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Special Insert
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The Internet and Social Media:
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Intellectual Property Law Section
LIVE PROGRAMS State Bar Center, Albuquerque

Skeptically Determining the Limits of Scientific Evidence IV
Friday, March 22, 2013, 9 a.m.–5 p.m. • State Bar Center, Albuquerque
Standard Fee $219
Government, Paralegal, Legal Service Provider $189

Barbarians at the Gate: Can Judicial Gatekeeping Restrain the Expert Hordes?
Prof. David Faigman, Professor, Hastings College of the Law, Co-Editor of Modern Scientific Evidence Series

The Usual Suspects Magnetized: When Law and Neuroscience Collide
Kent Kiehl, Associate Professor of Psychology, University of New Mexico

Laying Siege to the Lab: Wreck and Ruin in St. Paul
Christine Funk, JD, General Counsel, Department of Forensic Services, Washington, DC

Is It Time for Attorneys and Their Experts to Have Some Skin in the Game?
Fred Chris Smith, JD, Former AUSA

Where's the Beef? Are the Courts Catching Up?
Roderick Kennedy, Chief Judge, New Mexico Court of Appeals
Recipient of the 2011 CLE Peak Award from the State Bar of New Mexico

Making Your Case With a Better Memory
With Paul Mellor
Wednesday, March 27, 2013 • State Bar Center, Albuquerque
Standard Fee $209
Government, Paralegal, Legal Service Provider $179

Join nationally recognized memory training consultant Paul Mellor for a session that will improve the way your mind retains facts. Learn techniques to improve your memory and learn how to apply these techniques to your everyday practice. Mellor’s objective is to show you how a trained memory can increase your efficiency and productivity in all aspects of law. He will shred the myth that memory cannot be enhanced and help you lay a foundation for total recall. Invest in a better memory. You have invested years in becoming an attorney, and you invest months preparing a case. Invest one day to strengthen your mind and achieve these goals:
- Think quickly and clearly without fumbling for notes,
- Remember important information about a jury and use it to win cases,
- Effectively recall facts and figures from research and interview to argue cases in court,

Registration includes Mellor’s recently released book, MEMORY! How to Remember Anything. This 305-page book includes chapters for remembering names and faces, speaking without notes, and 101 Q&As on beating absent mindedness.

8:00 a.m. Registration
8:30 a.m. Deposition Demonstration
Introduction with demonstration displays the lightning speed of a trained memory. You will see the ease of remembering information from a deposition. Emphasis is placed on why we forget and how we remember.

10:00 a.m. Break
10:15 a.m. How to Speak Without Notes to Jurors
Discover secrets on how to present a case without notes. Learn step by step techniques on how to draft your remarks, prepare your mind, and deliver a powerful presentation. To keep the jury in the palm of your hand, you’ll have to let go of your notes.

12:00 p.m. Lunch

1:05 p.m. Cross Examination with Confidence
Using the two-step formula in recall, you will acquire the skill in remembering to ask key questions during cross examination. Use of examples and illustrations will help reinforce your proficiency when dealing with those on the witness stand.

2:15 p.m. Break
2:30 p.m. Remember Names and Faces of Jurors in Trial, Clients in the Presentations, and in Other Professional Settings
You will learn the FACIAL Formula to quickly remember a name. Attention is placed on concentration techniques and focusing on recalling names correctly. Use of pictures and examples create a proven system in correctly matching a name to a face. You will learn how to remember first names, last names and groups of people.

4:00 p.m. Adjourn
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State Bar Workshops

February

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Lawyer Referral for the Elderly Workshop
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1–3 p.m., Clinics
Belen Senior Center, Belen

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Consumer/Debt Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque

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Consumer/Debt Bankruptcy Workshop
5:30 p.m., Law Office of Kenneth Egan,
Las Cruces

March

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Divorce Options Workshop
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Lawyer Referral for the Elderly Workshop
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1–3:30 p.m., Clinics
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Lawyer Referral for the Elderly Workshop
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Lawyer Referral for the Elderly Workshop
9:30–10:45 a.m., Presentation
1–4 p.m., Clinics
Cibola Senior Center, Grants

Cover Artist: Jack Atkins paints the Southwest’s intense desert light, its spectacular vistas, and the people and things that create its sense of place. His vivid colors and dramatic compositions tell the story of this area’s underlying sense of drama and history in a contemporary realist style.
PROFESSIONALISM TIP

With respect to the courts and other tribunals:
I will communicate with opposing counsel in an effort to avoid litigation or to resolve litigation.

Judicial Records Retention and Disposition Schedules

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits (see specifics for each court below) filed with the courts 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 (see specifics for each court below) can be retrieved by the dates shown below. Attorneys who have cases with exhibits may verify exhibit 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 not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

<table>
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<tr>
<th>Court</th>
<th>Exhibits/Tapes</th>
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<td>1998-2012</td>
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<td>575-742-7518</td>
<td>Civil</td>
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<td>JR-Juvenile</td>
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<td>March 1</td>
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<tr>
<td>5th Judicial District Court</td>
<td>Domestic Relations</td>
<td>1972-1997</td>
<td>April 10</td>
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<tr>
<td>Eddy County, 575-885-4740</td>
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Lovelace will be assigned Criminal Court cases previously assigned to Judge Reed Sheppard, Division XIV. Pursuant to Supreme Court Rule 1-088.1, parties who have not yet exercised a peremptory excusal will have 10 days from Feb. 13 to excuse Judge Loveless.

Governor Susana Martinez has appointed Judge Judith K. Nakamura to fill the vacancy of Division IX at the 2nd Judicial District Court. Effective Feb. 18, Judge Judith Nakamura, will be assigned Criminal Court cases previously assigned to Judge Robert Schwartz. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have ten days from March 6 to excuse Judge Nakamura.

Bernalillo County Metropolitan Court Judicial Vacancy

One vacancy on the Bernalillo County Metropolitan Court will exist in Albuquerque as of Feb. 16 upon the appointment of Judge Judith K. Nakamura to the 2nd Judicial District Court. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. The dean of the UNM School of Law, designated by the New Mexico Constitution to chair the Bernalillo County Metropolitan Court Nominating Committee, solicits applications for this position from lawyers who meet the statutory qualifications in Section 34, Article 8A-4b of the New Mexico Statutes Annotated 1978. Applications as well as information related to qualifications for the position, may be obtained from the Judicial Selection website at http://lawschool.unm.edu/judsel/application.php, or via email by contacting Raylene Weis, 505-277-4700. The deadline for applications is 5 p.m., Feb. 20. Applications received after that date will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Committee will meet Feb. 26 at the Bernalillo County Metropolitan Courthouse, 400 Lomas NW, Room 849, Albuquerque, to evaluate the applicants for this position. The meeting is open to the public and those wishing to speak about any of the candidates will have an opportunity to be heard.

STATE BAR NEWS

Attorney Support Group

- Feb. 18, 7:30 a.m. Morning groups meet on the third Monday of the month.
- March 4, 5:30 p.m. Afternoon groups meet on the first Monday of the month.

Support Group for Legal Professionals

Feb. 14, 5:30 p.m. The group meets on the second Thursday of the month, Unitarian Universalist Church, 107 West Barcelona Rd., Santa Fe. For information, call Diego Zamora, 505-629-7343.

Paralegal Division Luncheon CLE Series

The Paralegal Division invites members of the legal community to bring a lunch and attend E-Discovery and All Its Benefits (1.0 EP CLE credit) presented by Corey Reitz. The program will be held from noon–1 p.m., Feb. 13, at the State Bar Center (registration fee for attorneys–$16, members of the Paralegal Division–$10, non-members–$15). Registration begins at the door at 11:45 a.m. For more information, contact Cheryl Passalaqua, 505-247-0411, or Evonne Sanchez, 505-222-9352. Webcast to three locations:
- Santa Fe: Montgomery & Andrews, 325 Paseo de Peralta, Santa Fe. Contact Donna Ormerod, 505-986-2520.

Public Law Section Annual Public Lawyer Award

The Public Law Section is currently accepting nominations for the Public Lawyer of the Year Award, which will be presented April 26. Visit http://www.nmbar.org/AboutSBNM/sections/PublicLaw/publiclawyerawards.html to view previous recipients and award criteria. Nominations are due no later than 5 p.m., March 1. Send nominations to Doug Meiklejohn, New Mexico Environmental Law Center, 1405 Luisa St., Ste 5, Santa Fe, NM 87505-3452.
reservations with Tony Horvat, thorvat@nmbar.org, or 505-797-6033. For those unable to attend in person, a teleconference option is available by dialing 1-866-640-4044 and entering access code 144996.

**Young Lawyers Division**

**2013 Summer Fellowships**

The Young Lawyers Division is currently accepting applications for its 2013 Summer Fellowships. The YLD is offering two fellowships for the summer of 2013 to law students who are interested in working in public interest law or the government sector. The fellowship awards are intended to provide the opportunity for law students to work for public interest entities or in the government sector in an unpaid position. Applications must be postmarked by March 29. Direct questions to Samantha M. Hufts, samanthahufts335@gmail.com. Visit [http://www.nmbar.org/AboutSBNM/YLD/YLDA- ctivities.html](http://www.nmbar.org/AboutSBNM/YLD/YLDactivities.html) for details.

**NMLA Launch Party**

The New Mexico Lawyers for the Arts and its board of directors will host a special Attorney and Accountant Membership Launch Party from 6–8 p.m., Feb. 28, at Seasons in Albuquerque. It will be an innovative evening featuring several speakers discussing NMLA’s opportunities and benefits of membership for attorneys, accountants and other professionals and the many ways to get involved and assist NMLA in expanding its referral network throughout the state. NMLA is the only nonprofit organization in New Mexico dedicated to providing artists and arts organizations with educational resources, lectures and pro-bono legal assistance. Considering that Santa Fe is the third largest art market in the country, the mission of NMLA is to establish a bridge between the arts and the legal and professional communities so that artists and art groups may gain greater competence in handling legal and business aspects of their creative activities. This will be a fantastic opportunity to network with other attorneys, accountants, and other professionals interested in becoming involved and supporting the arts in New Mexico. As there is limited space available, R.S.V.P. as soon as possible to NMLA President Talia Kosh, tk@thebennettfirm.us. The event is co-sponsored by the YLD and ZiaTrust, Inc.

**Prevention-Focused Training**

The Young Lawyers Division and the Lawyers and Judges Assistance Program (NMJLAP) are co-sponsoring a prevention-focused training from 1–5 p.m., Feb. 15, at the State Bar Center. The training will be facilitated by attorney and certified trainer, Hallie Love. Integrative Restoration, or iRest, is a systematic form of guided relaxation/meditation shown to reduce stress and its effects and to improve concentration and composure during difficult situations. Studies have found that even 30 minutes of iRest can provide the equivalent of three to four hours of deep, restful sleep. After conducting extensive research into iRest, the Department of Defense is now using it to counter the trauma and stress experienced by soldiers returning from Afghanistan and Iraq. iRest programs in corporate settings, schools, hospitals, and organizations are supporting personal growth and well-being. The charge for the four-hour training is $40. Space is limited so sign up early. For more information, contact Jill Yeagley, 505-797-6003.

**Volunteer Tax Preparers Needed**

The AARP and New Mexico Tax Aid need your help. Become a volunteer tax preparer. Get training and experience to help the community. Flexible hours. Contact Sherri, sherritrevinoesq@gmail.com.

**YLD Bar Scholarship Awarded**

The YLD awarded a $750 scholarship to University of New Mexico School of Law 3L Louise Pocock. The purpose of the scholarship is to help a student enroll in courses for bar examination preparation.

**Other Bars**

**2013 Western States Bar Conference**

The 2013 Western States Bar Conference will be held March 20-23 at the Sheraton Kauai Resort, Hawaii. The theme is “The Future Is Now,” a program that will change someone’s course of direction. All will gain valuable information about leadership and how each of us can make a difference. Enjoy receptions, recreation, a golf tournament and an entertaining luau. The first 50 registrants will receive a special gift. Contact Joe Conte, jconte@nmbar.org, or Kris Becker, kbecker@nmbar.org. The deadline for room reservations is Feb. 16.

**UNM School of Law**

**Arturo L. Jaramillo Summer Law Clerk Program**

The Arturo L. Jaramillo Summer Law Clerk Program provides employment opportunities for talented and deserving first-year UNM law students who might not otherwise benefit from the real-world legal experience and mentoring. Nearly 30 students apply for the program each year. Firms with three or more attorneys are eligible to participate. Contact Morris J. Chavez, 505-338-3945 or mo@saucedochavez.com, by Feb. 22. Visit [http://www.nmbar.org/Attorneys/MemberServices/summerlawclerkprogram.html](http://www.nmbar.org/Attorneys/MemberServices/summerlawclerkprogram.html) for more information.

**UNM Free Library Services for New Mexico Attorneys**

- Delivery (fax, e-mail, or mail) of articles or other documents available in our collection. (Requests must include an exact citation.)
- Interlibrary loan of materials from other law libraries. (The Law Library does not charge a fee for this service, but the attorney will be responsible for any fees assessed by the lending library.)
- Onsite access to research databases such as Westlaw-Pro, LexisNexis Academic, Loislaw, Shepard’s, RIA Checkpoint, and many others.
- Onsite access to LexisNexis Academic and Loislaw at the UNM branch campus libraries in Valencia County, Gallup, and Los Alamos (licenses provided by the UNM Law Library).
- Advice concerning the licensing of low-cost online legal resources.

For more information about the UNM Law Library and any of these free services, visit [http://lawlibrary.unm.edu](http://lawlibrary.unm.edu), call 505-277-0935, or e-mail libref@law.unm.edu.

**Law Library Hours Through May 11**

**Building & Circulation**

- Monday–Thursday: 8 a.m.–10 p.m.
- Friday: 8 a.m.–6 p.m.
- Saturday: 8 a.m.–5 p.m.
- Sunday: noon–8 p.m.

**Reference**

- Monday, Jan. 7: 9 a.m.–6 p.m.
- Saturday–Sunday: Closed

**Other News**

**Family Law Council of Community Property States Annual Symposium**

The 24th Annual Symposium of the Family Law Council of Community Property States will be held March 7–9 in Madison, Wisconsin. The topic will be the status of litigation and legislation regarding same-sex marriage, alternatives such as domestic partnership or civil union, legal and equi-
table theories when same-sex relationships terminate, and analysis of the two same-sex marriage cases that are being heard by the U.S. Supreme Court. For information, Sandra Rotruck, Sutin, ser@sutinfirm.com or visit www.b-rlaw.com. Special rates are available at the Hilton Madison until Feb. 15. Call 1-866-403-8838 (reservation code FSCPS).

U.S. Department of Agriculture
Hispanic and Women Farmers and Ranchers Claims Process
Attorneys Needed

Farmers Legal Action Group, Inc. and the National Agricultural Law Center are assisting in the development of a legal assistance network of attorneys to assist claimants in the completion of the official claims form for the USDA Hispanic and Women Farmers and Ranchers Claims Process. The Legal Assistance Network listing will be widely available, including being listed on the National Agricultural Law Center website so that claimants and others can easily access the information and make contact. For background information on the USDA HWFRCP, visit the official Claims Process website at www.farmerclaims.gov or the National Agricultural Law Center website at http://new.nationalaglawcenter.org/. Attorneys interested in being listed in the Legal Assistance Network should email nataglaw@uark.edu and include the state(s) in which you are licensed to practice, the corresponding bar number(s) for those states, and a request for a copy of the training video. Once listed in the network, an attorney can be removed at any time upon request.

TLC Cares
This Legal Community Cares
Emergency Assistance
to Legal Professionals in Crisis

TLC Cares enables the legal community to reach out in small but meaningful ways to those judges, lawyers, court personnel, paralegals, legal staff and their families who experience the death of a loved one, a catastrophic illness or injury, or other unfortunate circumstance. Join the network today.

Email TLCcares@nmbar.org.
• Have you received your ENews yet?
• It’s placed in your inbox every Friday.
• Get the latest updates on CLE classes, member benefits, and other law-related activities around New Mexico.

To subscribe to ENews free of charge, contact sbnm-ENews@nmbar.org.
2013 Newly Elected BBC Members Take Oath of Office

Justice Charles W. Daniels officiated at swearing-in ceremonies in Albuquerque.

I do solemnly swear that I will support the Constitution of the United States and the Constitution and laws of the State of New Mexico, and that I will faithfully and impartially discharge the duties of Bar Commissioner of the State Bar of New Mexico on which I am about to enter to the best of my ability.

—Bar Commissioner Oath

First Bar Commissioner District, Commissioner George C. Kraehe

Third Bar Commissioner District, Commissioner Rod Thompson

Third Bar Commissioner District, Commissioner James A. Hall (Judge, Ret.)

Young Lawyers Division Chair, Commissioner Keya Koul

PAPERLESS Billing

Whatever you purchase or pay, from bar licensing fees to advertising, you are now receiving invoices and statements by email from statebaraccounting@nmbar.org.

State Bar of New Mexico
Hannah Banks Best has done a little bit of everything. Her titles include activist, social worker, organizer, freedom fighter, mother, teacher, consultant, and lawyer, to name a few. She has been a resident of New Mexico since 1961, when she moved to Albuquerque with her then-husband, Eric Best, M.D., and her twin sons. In 1977, she graduated from the University of New Mexico School of Law and now operates a private practice with an emphasis on employment law and civil rights. Best possesses a rare combination of unending compassion and brash outspokenness and has used those abilities to effect positive change in New Mexico. She has dedicated her life to the advancement of human rights, and we are indebted to her for the lasting mark she has made on our community.

February is Black History Month, a time to celebrate the past and present achievements of African-Americans. You were raised in New York by your father, a member of a black-only unit of the U.S. Army known as the Buffalo Soldier regiment. What kind of values did he pass on to you as a child?

My mother died when I was four and my father was stuck raising six children. I’m much younger than my siblings, so he raised me himself. The thing that my father taught me early in life was that you need to give back. Growing up, I never liked my name much because I didn’t know anyone else named Hannah. My father told me that my name means “state of grace.” He taught me that you need to give back. Growing up, I never liked my name much because I didn’t know anyone else named Hannah. My father told me that my name means “state of grace.” He taught me that you have to give back. Growing up, I never liked my name much because I didn’t know anyone else named Hannah. My father told me that my name means “state of grace.” He taught me that you grow into grace by giving back to your community, friends and family. He said that is the way you should live your life—by always giving back.

You went to school in West Point. Describe that experience.

My early education was at West Point. I didn’t know it at the time, but I was given privileges at the academy as an officer’s child because my father worked for the general. When my mother died, my father had no one to take care of me, so the general’s wife enrolled me in a program that was meant for officer’s children but not for black kids. She was the general’s wife so no one questioned what she did, and I was put in this pre-program with little white girls and boys. It was a very formal environment, but that background helped me later in life.

How so?

I moved south to Ft. Sill, Oklahoma, during World War II, and there I went to an all-black school. It was a wonderful experience going from a very white community into this totally black community. At first, I was not accepted. It wasn’t because of my skin color; it was because I was different. I was a Yankee. I was not immediately accepted but I had this friend—I remember her name was Bursa Mae—who was extremely popular. She took me under her wing, and once Bursa Mae became your friend, you didn’t have any more problems.

You moved here in 1961. What was New Mexico like for a young, African-American woman?

I went to State University in New York for my B.A. When I came to New Mexico, I had just graduated with my MSW (Master’s Degree in Social Work) from UCLA. I was one of the few social workers with a degree; there were probably 25 others in the whole state at that time. New Mexico was a very interesting place because people didn’t think that there was any racial discrimination going on here. But let me tell you, it was very subtle. It’s much better when it’s out in the open. Here, a big problem was racial discrimination in housing. I didn’t have any trouble because I lived at the VA, but it was rampant. There were people who were very active in the NAACP who fought against the discrimination. Oliver and Carnis Salisbury were really involved in getting fair housing ordinances passed. Ken Carson was another person who was integral to the fight. We came together and formed these interracial speaking groups and even brought a TV show to New Mexico to celebrate the 10th anniversary of Brown v. Board of Education.

Blacks accounted for only about two percent of the population of New Mexico in the 1960s. Do you think that affected the fight for civil rights in this state?

Because we were so small in number, we had to have a presence. One of the greatest things about New Mexico is that it is very easy to know the players. Anybody can go to the governor’s house because there are so few people in the state in general, not just blacks. It was easy in the sense that our names were out there—not just my name, but all of our names. So we were able to make a real difference, regarding local legislation and state legislation as well.

Some critics think it’s unfair to have a month dedicated to the history of one race. What are your thoughts?

I think they should dedicate the whole year as far as I’m concerned. When you think about what’s happened in this country and the changes that have been made, it’s because of diversity. There is such a value in diversity, and we should celebrate it. That’s what makes us special. Although sometimes when I think about it, I like Norway...
a lot and they aren't so diverse [laughs]. But diversity has made a difference in the whole feel of this place. I don't think some of the younger people realize how far we've come, and it ain't been easy.

If you could interview one historical figure, who would it be?

Mary McLeod Bethune. Because she was out there and in your face before it was cool.

You were at the forefront of the fight for gender equality and are a founding member of a number of women's organizations. What prompted you to start these groups?

The late Mary Walters, who eventually became the first female justice of the New Mexico Supreme Court, was running for district judge. A group of women and I got together to help with the campaign. We started getting support from women, and it didn't have anything to do with their political affiliation. Unfortunately Mary Walter's lost, but as a result of her losing we had money left over. It occurred to me that we needed more women in those kinds of positions. The National Women's Political Caucus was being founded in Houston at that time. So we took that money, and a group of us went to the NWPC convention. All of these renowned, intelligent women were at the convention. I'll tell you who was there: Gloria Steinem, Shirley Chisholm, Sissy Farenthold, and many, many more. So we came back and formed the Women's Political Caucus. There are women whom we supported that are up in Santa Fe in the legislature right now.

Did you participate in helping any other groups achieve equal opportunities?

I personally conducted what we call “the Conversation” up at Ghost Ranch, which had to do with minorities of all colors. We talked about how important it was for us to communicate with each other. Out of that, we realized that our view of each other was how the majority viewed us, and that we had to dispel that way of thinking. Another group that I was a part of was the New Mexico Black Lawyers Association. Thirty years ago, a small group of black lawyers—Raymond Hamilton, Angela Jewell, Tommy Jewell and I—came together to form this organization. There was no minority caucus until the New Mexico Black Lawyer's Association. We paved the way for the founding of other minority organizations that still exist today. I was also involved in the Poor People's Campaign in 1968. It happened in the wake of Martin Luther King, Jr.’s assassination. We were trying to secure civil rights for poor people, not just poor blacks, but all poor people. People were caravanning to Washington to protest and picking up people on their way. They were traveling from California, from El Paso, from New Mexico. The NAACP was involved. Reies Tijerina and his people were involved. Even Marlon Brando came to town! We had people picking up poor people, and some decided to house these people in their homes. Everyone wanted to do it, and so we ran out of poor people! It was sort of funny when I think about it.

What inspired you to go to law school?

I worked over on the east side [of the state] because there was a lot of racial discrimination there, in places like Hobbs and Clovis. I would need to find a lawyer because there was so much discrimination going on in the school system and in housing. I can just remember being surrounded by people in Clovis. I couldn't find a lawyer over there, and so I said, "oh I'll just go to law school."

Who was your favorite professor at the UNM School of Law?

Ted Occhialino was one of the best instructors I've ever had. He came to the law school as a visiting professor when I was there. He taught federal civil procedure, and that is the one thing I maintain that I still know.

What were your aspirations once you graduated from law school?

When I graduated from law school, I worked for the American Indian Law Center, which I really loved. I was hired by Toby Grossman to advance White House meetings for tribal leaders. We had a program where we would bring Native Americans into the university and place them in internships with various federal agencies that had dealings with tribes. They would then teach the tribes how to deal with some of their issues on a regional and state level instead of having to travel to Washington, D.C. So if the tribe had a problem, they would have a face or a name they could call who wasn't miles and miles away. That was fascinating. One of the women that we placed (I can't remember her name), but she was so damn good, she ended up being a big shot at HUD when she finished the whole program.

Speaking of the White House, did you think you would ever live to see a black president?

No. First of all, I didn't know much about Barack Obama when he came on the scene, I just knew he was a young guy from Illinois. I was a Hillary Clinton supporter, because I knew Hillary Clinton. But I am a Yellow Dog Democrat, so when he got the nomination, I worked like hell. The thing I liked about the whole situation was that Hillary made him a better candidate. She was so good. He wasn't that great until he was up against her. But I am very glad that it happened. I never thought we would have a black president. And I never thought that we'd have a black secretary of state either. But we've had two.

Do you think that we will have a female president in the next 12 years?

I wouldn't be surprised at all. I hope so. You look at what happened in the election, of course, and you think about the demographics of our ever-changing nation. I hope that we have one. I'm pretty impressed with what I've lived to see. I've been very fortunate.

Why did you choose to practice family law after law school?

I had my background in social work and I had taken a mediation course as well. Also, I had been through a divorce and recognized the damage it did to children.

Why did you decide to go into private practice instead of working for the government?

I knew that I couldn't work for anybody else, but I also knew I didn't know enough. I made a deal to share an office with a lawyer (who happens to still be my friend) if he agreed to supervise me. I backed into doing employment law, probably in the late 80s. It was a gradual shift. But when I shifted, I had to become bigger because I had to hire lawyers. In employment law, you have to know more than just employment law; you have to know a little bit of everything. In a way it's like a divorce when you're suing people because jobs are just about 95 percent of who you are as a person.

You have been practicing law for a little over 35 years. What advice can you offer recent law school graduates?

I don't think new attorneys should go out on their own right out of law school like I did. I think if you're going to be a trial lawyer, the best place to go is either the public defender's or the district attorney's office. You can go to one of those big firms, but they are so concerned about billable hours. If you really want the experience of doing a trial, go to one of those agencies that get you out there right away.

What is your favorite thing about New Mexico?

Just being in this magical place, with these mountains...this landscape. I feel at home. I traveled a lot before I came to New Mexico and this is the only place that I've never wanted to leave.
The Internet and Social Media: Friends and Foes
IDEAS NEED PROTECTION.

The seeds of invention often require protection from the weather of today’s global competition. Carstens & Cahoon offers both the legal and technical insight needed for your ideas to prosper and grow. We are dedicated to helping our clients with all of their intellectual property needs. To find out how we can provide the shelter your ideas need, contact us. Dedicated to protecting ideas.®


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At home or in the office, during work or at play, with our peers and colleagues or with family and friends, we have become increasingly connected via social media. Broadly speaking, the definition of “social media” is any technology that lets people publish, converse and share content online. As of Dec. 2, 2012, Wikipedia listed more than 200 active social media websites, from sites such as Facebook with 908 million subscribers to NGO Post (in India) with 15,000 subscribers to The Sphere, a “private online social luxury network with exclusive personalized services,” with 1300 members. Although there is a common perception that social media is limited to a specific generation, a recent study by the Houston Chronicle stated that 69 percent of online adults, including 38 percent of Americans over the age of 65, use social media. It affects everyone.

In addition to the broad appeal of networks in the social context, social networks have broad application to the workplace. Recent surveys indicate that 88 percent of companies survey or consider social media as part of their hiring process. Additionally, more employers are creating social media policies in the workplace.

This issue of the New Mexico Lawyer focuses on the inherent legal conflicts that arise between privacy issues and the broad use of electronic media.

Gina Constant describes various discovery-and privacy-related issues that arise in the context of litigation.

In a related article, Ian Bezpalko highlights ongoing state legislation and federal legislation of the Social Online Protection Act under the Stored Communications Act and the Computer Fraud and Abuse Act to provide additional privacy rights for individuals.

Talia Kosh, 2013 chair of the Intellectual Property Law Section, analyzes the benefits and potential impact of social media “crowdfunding” on film makers, start-ups, and small businesses and the impact of the federal Jumpstart Our Business Startups Act on the filmmaking industry.

As we sign up for social media and establish various electronic accounts, the laborious reading of terms of service agreements when acquiring new products and enrolling in various programs is critical but often overlooked and even avoided by most people as they click on “accept” without reading terms and conditions. Using two recent case studies, Peter Ives identifies some of the help available to those for whom the review of such agreements is too taxing or incomprehensible. Ives also highlights some of the provisions that should serve as warnings before a person accepts the privacy issues and terms of service agreements.

Finally, I provide some “best practices” for creating strong password protections that should be considered by every individual, regardless of the frequency or extent of one’s use of social media or the Internet.

Endnotes
A typical claim for personal injury includes physical injuries as well as emotional distress and loss of enjoyment of life. Sometimes, and perhaps more often than not, the plaintiff’s social networking website accounts will be mined by defense counsel for relevant content. For instance, did a plaintiff who claims to have been so seriously injured in an auto accident that she can barely walk actually go snow skiing last weekend and post pictures on Facebook?

So how do courts address a request for a plaintiff’s social networking site (SNS) content? While there is not an abundance of case law on the topic, some general themes are emerging.

Courts addressing this issue have attempted to balance privacy concerns with liberal discovery rules. The privacy rights are usually based on three sources: The Fourth Amendment, Title II of The Electronic Communications Privacy Act, and Rule 26(c)(1) of the Federal Rules of Civil Procedure. The protection afforded by these sources varies. First, the Fourth Amendment will not support a claim of privacy since there cannot seriously be a reasonable expectation of privacy when a person took the affirmative action of posting content and opening it up to the public eye. Romano v Steelcase Inc., 907 N.Y.S.2d 650, 654 (N.Y. Sup. Ct. 2010). Also, SNSs like Facebook and MySpace have disclaimers that preclude a poster from having a realistic expectation of privacy, which is a requirement for Fourth Amendment protection. Second, Title II of the Electronic Communications Privacy Act prohibits SNSs from disclosing a customer’s electronic communications without the customer’s approval. 18 U.S.C. §§ 2701, 2702. And a subpoena to the SNS in a civil action is no exception to the Act. 18 U.S.C. § 2702(b); In re Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606, 609 – 611 (E.D. Va. 2008). Finally, parties who resist providing their SNS content in discovery usually seek a protective order pursuant to Rule 26(c)(1), which allows such “an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden.”

To overcome these privacy protections, the party seeking the SNS content must show that the requested SNS content is relevant to a claim or defense in the case and the request must be narrowly tailored enough so that it is reasonably calculated to lead to the discovery of admissible evidence. Mailhoit v. Home Depot U.S.A., Inc., No. 11-3892, 2012 U.S. Dist. LEXIS 131095, at *7–9 (C.D. Cal. Sept. 7, 2012).

The following are some examples of how courts have balanced the competing interests of privacy and liberal discovery:

- Where the plaintiff alleged serious physical injuries, emotional distress, and impaired quality of life, the court required the plaintiff to upload onto an electronic storage device SNS information within a relevant timeframe. The device was to be delivered to defense counsel who was required to keep the information confidential. The parties could then come back to court if disputes remained.

- In another case, the defendant served very narrow discovery requests asking only for SNS content specifically related to the plaintiff’s allegations of “teasing and taunting.” An in camera review by the court showed that the plaintiff’s production was so under-inclusive that the court required her complete SNS profile be provided to the defendant.

- Another court in a dispute about the scope of discovery of photographs on a party’s SNS pages gave the parties the following guidelines:
Pictures of the claimant taken during the relevant time period and posted on a claimant’s profile will generally be discoverable because the context of the picture and the claimant’s appearance may reveal the claimant’s emotional or mental status. On the other hand, a picture posted on a third party’s profile in which a claimant is merely ‘tagged,’ is less likely to be relevant. In general, a picture or video depicting someone other than the claimant is unlikely to [be relevant].

- Closer to home, a plaintiff in our federal district court alleged sexual harassment and emotional damages and testified in her deposition that her depression included a loss of interest in socializing and dating. Therefore, social networking was squarely before the court and access to her social networking sites was deemed to be relevant. First, in order to avoid the release of the plaintiff’s password and login information, the court ordered the parties to meet at the plaintiff’s attorney’s office so that the plaintiff could open her Facebook, Twitter, and MySpace pages. When the court determined that there was evidence that the plaintiff may have deleted her MySpace account while the lawsuit was pending, it ordered her to provide defense counsel with written consent to a subpoena to MySpace for all stored content.

So attorneys should feel free to request relevant SNS content. Also, attorneys should know that they will not be sanctioned for secretly perusing an opposing party’s public content unless they used improper means to hack into the account. Womack v. Yeoman, 2011 Va. Cir. LEXIS 143 at **2-**5 (Va. Cir. Ct. Oct. 28, 2011). Finally, attorneys would be wise to advise their clients to make their Facebook, Twitter, MySpace, LinkedIn, and other SNS profiles “private” as soon as litigation is anticipated, but know that private SNS content is not immune to discovery if the previously public content suggests discoverable information in the now-private content. Romano, 907 N.Y.S.2d at 656.

Endnotes
1 New Mexico’s rule contains the same language. See Rule 1-026(C)(1) NMRA.
3 Bass v. Miss Porter’s School, No. 08-1807, 2009 U.S. Dist. LEXIS 99916 at *1 (D.Conn. 2009).

Gina Constant is a registered patent attorney at the Rodey Law Firm in Albuquerque. In addition to her legal experience, she has 20 years of business experience including two years as a process engineer at a nuclear-chemical processing plant, fourteen years as an engineer and manager at Intel, and five years in partnership with her husband running a small health care business.
An article by Marc Andreessen in the Aug. 20, 2013, edition of the Wall Street Journal stated outright that “software is eating the world.” By this, Andreessen meant that software is superseding hardware in importance—if only because hardware has been outsourced—and that Internet companies such as Facebook and Twitter represent the future of what we call computing. Through such applications, anybody can build a personal brand and leverage it in employment interviews.

We in the legal profession can see a fundamental shift in the way companies recruit and retain employees. With this shift new issues arise that business must address, particularly in the areas of privacy and confidentiality. Unfortunately, the dominant approach appears to be to shoehorn fixes into the current framework.

Facebook’s Statement of Rights and Responsibilities, last revised June 8, 2012, states clearly under paragraph 4, point 8, that a subscriber “will not share [their] password … let anyone else access [their] account, or do anything else that might jeopardize the security of [their] account.” Facebook itself cautions that by accessing a Facebook page, an employer may find that the employee is a member of a protected group and thus the employer may be liable to a claim of discrimination if the potential employee is not hired.1

Some states are moving to block employers from asking for access to online profiles. Illinois Governor Pat Quinn signed such a law, which even prevents the request for such information regardless of whether the employer must conduct a thorough background check. Maryland, the first state to pass a law preventing employers from requesting or requiring that an employee surrender login details, codified the law at Ann. Code. Md. §3-712 (2008 Replacement Volume and 2011 Supplemental), which took effect Oct. 1, 2012. Comparatively, it does not go as far as the Illinois law and permits the access of online accounts to ensure compliance with applicable securities or financial law, or regulatory requirements. New Jersey and California are considering similar legislation.

Also attracting attention are two current federal laws, the Stored Communications Act and the Computer Fraud and Abuse Act. The SCA, 18 U.S.C. § 2701, prohibits intentional access to electronic information without authorization or by intentionally exceeding limited authorization, and the CFAA prohibits intentional access of a computer, without authorization, to obtain information under 18 U.S.C. § 1030(a)(2)(C). Civil liability under the SCA has been found when a company requested an employee’s login credentials in order to access private information contained in a chat group (Pietrylo v. Hillstone Restaurant Group, 2009 WL 3128420 (D.N.J. 2009)), and on an employee website (Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002)).

New federal legislation to address privacy concerns and make it an offense to request login credentials as part of an employment application has been proposed. On April 27, 2012, Representatives Eliot Engel and Jan Schakowsky introduced H.R. 5684, the Social Networking Online Protection Act. Currently, the bill is before the House Committee on Education and the Workforce. On May 9, 2012, Senator Richard Blumenthal introduced as companion legislation the Password Protection Act of 2012, Senate Bill 3074. The bill is currently before the Senate Committee on Health, Education, Labor, and Pensions.

Future employees and current ones will certainly use the services of Facebook, Twitter, and other online applications to build a brand. In doing so, no one should ignore ramifications of this endeavor, including the inevitable surrender of one’s privacy.

Endnotes


Ian Bezpalko is a member of the Intellectual Property Law Section and has been in private practice for six years.
On April 5, 2012, President Barack Obama signed the Jumpstart Our Business Startups Act (JOBS Act) into law to spur job creation by small companies and start-ups by relaxing the regulatory burdens of raising capital.

The JOBS Act allows small businesses and creative companies to access funds outside of the large accredited investor or venture capital firm. Specifically, it amends the Securities Act of 1933 with a registration exemption for transactions involving individual investments limited to the lesser of $10,000 or 10 percent of an investor’s income. Additionally, the entrepreneur can raise up to $1 million within a 12-month period through an SEC-registered “crowdinvesting portal.” The prediction is that the JOBS Act will change the face of venture capitalism. Only time will tell whether it will truly result in a new version of the American dream.

It is clear there is a great need for the JOBS Act. Small and mid-cap companies have been few and far between in the public-funding game for many years, and entrepreneurs are facing a global capital crunch along with fewer banks offering small business loans. The JOBS Act is an attempt to ease the problems of attracting capital in a difficult market.

Current crowdfunding regulations only allow offerings of non-monetary, donation-based rewards to donors and prohibit offering a stake in the company or a percentage of the profits. Many crowdfunding sites have already shut down because they cannot pursue helpful innovations due to such limitations. The JOBS Act has asked the SEC to adapt these rules to the current economy and the rapidly changing digital age.

When these new rules are written and adopted by the SEC by 2014, the regulatory landscape could be a “game changer” for the start-up and creative company. Creative companies and filmmakers around the nation await the SEC’s rules with a hopeful eye. The SEC’s interpretation of the bill and its amendments will determine to what degree this landscape will truly change. However, the JOBS Act was strongly opposed by the SEC and state securities regulators, and it will be years before everyone will be able to comprehend all of the opportunities, limitations, and areas for potential fraud.

With the JOBS Act’s “crowdfunding exemption,” the latest type of crowdfunding opening up new territory in raising money and soliciting investment, is equity-based crowdfunding, also known as “crowdinvesting.” Rather than crowd-funders merely receiving a perk for their donation, such as a letter of acknowledgement for a limited edition DVD, funders may become shareholders of the company with their contributions, receiving returns if the company does well.1

Since the passage of the JOBS Act, we have seen ever-increasing usage of crowdfunding platforms such as Kickstarter, Indiegogo and Fundable. These crowdfunding platforms have helped fund everything from startups to film and music projects to product ideas. While the forecast is still unclear as to the long-term viability of these platforms, crowdfunding should be a consideration for any start-up or creative company.

The SEC’s interpretation of the JOBS Act may be disappointing to many. Some are predicting that the SEC will lean toward requiring that registered broker-dealers be involved in each crowd-funded transaction. If regulated equity crowdfunding requires a

continued on page 10
Albuquerque Business Law’s IP Division emphasizes client service. Experienced patent attorneys Diane Albert and Kameron W. Kramer offer satisfaction guaranteed with flat fee filings and regular feedback to clients to ensure that they always know where they are in the process. Whether clients are new to the patent process or old hands, they will appreciate the way Albert and Kramer combine IP legal expertise and technical savvy (Albert has degrees in mathematics, materials science and metallurgical engineering, Kramer in chemical engineering) to make IP protection as efficient and stress-free as possible. And, ABL/IP is one of the few firms in the area to combine expertise in IP protection and IP litigation.

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The patent law change going into effect on March 16, 2013, has immediate impact anyone who is thinking about protection for any invention s/he has created in the past.

HR 1249, the Leahy-Smith America Invents Act (AIA) shifts the United States from a “first-to-invent” system to a “first-to-file” system. If any of your clients has been sitting on an invention for years, even decades, and has the proof via lab notebooks that s/he is the first to invent, they need to act now to file a patent application!

There is much at stake for inventors and prospective inventors, and it is important to direct your clients to experienced patent attorneys who know how to help entrepreneurs to successfully navigate the changes and plan for future protection. Small companies and independent inventors in particular need to talk to an IP attorney to help them create a strategy to win the day in the “race to file.”

Six-month grace period ends March 16
The AIA (also called the Patent Reform Act of 2011), enacted on September 16, 2011, changes the rules. After March 15, 2013, a claimed invention is not novel if it:

“was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention”

or:

“was described in a patent issued under section 151, or in an application for patent published or deemed published under section 122(b), in which the patent or application, as the case may be, names another inventor and was effectively filed before the effective filing date of the claimed invention.”

Major points regarding the First-Inventor-to-File are the applicant must be the true inventor or assignee; the “effective filing date” equals the earliest priority date; prior art is expanded to include disclosure available to the public anywhere; “effectively filed” includes foreign priority dates; and the priority date will be the effective date for both novelty-defeating and obviousness.

Exceptions to prior art include a one-year grace period for inventor or joint inventor which applies to all “disclosures” which may include offers, sales and public uses.

Other areas of change in AIA
There are three other major areas of change that may affect your clients:

• Patent Office prosecution fees and funding
• Litigation reforms
• Patent Office proceedings

Act now!
Whether your clients believe they have something patentable, are considering filing a patent in the future, or have protected IP in their business or their business plans, they need to evaluate their situation in light of the AIA. Changes in policies and proceedings can mean delay or disappointment if an inventor does not understand the new landscape. Any client who is depending on patent protection for successful execution of his/her business strategy needs to talk to an experienced, dedicated patent attorney now.

Like this type of information?
Albuquerque Business Law’s IP Division is here when you need us to provide IP protection and litigation expertise. For regular updates in IP law and how it affects you and your clients, subscribe to our blog at www.albuquerquebusinesslaw.com/blog.
broker-dealer with higher fees and revenue expectations, this will make it more difficult for small businesses to benefit from these deals and, consequently, from the JOBS Act. As crowdfunding portals are intended to be an alternative to broker-dealers, it will be hard to watch broker-dealers taking away most of their business should these rules be written as some are predicting.

More disappointing is the SEC’s answers to some preliminary questions about investor accreditation requirements. The SEC stated that different investors may need to supply the government with different information based on the type of investor they are considered. 2 This suggests rules which will be even more difficult for creative companies to understand, as now investor accreditation may change depending on how that investor is solicited.

Yet there is still much room for optimism. On Kickstarter last year, 10,000 different projects raised nearly $100 million combined, and over one million people have financially contributed. A culture is developing around crowdfunding and the opportunities are increasing, even extending to the manufacturing sector with 3D printing technologies that could allow people around the world to build and sell their own creations, with just a small injection of capital from the “crowd.”

Whatever way the SEC writes the rules, crowdfunding still has the spotlight. Crowdfunding’s capacity for networking and the ability to create a fan base for a company or its product is unrivaled. Reaching high numbers of smaller investors, who have an even wider reach of their own contacts, can have potentially greater value than working with a few large private investors. This can make everyone in the crowd “friends” who can come together and make real investments in companies they believe in. Investment then becomes a game of how to build community support and engagement at all phases of a business. As Sam Hogg at entrepreneur.com has stated, “Equity crowdfunding has essentially created a new era, that of the recreational venture capitalist.”

The SEC is still taking public comments on their rulemaking for JOBS Act provisions at www.sec.gov/spotlight/jobsactcomments.shtml. Please reach out to the SEC and let them know your thoughts and how this legislation might impact your clients.

Endnotes
1 Sec.gov, “US JOBS Act, Frequently Asked Questions.”

Talia Kosh is an associate at The Bennett Firm in Santa Fe, practicing in the areas of employment law, personal injury, contract law, nonprofit matters and copyright law. She is the president and founder of New Mexico Lawyers for the Arts, a nonprofit organization providing pro bono legal assistance and educational programs to artists and art organizations.

The US JOBS Act and Crowdfunding continued from page 7

We want to congratulate our clients on their success:

• Honeywell has received 270 patents filed and prosecuted by O&L.
• Neurmorphic computing start-up KnowmTech LLC receives its 22nd U.S. patent.
• Front Row technology signs patent license with Kangaroo Media, Inc. for $4M.
• Xerox Corporation receives its 103rd issued patent filed and prosecuted by O&L.
• Scientist Eleanor Schuler settles federal lawsuit and obtains control over valuable medical neurosignaling patent portfolio now scheduled for monetization.

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Privacy Issues in the Electronic Age: Terms of Service Agreements

By Peter Ives

Terms of service agreements are everywhere you look in this electronic age. Every time you sign up online for a new account, you are generally compelled to “<click>” to accept the terms and conditions under which the provider of the account or software is willing to provide the service. These agreements are drafted long before you, the consumer, are ever involved in your part of the transaction, and so there is never an opportunity for you to negotiate those terms. Such terms of service agreements, while occasionally written in plain English, often contain provisions that only a lawyer who has studied contracts will grasp or understand. These agreements are generally binding (that, however, is a topic for another day), and certainly it is best to presume that if push comes to shove, you will need to abide by those terms. After all, nobody made you set up that account or buy that software. This sin of omission, signing an agreement we have not read, is one we are all likely guilty of, especially when the new version of a particular software is out, perhaps iTunes 11.0, and we signed up back when it was version 8.2.

Wow! That’s Amazing!

So you ask, “How bad can that be?” The answer (not surprising given what can be done via our computers in this day and age) is that it can be very bad. A recent proceeding before the Federal Trade Commission, In the Matter of Designerware, LLC, et al.,1 is illustrative of the extent to which modern technology can be used inappropriately. Earlier this year, the FTC filed a complaint which contained some rather startling allegations. To understand the nature of the allegations, the business operation must be understood.

Designerware created PC Rental Agent, a software package marketed to rent-to-own stores, especially those renting electronic equipment such as computers. Most often, a consumer, without sufficient funds to buy outright or credit to finance the acquisition through other means, signs an agreement to rent the computer with an option to purchase for a fixed price after paying some amount as rent. The product was a hit in the rent-to-own industry.

“As of August 2011, approximately 1,617 rent-to-own stores in the United States, Canada, and Australia ha[d] licensed PC Rental Agent. PC Rental Agent has been installed on approximately 420,000 computers worldwide.”2

A portion of the PC Rental Agent software involved an application or module entitled “Detective Mode,” which allowed a user to not only track the physical location of the computer, but also to record data entered into the computer by the lessee. It even allowed the rent-to-own company to see the consumer surreptitiously through the computer’s webcam. Beyond that, Detective Mode allowed the company “to cause fake software registration windows to pop up on rented computers and gather consumer’s personal information.”3 No requirements existed for rent-to-own companies to advise their lessees that these features were on the machines, and “[t]he presence of PC Rental Agent [was] not detectable to a computer’s user and the computer’s renter cannot uninstall it.”

The FTC noted:

“in numerous instances, data gathered by Detective Mode has revealed private, confidential, and personal details about the computer user. For example, keystroke logs have displayed usernames and passwords for access to email accounts, social media websites, and financial institutions. Screenshots have captured additional confidential and personal information, including medical records, private emails to doctors, employment applications
containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit.… In numerous instances, Detective Mode webcam activations have taken pictures of children, individuals not fully clothed, and couples engaged in sexual activities.”

Makes one think “Wow! That’s amazing!” and pretty scary. The opportunity for gathering information about you is vast and not to be underestimated. What can be legally collected is often a matter set forth in terms of service agreements as well as in various statutes. In the Designerware Case, the draft consent order prohibited:

“[l]icensing, selling, or otherwise providing any third party with geophysical location tracking technology; receipt of an express affirmative consent by the computer user to same; and an icon that, when clicked, would indicate whether the geophysical tracking was on or not.

Endnotes

3  FTC Complaint; In the Matter of Designerware, LLC, a limited liability corporation, FTC File No. 1123151, Federal Trade Commission (the “FTC Complaint”).

4  FTC Complaint, ¶ 5.

5  FTC Complaint, ¶ 6

6  FTC Agreement Containing Consent Order, p.6.


8  Order Granting Defendant’s Motion to Dismiss, Deacon v. Pandora Media, Inc., Case No. C 11-04674 SBA, p.3.

Peter N. Ives is in-house counsel for the Trust for Public Land, where he advises the GIS Division on licensing and contract issues, as well as working on conservation transactions. He also enjoys crafting policy as a city councilor for the City of Santa Fe. He is a graduate of Harvard College and Georgetown University law Center.

The plaintiff alleged that Pandora violated the provisions of the VRPA by disclosing the Pandora customer’s name and listening history. The district court dismissed the plaintiff’s complaint, noting in part that

Plaintiff also fails to confront the fact that Pandora’s Terms of Use, which govern a subscriber’s use of the Pandora internet radio service, foreclose any borrowing or use of any temporary song file supplied by Pandora. . . . In particular, the Terms of Use plainly states[sic] that subscribers shall not “copy, store, edit, change, prepare any derivative work of or alter in any way any of the tracks streamed through the Pandora Services. Id., pp.9-10.

The terms of service agreement, upon which provision of the service by Pandora was based, allowed Pandora to successfully argue that its users were not “borrowing” any music, one leg of a possible violation of the VRPA. While the disclosure of a person’s music listening preferences might not seem of extraordinary importance, a minimal $5,000 penalty across the class of Pandora subscribers made for a large potential damage award.

What to do? One option is to actually print and read through the terms of service agreement each time the issue arises. That way, at least, you will know from an informed perspective what is being done to you or what is being done with your information. That would be a best practice. If the thought of that is still too onerous to contemplate, you might try using one of the helpful websites out there that does the bulk of that heavy lifting for you, such as Terms of Service–Didn’t Read (http://tos-dr.info/), a crowdsourced site that evaluates terms of service agreements, noting, “We are a user rights initiative to rate and label website terms & privacy policies, from very good ‘Class A’ to very bad ‘Class E.’” In addition to rating various sites’ terms of service, it also highlights key provisions in those agreements, including whether or not you will be informed if a law enforcement agency has requested information on you or whether your terms of use can be changed at any time, or not, and with or without notice to you. Remember, just because you aren’t paranoid doesn’t mean that there isn’t someone out there watching you.
Security experts estimate that more than one billion hacking attempts were made worldwide in 2012, and yet people remain largely apathetic about their online passwords. 1 The sobering reality is that most people will eventually get hacked. Nicole Perlroth, who writes on cybersecurity for the New York Times, describes her own experience:

“I set up unique, complex passwords for every Web site, enabled two-step authentication for my e-mail accounts, and even covered up my computer’s Web camera with a piece of masking tape—a precaution that invited ridicule from friends and co-workers who suggested it was time to get my head checked.

But recent episodes offered vindication. I removed the web-cam tape . . . only to see its light turn green a few days later, suggesting someone was in my computer and watching. More recently, I received a text message from Google with the two-step verification code for my Gmail account. That’s the string of numbers Google sends after you correctly enter the password to your Gmail account, and it serves as a second password. The only problem was that I was not trying to get into my Gmail account. I was nowhere near a computer. Apparently somebody else was.”

Perlroth’s experience is not uncommon. As she points out in her article, everyday hackers are looking for passwords to sell on auction-like market sites “where a single password can fetch $20.” 3 Password-cracking programs can also be purchased that can test millions of passwords per second. But there are measures that can be used to increase your own security and to make hacking into your accounts more difficult and less attractive to would-be hackers. Here are measures you can take, gleaned from multiple sources and from my own personal experience, to provide better password protection.

• Do not use the same password for more than one account—ever. Same goes for “challenge questions.” If you DO use the same password for an account, use different challenge questions for the second account.
• Make challenge questions more challenging. For example, if you grew up on Dogwood Street, instead of using “Dogwood” or “DogwoodStreet,” add the number in front of the name so it becomes “11224 Dogwood Street.” Instead of identifying the hometown in which you were born (perhaps readily available to a hacker looking at your Facebook page), list the hospital in which you were born. For example, instead of “Baltimore, MD,” list “Eastside Medical Center.” Remember, THE COMPUTER DOES NOT CARE! One word of caution, however. Security people looking for fraud will frequently look for patterns. A person that lists “coconut-creampies” for her favorite book, movie, AND place of birth may get rejected by the institution’s own internal monitoring systems. But the computer does not care if you list “TaleofTwoCities” as your favorite color or “Thirty Shades of Green” as your favorite restaurant.
• Use strong passwords for ALL of your accounts. Don’t use strong ones for financials and weaker ones for non-financials.
• Don’t click on the “remember this password”—ever. If you are concerned about remembering the password, write it down somewhere, preferably not on sticky notes on your computer, or download a text file and store it on an encrypted password-protected USB drive. Storing passwords on your desktop is not recommended. If malware infects your computer, they will be lost.
• Go Long. A strong eight-character password is easier to crack than a longer weak one. As an example, use upper and lower case (remember there are 26 letters for each space as opposed to the 10 digits for each space if you only use numbers), and using upper and lower case doubles the possibilities for each space. Mixing in some random characters increases the difficulty. Still, you can make them easy to remember. For example, using the website www.passfault.com to evaluate the complexity of passwords, the phrase: “whyRU-askingmethis?” would take about 86661 centuries to crack, with 262 quintillion combinations. That’s a lot of zeroes.
• Changing Passwords. Changing passwords every 60-90 days may enhance security—or maybe not. Making password changes frequently tends to defeat some of the other “better practices.” Employees don’t like it. People will tend to use the same password for multiple accounts, or they will tend to jot them down on sticky notes or some other convenient place in order to access and remember them. While changing passwords frequently is not a bad thing to do, it only enhances security if other practices are followed. 4
• Forget the dictionary. Even numbers inserted within words are easily hacked. To repeat, forget the dictionary. Enough said.
• Use a password manager? Maybe not. Perlroth identifies some programs that will help create strong passwords for you and that will
automatically log you into sites as long as you provide one master password. LastPass, SplashData and AgileBits offer password management software for Windows, Macs, and mobile devices but, and you have likely identified the problem, the software still lies on the computer itself. Perlroth mentions that at a security conference in Amsterdam in 2012, hackers demonstrated how easily the cryptography used by many popular mobile password managers could be cracked.5

• Use different browsers. Consider using different browsers for different activities; e.g., one browser for your banking, another for web browsing, perhaps another one for checking email. That decreases the chances of catching a virus for your banking accounts when accidentally stumbling across a tainted/infected celebrity news site. Some recent studies have shown that Chrome was the least susceptible to attacks compared to Firefox and Microsoft Internet Explorer.

• Create stronger user accounts. In addition to a strong password, increasing the complexity of your user identification will increase security. These need not be complex. For example, adding a middle initial or middle name to the user account enhances the complexity. This should not be a substitute for some of the other procedures, but it is easy and need not be mind-numbing.

• Use an alternative email account for password resets. Everyone likely forgets a password from time to time and invariably will require a password reset. Most intruders will expect password information to go to your “public” email account, which is easier to discover than a secondary account created specifically for password resets.

• Limit those who have access to your accounts. Even when registering for online accounts, one can decide not to use your real email account. Services such as “10minutemail.com” allow users to register and confirm an online account which self-destructs 10 minutes later.

Advances are being made to enhance security through the use of biometric sensors, such as keystroke patterns or iris scans. Apple has recently acquired AuthenTec, a maker of biometric sensors. Eventually, biometrics may be integrated into the iPhone and other electronic devices, but those systems are not yet in place. However, by using even a few of the suggestions discussed above, you can increase your online and electronic security.
ALBERTO A. LEÓN, JD, Ph.D.

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# Legal Education

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505-841-6873 (fax)

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RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2012 NMRA:

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**RULES OF CRIMINAL PROCEDURE FOR THE MAGISTRATE COURTS**

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<tr>
<th>Rule</th>
<th>Description</th>
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<td>6-702</td>
<td>Advising defendant of right to appeal</td>
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<td>6-703</td>
<td>Appeal</td>
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<tr>
<td>6-705</td>
<td>Withdrawn-Appeals; dismissals for failure to comply with rules or failure to appear</td>
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<td>6-503</td>
<td>Disposition without hearing</td>
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**RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS**

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<tr>
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<tr>
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<td>08/03/12</td>
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<tr>
<td>7-703</td>
<td>Appeal</td>
<td>08/03/12</td>
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<tr>
<td>7-705</td>
<td>Withdrawn-Tape recordings of proceedings; appeals on the record</td>
<td>08/03/12</td>
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<tr>
<td>7-706</td>
<td>Withdrawn-Statement of appellate issues; appeals on the record</td>
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<tr>
<td>7-707</td>
<td>Withdrawn-Review of review by district court; appeals on the record</td>
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<tr>
<td>7-709</td>
<td>Withdrawn-Appeals; dismissals for failure to comply with rules or failure to appear</td>
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**RULES OF PROCEDURE FOR THE MUNICIPAL COURTS**

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<tr>
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<tr>
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<td>Appeal</td>
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<td>8-705</td>
<td>Withdrawn-Appeals; dismissals for failure to comply with rules or failure to appear</td>
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**CRIMINAL FORMS**

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<tr>
<td>9-403A</td>
<td>Conditional order of appointment; plea and waiver</td>
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**CHILDREN’S COURT RULES AND FORMS**

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<td>Withdraw</td>
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<td>10-427</td>
<td>Withdrawn</td>
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<td>10-111</td>
<td>Motions; how and when presented</td>
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<td>10-262</td>
<td>Sealing of records under Section 32A-2-26 NMRA 1978</td>
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<td>10-341</td>
<td>Witness immunity</td>
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<td>10-342</td>
<td>Admissions, including no contest pleas, and consent decrees</td>
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<td>Form 10-420</td>
<td>Sealing order</td>
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<td>10-223A</td>
<td>Physical restraints in the courtroom</td>
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**RULES OF EVIDENCE**

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<th>Description</th>
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<tbody>
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<td>11-102</td>
<td>Purpose and construction</td>
<td>06/16/12</td>
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<td>11-103</td>
<td>Rulings on evidence</td>
<td>06/16/12</td>
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<tr>
<td>11-104</td>
<td>Preliminary questions</td>
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<td>11-105</td>
<td>Limiting evidence that is not admissible against other parties or for other purposes</td>
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<td>11-106</td>
<td>Reminder of or related writings or recorded statements</td>
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<tr>
<td>11-107</td>
<td>Comment by court</td>
<td>06/16/12</td>
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<td>11-201</td>
<td>Judicial notice of adjudicative facts</td>
<td>06/16/12</td>
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<td>11-301</td>
<td>Presumptions in civil cases generally</td>
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<td>11-302</td>
<td>Presumption in criminal cases</td>
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### Rule-Making Activity

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at [http://nmsupremecourt.nmcourts.gov](http://nmsupremecourt.nmcourts.gov).

To view recently approved rule changes, visit the New Mexico Compilation Commission's website at [http://www.nmcompcomm.us](http://www.nmcompcomm.us).

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<td>Admissibility of other evidence of content</td>
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<td>Copies of public records to prove content</td>
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<td>11-1006</td>
<td>Summaries to prove content</td>
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<td>Testimony or statement of a party to prove content</td>
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<td>Functions of the court and jury</td>
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<td>Applicability of the rules</td>
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**Rules of Appellate Procedure**

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<td>Calendar Assignments</td>
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<td>12-211</td>
<td>Transcript of proceedings</td>
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<td>12-302</td>
<td>Appearance, withdrawal or substitution of attorneys; change of address or telephone number</td>
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<td>12-212</td>
<td>Exhibits and depositions; general calendar cases</td>
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<td>12-603</td>
<td>Appeals in actions challenging candidates or nominating petitions; primary or general elections; school board recalls and recalls of elected county officials</td>
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<td>12-405</td>
<td>Opinions</td>
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**UJL—Civil**

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<td>Promissory estoppel; definition</td>
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<td>13-2304</td>
<td>Retaliatory discharge</td>
<td>05/26/12</td>
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<td>13-2006</td>
<td>All jurors to participate</td>
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<td>13-2320</td>
<td>Special verdict form for wrongful discharge cases</td>
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<td>13-832</td>
<td>Good faith and fair dealing</td>
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**UJL—Civil**

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<td>14-5131</td>
<td>Duress; no defense to homicide</td>
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**Rules Governing Admission to the Bar**

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<td>Legal services provider limited law license</td>
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**Rules Governing Discipline**

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<td>Types of discipline</td>
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<td>Resignation by attorneys under investigation</td>
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<td>17-210</td>
<td>Reciprocal discipline</td>
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<td>17-212</td>
<td>Resigned, disbarred or suspended attorneys</td>
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<td>17-213</td>
<td>Appointment of counsel</td>
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<td>17-214</td>
<td>Reinstatement</td>
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<td>17-306</td>
<td>Required presence of attorney; subpoena power</td>
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<td>17-307</td>
<td>Investigation of complaints</td>
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**Rules Governing the Client Protection Fund**

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<td>Composition and officers of the commission</td>
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**Rules of Legal Specialization**

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<td>Board of Legal Specialization; title</td>
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**Rules Governing the Recording of Judicial Proceedings**

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<td>22-101</td>
<td>Scope; definitions; title</td>
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<td>22-203</td>
<td>Application; qualifications; renewal of certification</td>
<td>01/27/12</td>
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<td>22-501</td>
<td>Examination standards</td>
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**Supreme Court General Rules**

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<td>23-106</td>
<td>Supreme Court rules committees and rule-making procedures</td>
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**Rules for Review of JSC**

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<td>27-401</td>
<td>Disposition</td>
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PROPOSED REVISIONS TO THE RULES OF EVIDENCE

The Rules of Evidence Committee is considering whether to recommend amendments to Article 5 of the Rules of Evidence for the Supreme Court's consideration. The amendments are intended to make Article 5 internally consistent and consistent with the recent stylistic revisions to the Rules of Evidence. If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://nmsupremecourt.nmcourts.gov/ or sending your written comments to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received on or before March 6, 2013, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

11-501. Privileges recognized only as provided. [Except as otherwise] Unless required by the constitution, [and except as provided in] these rules, or [in] other rules adopted by the supreme court, no person has a privilege to:

A. refuse to be a witness; [or]

B. refuse to disclose any matter; [or]

C. refuse to produce any object or writing; or

D. prevent another from being a witness [or], disclosing any matter, or producing any object or writing.

[As amended, effective ; as amended by Supreme Court Order No. , effective for all cases pending or filed on or after .]

11-502. Required reports privileged by statute.

A. Scope of the privilege. [A person, corporation, association or other organization or entity, either public or private, making a return or report required by law to be made] Should any law require a return or report to be made and the law mandating the creation of that report or report provides for its confidentiality, the person or entity, in either a public or private capacity, making the return or report has a privilege to refuse to disclose, [and] or to prevent any other person from disclosing, [the] return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides.] the return or report.

B. Exceptions. [No privilege exists under this rule in] The privilege does not cover a return or report that does not comply with the law that mandates its creation, nor actions involving perjury, false statements, or fraud in the return or report [or other failure to comply with the law in question].

[As amended by Supreme Court Order No. , effective for all cases pending or filed on or after .]

11-503. Lawyer-client privilege.

A. Definitions. [As used in For purposes of this rule[.]]

(1) a “client” is a person, public officer, [or] corporation, association, or other [organization or] entity[;] either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer or a representative of a lawyer with a view to obtaining professional legal services[;] who consults with, seeks advice from, or retains the professional services of a lawyer or a lawyer’s representative;

(2) a “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation;

(3) a “representative of [the] a lawyer” is one employed to assist the lawyer in [the rendition of] providing professional legal services; and

(4) a communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. The act of contacting or retaining a lawyer for the purpose of seeking professional legal services is a “confidential” communication if not intended to be disclosed to third persons.

(4) a communication is “confidential” if made privately and not intended for further disclosure except to other persons in furtherance of the purpose of the communication and includes the act of contacting or retaining a lawyer for the purpose of seeking professional legal services if not intended to be disclosed to third persons.

B. General rule of privilege. Scope of the privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating [the rendition of] or providing professional legal services to [the] that client,

(1) between the client and the client’s lawyer or [his] lawyer’s representative[;]

(2) between the client’s lawyer and the lawyer’s representative[;]

(3) between the client or client’s lawyer [to] another lawyer representing another in a matter of common interest[;]

(4) between representatives of the client or between the client and a representative of the client[;] or

(5) between lawyers representing the client.

C. Who may claim the privilege. The privilege may be claimed by [the client, the client’s guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association or other [organization entity,] whether or not in existence.

(1) the client[;]

(2) the client’s guardian or conservator[;]

(3) the personal representative of a deceased client[;] or

(4) the successor, trustee, or similar representative of a corporation, association, or other [organization entity, whether or not in existence.

The [person who was the] lawyer of the client at the time of the communication may claim the privilege [but] only on behalf of the client. [The authority Authority to claim the privilege is presumed [in the absence of] absent evidence to the contrary.
D. Exceptions. There is no privilege under this rule:

(1) **Furtherance of crime or fraud.** If the professional legal services of the lawyer were sought or obtained to enable or assist anyone to commit or plan to commit in committing or planning to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) **Claimants through same deceased client.** For a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) **Breach of duty by lawyer or client.** For a communication relevant to an issue of breach of duty either by the lawyer to the lawyer's client or by the client to the client's lawyer;

(4) **Communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;** or

(5) **Joint clients.** For a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

[As amended, effective December 1, 1993; January 1, 1995; as amended by Supreme Court Order No. ___________, effective for all cases pending or filed on or after ___________]


A. Definitions. For purposes of this rule,

(1) [As amended, effective December 1, 1993; January 1, 1995; as amended by Supreme Court Order No. ___________, effective for all cases pending or filed on or after ___________] a “patient” is a person who consults with or is examined by a physician, psychotherapist, or state or nationally licensed mental-health therapist;

(2) [As amended, effective December 1, 1993; January 1, 1995; as amended by Supreme Court Order No. ___________, effective for all cases pending or filed on or after ___________] a “physician” is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be so licensed;

(3) [As amended, effective December 1, 1993; January 1, 1995; as amended by Supreme Court Order No. ___________, effective for all cases pending or filed on or after ___________] a “psychotherapist” is a person engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, and who is

   (a) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or

   (b) a physician; or

   (c) a person licensed or certified as a psychologist under the laws of any state or nation, [while similarly engaged] or reasonably believed by the patient to be so licensed or certified.

(4) A communication is “confidential” if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family;

(5) a “state or nationally licensed mental-health therapist” is a person licensed or certified to provide counseling services as a social worker, marriage or family therapist, or other mental-health counselor; and

(6) a communication is “confidential” if made privately and not intended for further disclosure except to other persons in furtherance of the purpose of the communication.

B. General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, including drug addiction, among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

B. Scope of the privilege. A patient has a privilege to refuse to disclose, or to prevent any other person from disclosing, a confidential communication made for the purposes of diagnosis or treatment of the patient's physical, mental, or emotional condition, including drug addiction, between the patient and the patient's physician, psychotherapist, or state or nationally licensed mental-health therapist.

C. Who may claim the privilege. The privilege may be claimed by the patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient. The person who was the physician or psychotherapist may claim the privilege but only on behalf of the patient. The authority to claim the privilege is presumed in the absence of evidence to the contrary.

D. Exceptions.

(1) [As amended, effective December 1, 1993; January 1, 1995; as amended by Supreme Court Order No. ___________, effective for all cases pending or filed on or after ___________] Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) **Examination by order of court.** If the court orders an examination of the physical, mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) **Condition an element of claim or defense.** There is no privilege under this rule as to communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(4) **Required report.** There is no privilege under this rule for communications relevant to any information that the physician, psychotherapist or patient is required by statute to report to a public employee or state agency.

(1) **Proceedings for hospitalization.** If a physician, psychotherapist, or state or nationally licensed medical-health therapist has determined that a patient must be hospitalized due to mental illness or presents a danger to himself or others, no privilege shall apply to confidential communications relevant to the proceedings to hospitalize the patient.

(2) **By order of the court.** Unless the court orders otherwise,
any communications made by an individual during an examination of that individual’s physical, mental, or emotional condition that has been ordered by the court are not privileged.

(3) Elements of a claim or defense. If a patient relies on a physical, mental, or emotional condition as part of a claim or defense, no privilege shall apply concerning confidential communications made relevant to that condition. After a patient’s death, should any party rely on a patient’s physical, mental, or emotional condition as part of a claim or defense, no privilege shall apply for confidential communications made relevant to that condition.

(4) Required reports. No privilege shall apply for confidential communications concerning any material that a physician, psychotherapist, state or nationally licensed mental-health therapist, or patient is required by law to report to a public employee or public agency.

[As amended, effective July 1, 1990; January 1, 1995 1993; as amended by Supreme Court Order No. , effective for all cases pending or filed on or after ]

Committee commentary. — Under the previous version of the rule, the privilege applied only to communications with physicians, psychiatrists, and licensed or certified psychologists. The Supreme Court, however, endorsed expanding the scope of the privilege in Albuquerque Rape Crisis Center v. Blackmer, 2005-NMSC-032, 138 N.M. 398, 120 P.3d 820 (holding that confidential communications with a victim counselor are privileged).

Although Blackmer did not address the issue of licensure, expanding the privilege to include communications with a “state or nationally licensed mental-health therapist” is consistent with the broader view of the privilege recognized in that case. See also generally Jaffee v. Redmond, 518 U.S. 1 (1996) (applying the psychotherapist-patient privilege under the Federal Rules of Evidence to communications with a licensed social worker). The remaining amendments to the rule are intended to be stylistic only.

[Adopted by Supreme Court Order No. , effective for all cases pending or filed on or after ]

11-505. [Husband-wife] Spousal privileges.

A. Definition. [As used in this rule, ] A communication is “confidential” if made privately and not intended for further disclosure except to other persons in furtherance of the purpose of the communication.

B. [General rule of privileges] Scope of the privilege. A person has a privilege in any proceeding to refuse to disclose [and] or to prevent another from disclosing, a confidential communication by the person to that person’s spouse while they were husband and wife married.

C. Who may claim the privilege. [The privilege under Paragraph B] may be claimed by the spouse who made the confidential communication, by that spouse’s guardian; conservator or, upon death, the personal representative. The spouse to whom the confidential communication was made may claim the privilege on behalf of the other. The authority to claim the privilege is presumed in the absence of evidence to the contrary.

1. The privilege may be claimed by:
   a. the spouse who made the confidential communication;
   b. that spouse’s guardian or conservator; or
   c. that spouse’s personal representative.

2. The privilege may also be claimed by the spouse to whom the confidential communication was made.

3. Authority to claim the privilege is presumed absent evidence to the contrary.

D. Exceptions. [There is no privilege under this rule.

   1. in proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;
   2. as to matters occurring prior to the marriage; or
   3. in a civil action brought by or on behalf of one spouse or a child of either against the other spouse or a child of either.]

11-506. Communications to clergy.

A. Definitions. [As used in ] For purposes of this rule:

1. a “member of the clergy” is a minister, priest, rabbi or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting that person;

2. a communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

B. [General rule of] Scope of the privilege. A person has a privilege to refuse to disclose, [and] or to prevent another from disclosing, a confidential communication made for the purpose of seeking spiritual advice by the person to a member of the clergy as a spiritual adviser.

C. Who may claim the privilege. The privilege may be claimed by the person or by the person’s guardian, conservator or, upon death, personal representative. The member of the clergy may claim the privilege on behalf of the person. The authority to claim the privilege is presumed in the absence of evidence to the contrary.

The privilege may be claimed by:

1. the person who consults with a member of the clergy;
2. the person’s guardian or conservator; or
3. the person’s personal representative if the person is deceased.

The privilege may be asserted on the person’s behalf by the member of the clergy. Authority to claim the privilege is presumed absent evidence to the contrary.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. , effective for all cases pending or filed on or after ]

11-507. Political vote.

Every person has a privilege to refuse to disclose the tenor of the person’s vote [at] in a political election conducted by secret ballot unless [the vote was cast illegally] the person voted unlawfully.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. , effective for all cases pending or filed on or after ]
11-508. Trade secrets.

A. Scope of the privilege. (A person has a privilege, which may be claimed by the person or the person’s agent or employee) Unless upholding the privilege will tend to conceal fraud or otherwise work an injustice, a person or entity owning a trade secret has a privilege to refuse to disclose and to prevent any other person from disclosing, [a] the trade secret [owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice].

B. Who may claim the privilege. The privilege may be claimed by a person or entity owning the trade secret, including any agent or employee of that person or entity.

C. Protective orders. (When disclosure is directed) If a court orders the disclosure of a trade secret, the court [shall take such] must order any appropriate protective measures to safeguard the interests of the holder of the privilege and of the parties and the furtherance of trade secrets' owner or any interests that justice may require.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. , effective for all cases pending or filed on or after .]

11-509. Communications to juvenile probation officers and social services workers.

A. Definitions. [As used in this section] For purposes of this rule,[s],

(1) “probation officer” means a person employed by the Children, Youth and Families Department or successor entity who conducts preliminary inquiries pursuant to the Children’s Code [Chapter 32A NMSA 1978] and Children’s Court Rules and Forms;

(2) “social services worker” means a person employed by the Children, Youth and Families Department or successor entity who conducts preliminary inquiries pursuant to the Children’s Code and Children’s Court Rules and Forms; and

(3) a communication is “confidential” if made privately and not intended for further disclosure except to other persons in furtherance of the purpose of the communication.

B. [General rule of privilege.] Scope of the privilege. A child alleged to be delinquent or in need of supervision and a parent, guardian or custodian who allegedly neglected a child has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, either oral or written, between the child, parent, guardian or custodian and a probation officer or a social services worker which are made during the course of a preliminary inquiry.

C. Who may claim the privilege. The privilege provided in Paragraph B of this rule may be claimed by the child in a criminal proceeding or in a children’s court proceeding; or by the parent, guardian or custodian who allegedly abused or neglected a child. The claim of privilege may be asserted by the attorney, the probation officer or social services worker on behalf of the child, parent, guardian or custodian.

[As amended, effective December 1, 1993; February 1, 2000; as amended by Supreme Court Order No. , effective for all cases pending or filed on or after .]

11-510. Identity of informer.

A. Rule of privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of the law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

A. Definition. An “informer” is a person who has provided information concerning a possible violation of the law to

(1) a law enforcement officer;

(2) a legislative committee member or staffer; or

(3) an individual who has assisted with an investigation into a violation of the law.

B. Scope of the privilege. The United States, a state, or a subdivision thereof has a privilege to refuse to disclose the identity of an informer.

C. Who may claim the privilege. The privilege may be claimed by an appropriate representative of the United States, a state, or a subdivision thereof [except that in criminal cases the privilege shall not be allowed if the state objects].

D. Exceptions:

(1) Criminal cases. In criminal cases, the privilege shall not be allowed if the United States, a state, or a subdivision thereof objects.

(2) Voluntary disclosure. The privilege no longer exists if the informer or a holder of the privilege discloses the informer’s identity to anyone whose interests are adverse to the informer or to a holder of the privilege. Disclosure occurs when

(a) the informer’s actual identity is disclosed; or

(b) information that is substantially certain to reveal the informer’s identity is disclosed.

(3) Testimony on merits. If it appears from the evidence in the case or from other showing by a party that an informer will be able to give testimony that is relevant and helpful to the defense of an accused; or is necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the state or a subdivision thereof is a party, and the state or subdivision thereof invokes the privilege, the court shall give the state or subdivision thereof an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds that there is a reasonable probability that the informer can give the testimony, and the state or subdivision thereof elects not to disclose the informer’s identity, the court on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the court may do so on its own motion. In civil cases, the court may make any order that justice requires. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without an order of the court. All counsel shall be permitted to be present at any stage at which counsel for any party is permitted to be present.

(3) Compelled testimony.

(i) Motion by a party. A party may move the court for an in camera determination of whether the disclosure of an informer’s identity or ability to testify should be ordered if the United States, a state, or a subdivision thereof invokes the informer privilege, and the evidence suggests that the informer can provide testimony that is

(ii) relevant and helpful to a criminal defendant;

(iii) necessary for a fair determination of the guilt or innocence of a criminal defendant; or
(iii) material to the merits in a civil case in which the United States, a state, or a subdivision thereof is a party.

When such a motion is made, the court shall provide the United States, the state, or the subdivision thereof an opportunity to present evidence for an in camera review addressing whether the informant can, in fact, supply such testimony.

(b) In camera review. In an ordinary case, the United States, a state, or a subdivision thereof may defend such a motion with affidavits. If the court determines that the issue cannot be resolved through affidavits, the court may order testimony from the informant or other relevant persons.

(c) Standard governing disclosure. If the court finds a reasonable probability that the information can provide testimony favorable to the movant, the court shall require the disclosure of the informant's identity or testimony. If the United States, a state, or a subdivision thereof declines to make the disclosure, the court may, upon a motion of the movant or sua sponte

(i) dismiss the charges relating to the informant's testimony in a criminal case; or

(ii) order any remedy that justice requires.

(d) Record. If any counsel is permitted to be present at any stage of the proceedings conducted before the court, all counsel shall be given the opportunity to appear. Any evidence tendered to the court for an in camera review that is not ordered to be disclosed shall be placed under seal and preserved for appellate review. The evidentiary record shall not be revealed without an order of the court.

11-511. Waiver of privilege by voluntary disclosure. A person who possesses a privilege against disclosure of [the] a confidential matter or communication waives the privilege if the person [or person's predecessor while holder of the privilege] voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is [itself] a privileged communication.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. , effective for all cases pending or filed on or after ___________________.]

11-512. Privileged matter disclosed under compulsion or without opportunity to claim privilege. [Evidence of a statement or other A disclosure of a privileged matter is not admissible against [the] a holder of the privilege [if] when the disclosure [was]

A. was compelled erroneously; or
B. was made without the opportunity to claim the privilege.

[As amended by Supreme Court Order No. , effective for all cases pending or filed on or after ___________________.]

11-513. Comment upon or inference from claim of privilege; instruction.

A. Comment or inference not permitted. [The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the court or counsel.] Neither the court nor counsel may comment when a privilege has been claimed at any time. No inference may be drawn [therefrom] from any claim of privilege.

B. Claiming privilege without knowledge of jury. [In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of] To the extent possible, the court shall conduct jury trials to allow claims of privilege to be made without the jury's knowledge [of the jury].

C. Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to [an] a jury instruction that no inference may be drawn [therefrom] from the claim of privilege.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. , effective for all cases pending or filed on or after ___________________.]

11-514. News media-confidential source or information privilege.

A. Definitions. Unless a different meaning clearly appears from the context of this rule, [as used in] for purposes of this rule[c],

(1) a communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional news media services or those reasonably necessary for the transmission of the communication;

(2) information is “confidential” if communicated privately and not intended for further disclosure except to other persons in furtherance of the purpose of the communication;

(3) “in the course of pursuing professional news activities” does not include any situation in which a news media person participates in any act (involving physical violence, property damage or) of criminal conduct;

(4) “news” means any written, oral, or pictorial in-
formation gathered, procured, transmitted, compiled, edited, or disseminated by, or on behalf of any person engaged or employed by a news media and so procured or obtained while such required relationship is in effect; and

(4) “newspaper” means a news service that is printed or distributed electronically and distributed ordinarily not less frequently than once a week and that contains news, articles of opinion, editorials, features, advertising, or other matter regarded as of current interest;

(5) “news agency” means a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters;

(6) “news media” means newspapers, magazines, press associations, news agencies, wire services, radio, television, or other similar printed, photographic, mechanical, or electronic means of disseminating news to the general public;

(7) “magazine” means a publication containing news which is published and distributed periodically;

(8) “press association” means an association of newspapers or magazines formed to gather and distribute news to its members;

(9) “wire service” means a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

B. General rule of Scope of the privilege. A person engaged or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited, or disseminated has a privilege to refuse to disclose:

1. [the] a confidential source [from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered in the course of pursuing professional activities] who provided information to the person in the course of pursuing professional news activities; and

2. any confidential information obtained in the course of pursuing professional news activities.

The provisions of this rule [insofar as it relates] do not apply to radio stations [shall not apply] unless the radio station maintains and keeps open for inspection by a person affected by the broadcast, for a period of at least one hundred eighty (180) days from the date of an actual broadcast, an exact recording, transcription, or certified written transcript of the actual broadcast.

The provisions of this rule [insofar as it relates] do not apply to television stations [shall not apply] unless the television station maintains and keeps open for inspection by a person affected by the broadcast, for a period of at least one year from the date of an actual telecast, an exact recording, transcription, kinescope film or certified written transcript of the actual telecast.

C. Exception. There is no privilege under this rule in any action in which the party seeking the evidence shows by a preponderance of evidence, including all reasonable inferences, [that] each of the following:

1. a reasonable probability exists that a news media person has confidential information or sources that are material and relevant to the action;

2. the party seeking disclosure has reasonably exhausted alternative means of discovering the confidential information or sources sought to be disclosed;

3. the confidential information or source is crucial to the case of the party seeking disclosure; and

4. the need of the party seeking the confidential source or information is of such importance that it clearly outweighs the public interest in protecting the news media’s confidential information and sources.

D. Procedure. If a person defined in Paragraph B claims the privilege [granted], and the court is asked to determine whether the exception applies, a hearing shall be held in open court [to consider all information, evidence, or argument deemed relevant by the court. If possible, the determination of whether the exception applies [shall be made] without requiring disclosure of the confidential source or information sought to be protected by the privilege.

If it is not possible for the court to make a determination of whether the exception applies [without the court knowing the confidential source or information sought to be protected], the court may issue an order requiring disclosure to the court alone, in camera.

Following the in camera hearing, the court shall enter written findings of fact and conclusions of law [without disclosing any of the matters for which the privilege is asserted, and a written order [directing that disclosure either shall or shall not be made to the party seeking disclosure] identifying what, if anything, shall be disclosed.

Evidence submitted to the court in camera, and any record of the in camera proceedings, shall be sealed and preserved to be made available to an appellate court [in the event of an appeal] and the contents of the sealed evidence shall not [otherwise] be revealed without the consent of the person asserting the privilege.

All counsel and parties shall be permitted to be present at every stage of the proceedings under this rule, except at the in camera hearing [at which counsel or party, except the] The person asserting the privilege [shall be the only persons permitted to be present during the in camera proceedings with the court.

Any order requiring an in camera disclosure or ordering or denying disclosure may be appealed by any party or by the person asserting the privilege, if not a party, in the procedural manner provided by the Rules of Appellate Procedure.

[Adopted, effective November 1, 1982; as amended, effective December 1, 1993; as amended by Supreme Court Order No. , effective for all cases pending or filed on or after .]
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NICOLE CARDENAS
Trust Administrator
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The New Mexico State Bar Foundation will hold a silent auction to raise money for civil legal services as part of the State Bar's 2013 Annual Meeting in Santa Fe. The Bar Foundation helps families and individuals get the civil legal service help they need. Funds raised are used to make justice work for those who need it but cannot afford it — to give everyone a fighting chance.

The auction will take place Thursday, June 27th and Friday, June 28th, 2013 at the Santa Fe Convention Center. Please help by donating an auction item for the event. Anything would be greatly appreciated.

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Friday, March 29, 2013 • State Bar Center, Albuquerque

1.0 Ethics/Professionalism • 4.5 General (pending approval)

Speakers:
Pia Gallegos, Gallegos Law Firm, P.C., Albuquerque, NM
David Kern, Kern Law Firm, El Paso, TX
The Honorable Roderick Kennedy, Chief Judge of the New Mexico Court of Appeals
Steven K. Sanders, Steven K. Sanders & Associates, P.C., Albuquerque, NM
Whitney Warner, Moody & Warner, P.C., Albuquerque, NM

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Attorneys representing both plaintiffs and defendants are welcome to the CLE.

SCHEDULE

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<td>8:00–9:00 a.m.</td>
<td>Registration &amp; Continental Breakfast</td>
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<td>9:00–9:05 a.m.</td>
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<td>9:05–10:05 a.m.</td>
<td>FLSA Update</td>
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<td>11:15–12:15 p.m.</td>
<td>Ethics</td>
<td>The Honorable Roderick Kennedy, Chief Judge of the NM Court of Appeals</td>
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<td>1:15–1:45 p.m.</td>
<td>NELA for Plaintiff Employment Lawyers</td>
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<td>Pre-Trial Strategy in Employment Cases</td>
<td>Whitney Warner, Moody &amp; Warner, P.C.</td>
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<td>3:00–4:00 p.m.</td>
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<td>Steven K. Sanders, Steven K. Sanders &amp; Associates, P.C.</td>
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Happy Hour Social at the Marriott Pyramid Hotel immediately following the seminar.

REGISTRATION & INFORMATION

Registration Fee (includes lunch):

- $180.00 per person
- $150.00 - NELA members
- $75.00 - students

Registration postmarked before March 14, 2013 take $30 off.

Name: _______________________________ Firm/Student #: _______________________________
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Lewis and Roca LLP is a well-known regional, AV-rated law firm seeking a litigation attorney with three to seven years’ experience to handle a variety of tort and business litigation matters in its Albuquerque office. The selected candidate will work in a team-oriented environment, participate in a broad range of sophisticated matters, with significant client involvement. Our clients require a full range of services, as well as creative and thorough representation in all types of litigation matters. Candidates should have quality litigation experience, particularly litigating a range of business tort claims and evaluating complex legal issues and potential remedies. Qualified candidates must also have strong writing, research, analytical, and problem-solving skills. The ideal candidate will take on immediate responsibility for an active tort litigation caseload, working closely with an AV/Preeminent senior partner in our Phoenix office. Lewis and Roca actively fosters the career growth and development of our attorneys and will help you reach your potential. We encourage a congenial work environment balanced with an innovative, highly productive practice. The Firm offers a competitive salary and bonus structure commensurate with experience, and a full benefits package. If you have a passion for law and are committed to achieving excellence, please send resume, writing sample and law school transcript to Mary W. Riley, Lewis and Roca LLP, Recruiting@LRLaw.com, or fax materials to (602) 734-3930. Lewis and Roca is an Equal Opportunity Employer. We do not discriminate on the basis of race, sex, sexual orientation, religion, national origin, color, age, disability or veteran status.

**Lawyer-O Position**
The Office of General Counsel of the New Mexico Department of Transportation (NMDOT) is recruiting for an Assistant General Counsel (Lawyer-Operational). The position requires representation of the NMDOT in construction claims and litigation in State and Federal court, in construction and procurement-related administrative hearings, and in other practice areas such as assigned by the General Counsel. Experience in public works procurement, construction law, eminent domain and inverse condemnation is highly desirable. Also, experience in environmental law, Indian law, collections, water law, oil & gas law, torts, public finance or transportation planning would be useful. The requirements for the position include a J.D. degree from an accredited law school, a current license to practice law in New Mexico, and a minimum of three years of experience in the practice of law, which must have been in litigation, construction or eminent domain/ inverse condemnation law or public contracting issues. Overnight travel throughout the state and a valid New Mexico driver’s license are also required. The salary is a pay-band 75, which ranges between $38,168 and $67,870, and includes an excellent benefits and retirement package and paid holidays, sick leave and annual leave. The position is located in Santa Fe. The salary offered to the successful candidate will be based on qualifications and experience. Interested persons must submit an on-line application through the State Personnel Office website at http://www.spo.state.nm.us no later than the applicable closing date posted by State Personnel. Additionally, please submit a copy of your resume, writing sample and bar card to Toby Gurule in the Human Resources Division of the New Mexico Department of Transportation, located at 1120 Cerrillos Road Room 135, P.O. Box 1149, Santa Fe, New Mexico 87504. The NMDOT is an Equal Opportunity Employer.

**Deputy General Counsel**
**New Mexico Corrections Department**
The NMCD is hiring for the position of Deputy General Counsel (Attorney-Advanced) at its Central Office in Santa Fe. The position is responsible for representing the Department in defense of inmate pro se civil suits, employee disciplinary actions, employment law matters, arbitrations and other union matters, and in miscellaneous civil and criminal matters. The position is also responsible for reviewing/approving contracts and policies. Some interaction with inmates. Applicants must have JD degree from accredited law school; 5 years experience in the practice of law; and be licensed and in good standing with the NM Bar. Preference given to candidates with criminal, employment, civil rights, tort law, and/or labor relations experience from a management perspective, and to those with personnel/employment law experience who are able to give competent legal advice to management as needed. Salary range $43,056-$76,544 per year. Please send a copy of your resume to Trish Gallegos, Office of General Counsel, P O Box 27116, Santa Fe, NM 87502-0116 or e-mail trish.gallegos@state.nm.us. Applicants must apply with State Personnel Office at www.spo.state.nm.us, position #16504. The Department is an EOE.

**Experienced Insurance Defense Attorney – GEICO Albuquerque**
GEICO Staff Counsel is seeking an Experienced Insurance Defense Attorney for its Albuquerque, NM Office, which defends GEICO insureds in third party cases and GEICO in first party cases statewide. The Attorney will handle and manage litigation files from inception through trial; prepare motions and memorandums of law; prepare pleadings, discovery, demands and responses; and draft reports and provide file analysis. Proficiency in computer use is a must. Applicant must be a licensed New Mexico attorney. For position announcement and application instructions to www.geico.jobs and hit the apply now button.

**Associate Trial Attorney and Experienced Senior Trial Attorney**
The 11th Judicial District Attorney’s Office, (San Juan County) is accepting resumes for immediate positions of Associate Trial Attorney and Experienced Senior Trial Attorney. Salary is based on experience ($41,685 - $72,575). Send resumes to Lori Holesinger, HR Coordinator, 335 S. Miller Ave., Farmington, NM 87401, or via e-mail lholesinger@da.state.nm.us. Equal Opportunity Employer.

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Plaintiff’s personal injury law firm looking for a lawyer. See our Mission Statement at www.parnalllaw.com/mission.html. Do you have the same Mission? Will you be a team member? Are you an “A” player? If so, join our team and earn great compensation! Email cover letter, resume and references to Anna@ParnallLaw.com.

**13th Judicial District Attorney**
**Associate Trial Attorneys for Sandoval, Cibola and Valencia Counties**
The 13th Judicial District Attorney’s Office is accepting resumes for entry level Associate Trial Attorneys for the Sandoval (Bernalillo), Cibola (Grants) and Valencia (Belen) County Offices. The position requires felony caseload and at times, misdemeanor prosecutions. Upon request, be prepared to provide a summary of cases tried. Salary is based upon experience. Send resumes to Kathleen Colley, District Office Manager, P.O. Box 1750, Bernalillo, NM 87004, or via E-Mail to: KColley@da.state.nm.us. Deadline for submission of resumes: Open until positions are filled.

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The Albuquerque office of Sutin, Thayer & Browne A Professional Corporation seeks a lawyer with 1–5 years’ experience, preferably in commercial litigation. Applicants should be licensed in New Mexico. All replies will be kept confidential. Please send cover letter, resume and writing sample to kjb@sutinfirm.com or to Sutin, Thayer & Browne, attn: Kelly Brewer, PO Box 1945, Albuquerque, NM 87103. Applications will be accepted until March 1, 2013.

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Plaintiff’s personal injury law firm looking for a paralegal. See our Mission Statement at www.parnalllaw.com/mission.html. Do you have the same Mission? Will you be a team member? Are you an “A” player? If so, join our team and earn great compensation! Email cover letter, resume and references to Anna@ParnallLaw.com.

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Ex.: 35 years of exclusive, copyrighted annotations; content published in one exclusive source.

on·line
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