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End of Day by Tom Wezwick (see page 5)
Weems Gallery, Albuquerque

Special Insert:
Paralegal Survey

www.nmbar.org
Firm Finder
2007-2008
Bench & Bar Directory

Firm Listings are now available in the upcoming Directory

- Firms will be listed geographically in alphabetical order
- Firm logos can be used
- Firm Listings will be accepted through March 31, 2007

Cost $100 per listing

To purchase a Firm Listing contact:
Marcia Ulibarri
Account Executive
Direct: (505) 797-6058
Cell: (505) 400-5469
E-mail: mulibarri@nmbar.org
2007 CLE SEASON PASS

LIMITED PASS
$525 (choose any 3)
- CLE Annual Institutes
- State Bar of New Mexico Annual Meeting
- CLE at Sea (and other travel-related events, all travel excluded)
- CLE Seminars involving National Speakers (at State Bar Center in Albuquerque)
- CLE Video Replays

UNLIMITED PASS
$675 (attend all 2007 CLE seminars for one price)

Plus, with either pass, receive up to 40% off ABA publications purchased through the CLE Department.

Government, Legal Services Attorney, Paralegal
Limited Pass $295 Unlimited Pass $395

PLEASE NOTE: The CLE Season Pass applies only to the CLE registration fees of events described in this announcement. All online seminars and teleseminars are excluded. Call CLE at 797-6020 for further details or to obtain a list of the Terms and Conditions of the 2007 CLE Season Pass.
MARCH 28TH VIDEO REPLAYS - STATE BAR CENTER

Lawyers as Problem Solvers:  
2007 Professionalism  
9 – 10 a.m.  
1.0 Professionalism CLE Credit  
☐ $49

The Ethical Use of Paralegals in New Mexico  
10:30 – 11:30 a.m.  
1.0 Ethics CLE Credit  
☐ $49

Gain the Edge!  
Negotiation Strategies for Lawyers and Business Professionals with Marty Latz  
1 – 4 p.m.  
3.2 General CLE Credits  
☐ $130

Climate Change, Impacts, Laws and Policies  
8:30 a.m. – 4 p.m.  
3.8 General, 1.0 Ethics & 1.0 Professionalism CLE Credits  
☐ $189

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020; Monday - Friday, 9 a.m. - 4 p.m. (Please have credit card information ready)  
FAX: (505) 797-6071, Open 24 hours  
INTERNET: www.nmbarcle.org  
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Name ____________________________________________________________ NM Bar # ____________________________
Street _____________________________________________________________________________________________________
City/State/Zip _____________________________________________________________________________________________________
Phone __________________________________ Fax _______________________________________________________
E-mail __________________________________________________________________________________________________________

☐ Purchase Order (Must be attached to be registered)  
☐ Check enclosed $ ____________ Make check payable to: CLE

Credit Card # ____________________________________________________________________________________________ Exp. Date _________________
Authorized Signature __________________________________________________________________________________________
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Professionalism Tip

With respect to my clients:
I will advise my client against tactics that will delay resolution or which harass or drain the financial resources of the opposing party.

Meetings

March

5 Attorney Support Group, 5:30 p.m., First United Methodist Church
7 Employment and Labor Law Section Board of Directors, noon, State Bar Center
7 Quality of Life Committee, noon, State Bar Center
8 Public Law Section Board of Directors, noon, Risk Management Division, Montoya Building, Santa Fe
8 Business Law Section Board of Directors, 4 p.m., State Bar Center
9 Bankruptcy Law Section Annual Meeting, 1:15 p.m., State Bar Center

State Bar Workshops

March

6 Common Legal Issues Affecting Seniors 10:30 a.m., Phil Lovato Senior Center, Taos
7 Common Legal Issues Affecting Seniors 10:30 a.m., Questa Senior Center, Questa
9 Legal Clinic, Consultations 8 a.m. to noon and 1 to 4 p.m., Catron County Senior Center, Reserve
22 Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces
28 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

Cover Artist: Thomas Wezwick’s style of plein aire painting (outdoors and on location) has been developed during 17 years of painting in the mountains of the American West. It is a painterly, almost impressionistic, style with brush strokes that seem to dance across the canvas. Wezwick’s works show an economy of drawing and color that resonates with the actual scene. To see the cover art in its original color, visit www.nmbar.org and click on Bar Bulletin.
NOTICES

COURT NEWS

N.M. Supreme Court Address Changes

All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information should be e-mailed to the Supreme Court at suprvm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848. Information should be e-mailed to the State Bar at address@nmbar.org; faxed to (505) 828-3755; or mailed to PO Box 92860, Albuquerque, NM 87199-2860. The State Bar keeps both mailing and directory addresses. Contact the State Bar for more information.

Board of Legal Specialization Legal Specialists Announced

The New Mexico Supreme Court Board of Legal Specialization is pleased to announce the following attorney as a board certified specialist:

Elizabeth A. Musselman
Family Law

To receive information on New Mexico’s Legal Specialization Program contact the office of Court Regulated Programs (505) 821-1890.

Law Library

Open Monday–Friday, 8 a.m.–6 p.m.
Closed Saturdays and Sundays
Phone: (505) 827-4850; fax: (505) 827-4852; e-mail: libref@nmcourts.com; Web site: www.supremecourtlawlibrary.com.

Proposed Revisions to the Uniform Jury Instructions—Civil

The Committee on Uniform Jury Instructions for Civil Cases is considering whether to recommend proposed amendments to the Uniform Jury Instructions—Civil for the Supreme Court’s consideration. Comments on the proposed amendments set forth below must be received by the clerk on or before March 19 to be considered by the Court. Send written comments to:

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

See the Feb. 26 (Vol. 46, #9) Bar Bulletin for reference.

Notice of Vacancy Metropolitan Court Rules Committee

The Supreme Court has established a new committee called the Metropolitan Court Rules Committee. Previously, rules of procedure for Metropolitan Court were handled by the Rules for Courts of Limited Jurisdiction Committee, which will now be devoted only to magistrate and municipal courts. The new standing committee will have nine members. Judges and attorneys interested in volunteering their time on this committee may send letters of interest and/or resumes by March 19 to:

Kathleen Jo Gibson, Chief Clerk
PO Box 848
Santa Fe, NM 87504-0848.

Proposed Revisions to the Rules of Appellate Procedure

The Rules of Appellate Procedure Committee is considering whether to recommend proposed amendments to the Rules of Appellate Procedure for the Supreme Court’s consideration. To comment on the proposed amendments before they are submitted to the Court for final consideration, send written comments to:

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

Comments must be received by the clerk on or before March 12 to be considered by the Court. See the Feb. 19 (Vol. 46, #8) Bar Bulletin for reference.

Destruction of Exhibits and Tapes

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits or tapes filed with the court in criminal, civil, children’s court, domestic, incompetency/mental health, adoption and probate cases for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits and tapes can be retrieved by the dates shown below. Attorneys who have cases with exhibits, or who have cases with tapes and wish to have duplicates made, may verify exhibit or tape information with the Special Services Division at the numbers shown below. Plaintiff(s) exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits and tapes not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

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<tr>
<th>Court</th>
<th>Exhibits Released</th>
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<tr>
<td>1st Judicial District</td>
<td>Exhibits for years 1970–1990</td>
<td>May be retrieved through April 27</td>
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<td>2nd Judicial District</td>
<td>Exhibits in civil cases, 1987–1994</td>
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<td>Exhibits in civil cases, 1995</td>
<td>May be retrieved through April 19</td>
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<td>2nd Judicial District</td>
<td>Exhibits in civil cases, 1996</td>
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<td>Exhibits in domestic cases, 1981–1990</td>
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<td>Exhibits in criminal cases, 1987–1992</td>
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<tr>
<td>2nd Judicial District</td>
<td>LR (Metro Court Appeals) cases, 1996</td>
<td>May be retrieved through May 3</td>
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Second Judicial District Court

Court Clinic

The staff and director of the Court Clinic, along with the 2nd Judicial District Family Court judges, will give a short presentation on the processes of the Court Clinic at noon, March 5. Members of the Family Law Section of the State Bar are encouraged to attend.

Santa Fe Municipal Court Brown-Bag Lunch

Santa Fe Municipal Judge Ann Yalman invites all attorneys who practice in the Santa Fe Municipal Court to meet with her at Municipal Court at 11:30 a.m., March 21, for a discussion of practice and procedures in the Municipal Court.

STATE BAR NEWS

Address Changes for Bench & Bar Directory

State Bar staff is updating information for the 2007–08 Bench & Bar Directory. Address changes will be accepted through April 2. Information submitted beyond that date is not guaranteed to be in the new membership directory. To verify attorney information, go to www.nmbar.org, Attorney/Firm Finder and search by name. If changes are necessary, submit in writing to Address Changes, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 797-6019; or e-mail address@nmbar.org.

Attorney Support Group

The next Attorney Support Group meeting will be held at 5:30 p.m., March 5, at 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.

Bankruptcy Law Section Annual Meeting and CLE

The Bankruptcy Law Section will hold its annual membership meeting at 1:15 p.m., March 9, in conjunction with the 22nd Annual Bankruptcy Year in Review at the State Bar Center. See Cle-at-a-Glance in the Feb. 19 (Vol. 26, No. 8) Bar Bulletin for more information. Contact Chair James Jacobsen,jcjacobsen@ago.state.nm.us or (505) 222-9085, to place an item on the agenda. The board of directors would like input from members regarding areas of focus for 2007. Of particular interest is reaching members in outlying areas.

Board of Bar Commissioners Fair Judicial Elections Committee Vacancy

The Board of Bar Commissioners has created a Fair Judicial Elections Committee. The functions of the committee are to: 1) monitor judicial election campaigns for compliance with the Code of Judicial Conduct; 2) assist judges, candidates for judicial office, all citizens, citizen groups, advocacy groups, political action organizations and others to understand the standards and expectations of the Code of Judicial Conduct as they relate to statements and advertising in election campaigns for judicial office; and 3) receive, review and investigate statements and advertisements emanating from incumbent judges and lawyers who are candidates in elections for judicial offices, made in or made for the purpose of affecting judicial election campaigns, and to comment privately to those candidates and their campaign committees on statements and advertising that are deemed to violate or fall below the requirements of the Code of Judicial Conduct or that are destructive of or inconsistent with the standards of independence, integrity, impartiality, dignity and decorum that are the philosophical, legal and historical heritage of the judicial branch of government.

Anyone interested in serving on this committee should send a letter of interest and resume by March 16 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860, or fax to (505) 828-3765.

Casemaker Online Legal Research Free Training Available

Casemaker, the State Bar’s newest membership service, is free online legal research that includes New Mexico and federal materials, as well as access to 25 other state libraries. Trainings on using Casemaker will be held:

Albuquerque: 3 to 4 p.m., March 26, at the State Bar Center, Bigbee Auditorium, Albuquerque. R.S.V.P. to (505) 797-6000.

Employment and Labor Law Section Board Meetings Open to Section Members

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, March 7, at the State Bar Center. Lunch is not provided. For information about the section, visit the State Bar Web site, www.nmbar.org, or call S. Charles Archuleta, section chair, (505) 346-4646.

Issues Facing the Profession New Committee

A newly created committee, Issues Facing the Profession, will address current topics facing the legal profession and determine how the State Bar might respond. Younger as well as seasoned attorneys are encouraged to request an appointment. Send a letter of interest by March 16 to State Bar President Dennis Jontz through the State Bar, membership@nmbar.org, or PO Box 92860, Albuquerque, NM 87199-2860.

Paralegal Division Compensation, Utilization and Benefits Survey

The Paralegal Division of the State Bar is conducting a Paralegal Compensation, Utilization and Benefits Survey from March 1 to April 15. The division is urging every paralegal practicing in New Mexico to take just a few minutes to complete this very important survey. An easy link to the online version of the survey can be found on the State Bar Web site, www.nmbar.org; a printed survey is available in this issue of the Bar Bulletin; or e-mail PD@nmbar.org. Send the completed printed surveys to Paralegal Division Survey, PO Box 1923, Albuquerque, NM 87109. The deadline for submission of the survey is April 15. Confidentiality of all personally identifiable information will be strictly maintained at all times.

Monthly Brown-Bag CLE

The Paralegal Division invites members of the legal community to bring a lunch and attend the At-Will Doctrine: Employment Law’s Misunderstood Rule, presented by
Daniel Faber, Attorney at Law. The program will be held from noon to 1 p.m., March 14, at the State Bar Center and offers 1.0 general CLE credit. Registration begins at the door at 11:30 a.m. The cost is $16 for attorneys and $15 for paralegals and support staff. For more information, contact Cheryl Passalqua, (505) 872-7469, or Evonne Sanchez, (505) 222-9356.

Prosecutors Section
Annual Meeting
The Prosecutors Section will hold its annual meeting at noon, March 21, during the AODA Conference at the Doubletree Hotel/Albuquerque Convention Center. Agenda items should be sent to Chair Stephen Kovach, skovach@da.state.nm.us or (505) 622-4121.

Solo and Small Firm Practitioners Section
Luncheon Presentation
Public Regulation Commissioner Jason Marks, District 1 (Albuquerque area), will speak before the Solo and Small Firm Practitioners Section on Update on the PRC, Renewable Energy and Climate Change. The PRC regulates the utilities, telecommunications, motor carriers and insurance industries to ensure fair and reasonable rates and reasonable and adequate services to the public as provided by law. Marks, who holds a law degree from the UNM School of Law, also has extensive experience in health care financing.

The meeting will be held at noon, March 20, at the State Bar Center, and lunch will be served to those who R.S.V.P. by March 19 to Tony Horvat, thorvat@nmbar.org, or (505) 797-6033. Each attendee should bring a $5 check made payable to the State Bar Solo and Small Firm Practitioners Section to help defray the cost of the lunch. The board of directors will meet at 11:30 a.m.

Young Lawyers Division
2007 Summer Fellowships
The Young Lawyers Division is currently accepting applications for its 2007 Summer Fellowships. Two fellowships will be awarded by the YLD to two law students who are interested in working in the public interest or government sector during the summer of 2007. The fellowship awards are intended to provide the opportunity for law students to work in positions that might not otherwise be possible because the positions are unpaid. The fellowship awards, depending on the circumstances of the position, could be up to $3,000 for the summer. In order to be eligible, applicants must be a current law student in good standing with their school. Applications for the fellowship must include: (1) a letter of interest that details the student’s interest in public interest law or the government sector; (2) a resume; and (3) a written offer of employment for an unpaid legal position in public interest law or the government sector for the summer of 2007. Submit applications to: Brent Moore, Deputy Superintendent Insurance Division Public Regulation Commission 1120 Paseo de Peralta PO Box 1269 Santa Fe, New Mexico 87504-1269

Brown-Bag Luncheon
The Young Lawyers Division will host a brown-bag luncheon from noon to 1 p.m., March 15, at the 3rd Judicial District Court, 201 W. Picacho, Las Cruces, with the Honorable Michael T. Murphy of the 3rd Judicial District Domestic Division III. Lunch will be provided. R.S.V.P. by March 13 to Roxanna Chacon, lcrdrmc@nmcourts.com.

Junior Judges
Community Service Program
The Young Lawyers Division is seeking volunteer attorneys for its 2nd annual Junior Judges Program. Volunteer attorneys will lead discussions with third, fourth and fifth grade students about judging for themselves what the right choice may be in difficult situations, as well as the potential consequences of bad behavior. Topics include stealing, bullying, cheating, drugs and alcohol, and gangs and weapons. The program will take place in Albuquerque elementary schools April 13 in approximately one-hour units. Volunteer attorneys will show a brief video to the class and then engage students in discussion about the possible choices and consequences of particular situations. A full curriculum and teaching video will be provided as well as a brief orientation which will be held during the week of April 2. For more information or to volunteer, contact Martha Chicoski, mmchicoski@gmail.com, or (505) 550-6446 by March 23.

Other Bars
Albuquerque Bar Association
Membership Luncheon
The Albuquerque Bar Association’s Membership Luncheon will be held at noon, March 6, at the Albuquerque Petroleum Club. United States District Court Judge Bruce D. Black will present A Funny Thing Happened on the Way to (at) the Forum.

The CLE, May it Peeve the Court–2007 Update (1.0 professional credit and 1.0 ethics credit) will be from 1:15 p.m. to 3:30 p.m. The annual May it Peeve the Court is the best attended CLE program offered by the ABA. Former 2nd Judicial District Judge Wendy York has organized a distinguished panel of federal court judges who will provide direct insight into common litigation techniques which tend to “peeve” rather than “please” the court. The panel includes U.S. Magistrate Judge Carmen Garza, U.S. Magistrate Judge Karen B. Molzen, U.S. District Judge William P. (Chip) Johnson and U.S. District Judge Bruce Black.

Lunch only: $20 members/$25 non-members with reservations; $5 additional at the door. Lunch and CLE: $60 members/$55 non-members; $5 additional at the door. CLE only: $40 members/$60 non-members.

N.M. Defense Lawyers Association
Member Luncheon
The N.M. Defense Lawyers Association Membership Luncheon will be held at noon, March 15, at the Hotel Albuquerque. The Honorable Alan Torgerson will present Recent Filing and Case Management Changes Impacting the U.S. District Court for the District of N.M. An open-door discussion will follow. Contact NMDLA, (505) 797-6021, for more information or visit www.nmdla.org.

N.M. Women’s Bar Association
Bi-Monthly Luncheon
Interested in running for office? Want to know what is involved in running a political campaign? Emerge, a political leadership training program for democratic women in New Mexico, will give a presentation at the New Mexico Women’s Bar Association’s Bi-monthly Luncheon from noon to 1:30 p.m. March 5, at 3rd Judicial District Court, 201 W. Picacho, Las Cruces, with the Honorable Michael T. Murphy of the 3rd Judicial District Domestic Division III. Lunch will be provided. R.S.V.P. by March 13 to Roxanna Chacon, lcrdrmc@nmcourts.com.

May it Peeve the Court–2007 Update
The CLE, May it Peeve the Court–2007 Update, will be held at 11:30 a.m. to 1 p.m., March 15, at the Hotel Albuquerque. The Honorable Alan Torgerson will present Recent Filing and Case Management Changes Impacting the U.S. District Court for the District of N.M. An open-door discussion will follow. Contact NMDLA, (505) 797-6021, for more information or visit www.nmdla.org.

N.M. Women’s Bar Association
Bi-Monthly Luncheon
Interested in running for office? Want to know what is involved in running a political campaign? Emerge, a political leadership training program for democratic women in New Mexico, will give a presentation at the New Mexico Women’s Bar Association’s Bi-monthly Luncheon from noon to 1:30 p.m. March 5, at 3rd Judicial District Court, 201 W. Picacho, Las Cruces, with the Honorable Michael T. Murphy of the 3rd Judicial District Domestic Division III. Lunch will be provided. R.S.V.P. by March 13 to Roxanna Chacon, lcrdrmc@nmcourts.com.
p.m., March 14, at NYPD Pizza, 215 Central NW, Albuquerque. Julie Koob, founder of Emerge New Mexico, will be the guest speaker along with two graduates of Emerge, Christina Argyles and Marie Ward. Lunch is ordered and paid for individually. R.S.V.P. to Patricia Baca, womensbarnm_admnasst@msn.com.

UNM School of Law Association for Public Interest Law Fellowship Fund-Raiser

The Association for Public Interest Law cordially invites all members of the State Bar to attend the 7th Annual Public Interest Law Fellowship Fund-Raiser from 6 to 9 p.m., April 5, at the Carom Club, 301 Central NW, Albuquerque. APIL will host a live and silent auction. The funds raised at this event will benefit APIL’s summer fellowship fund for students who are working in the public interest during the summer of 2007. All donations are tax deductible. For more information about the event or to make a donation to the auction or the fellowship fund, contact Robert Lara, lararo@law.unm.edu, or (505) 610-1374.

Library Spring Hours

Building and Circulation
Monday–Thursday  8 a.m. to 11 p.m.
Friday             8 a.m. to 6 p.m.
Saturday           9 a.m. to 6 p.m.
Sunday             Noon to 11 p.m.
Mar. 12–16, Spring Break  8 a.m. to 6 p.m.
Reference
Monday–Friday       9 a.m. to 6 p.m.
Saturday            Closed
Sunday               Noon to 4 p.m.
Phone: (505) 277-6236
Call for Nominations

State Bar of New Mexico
2007 Annual Awards

Nominations are being accepted for the 2007 annual awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2006 or 2007. The awards will be presented during a special reception at the 2007 Annual Meeting, July 13–15, at the Inn of the Mountain Gods in Mescalero, N.M.

A letter of nomination for each nominee should be sent to: Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; faxed to (505) 828-3765; or e-mailed to sbnm@nmbar.org. Deadline for nomination submissions is April 27.

Consideration should be given to the following award descriptions and criteria when submitting nominations. (Previous recipients for the past five years are listed below, unless otherwise noted.)

1. Professionalism Award: This award is given to one or more attorneys or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism. This award is limited to one per year with the exception of an additional posthumous award. Nominations will be reviewed by the Commission on Professionalism to be recommended to the Board of Bar Commissioners for selection. Previous recipients: Graham Browne, Alice Tomlinson-Lorenz, John G. Baugh, Lawrence M. Pickett, Lowell Stout, Toby Grossman, Joseph P. Paone, William S. Dixon, Richard L. Gerding, Paul A. Kastler, The Honorable Neil P. Mertz and Betty Reed.

2. Seth D. Montgomery Distinguished Judicial Service Award: This award is given to judges who have distinguished themselves through long and exemplary service on the bench. The award is generally given to judges who have or soon will be retiring and is not necessarily an annual award. This award is limited to one per year with the exception of an additional posthumous award. Previous recipients: The Honorable Peggy J. Nelson; The Honorable Frank H. Allen, Jr.; The Honorable Gene E. Franchini and The Honorable Joseph F. Baca.

3. Outstanding Judicial Service Award: This award is given to judges whose recent activities have significantly advanced the administration of justice or improved the relations between the bench and the State Bar. This award is limited to one per year and is not necessarily given annually. Previous recipients: The Honorable James W. Counts, The Honorable John W. Pope, The Honorable Grace B. Duran, The Honorable Anne Kass, The Honorable Lynn Pickard and The Honorable Geraldine E. Rivera.

4. Courageous Advocacy Award: This award is given to one or more members of the State Bar who have distinguished themselves during their legal careers by courageous advocacy of unpopular causes, often without compensation and without concern for the impact of such advocacy upon their own practice. This award is not necessarily given annually. Previous recipients: Gary C. Mitchell, David S. Campbell, Randolph H. Barnhouse and Carmen E. Garza.

5. Robert H. LaFollette Pro Bono Award: This award is presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance to people who could not afford the assistance of an attorney. It is intended to reflect such contribution over an attorney's career, rather than during the past year. This award is not necessarily given annually. Previous recipients: Steve H. Mazer; Sage and Burks PC; Albert W. Schimmel, III and Nicholas T. Leger.

6. Distinguished Bar Service Award—Lawyer: This award is given to attorneys who have given long and valuable service to the State Bar over a significant period of time. It is intended to recognize long-term commitment to State Bar services and significant contributions to the legal profession. This award is not necessarily given annually. Previous recipients: Andrew G. Schultz, Norman S. Thayer, Briggs F. Cheney, Russell D. Mann, Michael T. Murphy, Joyce Stowers, James R. Crouch, Robert J. Desiderio and Jan B. Gilman-Tepper.

7. Distinguished Bar Service Award—Nonlawyer: This award is given to one or more nonlawyers who, over a period of time, have served or assisted the legal profession of the State Bar in a significant way. This award is not necessarily given annually. Previous recipients: Kay L. Homan, Michelle Giger, Edwina Logan Hambor, Carol Herrera and Louise Kodituwakku.
8. Outstanding Contribution Award: This award is given annually to those members of the State Bar who have made outstanding and extraordinary contributions of their time and talents to State Bar activities during the past year. *Previous recipients (for last three years):* 2006–Mary Ann Romero; 2004–Leigh Anne Chavez and Rosemary Maestas-Swazo; 2003–Daniel J. Behles, Michael F. Hacker, Ronald E. Holmes, Thomas J. “Budd” Mucci and Jason Neal.

9. Outstanding Local/Voluntary Bar Award: This award is given to one or more local/voluntary bar associations that have had the most outstanding programs and activities for their members and for the public at large. This award is not necessarily given annually. *Previous recipients:* New Mexico Black Lawyers Association, Sandoval County State Bar, San Juan County State Bar, Colfax-Union County State Bar and Curry-Roosevelt County State Bar.

10. Outstanding Program Award: This award is given to recognize programs of the State Bar that serve the mission of being a united, inclusive organization serving the legal profession and the public. This award is not necessarily given annually. *Previous recipients:* Consumer Issues Workshops, New Mexico Hispanic State Bar Scholarship Program, Lawyers’ Assistance Program, Consumer Debt Workshops, Consumer Attorney Assistance Program (CAAP) and Cross-Cultural Exchange Project.

11. Outstanding Section/Committee Award: This award is intended to recognize a State Bar section or committee that has made outstanding or extraordinary contributions to State Bar activities, programs or the legal profession during the past year. *Previous recipients:* New Mexico Medical Review Commission and Bankruptcy Law Section.

12. Pioneer Award: This award is presented to an attorney who has, on his/her own initiative and through considerable creativity, made an exemplary contribution to the State Bar in an area considered to be new, relatively unexplored and of considerable interest and benefit to members of the State Bar. This award is not necessarily given annually. *Previous recipients:* Arturo L. Jaramillo, Stephen E. Doerr, The Honorable Gene E. Franchini, John M. Greacen and Rex D. Throckmorton.

13. Outstanding Young Lawyer of the Year Award: This award is given to one or more attorneys who have, during the formative stages of their legal careers by their ethical and personal conduct, exemplified for their fellow attorneys the epitome of professionalism. In addition to a commitment to clients’ causes, this attorney has demonstrated a commitment to public service and in so doing has enhanced the image of the legal profession in the eyes of the public. To qualify for this award, an attorney must have practiced no more than five years or must be no more than 36 years of age. *Previous recipients:* Hector H. Balderas, Morris J. “Mo” Chavez, Brian S. Colón, Roxanna M. Chacon and H. Nicole Schamban.

14. Outstanding Contribution to People with Disabilities Award: This award is intended to recognize and honor exceptional achievements and contributions to further promote and protect the rights of people with disabilities. It is intended to acknowledge contributions to furthering the rights, dignity and access to justice for people with disabilities. This award is not necessarily given annually. Nominations will be reviewed by the Committee for the Delivery of Legal Services to People with Disabilities to be recommended to the Board of Bar Commissioners for selection. *Previous recipients:* Gail S. Stewart; Tara C. Ford; Rita Nuñez Neumann; Albert T. Gonzales, Sr.; Ann T. Sims and Peter M. Cubra.

15. Quality of Life—Legal Employer Award: This award is intended to honor and recognize legal employers who have demonstrated exemplary commitment in supporting programs designed to enhance the quality of life for employees. The employer must show a commitment to the quality of life of the individuals employed there through programs, activities, office policies or other means. Nominations will be reviewed by the Standing Committee on Quality of Life to be recommended to the Board of Bar Commissioners for selection. This award is not necessarily given annually. *Previous recipients:* Little & Gilman-Tepper PA; Aguilar Law Offices PC; New Mexico Environmental Law Center; Swaim, Schrandt & Davidson PC; and New Mexico Court of Appeals and Daniel J. O’Brien.

16. Quality of Life—Lawyer Award: This award is intended to recognize an attorney who demonstrates exemplary commitment to and value of an overall balance/quality of life. It is intended to honor and publicly recognize an attorney who demonstrates to colleagues, family and friends that he/she consistently works to improve quality of life and has an ongoing commitment to personal and professional fulfillment. Nominations will be reviewed by the Standing Committee on Quality of Life to be recommended to the Board of Bar Commissioners for selection. This award is not necessarily given annually. *Previous recipients:* B. Paul Briones, Susan E. Page, Wayne E. Bingham, Charles W. Daniels and Philip B. Davis.

17. Outstanding Advocacy for Women Award (New award created in 2007): This award recognizes attorneys who have distinguished themselves during the prior year by providing legal assistance to women who are underrepresented or underserved or by advocating for causes that will ultimately benefit and/or further the rights of women. The award is intended to reflect the goals of the Committee on Women and the Legal Profession, which will review the nominations and make recommendations to the Board of Bar Commissioners for selection. This award is not necessarily given annually.
Ethical Constraints on Advertising in Judicial Elections in New Mexico

By Norman S. Thayer

This is the second of two articles on New Mexico’s restrictions on candidate advertising and commitments in judicial election campaigns. Part I dealt with legal restrictions (see the Feb. 26, Vol. 46, No. 9, Bar Bulletin). Part II addresses ethical restrictions.

The New Mexico Code of Judicial Conduct, Rules 21-100 et. seq., NMRA, is the source of legal and ethical standards applicable to campaigns for election to judicial office. The objective of the Code is stated in its preamble as follows:

An independent and honorable judiciary is indispensable to justice in our society. The provisions of this Code should be construed and applied to further that objective.

New Mexico’s judges, after initially being appointed to office, are elected in either partisan or retention elections. Despite the fact that judges are elected, the standard of independence implies that judges must be free of control by other branches of government, free of commitments made to voters during election campaigns and free of coercion by public clamor and criticism. The requirement that the judiciary be “honorable” implies that our judges must be impartial to the parties and issues that come before them and must act with integrity in all things.

The Code has always contained provisions restricting statements and advertising in judicial election campaigns. Historically, judicial candidates were limited to promising the faithful and impartial performance of the duties of the office. Then the U.S. Supreme Court decided Republican Party of Minnesota v. White, 536 US 765, 122 S.Ct. 2528, 153 Law Ed.2d 694 (2002), which challenged a Minnesota rule providing that “a candidate for a judicial office, including an incumbent judge, shall not announce his or her views on disputed legal or political issues.”

The Court held that the Minnesota rule should be judged under the strict scrutiny test; that is, the state had the burden to prove that its rule was (1) narrowly tailored and (2) of compelling state interest. The Supreme Court held the rule unconstitutional as a violation of the First Amendment, saying that a state could not require judicial elections while preventing candidates from discussing what the elections are about, and if the state chose to require judicial elections, it had to accord candidates First Amendment rights.

The Minnesota rule was so similar to the New Mexico Rule 21-700 (B) (4) (c) then in effect that it appeared to the Code of Judicial Conduct Committee that the New Mexico rule was also unconstitutional. The committee decided that it should consider amendments to the New Mexico rules on judicial election campaigns.

After the White decision, the American Bar Association promulgated revised model rules and, in 2004, the New Mexico Supreme Court followed the ABA model by adopting a new Rule 21-700 (B) providing, in pertinent part, that all candidates for election to judicial office:

(4) shall not:

(a) with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office;

(6) may use advertising that does not contain any misleading contents, provided that the advertising is within the bounds of proper judicial decorum and does not, in nonpartisan elections, contain any reference to the candidate’s affiliation with a political party;

In elections for judicial office, more is involved than the right of a candidate to free speech or the right of the public to hear that speech.

The 2004 New Mexico rules prohibit campaign pledges, promises and commitments that are inconsistent with the duty to perform the adjudicative functions of the court impartially as to all parties and issues that come before the court after the election. The White
case did not adjudicate such language, nor has any other court since White was decided. Nevertheless, the decision in White opens the door to a challenge on constitutional grounds of enforcement by a state government (i.e., a state supreme court) of rules restricting campaign statements and advertising in judicial elections. See Catherine Ava Begaye, "Are There any Limits on Judicial Candidates’ Political Speech after Republican Party of Minnesota v. White," 33 N.M. L. Rev. 449 (2003), discussing the New Mexico rules before the 2004 amendments.

Contentious, partisan advertising in elections for judicial office has continued to be debated across the land. Candidates and advocacy groups have emerged to support or oppose particular issues in that debate. See Jerry Carter, "The Big Bopper," ABA Journal, November 2006, discussing a variety of cases and issues. Huge sums of money are being spent by advocacy groups in judicial elections to elect judges who favor the agendas of these groups. See Carter, "Boosting the Bench," ABA Journal, October 2002, and Carter, "Mud and Money," ABA Journal, February 2005.

The Americans for Tort Reform organization gave the New Mexico appellate courts a white hat’s “dishonorable mention award” for the appointment of “judicial activists.” See Litigation News, Vol. 30, No. 5, July 2005, published by the ABA Section of Litigation.

The New Mexico Alliance for Legal Reform announced that it will “develop a judicial scoreboard,” saying “we need judges that... don’t substitute their will for the will of the people.” See Albuquerque Journal, June 9, 2004.

The New Mexico Association of Commerce and Industry has begun publishing an annual “judicial scoreboard” to acknowledge those judges whose decisions are deemed to support the “business agenda.”

The increase in partisan attacks on judges, courts and the judicial system heightened the concern of the N. M. Supreme Court and the Code of Judicial Conduct Committee. In response, on June 6, 2006, then Chief Justice Richard Bosson announced at a luncheon of the Albuquerque Bar Association that a committee to monitor judicial election campaigns would be created. Specifically, the State Bar of New Mexico was requested to look into forming a bipartisan committee to assist candidates for election to public office to understand and comply with the standards of the Code of Judicial Conduct and, by so doing, to educate all voters about Code standards and about the differences between judicial office and political offices.

The Board of Bar Commissioners acted in September 2006 by creating the Fair Judicial Elections Committee. The committee is empowered to monitor judicial election campaigns for compliance with the Code of Judicial Conduct, to initiate investigations and to act on complaints claiming that statements and advertising by candidates and campaign committees in elections for judicial offices violate the Code. After reviewing the statements or advertising described in a complaint, the committee will send a decision to the candidates and campaign committees that published the statements, giving the opinions of the committee as to whether there were violations of the Code of Judicial Conduct and requesting corrective action and forbearance. The committee was not given enforcement authority, such as the power to issue cease and desist orders; it acts through peer pressure. After a period of experience, the powers of the committee may be broadened to include such things as publishing its decisions to inform candidates and the public when violations have occurred.

The committee hopes to raise the level of public understanding of the differences between judicial office and political office and to teach the unique role of the judicial branch in our system of government, which is absolutely fundamental to democracy.

In elections for judicial office, more is involved than the right of a candidate to free speech or the right of the public to hear that speech. As stated in the preamble to the New Mexico Code of Judicial Conduct, the purpose of electing judges is to provide justice through independent, honorable judges to litigants who will appear before the courts after the election is over. In deciding those future cases, courts and judges do not carry out the will of the voters or the will of their supporters in the campaign that preceded the election; they follow the law. The strongest argument for restrictions on campaign rhetoric is that uninhibited advertising and rhetoric will change the nature of the elected judicial office from an impartial arbiter applying the law, to a biased forum applying the perceived will of the voters or, worse, the will of the major contributors of campaign funds.

The White case involved legal sanctions imposed by a state supreme court based on the content of speech; i.e., state action. The Fair Judicial Elections Committee is not an arm of state government; it is a committee of the State Bar. The committee neither sanctions nor censors; it does not enforce the law; it seeks to persuade by the influence of professional peers. The committee applies the ethical standards of the Code, which are based on the professional aspirations of the judicial profession and the legal profession. It does not prohibit or sanction speech by candidates; it seeks to promote voluntary compliance with the ethical standards of the Code and, by so doing, to raise the level of civility, dignity and decorum in judicial elections. For these reasons, it is believed that the actions of the committee based on ethics are unaffected by the White decision.

Contact the committee and file complaints at:
Fair Judicial Elections Committee
State Bar of New Mexico
5121 Masthead NE
Albuquerque, New Mexico 87199
E-mail: judgelect@nmbar.org
(505) 828-3765

About the Author: Norman Thayer is a senior member of Sutin, Thayer & Browne PC. He is the chair of the Fair Judicial Elections Committee and a member of the Code of Judicial Conduct Committee.

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**LEGAL EDUCATION**

**MARCH**

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<td>State v. Monteleone</td>
<td>Petition for Writ of Certiorari denied.</td>
<td>2/13/07</td>
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<td>30,317</td>
<td>State v. Lopez</td>
<td>Petition for Writ of Certiorari denied.</td>
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<td>30,318</td>
<td>State v. Walters</td>
<td>Petition for Writ of Certiorari denied.</td>
<td>2/13/07</td>
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PUBLISHED OPINIONS

No. 25539 1st Jud Dist Santa Fe SF-97-3008, F KING v ALLSTATE INS CO (reverse and remand) 2/20/2007
No. 25406 1st Jud Dist Santa Fe CR-03-270, STATE v H CORTEZ (reverse) 2/22/2007

UNPUBLISHED OPINIONS

No. 27024 12th Jud Dist Lincoln CV-02-05, WORLD WILDLIFE v J BEAUVAIS (affirm) 2/19/2007
No. 26483 2nd Jud Dist Bernalillo CR-04-4350, STATE v R MONTOYA (reverse) 2/20/2007
No. 24530 12th Jud Dist Otero CR-02-104, STATE v D AKERS (reverse and remand) 2/22/2007
No. 26852 2nd Jud Dist Bernalillo, CV-01-3506, S GUTTMAN v H SILVERBERG (affirm) 2/22/2007

Slip Opinions for Published Opinions may be read on the Court’s Web site:
Bar Bulletin
- March 5, 2007 - Volume 46, No. 10

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From the New Mexico Supreme Court

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<td>Kimberly J. Lowman</td>
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<td>Fort Leavenworth, KS 66027</td>
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Bar Bulletin - March 5, 2007 - Volume 46, No. 10
State Bar of New Mexico Paralegal Division

2007 Paralegal Compensation, Utilization and Benefits Survey

All paralegals who meet one or more of the education, training or work experience qualifications set forth in Rule 20-115 NMRA are encouraged to participate in this survey. You can also find a link to an electronic version of this survey on the State Bar’s website at www.nmbar.org. Confidentiality of all personally identifiable information will be strictly maintained. Only a summary of the aggregate data obtained from all completed surveys will be published. Please mail all printed surveys no later than April 15, 2007, to: Paralegal Survey, Paralegal Division, P. O. Box 1923, Albuquerque, NM 87103.

1. Your gender:
   - ☐ Male
   - ☐ Female

2. Geographical region of New Mexico:
   - ☐ Albuquerque area
   - ☐ Santa Fe area
   - ☐ Roswell area
   - ☐ Las Cruces area
   - ☐ Farmington area
   - ☐ Other ______________________

3. Are you currently a member of the State Bar of New Mexico Paralegal Division?
   - ☐ Yes
   - ☐ No

4. Are you currently a member of any other national paralegal association?
   - ☐ Yes  If so, what organization? ________________________________
   - ☐ No

5. Education. Please mark all that apply:
   - ☐ GED
   - ☐ High school diploma
   - ☐ Paralegal certificate from an ABA-approved program of studies
   - ☐ Associate's degree
   - ☐ Two-year paralegal degree from an ABA-approved program of studies
   - ☐ Bachelor's degree
   - ☐ Four-year paralegal degree from an ABA-approved program of studies
   - ☐ Post baccalaureate degree
   - ☐ Master's degree
   - ☐ Ph.D./J.D.
   - ☐ Other ________________________________
6. Do you have any of the following certifications:

☐ Certified Paralegal (CP/CLA) from National Association of Legal Assistants.
☐ Certified Paralegal Specialist (CPS) or Advanced Certified Paralegal (ACP) from National Association of Legal Assistants. If so, what is your specialty:
_________________________________________
_________________________________________
_________________________________________

☐ PACE Registered Paralegal (RP) from National Federation of Paralegal Associations

7. Years of paralegal experience:

☐ Less than 1 year
☐ 1-5 years
☐ 6-10 years
☐ 11-15 years
☐ 16-20 years
☐ 21-25 years
☐ Over 25 years

8. Years with current employer:

☐ Less than 1 year
☐ 1-5 years
☐ 6-10 years
☐ 11-15 years
☐ 16-20 years
☐ 21-25 years
☐ Over 25 years

9. Where do you work:

☐ Private law firm
☐ Insurance agency
☐ Public sector/Governmental
☐ Self-Employed
☐ Health/Medical institution
☐ Bank
☐ Corporation
☐ Court system
☐ Non-profit agency
☐ Other

_________________________________________
_________________________________________

10. Number of attorneys in firm or office: ________

11. Number of paralegals in firm or office: ________

12. Areas of practice (please mark all areas that comprise at least 20% of your practice):

☐ Administrative
☐ Admiralty/Maritime
☐ Antitrust
☐ Asbestos
☐ Aviation
☐ Banking
☐ Bankruptcy
☐ Collections/Foreclosure
☐ Commercial Lending
☐ Contracts
☐ Copyright
☐ Corporate
☐ Criminal
☐ Entertainment
☐ Environmental
☐ ERISA/Employee Benefits/Pension
☐ Franchise
☐ Health
☐ Immigration
☐ Insurance
☐ Intellectual Properties
☐ International
☐ Labor
☐ Legislation/Lobbying
☐ Litigation (if not set forth elsewhere)
☐ Family Law
☐ Medical Malpractice
☐ Mergers/Acquisitions
☐ Municipal Finance
☐ Patent/Trademark
☐ Personal Injury
☐ Products Liability
☐ Public
☐ Real Estate
☐ Securities/Blue Sky
☐ Tax
☐ Telecommunications
☐ Trade Regulation
☐ Transportation
☐ Trust & Estates/Probate
☐ Utilities
☐ Workers’ Comp
13. What are your regular duties? (please check all that apply)
- Assist at trial
- Assist/attend depositions
- Assist/attend mediations, arbitrations
- Bookkeeping
- Calendaring deadlines
- Case management
- Client/witness interviews
- Copying
- Court filings
- Deposition summaries
- Document analysis/summary
- Document control for large cases
- Document organization
- Draft correspondence
- Draft legal briefs
- Draft legal memoranda
- Draft pleadings/document responses/discovery
- Factual research
- Faxing
- Investigation
- Large case document control
- Law library maintenance
- Legal research, advanced
- Legal research, basic
- Legal research, intermediate
- Office personnel management
- Other administrative duties
- Training employees

14. If your employer bills clients for your work, or if you work as a contract paralegal, what is your current hourly billing rate?
- $20-$25
- $26-$30
- $31-$35
- $36-$40
- $41-$45
- $46-$50
- $51-$55
- $55-$60
- $61-$65
- $66-$70
- $71-$75
- $76-$80
- Over $80

15. What is the average number of hours you work per week?
- 20 or less
- 21-25
- 26-30
- 31-35
- 36-40
- Over 40

16. If you are a full-time employee (40 or more hours per week), what is your annual compensation, including any bonuses? $_______________

17. If you are a part-time employee (less than 40 hours per week), or if you work as a contract paralegal, what is your hourly compensation, including any bonuses? $________________

18. Employer-paid benefits (partially or fully paid):
- Health insurance (employee)
- Health insurance (family)
- Life insurance (employee)
- Life insurance (family)
- Dental insurance (employee)
- Dental insurance (family)
- Vision insurance (employee)
- Vision insurance (family)
- Disability insurance
- Free representation
- Maternity benefits
- Parking
- Child care
- Leased car
- Mileage reimbursement
- Professional dues

19. Employer-paid educational benefits:
- Legal continuing education fees
- Tuition reimbursement
- Books
- Seminars (Local)
- Seminars (Out-of-state)
- Other

20. I am in favor of (check all that apply):
- Mandatory licensing for New Mexico paralegals
- Mandatory regulation for New Mexico paralegals
- Mandatory state certification for New Mexico paralegals
- Voluntary registration for New Mexico paralegals
- Voluntary certification for New Mexico paralegals
21. **Mandatory membership in the State Bar of New Mexico Paralegal Division is arguably the most cost-effective way to ensure that all practicing paralegals in New Mexico are qualified under the Supreme Court Rules Governing Paralegal Services. It could accomplish this goal without other expensive, state-imposed certification, licensing or regulation requirements. Additionally, all dues would benefit the State Bar and New Mexico paralegals, rather than some other state agency. If mandatory Paralegal Division membership was enacted, it is anticipated that there would be a grandfathering clause that would allow all practicing paralegals who meet one or more education, training or work experience qualifications under the Supreme Court Rules (20-115 NMRA) to join.**

I am in favor of mandatory membership in the Paralegal Division in lieu of other regulation, licensing, or regulation for New Mexico paralegals:

☐ Yes
☐ No
☐ Undecided

22. **I know what the minimum education, training or work experience qualifications set forth in Rule 20-115 NMRA are for paralegals:**

☐ Yes
☐ No
☐ Not sure

23. **My supervising attorney knows what the minimum education, training or work experience qualifications set forth in Rule 20-115 NMRA are for paralegals:**

☐ Yes
☐ No
☐ Not sure

24. **Is there anything else you would like to tell us?**

_______________________________________________________________________________________________
_______________________________________________________________________________________________
_______________________________________________________________________________________________
_______________________________________________________________________________________________
_______________________________________________________________________________________________
_______________________________________________________________________________________________
_______________________________________________________________________________________________
_______________________________________________________________________________________________

4 State Bar of New Mexico Paralegal Division
OPINION

EDWARD L. CHÁVEZ, CHIEF JUSTICE

I. BACKGROUND

{1} Among other charges, a grand jury indicted Defendant Karen Smallwood on one count of first-degree murder on November 17, 2004. See NMSA 1978, § 30-2-1(A) (1994). Smallwood was arraigned in the First Judicial District Court on November 22, 2004. At a pre-trial conference ninety-eight days later, the State filed notice of its intent to seek the death penalty. See Rule 5-704(A) NMRA. Instead of citing the aggravating circumstances as required by our rules, the State’s notice cited the mitigating circumstance that the defendant is likely to be rehabilitated as its basis for seeking the death penalty. See NMSA 1978, § 31-20A-6(G) (1979).

{2} Rule 5-704(A) provides that the State “shall file a notice of intent to seek the death penalty within ninety (90) days after arraignment unless good cause is shown.” Arguing that the State’s notice was eight days untimely and that the State did not properly specify the statutory aggravating circumstances, Smallwood filed a motion to bar the State from seeking the death penalty in her case. In response, the State argued that it had good cause for the late filing based on the complex nature of the case and the great amount of material that needed to be reviewed before making its decision to seek the death penalty. {3} At a hearing on Smallwood’s motion, the trial court noted its concern that the District Attorney’s office not only filed the notice eight days late, but that it also cited the wrong section as an aggravator.

Given the seriousness of a death penalty case, the trial court noted that it was “very concerned” by the fact that the District Attorney’s office did not express any good cause to file the notice late. The trial court also noted that the State did not file a motion to extend the time limit after it had initially been set. The State claimed that it had erred, the trial court entered an order allowing for an interlocutory appeal. See Rule 5-704(A) is “jurisdictional” in that a prosecutor may not assert good cause to excuse the failure of filing a notice after the ninety days has expired. Instead, Smallwood claims that, within ninety days of arraignment, the State must either: (1) file its notice of intent to seek the death penalty; (2) make a “protective” filing, leaving the door open to it being withdrawn; or (3) seek and receive from the trial court an extension of time in which to file its notice. Smallwood’s second argument is that, in any event, the State did not have good cause for failing to file its notice within ninety days of her arraignment.

{5} The State responds by first arguing that we lack jurisdiction to hear this case. Second, noting that Rule 5-704(A) does not expressly require a prosecutor to request an extension of time within ninety days after arraignment, and that Rule 5-104(B) NMRA typically allows for such requests after the expiration of time limits, the State asserts that the trial court was authorized to extend the time limit after it had initially expired. Finally, the State claims that the trial court correctly determined that good cause existed to excuse the State’s failure to timely file its notice of intent to seek the


decision to seek the death penalty. See Rule 5-704(A) NMRA. Instead of citing the aggravating circumstances as required by our rules, the State’s notice cited the mitigating circumstance that the defendant is likely to be rehabilitated as its basis for seeking the death penalty. See NMSA 1978, § 31-20A-6(G) (1979).

Given the seriousness of a death penalty case, the trial court noted that it was “very concerned” by the fact that the District Attorney’s office not only filed the notice eight days late, but that it also cited the wrong section as an aggravator.
II. THIS COURT HAS JURISDICTION TO HEAR INTERLOCUTORY APPEALS IN A CASE INVOLVING THE DEATH PENALTY

{6} Article VI, Section 2 of the New Mexico Constitution provides that our appellate jurisdiction extends to appeals from district court judgments imposing a sentence of life imprisonment or death, and “as may be provided by law.” N.M. Const. art. VI, § 2. The phrase “as may be provided by law” means that our Constitution or Legislature must vest us with appellate jurisdiction—we cannot create jurisdiction ourselves through our rule-making authority. See State ex rel. N.M. Judicial Standards Comm’n v. Espinosa, 2003-NMSC-017, ¶ 28, 134 N.M. 59, 73 P.3d 197; Seth D. Montgomery & Andrew S. Montgomery, Jurisdiction as May Be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico, 36 N.M. L. Rev. 215, 216-17 (2006). Thus, since this interlocutory appeal is not a judgment from a district court imposing a sentence of life imprisonment or death, our jurisdiction must be found elsewhere in the Constitution or legislation.

{7} The State directs us to various statutes, the most important of which being Section 34-5-14. See NMSA 1978, § 34-5-14 (1972) (setting forth the scope of the Supreme Court’s appellate jurisdiction); see also id. § 34-5-10 (1966) (conferring jurisdiction on cases transferred to this Court by the Court of Appeals); id. §§ 39-7-1 to -13 (1997) (conferring jurisdiction on cases certified to this Court by other courts). Among other things, Section 34-5-14 provides that our appellate jurisdiction “extends to all cases where appellate jurisdiction is not specifically vested by law in the court of appeals.” § 34-5-14(A). The State points out that the statute vesting appellate jurisdiction in the Court of Appeals provides that the Court of Appeals has appellate jurisdiction over “criminal actions, except those in which a judgment of the district court imposes a sentence of death or life imprisonment.” NMSA 1978, § 34-5-8(A)(3) (1983). The State concludes that this interlocutory appeal is taken as part of a “criminal action” and that, since it does not involve a judgment imposing a sentence of life imprisonment or death, jurisdiction over this matter is vested exclusively in the Court of Appeals.

{8} Smallwood claims that State v. Ogden, 118 N.M. 234, 880 P.2d 845 (1994), establishes our jurisdiction over interlocutory appeals involving pre-trial death penalty procedures. In Ogden, we decided on interlocutory appeal that Article VI, Section 3, which vests us with superintending control over lower state courts, gave us the inherent power to authorize district courts to determine pre-trial whether probable cause exists to support aggravating circumstances. Id. at 239-40, 880 P.2d at 850-51; see N.M. Const. art. VI, § 3. Although Ogden came to us on interlocutory appeal from the district court, the jurisdictional issue was simply not addressed as it appears that neither party raised the issue. We take this opportunity to analyze our interlocutory jurisdiction in death penalty cases.

{9} We begin our search for interlocutory jurisdiction in the one statute dealing specifically with appellate jurisdiction over interlocutory appeals in criminal cases. See NMSA 1978, § 39-3-3 (1972). Subsection A of that statute sets out the general jurisdictional rule that “[i]n any criminal proceeding in district court an appeal may be taken by the defendant to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts.” § 39-3-3(A). Subsection A contains three clarifying paragraphs, the last of which provides that the defendant may file an interlocutory appeal “in the appropriate appellate court.” § 39-3-3(A)(3).

{10} By using the language “in the appropriate appellate court,” we believe the legislature intended this Court to have jurisdiction over certain interlocutory appeals in criminal cases. Had the legislature intended the Court of Appeals to entertain all of a defendant’s interlocutory appeals, it simply would have stated so. The question thus becomes: over which interlocutory appeals in criminal cases did the legislature intend for this Court to have jurisdiction? The answer lies in Section 39-3-3(A), which provides that a criminal defendant may appeal to this Court with jurisdiction over interlocutory appeals in criminal matters, we conclude that the legislature intended for this Court to have jurisdiction over interlocutory appeals in situations where a defendant may possibly be sentenced to life imprisonment or death. See State v. Javier M., 2001-NMSC-030, ¶ 27, 131 N.M. 1, 33 P.3d 1 (“We read . . . legislation in its entirety and ‘construe each part in connection with every other part to produce a harmonious whole . . . .’” (quoting State ex rel. Klineline v. Blackhurst, 106 N.M. 732, 755, 749 P.2d 1111, 1114 (1988))).

III. RULE 5-704(A)

A. Standard of Review

{12} Smallwood and the State disagree as to the standard of review we should use in this case. Smallwood asserts that we should review the district court’s action de novo since she asks us to interpret a rule of criminal procedure. See State v. Stephen F., 2006-NMSC-030, ¶ 7, 140 N.M. 24, 139 P.3d 184. The State, on the other hand, contends that we should use an abuse of discretion standard since the issue hinges on whether the district court correctly concluded that the State made a sufficient showing of good cause. See State v. Herrera, 2001-NMCA-073, ¶ 31, 131 N.M. 22, 33 P.3d 22. Since it involves interpretation of a rule, we review de novo the district court’s conclusion that the State should be allowed to file its notice of intent to seek the death penalty after the ninety days has expired. We hold that Rule 5-704(A) requires the State to either file its

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2Although the State never directed us to this statute dealing with interlocutory appeals, the State, at oral argument, made the broad assertion that our Constitution and statutes provide that all interlocutory appeals go to the Court of Appeals. This is plainly wrong.
notice or a request for an extension within the ninety-day period. Such was our intent when we adopted the rule. Yet, we erred in drafting the rule because Rule 5-104(B) allows for enlargement of time limits, except in specified instances. We neglected to add Rule 5-704(A) as an exception, but do so now. Notwithstanding, the State still does not prevail because it never appropriately motioned the district court to allow it to file a late notice. We do not reach the State’s good cause argument except to note that, had we done so, we would have reviewed the issue using an abuse of discretion standard. See id.

B. Rule 5-704(A) Is Not Coextensive with the Requirements of Due Process

{13} Citing Lankford v. Idaho, 500 U.S. 110 (1991), and United States v. Ferere, 332 F.3d 722, 736 (4th Cir. 2003), Smallwood appears to assert that our ninety-day rule is coextensive with her due process right to receive adequate notice of the State’s intent to impose the death penalty. We do not find this argument persuasive. First, Lankford merely held that due process requires invalidation of a death sentence when the defendant does not receive adequate notice to the extent that there is an impermissible risk of an error in the adversarial process. See Lankford, 500 U.S. at 127. Second, Ferere interpreted a defendant’s federal substantive, statutory right that he or she receive “reasonable notice” before trial of the prosecution’s intent to seek the death penalty. See Ferere, 332 F.3d at 730-31; see also 18 U.S.C. § 3593(a). The Fourth Circuit simply held in Ferere that a post-trial determination of prejudice to the defendant was not an adequate remedy to vindicate this substantive right. Id. at 730-32. Finally, we held in State v. Cofrin, 1999-NMSC-038, ¶ 65, 128 N.M. 192, 991 P.2d 477, that a death penalty notice notice filed three weeks before trial satisfied due process under the circumstances of that case.

{14} Rule 5-704(A) does not bestow any substantive rights upon a defendant. This Court does not have the power to judicially legislate substantive rights. See State v. Arnold, 51 N.M. 311, 314, 183 P.2d 845, 846 (1947); Johnson v. Terry, 48 N.M. 253, 258-60, 149 P.2d 795, 797-99 (1944). Since the Legislature has not weighed in on this issue, Smallwood’s substantive right to receive notice of the State’s intent to seek the death penalty is governed solely by the limits of the due process clauses of the United States and New Mexico Constitutions. Due process does not require that the State file its notice within ninety days of a defendant’s arraignment.

{15} The fact that Rule 5-704(A) does not confer a substantive right, however, does not mean that it is without effect. We promulgated Rule 5-704(A) under our constitutional authority to exercise superintending control over all inferior courts. N.M. Const. art VI, § 3; see State v. Roy, 40 N.M. 397, 420-23, 60 P.2d 646, 660-62 (1936). This constitutional grant of power gives us the authority to make rules for the orderly flow of criminal cases through lower courts. See Coffin, 1999-NMSC-038, ¶ 65 n.3 (noting in a case before Rule 5-704(A) was promulgated that a “late filing of a notice of intent to seek the death penalty may potentially wreak havoc with a trial court’s schedule”); State ex rel. Delgado v. Stanley, 83 N.M. 626, 627, 495 P.2d 1073, 1074 (1972) (noting that the rule providing that a trial commence within six months, or the charges are to be dismissed with prejudice, was promulgated to “expedit[e] the flow of criminal cases through the courts”); State v. Bolton, 1997-NMCA-007, ¶ 8, 122 N.M. 831, 932 P.2d 1075 (noting that the six-month rule was adopted to regulate the “efficient management of criminal prosecutions so that neither the public nor defendant suffer[] undue delay”). Thus, while we could not, for instance, enact a procedural rule voiding the State’s right to seek the death penalty (since it is clearly authorized by the Legislature), we can promulgate “reasonable regulations affecting the time and manner” of exercising that right. Arnold, 51 N.M. at 314, 183 P.2d at 846; see also State ex rel. Gesswein v. Galvan, 100 N.M.769, 772, 676 P.2d 1334, 1337 (1984).

C. Rule 5-704(A) Requires the State to File Its Notice of Intent to Seek the Death Penalty or a Request for an Extension Upon a Showing of Good Cause Within Ninety Days of Defendant’s Arraignment

{16} In its entirety, the rule currently provides:

In any case in which the state may seek the death penalty, the state shall file a notice of intent to seek the death penalty within ninety (90) days after arraignment unless good cause is shown. The notice of intent shall specify the elements of the statutory aggravating circumstances upon which the state will rely in seeking a sentence of death.

Rule 5-704(A) NMRA. Smallwood claims that, by using the term “shall,” the rule requires—with no exceptions—the State to either file its notice or request for an extension within ninety days after the defendant’s arraignment. In essence, Smallwood believes that the clause “unless good cause is shown” does not apply once the ninety-day period has run. The State contends that the clause “unless good cause is shown” means that a district court can reopen the time period in which to file a notice of intent after the ninety days has expired on a showing of good cause.

{17} In support of its argument, the State directs us to Rule 5-604(E) NMRA, Rule 12-201(E) NMRA, and Rule 5-104(B) NMRA. Rule 5-604(E) and Rule 12-201(E) give instruction for determining whether a late filing is allowed for, respectively, an extension of time for commencement of trial and a notice of appeal. Rule 5-604(E) provides that a request for an extension of time for commencement of trial based on good cause must be filed within the time provided for by the rule, except that a request may be filed up to ten days late if the reason for the delay is based on exceptional circumstances beyond the control of the state or trial court.” Rule 12-201(E)(2) provides that a district court may, “upon a showing of excusable neglect or circumstances beyond the control of the appellant,” extend for thirty days the time for filing a notice of appeal after the time limits for filing have expired. Likewise, the rule provides that, upon good cause shown, the district court may, prior to the running of the time limits, extend the time limits for thirty days for filing a notice of appeal. Rule 12-201(E)(1) NMRA.

{18} Unlike Rules 5-604(E) and 12-201(E), Rule 5-704(A) does not specifically state the procedures to be followed for a late request. Smallwood contends that this means a late request is not allowed. However, the State asserts that this case is governed by Rule 5-104(B), which provides in relevant part:

When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done; but it may not extend the time for . . . taking an appeal . . . or for extending time for commencement of trial.

Rule 5-104(B)(2) NMRA. Our intent in promulgating Rule 5-704(A) was to require
the State to act, either by filing its notice or by seeking an extension, within ninety days of the defendant’s arraignment.

{19} In light of the fact that Rule 5-104(B) excludes the two rules that explicitly contain a provision limiting late filings, but does not exclude Rule 5-704(A), we understand that the rule as currently drafted should be read as the State suggests. That is, it is not unreasonable to conclude that the rule currently allows the district court to permit the State, after the expiration of the ninety days and upon motion, to file its notice of intent when there is good cause for the State not having filed its notice earlier. Nonetheless, even accepting this reading, the State does not prevail in the instant case.

D. The State Did Not Properly Motion the District Court to Enlarge the Time Limits for Filing Its Notice

{20} We do not reach the good cause issue because we conclude that the State never properly motioned the trial court to allow a late filing of its notice of intent to seek the death penalty. When the State filed its notice of intent on February 28, 2005, eight days late, the State did not affirmatively motion the district court to allow the filing. Four months later, on June 30, 2005, the district court held a hearing on Smallwood’s motion to strike the notice. At that hearing, in response to Smallwood’s motion, the State orally requested the district court to allow it to file a late notice. The State conceded as much at oral argument. The State asserts that this request satisfies Rule 5-104(B)’s requirement that the time limit will only be reopened for good cause “upon motion” by the party seeking the extension. We disagree.

{21} As an initial matter, we do not concern ourselves with whether the “upon motion” mandate of Rule 5-104(B) requires a formal written motion, or if an oral motion at a hearing will suffice. See Rule 5-120(A)-(B) NMRA. Instead, we assume that an oral motion at a hearing is adequate, and that the State did in fact make an oral request for a late filing at the hearing. What matters here is that the State made its request for a late filing in response to Smallwood’s motion to strike the notice because of the State’s untimely action in the first place.

{22} In State v. Guzman, 2004-NMCA-097, ¶ 9, 136 N.M. 253, 96 P.3d 1173, after discussing the rationale and policies behind the six-month rule, the Court of Appeals held that to trigger a dismissal, a defendant must file a motion to dismiss. See Rule 5-604 NMRA. Because the defendant had “slept upon” her rights under the rule by not timely filing a motion to dismiss, the Court upheld her conviction when the State had not complied with the rule. Guzman, 2004-NMCA-097, ¶¶ 11-13.

{23} In this case, Smallwood did not sleep on her rights. Instead, after the State filed its late notice of intent to seek the death penalty, Smallwood moved the district court to strike the notice because it was untimely. Under Rule 5-104(B)(2), when the State filed its late notice, it was required to motion the district court to allow the late filing. It did not do so. We will not, on the one hand, penalize a defendant for not moving to dismiss under Rule 5-604 and, on the other, penalize a defendant for moving to strike an untimely death penalty notice. To hold that the State may make its Rule 5-104(B) motion in response to a defendant’s timely motion to strike the State’s untimely notice would make a mockery of the rule. We will not read Rule 5-104(B) to reach such an ironic and unjust result. Instead, the district court should have granted Smallwood’s motion to strike the death penalty notice because the State did not make a proper motion to allow it to file a late notice.

E. Rule 5-704(A) Should Be Modified to Be Consistent with This Opinion

{24} Having concluded that Smallwood’s motion should have been granted, we are persuaded that now is the time for our Rules Committee to modify Rule 5-704(A) so that it may clearly reflect our original intent in promulgating the rule. In the meantime, as of the publication of this Opinion, the State is required within ninety days of arraignment to either: (1) file its notice of intent to seek the death penalty, or (2) based upon a showing of good cause, request an extension of time in which to file its notice.

{25} Rule 5-704(A) stems from a State Bar Task Force convened for the purpose of studying the death penalty in New Mexico. After working for over three years, the Task Force submitted its final report to the Board of Bar Commissioners on January 23, 2004. See State Bar of N.M. Task Force to Study the Admin. of the Death Penalty in N.M., Final Report (2004). The report notes that one factor strongly affecting the time and cost of a death penalty case is the timing of the prosecution’s decision to pursue the death penalty. Id. at 5. Continuing, the report states:

However, as of January 2004, the timing of notice is a matter solely within the discretion of the prosecution, subject only to the requirement that the defense receive notice within sufficient time to prepare for trial. Thus, the possibility of a death sentence and the need to treat the case as a death case can continue for months, even years, without a clear resolution. If the prosecution were forced to make a binding decision on the issue relatively early in the case, it would save significantly on the defense costs of these cases while, most importantly, enhancing the quality of the defense provided. Id. at 6 (emphasis added). Less than four months after this report was published, and after consultation with the offices of the Attorney General and the Public Defender and submitting the rule for public comment, we promulgated Rule 5-704(A). Besides ensuring that death penalty cases flow smoothly through the criminal justice system, our intent in requiring the State to act within ninety days was motivated by our desire to protect the public fisc and to enhance the quality of defense in death penalty cases. See N.M. Const. art VI, § 3; Rule 5-101(B) NMRA.

{26} In redrafting Rule 5-704(A), the Rules Committee should, consistent with this opinion, preclude the State from filing a late notice without first having sought, within ninety days of arraignment, leave of the trial court on the basis of good cause. At the same time, Rule 5-104(B) should be modified as well in order to clearly reflect our holding that it does not apply to Rule 5-704(A).

{27} Finally, we note that we reject Smallwood’s remedy of a “protective filing.” We believe that ninety days is more than enough time for the State to fully consider the evidence and to come to a decision as to whether to seek the death penalty. Although we have not surveyed all jurisdictions that impose the death penalty, it appears that prosecutors in other states are typically required to file a notice of intent to seek the death penalty sooner than ninety days after indictment or arraignment. See, e.g., Idaho Code Ann. § 18-4004(A)(1) (2004) (within thirty days after entry of plea); Wash. Rev.
Code § 10.95.040(2) (2006) (within thirty days after arraignment); Ariz. R. Crim. P. 15.1(i)(1) (within sixty days after arraignment); Nev. Sup. Ct. R. 250(4)(c) (within thirty days after filing of information or indictment). But see Tenn. R. Crim. P. 12.3(b)(1) (allowing notice within thirty days of trial). The purpose of our rule is to expedite a binding decision so that the case may be heard on the merits in a timely and cost-effective manner. While we do not wish to suggest that the State should not withdraw seeking the death penalty after having done so in good faith, we discourage the State from adopting a policy of filing notices in all death-eligible cases simply to avoid the diligent task of coming to a timely decision.

IV. CONCLUSION

{28} We have jurisdiction to hear this interlocutory appeal pursuant to Section 39-3-3. The district court should have granted Smallwood’s motion to strike the notice and to bar the State from seeking the death penalty in her case. We remand this case to the district court for proceedings consistent with this opinion.

{29} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
PETRA JIMÉNEZ MAES, Justice
RICHARD C. BOSSON, Justice

Certiorari Granted, No. 30,162, February 9, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-024

WILLIAM F. McNEILL, PAGE McNEILL, MARILYN CATES
and THE BLACK TRUST,
Plaintiffs-Appellants/Cross-Appellees,
versus
BURLINGTON RESOURCE OIL & GAS COMPANY,
Defendant-Appellee/Cross-Appellant.
No. 25,469 (filed: December 4, 2006)

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
WILLIAM A. MCBEE, District Judge

JAMES P. LYLE
LAW OFFICES OF JAMES P. LYLE, P.C.
Albuquerque, New Mexico

TURNER W. BRANCH
BRANCH LAW FIRM
Albuquerque, New Mexico

for Appellants/Cross-Appellees

HARPER ESTES
LYNCH CHAPPELL & ALSUP, P.C.
Midland, Texas

SCOTTY HOLLOMAN
MADDOX & HOLLOMAN, P.C.
Hobbs, New Mexico

for Appellee/Cross-Appellant

OPINION

MICHAEL D. BUSTAMANTE,
Chief Judge

{1} The Defendant-Appellee/Cross-Appellant filed a motion for rehearing. This Court has considered the motion and the motion is hereby denied. The opinion filed in this case on October 26, 2006, is withdrawn and the following opinion is substituted therefor.

{2} This case requires us to determine the correct measure of damages for injury to real property. We conclude that the correct measure of damages depends on whether the injury is permanent or temporary, which is an issue of fact for the jury. Where the injury is permanent, the correct measure of damages is the diminution in the fair market value of the property. Conversely, where the injury is temporary, the correct measure of damages is the cost of repair or remediation, as long as the cost is less than the diminution in fair market value. Furthermore, the Plaintiff should be allowed to present evidence on the cost of repair or remediation in either situation because such evidence will normally be relevant in both cases. Finally, when determining the diminution in value of damaged property, the jury should consider the decrease in value to the entire property, not just the damaged portion of land. We therefore reverse and remand for proceedings consistent with this opinion.

BACKGROUND

{3} Plaintiffs are the owners of the surface rights of the McNeill Ranch, a cattle ranch in Lea County, New Mexico. The McNeill Ranch covers approximately 31,000 acres over two large tracts. Defendant, Burlington Resource Oil and Gas Co., is the former oil, gas, and mineral lessee under a portion of Plaintiffs’ property. Defendant’s predecessor-in-interest owned and operated an oil well on a tract of land on the McNeill Ranch, known as Tract 2, since approximately 1950. Standard practice when operating an oil well is to dig a pit in the ground in the immediate vicinity of the oil well in order to contain waste by-products of oil production. These by-products, known as “produced water,” may contain many types of petroleum, hydrocarbons, salt water, and other contaminants.

{4} The oil well ceased production in 1986, and in 1992 Defendant closed the pit. After closure of the pit, the surface area looked like any other abandoned oil field operation, and it was not evident to the untrained eye that an old pit was buried at the site. In 1996, Plaintiff William McNeill received information leading him to suspect that there might be an old pit buried under Tract 2 of his ranch. After learning of the pit and possible contamination, Plaintiff William McNeill contacted Defendant and asked for the contaminated materials to be removed. Defendant did not remove or replace the contaminated materials. Although there have been no additional deposits into the pit since 1986, the existing contaminants had been accumulating on the property since 1950 and will not disappear or abate.
on their own. Instead, the contaminants will require removal and replacement of a large amount of contaminated soil. It is not disputed that Defendant is the successor-in-interest to the companies that drilled, operated, plugged, and cleaned up this well and the associated pit.

{5} Plaintiffs filed suit on June 1, 1999, then filed a second amended complaint on January 13, 2000, alleging negligence, trespass, and private nuisance for contamination of their property resulting from Defendant’s operation of an oil well. Specifically, Plaintiffs allege that Defendant’s failure to properly close the associated pit resulted in subsurface contamination of their property. Furthermore, Plaintiffs assert that the contamination has affected the water supply in the area and that, as a result, Plaintiffs’ cattle will not drink the water.

{6} Defendant filed an answer to the second amended complaint on September 28, 2004, raising the defenses of statute of limitations, estoppel, waiver, and release, among others. The district court ruled, in response to a motion in limine filed by Defendant, that the appropriate measure of damages in the case is diminution in value, if any, to the fair market value of the property involved. The district court further ruled that Plaintiffs’ experts could only testify as to the applicable standard for permanent damage to real property, which the court determined to be the diminution in the fair market value of the land involved, and that Plaintiffs’ experts could not testify regarding the remediation costs. The case went to trial before a jury. At the close of the evidence, Defendant moved for a directed verdict on the private nuisance claim, arguing that the New Mexico Supreme Court declined to adopt private nuisance as a theory of recovery. The district court granted the motion for directed verdict. The jury then returned a verdict for Plaintiffs on the theories of negligence and trespass and awarded damages in the amount of $135,000. Plaintiffs appeal on the issues of the jury instructions for damages and private nuisance. Defendant cross-appeals, raising several other issues.

DISCUSSION

{7} Plaintiffs argue that the district court erred in ruling that the injury was permanent, thus preventing the jury from considering whether the cost of removal of the contaminated material exceeded the value of the property, as well as stigma damages. Plaintiffs also argue that the district court erred in directing a verdict in favor of Defendant on the private nuisance claim. Defendant cross-appeals, raising three issues: (1) all claims for surface damages have been waived by deed, (2) the Black Trust Plaintiffs do not own the causes of action they have asserted, and (3) Plaintiffs’ claims are barred by the statute of limitations. We address Defendant’s issues on cross-appeal first, because if there is merit to any of Defendant’s contentions, Plaintiffs’ claims on appeal are moot.

DEFENDANT’S ARGUMENTS ON CROSS-APPEAL

1. Estoppel by Deed or Waiver

{8} We address this issue summarily by noting that Defendant failed to raise it in a timely manner. Defendant raised the issue of estoppel by deed or waiver for the first time as an affirmative defense in an answer to Plaintiffs’ second amended complaint, which was filed on January 13, 2000. Defendant filed its answer to the second amended complaint on September 28, 2004, more than four and a half years after Plaintiffs filed the second amended complaint. Defendant therefore waived the defense of estoppel by deed or waiver by operation of Rule 1-012(A) (providing that a defendant shall serve an answer within thirty days of service of the complaint). Alternatively, if we view the untimely answer to the second amended complaint as an attempt to amend the original answer, Defendant failed to comply with the deadlines applicable to the amendment of pleadings, which are required by Rule 1-015(A) NMRA.

{9} Rule 1-015(A) sets forth the relevant deadlines for amendments to pleadings and states that, where such deadlines have passed, “a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Id. Defendant failed to move for leave to amend the original answer, as required by Rule 1-015(A). Moreover, Defendant does not challenge the district court’s pretrial ruling precluding Defendant from presenting evidence on the issue of estoppel by deed or waiver. Rather, Defendant asserts that the district court considered the issue anew when Defendant reintroduced it by motion for directed verdict and during Defendant’s post-trial motion for judgment as a matter of law and alternative motion to alter or amend the judgment. This argument is without merit.

{10} The district court summarily denied each of Defendant’s motions regarding the defense of estoppel by deed or waiver without explaining its reasons for doing so. Defendant asserts that the district court, despite its pretrial ruling, agreed to weigh the merits of Defendant’s legal argument at a later time and that the court did so in the process of denying Defendant’s motions on the issue. However, the record is far from clear on this point and we can find no indication that the court ever limited or vacated its prior ruling. Without more, we must assume that the district court was simply upholding the prior ruling by denying the motions.

{11} In sum, we decline to entertain Defendant’s appeal on the estoppel by deed or waiver issue because to do so would frustrate the purpose of our Rules of Civil Procedure. Holding otherwise would allow any litigant to “sneak in” an appropriately barred claim or defense by simply reintroducing the issue by motion at trial and, if the motion is denied, appealing the denial of the motion. We therefore conclude that the affirmative defense of estoppel by deed or waiver in the answer was not properly raised, and thus will not be addressed on appeal. We next turn to Defendant’s second claim of error on cross-appeal.

2. The Black Trust Plaintiffs Own the Causes of Action

{12} Defendant next argues that the Black Trust Plaintiffs do not own the causes of action in this case because the language in the quitclaim deed by which the property was conveyed to them was insufficient to convey personal causes of action. Defendant moved for a directed verdict on the issue, contending that Plaintiffs presented no evidence of title or ownership of the property. Defendant asserts that the language in the quitclaim deed to the Black Trust states that the grantor quitclaims all of his or her “right, title, and interest” in the property to the Black Trust, but fails to convey any personal causes of action, such as the claims at issue in this case. Defendant relies on a series of Texas cases for the proposition that a cause of action for injury to real property accrues when the injury is committed, and is a personal right belonging to the person who owns the property at the time of the injury. See, e.g., Exxon Corp. v. Pluff, 94 S.W.3d 22, 27 (Tex. App. 2002); Lay v. Aetna Ins. Co., 599 S.W.2d 684, 686 (Tex. Civ. App. 1980). The district court denied Defendant’s motion for a directed verdict.

{13} “[A] directed verdict is appropriate only when there are no issues of fact to be presented to a jury.” Hedicke v. Gunville, 2003-NMCA-032, ¶ 9, 133 N.M. 335, 62 P.3d 1217. In considering a directed verdict
motion, a district court considers all the evidence, “and any conflicts in the evidence or reasonable interpretations of it are viewed in favor of the party resisting the directed verdict.” *Id.* The district court’s ruling on the motion is a question of law, and we review questions of law de novo. *Id.*

{14} The district court properly denied Defendant’s motion for a directed verdict. In New Mexico, a cause of action arises not necessarily at the time of injury, but rather at the time a plaintiff knows or should have known of the claims. *See NMSA 1978, § 37-1-7 (1880)* (stating “the cause of action shall not be deemed to have accrued until the fraud, mistake, injury or conversion complained of, shall have been discovered by the party aggrieved”). This is referred to as the “discovery rule.”

{15} The jury found that Plaintiffs knew or should have known of the cause of action on or after July 1, 1995. Plaintiffs presented testimony at trial that they discovered the contaminated pit in 1997, two years before the lawsuit was filed. The Black Trust received its conveyance of interest in the property in 1997 and evidence of the conveyance was admitted at trial. Applying the discovery rule to the evidence presented at trial, the causes of action accrued at the time the injury or trespass to the land was discovered, which according to Plaintiffs was in 1997. Defendant fails to point to any persuasive evidence indicating otherwise. Plaintiffs’ evidence established that the grantor conveyed the land to the Black Trust by quitclaim deed, the Black Trust thereby acquiring all right, title, and interest in the land that the grantor owned. Thus, the Black Trust Plaintiffs own the causes of action because the causes of action accrued, or was “discovered,” after the conveyance of the property to them. Defendant’s contentions otherwise are without merit.

3. STATUTE OF LIMITATIONS

{16} Finally, Defendant argues that Plaintiffs’ claims are barred by the statute of limitations. The jury received a special interrogatory on this issue that required the jury to determine when the Plaintiffs knew or reasonably should have known of the causes of action. Since the issue was presented to the jury to determine as a factual issue, we review the jury’s finding for substantial evidence. “Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion.” *Landavazo v. Sanchez*, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990). In reviewing for substantial evidence, “the appellate court resolves all disputes of facts in favor of the successful party and indulges all reasonable inferences in support of the prevailing party.” *Las Cruces Prof’l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. “The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached.” *Id.*

{17} Substantial evidence supports the jury’s determination. The jury found that only after July 1, 1995, did Plaintiffs or their predecessors-in-interest know, or in the exercise of reasonable diligence they should have known, of their causes of action. At trial, Plaintiffs presented testimony from Plaintiff William McNeill stating that he became aware of a problem in 1997. This testimony was sufficient evidence for the jury to have found that Plaintiffs knew or should have known of the causes of action or after July 1, 1995. Thus, when Plaintiffs filed suit on June 1, 1999, they did so within the four year statute of limitations under NMSA 1978, § 37-1-4 (1880). Concluding that all of the arguments Defendant raises on cross appeal fail, we now turn to the issues Plaintiffs raise on appeal.

**PLAINTIFFS’ ARGUMENTS ON APPEAL**

1. Jury Instructions and Damages

{18} Plaintiffs contend that the district court erred in prohibiting the jury from hearing evidence on the cost of remediation or repair of the property. Prior to trial, the district court ruled that the damages in this case were permanent, and thus the proper measure of damages was the difference between the fair market value of the land before the injury and the fair market value after the injury. The district court expressly prohibited Plaintiffs from presenting to the jury any evidence of the cost of repair or remediation. Plaintiffs assert that the issue of whether cost of repair or diminution in value is the proper measure of damages is determined by the characterization of the injury as temporary or permanent, which is a question of fact for the jury. According to Plaintiffs, if the cost of repair or remediation is less than the diminution in fair market value, then the cost of repair is the correct measure of damages. Plaintiffs also argue that the district court erred by instructing the jury to consider only damage to such land that was actually injured, rather than the diminution in value of the entire property, which limited the award of damages.

**STANDARD OF REVIEW**

{19} Whether the district court erred in determining, as a matter of law, that the injury was permanent and the jury instructions should be limited to diminution in value is a question of law, which we review de novo. *Sitterly v. Matthews*, 2000-NMCA-037, ¶ 22, 129 N.M. 134, 2 P.3d 871 (when the matter to be decided is a question of law, the standard of review is de novo); *Sowder v. Sowder*, 1999-NMCA-058, ¶ 7, 127 N.M. 114, 977 P.2d 1034 (same). To the extent we are required to review for error in the Uniform Jury Instructions, we note that the Court of Appeals may consider error in the Uniform Jury Instructions, except that it may not overrule “those instructions that have been considered by [the Supreme Court] in actual cases and controversies that are controlling precedent.” *State v. Wilson*, 116 N.M. 793, 795, 867 P.2d 1175, 1177 (1994). Furthermore, we note that if a legal theory is supported by the evidence, a party is entitled to have the jury instructed on that theory. *Thompson Drilling, Inc. v. Romig*, 105 N.M. 701, 705, 736 P.2d 979, 983 (1987). However, “[i]t is not error to deny requested instructions when the instructions given adequately cover the law to be applied.” *Kirk Co. v. Ashcraft*, 101 N.M. 462, 466, 684 P.2d 1127, 1131 (1984). A civil case will not be reversed due to error in jury instructions unless the result is fundamentally unjust. *Kennedy v. Dexter Consol. Sch.*, 2000-NMSC-025, ¶ 27, 129 N.M. 436, 10 P.3d 115. Furthermore, the complaining party must be able to show that the erroneous instructions were prejudicial. *Id.*

1. The correct measure of damages for injury to real property depends on whether the injury is permanent or temporary

{20} The objective in awarding damages, whether in tort for physical harm to property or in breach of contract or warranty, is to place the plaintiffs in the same financial position regarding the property as they would have been in had there been no damage to the property in the first place. *Camino Real Mobile Home Park P’ship v. Wolfe*, 119 N.M. 436, 443, 891 P.2d 1190, 1197 (1995). Our Uniform Jury Instructions provide for the measure of damages to real property as follows: “You shall determine what was the value of the property immediately before the occurrence and immediately after the occurrence. The difference between these two figures is the legal measure of damages to real property.” UJI 13-1819 NIRA. The UJI is silent with respect to any distinction between permanent and temporary damages. However, the committee commentary to UJI 13-1819 cites to three cases for the
proposition that “[t]he Supreme Court of New Mexico has recognized that under certain circumstances the measure of damages to real property may vary.”

{21} In Snider v. Town of Silver City, 56 N.M. 603, 247 P.2d 178 (1952), the Court upheld a measure of damages based on the cost of restoration of a cabin complex that was destroyed by an explosion. The Court allowed the cost of repair and restoration of the damaged building as the appropriate measure of damages. Id. at 614, 247 P.2d at 185. Thigpen v. Skousen & Hise, 64 N.M. 290, 327 P.2d 802 (1958), addressed whether strict liability could be imposed for damage to buildings that resulted from blasting operations. The Court upheld an award of damages for actual damage to the building from fragments and debris hitting the building, as well as damage from shock waves passing through the building. Id. at 291-92, 327 P.2d at 803. Finally, in Duke City Lumber Co. v. Terrel, 88 N.M. 299, 540 P.2d 229 (1975) the Court determined “that the difference between the before and after ... market values of a business enterprise correctly measures[d] the damages resulting from the destruction of or injury to the enterprise.” Id. at 302, 540 P.2d at 232 (internal quotation marks omitted). However, the Court also stated that this method of calculating damages “was [not] the only method by which the claimed damages could properly have been measured.” Id. Unfortunately, the Court did not provide any further explanation of what other methods might be appropriate.

{22} None of the three cases discussed in the committee commentary for the proposition that damages to real property may vary involve damage to the surface or subsurface of real property. Instead, the cases involve damage to buildings or to businesses in terms of economic losses. We therefore do not find these cases instructive on the issue of when a court should deviate from the standard instruction on damages to real property. See Cress v. Scott, 117 N.M. 3, 5-6, 868 P.2d 648, 650-51 (1994) (noting that committee comments to UJIs are not the law of New Mexico). However, other case law not cited in the commentary seems to indicate that there may be alternate methods of calculating damages to real property, depending on whether they are permanent or temporary.


2. The determination of whether an injury to real property is permanent or temporary is a question of fact to be decided by the jury

{24} However, in Ruiz, our Supreme Court again relied on the general rule for damages to real property, as stated in UJI 13-1802 NMRA and 13-1819. Ruiz, 110 N.M. at 481, 797 P.2d at 270. The Court stated that UJI 13-1802, which is the instruction concerning the general measure of damages, “is intended to provide for an ‘amount of money which will reasonably and fairly compensate’ for an injury as established by evidence.” Ruiz, 110 N.M. at 481, 797 P.2d at 270. This amount is ordinarily found “by instructing the jury to determine what was the value of the property immediately before the occurrence and immediately after the occurrence. The difference between these two figures is the legal measure of damages to real property.” Id. (internal quotation marks and citations omitted). However, the Court went on to state that “nothing in our case law precludes substituting a ‘lost use’ measure for the standard ‘before and after’ measure set out in UJI 13-1819 where such a measure represents fair and reasonable compensation.” Ruiz, 110 N.M. at 481, 797 P.2d at 270. Thus, the proper measure of damages is not constrained by the guidelines set forth in UJI 13-1819, but rather will “depend[] on the proof offered to establish and quantify the harm.” Ruiz, 110 N.M. at 481, 797 P.2d at 270.

{25} The existence of a single UJI on damage to real property indicating one measure of damages, contrasted with case law indicating that the measure of damage to real property depends on whether the damage is temporary or permanent, clearly illustrates the difficulty in the present case in determining the correct measure of damages. We are bound by the precedent in Carter Farms and therefore conclude that the measure of damages for injury to real property depends on whether the injury is temporary or permanent. As stated in Carter Farms, the measure of damages for permanent injury is the diminution in the fair market value of the property. This is the general measure of damages, as stated in UJI 13-1819. If the damage to real property is temporary, the measure of damages is the cost of repair or remediation, so long as this cost is less than the diminution in fair market value. But the difficulty does not end there. Having made the determination of the correct measure of damages, we must now determine whether the issue of damages being temporary or permanent is a question for the jury, or one for the judge to decide as a matter of law.

2. The determination of whether an injury to real property is permanent or temporary is a question of fact to be decided by the jury

{26} In the present case, the district court decided as a matter of law that the damages were permanent. Plaintiffs argue that whether damages are permanent or temporary is an issue of fact to be decided by the jury, not as a matter of law by the judge. Plaintiffs also contend that the district court erred by limiting the evidence to the fair market value of the property, thus prohibiting the introduction of evidence on the cost of repair or remediation. We agree.
permanent and temporary damages is often problematic. Temporary damages are generally defined as damages that can be remedied, removed, or abated within a reasonable period and at a reasonable expense. *Morsey v. Chevron, USA, Inc.*, 94 F.3d 1470, 1476 (10th Cir. 1996). “Inherent in the concept of temporary damages is an element of feasibility, comprised of (but not limited to) both economic and temporal concerns.” *Id.*

{28} In contrast, permanent damages are defined as those damages caused by an injury that is fixed and where the property will always remain subject to that injury. *Id.* “Permanent damages are damages for the entire injury done—past, present, and prospective—and generally speaking those which are practically irremediable.” *Id.* Nevertheless, “the distinction between permanent and temporary injuries has not always been considered helpful, because the classification of the injury often turns on whether the cost of restoration is more than the value of the property.” 22 Am. Jur. 2d Damages, § 257 (2006). Another commentator suggests that:

> [P]ermanency is a word of art that stands for policy concerns rather than a simple physical description; the damages appear to be as permanent in some of the cases allowing repair-costs as they are in the cases limiting the damages to the diminution measure. . . . Courts appear to describe harm to land as permanent in this sense when the cost of repair would be likely to exceed the diminished value by a substantial margin.

1 Dan B. Dobbs, *Law of Remedies* § 5.2(2) at 717 (2d ed. 1993). In other words, the determination of whether an injury is permanent often depends on whether the cost of repair exceeds the diminution in fair market value. It is true that even with a temporary injury, if the cost of repair is greater than the diminution in value, the plaintiff will only receive the latter. This rule makes sense given the purpose of awarding damages, which is to fully compensate a plaintiff, or restore plaintiff to his rightful position. Allowing a recovery that is greater than the value of a plaintiff’s loss would put the plaintiff in a better position than he or she had been in before the injury, which is never the purpose of compensatory damages. See *Camino Real Mobile Home Park P’ship*, 119 N.M. at 444, 891 P.2d at 1198 (noting that if the cost of repair or replacement involves economic waste, the measure of damages is the difference between the reasonable market value of the property as warranted and the reasonable market value in the actual condition).

{29} In light of the authority cited above, we conclude that the determination of whether damage to real property is permanent or temporary is an issue of fact for the jury to decide. *See Santa Fe S. Ry., Inc. v. Baucis Ltd. Liab. Co.*, 1998-NMCA-002, ¶ 18, 124 N.M. 430, 952 P.2d 31 (noting that issues of fact are for the jury to decide); *Silva v. State*, 106 N.M. 472, 476, 745 P.2d 380, 384 (1987) (same). In making this determination, the jury should take into account the nature and extent of the injury and, in turn, the reasonableness of awarding the cost of repair versus the diminution in value. Furthermore, even where the jury has determined that the injury is permanent, the plaintiff should not be precluded from presenting evidence on the cost of repair or remediation, as such evidence will often have a significant relationship to the diminution in value of the land. *See* 1 Dobbs, *supra* at 720 (“The diminution measure . . . should not forbid introduction of evidence as to repair costs, which are ordinarily at least some evidence as to diminished value.”).

{30} Thus, in the present case, the district court erred in making the determination, as a matter of law, that the damages to Plaintiffs’ real property were permanent and by precluding Plaintiffs from presenting evidence on the cost of repair or remediation. Proper jury instructions would include an instruction on permanent versus temporary damages, as well as the cost of repair or remediation versus the diminution in fair market value.

{31} We note that the Dobbs treatise uses the terms “diminished value” and “diminution in value” interchangeably, although these terms arguably have distinct meanings. We have elected to use “diminution in value” and clarify that this term means the difference in value of the land before the occurrence of the harm and the fair market value of the property after the harm occurred.

{32} We also note that the measure of damages we adopt here is not rigid or inflexible. As the cited commentators note, there may be unusual or exceptional circumstances warranting an award of the cost of repairs even when that amount exceeds the property’s diminution in value. *See*, e.g., Dobbs, *supra* at 715 (noting that in some cases “costly repairs might be justified even though the land’s value has been reduced only slightly,” and observing that “[i]n many instances the plaintiff is using land in a way that suits the plaintiff very well but that does not maximize its economic value”); Restatement (Second) of Torts, § 929 cmt. b (explaining that, where repair or restoration costs exceed the land’s diminution in value, damages are measured by the diminution in value “unless there is a reason personal to the owner for restoring the original condition”). We are confident that the district courts can recognize these exceptional circumstances and craft appropriate jury instructions in such instances.

{33} We now address Plaintiffs’ contention that the district court erred by instructing the jury to consider only damage to such land that was actually injured, rather than the diminution in value of the entire property.

### 3. The measure of damages for permanent injury to real property should include diminution in value of the entire property, not just the portion of land that is physically injured

{34} Plaintiffs assert that, even if diminution in fair market value were the correct measure of damages, the district court erred in instructing the jury that it could only consider the decrease in value of the land actually injured and not the entire ranch. The jury was instructed that, “[i]n awarding damages, you may consider only so much of the land as may have been actually physically injured by any negligence you may have found.” According to Plaintiffs, the jury should have been able to consider the diminution in value of the entire property. We agree.

{35} We find the Restatement (Second) of Torts instructive on this point. In discussing damages for harm to land from “past invasions,” the Restatement notes that damages for harm to land include compensation for the difference in value of the land before the harm and the value after the harm, or in an appropriate case, the cost of restoration. Restatement (Second) of Torts § 929 (1979). The Restatement goes on to note that, when the measure of damages is the difference in fair market value, “[i]f only a portion of a tract of land has been directly harmed, the diminished value of the entire tract is considered.” *Id.* cmt. a. (Emphasis added.)

{36} The diminution in value of the entire property provides the correct measure of damages for permanent injury to real property. If the injury is only to a small portion of land within the property, as in the present...
case, then the diminution in value of the entire property will take into account the degree or amount of injury. Under these circumstances, evidence regarding cost of repair may be quite helpful in determining the diminution in value of the entire property, since a reasonable prospective buyer will want to subtract the cost of repair from the sale price of the land. The same is true regarding stigma damages; the decrease in market value of the property necessarily takes into account any stigma associated with the property as a result of the injury. In other words, to the extent stigma is an issue, it will be reflected in the decrease in fair market value of the property.

In sum, we hold that the question of whether the injury to real property is temporary or permanent is an issue of fact for the jury to decide. If the injury is permanent, the correct measure of damages is the diminution in fair market value of the entire property. If the injury is temporary, then the correct measure of damages is the cost of repair or remediation. If the cost of repair or remediation is greater than the diminution in fair market value, then the latter is the correct measure of damages. Finally, even where the jury finds that the injury is permanent and thus the correct measure of damages is diminution value, evidence regarding cost of repair or remediation should be allowed. We now turn to Plaintiffs’ claim of private nuisance.

PRIVATE NUISANCE

{38} Plaintiffs asserted a claim for private nuisance in their amended complaint. Plaintiffs allege that the spilled or allowed flow of oil onto Plaintiffs’ lands resulted in contamination of the land, and that such conduct was unreasonable and interfered with their use and enjoyment of the land. According to Plaintiffs, the nuisance resulted in diminution in value of the land and caused Plaintiffs annoyance and inconvenience.

{39} We find the decision in Carter Farms determinative on Plaintiffs’ private nuisance claim. Although the jury awarded damages based on a finding of private nuisance in Carter Farms, the Court noted that such a theory had not been pled in the original complaint. Carter Farms, 103 N.M. at 119, 703 P.2d at 896. The Court declined to adopt private nuisance as a theory of recovery in Carter Farms, noting that “state courts have rarely utilized a private nuisance theory since recovery ordinarily can be based upon standard theories of negligence.” Id. at 120, 703 P.2d at 897 (internal citation omitted). Although the parties disagree as to whether Carter Farms essentially precluded private nuisance as a theory of recovery in New Mexico, we believe the Court declined to adopt the theory of private nuisance in Carter Farms because it was not pled by the plaintiffs. To the extent a plaintiff can recover under other theories such as negligence, private nuisance is rarely utilized. We thus interpret the Court’s decision in Carter Farms to allow recovery for private nuisance in circumstances where private nuisance has been properly pled by the plaintiffs and other theories of recovery are not available.

{40} In the case before us, Plaintiffs did plead private nuisance in their amended complaint. However, other theories of recovery, including standard negligence and trespass, were available to Plaintiffs. Therefore, applying Carter Farms, we conclude that the district court did not err in disallowing Plaintiffs’ claim of private nuisance to go to the jury. Furthermore, we note that in this case, even without the theory of private nuisance available, the damages available to Plaintiffs are the same.

CONCLUSION

{41} We reverse and remand for proceedings consistent with this opinion.

{42} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Chief Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
CYNTHIA A. FRY, Judge
In this case we consider the tension between an accused’s confrontation rights and our rape shield statute, which precludes admission of evidence of a witness’s past sexual conduct under certain circumstances. Stephen F. (Child) appeals his convictions for two counts of criminal sexual penetration and argues that the trial court erred in excluding evidence of the State’s main witness’s past sexual activities, which according to Child, showed the witness’s motive to fabricate. We conclude that Child made the requisite showing under State v. Johnson, “establish[ing] a constitutional right to present evidence otherwise excluded by our [rape shield] statute.” 1997-NMSC-036, ¶ 28, 123 N.M. 640, 944 P.2d 869. Therefore, we hold that the trial court abused its discretion in excluding testimony that tended to prove the complaining witness’s motive to lie, and we reverse Child’s convictions and remand for a new trial. Child makes an additional argument that we briefly address to provide guidance on remand.

BACKGROUND

This is our second opportunity to address Child’s appeal. Following its convictions, Child appealed, making the same arguments we consider in the present appeal. He also argued that his post-trial dispositional hearing occurred beyond the time limit provided in the Children’s Court Rules. Relying on this procedural argument, this Court reversed Child’s convictions and remanded the case with instructions to dismiss the charges. State v. Stephen F., 2005-NMCA-048, ¶¶ 25-27, 137 N.M. 409, 112 P.3d 270, rev’d in part on other grounds, 2006-NMSC-030, 140 N.M. 24, 139 P.3d 184. On certiorari, our Supreme Court agreed with this Court that the time limit in the Children’s Court Rule indeed applied, but reversed this Court with respect to the remedy of dismissal. Stephen F., 2006-NMSC-030, ¶ 19. The Supreme Court then remanded the appeal to this Court to resolve the remaining substantive issues. Id.

In order to put the facts in context, we first set out the New Mexico rape shield statute. NMSA 1978, § 30-9-16 (1993), provides in part:

A. As a matter of substantive right, in prosecutions pursuant to the provisions of Sections 30-9-11 through 30-9-15 NMSA 1978, evidence of the victim’s past sexual conduct, opinion evidence of the victim’s past sexual conduct or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent that the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

C. If the evidence referred to in Subsection A . . . of this section is proposed to be offered, the defendant shall file a written motion prior to trial. The court shall hear the pretrial motion prior to trial at an in camera hearing to determine whether the evidence is admissible pursuant to the provisions of Subsection A or B of this section. If new information, which the defendant proposes to offer pursuant to the provisions of Subsection A or B of this section, is discovered prior to or during the trial, the judge shall order an in camera hearing to determine whether the proposed evidence is admissible. If the proposed evidence is deemed admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted.

The corresponding evidence rule, Rule 11-413 NMA, is consistent with the statute. 4 The parties do not dispute that on the night in question, Child and the State’s main complaining witness and alleged victim (B.G.) engaged in sexual intercourse. B.G. was sixteen at the time, and Child was fifteen. According to B.G.’s trial testimony, Child, B.G., and B.G.’s brother had been watching movies in B.G.’s bedroom. B.G. testified that Child, a friend of her brother and family for nine years, usually slept on the couch in the living room when he stayed over. B.G. then testified that after Child had headed for bed in the living room, he came back into her room and forced her to engage in sexual conduct, including oral, vaginal, and anal intercourse. The morning after the incident, B.G. told her mother that Child had raped her. B.G.’s accusations led to the State’s prosecution of Child for, among other charges, three counts of criminal sexual penetration in violation of NMSA 1978, § 30-9-11 (2003). Child was convicted of two counts of criminal sexual penetration.

Child’s theory of the case was that the intercourse was consensual. Specifically, Child’s defense was that B.G. lied because she feared punishment from her parents for engaging in premarital sex. Child based his defense on B.G.’s statement that prior to the incident with Child, she had sexual rela-
tions with her then boyfriend, and that her parents, upon learning of their daughter’s sexual conduct, had punished her. Because of the punishment that B.G. had experienced as a result of her prior consensual sexual experience, Child argued B.G. was motivated to lie to avoid punishment.

{6} Pursuant to the rape shield statute and corresponding rule of evidence, Child requested a hearing to determine the admissibility of evidence regarding B.G.’s prior sexual conduct, and the punishment she suffered because of it, to support Child’s theory that B.G. had motive to fabricate the rape. Child stated that he was “not offering evidence of [B.G.’s] prior sexual encounter to show propensity,” but that he intended “to show that she has a powerful motive to fabricate.” In her statement to defense counsel, B.G. said her mother “was really upset[] [about my having engaged in sex with my boyfriend:] she said that it was going to take her a long time to trust me again, . . . about three or four months[.] . . and I wasn’t allowed to go out on dates with guys.” In the same statement, B.G. explained that her mother’s disapproval of B.G.’s sexual behavior was based on religious values. Child’s theory was that B.G. was motivated to fabricate the claim of rape because she feared the punishment and disapproval of her parents, devout Christians who “don’t believe in sex before marriage.”

{7} Relying on the rape shield statute and corresponding rule of evidence, the State opposed Child’s motion and argued that Child was using the motive to fabricate as a pretext for offering the evidence to show propensity. The State argued that “the way a family with strong Christian values chooses to handle a family problem” was irrelevant to the issues in the case.

{8} At the pretrial in camera hearing on the motion in limine, the trial court agreed with the State’s position and explained to defense counsel, “I understand fully your statement that that is not your intent [to use evidence of B.G.’s prior sexual conduct to establish consent based on B.G.’s propensity], but is that in fact the result? Is that not the collateral benefit or, better stated, the collateral damage that occurs?” In denying Child’s motion seeking admission of B.G.’s statement, the trial court said, “I do find specifically that the prejudicial aspects of this would greatly outweigh the probative value. I do not address it . . . under the confrontation aspect but rather under the measure of prejudice versus probative value.”

DISCUSSION
The Rape Shield Law
{9} The primary issue in this case is resolved by Johnson. In that case, our Supreme Court explained that rape shield laws were enacted in reaction to the historic use of evidence of an alleged victim’s prior sexual conduct “on the reasoning that someone who had consented previously would have been more likely to have consented on the particular occasion at issue.” 1997-NMSC-036, ¶ 11. In general, rape shield laws restrict the use of evidence of an alleged victim’s prior sexual conduct to establish consent because such evidence “is only marginally, if at all, probative of consent.” Id. ¶ 12 (internal quotation marks and citation omitted). In shielding alleged victims from exposing their sexual history, rape shield laws protect alleged victims from harassment and encourage them to report and testify. Id.

{10} Rape shield laws are not absolute bars to the admission of an alleged victim’s sexual history. The purpose of rape shield laws is “not to remove relevant evidence from the jury’s consideration.” Id. ¶ 21 (emphasis added) (internal quotation marks and citation omitted). Our Supreme Court in Johnson explained that “evidence of [the alleged victim’s] prior sexual conduct must be admitted if a defendant shows that evidence implicates his or her constitutional right of confrontation.” Id. ¶ 22 (emphasis added). For example, a defendant’s right to show the alleged victim’s bias can trump the protection afforded by a rape shield law. Cf. Olden v. Kentucky, 488 U.S. 227, 231 (1988) (per curiam) (reversing the defendant’s conviction on grounds that the defendant was denied opportunity to show “prototypical form of bias” when the trial court disallowed the defendant from cross-examining the witnesses about her living arrangements, which tended to prove her motivation to fabricate claim of rape (internal quotation marks and citation omitted)); Davis v. Alaska, 415 U.S. 308, 319 (1974) (holding that the defendant’s right to confront and cross-examine witness to show evidence of witness’s bias outweighed statutory protection offered to witnesses, who were juvenile offenders, from cross-examination regarding their records). In order for a defendant to introduce evidence of an alleged victim’s sexual history, “a defendant must show sufficient facts to support a particular theory of relevance” that would “enable the trial court to perform its role in identifying a theory of relevance prior to balancing probative value against prejudice.” Johnson, 1997-NMSC-036, ¶ 32. Thus, at bottom, the admission or exclusion of such evidence is entrusted to the trial court’s sound discretion. Id. ¶ 21.

{11} Johnson instructs us that “[a]fter assessing the legitimate probative value of the evidence, the [trial] court should consider the effect of excluding such evidence on [the] defendant’s right to a fair trial and balance that effect against the potential prejudice to the truthfinding process itself.” Id. ¶ 25 (internal quotation marks and citation omitted). In this case, the possible potential prejudice was that the jury would be confused or misled, “or [that] the jury [would] decide the case on an improper or emotional basis,” such as irrelevant prior sexual conduct of the alleged victim. Id. (internal quotation marks and citation omitted).

{12} In connection with the trial court’s balancing process, Johnson explains that a defendant’s constitutional confrontation right “informs the trial court’s exercise of discretion under the [rape shield] statute and rule.” Id. ¶ 28. To assist the trial court in exercising its discretion, Johnson adopted, as a possible framework for analysis, a five-factor test. Id. If a defendant makes a sufficient showing under the test, he establishes a constitutional right to present evidence that would otherwise be excluded under the rape shield law. Id. The five-part test consists of the following factors:

1) whether there is a clear showing that complainant committed the prior acts; (2) whether the circumstances of the prior acts closely resemble those of the present case; (3) whether the prior acts are clearly relevant to a material issue, such as identity, intent, or bias; (4) whether the evidence is necessary to the defendant’s case; [and] (5) whether the probative value of the evidence outweighs its prejudicial effect.

Id. ¶ 27.

{13} We apply the five factors to the present case. With respect to the first factor, the fact that B.G. engaged in the prior sexual act that Child seeks to introduce is uncontested. B.G. spoke openly about her punishment for having sex with her boyfriend in a statement she gave to the defense. Thus, the first factor is met.

{14} The second factor, whether the circumstances of the prior acts closely resemble those of the present case, does not apply in this case. We acknowledge the
State’s argument that the prior acts of sex between B.G. and her then boyfriend were “intimate consensual acts,” as compared to the “force and coercion” allegedly used by Child in this case. However, Child intended to show that B.G.’s prior sexual conduct and the resulting punishment created a motivation to lie, as opposed to showing any pattern or series consistent with prior sexual conduct. Child was not relying on any of the details of B.G.’s prior acts to analogize factual similarities between B.G.’s prior sexual experiences and her experience with Child. Consequently, we conclude that under the circumstances of this case, the second factor is unhelpful in evaluating the admissibility of the evidence. It is not necessary that each factor be satisfied. Our Supreme Court in Johnson adopted the five factors merely as a framework for analysis and did not intend for the factors to be determinative. Id. ¶ 28; cf. State v. Pulizzano, 456 N.W.2d 325, 333 (Wis. 1990) (concluding that the second factor was satisfied because the alleged victim’s prior sexual conduct “show[ed] an alternative source for sexual knowledge, and [was] necessary to rebut the logical and weighty inference that [the child victim] could not have gained the sexual knowledge [absent] the sexual assault”).

{15} In considering the third factor, whether the prior acts are clearly relevant to a material issue, such as identity, intent, or bias, the inquiry is whether the evidence Child sought to admit tended to prove B.G.’s motivation to fabricate. Child asked the trial court to admit evidence that B.G. had previously had sex, that B.G.’s mother had been “really upset” upon learning of her daughter’s sexual conduct, and that B.G.’s mother had forbidden B.G. from dating and punished her for three or four months. The State primarily contends that these facts do not support the theory that B.G. had a motive to lie. The State argues that Child would have to show facts tending to prove “that [B.G.’s] mother knew or even suspected that her daughter had once again engaged in . . . consensual sex with [Child]” in order for Child to establish that B.G. had a motive to fabricate a claim of rape. The State also argues that “[b]ased on [B.G.’s] prior experience, had the sex with [Child] been consensual, [B.G.] would have had every reason not to tell her parents[,] and w[ith] no disclosure to the parents there is no fear of punishment and consequently no motive to fabricate.” We think the State’s arguments provide one possible interpretation of the facts, while Child’s view provides another interpretation. This presents a classic jury question. See State v. Gurule, 2004-NMCA-008, ¶ 38, 134 N.M. 804, 82 P.3d 975 (“It is up to the jury to weigh the testimony and contradictory evidence and believe or disbelieve any testimony it hears.”).

{16} We conclude that Child has articulated a plausible theory of relevance for the evidence of B.G.’s prior sexual conduct. Child expressly articulated his theory to the trial court in both his written motion in limine and at the hearing on the motion. Unlike the defendant in Johnson, Child specifically argued that he intended the evidence to show that B.G. had a motive to lie, and Child provided the trial court with a legitimate theory of relevance. See 1997-NMSC-036, ¶ 37 (rejecting the defendant’s claim of relevancy because he “never expressed his intention to use the prior sexual conduct evidence to expose the victims’ motives to lie or as a basis for a theory of relevance other than propensity”). Because Child articulated a theory of his defense that is supported by the evidence he sought to have admitted, he has demonstrated that B.G.’s prior acts of sexual conduct are relevant to a material issue.

{17} The fourth factor, whether the evidence is necessary to the defendant’s case, is also met here. Because the entire case depended upon whether the jury believed Child’s or B.G.’s version of the facts, evidence of B.G.’s motive to lie was the basis for Child’s entire defense. Child explained that the evidence was crucial to his case because “jurors certainly are going to be asking themselves[yes, w]ell, why would she lie?” Child’s defense was that B.G. consented. Denying Child’s request to admit that B.G. had a strong motive to lie—fear of admonishment and punishment from her parents—essentially stripped Child of his only defense. We therefore conclude that the excluded evidence was not only necessary but crucial to Child’s defense.

{18} Under the final factor, the trial court had to weigh the probative value of Child’s being able to present his defense against the potential prejudice to the truth-finding process. At the hearing on the motion to admit the evidence, Child’s counsel articulated the proper role of the trial court by stating that “the court is being asked to balance [Child’s] confrontation rights.” Instead of considering Child’s constitutional rights, the trial court excluded the evidence by stating, “I do not address it in terms suggested by counsel, that is, under the confrontation aspect but rather under the measure of prejudice versus probative value.” (Emphasis added.) Because Child made the requisite particularized showing that the evidence was both highly probative of B.G.’s motive to lie and crucial to his defense, the trial court’s failure to address the evidentiary issue “under the confrontation aspect” amounted to a misunderstanding of the balance the trial court must employ in these situations. A trial court must consider a defendant’s confrontation rights in exercising its discretion to admit or exclude evidence of this nature. Because Child established relevancy and necessity and because the trial court failed to consider this, we hold that the trial court abused its discretion in excluding the evidence.

{19} Our holding is supported by factually analogous rape cases from other jurisdictions. In Commonwealth v. Stockhammer, 570 N.E.2d 992, 994-95 (Mass. 1991), both the alleged victim and the defendant testified that sexual intercourse occurred, but the defendant claimed it was consensual. Id. Prior to the alleged rape, the defendant and the alleged victim were close friends and the alleged victim had a boyfriend with whom she was sexually active. Id. at 994. The defendant’s theory was that the alleged victim accused him of rape because she feared angering her parents, who “strongly disapproved of premarital sex,” and she feared upsetting her boyfriend, who would also be angry if he learned she had sex with the defendant. Id. at 998. The trial court excluded evidence of the alleged victim’s prior sexual conduct, but the Massachusetts Supreme Court reversed on appeal because “the judge prevented counsel from pursuing on cross-examination a line of inquiry that . . . could have established that the complainant was biased and had a specific reason to lie about what happened.” Id. at 1000; see also State v. DeLawder, 344 A.2d 446, 451 (Md. Ct. Spec. App. 1975) (holding the defendant should have been allowed to cross-examine the alleged victim regarding her prior sexual conduct as it tended to prove that she had a motive to lie because she was pregnant by another man and feared her mother’s anger).

{20} Child, like the defendant in Stockhammer, wanted to present evidence of B.G.’s prior sexual conduct to demonstrate B.G.’s motive to lie in order to avoid the punishment she had previously suffered for engaging in premarital sex. Like the Massachusetts court, we think that a teenage girl’s fear of punishment from her parents for engaging in premarital sex tends to prove her motivation to fabricate a claim
of rape to cover up consensual sex. The trial court should allow Child to introduce this relevant evidence on retrial. Because of our holding, we need not address Child’s alternative argument that the trial court erroneously denied his motion for a new trial.

**Jury Instructions**

{21} Because the issue may arise on remand, we briefly address Child’s challenge to the jury instructions. Child contends the jury instructions given by the trial court misleadingly defined the essential element of unlawfulness. Child argued that the unlawfulness instruction, UJI 14-984 NMRA, criminalized sexual touching that was “done with the intent to arouse or gratify sexual desire,” which is incongruent with Child’s defense that the sexual conduct was consensual. *Id.* We note that the jury instructions have been amended since the filing of this appeal. UJI 14-984 has been withdrawn and the proposed jury instruction that Child supported, UJI 14-132 NMRA, has been amended and should be used if Child requests it on remand.

**CONCLUSION**

{22} For the foregoing reasons, we reverse Child’s convictions and remand for a new trial consistent with this opinion.

{23} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

CElia FOY CASTILLO, Judge

MICHAEL E. VIGIL, Judge
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Legal asst. wanted for Plaintiff’s civil litigation firm. Growing uptown office seeks full time, experienced legal assistant that is well organized, detail oriented and has the ability to work independently. Candidate must have prior experience in civil litigation w/an emphasis in personal injury. 5 years experience preferred. Computer skills a must. Send resume to Hiring Partner: Bleus & Assosc. LLC, 2633 Dakota, NE 87110 or fax to 505-884-9305.

Law Access is an equal opportunity employer.

**Paralegal/Admin. Assistant**

Larry Zamzok seeks bright N/S to assist both me and my office mgr. at P.I./coll’n practice. P.L. exp. req’d. Acc’g exp. pref’d. Fax resume/ salary to Duane @ 898-7313.

**Attorney**

Wolf & Fox, P.C., a rapidly growing law firm with a general practice, is seeking an attorney with a minimum of two years experience for full-time employment. Experience in domestic relations and business transactions helpful. Must be a highly motivated team player. Excellent benefits. Salary DOE. Please fax resume to (505)268-7027 or mail to 1200 Pennsylvania NE, Albuquerque, NM 87110.
Paralegal
Paralegal wanted for uptown law firm that strongly emphasizes the quality of life for its employees. General civil practice with primary focus on business matters and domestic relations. 2+ years experience. Spanish speaking a plus, but not required. Excellent benefits including health, dental, 401(k), gym membership. FT. Salary DOE. Send resume and salary requirements to Wolf & Fox, P.C., 1200 Pennsylvania NE, Albuquerque, NM 87110 or fax to 268-7027.

Legal Assistant
Legal Assistant w/exp needed for law firm. Must thrive in a fast paced environment. Great ben include hol, vac, sick leave, health, dental, retire plan & more. Submit in confidence cover letter, resume, sal his & req to: 7430 Washington Street, NE Albuquerque, NM 87109, fax 833-3040, or email admin@littledranttel.com

Legal Secretary
Secretary needed for Santa Fe sole proprietor lawyer. Good computer and language skills. Word, Excel, etc. Litigation. Fax to 505-982-6795 or email to elliot@weinrelaw.com.

Experienced Legal Secretary/Assistant
Experienced legal secretary/assistant for uptown law firm dealing primarily in civil litigation, including personal injury, medical malpractice and products liability. Strong computer skills required and working knowledge of Word, Outlook, e-filings with court, calendaring of hearings, depositions, etc. Strong writing skills required. Fax resume to 822-8037.

SERVICES

Transcription
Prosource24-7 offers secure, networking base digital transcription. Tapes and CD’S are also accepted. Best Rates and fast turn around. Also ask about our website/hosting services. Call Sharon 385-9133

OFFICE SPACE

Three Offices Available
Best location in town, one block or less from the new federal, state, metropolitan courts. Includes secretarial space, phones and service, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

Nob Hill Area Law Office
Comfortable, non-smoking environment featuring off-street parking, hardwood floors, and easy access to Law School and Courthouses. Many of the finest restaurants in town are within walking distance. $600.00 monthly rent includes telephone system with voicemail, access to copy/fax machine, DSL line and conference room. Contact Jim Ellis, 118 Wellesley Dr., SE, 266-0800.

Albuquerque Offices
Albuquerque offices for rent, 820 2nd NW, one block from courthouses, copier, fax, high speed internet, off street parking, library, statutes up to date, telephone system, conference room, receptionist, rates depending on space rented $500 to $1000 monthly. Call Ramona @243-7170 for appointment.

Downtown Albuquerque
620 Roma Avenue, N.W. $550.00 per month. Includes office, all utilities (except phones), cleaning, conference rooms, access to full library, receptionist to greet clients and take calls. A must see. Call 243-3751.

Equal Access to Justice helps fund New Mexico’s four legal aid providers.

·Make your donation through www.eaj-nm.org
·Mail your check to: Equal Access to Justice
  Box 92860, Albuquerque, NM 87199-2860
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Equal Access to Justice donates to: DNA Peoples Legal Services, Law Access, NM Center on Law and Poverty, NM Legal Aid. All donations are tax-deductible.
ROAD AND ACCESS LAW

Saturday, March 24, 2007
State Bar Center, Albuquerque
3.0 General CLE Credits
Co-Sponsor: Paralegal Division

☐ Standard Fee $95
☐ Government, Legal Services Attorney, Paralegal $90

This seminar will focus upon the creation and use of public and private roads, vacation of public roads, termination of private easements, common road and access issues, to include problems that may arise during a real estate transaction, how to recognize and resolve them, and steps, tips and tactics in litigating a road and access case.

1:30 p.m.  Road and Access Law
Alexia Constantaras, Esq., Simons & Slattery LLP
Charlotte Hetherington, Esq., Scheuer, Yost & Patterson PC

3:00 p.m.  Break

3:15 p.m.  Road and Access Law (continued)
Alexia Constantaras, Esq. & Charlotte Hetherington, Esq.

4:45 p.m.  Adjourn

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m. (Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours
INTERNET: www.nmbarcle.org
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Please Note: For all WEBCASTS, you must register online at www.nmbarcle.org

Name _________________________________________________ NM Bar # _________________________________
Street __________________________________________________________________________________________________________
City/State/Zip _____________________________________________________________________________________________________
Phone ____________________________________________________ Fax  ____________________________________________________
E-mail ____________________________________________________________________________________________________________

☐ Purchase Order (Must be attached to be registered)  ☐ Check enclosed $ ____________ Make check payable to: CLE

Credit Card # ____________________________________________ Exp. Date ______________________
Authorized Signature ____________________________________________
## Four Ways to Register

**PHONE:** (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m. *(Please have credit card information ready)*  
**FAX:** (505) 797-6071, Open 24 hours  
**INTERNET:** [www.nmbarcle.org](http://www.nmbarcle.org)  
**MAIL:** CLE, PO Box 92860, Albuquerque, NM 87199

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## Advancing the HR/Attorney Relationship: Enhancing Employer Practices for Any Size Business

**Friday, March 23, 2007 • State Bar Center, Albuquerque**

**5.5 General CLE Credits**

**Co-Sponsors:** Employment & Labor Law Section, State Bar of New Mexico  
Human Resource Management Association of New Mexico (HRMA)

- ☐ Standard and Non-Attorney $159  
- ☐ Employment and Labor Law Section Member $149  
- ☐ Government, Legal Services Attorney, Paralegal $149  
- ☐ Human Resource Professional $149

**Schedule:**

- **8:30 a.m.** Registration
- **8:55 a.m.** Introductory Remarks  
  Charles Archuleta, Esq., Chair, Employment & Labor Law Section  
  Melissa Smith, SPHR, HR Director, Apogen Technologies, Inc.
- **9:00 a.m.** Technology Update and Developing a Technology Policy  
  Ben Feuchter, Esq. & David Schneider, Keleher & McLeod, P.A.
- **10:00 a.m.** Break
- **10:15 a.m.** e-Discovery, Preservation, Recovery and Document Retention Policies  
  James L. Cook, Esq., Noeding & Jarrett  
  Jon Hill, President & CEO, iniCom Networks Inc.
- **11:00 a.m.** Panel Discussion: HR/Attorney Interactions  
  Attorneys: Charles Archuleta, Esq. & Whitney Warner, Esq., Moody & Warner PC  
  HR: Melissa Smith, SPHR, HR Director, Apogen Technologies, Inc.  
  Cheryl Ebner, Human Resources Director, Gardunos Restaurants
- **11:45 a.m.** Lunch (provided at the State Bar Center)
- **12:45 p.m.** Q & A (stemming from panel discussion and lunch conversations)  
  Attorneys: Charles Archuleta, Esq., Whitney Warner, Esq.  
  HR: Melissa Smith, SPHR, HR Director, Apogen Technologies, Inc.  
  Cheryl Ebner, Human Resources Director, Gardunos Restaurants
- **1:00 p.m.** Employer Case Study: Technology  
  Ben Feuchter, Esq. & David Schneider, Keleher & McLeod, P.A.  
- **1:30 p.m.** Employer Case Study: Handbook Compliance  
  Kay Bratton, Esq., Cuddy Kennedy Albetta & Ives LLP  
  Mary Rutland, HR Consultant
- **2:00 p.m.** Break
- **2:10 p.m.** Employer Case Study: Conflict Resolution  
  Rita Siegel, Esq.  
  Marvin Glass, SPHR, CHRL, Manager-Human Resources, Wal-Mart
- **2:40 p.m.** Employer Case Study: Investigation/Response to Complaint  
  Charles Archuleta, Esq.  
  Marvin Glass, SPHR, CHRL
- **3:10 p.m.** Break
- **3:20 p.m.** Top 10 Things Employers, Employees, and Their Attorneys Should Know  
  Whitney Warner, Esq.  
  Jeff Parker, Regional Director, Manpower New Mexico
- **4:00 p.m.** Adjourn
2007 Annual Meeting
July 12-15, 2007
Inn of the Mountain Gods
Mescalero, NM

Justice Sandra Day O’Connor – Keynote Speaker

The State Bar has reserved room blocks at the following hotels. Be sure to mention the “State Bar of New Mexico” to receive the special discounted rates.

**Inn of the Mountain Gods**
287 Carrizo Canyon Road, Mescalero - $159 (1-800-545-9011)

**The Lodge at Sierra Blanca** (formerly Hawthorn Suites)
107 Sierra Blanca Drive, Ruidoso - $119 – $139 (1-866-211-7727)

**The Holiday Inn Express**
400 West Highway 70, Ruidoso - $109 (1-505-257-3736)

Beautiful Ruidoso
Championship Golf