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Special Insert:
NEW MEXICO HISPANIC BAR NEWSLETTER
RES PUBLICA

2006 State Bar of New Mexico Budget Disclosure is available online at www.nmbar.org. In an effort to save money this year, printed copies will be available upon request. See the Nov. 7 issue of the Bar Bulletin.
Paul Adams

Is pleased to announce his Of Counsel affiliation with Hisey-Grafe P.C. in Albuquerque, New Mexico. Paul will continue his practice specializing in patent litigation and intellectual property counseling. Hisey-Grafe is a technology firm specializing in services for emerging technology companies. Allan Hisey practices in the business transactions area; Gerald Grafe is a registered patent attorney practicing in patent prosecution and intellectual property transactions.

901 Rio Grande Boulevard, NW
Building H, Suite 262
Albuquerque, New Mexico 87104
(505) 222-3145 Office
adamspatentlaw@gmail.com
www.adamspatentlaw.squarespace.com
Dear Fellow Members of the Bar:

Past reports have discussed that attorney discipline proceedings have no guarantee for accused attorneys to take depositions of witnesses, propound interrogatories, requests to produce or requests for admissions to the Office of Disciplinary Counsel. An accused attorney must ask permission and prove need to obtain leave from the chair of the Hearing Committee to conduct any discovery. See, N.M.R.A. Rule 17-311. But this is only after charges are filed.

In contrast, Discipline Counsel and the Disciplinary Board are given plenary powers under Rules of Discipline from the get-go. Prior to the filing of any charges, Discipline Counsel can serve interrogatories on the accused attorney, require statements under oath of the accused attorney and other witnesses. See, Rule 17-306. So by the time formal charges are brought, Discipline Counsel has everything they need.

To begin leveling the playing field we must have rule changes. The Board of Bar Commissioners will be presented with a change to Rule 17-311 allowing discovery for accused lawyers in disciplinary matters equal to what is allowed in civil cases before the District Courts.

Presentation of the rule change will be at the December 9, 2005 meeting of the Board of Bar Commissioners. It is the understanding of this office that it would be brought up and discussed at the December meeting and then a further discussion and vote will be taken at the next meeting. If approved by the Bar Commissioners it would then be presented to the Supreme Court.

If you believe that accused lawyers should have discovery rights equal to a party in any personal injury or breach of contract suit, you should call or write your Bar Commissioners and let them know.

With Best Regards,

A Professional Law Corporation
The Stein Law Firm
City Place ~ Suite 2200  2155 Louisiana Blvd. NE
Albuquerque, NM  87110
(505) 889-0100 or 800-889-4433

This ad is paid for by the Stein Law Firm to inform the Bar.
## NOVEMBER - Video Replay Tuesdays

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
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<tr>
<td>29</td>
<td><strong>2005 Professionalism: Lawyers Concerned for Lawyers Substance Abuse and Addiction Issues in the New Mexico Legal Community</strong>&lt;br&gt;Tuesday, November 29 - 12:30-2:30 p.m.&lt;br&gt;2.0 Professionalism CLE Credits</td>
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<td>29-30</td>
<td><strong>Old Dogs, New Tricks: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005</strong>&lt;br&gt;Tuesday, October 18, 2005, 9-4 p.m.&lt;br&gt;Wednesday, October 19, 2005, 9-Noon&lt;br&gt;10.3 General and 1.2 Ethics CLE Credits</td>
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<td><strong>Dementia, Capacity &amp; Undue Influence of the Elderly</strong>&lt;br&gt;Tuesday, November 29 - 9 a.m. - 12:30 p.m.&lt;br&gt;4.2 General CLE Credits</td>
<td>$119</td>
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<td><strong>The ABC’s of Immigration Law</strong>&lt;br&gt;Tuesday, November 29 - 1 – 4:30 p.m.&lt;br&gt;4.2 General CLE Credits</td>
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<td><strong>Current Developments in Handling Discrimination Charges at the EEOC and the NM Human Rights Division</strong>&lt;br&gt;Tuesday, November 29 - 10 a.m. - Noon&lt;br&gt;2.7 General CLE Credits</td>
<td>$79</td>
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### FOUR WAYS TO REGISTER

**PHONE:** (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.<br>(Please have credit card information ready)<br>**FAX:** (505) 797-6071, Open 24 hours<br>**INTERNET:** www.nmbar.org, click CLE, then area of interest<br>**MAIL:** CLE, PO Box 92860, Albuquerque, NM 87199

Name __________________________
NM Bar # _______________________
Street _________________________
City/State/Zip ___________________
Phone _________________________
Fax ___________________________
E-mail _________________________

Program Title __________________
Program Date ___________________
Program Location_________________
Program Cost ____________________

- [ ] Purchase Order (Must be attached to be registered)
- [ ] Check enclosed $ __________
  Make check payable to: CLE
- [ ] VISA  [ ] MC  [ ] American Express  [ ] Discover
- [ ] Credit Card # _______________________
- [ ] Exp. Date _________________________
- [ ] Authorized Signature
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*Professionalism Tip*

With respect to parties, lawyers, jurors and witnesses:

I will be open to constructive criticism and make such changes as are consistent with this creed and the Code of Judicial Conduct when appropriate.

Meetings

November

21 Lawyers Professional Liability Committee
noon, State Bar Center

29 Natural Resources, Energy and Environmental Law Section
Board of Directors
noon, State Bar Center

December

1 Elder Law Section
noon, State Bar Center

1 Health Law Section Annual Meeting
5 p.m., Petroleum Club, Albuquerque

2 Board of Editors
noon, State Bar Center

3 Young Lawyers Division Board of Directors
10 a.m., State Bar Center

5 Attorney Support Group
5:30 p.m., 411 St. Michael’s Drive, Suite 1, Santa Fe

7 Employment and Labor Law Section
Board of Directors
noon, State Bar Center

State Bar Workshops

December

1 Consumer Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces

7 Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center

7 Family Law Workshop
5:30 p.m., Branigan Library, Las Cruces

January

25 Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar

25 Family Law Workshop
5:30 p.m., Branigan Library, Las Cruces

26 Consumer Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces

February

22 Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar

*Albuquerque and Las Cruces Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227; or visit the SBM Web site, www.nmbar.org
NOTICES

COURT NEWS
NM Supreme Court Law Library November Hours
The New Mexico Supreme Court Law Library will be closed on November 24, 25 and 26.

NM Board of Legal Specialization
Comments Solicited
The following attorneys are applying for certification as specialists in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon any of the applicants qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 92860, Albuquerque, NM 87199.

Employment and Labor Law
Duane C. Gilkey
Agnes Fuentevilla Padilla

Natural Resources Law
Don M. Fedric

Trial Specialist – Civil Law
Bradford C. Berge

First Judicial District Court
Destruction of Tapes
Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1976 to 1987
Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the First Judicial District Court will destroy tapes filed with the court in Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate cases for years 1976 to 1987 included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning Oct. 20 to Dec. 22. Verify exhibit information with the Special Services Division, (505) 7596/7405, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Destruction of Exhibits
Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1979 to 1987
Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the First Judicial District Court will destroy exhibits filed with the court in criminal, civil, children’s court, domestic, incompetency/mental health, adoption and probate cases for years 1979 to 1987 included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved through Dec. 2.

Second Judicial District Court
Children’s Court Monthly Judges’ and Managers’ Meeting
The Second Judicial District Children’s Court will hold its monthly judges’ and managers’ meeting at noon, Dec. 5, in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, Albuquerque, Children’s Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. Call (505) 841-7644 for an agenda.

Sixth Judicial District Court
Change of Physical Location of Public Auctions
Effective immediately, the Sixth Judicial District Court will hold all public auctions in the foyer/lobby of the Grant County Courthouse, Silver City, New Mexico.
Corrales Municipal Court
Change in Contact Information
The Corrales Municipal Court has a new address and fax number. The phone number remains the same.
Corrales Municipal Court
4324 Corrales Rd.
Corrales, NM 87048
Phone (505) 897-0503
Fax (505) 899-6541

STATE BAR NEWS
Attorney Support Group
Change in Meeting Location
The Dec. 5 meeting of the Attorney Support Group will meet at 5:30 p.m. at the office of Scott Voorhees, 411 St. Michael’s Drive, Suite I, Santa Fe, (505) 820-3302. The January meeting and all subsequent meetings will be held at the usual location, the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

Board of Bar Commissioners
Center for Civic Values IOLTA Grant Committee
The Board of Bar Commissioners will appoint two representatives, one-lawyer member and one public non-lawyer member, to the Center for Civic Values IOLTA Grant Committee for three-year terms. Anyone wishing to serve on the committee should send a letter of interest and brief resume by Nov. 28 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Disciplinary Board Appointment
The State Bar of New Mexico will make one appointment to the Disciplinary Board for a three-year term. Members wishing to serve on the board should send a letter of interest and brief resume by Dec. 1 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Election of Commissioners
The 2005 election of commissioners for the State Bar of New Mexico Board of Bar Commissioners will be held on Nov. 30. The Third Bar Commissioner District will have a contested election. Positions in the first, second, fifth and sixth districts are uncontested. Ballots for the contested election were mailed Nov. 4 and are due by noon, Nov. 30. See biographies and candidates’ statements in the Nov. 7 issue of the Bar Bulletin, pages 10–11.

No candidates filed for the vacancy in the seventh district, which includes Catron, Doña Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties. The Board of Bar Commissioners will make an appointment for that vacancy at the Dec. 9 meeting. Active State Bar members who practice in the district and are interested in serving on the Board of Bar Commissioners should send a letter by Dec. 8 to Executive Director Joe Conte, PO Box 92860, Albuquerque, NM 87199-2860, or jconte@nmbar.org.

Rocky Mountain Mineral Law Foundation Board
The Board of Bar Commissioners will make one appointment to the Rocky Mountain Mineral Law Foundation Board for a three-year term. Members wishing to serve on the board should send a letter of interest and brief resume by Nov. 28 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to 828-3765.

Board of Editors Vacancies
Two attorney and one non-attorney terms on the State Bar Board of Editors will expire at the end of 2005. As the editorial board for the Bar Bulletin, the Board of Editors reviews and approves articles submitted for publication. All vacancies are two-year terms, beginning Jan. 1, 2006 and ending Dec. 31, 2007, and may be renewed for one additional two-year term.

Interested attorneys should have previous editing or publication experience and be available to review articles regularly, as well as be able to attend quarterly board meetings in person or by teleconference. Resumes should be sent by Nov. 30 to Dorma Seago, PO Box 92860, Albuquerque, NM 87199; or by e-mail, dseago@nmbar.org.

Employment and Labor Law Section
Board Meeting
The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be Dec. 7. (Lunch is not provided.) For information about the section, visit the State Bar Web site, www.nmbar.org, or call Cindy Lovato-Farmer, section chair, (505) 667-3766.

Health Law Section
Annual Meeting
The Health Law Section will hold its annual meeting at 5 p.m., Dec. 1, at the Petroleum Club, 500 Marquette, Albuquerque. Program to be announced. Contact Chair John Bannerman, (505) 837-1900, or jab@nmcountylaw.com, to place an item on the agenda.

Public Law Section
Annual Meeting and Co-sponsorship of Municipal Attorneys’ Seminar
The Public Law Section will hold its annual meeting at 11:45 a.m., Nov. 30, in conjunction with the Municipal Attorneys’ Association Winter Meeting and Seminar at the Marriott Hotel, Albuquerque. All section members are encouraged to attend. Agenda items should be sent to Chair-elect Al Lama, Al.Lama@state.nm.us.

As co-sponsors of the seminar, section members will receive the same discount as members of the Municipal Attorneys’ Association. Visit www.nmml.org or contact Cherise Montoya, cmontoya@nmml.org, or (505) 982-5573, to obtain a registration form.

Real Property, Probate and Trust Section
Annual Meeting
The Real Property, Probate and Trust Section will hold its annual membership meeting at 1 p.m., Dec. 9, at the State Bar Center in conjunction with the 2005 Real Property Institute: Hot Topics in Real Estate. All section members are encouraged to attend the meeting. Contact Chair James Wildland, jwildland@mslaw.com, to place an item on the agenda.
Senior Lawyers Division Nominating Committee Report

The report of the Senior Lawyers Division nominating committee follows. Additional nominations may be made in the form of a petition signed by at least 30 members of the division. All members of the State Bar of New Mexico in good standing who are 55 years of age or older and who have practiced law for 25 years or more are members of the division and are eligible for office.

A nomination petition form is included on page 12. The petition must identify the position sought and state that the member agrees to the nomination. The deadline for submission of petitions to the State Bar is Dec. 16.

If no additional nominations are received, the nominees listed below are deemed elected by acclamation. If additional nominations are received via nominating petition, ballots will be mailed to all members of the division by Dec. 16.

Position #1
Term: 2006-2008
Nominee: Carter J. Clary
Biography unavailable.

Position #2
Term: 2006-2008
Nominee: R. Thomas Dawe
Biography unavailable

Position #3
Term: 2006-2008
Nominee: Terrence Revo
Biography unavailable

Position #4
Term: 2006-2008
Nominee: Robert S. Simon has been in practice for 35 years, during which he has been sole corporate counsel for three SEC reporting companies: Pier 1 Imports for ten years, Titan Technology for seven years and Westland Development Co., Inc. for 16 years. He has had a bifurcated practice divided between private practice and corporate counsel functions. His major areas of experience are corporate law, real estate law and securities law. Simon received a B.B.A. in the honors program from the University of Texas in 1967, a law degree from the University of Texas in 1970 and an M.B.A. from Texas Christian University in 1976.

Position #5
Term: 2006-2008
Nominee: Ronald T. Taylor
Biography unavailable.

Other Bars

Albuquerque Bar Association Annual Meeting Luncheon and CLE

The Albuquerque Bar Association’s annual meeting luncheon will be held at noon, Dec. 6, at the Albuquerque Petroleum Club. Elections for the board of directors and officers of the association will be held. The outstanding judge and attorney awards will be presented.

The CLE program will be Records Management, presented by Mark Fidel, and What to Consider When Opening Your Law Office, presented by Ron Taylor, for 1.0 ethics and 2.0 general credits. The CLE will be held from 1:30 to 4:30 p.m. Lunch only: $20 members/$25 non-members; lunch and CLE: $80 members/$115 non-members; and CLE only: $60 members/$90 non-members. Register by noon, Dec. 5, at www.abqbar.com; by email at abqbar@abqbar.com; or by mail or phone to the Bar office at 400 Gold SW, Suite 620, ABQ 87102 or (505) 243-2615 or (505) 842-1151.

First Judicial District Bar Association

Individuals who are interested in becoming members of the First Judicial District Bar Association or renewing memberships for 2006 should submit their dues to the State Bar along with their general annual dues. The association will not collect dues for membership. Register by noon, Dec. 5, at www.abqbar.com; by email at abqbar@abqbar.com; or by mail or phone to the Bar office at 400 Gold SW, Suite 620, ABQ 87102 or (505) 243-2615 or (505) 842-1151.

NM Hispanic Bar Association

The New Mexico Hispanic Bar Association will hold its Fifth Annual Holiday Scholarship Fundraiser Dec. 8 at The Hotel Albuquerque at Old Town, 800 Rio Grande Blvd., NW, Albuquerque. The “reverse drawing” event begins at 6 p.m. with hors d’oeuvres, entertainment and a cash bar. The following prizes will be awarded in a reverse drawing:

- Last ticket drawn: $5,000
- 2nd to last ticket drawn: $2,000

3rd to last ticket drawn: $1,000

Participants do not need to be present to win. The ticket price is $100, which will admit two people. To purchase a ticket or for more details, contact Rosalie Fragoso, (505) 883-1772 or rfragoso@nixlawfirm.com.

UNM School of Law

Annual Meeting Luncheon and CLE

Mon. – Thurs. 8 a.m. to 11 p.m.
Fri. 8 a.m. to 6 p.m.
Sat. 9 a.m. to 6 p.m.
Sun. noon to 11 p.m.

OTHER NEWS

Construction Dispute Resolution Services Arbitration Training Course

Construction Dispute Resolution Services, LLC (CDRS), is pleased to announce that they will offer four arbitration training courses each year instead of the twice-a-year schedule offered in the past. The last course in September was full several weeks before the program was held at the State Bar Center. The arbitration training course offers the following MCLE credits: 14.4 general, 1.2 ethics and 2.4 professionalism. Although the course is conducted by CDRS, it is a basic arbitration training course for anyone interested in becoming an arbitrator or in learning the arbitration process. The next arbitration training course is being offered on Dec. 2 and 3 at the State Bar Center. Details of the course and registration information can be found on the CDRS Web site: www.constructiondisputes-cdrs.com, or call (505) 466-7011.

National Association of Legal Professionals Annual Charity Auction

The National Association of Legal Professionals (NALS of Albuquerque, formerly known as AALP) proudly announces the annual charity auction to be held from 6 to 10 p.m., Dec. 16, at the Hotel Albuquerque, Old Town, to benefit Red Cross Katrina Relief. Dinner begins at 6 p.m. followed by the auction, which will feature unique holiday items, gift baskets/cards/certificates. Call Debra Torres, NALS treasurer, (505) 883-3070, for details.
NM Medicaid Program
Free Insurance Coverage for Working Disabled Clients

Medicaid category 043 for the working disabled individual provides full Medicaid benefits for qualified individuals. Coverage includes prescriptions, rehabilitation, doctor visits, lab work etc. Brochures, applications, and more information are available by contacting the phone number below.

To locate the nearest support division office (ISD), phone (888) 997-1583 or go to http://www.state.nm.us/hsd/offices.html. For more information or assistance, contact Janet Murray, outreach coordinator for The Working Disabled Individuals Medicaid Division of Vocational Rehabilitation at (800) 318-1469 or (505) 954-8573. For technical information, such as problems with the application process/denial at ISD, phone (888) 997-2583.

HEARSAY

Bernalillo County Metropolitan Court
Judge Benjamin Chavez has successfully completed the rigorous two-week general jurisdiction course at the National Judicial College (NJC) at the University of Nevada at Reno. The curriculum focuses on courtroom management, jury and non-jury trials, application of criminal law and procedure, making evidentiary rulings, fair and unbiased decision-making skills and how to communicate with news media and constituents in a positive manner. Participants also enhance their knowledge regarding various problem-solving courts, such as Bernalillo County Metropolitan Court, that have domestic violence, DWI/drug courts and mental health courts.

Judge Chavez is a former DWI prosecutor, a former narcotics prosecutor and assistant city attorney. He was appointed to the bench by Governor Bill Richardson in October 2004 and has been on the Metro Court bench for more than a year.

Bernalillo County Metropolitan Court
Criminal Presiding Judge Victoria Grant was elected to serve on the NMADCP Board of Directors. Judge Jaramillo is also a DWI/Drug Court judge, and she presides over a co-occurring disorders court, one of the few specialized courts in the country.

The NMADCP is an association that includes the judges, probation and counseling professionals who staff the 28 drug courts that operate in New Mexico state courts.

Ralph Scheuer of Scheuer, Yost & Patterson has been named to Worth magazine’s list of 100 top attorneys. The list includes attorneys who specialize in trusts, estate and other private-practice areas.

Lewis and Roca, practicing in New Mexico as Lewis and Roca Jontz Dawe LLP, is pleased to announce that Felicia Taghizadeh has joined the firm’s Albuquerque office as an associate. Taghizadeh will practice with the firm’s commercial litigation group. Prior to joining Lewis and Roca, Taghizadeh was a summer associate with Clear Gottlieb Steen & Hamilton in Washington, D.C.

ACI is a business advocacy organization comprised of statewide membership that sets policies and priorities for each legislative session. The organization supports legislation that enhances the value of the state’s economic development incentives, environmental factors, land and natural resources, education and government regulations.

Gulley earned his J.D. and B.S. degrees from the University of Illinois and practices in the areas of commercial and tort litigation, employment law and professional malpractice.

Editor’s Note: The contents of Hearsay are submitted by members or obtained from news clippings. Send items to: Editor, PO Box 92860, Albuquerque, NM 87199-2860 or notices@nmbar.org.
Holiday Food Drive - Oct. 14- Nov. 29th

Holiday Food Drive - Oct. 14- Nov. 29th

It is estimated that 20 percent of New Mexico’s population (29 percent of children) live in poverty, and thousands of people are at risk of being hungry every single day. The legal community can help those in hunger by donating food at the State Bar Center at 5121 Masthead NE, Albuquerque. The Holiday Food Drive is being held from Oct. 14 to Nov. 29th. Please bring nonperishable food items to the State Bar Center. The food will be distributed through Roadrunner Food Bank. Your generous contributions to this effort will help hungry people in our community.

Thank you for joining us in the cause.
The State Bar Staff

The Bar Bulletin now accepts letters to the editor. Submit letters to notices@nmbar.org.

The complete editorial policy may be found on www.nmbar.org under Publications/Media.

COURT REGULATED PROGRAMS

DON’T WAIT

UNTIL IT’S TOO LATE...

MCLE COMPLIANCE DEADLINE: 12/31/05

MCLE – mcle@nmbar.org or www.nmmcle.org

Locating Approved Courses
• Access all approved courses on www.nmmcle.org. Choose “Search for Courses” on the menu.
• Look in the CLE Calendar in this issue of the Bar Bulletin.
• Can’t find the course you want to take? Contact MCLE at (505) 797-6015 or email mcle@nmbar.org.

LEGAL SPECIALIZATION – ls@nmbar.org or (505) 797-6057

At the October 15, 2005 Board meeting, the following attorneys were newly certified as Board Certified Specialists.

• Jennifer Bradley and Paul Frye, Federal Indian Law
• Reginald Woodard, Workers’ Compensation

PLEASE NOTE: Attorneys whose specialty status expires December 31, 2005 are encouraged to submit their recertification applications as soon as possible before the end of the year. The processing of recertification applications could extend into 2006. The Board of Legal Specialization has determined that as long as a specialist has applied for recertification in a timely manner, is current in their specialist dues, and has a recertification application pending, the specialist status is maintained while the Specialty Committee and/or Board of Legal Specialization makes their final determination.

Access www.nmbar.org > Other Bars/Legal Groups for information regarding the Legal Specialization program including a list of Board Certified Specialists.
NOMINATION PETITION for SENIOR LAWYERS DIVISION
STATE BAR OF NEW MEXICO - 2005 ELECTION

We, the undersigned members of the Senior Lawyers Division in good standing, nominate ______________________________ of ____________________________ New Mexico, for Position # _____, Senior Lawyers Division Board of Directors.

Date Submitted: _____________________________________ (Note: 30 signatures are required; copy as needed.)

1. ___________________________________________ ______________________________________________
   Signature Address
   ___________________________________________ ______________________________________________
   (Print or type name) City

2. ___________________________________________ ______________________________________________
   Signature Address
   ___________________________________________ ______________________________________________
   (Print or type name) City

3. ___________________________________________ ______________________________________________
   Signature Address
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   (Print or type name) City

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   (Print or type name) City

10. ___________________________________________ _____________________________________________
    Signature Address
    ___________________________________________ _____________________________________________
    (Print or type name) City
The purpose of the ongoing project is to study and collect data about the use of the proposed alimony guidelines in settlement negotiations.

Based on questionnaires and surveys that have been completed by attorneys who have reviewed or applied the Alimony Pilot Project Guidelines during settlement negotiations, several common questions and misconceptions about the guidelines have come to the committee’s attention.

Q: Where can I get a copy of the Pilot Project Guidelines, Worksheet, Commentary, Survey and related documents?
A: The Pilot Project Alimony Guidelines, Commentary, Worksheet and Survey (and the Final Report of the 1994 Child Support Guidelines Review Commission) are now available at the State Bar of New Mexico Web site (www.nmbar.org), through a link on the New Mexico Supreme Court Library Web site (www.fscil.org) and at the New Mexico Supreme Court Library.

Copies of 1) the Alimony Pilot Project Guidelines, Commentary, Worksheet and Survey and 2) the Final Report of the 1994 Child Support Guidelines Review Commission may be purchased at the clerk’s offices at the First, Second, Third and Eighth Judicial District courts for $10 each.

Q: Are the alimony factors set forth in §40-4-7 NMSA going to be considered any more?
A: Yes. Whether it is within the context of settlement or trial, the Alimony Guideline Worksheet would only be used after an attorney or the court determines that an award of alimony is appropriate when considering the statutory factors set forth in §40-4-7 NMSA.

Q: Is it important to review the guidelines, consider them in the context of settlement negotiations and fill out and return an Alimony Survey each time alimony is an issue in one of my cases?
A: Yes. Your consideration of and comments on the application of the alimony guidelines are very important. Your comments will help the Pilot Project Committee determine whether to recommend the adoption of alimony guidelines and, if so, what factors should be included in the Alimony Worksheet and addressed in the commentary; whether the guidelines should continue to be used only within the context of settlement; or whether the proposed guidelines should be abandoned.

Q: Would use of guidelines set forth in a rule or statute prevent the court from exercising its discretion equitably based on the facts of a particular case?
A: No. Again, the court would only consider the alimony guidelines if it first determines that an award of alimony is appropriate under §40-4-7 NMSA.

Q: If the Supreme Court adopts alimony guidelines, can the issue of alimony still be raised in a hearing and determined by the court?
A: Yes. You would still have the opportunity to address the statutory factors set forth in §40-4-7 NMSA and the specific facts of your case at trial or by hearing.

The committee looks forward to receiving your input so that our recommendations to the New Mexico Supreme Court accurately reflect the general consensus of family law practitioners.
### November

<table>
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<tr>
<th>Date</th>
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<td>What Puts Government Lawyers in a Class by Themselves</td>
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## LEGAL EDUCATION

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### DECEMBER

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**WRITS OF CERTIORARI**

**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

**Effective November 18, 2005**

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### Petitions for Writ of Certiorari Filed and Pending:

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**Response due 11/14/05**

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**Responses filed 8/29 & 9/2/05**

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### Certiorari Granted but not yet Submitted to the Court:

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### WRITS OF CERTIORARI

**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective November 18, 2005**

**Certiorari Granted and Submitted to the Court**

(Submission = date of oral argument or briefs-only submission)

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# OPINIONS

**AS UPDATED BY THE CLERK OF THE NEW MEXICO COURT OF APPEALS**

Patricia C. Rivera Wallace, Chief Clerk New Mexico Court of Appeals

PO Box 2008 • Santa Fé, NM 87504-2008 • (505) 827-4925

**EFFECTIVE NOVEMBER 10, 2005**

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## UNPUBLISHED OPINIONS

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Slip Opinions for Published Opinions may be read on the Court’s website:  [http://coa.nmcourts.com/documents/index.htm](http://coa.nmcourts.com/documents/index.htm)
PROPOSED AMENDMENT OF THE RULES
GOVERNING DISCIPLINE

The Supreme Court is considering the amendment of Rule 17-306 of the Rules Governing Discipline. If you would like to comment on the proposed revisions set forth below, please send your written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received by the Clerk on or before December 9, 2005, to be considered by the Court.

17-306. Required presence of attorney; subpoena power.

A. During investigation. (No amendments are proposed for Paragraph A.)

B. [Hearings] Formal disciplinary proceedings. At request of either disciplinary counsel or the respondent-attorney, the chair of a hearing committee may issue subpoenas:

(1) requiring the presence of a witness at a deposition for discovery which has been authorized pursuant to Rule 17-311 NMRA and which, if so authorized, may command the witness to produce the designated books, papers, documents or tangible things;

(2) requiring the person to whom the subpoena is directed to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises at a specified time and place. A command to produce evidence or to permit inspection may be joined with a command to appear at a hearing or at deposition, or may be issued separately;

(3) requiring the presence of witnesses at a formal hearing before a hearing committee or the Disciplinary Board [The subpoena shall set forth the time and place at which the witness is to appear];

(4) commanding the person to whom it is directed to produce at a formal hearing before a hearing committee the books, papers, documents or tangible things designated therein. [The subpoena shall set forth the time and place at which the person is to appear with the documents.]

C. Contents. No subpoena shall be issued pursuant to this rule unless it sets forth:

(1) the reason or purpose for the investigation or hearing;

(2) with reasonable definiteness, any records or other documents to be produced which are relevant to the investigation or hearing; [and]

(3) a statement that the witness has a right to be accompanied by counsel; and

(4) the date, time and place at which the witness is to appear.

D. Enforcement.

(1) Failure to cooperate with an investigation of the Disciplinary Board, or failure to respond to letters from disciplinary counsel regarding an investigation shall be grounds for submission of a motion to the Supreme Court to order that the offending respondent-attorney be held in contempt of court.

(2) Any person who has been served with a subpoena pursuant to this rule may apply to the officer issuing the subpoena for an order to quash the subpoena. If any person fails to comply with a subpoena issued by the chair of the Disciplinary Board or the chair of a hearing committee in accordance with the provisions of this rule or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, at the request of the officer issuing the subpoena, disciplinary counsel may apply to the Supreme Court for an order directing that person to take the requisite action. The Supreme Court may issue such order or may quash the subpoena. Should any person willfully fail to comply with an order of the Supreme Court, the court may punish such person for contempt of court. [Any person who has been served with a subpoena pursuant to this rule may apply to the Supreme Court for an order to quash such subpoena.]

E. Subpoena; request of another jurisdiction. The chair of the Disciplinary Board, or a member of the board designated by the chair, may issue a subpoena to compel the attendance of witnesses and production of documents in this state for use in lawyer disciplinary or disability proceedings in another jurisdiction. The subpoena may be requested by disciplinary counsel of this state when the request is by the disciplinary authority of the other jurisdiction, or an attorney admitted to practice in this state when the request is by a respondent in a proceeding in another jurisdiction. The person seeking the subpoena shall certify that the subpoena has been approved or authorized under the law or disciplinary rules of the other jurisdiction. Service, enforcement and challenges to a subpoena issued pursuant to this paragraph shall be in accordance with the Rules Governing Discipline.
OPINION

PAMELA B. MINZNER, JUSTICE

[1] Defendant appeals from a judgment and sentence entered following a jury trial and a bench trial. Defendant was convicted on a total of seven counts, of which six were by the jury and the other by the trial judge. The jury convicted him on six counts: robbery, contrary to NMSA 1978, § 30-16-2 (1973); burglary, contrary to NMSA 1978, § 30-16-3 (1971); felony murder, contrary to NMSA 1978, § 30-2-1(A)(2) (1994); conspiracy to commit first degree murder (felony) murder and conspiracy to commit robbery, contrary to NMSA 1978, § 30-28-2 (1979); and tampering with evidence, contrary to NMSA 1978, § 30-22-5 (1963, prior to 2003 amendment). The court convicted him of the seventh count: possession of a firearm by a felon, contrary to NMSA 1978, § 30-7-16 (1987, prior to 2001 amendment). The Court aggravated the sentence for conspiracy to commit first degree murder by one-third. See NMSA 1978, § 31-18-15.1 (1993). We have jurisdiction pursuant to Article VI, Section 2 of the New Mexico Constitution and Rule 12-102(A)(1) NMRA 2005.

[2] Defendant has made two arguments on appeal. Defendant contends that the Sixth Amendment to the United States Constitution, which guarantees his right to a trial by jury, precludes the aggravation of his sentence for conspiracy to commit first degree murder. Defendant also argues that there was insufficient evidence to support some of his convictions. Relying on Blakely v. Washington, 124 S. Ct. 2531 (2004), he argued that in aggravating his sentence for conspiracy pursuant to Section 31-18-15.1, the trial court exceeded its authority, because under the Sixth Amendment the maximum sentence a judge may impose is “the maximum he may impose without any additional findings.” Id. at 2537. Defendant argued that the “aggravating circumstances surrounding the offense or concerning the offender” to which Section 31-18-15.1 refers are “additional findings” under Blakely and that a jury rather than a judge must determine whether the State has proved the necessary facts to support these findings beyond a reasonable doubt.

[3] After Defendant’s appeal was submitted, following oral argument, the Court of Appeals held Section 31-18-15.1 unconstitutional in reliance on Blakely. See State v. Frawley, 2005-NMCA-017, 137 N.M. 18, 106 P.3d 580, cert. granted, 2005-NM-CERT-002, 137 N.M. 266, 110 P.3d 74. While his appeal was pending, the United States Supreme Court decided United States v. Booker, 125 S. Ct. 738 (2005). In Booker, the United States Supreme Court concluded that the federal sentencing guidelines violated the Sixth Amendment. A majority of the Court concluded that the Sixth Amendment as construed in Blakely required that result. 125 S. Ct. at 755-56. In adopting a remedy, however, a different majority of the Court decided that only a portion of the guidelines needed to be severed and excised. Id. at 756-57. So modified, the Court construed them as advisory, requiring a sentencing court to “take them into account when sentencing.” Id. at 767. We scheduled additional oral argument in order to consider the combined effect of Booker and Blakely. We now affirm.

I

[4] Defendant and Ed Sedler worked at a Salvation Army location in Albuquerque. On Saturday, September 7, 1996, they borrowed a pickup truck from either the Salvation Army or a husband and wife and went camping.1 The victim, Gilbert Bruce Stark, was over 70 years old and lived alone at his rural residence in Catron County, New Mexico. Sedler knew him. On Monday, September 9, Defendant and
Sedler visited Stark, as they had done a day or two earlier. On the 9th, however, they intended to rob him. According to Defendant’s statement Sedler broke Stark’s neck and removed five hundred dollars from his pockets, splitting the money with Defendant. Then the two took Stark to a well on his property and threw him into it. Sedler and Defendant covered the well, replaced the lid, and locked it.

[5] The well was about 20 feet deep and three or four feet in diameter. A pipe extended about two feet above and below the bottom of the well, in roughly the center. The pipe was capped with a tin can. A ladder ran from the bottom of the well to the ground surface. Stark had stacked lumber over the opening to the well, enclosed the well in a box, chained the lid shut, and locked it with a padlock.

[6] Defendant and Sedler then entered Stark’s residence and took two pistols and at least three long firearms. After driving away from the residence, they stopped and Defendant threw the long firearms into the woods a few miles from the residence. Either that night or the night of the 10th they returned to Albuquerque. On September 11 Sedler sold one of the pistols at a pawnshop. Defendant traded the other pistol for crack. The men were supposed to have returned the borrowed pickup truck on Sunday the 8th. When they did not, the truck was reported as embezzled. Later that week the truck was found undamaged in a church parking lot, and the police did not pursue a charge of embezzlement.

[7] On Wednesday, September 11, Robert Nelson, a neighbor and retired law enforcement officer, stopped by Stark’s residence. He became alarmed when he saw Stark’s Leatherman tool, a spotting scope, and numerous beer cans on the ground. Nelson looked for Stark that day, and he eventually asked another neighbor for help, who found Stark’s broken glasses on the ground. Nelson contacted the State Police but continued his search. The State Police contacted Stark’s family, and on Wednesday, September 11, Nelson and Stark’s son found him dead at the bottom of the well. The box over the well was chained and locked from the outside, and planks of wood covered the well.

[8] Dr. Patricia McFeely conducted an autopsy and later testified at trial. She stated that the cause of death was blunt trauma to the chest, abdomen, and extremities, with thickening of the arteries as a contributing factor. Stark’s neck was not broken. He had three broken ribs, a broken hip, an eight-inch cut on his hip, lacerations and bruising to his head, and a number of other bruises and abrasions. McFeely stated that Stark was alive when these injuries were inflicted because bruising and bleeding around the injuries indicated that blood circulated after infliction.

[9] McFeely said that the head injuries were consistent with striking by a blunt object, such as a fist or spotting telescope, but were not fatal. She said that the hip injuries and broken ribs were consistent with being thrown down the well and landing on the pipe topped with a can. When Stark was found, his left hip was adjacent to the pipe and can. Although she could not be precise, McFeely stated that he had likely been dead for a couple or several days before being found. Thus, he might have been alive in the well, and he might have survived his injuries had he received prompt care. In sum, Stark’s injuries were consistent with the State’s theory at trial that Sedler and Defendant inflicted the head wounds, threw Stark into the well while alive, that the wounds to the hip and ribs occurred when he fell, and that he survived for some time in the well.

[10] McFeely could not rule out several other possibilities. Stark might have died before he was thrown into the well, and all of the injuries might have been inflicted before he was thrown into the well. The spotting scope could have inflicted the cut to the hip, and something other than the fall down the well could have caused the hip fracture. Stark had a history of heart disease, and narrowing of the arteries was a contributing factor in his death. He could have suffered a heart attack, because if he died within an hour of such an attack there would be no discernable evidence of damage to the heart. A heart attack could have occurred before or after he was thrown into the well, although the observable injuries had to have been inflicted before the heart attack because there was bleeding and bruising around the injuries.

[11] The criminal investigation stalled until the spring of 1999, when the case was assigned to an inter-departmental unit that investigated old, unsolved crimes. Stark had kept a list of his firearms, including the serial numbers. Using this list, Jeff Campbell of the Attorney General’s Office determined that Sedler had sold one of the firearms at a pawnshop in Albuquerque on September 11, 1996. Campbell contacted the police in Albuquerque, who informed him that Sedler and Defendant appeared on a report about the embezzled pickup truck. Campbell brought Defendant to the Valencia County Sheriff’s Office for questioning. Campbell made a recording of the interrogation, which was later introduced into evidence.

[12] The recording begins with Campbell questioning Defendant after advising him of his rights. Campbell’s questions focused on Defendant’s involvement in embezzling the pickup truck. Defendant was evasive, and he accused Campbell of tricking him. Defendant repeatedly denied any knowledge or recollection of the stolen vehicle or his employment by the Salvation Army in Albuquerque.

[13] The interview continued as Sargent Kindig of the State Police took over the questioning and Campbell observed. Kindig insisted that Defendant had worked at the Salvation Army and had borrowed the Salvation Army truck with Sedler. Kindig told Defendant that his fingerprints were found at the crime scene, although that was not true. Kindig repeatedly stated or implied that he thought Defendant was scared for his own life and that Sedler committed the murder. Kindig told Defendant that Sedler had made a statement, placing the blame on Defendant, but that he thought Sedler was lying.

[14] Defendant indicated that he had relevant information. For example, he said, “He’s the murderer,” meaning Sedler. At another point he said, “Ya, he killed that old man. He broke his fucking neck. It was over crack cocaine.” Defendant attempted to bargain with Kindig, seeking assurance that he was only a witness and that he would not be charged. He stated repeatedly that Kindig needed Defendant’s help and that he wanted help and assurance in return. Kindig continued to assert that Defendant was present, that Sedler had blamed Defendant, and that Kindig did not believe Sedler. Kindig repeatedly said that Defendant had a choice to make, that is, to make a statement, or Kindig would go to the prosecutor with the information Sedler had provided.

[15] Eventually, Defendant said, referring to Sedler, that “he got the old man by the neck and broke his neck.” He then provided a narrative of events. Defendant and Sedler borrowed the pickup truck and went camping in Catron County. They went back to Albuquerque to use crack cocaine. Returning to the mountains, Sedler had the idea to borrow money from Stark or sell the spotting scope to him. Sedler then suggested robbing him, to which Defendant replied, “Fuck it, let’s go for it.”
him by the neck, took him down, twisted his neck and broke it. Defendant, scared for his own life, then asked Sedler, “Is it my turn,” meaning “my turn to be killed.” Sedler responded, “Are you going to help me or not?” In response, Defendant assisted Sedler in dragging Stark and throwing him into the well.

{16} In response to Kindig’s questions to clarify details, Defendant said that Sedler took five hundred dollars from Stark’s pocket before throwing him into the well. Defendant and Sedler split the money. Defendant also admitted taking two pistols, one of which he traded for crack, and some long firearms from Stark’s residence, which he threw in the woods. Kindig began reviewing Defendant’s story, again asking for details. Defendant reiterated the story: their visit to the victim’s residence before the day of the murder; Sedler’s idea to rob the victim; Sedler’s murder of the victim; their “ransacking” of the victim’s residence and taking of the firearms; Sedler’s removal of the five hundred dollars from the victim’s pocket; and Defendant’s disposal of the long firearms in the woods. Defendant maintained that Stark was dead when he was thrown into the well. Throughout the interview, Defendant maintained that he did not kill Stark, that he was scared for his own life, and that he wanted to take a lie detector test and wanted Sedler to do so as well.

{17} After his confession, Defendant led law enforcement to the place where he had discarded the long firearms. At least two long firearms were recovered in the woods. The pistol which Defendant said he traded for crack had been previously recovered from an apartment where police suspected drugs were used or sold.

{18} Defendant was charged on an open count of murder, and the jury was instructed on first degree deliberate murder as well as felony murder. He was acquitted of first degree deliberate murder but was convicted of felony murder and the other counts with which he was charged. The district court sentenced Defendant to life imprisonment for felony murder, to fifteen years for conspiracy to commit first degree (felony) murder, to nine years for robbery, to three years for conspiracy to commit robbery, to eighteen months for tampering with evidence, to three years for burglary, and to eighteen months as a felon in possession. The court aggrivated the sentence for conspiracy to commit murder, ordered the sentences for felony murder and conspiracy to commit murder to run consecutively, and ran the other sentences concurrently with the sentences for felony murder and conspiracy. See NMSA 1978, § 31-18-15 (1994, prior to 1999 amendment); § 31-18-15.1. On appeal, we first address Defendant’s claim that there was insufficient evidence to support his convictions.

II

{19} In his briefs, Defendant has set forth the underlying facts and the standard of review but he has not “identified with particularity the fact or facts which are not supported by substantial evidence,” contrary to Rule 12-213(A)(4) NMRA 2005. We are not persuaded that Defendant intended to waive his claim that there was insufficient evidence to support his convictions nor that we should refuse to consider it. Under Blakely, “the facts reflected in the jury verdict or admitted by the defendant” are relevant in identifying the sentence the judge may impose “without any additional findings.” 124 S. Ct. at 2537. We conclude we should review the evidence not only in response to Defendant’s claim there was insufficient evidence but also to address fully Defendant’s Sixth Amendment argument.

{20} The standard of review for sufficiency of evidence claims requires us to “view all of the evidence in the light most favorable to support the jury’s verdict,” and to “determine whether any rational jury could find all elements of the crime based on the facts presented at trial.” State v. Montoya, 2003-NMSC-004, ¶ 26, 133 N.M. 84, 61 P.3d 793. Defendant conceded he committed several offenses, and we believe the evidence supports the concessions he made at trial.

{21} Defendant conceded in his opening and closing statement to the jury that he was guilty of conspiracy to commit robbery. He also conceded that he had committed the crimes of robbery, burglary, and tampering with evidence, but he contended that he should be acquitted of these charges because he did so under fear that Sedler would assault or kill him. The charges which Defendant vigorously defended were first degree murder and conspiracy to commit first degree murder. He contended that Sedler killed the victim without Defendant’s assistance or agreement and that Stark was dead when he helped Sedler throw him into the well.

{22} In response to Sedler’s idea to rob Stark, Defendant admitted he agreed. There was evidence that Defendant or Sedler or both assaulted Stark and split the money taken from the victim. This is sufficient evidence for the convictions of robbery, as principal or as an accessory, and for conspiracy to commit the robbery. See §§ 30-16-2; 30-28-2. Defendant also admitted that he and Sedler “ransacked” the residence and removed at least two pistols and three long firearms. This is sufficient evidence for the conviction of burglary. See § 30-16-3. Finally, Defendant admitted that he assisted Sedler in throwing Stark into the well and that he threw the long firearms into the woods. The jury could infer that he committed these acts to avoid apprehension. This is sufficient evidence for the conviction of tampering with evidence. See § 30-22-5.

{23} For the conviction of felony murder, the State presented alternative theories: Defendant committed the crime of [r]obbery “under circumstances or in a manner dangerous to human life” and caused the death “during the commission of the robbery;” or Defendant was an accessory to such a robbery and “helped[,] encouraged[,] or caused the killing to be committed.” Conviction of felony murder in New Mexico requires proof that a “defendant intended to kill, knew that his actions created a strong probability of death or great bodily harm . . . or acted in a manner greatly dangerous to the lives of others.” State v. Griffin, 116 N.M. 689, 695, 866 P.2d 1156, 1162 (1993). In this case, the jury was instructed by the State that under either theory it needed to find Defendant “intended the killing to occur or knew that he was helping to create a strong probability of death or great bodily harm.”

{24} Dr. McFeely testified that Stark sustained injuries from some combination of injuries sustained during the robbery and after being thrown into the well and that these injuries were the cause of death. The jury might have found Stark was alive when he was thrown into the well, that Defendant knew Stark was alive, and that in helping Sedler throw Stark into the well Defendant knew he helped create a strong probability of death or great bodily harm. We do not address the sufficiency of the evidence to support the State’s theory that Defendant was liable as a principal. That theory would have required the jury to find that Defendant committed the robbery in a manner that was inherently or foreseeably dangerous to human life. See State v. Duffy, 1998-NMSC-014, ¶ 27-28, 126 N.M. 132, 967 P.2d 807. We do not address the sufficiency of the evidence to support that theory, because “due process does not require a general verdict of guilt.
to be set aside so long as one of the two alternative bases for conviction is supported by sufficient evidence.” State v. Salazar, 1997-NMSC-044, ¶ 43, 123 N.M. 778, 945 P.2d 996.

(25) For the crime of conspiracy to commit first degree murder, the jury was instructed that the State had to prove Defendant agreed with another person, by words or acts, to commit first degree murder and that he and the other person intended to commit first degree murder. See § 30-28-2(A); UJI 14-2810 NMRA 2005. The jury’s verdict specifically found Defendant guilty of first degree (felony) murder. The jury’s verdict requires evidence of an agreement as well as of intent to commit felony murder. We are not certain that evidence sufficient to support a felony murder conviction when more than one offender is involved necessarily will be sufficient to support a conviction of conspiracy to commit felony murder. Cf. State v. Nieto, 2000-NMSC-031, ¶¶ 28-29, 129 N.M. 688, 12 P.3d 442 (affirming convictions of felony murder and conspiracy to commit first degree murder based on the same evidence). See generally 2 Wayne R. LaFave, Substantive Criminal Law § 12.2(c)(2), at 278 (2d ed. 2003) (arguing “that there is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result”). In this case, there was evidence from which the jury was entitled to infer that Defendant and Sedler formed the requisite intent to kill Stark during the robbery and that they threw him into the well while he was alive. The evidence that they carefully, deliberately, even painstakingly first opened, then covered, and finally resealed the well supports an inference that they reached an agreement to kill Stark in the course of the robbery and that both intended his death. We conclude the evidence in this case supports the jury’s verdict.

(26) At oral argument, Defendant noted that we have said “a conviction under a general verdict must be reversed if one of the alternative bases of conviction is legally inadequate.” State v. Olguin, 120 N.M. 740, 741, 906 P.2d 731, 732 (1995). We are not persuaded that this principle requires us to decide whether conspiracy to commit felony murder requires proof of intent to kill. Cf. State v. Foster, 1999-NMSC-007, ¶ 27, 126 N.M. 646, 974 P.2d 140 (discussing the principle in the context of an alternative basis that would violate the constitutional protection against double jeopardy). The application of this principle was not raised at trial, see Olguin, 120 N.M. at 742, 906 P.2d at 733 (Ransom, J., dissenting), and Defendant has not argued that the doctrine of fundamental error applies.

(27) For the crime of felon in possession of a firearm, the State had to prove that Defendant had been previously convicted of a felony and he possessed a firearm within ten years of completing his sentence for the prior felony conviction. Section 30-7-16; UJI 14-701 NMRA 2005. At the bench trial the parties stipulated to admission of all evidence admitted in the jury trial, including Defendant’s statement to police in which he admitted possessing a firearm. The primary issues at the bench trial were whether Defendant had a prior felony conviction and whether he had completed his sentence less than ten years earlier. The State contended that Defendant was convicted in 1988 and that his sentence of probation continued until 1991. The State submitted documentary evidence that Defendant was convicted of burglary in San Juan County in CR-86-0383-3. Two documents, the criminal information and the criminal complaint, listed his birth date and social security number. Another document, the repeat offender plea agreement and disposition agreement, listed his birth date and social security number. A third document, the repeat offender plea agreement and disposition agreement, listed his birth date and social security number. Another document, the repeat offender plea agreement and disposition agreement, listed his birth date and social security number. The guilty plea and the judgment and sentence did not list either his birth date or social security number, but they did list his name and the same case number. The judgment and sentence was filed on November 3, 1988, and provided for three years probation.

(28) Based primarily on the documentary evidence, the court concluded that the State had satisfied its burden of proof and found Defendant guilty of possession of a firearm by a felon. The documentary evidence of a prior felony conviction and Defendant’s numerous statements during the interrogation that he possessed several of Stark’s firearms is sufficient evidence for the conviction of felon in possession of a firearm.

III

(29) We now turn to Defendant’s Sixth Amendment argument. Defendant did not make this argument at trial or sentencing, but both Booker and Blakely were decided after he was tried and sentenced. The same issue arises in other cases now pending before us. Defendant raises the same issue that arises in Frawley. We apply new rulings in criminal cases to all cases on direct review. See Duffy, 1998-NMSC-014, ¶ 26. We conclude Defendant is entitled to consideration of his Sixth Amendment issue on direct appeal. See Lopez v. People, 113 P.3d 713, 716 (Colo. 2005) (noting that Booker applied its holdings to all cases on direct review).

(30) We begin to consider whether Defendant’s sentence under Section 31-18-15.1 is consistent with the Sixth Amendment by quoting or summarizing relevant portions of the statutes and reviewing our analysis of the effect of the Sixth Amendment on our statutory scheme prior to Frawley. We then examine the significance of Blakely and Booker to our statutory scheme and analyze its effect on our scheme. Finally, we discuss the sentencing hearing in this case.

A

(31) The New Mexico Criminal Sentencing Act provides a “basic sentence” for all noncapital felonies. NMSA 1978, § 31-18-15 (2003). The Legislature has provided that “[t]he appropriate basic sentence of imprisonment shall be imposed upon a person convicted and sentenced pursuant to Subsection A of this section, unless the court alters the sentence pursuant to the provisions of” one or more of four statutes. Id. § 31-18-15(B) (emphasis added). One of the four is the statute at issue in this appeal, Section 31-18-15.1, which provides

A. The court shall hold a sentencing hearing to determine if mitigating or aggravating circumstances exist and take whatever evidence or statements it deems will aid it in reaching a decision. The court may alter the basic sentence as prescribed in Section 31-18-15 NMSA 1978 upon a finding by the judge of any mitigating or aggravating circumstances surrounding the offense or concerning the offender. If the court determines to alter the basic sentence, it shall issue a brief statement of reasons for the alteration and incorporate

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2Prior to amendment in 2003, the italicized portion read as follows: “of a first, second, third or fourth degree felony or a second or third degree felony resulting in the death of a human being, unless the court alters such.” NMSA, 1978, § 31-18-15-B (1994, prior to 2003 amendment). Because we do not believe the change in wording changed our analysis, we analyze the statute in its present form.
that statement in the record of the case.
B. The judge shall not consider the use of a firearm or prior felony convictions as aggravating circumstances for the purpose of altering the basic sentence.
C. The amount of the alteration of the basic sentence for non-capital felonies shall be determined by the judge. However, in no case shall the alteration exceed one-third of the basic sentence; provided, that when the offender is a serious youthful offender or a youthful offender, the judge may reduce the sentence by more than one-third of the basic sentence.


Under that Act, when a separate finding of fact shows beyond a reasonable doubt that the offender was “motivated by hate” as defined in Section 31-18B-2, the court may increase the basic sentence. Section 31-18B-3. A fourth statute requires an increase in the basic sentence on proof of the existence of a prior felony or felonies. See NMSA 1978, § 31-18-17 (1993, prior to 2002 amendment).

[33] In Booker, the United States Supreme Court stated that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” 125 S. Ct. at 756. In making this statement, the Court rephrased a prior holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Booker noted that it “reaffirm[ed] our holding in Apprendi.” 125 S. Ct. at 756.

In relying on these statements, Defendant contends, based on Blakely, that the statutory maximum is the basic sentence provided in Section 31-18-15. We reached a contrary conclusion in considering the effect of Apprendi on our sentencing scheme.

[34] Between Apprendi and Booker, our Court of Appeals considered Sections 31-18-15 and 31-18-15.1 in light of Apprendi’s holding. In State v. Wilson, 2001-NMCA-32, ¶¶ 18-20, 130 N.M. 319, 24 P.3d 351, the Court of Appeals reviewed the history of sentencing in New Mexico. New Mexico enacted determinate sentencing in 1977, when the Legislature provided sentence ranges within which a trial court could set a definite term of imprisonment. In 1979, the Legislature enacted the current system, replacing the ranges with basic sentences and allowing an increase or decrease of up to one-third. Id. ¶ 20. The Court of Appeals concluded that the authority of the sentencing court [had] not changed since “the 1977 amendment implemented determinate sentencing within a range of years and gave the trial court the authority to impose a sentence of a definite term of years within that range.” Id. ¶ 21. Every defendant convicted of a noncapital felony faced a sentence within the applicable range, and the judge had broad discretion to sentence within the range. Id. ¶ 29.

[35] The defendant in Wilson argued that the “basic sentence” established by Section 31-18-15 established the “maximum sentence authorized” for purposes of Apprendi. Id. ¶ 13. The Court rejected that challenge, holding that New Mexico’s sentencing statutes establish a range of sentences, and “the basic sentence[]” is the midpoint of each range. Id. ¶ 15. The Court observed that upon conviction, in every criminal case, without exception, the sentencing judge must hold a hearing to determine whether to decrease the defendant’s sentence below the midpoint, or increase it above it, showing there was no right to the basic sentence. Id. ¶¶ 15, 29. “The outer limits of sentencing, without additional specific fact-finding, is the basic sentence plus a one-third increase under Section 31-18-15.1.” Id. ¶ 16. This Court granted the defendant’s petition, heard oral argument, but then quashed our writ. See State v. Wilson, 130 N.M. 459, 26 P.3d 103 (2001) (granting); State v. Wilson, 132 N.M. 484, 51 P.3d 527 (2001) (quashing).

B

[36] Since Wilson, the Supreme Court has decided Blakely and Booker. Prior to Booker, the New Mexico Court of Appeals decided Frawley. The Court of Appeals concluded Blakely meant that Wilson “can no longer control or be considered controlling authority.” Frawley, 2005-NMCA-017, ¶ 13. After Booker, we are not persuaded Frawley was correctly decided. See People v. Black, 113 P.3d 534 (Cal. 2005) (upholding California’s determine sentencing scheme, which provides a presumptive term, a definite term above and a definite term below the presumptive term, and requires the sentencing judge to explain a sentence below or above the presumptive term).

[37] In Blakely, 124 S. Ct. at 2534-35, the Court reviewed the sentencing scheme in the State of Washington. Under that scheme, the defendant’s plea to a second degree felony involving domestic violence and a firearm authorized a sentence within a range of 49 and 53 months. The court made a finding of fact of deliberate cruelty, which was a specifically enumerated factor that authorized an increased sentence of 90 months. Under Washington’s sentencing scheme, a second degree felony was not subject to imprisonment exceeding ten years, and the State argued the relevant statutory maximum was ten years. Id. at 2537. The Supreme Court rejected the State’s argument, stating

[38] Following Blakely, but prior to Booker, our Court of Appeals reconsidered Sections 31-18-15 and 31-18-15.1. Frawley, 2005-NMCA-017, ¶ 3. In Frawley, the
defendant was convicted of two felonies for each of which the basic sentence was three years imprisonment. Id. ¶ 2. The district court increased the sentence for each felony by one year because the defendant lacked remorse, there had been only a short interval between the two felonies and a prior similar offense, the victims and their families had experienced pain and fear, and the defendant fled to avoid prosecution. Id. The Court of Appeals determined that the district court made findings of fact and that the Court had increased the sentence on the basis of those facts pursuant to a statute that was indistinguishable from the statutes at issue in Blakely. Frawley, 2005-NMCA-017, ¶¶ 7, 14. The Court reasoned that in rejecting Washington’s argument in Blakely that the relevant statutory maximum was ten years, the United States Supreme Court implicitly rejected the basis on which Wilson had rejected the defendant’s argument based on Apprendi. Frawley, 2005-NMCA-017, ¶ 8. Defendant makes a similar argument in this case. [39] In Frawley, the Court stated, We read Blakely to say: When the jury considers the facts relevant to the elements of an offense in determining guilt or innocence, the criminal sanctions for that offense cannot be increased after the verdict based on facts the jury has not specifically considered in connection with its finding of guilt, whether or not the facts are labeled “sentencing factors,” and even if the facts are not material to the statutory elements of the offense. Id. ¶ 12. That reading limits the concept of a statutory maximum, consistent with the Supreme Court’s rejection of Washington’s argument in Blakely, but that reading seems contrary to another part of Blakely, which explicitly states:

Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. 124 S. Ct. at 2540. Apprendi also stated that, when sentencing offenders, it is permissible “for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment within the range prescribed by statute.” Apprendi, 530 U.S. at 481. Thus, Blakely appears to authorize some “judicial factfinding.” Further, Blakely did not change the Apprendi rule that a court can punish within a range. Blakely prohibits punishing in excess of the punishment authorized by law as a consequence of the jury’s verdict. 124 S. Ct. at 2537. The questions of what punishment a jury’s verdict can be said to authorize and when a jury’s verdict can be said to authorize punishment within a range as a judge may determine is appropriate are not easy to answer. Compare State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005) (upholding Tennessee’s sentencing scheme under Booker by a split decision) with Lopec, 113 P.3d at 726 (upholding Colorado’s sentencing scheme to the extent it is applied consistently with Blakely by an equally split decision). [40] As Wilson recognized, Section 31-18-15.1 refers to “circumstances” rather than “facts,” and imposes very few restrictions on what circumstances may be considered. Wilson, 2001-NMCA-032, ¶ 25. The statute requires a writing stating “reasons” rather than findings of fact. The purpose of the writing requirement is to ensure that the trial court did not consider impermissible circumstances, such as a defendant’s exercise of the right to silence. Cf. Black, 113 P.3d at 543-44 (“The judge’s discretion to identify aggravating factors in a case is guided by the requirement that they be ‘reasonably related to the decision being made.’”) (quoting California court rules). This safeguard, which is to protect criminal defendants, may not be analogous to the statutory requirements that Apprendi and Blakely indicated must be submitted to a jury, although the judge’s reasons are characterized as “written findings” in Wilson. See Wilson, 2001-NMCA-032, ¶ 23. Cf. Black, 113 P.3d at 536 (concluding that “the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant’s Sixth Amendment right to a jury trial”). Apprendi indicates that the characterization given such determinations is not controlling, 530 U.S. at 492, and that “the relevant inquiry is one not of form, but of effect.” Black, 113 P.3d at 543. [41] Frawley indicates that judicial factfinding is impermissible only if it results in “the criminal sanctions for that offense [being] increased after the verdict.” 2005-NMCA-017, ¶ 12. Frawley persuasively reasons that the construction of the statutory scheme in Washington controlled Blakely. Wilson concluded that the legislative history of Sections 31-18-15 and 31-18-15.1 “strongly evinces a legislative intent that the two provisions be read together to prescribe a range of permissible sentences.” 2001-NMCA-032, ¶ 17. Frawley did not hold that the statutory construction in Wilson was incorrect, but concluded that the Washington sentencing scheme considered by Blakely was “not significantly dissimilar” to New Mexico’s. 2005-NMCA-017, ¶ 7. We think however, that the legislation Blakely considered is “significantly dissimilar” to the legislation at issue in this appeal. [42] The California Supreme Court, like the Court of Appeals in Frawley, recognized that Blakely and Booker raise “questions about the permissible scope of judicial factfinding under a variety of sentencing schemes.” Black, 113 P.3d at 542. The New Jersey Supreme Court recently observed that “many modern legislative sentencing schemes place a ceiling on the sentence that can be imposed based on the jury verdict alone, but allow for judicial factfinding to increase the sentence up to the maximum allowed by the statute. Such schemes appear to be in conflict with the Constitution.” State v. Natalie, 878 A.2d 724, 732 (N.J. 2005) (footnote omitted) (listing in a footnote a number of jurisdictions in which the effect of Blakely and both Blakely and Booker on the state’s sentencing scheme has been considered). [43] The California Supreme Court, however, reached a different conclusion on the constitutionality of its sentencing scheme. In Black, the court distinguished the Washington scheme on the basis that the judge had limited discretion to sentence Black to the maximum sentence of ten years because the facts he had admitted in pleading guilty had been “taken into account in establishing the standard range.” Black, 113 P.3d at 541, 546. The court concluded the discretionary authority of a federal district court under the post-Booker federal guidelines were comparable to that provided under the California Penal Code to a trial judge. Because an aggravating factor under California law may include any factor that the judge reasonably deems to be relevant, the determinate
sentencing law’s requirement that an upper term sentence be imposed only if an aggravating factor exists is comparable to Booker’s requirement that a federal judge’s sentencing decision not be unreasonable.

Id. at 548.

(44) After reaffirming the propriety of judicial factfinding and discretion in indeterminate sentencing schemes, Blakely points out that facts thus determined by a sentencing judge “do not pertain to whether the defendant has a legal right to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.” 124 S. Ct. at 2540. Blakely also emphasizes the word “right” in a later passage. “As Apprendi held, every defendant has the right to insist that the prosecutor prove to a jury the defendant has a legal sentencing judge “do not pertain to whether points out that facts thus determined by a traditional role of the jury is concerned.”

124 S. Ct. at 2540.

(45) Unless convicted criminals in New Mexico have a right to receive only the basic sentence for their crimes, we are not persuaded a trial court’s finding of aggravating factors must be viewed as increasing the statutory-authorized penalty for an offense. The statute requires a hearing concerning aggravating and mitigating factors in every case. Wilson, 2001-NMCA-032, ¶ 29. If it cannot be said that such a finding increases the sentence beyond the statutory maximum, then Frawley’s understanding of Blakely, even if correct, does not apply to the New Mexico sentencing scheme. If, on the other hand, Wilson was correct in concluding that the Legislature intended to and succeeded in creating ranges of permissible sentences, of which the basic sentence is the midpoint, and that a convicted criminal has no right to a sentence at the midpoint, then it would follow that a judicial finding under Section 31-18-15.1 does not increase the sentence beyond the statutory maximum.

(46) We perceive ambiguity within Blakely and Apprendi that has contributed to inconsistent opinions from the Court of Appeals. We believe that Booker provides a basis for believing Wilson was decided correctly. As the California Supreme Court has reasoned in Black, the United States Supreme Court cases ought not be viewed as “draw[ing] a bright line, but Booker makes clear that the concept of a discretionary sentencing decision is not limited to those decisions that involve complete, unguided, and unreviewable discretion.” Black, 113 P.3d at 547.

(47) Both Booker and Blakely considered statutory schemes in which a range had been established but the sentencing judge was authorized or required to go above the maximum of the range if the judge found a specified fact or facts. In Blakely, the range was between 49 and 53 months. 124 S. Ct. at 2535. In Booker, the range was from 210-262 months. 125 S. Ct. at 746. In Blakely, the judge was authorized to exceed the maximum in the range if he or she made a finding of an aggravating factor from a list meant to be illustrative. 124 S. Ct. at 2535. In Booker, the judge was required to exceed the maximum in the range if he or she made findings that mandated a different range. 125 S. Ct. at 746. The federal sentencing guidelines and Washington sentencing scheme both appear to have involved initial sentencing ranges, based on factors such as prior criminal history and the particular offense reflected by the jury verdict. See Booker, 125 S. Ct. at 746; id. at 775 (Stevens, J., dissenting); State v. Nordby, 723 P.2d 1117, 1118 (Wash. 1986) (en banc) (“The presumptive sentence range for this crime . . . is determined by combining the seriousness level of vehicular assault with Nordby’s criminal history.”).

(48) Statements made in Apprendi, Blakely, and Booker about the limiting effect of the facts reflected in the jury verdict or admitted by the defendant become less clear when viewed in light of the statutory scheme in which the statements were made. The statement “that the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,” Blakely, 124 S. Ct. at 2537, might be read to mean the maximum of the initial range set by the respective statutes, or it might be read to mean the minimum of that range. Booker indicates that the former was intended. Justice Stevens states in his decision for the majority that “when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.” See Booker, 125 S. Ct. at 750. In his dissent, furthermore, he offers an example of a sentencing judge using her discretion “to sentence within ‘the defendant’s initial sentencing range’ and ‘rely[ing] upon factual determinations beyond the facts found by the jury.’” Id. at 775 (Stevens, J., dissenting).

(49) The statement in Blakely “that ‘the statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” 124 S. Ct. at 2537, is ambiguous in another way. The word “solely” may mean “without additional factfinding” or it may mean “without taking into account his or her discretion within a range.” Booker, as discussed above, suggests the former was intended.

(50) There is a comparable sentence in Apprendi, reaffirmed in Booker, about the limitations imposed upon a sentencing judge by a jury’s verdict or a plea, which is less clear when taken out of context. That statement is: “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” Booker, 125 S. Ct. at 756-57. That sentence might mean that a sentencing judge cannot sentence within a range but rather must sentence a defendant to the minimum of the range. Alternatively, the sentence might mean that the Legislature may not authorize exceeding the maximum of the range on the basis of a fact or facts found by the judge following a jury verdict or a guilty plea. The majority opinion by Justice Stevens indicates that the latter was intended.

(51) In addition, by adopting the remedy that the federal sentencing guidelines should be treated as advisory, the remedial majority in Booker has indicated that a sentencing judge may be given discretion to consider facts other than those that are implicit in the jury’s verdict or admitted by a defendant. Justice Breyer, writing for the remedial majority, severed and eliminated the portions of the federal sentencing statute that made the guidelines mandatory, as well as the provisions for appellate review, and authorized sentencing judges to exceed the initial sentencing range in light of other statutory concerns surrounding the circumstances of the offense and the offender. Booker, 125 S. Ct. at 756-57.

(52) The New Jersey Supreme Court adopted a similar remedy after considering that its sentencing scheme could not survive after Blakely. See Natale, 878 A.2d at 741 (eliminating presumptive terms from the New Jersey sentencing scheme and recognizing the top of the sentencing range as the statutory maximum authorized
by the jury verdict). The North Carolina Supreme Court, on the other hand, rejected that remedy, on the ground “that the choice of remedy is properly within the province of the” Legislature. See State v. Allen, 615 S.E.2d 256, 272 (N.C. 2005). The court also observed that until its decision “no two state supreme courts [had] resolved Blakely issues in the same manner.” Id. at 271 n.7 (summarizing the results in a number of recent cases).

{53} We recognize that a majority of state supreme courts have reasoned as did the Court of Appeals in Frawley that Blakely’s discussion of the relevant statutory minimum within Washington’s sentencing scheme requires a state court to equate the presumptive sentence in a determinate sentencing scheme with the punishment authorized by the jury’s verdict. See, e.g., Natale, 878 A.2d at 737-38 (summarizing the varying conclusions); Smylie v. State, 823 N.E.2d 679, 682-84 (Ind. 2005) (holding an increase in the sentence above the presumptive term in Indiana’s sentencing scheme unconstitutional under Blakely). We are more persuaded by the reasoning of the California Supreme Court in Black.

{54} In Black, the California Supreme Court was impressed that “Apprendi, Blakely, and Booker all make clear that judicial factfinding is acceptable in the context of a discretionary sentencing decision.” 113 P.3d at 547. The court also was impressed that Booker expressed, as a matter of policy, a concern that there was “a new trend in the legislative regulation of sentencing” as a result of which legislatures selected facts that authorized greater punishment and permitted judges to find those facts after the jury had reached its verdict. Id. at 544 (quoting Booker, 125 S. Ct. at 751). The California Supreme Court concluded that the California sentencing scheme did not “implicate the concerns described in the majority opinion in Booker.” Black, 113 P.3d at 544. The court viewed Booker and Blakely as having “established a constitutionally significant distinction between a sentencing scheme that permits judges” to exercise judicial discretion within a range and one “that assigns to judges the type of factfinding role traditionally exercised by juries in determining the existence or nonexistence of elements of an offense.” Id. at 542. The court believed its own sentencing scheme illustrated the former rather than the latter. Id. at 548.

{55} We similarly conclude that Wilson properly construed Section 31-18-15.1. Our Legislature did not intend to confer a right to a basic sentence but rather to limit the trial court’s discretion to punish within a range by taking into consideration a wide range of circumstances, and to provide for meaningful appellate review. We believe our sentencing scheme reflects an appropriate legislative deference to judicial discretion in sentencing as well as respect for the jury’s role in determining guilt or innocence of crimes defined by statute. The mandatory language of Section 31-18-15(B) and writing requirement of Section 31-18-15.1(A) were intended to limit the judge’s sentencing discretion by imposing a standard of reasonableness, rather than creating a right in defendants to be sentenced to the basic sentence. See Black, 113 P.3d at 543-44. “[T]he upper term is the ‘statutory maximum’ for purposes of Sixth Amendment analysis,” and the judge’s sentence pursuant to Section 31-18-15.1 “will be upheld ‘as long as the judge exercises his or her discretion in a reasonable manner . . . .”’ Id. at 545. We believe New Mexico’s sentencing scheme, so construed, is consistent with Booker. We also conclude that neither Blakely nor Booker require us to depart from the conclusion in Wilson, based on this construction, that Section 31-18-15.1 is not unconstitutional. We conclude, as did the California Supreme Court in reviewing its state’s sentencing scheme, that New Mexico’s sentencing scheme illustrates an appropriate reliance on judicial discretion to sentence following a jury verdict, bench trial, or guilty plea.

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{56} Although Defendant has not challenged the aggravation of his sentence for conspiracy, we discuss the sentencing hearing to illustrate the operation of Section 31-18-15 for each of Defendant’s convictions. The court apparently found the facts as a result of which legislatures selected facts that authorized greater punishment and permitted judges to find those facts after the jury had reached its verdict. Id. at 544 (quoting Booker, 125 S. Ct. at 751). The California Supreme Court concluded that the California sentencing scheme did not “implicate the concerns described in the majority opinion in Booker.” Black, 113 P.3d at 544. The court viewed Booker and Blakely as having “established a constitutionally significant distinction between a sentencing scheme that permits judges” to exercise judicial discretion within a range and one “that assigns to judges the type of factfinding role traditionally exercised by juries in determining the existence or nonexistence of elements of an offense.” Id. at 542. The court believed its own sentencing scheme illustrated the former rather than the latter. Id. at 548.

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of criminal sexual contact of a minor)). We implied, but did not state, that double jeopardy was the reason for the holding. Id.; see also State v. Kurley, 114 N.M. 514, 516, 841 P.2d 562, 564 (Ct. App. 1992).

{60} Circumstances of the crime, even if closely related to the elements, may be the basis for an aggravated sentence. See, e.g., State v. Castillo-Sanchez, 1999-NMCA-085, ¶ 28 (affirming an aggravated conviction based on the length of the conspiracy); State v. Fuentes, 119 N.M. 104, 109-10, 888 P.2d 986, 991-92 (Ct. App. 1994) (affirming an aggravated sentence based on Defendant’s repeated stabbing of victim, which went beyond the elements necessary for convictions of armed robbery and aggravated assault); Kurley, 114 N.M. at 515-16, 841 P.2d at 563-64 (affirming an aggravated sentence partially based on brutality of the defendant’s attack on the victim, when the brutality was used to show great bodily harm, an element of the conviction for aggravated battery causing great bodily harm).

{61} We believe our cases decided under Section 31-18-15.1 illustrate the discretion imposed in the judge at sentencing as well as distinguish the role of the jury in determining whether the State has proved the elements of a crime beyond a reasonable doubt. The factors or circumstances on which the trial judge relied in sentencing Defendant do not appear to us to be findings of fact within the meaning of Blakely and Apprendi. Because we are persuaded that Section 31-18-15.1 as construed in Wilson is constitutional, we believe the remaining question is whether the court abused the discretion the sentencing scheme as construed in Wilson entrusts to the court. We believe there was no abuse.

IV

{62} For these reasons, we affirm Defendant’s judgment and sentence. There was sufficient evidence to support his convictions. We hold that Section 31-18-15.1 is constitutional, based on the construction given that statute by Wilson, and therefore the aggravation of Defendant’s sentence does not violate the Sixth Amendment of the United States Constitution. We overrule Frawley, which holds to the contrary.

We note that Defendant’s sentences for robbery, a third degree felony, and for conspiracy to commit robbery, a fourth degree felony, appear to be incorrect. See § 31-18-15 (providing a basic sentence of three years for a third degree felony and a basic sentence of eighteen months for a fourth degree felony). If there has been an error it may be corrected pursuant to Rule 5-113(B) NMRA 2005 or Rule 5-801 NMRA 2005.

{63} IT IS SO ORDERED.

PAMELA B. MINZNER,
Justice

WE CONCUR:

RICHARD C. BOSSON, Chief Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice (concurring in part and dissenting in part)

CHÁVEZ, Justice (concurring in part and dissenting in part).

{64} I agree with the majority that there is sufficient evidence to support defendant’s convictions and I therefore concur with Section II of the majority opinion. However, because in my opinion NMSA 1978, Section 31-18-15.1 (1993), while constitutional on its face, may be applied in violation of the Sixth Amendment, I respectfully dissent from Section III of the majority opinion. The majority upholds the constitutionality of Section 31-18-15.1 by combining it with the basic sentence defined in NMSA 1978, Section 31-18-15 (2003) to create a range, reasoning that the combination is appropriate since a defendant does not have a right to be sentenced to the basic sentence. Majority Opinion ¶ 44. I respectfully disagree with the analysis and conclude that a defendant does indeed have a right to be sentenced to no more than the basic sentence unless and until there is a finding of aggravating circumstances. Yet the real question is whether a defendant has a Sixth Amendment right to have a jury, and not a judge, make the findings that will increase his or her sentence. In my opinion, the United States Supreme Court has consistently answered the question in Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington, 124 S. Ct. 2531 (2004), and United States v. Booker, 125 S. Ct. 738 (2005) to require a jury finding of any fact that increases the defendant’s sentence beyond the prescribed statutory maximum. In New Mexico, the prescribed statutory maximum is the basic sentence, as evidenced by the plain language of the statute, which requires the imposition of the basic sentence unless altered by the judge. NMSA 1978, Section 31-18-15(B) (“The appropriate basic sentence of imprisonment shall be imposed ... unless the court alters such sentence ...”). An alteration increasing the basic sentence may only occur if there is a finding of aggravating circumstances.


{65} In this case, the sentencing judge increased the Defendant’s sentence based on his perception that the jury believed the victim remained alive after being tossed in the well. This fact was not found by the jury, and as such the judge’s perception may have been misplaced, which illustrates the importance of requiring a jury to make a finding of aggravating circumstances before a judge exercises discretion to increase a sentence. In my opinion, adhering to the Sixth Amendment requirement that a jury find facts which may increase a defendant’s confinement does not interfere with judicial discretion. Because I conclude that the United States Supreme Court in Apprendi, Blakely, and Booker has interpreted the Sixth Amendment to require a jury, absent a waiver by the defendant, to make findings which will increase a basic sentence, I would reverse the five-year increase of Defendant’s sentence in this case.

A DEFENDANT HAS A RIGHT TO BE SENTENCED TO THE BASIC SENTENCE ABSENT A JURY FINDING OF AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT

{66} In State v. Wilson, 2001-NMCA-032, ¶¶ 18-21, 130 N.M. 319, 24 P.3d 351, Judge Pickard concisely set forth the historical evolution and intent of the Legislature in enacting Section 31-18-15.1. Important to this history was the noble goal of the Legislature to promote uniformity in sentencing by specifying a basic sentence and then requiring a sentencing judge to articulate findings of aggravating circumstances to justify increasing the period of confinement beyond the basic sentence. The majority concludes that a defendant does not have a right to be sentenced to the basic sentence. Majority Opinion ¶ 54. This appears to me to be the polestar rationale for its conclusion that the Sixth Amendment does not preclude a sentencing judge from finding aggravating circumstances, which may lead to an increased period of incarceration. I respectfully disagree.

{67} In my opinion, under a plain reading of the sentencing statutes, a defendant has a right to expect that he or she will receive the basic sentence, unless and until there is an articulated finding of either mitigating or aggravating circumstances. This is how the Legislature sought to accomplish uniformity in sentencing - by requiring an explanation of the findings justifying a departure from the basic sentence. If a sentencing judge finds mitigating circumstances, (s)he may reduce the basic
sentence by up to one-third. This reduction does not have to be based on a jury finding of mitigating circumstances because the jury verdict during the guilt phase already authorizes a greater sentence, the basic sentence.

{68} If a sentencing judge finds aggravating circumstances, (s)he may increase the basic sentence by up to one-third. As with mitigating circumstances, the sentencing judge must articulate the findings in the record. NMSA 1978, § 31-18-15.1(A). Requiring the sentencing judge to articulate the findings allows the appellate courts to determine whether the findings are supported by the record. See State v. Wilson, 117 N.M. 11, 19, 868 P.2d 656, 664 (Ct. App. 1993) (“We will uphold the trial court’s aggravation of a sentence if the circumstances relied on are supported in the record and constitute proper factors to consider under the enhancement statute.”). As demonstrated by appellate court opinions, aggravating circumstances require findings of fact and not simply the consideration of sentencing factors. See e.g. Swafford v. State, 112 N.M. 3, 17, 810 P.2d 1223, 1237 (1991) (“[W]e save for later the question of the reliability of a lack of remorse as a significant factor in sentencing. In the interests of justice, in any event, future sentence enhancements based on a lack of remorse will merit specific findings, and where not so supported will be subject to careful scrutiny on review.” (emphasis added)). Because findings of fact which constitute aggravating circumstances are required to permit a sentencing judge to increase the basic sentence, I agree with the United States Supreme Court that the Sixth Amendment requires a jury to make these specific findings. This is because the jury verdict alone does not authorize the increased sentence. The basic sentence is the maximum authorized by the jury verdict. Additional findings are required to increase the basic sentence. These findings should be made by a jury beyond a reasonable doubt following the guilt phase. Of course, the defendant may stipulate to the facts that constitute aggravating circumstances or waive a jury finding of such aggravating circumstances, in which case the Sixth Amendment is not implicated.

THE JUDGE’S SPECULATION ABOUT WHAT THE JURY FOUND IN ORDER TO INCREASE THE BASIC SENTENCE ILLUSTRATES THE IMPORTANCE OF REQUIRING A JURY FINDING OF AGGRAVATING CIRCUMSTANCES

{69} In this case, before increasing Defendant’s sentence by one-third for conspiracy to commit murder, the judge stated:

For the reasons pointed out by the state this was a very egregious killing. And I’m satisfied that the jury felt—and there’s certainly sufficient evidence—that when [the victim] was thrown into the well he was still alive. And he was left to die there without having means of extricating himself from his predicament. The well was covered over. And the evidence before the jury and the court was that he didn’t die from the blow in the head. I just see no mitigating circumstances in this case.

{70} The sentencing judge both speculated about what the “jury felt” and weighed the evidence on a critical issue, which he ultimately relied on to increase Defendant’s sentence. The issue is critical because during trial the prosecution was adament that the evidence proved the victim was alive after being tossed into the well. The prosecution also argued vehemently that the evidence established that Defendant knew the victim was alive when he helped to toss him in the well. Defendant’s version, as presented through the testimony of the investigating officer who took Defendant’s statement, was that the co-defendant had killed the victim during a robbery, and that out of fear for his own life, Defendant assisted the co-defendant in tossing the lifeless body into the well.

{71} Important to my analysis is the fact that the jury acquitted Defendant of first-degree premeditated murder. They found him guilty of first-degree felony murder, and perhaps as an accomplice. We do not know which because a special interrogatory is not required for accomplice liability. The speculation by the sentencing judge as to what the “jury felt” may not be unreasonable. However, one might also reasonably speculate that the jury had a reasonable doubt that the victim remained alive once tossed in the well. Did their acquittal of Defendant for premeditated murder mean the jury rejected the prosecutor’s argument that the victim remained alive in the well with Defendant covering the well to leave the victim there to die? If so, the judge’s finding that the victim “was left to die there without having means of extricating himself from his predicament” was inconsistent with the jury finding. Did the jury reject the prosecutor’s argument that Defendant knew the victim was alive after being tossed in the well? Did the jury find Defendant’s version of the events closer to the truth? Did the jury accept Defendant’s version that he believed the victim was already dead when the victim was tossed in the well? Defendant’s version of the events certainly is sufficient to support a conviction for felony murder under an accomplice theory, and could also explain why the jury acquitted him of premeditated murder. After all, if the prosecution was correct that the victim was alive after being tossed in the well, and that Defendant covered the well knowing the victim was alive in order to prevent the victim from getting out and saving himself, what better evidence of premeditated murder? Suffice it to say that adherence to the Sixth Amendment would have permitted the jury to clarify for the court whether it believed the victim was alive after being tossed in the well and was left there to die. Such a jury finding would constitutionally permit the sentencing judge to exercise discretion to increase the basic sentence by one-third under the provisions of Section 31-18-15.1. If the jury did not make such a finding, the very rationale relied on by the judge for increasing Defendant’s sentence would not have been supported in the record and the increase would not have been permissible.

A SENTENCING JUDGE’S DISCRETION IS NOT COMPROMISED BY A JURY’S CONSIDERATION OF EVIDENCE OF AGGRAVATING CIRCUMSTANCES

{72} During oral argument, some concern was expressed regarding the importance of judicial sentencing discretion and how reversing the enhanced sentence in this case might interfere with that discretion. As a preface to my discussion of Apprendi, Blakely, and Booker, I think this concern merits comment. I firmly believe a sentencing judge must have discretion in sentencing a defendant convicted of committing a crime. Requiring a jury finding of aggravating circumstances does not interfere with this discretion. Even if a jury finds aggravating circumstances, the sentencing judge does not automatically increase the basic sentence by one-third. The judge may increase it by less or not at all. Likewise, if a jury does not find aggravating circumstances, the judge’s sentencing discretion is still not frustrated. Although the sentencing judge may not increase the basic sentence, the judge may still use discretion in deciding whether to run the sentences concurrently or consecutively.
whether to suspend or defer a sentence, or to determine the period and conditions of probation or parole. In doing so, the judge may consider pre-sentence reports, victim impact statements, the circumstances of the crime and the character of the defendant.

We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence[s] within statutory limits in the individual case.

Apprendi, 530 U.S. at 481 (emphasis omitted).

73 What occurred during the sentencing of Defendant illustrates how a sentencing judge may continue to exercise discretion, whether or not a jury makes a finding of aggravating circumstances. At the sentencing hearing, the prosecutor urged the sentencing judge to impose the maximum sentence on Defendant. Life in prison for felony murder. Fifteen years for conspiracy to commit murder. Nine years for robbery. Three years for conspiracy to commit robbery. Eighteen months for tampering with evidence. Three years for burglary. Eighteen months for felons in possession of a firearm. The prosecutor also asked that the sentences for all but the felony murder be increased by one-third and that all of the sentences run consecutively. The basic sentences would have totaled life plus thirty-three years if run consecutively. The prosecution also sought an increase of sixteen and one-half years, which would have resulted in a total sentence of life plus forty-nine and one-half years.

74 Although the sentencing judge increased the fifteen year sentence for conspiracy to commit murder by five years, the judge declined to run all of the sentences consecutively. Instead, the judge sentenced Defendant to life plus twenty years, deciding to run the sentences for Counts III-VII concurrent with sentences for Counts I and II. Assuming the jury was asked to, and did, find aggravating circumstances, the sentencing judge could still have imposed the same sentence. Alternatively, had the jury rejected the aggravating circumstance(s), the sentencing judge could have imposed the same sentence by exercising discretion to run more sentences consecutively so as to still arrive at a sentence equaling life plus twenty years. In my judgment, the sentencing judge exercised wisdom, justice and sound discretion in sentencing Defendant. However, that is not the issue. The issue is whether the United States Supreme Court has interpreted the Sixth Amendment to require that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Blakely, 124 S. Ct. at 2536 (internal quotation marks omitted). The Court rejected the State’s argument and the Washington Court of Appeals’ analysis that the sentence did not violate the rule in Apprendi because the verdict authorized a sentence up to 10 years as a class B felony conviction. Id. at 2537. Instead, the Court concluded that the “statutory maximum” for Apprendi purposes was 49 to 53 months, the maximum sentence authorized solely by facts reflected in the defendant’s plea or a jury verdict, rather than the separately defined maximum up to which a judge could elevate a standard sentence based on facts not admitted by a defendant or found by a jury. Id. at 2536. Because Washington law mandated sentencing within the basic range authorized by a defendant’s plea or jury verdict, and only granted discretion to the judge to enhance a sentence beyond this range after finding facts not found by a jury, the Court held that the defendant’s enhanced sentence violated the defendant’s Sixth Amendment right to trial by jury. See id. at 2543. Applying this analysis, I conclude that since the New Mexico Legislature mandates imposition of the basic sentence, and only grants discretion to the judge to increase the basic sentence upon a finding of aggravating circumstances, that an increased sentence would violate the Sixth Amendment if increased without a jury finding of the aggravating circumstances.

75 At issue here is whether the sentence enhancements authorized by Section 31-18-15.1 are constitutional in light of the United States Supreme Court’s recent holdings in Blakely and Booker. In Blakely, the Court invalidated a Washington sentencing scheme which provided a basic sentencing range authorized by a defendant’s plea or jury finding of guilt, but which granted the judge the discretion to enhance the sentence above the basic range, up to a separately defined statutory maximum, if the judge found “substantial and compelling reasons justifying an exceptional sentence.” 124 S. Ct. at 2535 (internal quotation marks and citations omitted). There, the defendant pleaded guilty to kidnapping, a Class B felony punishable by incarceration for no more than 10 years. Id. However, specific provisions of Washington law required the judge to sentence the defendant to a standard range of 49 to 53 months, based on the defendant’s “offender score” and the seriousness of the crime, unless the judge found aggravating facts justifying an exceptional sentence. Id. Although the prosecutor recommended imposition of the standard sentence, after a sentencing hearing the judge found that the defendant had acted with deliberate cruelty and had done so in the presence of his minor child.

3 Defendant waived a jury trial on the issue of felon in possession of a firearm.

4 Washington has since amended its sentencing scheme to permit enhancement of a sentence following a jury finding of certain aggravating circumstances, one being a finding of deliberate cruelty. Wash. Rev. Code § 9.94A.535 (2005).

5 Assuming the defendant has not waived the jury requirement or admitted the facts.

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judge to enhance a sentence above the amount permitted by the plea or jury verdict alone, based on the judge’s determination of a fact that was not found by the jury or admitted by the defendant. 125 S. Ct at 755-56. In Booker, the defendant was found guilty by a jury of possession with intent to distribute more than 50 grams of crack cocaine, based on evidence presented to the jury that defendant possessed 92.5 grams. \textit{Id.} at 746. The Anti-Drug Abuse Act (ADAA) prescribed only two quantity-based offenses per drug type, in this case, crack cocaine: (1) the offense of possessing with intent to distribute at least 5 grams of cocaine base, not involving death or serious bodily injury, punishable as 5 to 40 years, 21 U.S.C. \textsection 841(b)(1)(B)(iii) (1986); and (2) the comparable offense of possessing at least 50 grams, punishable as 10 years to life. 21 U.S.C. \textsection 841(b)(1)(A)(iii); see 18 U.S.C. \textsection 3551 et seq. (2000); 28 U.S.C. \textsection\textsection 991-998 (2000). Had Congress not acted further, a life sentence would have constituted the relevant “statutory maximum” for Apprendi purposes under the federal scheme; therefore, the defendant’s conviction would have permitted the trial judge to sentence him to any term between 10 years and life in prison.

{78} However, Congress altered the relevant “statutory maximum” when the Federal Sentencing Commission, cloaked with legislative authority, adopted narrower guidelines prescribing mandatory sentencing ranges based on a defendant’s criminal history and offense level. See 28 U.S.C. \textsection 994 (1984); \textit{Mistretta v. United States}, 488 U.S. 361, 367 (1989) (stating that Federal Sentencing Guidelines were binding on the courts). Under these mandatory guidelines, Booker’s criminal history qualified him as a category VI offender, and the jury finding that he possessed 92.5 grams of crack made his crime a level 32 offense. \textit{United States v. Booker}, 375 F.3d 508, 510 (7th Cir. 2004) (citing U.S. Sentencing Guidelines Manual \textsection\textsection 2D1.1(c)(4), 4A1.1 (Nov. 2003) (“U.S.S.G.” or “Guidelines”), and explaining that under the Guidelines, 32 is the base offense level when a defendant possesses at least 50 grams but less than 150 grams of crack). The sentencing table under the Guidelines mandated that a trial judge select a “base” sentence of 210 to 262 months incarceration for a category VI criminal committing a level 32 offense. See U.S.S.G. \textsection\textsection 2D1.1(c)(4), 4A1.1. Thus, under the Guidelines, the “statutory maximum” for Apprendi purposes, under which the judge could sentence Booker based on the plea or jury verdict alone, was 262 months rather than life.

{79} However, at a sentencing hearing the trial judge found by a preponderance of the evidence that Booker possessed a total of 658.5 grams of crack and that he had obstructed justice. \textit{Booker}, 125 S. Ct. at 746, 763. Based on these findings, while Booker’s criminal history remained a category VI, his offense level was increased to 36 for possessing between 500 grams and 1.5 kilograms of crack, and was increased another two levels because of the finding of obstruction of justice. See \textit{Booker}, 375 F.3d at 509; U.S.S.G. \textsection 4A1.1, 3C1.1. These findings mandated a sentence under the Guidelines of between 360 months and life imprisonment. The judge chose the lowest sentence within the range and sentenced Booker to 30 years. \textit{Booker}, 125 S. Ct. at 746 (“Thus, instead of the sentence of 21 years and 10 months that the judge could have imposed on the basis of the facts proved to the jury beyond a reasonable doubt, Booker received a 30-year sentence.”).

{80} In invalidating Booker’s sentence under the mandatory Guidelines, the United States Supreme Court reaffirmed its holding in \textit{Apprendi} that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” \textit{Booker}, 125 S. Ct. at 756. The Court explained that had the Guidelines been “advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment,” as there has never been any doubt about the authority of a judge to exercise discretion in imposing a sentence within a statutory range. \textit{Id.} at 750 (citing \textit{Apprendi}, 530 U.S. at 481; \textit{Williams v. New York}, 337 U.S. 241, 246 (1949)). However, because the Guidelines were mandatory, the statutory range for Apprendi purposes was not 10 years to life, as stated in Section 841(b)(1)(A)(iii), but rather 210 to 262 months based on Booker’s criminal history and the quantity of drugs the jury found he possessed. In other words, the statutory range Booker faced based solely on the jury finding that he possessed 92.5 grams of crack was 210 to 262 months, not 10 years to life. Had the jury considered evidence and found beyond a reasonable doubt that Booker possessed 658.5 grams of crack and was guilty of obstruction of justice, the statutory range would have been 360 months to life. Under the latter hypothetical, the sentence imposed on Booker would not have violated his Sixth Amendment rights.

{81} To remedy the constitutional vice, the United States Supreme Court severed and excised two provisions of the Federal Sentencing Act: (1) the provision requiring sentencing courts to impose a sentence within the Guidelines range, and (2) the provision that set forth standards for review of sentences on appeal. \textit{Booker}, 125 S. Ct. at 764 (citing 18 U.S.C. \textsection\textsection 3553(b)(1), 3742(e) (Supp. 2004)). As applied to Booker, this remedy effectively made the Guidelines discretionary so that the jury finding that the defendant was guilty of possessing over 50 grams of crack cocaine authorized a sentence of incarceration between 10 years and life. A judge could then exercise discretion to sentence the defendant to any period between 10 years and life by consulting the Guidelines and other sentencing goals. See \textit{id.} at 764 (citing 18 U.S.C. \textsection 3553(a) (Supp. 2004)).

{82} New Mexico’s sentencing statute provides a basic sentence for different degrees of noncapital felonies, based on a defendant’s guilty plea or a jury finding of guilt. NMSA 1978, \textsection 31-18-15. The judge must hold a sentencing hearing to determine the existence of aggravating or mitigating circumstances. NMSA 1978, \textsection 31-18-15.1(A). A judge has discretion on whether or not to alter a basic sentence up to one-third of the basic range “upon a finding by the judge of any mitigating or aggravating circumstances surrounding the offense or concerning the offender.” \textit{Id.} In making such findings, the judge may rely on any evidence or statements he or she finds useful. \textit{Id.} If a judge enhances a sentence, Section 31-18-15.1 requires a judge to state his or her reasons for doing so on the record, which allows appellate courts to review the increase to ensure the reasons are supported in the record and not based on an improper motive. See, e.g., \textit{Reyes v. Quintana}, 853 F.2d 784, 785 (10th Cir. 1988).

{83} The State urges us to uphold our sentencing scheme as providing a broad range authorized by a guilty plea or jury verdict within which a judge has unfettered sentencing discretion. The majority does so. Indeed, before the United States Supreme Court decided \textit{Blockely}, the New Mexico Court of Appeals held that Sections
31-18-15 and 31-18-15.1 should be read together to provide a range of permissible sentencing, and that sentencing within this range was constitutional under Apprendi so long as the judge placed on the record any finding of aggravating or mitigating circumstances. Wilson, 2001-NMCA-032, ¶ 4. This holding was called into question by a different panel of the Court of Appeals, which held Section 31-18-15.1 unconstitutional in light of Blakely. State v. Frawley, 2005-NMCA-017, ¶¶ 12-13, 137 N.M. 18, 106 P.3d 580. This panel concluded that the basic sentence in Section 31-18-15 was the maximum sentence a judge could impose solely on the basis of the facts reflected in the jury verdict. Id. at ¶¶ 12-13. The Court of Appeals in Frawley read Blakely to say:

When the jury considers the facts relevant to the elements of an offense in determining guilt or innocence, the criminal sanctions for that offense cannot be increased after the verdict based on facts the jury has not specifically considered in connection with its finding of guilt, whether or not the facts are labeled “sentencing factors,” and even if the facts are not material to the statutory elements of the offense.

Id. at ¶ 12.

{84} As explained in Frawley, the United States Supreme Court explicitly rejected an approach taken by the Washington court in Blakely, which was similar to our Court of Appeals’ analysis in Wilson, and now to the analysis of the majority. See Frawley, 2005-NMCA-017, ¶¶ 11-13. In Blakely, the Washington court had read the statutory provisions together to provide a permissible range of sentencing up to a statutory maximum, so that a judge’s finding of aggravating factors did not increase the punishment authorized by a judge’s findings or defendant’s plea. See Blakely, 47 P.3d at 159, rev’d by 124 S. Ct. at 2537-38. In rejecting the Washington court’s reasoning, the Supreme Court emphasized that:

[T]he relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum [sentence] he may impose without any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts

“which the law makes essential to the punishment,” and the judge exceeds his proper authority.

Blakely, 124 S. Ct. at 2537 (internal citation omitted). The Washington Court of Appeals’ attempt to construe the 90 month sentence as falling within the statutory range of no more than 10 years for a Class B felony failed because the trial judge was required to impose a standard sentence of 49 to 53 months unless the judge found aggravating facts justifying an exceptional sentence. Id. at 2537-38. Stated differently, the statutory maximum based on the guilty plea or jury verdict alone was 53 months, not 10 years, and enhancing the sentence above that amount based on judicial findings violated the Sixth Amendment. Stated in terminology used by the majority, the defendant had a right to be sentenced to 53 months, not anything up to 10 years. Before the defendant could be sentenced to more than 53 months, the United States Supreme Court held that the defendant had a Sixth Amendment right to have a jury make the requisite findings justifying the increase. {85} My interpretation of Apprendi, Blakely, and Booker leads me to conclude that Section 31-18-15.1 is not unconstitutional on its face but, nevertheless, may be unconstitutional as applied. A trial judge, even upon finding aggravating circumstances, is not required to increase a sentence and therefore may apply the statute in a manner that comports with Blakely. Therefore the statute is constitutional on its face. However, I believe the trilogy of Apprendi, Blakely, and Booker requires us to determine the maximum sentence authorized solely by the facts established by a plea of guilty or facts established at trial and reflected in a jury verdict. If the trial judge enhances a sentence above the statutory basic sentence after finding facts not supported by a plea of guilty or the jury verdict, the increased sentence violates the Sixth Amendment. This is true regardless of whether the judge is required to increase the sentence or has discretion to increase the sentence; in either scenario the sentence violates the rule in Apprendi, as explained in Blakely and Booker, because the judge exercises discretion only after finding facts not established by the plea or facts not established at trial and reflected in the jury verdict. Blakely, 124 S. Ct. at 2537 (“Our precedents make clear, however, that the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” (emphasis omitted)).

{86} Under Blakely, Booker and Apprendi, Section 31-18-15.1 may be constitutionally applied so long as: (1) the defendant has stipulated to the judicial fact-finding for sentencing purposes; or (2) the defendant admits the facts relied on by the court to increase the sentence. Where the prosecution serves notice of its intent to seek an increase in the basic sentence, unless the defendant admits such facts or stipulates to the judge’s authority to decide such facts, I would hold that such facts must be found by a jury beyond a reasonable doubt. Without a jury determination, application of Section 13-18-15.1 under such circumstances would violate the Sixth Amendment under Blakely and Booker. To the extent Wilson (declaring Section 31-18-15.1 to be constitutional) and Frawley (declaring Section 31-18-15.1 to be unconstitutional on its face) conflict, I would overrule these cases.

{87} For all of the foregoing reasons, I respectfully dissent from Section III of the majority opinion and would reverse the increase of Defendant’s sentence by five years. I would remand to the trial court for imposition of a sentence without the five year increase or to convene a jury to consider whether aggravating circumstances exist which would justify imposition of the increased five year sentence.

EDWARD L. CHÁVEZ,
Justice
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In fact, the New Mexico Hispanic Bar Association (NMHBA) has come a long way in its twenty-nine years of existence. In the 1970’s a lawsuit was filed with the financial assistance of the Mexican American Legal Defense and Education Fund pertaining to the validity of New Mexico’s bar admission policies. Bar exams were graded using a “floating” score resulting in an inherent discriminatory impact upon minority applicants. The late Judge Steve Herrera and attorney Edward Benavidez took the lead in the lawsuit contesting the bar exam grading process. From that concerted effort, the New Mexico Hispanic Bar Association was born.

Since then, the NMHBA has grown into an organization of hundreds of members and into a professional association that is cohesive in its goal of promoting opportunities for Hispanic legal professionals. The organization’s accomplishments can be attributed to many dedicated individuals; far too many to name in this message. Each of them deserves a thank you from those of us who follow the path they have paved for us. During my term as President of the NMHBA, I intend to build upon the many accomplishments of my mentors and predecessors, including past-presidents Alan Varela, Phillip Sapien, and Judge Victor Valdez.

Board took time away from their families and busy law practices to assist the organization in finding ways to foster the continued development of the association. From the leadership retreat, several ideas were born which will keep our professional organization moving forward for decades to come. Several new committees were formed to address several issues, including:

1. Mission Statement revision committee (to include the addition of a vision statement);
2. Bylaws revision committee;
3. Student mentor committee;
4. Judicial committee (to assist judicial applicants with the application process);
5. Financial policy and long term planning committee; and
6. Education steering committee (to deal with bar exam passage rates, education pipeline issues and the like).

A strategic planning session is scheduled for next spring to guarantee the implementation of long-term goals. I invite and challenge the membership of the organization to become involved in these projects.

Finally, the NMHBA continues to raise thousands of dollars each year to directly promote the education and professional development of Hispanic attorneys through its scholarship program. This year the State Bar of New Mexico recognized our program with its Outstanding Program of the Year award in Ruidoso in August. Through the generosity of those who financially support our program and the hard work of the Chairpersons of the several Committees (Brian Colón, Tina Cruz, Joseph Sapien, and Mary Torres), and their committee members, scholarships are not only given to law students, but for the first time ever this year to college and high school students as well. Board Member Geno Zamora was the first Chairperson of the annual Holiday Fundraiser and it has been an astounding success. Please see the inside of this edition of Res Publica for more information regarding the Holiday Fundraiser to be held December 8, 2005, and please contact any Board Member to purchase a ticket.

I would like to take this opportunity to publicly thank the Executive Committee: Frank Baca, Vice-President; Mary Torres, Secretary; Lori Martinez – Treasurer; Phillip Sapien – Executive Committee Member At-large; and Carla Lopez – Executive Committee Member At-large. Each of them has provided tremendous support, leadership and undying commitment to me and to the goals of our organization.

I look forward to a successful year at your service.

Adelánte.
MALSA Named HNBA’s “Law Student Organization of the Year”

by Denise Chanez, MALSA President

The Hispanic National Bar Association (HNBA) selected the UNM Law School’s Mexican American Law Student Association (MALSA) as Law Student Organization of the Year. MALSA competed with law student organizations from across the country and was selected by members of the HNBA’s Law Student Division. The HNBA represents the interests of over 25,000 Hispanic attorneys, judges, law professors, and law students in the United States and Puerto Rico. MALSA President, Denise Chanez, and Board Member, Dahlia Olsher, accepted the award on MALSA’s behalf at the HNBA’s 2005 convention in Washington, D.C. on October 17. The award was dedicated to the founders of MALSA, who started the organization in the 1970’s.

The award is presented each year to an organization whose efforts create an overall awareness of issues affecting the Hispanic population. The award recognized MALSA’s efforts and among the activities recognized by the HNBA were: 1) the mentorship program with ENLACE (Engaging Latino Communities for Education), in which MALSA members mentor minority high school students; 2) the first annual Minority Mentorship Mixer for high school and college students, 3) recruitment of minority law students through free Practice LSAT tests and admissions information sessions at schools across New Mexico; 4) activism in promoting the benefits of diversity and race-conscious admissions at the UNM School of Law; 5) support for its members through bar scholarships, travel reimbursements, educational seminars, and mentorship programs, and 6) the Annual Fighting for Justice Banquet.

A Time Will Come...

by Phillip G. Sapien, Esq., Sapien Law LLC

I, like many Latinos, waited with guarded optimism, and perhaps, an expectation, that a qualified Hispanic candidate would be nominated to the United States Supreme Court. The current Administration didn’t have just one, but two vacancies, and as it turned out, three opportunities to nominate a Latino/a to the High Court. After all his campaign promises, President Bush would surely reward those Latino/as that supported him for their reelection support.

Órale, this President is even related to some people of color. Didn’t Bush One refer to some of his grandchildren as “the little brown ones”? Surely, that would count for something, no? No. Clearly, blood, religious ideological blood, was stronger than watered down marital blood.

The opportunities missed here could not have been clearer. This President is not, as he has claimed, someone that will unite people of differing opinions and backgrounds. He has shown us nothing more than the same divisive politics we have come to expect from Washington.

How much more blood, patriotic loyalty and sacrifice must the largest minority in this country endure before we are rightfully given a seat on the highest court in the land? It has taken corporate America decades to realize the economic buying power of “Brown” money. Now, you see ads on TV and other mediums targeting Latinos. A time will come when the political strength of Latino/as will be respected but more importantly, rewarded.

Without a doubt, there are several Latino/a judges and lawyers qualified to sit on the Supreme Court. In fact, the Hispanic National Bar Association (HNBA) has submitted such a list to the White House every time a vacancy has occurred on the Court. These lists have obviously been rejected.

Would many Latino/as complain about, and perhaps, oppose a Latino Bush nominee? Probably. But, give us that opportunity. As an ethnic group, Latino/as deserve that opportunity. As a nation, we need the opportunity to consider such a nominee. As Americans, Latino/as have earned this opportunity. An opportunity to identify and support the true diversity of America.

The diversity of our country is one of the things that make it the greatest country in the world. Our institutions should reflect this diversity; otherwise, we are destined to become just like the nations we claim to liberate The United States Supreme Court will be unable to truly administer justice to the public it judges until it truly mirrors the populous in this country.

A time will come when a Latino/a is nominated and confirmed to the Supreme Court. Not to add more color and a “token” to the Court, but more importantly, to add diversity and perspective.
New Mexico Students Attend the First Annual Future Latino Leaders Law Camp

by Lisa Martinez, High School Student

Lisa Martinez and Jonathan Bustillos

The Hispanic Bar Association and the Hispanic Bar Foundation (Foundation) held their First Annual Future Latino Leaders Law Camp on July 24-31, 2005. The Foundation is a non-profit corporation organized for charitable and educational purposes. Sixteen students participated in the Law Camp at Georgetown University in Washington D.C. There were students from around the country including Arkansas, Florida, Georgia, Minnesota, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Texas and an international student from Guatemala.

From making new friends to meeting the United States Treasurer, this was truly a wonderful opportunity. Students were informed about minority scholarships and the LSAT. We began to learn about the legal profession and various careers that can be pursued with a law degree. Speakers taught various areas of law throughout the week and in the end participated in a mock trial.

With the hard work and dedication from the great people at the Foundation, the HNBA, and support of all the sponsors such as the New Mexico Hispanic Bar Association, we were able to take part in a once-in-a-lifetime experience.

HNBA Flourishes in 2004

by Briana Zamora, Esq., Butt, Thornton & Baehr

Alan Varela with U.S. Attorney General Alberto Gonzales

In October the Hispanic National Bar Association (HNBA) held its 30th Annual Convention in Washington, D.C. Attorney General Patricia Madrid, the nation’s only Latina Attorney General and UNM Professor Margaret Montoya, the first Latina to graduate from Harvard Law School, were honored. Charles “Chuck” Vigil, President of the State Bar Association of New Mexico, also attended the event as one of the VIP’s from New Mexico.

Alan M. Varela, Director of the New Mexico Workers’ Compensation Administration, concluded his year as President of the HNBA. Mr. Varela will continue to serve on the HNBA Board and as a member of the Past Presidents’ Division. During his tenure, the HNBA raised approximately one million dollars to bolster the capitalization of the organization, added more Affiliate entities than at any other time in the history of the professional association, increased the size of the D.C. headquarters staff, and added a weekly electronic newsletter to the membership containing breaking news, regional updates, and lucrative job postings. Mr. Varela was consulted by the White House, Congress and foreign leaders on a wide range of issues pertaining to human rights, economic opportunity, and access to justice. Mr. Varela was recently listed in Hispanic Business Magazine as one of the 100 most influential Hispanics. “It was an honor to serve and to represent New Mexico. I am especially grateful to Governor Richardson for his mentoring, encouragement and support throughout this challenging endeavor. It was a humbling and exhilarating experience to fight for fairness and opportunity while leading a network that directly influences millions of voters across the entire United States of America.”

Members on the Move

- Aguilar Law Offices-received the “Quality of Life – Legal Employer Award” from the New Mexico State Bar
- Morris “Mo” Chavez-received “Outstanding Young Lawyer of the Year” from the New Mexico State Bar
- Brian Colon - President of the Popejoy Hall Leadership Team and named one of “New Mexico’s 40 under Forty Power Brokers” by the New Mexico Business Weekly
- Sharon Gentry – new General Counsel of the New Mexico Workers Compensation Administration
- Judge Rose Marie Lazzano Allred - appointed as a Bernalillo County Metropolitan Court Judge by Governor Bill Richardson
- Attorney General Patricia Madrid – Hispanic National Bar Association honoree as the nation’s only Latina Attorney General
- Judge Kenneth Martinez - appointed as a Bernalillo County District Court Judge by Governor Bill Richardson
- Lori A. Martinez - new General Counsel for the Office of Workforce Training & Development
- UNM Professor Margaret Montoya – Hispanic National Bar Association honoree as the first Latina to graduate from Harvard Law School
- Ramond Ortiz - appointed as Santa Fe County District Judge by Governor Bill Richardson
- Phillip Sapien and Joseph Sapien - opened their new law offices - Sapien Law LLC
- Alan M. Varela - named one of Business Magazine’s 100 Most Influential Hispanics and recently elected President of the Seventeen State Western Association of Workers Compensation Administrations

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Attorneys and Counselors at Law

Por parte de la oficina de Narvaez Law Firm, P.A. es un placer tener ésta oportunidad para servir como patrocinador del boletín Res Publica
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Robles, Rael & Anaya, P.C. is proud to support the New Mexico Hispanic Bar Association and its Board Member Brian S. Colón of the Aguilar Law Offices, P.C.

We congratulate our friend, Brian, on being named one of New Mexico Business Weekly’s 40 Under Forty Power Brokers.

RES PUBLICA
New Mexico Hispanic Bar Association

Briana Zamora, Esq., Editor
Butt, Thornton & Baehr

To submit articles for next quarter’s publication of Res Publica, contact Briana Zamora at bhzamora@btblaw.com or at (505) 884-0777.

For past issues of Res Publica visit www.nmbar.org, click Other Bars/Legal Groups and follow the links to the New Mexico Hispanic Bar Association Website.

“Members on the Move” section, submit information regarding NMHBA members to bhzamora@btblaw.com for the next quarter’s publication.

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The University of New Mexico
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Calendar of Events

January 2006
27   Simms/Alumni Lecture
   Harold Koh, Dean Yale
   Law School

April 2006
6    Dedication - Bruce King
     Reading Room

For more information please call
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Visit the State Bar of New Mexico’s web site
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Assistant District Attorney
The Fifth Judicial District Attorney’s office has immediate positions open to new as well as experienced attorneys in Roswell, Chaves County and Hobbs, Lea County. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan with starting salary range of an Assistant District Attorney to a Senior Assistant District Attorney ($38,384.00 to $45,012.28) dependent upon experience. Please send resume to Floyd D. “Terry” Haake, District Attorney, 102 N. Canal Suite 200, Carlsbad, NM 88220 or e-mail to thaake@da.state.nm.us.

Associate To Senior Trial Attorney
3rd Judicial District
The 3rd Judicial District Attorney’s Office has a vacancy for an Associate Attorney to a Senior Trial Attorney, depending upon experience. Qualifications and salary are pursuant to the New Mexico District Attorney’s Personnel & Compensation Plan. Resumes can be faxed to Kelly Kuenstler at (505) 524-6379, or mailed to 201 W. Picacho, Suite B, Las Cruces, NM 88005.

Doña Ana County
Assistant County Attorney
Under the general supervision of the County Attorney and Deputy County Attorney, performs internal counsel duties such as draft ordinances, review contracts, consult in matters of potential liability, attend public meetings and hearings on behalf of the Board of County Commissioners, County Manager, Elected Officials, Department Directors, and other appointed boards and commissions. Defends and/or represents the county in limited litigation matters. Salary: $55,182. Closing Date November 21, 2005. Doña Ana County, H.R.Dept.180 W. Amador Ave., Las Cruces, NM 88001. Phone 505-647-7210 or toll free 1-877-827-7200 ext. 7294 for info. Fax#(505) 647-7302. Resumes welcome but not in lieu of application. Application available on website: www.co.dona-ana.nm.us.

Part Time Associate
Part time associate with potential for full time employment. Minimum 5 years experience required in Domestic and General Civil Litigation. Send resume, references and writing sample: 2019 Galisteo, Suite C3, Santa Fe, NM 87505.

Assistant City Attorney I
$4,336.57-$5,138.58 Per Month
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Office of the State Engineer/Interstate Stream Commission
State of New Mexico
The OSE/ISC is seeking a Lawyer – Advanced Level. The position involves providing advice to & representation of the Interstate Stream Commission & its staff in connection with interstate & intrastate water-related matters. The position also involves representation of the State in federal & state court. The position involves providing comprehensive legal advice on interstate compact matters & federal/state water issues throughout the state. The position involves making public presentations & conducting complex negotiations on specialized & technical areas of water law. Work Experience/Education Requirements (minimum qualifications): Demonstrated experience with a concentration in water law. Transactional experience a plus. REQUIRED Licensure as an attorney by the Supreme Court of New Mexico; member in good standing of State Bar & eligible to obtain New Mexico Attorney General Commission. Current admission to the federal district court of New Mexico & 10th Circuit Court of Appeals or admission with six months of hire. The position could be located in Santa Fe or Albuquerque. Salary range is $43,064 to $76,556. Please refer to DOL #75693 when applying. Applications are being accepted by the Department of Labor, November 14, 2005, through December 2, 2005. Please send an additional copy of your resume, bar card & a writing sample to T. Trujillo, General Counsel, @ OSE/ISC, P.O. Box 25102, Santa Fe, NM 87504-5102. Office of the State Engineer is an Equal Opportunity Employer.

Commercial Litigation and General Civil Practice
Comeau Maldegen Templeman & Indall, LLP in Santa Fe seeks motivated self-starter with 0-5 years experience for commercial litigation and general civil practice. Must desire courtroom advocacy and possess strong research, writing, communication and “people skills.” Please send resume, references, recent writing sample and letter of introduction to P.O. Box 669, Santa Fe, NM 87504.

Narcotic and Violent Crimes
Prosecutor - Ninth Judicial District Attorney’s Office
Assistant Trial Attorney to Senior Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney’s Office, which includes Curry and Roosevelt Counties. The job responsibility of this particular position will focus primarily on felonies, including narcotics and violent crimes. Qualifications and salary are pursuant to the New Mexico District Attorney’s Personnel & Compensation Plan. Resumes can be faxed to Ninth Judicial District Attorney Matthew Chandler at (505) 769-3198, or mailed to 700 N. Main, Suite 16, Clovis, NM 88101.

NOTE
SUBMISSION DEADLINES
All advertising must be submitted by e-mail or fax by 5 p.m. Wednesday, two weeks prior to publication (Bulletin publishes every Monday). Advertising will be accepted for publication in the Bulletin in accordance with standards and ad rates set by the editor and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The editor reserves the right to review and edit classified ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, two weeks prior to publication. For more advertising information, contact: Marcia C. Ulibarri at 505.797.6058 or e-mail ad to ads@nmbar.org or fax 505.797.6075.
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**New Mexico Human Services Department**

NM HSD, Child Support

Enforcement Division is seeking to fill two Lawyer-O, Attorney Positions, one located in Las Cruces (DOL #76020) and one in Farmington (DOL #76067). The positions require a Juris Doctor, current licensure with the State Bar of New Mexico and 1 year total legal experience. Salary ranges from $18,356 to $32,634 per hour. Interested individuals must apply using the DOL Job Order Number listed at any NM Department of Labor Workforce Center statewide. For DOL information, please call 505-827-7434 or any DOL office statewide. Please bring resume and copy of your NM bar card for application purposes. Upon completion of the NM DOL application process, please send a copy of your resume, bar card, NM DOL Job Referral Form and cover letter to NM HSD, Child Support Enforcement Division, PO Box 25110, Santa Fe, NM 87504, ATTN: Lila Bird, Chief Counsel. For general information, you may contact Donna Lopez at 505-827-7725 or by e-mail, donna.lopez@state.nm.us. The State of New Mexico is an Equal Opportunity Employer.

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At-Will General Counsel (At-Will Trial Court Staff Attorney) position with the Bernalillo County Metropolitan Court... Graduate of a law school meeting the standards of accreditation of the American Bar Association; current license to practice law in New Mexico and have five years’ experience in the practice of law. Salary $62,000 - $78,000 DOE. A copy of the complete job description is available upon request at (505) 841-9818. State of New Mexico benefits package. Submit a NM Judicial Branch application for employment to the Human Resource Division, P.O. Box 133, Albuquerque, NM 87103 Application deadline is 5 p.m., November 28, 2005. EOE.

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Experienced full-time legal assistant needed for small law firm. Applicant must have extensive experience in Microsoft Word, Microsoft Outlook, and Windows XP. Organizational skills and ability to draft legal documents required. A minimum of 2 years in medical malpractice, and/or insurance defense experience preferred. Now interviewing for position available December 1st, 2005. E-mail resume and salary requirements to joshua@sharpattorneys.com.

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Four generations now inhabit the legal workplace, each confronting in its own way the fast-changing and high pressured environment. With divergent work and life objectives and differing workstyles, getting junior and more senior lawyers to work together harmoniously and on the same wave-length is not an option. It is a professional necessity.

In this informative seminar, Phyllis Weiss Haserot, President and Founder of Practice Development Counsel, will utilize her 22 years of consulting and coaching experience to shed some light on the inter-generational conflict that currently exists in legal practice and steps to resolve it. Breda Bova, Senior Advisor to UNM President Louis Caldera, will share additional insights from research on mentoring that have arisen from the melding of these inter-generational cultures.

9:30 a.m.  Registration

10:05 a.m.  Perspectives across the Generations (Professionalism)
            Breda Bova, PhD, Senior Advisor to UNM President Louis Caldera

10:35 a.m.  Strategies and Techniques for Bridging the Multi-Generational Divides (Professionalism)
            Phyllis Weiss Haserot, President/Founder, Practice Development Counsel

11:25 a.m.  Panel Discussion – How to Manage the Differences (Professionalism)
            Phyllis Weiss Haserot (Moderator) and Breda Bova

11:45 a.m.  Lunch (provided at the State Bar Center)
Environmental Justice & The Public Welfare: Evolving Concepts of the Public Interest

Friday, December 16, 2005
State Bar Center, Albuquerque
5.0 General and 2.0 Professionalism CLE Credits

8:30 a.m.  Registration
9:00 a.m.  Professionalism in Natural Resource and Environmental Conflicts:
Who leads? Who follows? (Professionalism)
Tom Davis, Treasurer-Manager,
Carlsbad Irrigation District, Carlsbad
Steven L. Hattenbach, Rodey Law Firm, Albuquerque
Jim Lochhead, Brownstein, Brownstein Hyatt & Farber, P.C., Denver, CO
Gilbert Sandoval, Non-Indian Irrigators’ Group Representative, Rio Jemez
Frank Weissbarth, New Mexico Attorney General’s Office, Santa Fe
10:40 a.m.  Break
11:00 a.m.  Title VI of the Civil Rights Act
Karen Higginbotham, Director of the Office of Civil Rights
Environmental Protection Agency, Washington, DC
11:55 a.m.  Lunch (provided at State Bar Center)
12:45 p.m.  Environmental Justice: An EPA Perspective
Nicholas Targ, General Counsel for Environmental Justice
Environmental Protection Agency, Washington, DC
12:15 p.m.  Break
1:30 p.m.  Environmental Justice: A State Perspective
Felicia Orth, New Mexico Environmental Department
2:15 p.m.  Break
2:30 p.m.  Environmental Justice: A General Perspective
Professor Eileen Gauna, Southwestern School of Law
3:15 p.m.  Break
3:30 p.m.  Panel Discussion
Professor Eileen Gauna, Karen Higginbotham, Felicia Orth, and Nicholas Targ
4:30 p.m.  Adjourn and Reception (State Bar Center)

REGISTRATION - ENVIRONMENTAL JUSTICE & THE PUBLIC WELFARE:
EVOLVING CONCEPTS OF THE PUBLIC INTEREST
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