for cell records.

66. In 2013, without the knowledge of Respondent, ADA Simms, issued and filed twenty-one (21) Subpoenas *Duces Tecum* under the caption, State of New Mexico v. John Doe, using a “cause number” of CS 2013-1 or more fully, D-820-CS-2013-000001 for cell records:

- a. January 9, 2013 – one (1) John Doe subpoena
- b. January 30, 2013 – six (6) John Doe subpoenas

c. February 25, 2013 – one (1) John Doe subpoena

d. March 13, 2013 – thirteen (13) John Doe subpoenas

67. On February 8, 2013, without the knowledge of Respondent, ADA Sims issued and filed a Subpoena *Duces Tecum* under the caption, State of New Mexico v. John Doe, using a “cause number” of CS 2013-1 or more fully, D-820-CS-2013-000001 for records from Kit Carson Electric Cooperative to the attention of Richard Martinez. The records requested were for subscriber of service information for an account, the date the account was activated and records that “show monthly power consumption and bill amount”. Notably, the Subpoena *Duces Tecum* stated, **“DO NOT DISCLOSE EXISTENCE OF THIS SUBPOENA”**.
68. No criminal case had commenced, nor was any attorney in the Office of the District Attorney representing the State as a party in relation to the issuance of the subpoenas.
69. The subpoenas were not issued by the grand jury.
70. The subpoenas did not conform to Rule 5-511 NMSA of the Rules of Criminal Procedure for the District Courts.
71. The subpoenas did not conform to NMRA, Form 9-217.
72. The subpoenas did not conform to the Federal Stored Communications Act, 18 USCA §§2701 through 2712 (“FSCA”).

73. The subpoenas did not conform to any New Mexico state law or federal law.

74. By reason of the aforementioned conduct, Respondent has violated the following provisions of the Rules of Professional Conduct:

- a. Rule 16-501(A), by having managerial authority over a lawyer and failing to make reasonable efforts to insure that the subordinate lawyer conformed to the Rules of Professional Conduct;
- b. Rule 16-501(B), by having direct supervisory authority over another lawyer and failing to make reasonable efforts to ensure that the other lawyer conformed to the Rules of Professional Conduct; and/or
- c. Rule 16-804(D) by engaging in conduct prejudicial to the administration of justice.

FACTORS IN AGGRAVATION

75. Respondent has displayed a pattern of misconduct. *See, ABA Standards for Imposing Lawyer Sanctions, Standard 9.22(c);*

76. Respondent has substantial experience in the practice of law (1991/23 years). *See, ABA Standards for Imposing Lawyer Sanctions, Standard 9.22(i); and/or*

77. The names and addresses of potential witnesses presently known to disciplinary counsel are:

Emilio J. Chavez
Donald Gallegos
Robyn A. Simms
105 Albright Street, Suite 2
Taos, NM 87571

Rachel Berenson
415 6th Street, N.W.
Albuquerque, NM 87102

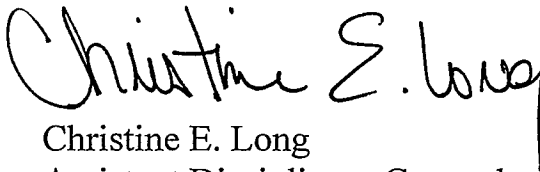
Todd Coberly
1322 Paseo de Peralta
Santa Fé, NM 87501

78. It is anticipated that this matter will be prosecuted by Assistant Disciplinary Counsel, Christine E. Long.

Wherefore, by reasons of the foregoing, it is respectfully requested pursuant to Rule 17-309(C) NMRA 2014, that a hearing committee be designated to hear evidence and make findings of fact, conclusions of law, and recommendations to the Disciplinary Board and, if any of the charges are sustained, be disciplined and assessed the costs of this proceeding.

DATE: October 1, 2014

Respectfully Submitted,



Christine E. Long
Assistant Disciplinary Counsel