

**PROFESSIONAL SERVICES AGREEMENT
BETWEEN SANTA FE COUNTY AND
KELLY, DURHAM & PITTARD, L.L.P
TO PROVIDE SPECIAL LEGAL COUNSEL SERVICES FOR OPIOID
INVESTIGATION/LITIGATION**

THIS AGREEMENT is made and entered into this 24th day of April 2018, by and between **Santa Fe County**, hereinafter referred to as the “County” and Kelly, Durham & Pittard, L.L.P., with a principal place of business located at 505 Cerrillos Road, Suite A209, Santa Fe, New Mexico, hereinafter referred to as the “Contractor”.

WHEREAS, the County wishes to determine the feasibility of Santa Fe County bringing an action against the manufacturers and distributors of prescription opiates for damages to the County arising out of aggressive marketing and distribution of opiates in and to the County; and

WHEREAS, the County wishes to retain outside counsel to investigate and if appropriate commence litigation against such manufacturers and distributors, with all work to be performed on a contingency basis without the County advancing costs and expenses for such litigation; and

WHEREAS, pursuant to NMSA 1978, Sections 13-1-112 and 13-1-117 of the Procurement Code, Request for Proposals No. 2018-0236-AT/MM was issued to procure these legal services; and

WHEREAS, the County requires the services of the Contractor and the Contractor is qualified and willing to provide these services and both parties wish to enter into this Agreement.

NOW, THEREFORE, in consideration of the premises and mutual obligations herein, the parties hereto mutually agree as follows:

1. SCOPE OF WORK

At the discretion of the County Attorney or the County Attorney’s designee, Contractor shall provide the following professional legal services:

1. Evaluate the merits of and, to the extent desired by the County, initiate and pursue litigation against opiate manufacturers, distributors and others related to the impact of the opiate epidemic and crisis on Santa Fe County. Contractor shall collaborate with other public entities if the County, in consultation with the Contractor, determines such collaboration to be in the best interest of the County.
2. Be responsible for legal research, advice and representation concerning the marketing, advertising, distribution, and manufacture of opiates and the impact of opiates on Santa Fe County.
3. Brief County officials and the County Attorney on all matters related to this Scope of Work.

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4. Provide copies of all litigation correspondence and pleadings produced and received in connection with litigation on behalf of the County and give timely written notice to the County Attorney on any and all pleadings, dispositive motions, rulings, hearings, trials, mediations or settlement negotiations and any other legal events relevant to this Scope of Work.
5. Meet, coordinate with and submit interim reports to the County Attorney on a basis to be determined by the County Attorney, but not less than monthly.
6. Refrain from making any settlement or compromise of any nature of any of the County's claims without the County's prior approval. The County has the absolute right to accept or reject any settlement or compromise. The County agrees to seriously consider any settlement offer Contractor recommends before making a decision to accept or reject such offer.

2. CONTINGENT FEE COMPENSATION; COSTS AND EXPENSES

A. There is no fee for this representation unless a monetary recovery acceptable to County is obtained by Contractor. Contractor will only be compensated for services performed if the Contractor obtains Recovery for the County. Recovery means a monetary recovery stemming from performance of the scope of work set forth herein, acceptable to the County, and obtained by Contractor, whether by suit, settlement, or otherwise. Contractor agrees to advance all costs and expenses associated with prosecuting the litigation. Absent Recovery, Contractor will not be compensated for fees and costs and expenses associated with this Agreement.

B. The fee for the representation outlined herein shall be a 25% gross fee. From any Recovery, after the application of the 25% fee to the gross amount recovered, Contractor will be reimbursed for all costs and expenses associated with representation of Santa Fe County in this matter. Contractor shall facilitate payment of fees and costs and expenses in accordance with this Agreement, and shall then remit the balance of monies recovered to the County. The fees, costs and expenses received by Contractor in accordance with this Agreement shall be paid from the settlement proceeds, with authorization from the County, to the Contractor. The Contractor shall be solely responsible for payment to subcontractors or third parties whose services are rendered to the Contractor as part of Contractor's Scope of Work under this Agreement. In the event of a loss at trial or abandonment of the claim prior to recovery of any sums, no monies shall be paid to Contractor or any subcontractors for any work performed or any costs or expenses incurred.

C. By way of example only, if the litigation is settled for the gross amount of \$1,000,000.00, and the costs and expenses are \$100,000, then the fee to Contractor shall be \$250,000, the costs and expenses of \$100,000 shall be deducted from the balance, and the net recovery to County shall be \$650,000. The costs and expenses which may be deducted from a monetary recovery acceptable to County that is obtained by Contractor include the following without limitation: court fees, process server fees, transcripts fees, expert witness fees, MDL fees, common benefit assessments, courier service fees, appellate printing fees, necessary travel expenses of attorneys to attend depositions, interview witnesses and the like, and other appropriate out-of-pocket expenses, as determined in the reasonable discretion of County.

D. In the event that any settlement, final judgement, or other resolution of the action results in a monetary recovery to the County that is less than the amount of the attorney's fees and costs and expenses incurred by Contractor, County shall not be required to pay Contractor any more than the sum of the full monetary recovery. No monies shall be paid to Contractor for any work performed or costs or expenses incurred by Contractor in the event no monetary recovery to County has been obtained by Contractor. In the event the Contractor fails to secure funds from which attorney's fees and costs and expenses can be paid, including but not limited to a loss at trial or a dismissal of the lawsuit by the court, no monies shall be paid to Contractor for any work performed or costs and expenses incurred by the Contractor. In such an event, neither party shall have any further rights against the other.

E. Contractor's fee set forth above is not set or regulated by law but has been freely negotiated between the Contractor and County. Unless Contractor and County negotiate and execute a separate agreement, the County need not pay Contractor for any matter related to, but not specifically covered in, this Agreement.

F. No settlement or compromise of any nature shall be made of any of the County's claims without the County's prior written approval.

G. Payment of Contractor's fee under this Agreement shall not foreclose the right of the County to recover excessive or illegal payment.

H. Contractor will incur various costs and expenses in performing these legal services. Costs and expenses shall include court fees, jury fees, service of process charges, court and deposition reporters' fees, MDL fees, common benefit assessments, photocopying and reproduction costs, notary fees, long distance telephone charges, messenger and other delivery fees, postage, deposition costs, travel costs including parking, mileage, transportation, meals and hotel costs, investigation expenses, consultant, expert witness, professional mediator, and arbitrator and/or special master fees. Costs and expenses will be compensated at cost in the event of a sufficient recovery. In office photocopying shall be charged at the rate of .10/page. Facsimile charges shall be charged at the rate of .10/page. Mileage shall be compensated at the rate of .43 cents per mile.

F. As set forth above, the County's responsibility for attorney fees, costs and expenses is contingent upon the scope of work defined above resulting in Recovery. Contractor and additional law firms working as subcontractors with the approval of the County have agreed in writing as to the appropriate split of attorney fees. Specifically, in the event of a Recovery (as defined above), the attorney fees will be split between the law firms as follows:

<u>Firm Name</u>	<u>Percentage of Fees if Successful</u>
Kelly, Durham & Pittard, LLP	10%
von Briesen & Roper, s.c.	10%
Crueger Dickinson LLC	40%
Simmons Hanly Conroy LLC	40%

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The split of attorneys' fees outlined above may be subject to change. In the event of such an amendment, the County will be notified in writing of that amendment.

G. The County shall have all of its common law, equitable, and statutory rights of set-off. These rights shall include, but not be limited to, the County's option to withhold, for the purposes of set-off, any moneys due to Contractor under this Agreement up to any amounts due and owing to the County with regard to this Agreement. The County shall exercise its set-off rights in accordance with normal County practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the County.

3. EFFECTIVE DATE AND TERM

This Agreement shall be effective upon the date indicated above (Effective Date) and the term shall be four years from the Effective Date, unless earlier terminated pursuant to Section 5 (Discharge and Withdrawal) of this Agreement.

4. DISCHARGE, WITHDRAWAL, OR EXPIRATION OF THE TERM PRIOR TO COMPLETION

The County may discharge the Contractor at any time and in the event of such termination neither party shall have any rights against the other party, except as follows. In the event of a recovery by the County against the Defendants of a claim brought by Contractor subsequent to termination, Contractor shall have rights in the nature of *quantum meruit* to recover fees, costs and expenses reasonably allocable to their work prior to termination. Contractor may withdraw with the County's consent or, within a reasonable time after giving notice to the County, for good cause. Good cause includes the County's breach of this Agreement and/or the County's refusal to cooperate with the Contractor in pursuing this litigation, the Contractor's determination that there is a lack of merit to any claims, or any other fact or circumstance that would render Contractor's continuing representation unlawful or unethical. To the extent the term expires prior to the completion of litigation commenced by Contractor during the term of this Agreement, Contractor shall also have rights in the nature of *quantum meruit* to recover fees, costs and expenses reasonably allocable to their work prior to expiration of the Agreement, but only if they thereafter attempt unsuccessfully to compete to secure responsibility for continuing the litigation.

5. INDEPENDENT CONTRACTOR

The Contractor and its subcontractors, agents, and employees are independent contractors and are not employees or agents of the County. Accordingly, the Contractor and its subcontractors, agents, and employees shall not accrue leave, participate in retirement plans, insurance plans, or liability bonding, use County vehicles, or participate in any other benefits afforded to employees of the County. Except as may be expressly authorized elsewhere in this Agreement, the Contractor has no authority to bind, represent, or otherwise act on behalf of the County and agrees not to purport to do so.

6. ASSIGNMENT

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for compensation due or to become due under this Agreement without the advance written approval of the

County. Any attempted assignment or transfer without the County's advance written approval shall be null and void and without any legal effect.

7. SUBCONTRACTING

The law firms identified in Contractor's proposal shall be subcontractors to the Contractor for the purposes of completing the scope of work set forth herein. They shall be tasked by Contractor with responsibility for the scope of work required by this Agreement in accordance with the proposal. The Contractor shall not subcontract or delegate any portion of the services to be performed under this Agreement other than as set forth in the proposal, without the advance written approval of the County. Any attempted subcontracting or delegating without the County's advance written approval shall be null and void and without any legal effect and the County shall not form the basis of a component of the fees and costs for which Contractor is compensated. The law firms with whom Contractor must subcontract are identified in Attachment A.

8. PERSONNEL

A. All work performed under this Agreement shall be performed by the Contractor and the approved subcontractors or under its supervision.

B. The Contractor represents that it has, or will secure at its own expense, all personnel required to discharge its obligations under this Agreement. Such personnel (i) shall not be employees of or have any contractual relationships with the County and (ii) shall be fully qualified and licensed or otherwise authorized or permitted under federal, state, and local law to perform such work.

9. RELEASE

Upon its receipt of all payments due under this Agreement, the Contractor releases the County, its Elected Officials, officers, agents and employees from all liabilities, claims, and obligations whatsoever arising from or under or relating to this Agreement.

10. CONFIDENTIALITY

Any confidential information provided to or developed by the Contractor and Subcontractors in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor or Subcontractors without prior written approval of the County.

11. PUBLICATION, REPRODUCTION, AND USE OF MATERIAL; COPYRIGHT;

- A. The County has the unrestricted right to publish, disclose, distribute and otherwise use, in whole or in part, any reports, data, or other material prepared under or pursuant to this Agreement.
- B. The Contractor acknowledges and agrees that any material produced in whole or in part under this Agreement is a work made for hire. Accordingly, to the extent that any such material is copyrightable in the United States or in any other country the County shall own such copyright.

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12. NO ORAL MODIFICATIONS; WRITTEN AMENDMENTS REQUIRED

This Agreement may not be modified, altered, changed, or amended orally but, rather, only by an instrument in writing executed by the parties hereto. The Contractor specifically acknowledges and agrees that the County shall not be responsible for any changes to Section 1 (Scope of Work) of this Agreement unless such changes are set forth in a duly executed written amendment to this Agreement.

13. ENTIRE AGREEMENT; INTEGRATION

This Agreement incorporates all the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof, and all such agreements, covenants and understandings have been merged into this written Agreement. No prior or contemporaneous agreement, covenant or understandings, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

14. NOTICE OF PENALTIES

The Procurement Code, NMSA 1978, Section 13-1-28 through 13-1-199, imposes civil and criminal penalties for its violation. In addition, New Mexico criminal statutes impose felony penalties for bribes, gratuities, and kickbacks

15. EQUAL OPPORTUNITY COMPLIANCE

- A. The Contractor agrees to abide by all Federal, State, and local laws, ordinances, and rules and regulations pertaining to equal opportunity and unlawful discrimination. Without in any way limiting the foregoing general obligation, the Contractor specifically agrees not to discriminate against any person with regard to employment with the Contractor or participation in any program or activity offered pursuant to this Agreement on the grounds of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap, serious medical condition, spousal affiliation, sexual orientation, or gender identity.
- B. The Contractor acknowledges and agrees that failure to comply with this Section shall constitute a material breach of this Agreement.

16. COMPLIANCE WITH APPLICABLE LAW; CHOICE OF LAW

- A. In performing its obligations hereunder, the Contractor shall comply with all applicable laws, ordinances, and regulations.
- B. Contractor shall comply with the requirements of Santa Fe County Ordinance 2014-1 (Establishing a Living Wage).
- C. This Agreement shall be construed in accordance with the substantive laws of the State of New Mexico, without regard to its choice of law rules.

17. RECORDS AND INSPECTIONS

To the extent its books and records relate to (i) its performance of this Agreement or any subcontract entered into pursuant to it or (ii) cost or pricing data (if any) set forth in this Agreement or that was required to be submitted to the County as part of the procurement process, the Contractor agrees to (i) maintain such books and records in accordance with Santa Fe County's records retention schedule and dispose of such records in accordance with the disposition of public records process in effect for Santa Fe County at the time of disposition of those records; (ii) allow the County or its designee to audit such books and records at reasonable times and upon reasonable notice; and (iii) to keep such books and records in accordance with generally accepted accounting principles ("GAAP").

In the event the County receives a request for Santa Fe County public records in the possession of Contractor, the County Attorney's Office shall coordinate with the Contractor so that the Contractor can provide the County Attorney's office with the responsive documents in compliance with the Inspection of Public Records Act.

The Contractor shall retain records generated as a result of this Agreement for a time period compliant with Santa Fe County's record retention schedule, as the schedule may change from time to time. That schedule is currently established by Santa Fe County Resolution No. 2013-60. Currently litigation files must be maintained for ten years following the completion of the case. Upon the expiration of the applicable records retention period, the County will write to the Contractor to advise that the retention period has expired. The Contractor shall cooperate with the County Attorney's Office to provide the records to Santa Fe County in their native format so that Santa Fe County can, in compliance with New Mexico law, send out those notices required prior to destruction of public records and comply with any destruction requirements then in effect pertaining to destruction of local government records.

18. SEVERABILITY

If any term or condition of this Agreement is held invalid or non-enforceable by any court of competent jurisdiction, the remainder of this Agreement shall not be affected and shall be valid and enforceable to the fullest extent of the law.

19. NOTICES

All notices required to be given to the County under this Agreement shall be mailed (pre-postage paid) to:

Santa Fe County
Attn: Santa Fe County Attorney
P.O. Box 276
102 Grant Ave.
Santa Fe, NM 87504-0276

All notices required to be given to the Contractor under this Agreement shall be mailed (pre-postage paid) to:

Kelly, Durham & Pittard, L.L.P.
Attention: Justin R. Kaufman
505 Cerrillos Road, Suite A209
Santa Fe, New Mexico 87501

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The Contractor may provide notices such as case and client updates via email as an alternative to mail.

20. CONTRACTOR'S REPRESENTATIONS

The Contractor hereby represents and warrants that:

A. This Agreement has been duly authorized by the Contractor, the person executing this Agreement has authority to do so, and, once executed by the Contractor, this Agreement shall constitute a binding obligation of the Contractor.

B. This Agreement and Contractor's obligations hereunder do not conflict with Contractor's corporate agreement.

C. Contractor represents and warrants that it has completed diligent inquiry within its offices and conducted a search of other clients to determine whether Contractor's performance of the Scope of Work under this Agreement might create a potential conflict of interest with any other clients.

21. FACSIMILE SIGNATURES

The parties hereto agree that a facsimile signature has the same force and effect as an original for all purposes.

22. NO THIRD-PARTY BENEFICIARIES

This Agreement was not intended to and does not create any rights in any persons not a party hereto.

23. INSURANCE

A. General Conditions. The Contractor shall submit evidence of insurance as is required herein. Policies of insurance shall be written by companies authorized to write such insurance in New Mexico.

B. General Liability Insurance, Including Automobile. The Contractor and all subcontractors shall procure and maintain during the life of this Agreement a comprehensive general liability and automobile insurance policy with liability limits in amounts not less than \$1,000,000 combined single limits of liability for bodily injury, including death, and property damage for any one occurrence. Said policies of insurance shall include coverage for all operations performed for the County by the Contractor or subcontractor; coverage for the use of all owned, non-owned, hired automobiles, vehicles and other equipment, both on and off work; and contractual liability coverage under which this Agreement is an insured contract. The County of Santa Fe shall be a named additional insured on each policy.

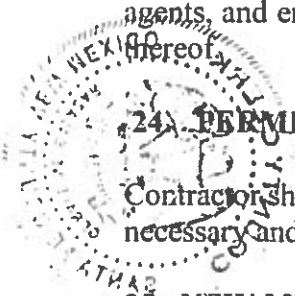
C. Workers' Compensation Insurance. The Contractor and subcontractors shall comply with the provisions of the Workers' Compensation Act.

D. Increased Limits. If, during the life of this Agreement, the Legislature of the State of New Mexico increases the maximum limits of liability under the Tort Claims Act (NMSA 1978, Sections

41-4-1 through 41-4-29, as amended), the Contractor shall increase the maximum limits of any insurance required herein.

E. Professional Liability [Malpractice/Errors and Omissions Insurance]. The Contractor shall procure and maintain during the life of this Agreement professional liability (errors and omissions) insurance with policy limits of not less than \$1,000,000.00 per occurrence, \$2,000,000.00 aggregate. The Contractor shall require Simmons Hanly Conroy, LLC to procure and maintain during the life of this Agreement professional liability (errors and omissions) insurance with policy limits not less than \$10,000,000.00 per occurrence including aggregate, Crueger Dickinson, LLC to procure and maintain during the life of this Agreement professional liability (errors and omissions) insurance with policy limits not less than \$1,000,000.00 per occurrence including aggregate, and VonBriesen & Roper S.C., to procure and maintain during the life of this Agreement professional liability (errors and omissions) insurance with policy limits not less than \$1,000,000.00 per occurrence including aggregate.

F. Indemnification. Contractor shall indemnify and hold the County, its Elected Officials, agents, and employees harmless from any liability arising with respect to this Agreement or any terms



hereof.

24. PERMITS, FEES, AND LICENSES

Contractor shall procure all permits and licenses, pay all charges, fees, and royalties, and give all notices necessary and incidental to the due and lawful performance of its obligations hereunder.

25. NEW MEXICO TORT CLAIMS ACT

No provision of this Agreement modifies or waives any sovereign immunity or limitation of liability enjoyed by County or its "public employees" at common law or under the New Mexico Tort Claims Act, NMSA 1978, § 41-4-1, et seq.

26. CAMPAIGN CONTRIBUTION DISCLOSURE FORM

The Contractor agrees to compute and submit simultaneous with execution of this Agreement a Campaign Contribution Disclosure Form approved by the County.

27. APPOINTMENT OF AGENT FOR SERVICE OF PROCESS.

The Contractor appoints Justin Kaufman, Kelly, Durham, Pittard, L.L.P., 505 Cerrillos Road Suite A209, Santa Fe, New Mexico 87501, as its agent upon whom process and writs in any action or proceeding arising out of or related to this Agreement may be served. The Contractor acknowledges and agrees that service upon its designated agent shall have the same effect as though the Contractor were actually and personally served within the state of New Mexico.

28. SURVIVAL

The following provisions shall survive termination of this Agreement: CONTINGENT FEE COMPENSATION; COSTS AND EXPENSES, RECORDS AND INSPECTION, RELEASE, CONFIDENTIALITY, PUBLICATION AND USE OF MATERIAL, COMPLIANCE WITH LAW

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APPLICABLE LAW, INSURANCE, NO THIRD-PARTY BENEFICIARIES, APPOINTMENT OF AGENT FOR SERVICE OF PROCESS, AND SURVIVAL.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date of last signature by the parties below.

SANTA FE COUNTY:

Anna Hansen
Anna Hansen, Chair
Board of County Commissioners of Santa Fe County



COUNTY OF SANTA FE)
STATE OF NEW MEXICO) ss

AGREEMENT (COUNTY) NO
PAGES: 11

I Hereby Certify That This Instrument Was Filed for Record On The 30TH Day Of April, 2018 at 10:14:59 AM And Was Duly Recorded as Instrument # 1856197 Of The Records Of Santa Fe County

Witness My Hand And Seal Of Office
Geraldine Salazar
Deputy Eustolia County Clerk, Santa Fe, NM
Martinez

ATTESTATION:

Geraldine Salazar
Geraldine Salazar
Santa Fe County Clerk

4/24/2018
Date



APPROVED AS TO FORM:

R. Bruce Frederick
R. Bruce Frederick
Santa Fe County Attorney

4-23-18
Date

Finance Department:

Stephanie S. Clarke
Stephanie S. Clarke
Finance Director

4/23/18
Date

KELLY, DURHAM & PITTARD, L.L.P.:

Justin R. Kaufman
Justin R. Kaufman
Partner, Kelly, Durham & Pittard, LLP

4/23/18
Date

**Attachment A
Subcontractor Listing**

Name of Subcontractor: Simmons Hanly Conroy	
Address: 112 Madison Avenue, 7 th floor, New York, New York 10016-7416	
Telephone No: 1 (212) 784-6400	State Bar Admissions: New York, Texas, Massachusetts, Missouri
Staff Representatives: Paul Hanly, JR (New York/Texas) Jayne Conroy (Massachusetts/New York) Sarah Burns, ESQ. (Missouri)	
Name of Subcontractor: Crueger Dickinson	
Address: 4532 N. Oakland Avenue, Whitefish Bay, Wisconsin 53211	
Telephone No: 1 (414) 210-3868	State Bar Admissions: Wisconsin, Missouri, Texas
Staff Representatives: Charles Crueger (Wisconsin) Erin Dickinson (Wisconsin/Missouri/Texas) Krista Baisch (Wisconsin)	
Name of Subcontractor: vonBrieson	
Address: 411 East Wisconsin Avenue, Suite 100, Milwaukee, Wisconsin 53202	
Telephone No: 1 (414) 287-1570	State Bar Admissions: Wisconsin
Staff Representatives: Andrew Phillips (Wisconsin)	

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