

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

**In the Matter of**

**Emilio J Chavez, Esq.**

**Disciplinary No. 10-2014-704**

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

**CONSOLIDATED WITH:**

**In the Matter of**

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

**Donald Gallegos, Esq.**

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

**DISCIPLINARY PANEL'S DECISION AND RECOMMENDATIONS**

This matter having come before the Disciplinary Panel of the New Mexico Disciplinary Board (hereinafter "the Disciplinary Panel") pursuant to NMRA Rule 17-314 and the Disciplinary Panel consisting of Margaret A. Graham, Esq., Board Panel Chair, Curtis R. Gurley, Esq. and Edward L. Rose, MD, Board Panel Members, having reviewed the entire record including the "Hearing Committee's Findings of Fact, Conclusions of Law", the briefs submitted by each party, and having heard the oral arguments of the parties, hereby finds the following:

1. The Disciplinary Panel has been duly appointed to hear this matter and has jurisdiction over the parties and subject matter of this action.
2. The record contains sufficient evidence to support the Hearing Committee's findings of fact.
3. The Disciplinary Panel hereby adopts and incorporates by reference as if set forth

in full herein the Hearing Committee's Findings of Fact numbers 1-24, 27-29, 31, 33, 35-43, 45-47 and 54, and further finds that the factual allegations giving rise to the charges filed by Disciplinary Counsel are largely undisputed.

4. The Disciplinary Panel does not adopt the Hearing Committee's Findings of Fact numbers 25, 26, 30, 32, 34, 44, and 48-53, finding that the record does not support these finding of fact.

5. The Disciplinary Panel finds that the Hearing Committee's Conclusion of Law are not supported by the Findings of Fact. Therefore, the Disciplinary Panel sets forth herein its own Conclusions of Law as follows:

a. The largely uncontroverted facts as set forth in the Hearing Committee's April 16, 2015 Order were proven by a preponderance of the evidence. The standard of proof in disciplinary cases is a preponderance of the evidence, and the burden of proof is borne by Disciplinary Counsel. *See In re D'Angelo*, 105 NM 391, 733 P. 2d 360 (1986).

b. These matters were consolidated by order of the Hearing Committee Chair without objection from the parties.

c. Respondents Chavez and Gallegos were acting on behalf of the State of New Mexico at all times relevant hereto when they engaged in the activities that gave rise to this disciplinary proceeding.

d. At the time that Respondents issued the pre-indictment subpoenas that are the subject of this matter, no New Mexico case law, rule or statute authorized the issuance of pre-indictment subpoenas. *See State v. Frawley*, 2007-NMSC-057 ¶¶ 38-43 ("A change in procedural rules in a criminal case is only applied prospectively unless it is a substantive change altering the range of conduct or class of persons it punishes, or it is a "watershed rule" necessary to prevent an

impermissibly large risk of inaccurate convictions and substantially alters the “bedrock” procedural elements essential to the fairness of a proceeding”).

e. Rule 5-511 NMRA, which governs the issuance of subpoenas in criminal cases, states in part that “(1) Every subpoena shall: (a) state the name of the court from which it is issued; (b) state the title of the action and its criminal action number ...”. Clearly, this contemplates a case having been filed under the caption of which the subpoena is to be issued. Without a case having been filed, there can be no parties to the action as required by Rule 5-511(A)(3) NMRA.

f. It is undisputed that there was no case in controversy, no action, no criminal action number, or party to represent at the time the pre-indictment subpoenas that are the subject of this matter were issued.

g. Because there was no case in controversy, no action, no criminal action number, or party to represent at the time the pre-indictment subpoenas that are the subject of this matter were issued, there was also no party to object to the issuance of the pre-indictment subpoenas and thereby test the sufficiency of the subpoenas prior to the production of information pursuant to the subpoenas.

h. There is no legal ambiguity as to the law in New Mexico regarding the issuance of pre-indictment subpoenas. Clearly, such practice is not permitted and to engage in such conduct is a violation of the Rules of Professional Conduct.

i. In issuing the pre-indictment subpoenas the Respondents may have acted with the meritorious intentions of gathering information with which they could solve a crime that had occurred or was occurring in their community. However, it is not acceptable for any officer of the Court, and certainly not one with the responsibility and power of a prosecutor to use their



position to try to obfuscate the rules to the degree as Respondents have done.

j. As a result of Respondents' improper actions, the time and resources of the Courts and parties to the matters for which the pre-indictment subpoenas were issued, was used to litigate matters that should not have been at issue but for Respondents' improper actions.

k. As a result of Respondents' improper actions, the private and personal information of various individuals was provided to Respondents without the knowledge of those individuals and without their ability to challenge the propriety of the disclosure of the information.

l. As a supervisor, it is incumbent upon Respondent Gallegos to ensure that those under his supervision are complying with the requirements of the Rules of Professional Conduct. *See In re Estrada*, 2006-NMSC-047, 140 N.M. 492, 143 P.3d 731 ("When others are involved in misconduct with counsel, degrees of culpability may vary, but ultimate responsibility does not. Counsel simply cannot delegate to others their own duty to act responsibly...").

m. Respondents' conclusion at the time they acted concerning the propriety of using pre-indictment subpoenas was unreasonable and in violation of the Rules of Professional Conduct.

n. Respondent Gallegos violated 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.

o. Respondent Gallegos violated 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.

p. Respondent Gallegos violated 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 by failed to take remedial action.

q. Respondent Chavez violated Rule 16-101 by failing to provide competent representation to their client, the State of New Mexico in obtaining information beneficial to his position that violated the rights of others.

r. Respondent Chavez violated Rule 16-304(A) by unlawfully obstructing another party's access to evidence by obtaining the evidence in an improper manner that prevented other parties and interested persons from being able to challenge the propriety of the subpoenas prior to the information requested being provided.

s. Respondent Chavez violated Rule 16-304(C) by failing to obey the rules of a tribunal by working outside of the Rules of Procedure to procure information in an improper manner.

t. Respondent Chavez violated Rule 16-305(D) by engaging in conduct disruptive to the tribunal by using Court time and resources to litigate matters that would not have been at issue but for Respondents' improper actions.

u. Respondent Chavez violated Rule 16-404(A) by using methods to obtain evidence that violate the legal rights of third persons; and

v. Respondents Chavez and Gallegos violated Rule 16-804(D) by engaging in conduct prejudicial to the administration of justice.

w. The ABA Standards for Imposing Lawyer Sanctions 4.53 states that a Reprimand is generally appropriate when a lawyer: (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client.

x. The ABA Standards for Imposing Lawyer Sanctions 6.12 states that Suspension is generally appropriate when a lawyer knows ... that material information is

improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceedings, or causes an adverse or potentially adverse effect on the legal proceedings.

y. The ABA Standards for Imposing Lawyer Sanctions 6.22 states that Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or third party, or causes interference or potential interference with a legal proceeding.

z. The ABA Standards for Imposing Lawyer Sanctions 6.23 states that Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

6. Pursuant to *In re Stein*, 2008-NMSC-013, 143 NM 462, 177 P.3d 513, the panel has considered both mitigating and aggravating factors in this matter as well. Factors in support of mitigation include, both Respondents have acknowledged their errors and have discontinued the practice of issuing pre-indictment subpoenas, and neither Respondent has a history of disciplinary infractions. Factors in support of aggravation include, both Respondents are experienced attorneys who have practiced in their area of expertise for many years, and both Respondents are in positions of authority in which they represent the State of New Mexico and hold the powers of prosecutors in the State.

7. The Board Panel, by Margaret A. Graham and Edward L. Rose, therefore orders the following:

A. That Respondent Gallegos shall receive a Formal Reprimand, pursuant to NMRA 17-315(B) 2015.



8. The Board Panel, by Margaret A. Graham and Edward L. Rose, further recommends the following:

- A. That Respondent Chavez shall receive a Public Censure pursuant to NMRA 17-315(C) 2015; and
- B. That Respondents Gallegos and Chavez each should be assessed one-half of the costs of this action with their individual deposition costs being assigned to them separately pursuant to Rule 17-106(B) NMRA 2015, within thirty (30) days of the imposition of sanctions by the Supreme Court of New Mexico (any costs not paid in a timely manner accruing interest at the rate of 8 ¾ % per annum).

/s/ Margaret A. Graham  
MARGARET A. GRAHAM, Esq.  
Board Panel Chair

Approved Telephonically July 27, 2015  
EDWARD L. ROSE, MD  
Board Panel Member

**Dissenting Recommendation:**

- 1. Board Panel Member, Curtis R. Gurley, Esq., respectfully dissents from the majority of the Board Panel's Recommendation as follows:
- 2. Respondent Chavez and Respondent Gallegos both hold governmental positions of authority.
- 3. Respondent Chavez issued in excess of 90 subpoenas when he knew no matter whatsoever was pending before any court, grand jury, or other tribunal, in clear violation of Rule 5-511 *et seq.* NMRA.

4. At least one of those improperly issued subpoenas further violated Rule 5-511.A(1)(d), which mandates that such subpoena be substantially in the form approved by the Supreme Court. Such subpoena did not include all the language approved by the Supreme Court, including the warnings and instructions to the person or entity subject to the subpoena; and was allowed by Respondent Chavez to be prepared by a non-lawyer, and then knowingly was executed by Respondent Chavez.
5. The ABA Standards for Imposing Lawyer Sanctions 5.22 provides, “suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.”
6. Once Respondent Gallegos became aware of the issues with the practices of Respondent Chavez, he negligently relied solely on Respondent Chavez’ justifications of Respondent Chavez’ own actions.
7. ABA Standards for Imposing Lawyer Sanctions 5.23 provides, “[Public Censure] is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.”
8. The recitations of violations *et cetera* set forth in the Board Panel’s Decision paragraph 5, a through u, above, are herein adopted.
9. Respondent Chavez should be suspended from the practice of law for a period of one year, with the imposition of that suspension deferred for a period of one year, on the condition that he not further violate any rules of the Court nor laws of the



State.

10. Respondent Gallegos should receive a Public Censure from the Supreme Court.

Approved Electronically July 28, 2015

CURTIS R. GURLEY, Esq.

Board Panel Member

**Certificate of Mailing**

I hereby certify that on this 28<sup>th</sup> day  
of July, 2015, a true and correct  
copy of the foregoing was  
mailed to the following parties of record:

William F. Riordan, Esq.  
2740 Rio Grande Blvd NW  
Albuquerque, NM 87104  
*Counsel for Mr. Chavez*

Ahmad Assad, Esq.  
818 Fifth Street NW  
Albuquerque, NM 87102  
*Counsel for Mr. Gallegos*

Christine Long, Esq.  
Assistant Disciplinary Counsel  
20 First Plaza NW, Ste. 710  
Albuquerque, NM 87102

William Slease, Esq.  
Chief Disciplinary Counsel  
20 First Plaza NW, Ste. 710  
Albuquerque, NM 87102

/s/ Margaret A. Graham

Margaret A. Graham