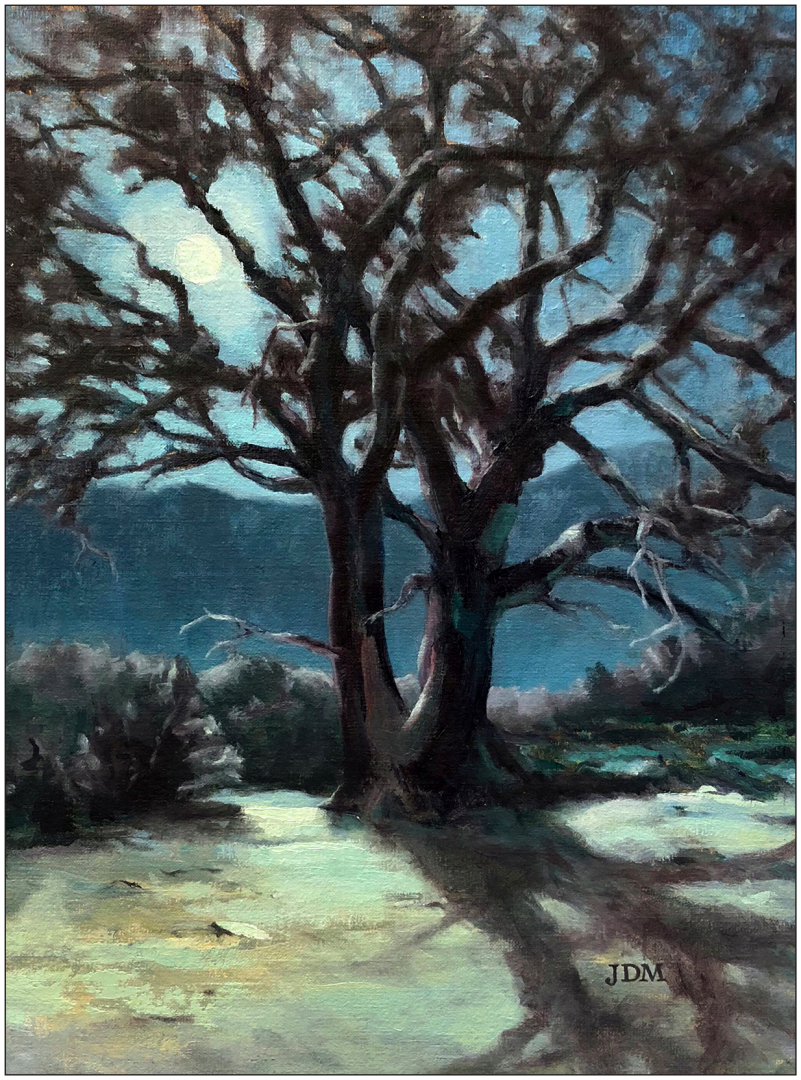
Official Publication of the State Bar of New Mexico

Bar Bulletin

October 31, 2018 • Volume 57, No. 44



Night Watch by John Meister

Purple Sage Gallery (Old Town, ABQ),
Warren Fine Art (Old Town, ABQ)

Inside This Issue

New Mexico Lawyer
Intellectual Property Law

Hold your conference, seminar, training, mediation, reception, networking social or meeting at the State Bar Center.

Your Meeting Destination

- Multi-media auditorium
- Board room
- Small to medium conference rooms
- Classrooms
- Reception area
- Ample parking
- Free Wi-Fi

For more information, site visits and reservations, call 505-797-6000.

STATE BAR of NEW MEXICO

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14
Common Legal Issues for Senior Citizens Workshop Presentation
10–11:15 a.m., Moriarty Senior Center, Moriarty, 1-800-876-6657

About Cover Image and Artist: John Meister graduated from the University of Texas at Austin with a B.A. in Art and began his career with 23 years in commercial graphic design and illustration, shifting to full-time painting in 2009. Living in New Mexico since 1990, he paints primarily in oils, both in his Albuquerque studio and en plein air and often explores ways to depict the unique character of the beautiful Southwest. When he feels that his "muse" is hiding, he first looks for it in an art museum or gallery. He is always inspired by those visual historians that came before and left behind something to admire. Meister volunteers with several art organizations, including Plein Air Painters of New Mexico, and he occasionally teaches at the New Mexico Art League in Albuquerque. His work can be found in collections across the Southwest. To view more of his work, visit www.johnmeisterart.com.

Notices

Court News

New Mexico Supreme Court

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has a comprehensive legal research collection of print and online resources, and law librarians are available to assist. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe.

Building Hours:
Mon.-Fri. 8: a.m.-5 p.m.
Reference & Circulation Hours:
Mon.-Fri. 8 a.m.-4:45 p.m.
For more information:
Call 505-827-4850
Visit https://lawlibrary.nmcourts.gov
Email libref@nmcourts.gov

Second Judicial District Court

Announcement of Vacancy

The Second Judicial District Court announces the retirement of the Hon. Judge Alan M. Malott effective Oct. 31. Inquiries regarding more specific details of this judicial vacancy should be directed to the chief judge or the administrator of the court. Dean Sergio Pareja of the UNM School of Law, designated by the New Mexico Constitution to chair the District Court Nominating Committee, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications, as well as information related to qualifications for the position, may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php, or by email by contacting Beverly Akin at 505-277-4700. The deadline for applications has been set for 5 p.m., Nov. 14. 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 at 9 a.m. on Nov. 27, at the Second Judicial District Court located at 400 Lomas Blvd NW, Albuquerque to evaluate the applicants for this position. The committee meeting is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

Professionalism Tip

With respect to the public and to other persons involved in the legal system:

I will willingly participate in the disciplinary process

Destruction of Tapes

In accordance with 1.17.230.502 NMAC, taped proceedings on domestic matters cases in the range of cases filed in 1972 through 1998 will be destroyed. To review a comprehensive list of case numbers and party names or attorneys who have cases with proceedings on tape and wish to have duplicates made should verify tape information with the Special Services Division 505-841-6717 from 8 a.m.-5 p.m. Mon.- Fri. The aforementioned tapes will be destroyed after Dec. 15.

Notice to Attorneys and Public

Effective Nov. 1, the Second Judicial District Court Clerk's office will no longer accept cash bills larger than $20. The Second Judicial District Court will continue to accept cashier checks and money orders. The Second Judicial District Court does not accept personal checks, credit cards or debit cards at this time.

Fourth Judicial District Court

Mass Reassignment

On Oct. 4, pursuant to the authority of Article VI, Sections 35 and 36 of the Constitution of the State of New Mexico, Chief Justice Nakamura appointed Flora Gallegos to fill the vacant position in Division III of the Fourth Judicial District Court. Effective Oct. 26, all cases previously assigned to Division III shall be assigned to Judge Flora Gallegos. Pursuant to Rules 1-088.1, 5-106, and 10-162 NMRA, parties who have not yet exercised a peremptory excusal will have 10 business days from Nov. 21, to excuse Judge Flora Gallegos.

Bernalillo County Metropolitan Court

Announcement of Vacancy

A vacancy on the Bernalillo County Metropolitan Court will exist as of Jan. 1, 2019, due to the retirement of the Hon. Judge Sharon Walton, effective Dec. 31. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the court. Sergio Pareja, chair of the Bernalillo County Metropolitan Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php. The deadline for applications has been set for 5 p.m., Dec. 13. Applications received after that time 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 Bernalillo County Metropolitan Court Nominating Commission will meet beginning at 9 a.m. on Jan. 18, 2019, to interview applicants for the position at the Metropolitan Courthouse, located at 401 Lomas NE, Albuquerque. The Commission meeting is open to the public, and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

State Bar News

Appellate Practice Section

Luncheon with Justice Charles W. Daniels

Join the Appellate Practice Section for a brown bag luncheon at noon, Nov. 16, at the State Bar Center with guest Justice Charles W. Daniels of the New Mexico Supreme Court. Justice Daniels will reflect on his time on the bench as he prepares to retire in January 2019. The lunch is informal and is intended to create an opportunity for appellate practitioners to learn more about the work of the Court. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. to Carmela Starace at cstarace@icloud.com.

Court of Appeals Candidate Forum Archive

On Oct. 18, the Appellate Practice Section hosted candidate forum for the eight candidates running for the New Mexico Court of Appeals this November. A recording of the event is available at https://youtu.be/baAxfyxtr4c for those who missed

Notices continued on page 7

Welcome to the Profession!

Fall Swearing In Ceremony

On Sept. 25, 124 new attorneys were sworn in at the Kiva Auditorium in Albuquerque. After signing the historic roll book, the new attorneys gathered to receive advice and congratulations from bar leaders and the justices of the New Mexico Supreme Court.

Signing the Roll Book

Taking the Oath

Congratulations!

The State Bar of New Mexico wishes a warm welcome to each new attorney!
For more photos, visit **www.nmbar.org/photos**.

2019 Budget Disclosure

Deadline to Challenge Expenditures

The State Bar of New Mexico Board of Bar Commissioners (BBC) has completed its budgeting process and finalized the 2019 Budget Disclosure, pursuant to the State Bar Bylaws, Article VII, Section 7.2, Budget Procedures. The budget disclosure will be available in its entirety by Nov. 1 2018 on the State Bar website at www.nmbar.org on the financial information page under the About Us tab. **The deadline for submitting a budget challenge is on or before noon, Nov. 30, 2018**, and the form is provided on the last page of the disclosure document.

The BBC will consider any challenges received by the deadline at its Dec. 13, 2018, meeting.

Address challenges to:
Executive Director Richard Spinello
State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199
rspinello@nmbar.org

Challenges may also be delivered in person to the State Bar Center, 5121 Masthead NE, Albuquerque, NM 87109.

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it. Thank you to the New Mexico Trial Lawyers Association, New Mexico Defense Lawyers Association and Albuquerque Bar Association for their co-sponsorship of the event.

Business Law Section

2018 Business Lawyer of the Year

The Business Law Section has opened nominations for its annual Business Lawyer of the Year Award, to be presented on Nov. 14 after the Section's Business Law Institute CLE. Nominees should demonstrate professionalism and integrity, superior legal service, exemplary service to the Section or to business law in general, and service to the public. Self-nominations are welcome. A complete description of the award and selection criteria are available at www.nmbar.org/BusinessLaw. The deadline for nominations is Nov. 2. Send nominations to Breanna Henley at bhenley@nmbar.org. Recent recipients include Jay D. Rosenblum, David Buchholz, Leonard Sanchez, John Salazar and Dylan O'Reilly.

Board of Bar Commissioners

Client Protection Fund Commission

The Board of Bar Commissioners will make two appointments to the Client Protection Fund Commission for three-year terms. Active status attorneys in New Mexico who would like to serve on the Commission should send a letter of interest and brief résumé by Nov. 26 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

New Mexico Access to Justice Commission

The Board of Bar Commissioners will make one appointment to the N.M. Access to Justice Commission for a three-year term. The Commission is dedicated to expanding and improving civil legal assistance by increasing pro bono and other support to indigent people in New Mexico. Active status attorneys in New Mexico who would like to serve on the Commission should send a letter of interest and brief resume by Nov. 26 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Historical Committee

Rio Arriba Raid: Lonesome Dave and the Tiger of the North

Join the Historical Committee for its annual historical presentation from noon-1 p.m., Nov. 14, at the State Bar Center. Deputy State Historian Rob Martinez will present "Lonesome Dave and the Tiger of the North," an intriguing account of the professional and public relationship between then Governor of New Mexico Dave Cargo and land activist Reies Lopez Tijerina who went on to defend himself in trial. At the heart of the dynamic interaction was the dramatic 1967 Courthouse Raid at Tierra Amarilla. Those nostalgic, curious and with personal memories are encouraged to attend. Lunch will be provided. R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Intellectual Property Law Section

Volunteers Needed for IP Pro Bono Fair

The Intellectual Property Law Section seeks volunteer attorneys for its first Pro Bono IP Fair from 9 a.m.-1 p.m. on Nov. 10, at the UNM School of Law. Many creatives and inventors in our community need our help to get their journey started. Attorneys will provide free consultations (limited to the time spent at the Fair) in all areas of IP law and/or business law. To volunteer, email Justin Muehlmeyer at JRM@PeacockLaw.com with 1) the time you are available and 2) the type of subject matter you want to receive (e.g., "Trademark and Copyright only," "all IP including Patent," "corporate formation," etc.). Even an hour of your time may make a difference in the success of a fellow New Mexican's endeavor and your time will count towards your annual pro bono hours. Malpractice insurance is provided by the State Bar and continental breakfast and parking is free. Direct inquiries from creatives to https://form.jotform.com/sbnm/IPprobonofair to register.

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New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- Nov. 5, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group normally meets the first Monday of the month.)
- Nov. 19, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- Dec. 10, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert at 505-242-6845.

JLAP Committee End of the Year Celebration

Members of the Judges and Lawyers Assistance Program committee are cordially invited to attend the annual end of year celebration scheduled from 6–9 p.m., on Dec. 8, at Mykonos Café and Taverna. Committee members and one guest each are welcome to attend. R.S.V.P. to Erica at ecandelaria@nmbar.org or 505-797-6093 no later than Nov. 21. JLAP looks forward to sharing an evening of good food, good conversation and appreciation for volunteers' time and energy to the New Mexico Judges and Lawyers Assistance Program.

Natural Resources, Energy and Environmental Law Section

Nominations Open for 2018 Lawyer of the Year Award

The NREEL Section will recognize an NREEL Lawyer of the Year during its annual meeting of membership, which will be held in conjunction with the Section's CLE on Dec. 21. The award will recognize an attorney who, within his or her practice and location, is the model of a New Mexico natural resources, energy or environmental lawyer. More detailed criteria and nomination instructions are available at www.nmbar.org/NREEL. Nominations are due by Nov. 16 to Breanna Henley, bhenley@nmbar.org.

RPTE Section: Real Property Division

Seeking the Best and Brightest: 2018 Real Property Attorney of the Year

The Real Property, Trust and Estate Section's Real Property Division is seeking nominations for an outstanding lawyer who has demonstrated professionalism, exemplary contributions and made a difference in their legal community. The Division Board will select the honoree to be presented with a plaque and awarded free registration for the 2019 Real Property Institute during a special lunch at the 2018 Real Property Institute on Dec. 5. Nominations should be no more than 350 words and submitted by email to Division Chair Denise Archuleta Snyder at dasnyder@aldridgepite.com by 5p.m. on Nov. 6 with "Nomination for Best Real Property Lawyer" in the subject line. Nominees must be lawyers in good standing, based in New Mexico and be a Real Property, Trust and Estate Section member.

Senior Lawyers Division

Attorney Memorial Scholarship Reception

Three UNM School of Law third-year students will be awarded a $2,500 scholarship in memory of New Mexico attorneys who have passed away over the last year. The deceased attorneys and their families will be recognized during the presentation. The reception will be held from 5:30-7:30 p.m., Nov. 13, at the State Bar Center. All State Bar members, UNM School of Law faculty, staff and students and family and colleagues of the deceased are welcome to attend. A list of attorneys being honored can be found at www.nmbar.org/SLD under "Attorney Memorial Scholarship." Contact Breanna Henley at bhenley@nmbar.org to notify the SLD of a member's passing and to provide current contact information for surviving family members and colleagues.

Annual Meeting of Membership

The Senior Lawyers Division invites Division members to its annual meeting of membership to be held at 4:30 p.m., Nov. 13, at the State Bar Center. Members of the SLD include members of the State Bar of New Mexico in good standing who are 55 years of age or older and who have practiced law for twenty-five years or more. During the annual meeting of membership, members will have the opportunity to meet with members of the SLD Board of Directors and learn more about the activities of the Division. The meeting will last an hour and attendees are welcome to stay for the Attorney Memorial Scholarship Reception following the annual meeting.

Solo and Small Firm Section

Fall Speaker Features Robert Huelskamp

Robert Huelskamp will share his insights from almost 40 years working with nuclear weaponry, non-proliferation, and counter terrorism in "Russia, Iran and North Korea: What Could Possibly Go Wrong?" from noon-1 p.m. on Nov. 20 at the State Bar Center in Albuquerque. The presentation is open to all State Bar members and lunch will be provided free by the section to those who R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

UNM School of Law

Law Library

Fall 2018 Hours

Mon., Aug. 20– Sat., Dec. 15

Building and Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Saturday & Sunday	No reference

The Natural Resources Program and Utton Center

Federal Water Policy—Does New Mexico Have a Partner?

Michael Connor will present "Federal Water Policy—Does New Mexico have a Partner?" at 5:15 p.m., Nov. 5, at the UNM School of Law, Room 2402. He will discuss current federal water challenges facing New Mexico including Texas v. New Mexico, the Endangered Species Act, Indian water rights settlements and climate change. Connor is a partner with the law firm of WilmerHale in Washington, DC. His practice focuses on natural resources, energy development, environmental compliance and Native American law. He previously served as deputy secretary of the U.S. Department of the Interior, addressing some of the most complex natural resource issues facing federal agencies across the nation. No registration is required. Free parking is provided at 1117 Stanford NE, Albuquerque. For more information, call Laura Burns at 505-277-3253.

Other Bars

New Mexico Criminal Defense Lawyers Association

The Defender's Role in Trial Advocacy

NMCDLA is coming to Roswell this fall with an information-packed seminar to help lawyers become a stronger advocates for their clients. Join NMCDLA on Nov. 9 for "The Defender's Role in Trial Advocacy" CLE and to get the latest updates on pre-trial detention, technology, search and seizure, immigration and more. This seminar is worth 6.0 total CLE credits, including 1.0 ethics credit. Visit nmcdla.org to register today.

New Mexico Defense Lawyers Association

Mindfulness Based Stress Reduction for Lawyers

New Mexico Defense Lawyers Association is pleased to bring a day retreat in mindfulness based stress reduction for lawyers on Nov. 9, at the Norbertine Community. This day retreat offers the perfect opportunity to learn not only the fundamentals of mindfulness and meditation, but also the science behind it. Understand what mindfulness is all about, and how to bring the practices into daily life for real stress reduction. Contact NMDLA with questions at nmdefense@nmdla.org or by phone 505-797-6021.

New Mexico Black Lawyers Association

Cyber Security, Social Media and Cell Phones: How to Use Technology in Business and Practice

The New Mexico Black Lawyers Association invites members of the legal community to attend its annual CLE, "Cyber Security, Social Media and Cell Phones: How to Use Technology in Business and Practice." (5.0 G, 1.0 EP pending) from 8 a.m.- 4:30 p.m. on Nov. 16, at the State Bar of New Mexico, 5121 Masthead NE, Albuquerque. Registration is $199 and the deadline to request a refund is Nov. 9. For more information, or to register online, visit www.newmexicoblacklawyersassociation.org.

Albuquerque Bar Association

Monthly Luncheon

Join the Albuquerque Bar Association for its monthly luncheon from 11:45 a.m.-1 p.m., Nov. 6, at the Hyatt Regency located on 330 Tijeras NW, Albuquerque. Our guest speaker this month is Pamela Herndon. Lunch is only: $30 for members, $35 for non-members or a $5 walk-up fee. Register for lunch by 5 p.m., Nov. 2. To register contact the Albuquerque Bar Association's interim executive director Deborah Chavez at dchavez@vancechavez.com or 505-842-6626. Parking is available on the streets surrounding the Hyatt Regency if the visitor parking garage becomes full. Plan to arrive early to find parking.

Albuquerque Lawyers Club

Monthly Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its November meeting. Chris Orwoll, executive director of the New Mexico Museum of Space History is the featured speaker. The title of his presentation is "Fun and Frivolity on the way to the Moon: Anecdotes from Apollo." The museum houses the International Space Hall of Fame, and highlights the history of space exploration, and N.M.'s pivotal role since the very beginning. The museum is one of Lonely Planet's "50 Museums to Blow Your Mind!" The lunch meeting will be held at noon on Nov. 7 at Seasons Restaurant, located at 2031 Mountain Road, NW, Albuquerque. The cost is free to members, $30 non-members in advance or $35 at the door. For more information, email ydennig@yahoo.com or call 505-844-3558.

The New Mexico Women's Bar Association

Nominations for New Mexico Women's Bar Association Board of Directors

The New Mexico Women's Bar Association Board of Directors has openings on its board for two terms beginning January 2019. Elections for board members will be held on Nov. 16. The Board invites interested members to apply by sending a short letter of interest and a resume to nmwba1990@gmail.com. Board members are expected to attend an overnight retreat Jan. 26-27, 2019, to attend bi-monthly meetings, in person or by phone, to actively participate on one or more committees, and to support events sponsored by the Women's Bar Association. The New Mexico Women's Bar does not discriminate on the basis of sex or gender and encourages all licensed attorneys to become members and apply to be on the board. For more information about the Women's Bar Association, or to become a member, please go to our website, www.nmwba.org.

Other News

The Department of Labor

New Payroll Audit Independent Determination (PAID) Program

The U.S. Department of Labor's Wage and Hour Division has announced a new nationwide pilot, the Payroll Audit Independent Determination program, which facilitates resolution of potential overtime and minimum wage violations under the Fair Labor Standards Act. The program's primary objectives are to resolve such claims quickly and without litigation, to improve employers' compliance with overtime and minimum wage obligations. Under the PAID program, employers are encouraged to conduct audits and, if they discover overtime or minimum wage violations, to share this information with WHD, work with us in good faith to correct their mistakes, and provide due compensation to their employees in an expedited manner. Employers that voluntarily self-report and work with the department in good faith to take corrective action under the PAID program will not be subject to liquidated damages or civil money penalties as a condition to finalize settlements.For more information about the program, please visit www.dol.gov/whd/paid/ or call the WHD office at 505-248-6100.

How Are We Doing?

It is the goal of the *Bar Bulletin* and the State Bar of New Mexico staff to provide a relevant and useful publication for our members to read. You may direct feedback and suggestions at any time to notices@nmbar.org or Bar Bulletin, PO Box 92860, Albuquerque, NM 87199-2860.

Board of Bar Commissioners

Meeting Summary

The Board of Bar Commissioners met at the State Bar Center in Albuquerque, on Oct. 12 Action taken at the meeting follows:

- Approved the Aug 9, 2018 meeting minutes as submitted;
- Accepted the August 2018 financials for the State Bar and the N.M. State Bar Foundation;
- Discussed the equipment leases for the print shop and a plan for the future of the print shop and the *Bar Bulletin*;
- Approved the State Bar and State Bar Foundation's 2019 budgets;
- Designated 2017 MCLE assets to be used to enhance the program and upgrade the database;
- Received the draft financial policies, which will be finalized by the Finance Committee and presented to the Board for approval at the December meeting;
- Received a report from the Policy and Bylaws Committee and took action as follows: 1) approved amendments to the Executive Director Evaluation and Compensation Policies regarding the evaluation timeframe; 2) approved the Real Property, Trust and Estate Section bylaw amendments regarding the chair; 3) approved the Senior Lawyers Division draft amendments regarding members to Rule 24-101(b)(2) NMRA, which will be submitted to the Supreme Court for consideration; once the Rule is approved, the bylaws will also be amended; 4) approved a global section bylaw amendment regarding absenteeism; and 5) approved the Trial Practice Section bylaw amendments;
- Received a presentation from Tyler Technologies on "re:searchN.M.";
- Reviewed revisions to the Secure Odyssey Public Access Policy, which the Board's SOPA Committee will be meeting on to discuss and provide comments to the Court's Online Access Subcommittee;
- Received a report from the Board's Regulatory Committee and approved the mission statement for the committee; the committee discussed the wind down of the current Legal Specialization program and the creation of a possible program in the future; the committee will discuss further and present a proposal to the Board;
- Received an update from the Intellectual Property Law Section;
- Elected Commissioner Carla Martinez to the position of secretary-treasurer and Commissioner Tina Cruz to the position of president-elect for 2019 by acclamation;
- Approved resolutions for the State Bar and the State Bar Foundation for the Employee Retirement Income Security Act Wrapper Plan;
- Received a report on the Access to Justice Commission's Justice for All Initiative; their goal is to provide 100 percent access for critical legal needs, which will require active involvement of people from all sectors of the community;
- Received a written report from the Board's ABA House of Delegates representative;
- Reported that the 2019 Annual Meeting will be held at Hotel Albuquerque at Old Town and Hotel Chaco, Aug. 1-3; and
- Received an update on the second annual Golf Classic to benefit the State Bar Foundation.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the Dec. 13 meeting.

Legal Education

November

2 **ADR Across the Spectrum**
4.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Releasing Employees & Drafting Separation Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **2018 Employment and Labor Law Institute**
5.0 G, 1.0 EP
Webcast/Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Bankruptcy Fundamentals for the Non-Bankruptcy Attorney (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct (2017)**
1.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Basic Guide to Appeals for Busy Trial Lawyers (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **What Starbucks Teaches Us about Attracting Clients the Ethical Way (2018 Annual Meeting)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **An Overview of Music Copyright Law Using the Beatles as a Case Study**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Abuse and Neglect Case in Children's Court (2018)**
3.0 G
Webcast/Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Legal Malpractice Potpourri (2018 Annual Meeting)**
1.0 EP
Webcast/Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Speaking to Win: The Art of Effective Speaking for Lawyers (2018)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **The Cyborgs are Coming! The Cyborgs are Coming! The Latest Ethical Concerns with the Latest Technology Disruptions (2017)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Children's Code: Delinquency Rules, Procedures and the Child's Best Interest (2018)**
1.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Ethics and Changing Law Firm Affiliation**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **The Defender's Role in Trial Advocacy**
5.0 G,1.0 EP
Live Seminar, Roswell
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

9 **Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Mindfulness Based Stress Reduction for Lawyers**
2.0 EP
Live Seminar, Roswell
New Mexico Defense Lawyers Association
nmdefense@nmdla.org

13 **Estate Planning for MDs, JDs, CPAs & Other Professionals, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Estate Planning for MDs, JDs, CPAs & Other Professionals, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **2018 Business Law Institute**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

15 **2018 Probate Institute**
6.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Ethical Issues and Implications on Lawyers' Use of LinkedIn**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Ethics of Beginning and Ending Client Relationships**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Discover Hidden and Undocumented Google Search Secrets**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Secured Transactions Practice: Security Agreements to Foreclosures, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Secured Transactions Practice: Security Agreements to Foreclosures, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **2018 Family Law Institute: Hot Topics in Family Law Day 1**
5.0 G, 1.5 EP
Webcast/Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **29th Annual Appellate Practice Institute (2018)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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27 **Zen Under Fire: Mindfulness for the Busy Trial Lawyer (2018 Annual Meeting)**
1.0 EP
Live Replay, Albuquerque
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27 **Add a Little Fiction to Your Legal Writing (2017)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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27 **Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics (2017)**
3.0 EP
Live Replay, Albuquerque
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www.nmbar.org

28 **Ethics and Dishonest Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
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28 **2018 Family Law Institute: Hot Topics in Family Law Day 2**
6.0 G
Webcast/Replay, Albuquerque
Center for Legal Education of NMSBF
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28 **Litigation and Argument Writing in the Smartphone Age (2017)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **2018 Animal Law Institute: Updates, Causes of Action, and Litigation**
6.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Law Practice Potpourri for Lawyers and Paralegals**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

December

5 **Business Divorce, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **2018 Real Property Institute**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Business Divorce, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Attorney Orientation and the Ethics of Pro Bono**
2.0 EP
Live Seminar, Albuquerque
New Mexico Legal Aid
505-814-6719

6 **Intellectual Property in Tech Transfer, Estate and Business Opportunities**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **2018 Ethics and Social Media Update**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **A Practical Approach to Indian Law: Legal Writing, 2018 Update and the Ethics of Practicing Indian Law**
2.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Cutting Edge Ethics Threat: The Dangers with Frictionless Computing**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Guarantees in Real Estate Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **2018 Ethicspalooza (Full Day)**
6.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Employee v. Independent Contractor: Tax and Employment Law Considerations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Advanced Mediation Skills Workshop**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Criminal Rules Hot Topics**
2.5 G, 0.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **Drafting Client Letters in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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14 **Ethics and Virtual Law Offices**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Trial Know-How! Presentation and Expertise**
5.2 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
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17 **Trust and Estate Planning for Pets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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17 **Practice Management Skills for Success**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
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www.nmbar.org

18 **Rights of First Offer, First Refusal in Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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19 **Ethical Puzzles: The Wrongful Death Act, Negligent Settlement Claims, and the Search for the Silver Bullets**
3.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Gain the Edge! Negotiation Strategies for Lawyers**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Ethics, Satisfied Clients & Successful Representations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Recent Developments in New Mexico Natural Resource Law**
5.2 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Find it Fast and Free (and Ethically) with Google, Fastcase 7, and Social Media Sites**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **How to Practice Series: Demystifying Civil Litigation Pt 1 (2018)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Fall Elder Law Institute: Navigating Changes to the Adult Guardianship and Conservatorship Statutes and Rules (2018)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Immigration Law: U-Visa Training (2018)**
1.0 G, 0.5 EP
Live Replay, Albuquerque
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28 **Immigration Law: Assisting Human Trafficking Survivors (2018)**
1.0 G, 0.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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28 **Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204**
1.0 EP
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Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location/course type, course provider and registration instructions.

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective October 19, 2018

PUBLISHED OPINIONS

A-1-CA-34929	State v. M Winn	Reverse/Remand	10/15/2018
A-1-CA-36072	D Griego v. J Lasalle	Reverse/Remand	10/16/2018
A-1-CA-34929	State v. M Winn	Reverse/Remand	10/17/2018

UNPUBLISHED OPINIONS

A-1-CA-36728	State v. M Clark	Affirm	10/15/2018
A-1-CA-37129	Deutsche Bank v. C Streett	Affirm	10/15/2018
A-1-CA-37340	CYFD v. Timmy M.	Affirm	10/15/2018
A-1-CA-36274	State v. J Gardner	Affirm/Reverse/Remand	10/16/2018
A-1-CA-37126	State v. S Martinez	Affirm/Reverse/Remand	10/16/2018
A-1-CA-36262	State v. A Baca	Affirm/Reverse	10/18/2018

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
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Lawyer
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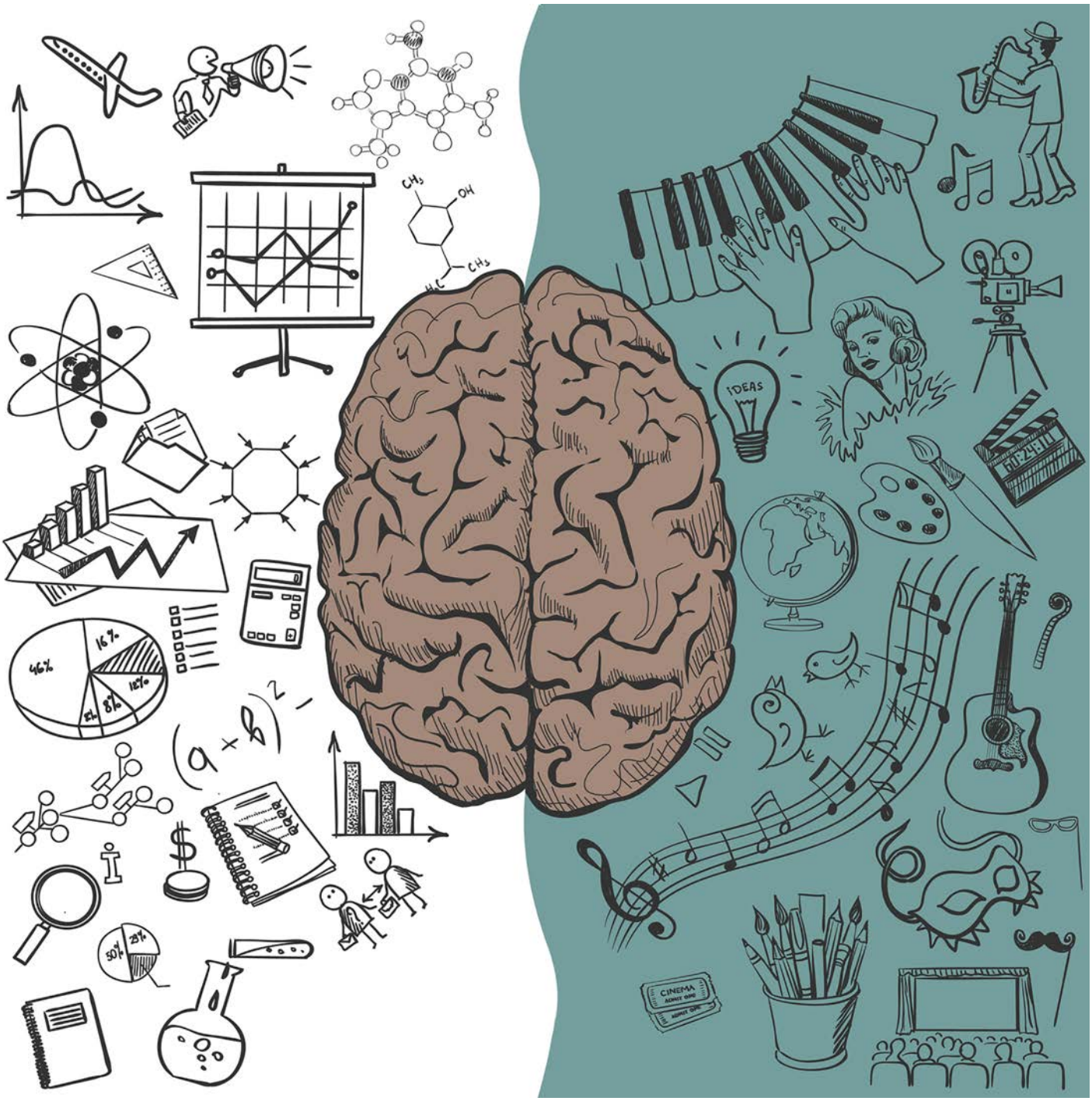
Intellectual Property Law



Intellectual Property Law Section

Introduction

Let's Help New Mexico Be a Place of Creativity and Innovation

The Intellectual Property Law Section wants you and your clients to know about Intellectual Property (IP) so that our community can be a place of creativity and innovation. Many creatives, innovators and business people don't know where to start or even to think about IP in the first place. This is where you, a member of the State Bar, can help. Keep yourself informed about IP and discuss it with your clients. This may very well make or break your client's business.

The Intellectual Property Law Section is committed to improving the health of IP in New Mexico. On **Saturday, Nov. 10** we are partnering with the UNM Law School to host the first **Pro Bono IP Fair** at UNM Law School to provide **free IP and other business legal advice** to individuals, start-up businesses and entrepreneurs. Tell your clients and friends about the Pro Bono IP Fair! Or better yet, come volunteer! Details and the public flyer are available on our section website.

In the articles that follow we touch upon some of the hot IP issues of the year and address the state of IP in New Mexico.

Actions to Protect Private Information and How "Terms and Conditions" are Sometimes Designed to Thwart the Law

by Jeffrey Albright

We have seen the headlines: "Facebook handed maximum data breach fine for role in Cambridge Analytica Scandal"; "Google's Gmail controversy is everything people hate about Silicon Valley"; "Yes, your phone is spying on you and these researchers proved it"; "Telecom companies say they won't share your location data—anymore." And we have all done it. We have signed up for a service or we are staying at a hotel or shop at particular stores and we "accept" the terms and conditions of being a "rewards" member or to obtain "access" to the Internet, without really reading the terms and conditions.

All too often, those terms and conditions allow information to be shared with affiliates or third party vendors, or they are sold to advertisers or aggregators. In some cases, acceptance of terms and conditions by an individual means that in the event of a dispute about who is or who is not using the information, you agree to accept jurisdiction and the law of Canada (or another country) because that is where the parent company is located.

This article provides examples of trends in both federal and state law in the domain of information privacy in an ever increasing world of integrated technology. It also analyzes some examples of the terms and conditions and the potential impact of granting access to your personal information (other than medical, certain employment, and data such as social security information), and provides an overview of the ramifications of what it means to "accept" the terms and conditions of major companies and an overview of the interpretation of the non-disclosure provisions of some major technology companies. The article concludes with a discussion of some of the apparent competing requirements in New Mexico that pit the desire for privacy in technology with the right of the public to have access to individuals' personal information held in public records—and some actions that individuals might take to protect their privacy.

Customer Proprietary Network Information and *Carpenter v. United States*

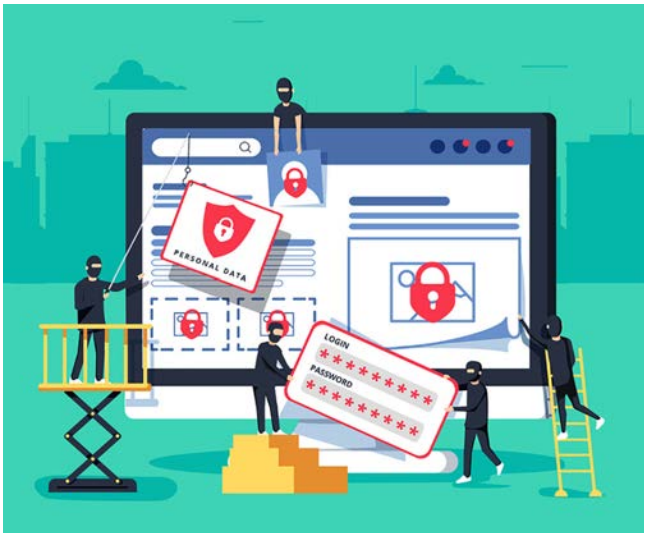
Customer Proprietary Network Information is the data collected by telecommunications companies about a consumer's telephone calls. It includes the time, fate, duration and destination number of each call, the type of network

a consumer subscribes to and any other information that appears on the consumer's telephone bill. The Telecommunications Act of 1996 granted the Federal Communications Commission authority to regulate how CPNI can be used to enforce related consumer information privacy provisions. Rules in the 2007 CPNI FCC Order:

- Limit the information which carriers may provide to third-party marketing firms without first securing the affirmative consent of their customers;
- Define when and how customer service representatives may share call details;
- Create new notification and reporting obligations for carriers (including identity verification procedures); and (among other things)
- Verify the process must match what is shown with the company placing the call.

It must be noted that as long as an affiliate is "communications" related, the FCC has ruled that CPNI is under an opt-out system. That is, it can be shared without your explicit permission, and a phone company is permitted to sell all information that they have about you, such as numbers you call, when you called them, where you were when you called them or any other personally identifying information—as long as there is an affiliated relationship AND you have not advised the company "not to" do so. This allows the company to share such information as websites you visit when you use the wireless service, the location of your device and your use of applications and features of the phone service.

In June, 2018, in *Carpenter v. United States*, [1] the U.S. Supreme Court (in a 5-4 decision) held that the federal government generally needs a warrant to access historical cell phone location records, reasoning that the location data deserves more stringent protection than other customer information held by a company. In so concluding, the Court determined that there was a reasonable expectation of Fourth Amendment protection in light of the "unique nature of cell phone location information." Of interest is that companies such as Google, Microsoft, Twitter, Verizon, Facebook and Apple along with many privacy advocates and shareholders of those major companies advocated for the requirement that search warrants should



be needed by the government before attempting to obtain the information.

California Passes Strict Online Privacy Law on June 28, 2018

On June 28, 2018, shortly after *Carpenter* was filed, Gov. Jerry Brown signed the California Consumer Privacy Act of 2018 (CCPA). The CCPA was passed unanimously by the State Assembly and Senate. The law takes effect in 2020. It grants consumers broad control over their personal data and:

- applies to any company that does business in the State of California; or
- has annual gross revenue in excess of $25 million; and
- grants the consumer the right to know what information companies like Facebook and Google are collecting, including: why they are collecting it and with whom it is being shared;
- enables consumers to bar tech companies from selling their data and the requirement for the business to delete information upon receipt of a verified request; and
- requires children under 16 to opt into allowing tech companies to even collect information at all.

On Sept. 23, 2018, Gov. Brown signed into law SB-1121, amending certain provisions of the CCPA. Among the numerous amendments were changes to include that a private cause of action exists only for data breaches and only if prior to initiating any action for statutory damages, a consumer provides a business 30 days written notice and an opportunity to cure any violation; removal of a requirement for a consumer to provide notice of a private cause of action to the attorney general; incorporation of a provision that businesses, services providers, or persons who violate the CCPA and fail to cure such violation within 30 days of written notice shall be liable—in an action brought by the state attorney general—for a civil penalty of not more than $2500 for each violation or $7500 for each intentional violation.

These actions follow on the heels of the European General Data Protection Regulation that imposed strong penalties on companies that violate data privacy. [2] See also "Facebook handed maximum data breach fine for role in Cambridge Analytica scandal" in which Facebook was fined £ 500,000 fine. [3]

Ironically, just a few months after the CCPA was enacted, Amazon.com, Inc. began an investigation into employees that are said to have offered sellers on its e-commerce program with an advantage by providing confidential internal date on customers' buying habits for a fee. Allegedly, Amazon employees had been selling information on sales and searches to independent merchants that operate on the site. This included assisting certain companies by deleting negative reviews and offering "higher search results" in that process.

Protection of New Mexico Consumer Information Faces Mixed Results in New Mexico

The New Mexico Inspection of Public Records Act (IPRA) states that "[e]very person has a right to inspect public records of this state, except" for records that fall within 12 defined exceptions. The stated purpose of the IPRA is that all persons are entitled to the "greatest possible information regarding the affairs of government." The New Mexico Supreme Court, interpreting IPRA, has held that "there is strong public policy favoring access to public records." [4] Trade secrets are exempt from disclosure under IPRA pursuant to the "as otherwise provided by law" exception in subsection 12.

Where does that leave consumers who wish *not* to disclose their telephone information to third parties? Do the federal rules under CPNI or other non-disclosure provisions apply? The rulings are not clear. Where address, name and e-mail information was made available to a mutual domestic water association, the

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Til Divorce Do You P(Art)

by Breanna Contreras

Picture this: Your artist client Arthur (Art for short) comes to you with a sad tune about his *achy breaky heart*.[1] Art's musician wife told him, "*we are never ever, ever getting back together*." Art is beside himself. He's getting divorced and needs your advice. For an artist who makes it big—and finds himself in divorce court—New Mexico's status as a community property state can cause more than a drag on his finances.

So what happens to Art's copyrights when it comes time for him to *put everything he owns in a box to the left*? While the answer is unclear in New Mexico, where community property rules apply (no appellate court has considered the issue), other community property states that have considered the matter provide important guidance.

Whether you haven't studied family law since you took the bar exam, or you don't even know what a copyright is, read on to find out why, in Neil Sedaka's words, *breakin' up* (copyrights) *is hard to do*.

What Is a Copyright and What Rights Does a Copyright Owner Have?
Under federal copyright law, when a new work of art is created, a copyright comes into being automatically at the moment of that work's creation. 17 U.S.C. § 302(a). For a painting, book, film, musical composition, or other work, the copyright in the work is distinct and separate from the physical work itself. 17 U.S.C. § 202.

Buying a book at the bookstore does not give a purchaser the right to copy the book and sell 20 more—this is a right reserved only to the author (unless there is an agreement that provides otherwise). Likewise, when an artist sells her painting, the purchaser owns the physical object but the artist continues to own the copyright in the painting and can use that copyright to make prints or postcards. The owner of the copyright has the exclusive right to copy, perform, display and distribute the work, and make derivative works. 17 U.S.C. § 106.

New Mexico's Presumption of Community Property
In New Mexico, if a married person makes a painting or writes a book, the copyright in the painting or book is co-owned by the spouses. This is because New Mexico is one of a handful of states that follows a community property regime. In New Mexico, the presumption is that property acquired—or created—during marriage by either spouse is community property. This presumption is codified in New Mexico statute. NMSA 1978, § 40-3-12(A). "Underlying this presumption is an understanding that the fruit of a spouse's labor during marriage is community property." *Arnold v. Arnold* 2003-NMCA-114, ¶ 8, 134 N.M. 381. The New Mexico Supreme Court makes this rule clear in *Hughes v. Hughes*, 1978-NMSC-002, ¶ 26, 91 N.M. 339:

Under community property law no distinction is made between husband and wife in respect to the right each has in the community property. The husband receives no higher or better title than does the wife. The plain public policy that this law expresses is that the wife shall have equal rights and equal dignity and shall be an equal benefactor in the matrimonial gain.

How Do Community Property Statutes Converge with the Copyright Act?
Both federal copyright and state community property regimes have a long history in the U.S., dating back to the late 1700s and early 1800s. Despite more than 200 years of history for both regimes, it is only relatively recently that copyright law appears to have intersected with state community property statutes.

Two community property states to have considered this issue both agree that the spouses co-own any copyrights created during marriage, but take different approaches to how these rights are divided.

While the Copyright Act provides that a copyright "vests initially in the author or authors of the work," the Act also provides that copyrights may be transferred "by any means of conveyance *or by operation of law*," including the operation of community property law. 17 U.S.C. § 201(a), (d)(1). This is the interpretation of the Copyright Act that one court in California adopted in the case *In re Marriage of Worth*, 195 Cal. App. 3d 768 (Ct. App. 1987).

During his marriage to Susan Worth, Frederick Worth authored several books, including two encyclopedias on trivia. The divorcing spouses agreed that the royalties from Fred's books would be divided equally. Later, Fred filed a separate lawsuit against the producers of the board

GOOD GRIEF!

When famous Peanuts comic strip creator Charles M. Schulz divorced his wife Joyce Halverson after more than 20 years of marriage, the divorcing spouses reportedly agreed that Halverson would share in the revenues Schulz received from the comic strip starting from 27% and declining to 15% over the course of ten years. Halverson and Schulz divorced in 1972, nearly five decades ago; if this issue were contested and needed to be resolved by a New Mexico court today, the matter would likely be resolved very differently. It is quite possible that the court would determine that the non-creator spouse co-owns the copyrights and all royalties from them on equal terms with the creator-spouse. For this reason, it is more important than ever to evaluate what copyrightable works (and other intangible property rights) created during marriage exist, and which have the likelihood of generating future income, including license fees and royalties.

The Lawsuit that Was A *Trivial Pursuit*

By the time Fred Worth filed his lawsuit against the creators of Trivial Pursuit in 1984, sales revenue for the game had already reached $256 million. Fred Worth's case was wildly unsuccessful. Some might even say it was a trivial pursuit. In *Worth v. Selchow & Righter Co.*, 827 F.2d 569 (1987), the original creators of the game did not deny that they consulted Mr. Worth's books in developing the board game, but argued in a motion for summary judgment that using Mr. Worth's books did not constitute copyright infringement. The federal district court granted defendants' motion, and the Ninth Circuit affirmed, ruling that the facts in Mr. Worth's books are, like ideas, never protected by copyright law. The Court, quoting Nimmer, reasoned that "the discovery of a fact, regardless of the quantum of labor and expense, is simply not the work of an author." Finding otherwise "would effectively grant a copyright in the work's nonprotectible ideas." Mr. Worth appealed, but the Supreme Court denied certiorari.

game Trivial Pursuit for copyright infringement. He claimed they copied his Super Trivia Encyclopedia in making the board game.[2] Susan sued Fred seeking an order declaring she would be entitled to one-half of any proceeds from his lawsuit against the producers of Trivial Pursuit.

The *Worth* court decided that the Copyright Act's language allowing transfer "by operation of law" meant that "the copyright is automatically transferred to both spouses by operation of the California law of community property." *Id. at* 74. The Copyright Act, the *Worth* Court reasoned, could be read harmoniously with California's community property statutes, and the two thus co-owned the copyrights in the books and any proceeds derived from them.

Like New Mexico, the California Court in *Worth* recognized that the "principles of community property law do not require joint or qualitatively equal spousal efforts or contributions in acquiring the property." It did not matter that only one of the spouses wrote the Super Trivia Encyclopedia books. "It is enough that the skill and effort of one spouse expended during the marriage resulted in the creation or acquisition of a property interest."

In Louisiana, also a community property state, the Fifth Circuit confronted a similar issue in *Rodrigue v. Rodrigue*, 218 F.3d 432 (5th Cir. 2000). George Rodrigue became a highly successful and prolific painter during his marriage to Veronica, most notably for his Blue Dog Series, which he modeled after the family pet.[3] Following George's divorce from Veronica, George continued to create Blue Dog paintings and filed an action in federal court seeking a declaration that he was the sole owner of the intellectual property rights in all his paintings. Veronica counterclaimed for a declaration that she owned an undivided one-half interest in all intellectual property rights created by George, and she even asked that she be declared a co-owner of any derivative works created by George after the parties divorced. Both George and Veronica filed cross motions for summary judgment. The trial court ruled in George's favor, concluding that the Copyright Act conflicted with Louisiana community property law and therefore, the state community property law was preempted by federal law.

The Fifth Circuit reversed the trial court, concluding that the Copyright Act does not preempt Louisiana's community property statutes, and that the married couple were co-owners of the copyrights. The way in which the Court reached this conclusion was distinct from the straightforward analysis in *Worth*—it rested on the conclusion that "an author-spouse in whom a copyright vests maintains exclusive managerial control of the copyright" and that the economic benefits of the copyright work belong to the spouses jointly. *Id.* at 435. The way it reached this conclusion was by splitting up the "bundles" of property rights in the artwork into three groups under Louisiana's unique civil law system: the *usus*—the right to use or possess; the *abusus*—the right to transfer, lease, or

encumber the property; and the *fructus*—the right to the economic fruits of the property. *Id.* at 436-37.

Why do *Worth* and *Rodrigue* matter?
No New Mexico appellate court has squarely dealt with the issue of the community property division of copyrights created during marriage. In the 1999 Court of Appeals case *Boutz v. Donaldson*, the Court touched on this issue in *dicta*, recognizing that the case before it involved only the propriety of including the income the father received from books he authored as part of his overall income for purposes of calculating child support. 1999-NMCA-131, 128 N.M. 232. The matter did not involve the community property division of the copyrights, but the Court signaled a willingness to entertain the issue in the future, citing both *Worth* and *Rodrigue* as support.

It is only a matter of time before this issue comes back before the state's appellate courts, making it more critical than ever for attorneys to be up to speed on what types of intangible property might need to be dealt with in divorce proceedings. Part of that analysis necessarily includes evaluating the possibility of future income streams from intellectual property rights, which can be extremely difficult. If your client *lost that lovin' feelin', whoa, that lovin' feelin*, make sure you have the tools to advise her about the ways in which New Mexico's community property laws may affect her intangible rights before the couple says "*Baby, bye, bye, bye.*"

Endnotes

[1]See how many cheesy references to popular oldies and contemporary breakup songs you can find.

[2]Fred Worth's The Complete Unabridged Super Trivia Encyclopedia is available for sale on Amazon.

[3]To see the Blue Dog series, visit George Rodrigue's website at https://georgerodrigue.com/.

About the Author

Breanna Contreras is a graduate of Notre Dame Law School and practices with Bardacke Allison LLP in Santa Fe where she represents a variety of clients in brand strategy, trademark and copyright registration and licensing, and enforcement of intellectual property rights. She serves on the Board of Directors of the Intellectual Property Law Section.

Actions to Protect Private Information and How "Terms and Conditions" are Sometimes Designed to Thwart the Law

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New Mexico attorney general in late 2017 said that as a quasi-government entity, this information had to be disclosed to a third party by the mutual domestic water users association, even over the objection of the individual. The consumer could protect the information from being disclosed by the national carrier, but could not prevent it from being disclosed if requested by a third party to the mutual domestic. The Attorney General stated that private information that can be protected *does not include* addresses and phone numbers—even though the mutual domestic had passed a resolution that the information should be provided confidential treatment.

What Are the Options for an Individual to Protect Private Information?
Given the concerns over private misuse of one's private information by companies or organizations, one can take the following action to safeguard personal and private information:

- Opt out. Take a look at the language in agreements with your telephone carrier, your credit card companies, your internet service provider or even your insurance carriers and credit unions. Look for language, or periodic notifications, that say how the company is using your information. Notifications from Chase, for example, include reasons why they share your data. Such things as: for our everyday business purposes; for our marketing purposes; for joint marketing with other financial companies; for our affiliates' everyday business purposes; for our affiliates' everyday business purposes; for our affiliates to market to you; and even for nonaffiliates to market to you.
- When you download an application on your mobile device, check to see what conditions/disclosures come with placing that app on your mobile device. It might not be worth its convenience. You might also be able to find a different app that serves the same purpose but with fewer strings attached.
- In June, the four major wireless carriers agreed to "choke off" data aggregators such as LocationSmart and Zumibo. [5]
- When signing up for reward programs at your supermarket or with an online service, check to see with whom the information is being shared or what other affiliates are going to have access to the information.
- If you join an association or some quasi-governmental entity, check with them so the extent that your personal information is being shared is only to the degree with which you are comfortable.

And finally, read the fine print. It takes time, but at least you will have firsthand knowledge about your potential vulnerability and will be able to make an informed decision as to whether you want to risk exposure/disclosure of personal data.

Endnotes

[1] *Carpenter v. United States*, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018).

[2] *See* Jackson Lewis, PC, *California Consumer Privacy Act Amendment Signed Into Law*, JD Supra (Sept. 26, 2018), https://www.jdsupra.com/legalnews/california-consumer-privacy-act-35099/.

[3] *See* Margi Murphy, *Facebook Handed Maximum Data Breach Fine for Role in Cambridge Analytica Scandal*, The Telegraph, (July 11, 2018), https://www.telegraph.co.uk/technology/2018/07/10/facebook-handed-maximum-data-breach-fine-role-cambridge-analytica/. Note: had the breach occurred after May 2018, under the new data protection law, a maximum of four percent of global turnover or £18 million could have been imposed.

[4] *City of Las Cruces v. Pub. Employee Labor Relations Bd.*, 1996-NMSC-024, ¶ 8, 121 N.M. 688, 917 P.2d 451.

[5] Sara A. O'Brien, *Telecom Companies Say They Won't Share Your Location Data Anymore*, CNN (June 19, 2018), https://money.cnn.com/2018/06/19/technology/telecom-location-data/index.html.

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Public *or* Private:

The Implications of the *Oil States* Decision

by Kevin Soules

In 2011, Congress enacted the most sweeping changes to patent law in 50 years. One important feature of the America Invents Act (AIA) is a revision of the means by which a patent can be reviewed after it has issued. New post-grant procedures expand the reexamination proceedings available to challenge a patent. Among the new procedures, the most common, and arguably controversial, is *inter partes* review (IPR).

The introduction of *inter partes* review was intended to address growing concern over the assertion of what some considered to be "low quality patents".[1] Many saw the increasing number of vexatious patent lawsuits by "patent trolls" as a serious burden on both business and the judicial system. The "patent troll" model works something like this:

> The troll acquires one or more patents covering a common (usually electronic or software related) process. The troll then asserts these patents against multiple unwitting defendants, demanding a settlement. The defendants are then left with two options: risk bankruptcy defending the lawsuit, or pay the troll's demands and move on.

Enter the *inter partes* review. An IPR gives the defendant a chance to challenge the validity of the asserted patent before a panel of Patent Trial and Appeal Board judges (an arm of the Patent Office), at a fraction of the cost of full blown litigation. If the defendant is successful in invalidating the patent, the defendant is saved from defending a lawsuit in Federal Court.

Beyond curtailing patent trolls, IPR procedures were justified by a number of other seemingly valuable improvements to the patent system. For example, the Patent Office (PTO) specializes in patents, making it arguably better suited than Federal Courts to review patent validity. Likewise, the director of the Patent Office has wide latitude over the administration of IPR proceedings. This was expected to allow the Office to quickly adjust and/or adapt the IPR process as circumstances dictated. The Patent Trial and Appeal Board (PTAB) even highlights the relatively expeditious disposition of its docket (two years or less in most cases), a relative sprint compared to the slog of patent litigation in Federal Court.

While IPRs were meant to limit the financial burden and expedite the process of patent infringement litigation, some contend the opposite has happened. Specifically, *inter partes* review has become the de facto first step in defending patent infringement lawsuits. The process itself is quasi-judicial, and mirrors standard litigation procedure. Limited discovery is permitted, each party is invited to present arguments and testimony, including expert opinions, and the ultimate decision is made by PTAB judges. However, the Patent Office is an administrative body and the director has significant discretion in establishing how *inter partes* reviews are conducted. For example, if a panel of PTAB judges reaches a decision the director views with disfavor, the director can unilaterally call for an expanded panel to review the case again.

The IPR process has become an astonishingly effective tool for striking down patents. Indeed, as of February 2018, in 81% of instituted cases, some or all of the challenged claims were invalidated.[2] The magnitude of this point is striking. In 81% of instituted cases, the very office that initially issued the patent later concluded the patent was, at least partially, issued incorrectly. As a result, the IPR process has arguably undermined the integrity of the entire patent system at a foundational level. If a patent can be invalidated in an IPR proceeding, even after issuance through the standard arduous process,

many creators of intellectual property will understandably find it difficult to justify the effort and expense of pursuing a patent in the first place.

Not surprisingly, a number of challenges to the IPR process have been mounted. In 2018, the Supreme Court addressed the constitutionality of *inter partes* review in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC, et al*.[3]

The patent holder, Oil States, acquired a patent related to well-head equipment for hydraulic fracturing. Oil States asserted the patent against the defendant, Greens Energy Group, who duly challenged the validity of the patent via IPR. The Patent Trial and Appeal Board found Oil States claims unpatentable. Oil States challenged the PTAB decision in Federal District Court, most importantly challenging the constitutionality of *inter partes* review. Oil States asserted that patent rights could not be extinguished outside an Article III court, and that patent invalidation at the PTAB violated the Seventh Amendment right to trial by jury.

The heart of the Oil States decision is centered on the fundamental nature of a patent. Specifically, the decision rested on a determination of whether a patent is a private property right, and therefore not extinguishable outside an Article III court and jury trial, or if a patent is a public franchise governed by the public rights doctrine. In a 7-2 decision, the Supreme Court found:

> *Inter partes* review falls squarely within the public-rights doctrine. The decision to grant a patent is a matter involving public rights. *Inter partes* review is simply a reconsideration of that grant, and Congress has permissibly reserved the PTO's authority to conduct that reconsideration.[4]

The modern public rights doctrine is a topic unto itself, deserving review. The doctrine was established by a line of cases starting at *Murray's Lessee*[5] and most recently revisited in *Stern v. Marshall*.[6] Originally, the public rights doctrine was developed to resolve cases involving the government. However, over time, the doctrine has evolved into a means for adjudicating statutorily-created rights stemming from the government as well.

The modern public rights doctrine has changed significantly from the decision in *Murray's Lessee*. In the landmark *Atlas Roofing* decision, the Supreme Court held:

> At least in cases in which "public rights" are being litigated - e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact -- the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.[7]

The doctrine was further extended in *Granfinanciera, S. A. v. Nordberg*.[8] In that case, the Supreme Court held:

> Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] created a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.[9]

Thus, the public rights doctrine essentially holds that if a statutory right is not closely intertwined with a federal regulatory program, and if that right neither belongs to, nor exists against, the Federal Government, then it must be adjudicated by an Article III court. If the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial. However, in cases where the right is created by statute, Congress is free to assign certain functions, including adjudication, to an administrative body.

Thus, in *Oil States*, when faced with the determination of the constitutionality of patent invalidity via IPR, the Supreme Court held:

> Our precedents have recognized that the doctrine covers matters "which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." Crowell v. Benson, 285 U. S. 22, 50 (1932). In other words, the public-rights doctrine applies to matters "arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." Ibid. (quoting Ex parte Bakelite Corp., 279 U. S. 438, 451 (1929)). *Inter partes* review involves one such matter: reconsideration of the Government's decision to grant a public franchise.[10]

In a particularly interesting analogy, the Court likens a patent right to a public franchise, explaining, "Congress can grant a franchise that permits a company to erect a toll bridge, but qualify the grant by reserving its authority to revoke or amend the franchise."[11]

The Court further dismissed precedential decisions such as *McCormick Harvesting Machine Co.*[12] and *American Bell Telephone Co.*[13] where the Court previously held "[t]he only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent." The Court found these rules, vestiges of a since abandoned patent statute, not applicable to the provisions of the newly promulgated America Invents Act.

Justice Gorsuch offers a dissent that is fairly well summarized in his first paragraph:

> After much hard work and no little investment you devise something you think truly novel. Then you endure the further cost and effort of applying for a patent, devoting maybe $30,000 and two years to that process alone. At the end of it all, the Patent Office agrees your invention is novel and issues a patent. The patent affords you exclusive rights to the fruits of your labor for two decades. But what happens if someone later emerges from the woodwork, arguing that it was all a mistake and your patent should be canceled? Can a political appointee and his administrative agents, instead of an independent judge, resolve the dispute? The Court says yes. Respectfully, I disagree.[14]

While the Court suggests that their decision is to be narrowly construed, it is likely to have profound and lasting effects on the patent system. The uncertainty associated with a public franchise right that can be freely revoked by an administrative agency makes the time, effort, and expense of patent acquisition much less palatable. The patent system is meant to encourage innovation by rewarding those that contribute to the general storehouse of knowledge upon which future innovations are built. It will be interesting to see if the characterization of patent rights as a franchise, governed by the public rights doctrine, as opposed to a private property right, serves to promote or frustrate that purpose.

Endnotes

[1] The term "low quality patent" is itself controversial. A detailed review of this point is beyond the scope of this discussion.

[2] See https://www.uspto.gov/sites/default/files/documents/trial_statistics_20180228.pdf

[3] *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. ___ (2018).

[4] Id.

[5] *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856).

[6] *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011).

[7] *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442, 450, 51 L. Ed. 2d 464, 97 S. Ct. 1261 (1977)

[8] *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 54-55, 106 L. Ed. 2d 26, 109 S. Ct. 2782 (1989)

[9] *Id.*

[10] *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. ___ (2018).

[11] *Id.*

[12] *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 609.

[13] *United States v. American Bell Telephone Co.*, 128 U. S. 315, 370

[14] *Oil States Energy Services, LLC v. Greene's Energy Group*, LLC, 584 U.S. ___ (2018).

The State of *Innovation and Creativity* in New Mexico

by Justin Muehlmeyer

One need not look into bygone eras for examples of innovation and creativity in New Mexico: last year, the pioneering art-park Meow Wolf generated $8.8 Million in revenue in its second year in existence, employed more than 100 creatives and launched an equity crowdfunding campaign to help it expand into other states. The campaign closed in record time, making it the fastest known regulation equity investment crowdfund since SEC regulations permitted such equity crowdfunding in January 2016 as part of the JOBS Act of 2015. [1]

But how innovative and creative is New Mexico actually? To help us wrap our mind around this complex question, we looked at intellectual property statistics that are available for New Mexico. Here are six things we learned.

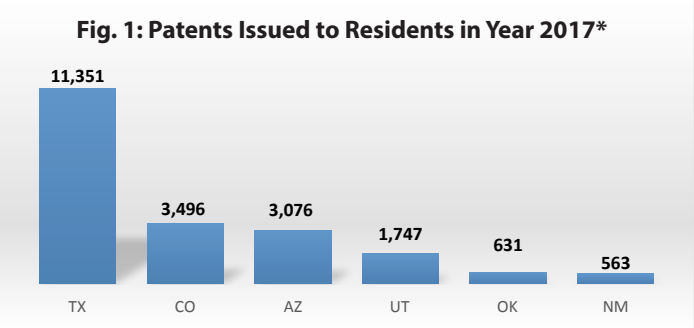
1. Of all of New Mexico's neighbors, New Mexico residents were issued the fewest number of patents in 2017.

If we are looking to understand the "innovative health" of a community, stats about patents and who owns them may tell us something. Patent applications are costly and time-consuming endeavors that reflect the applicant's belief that their invention has value. **New Mexico residents apply for between 900 and 1,000 patents a year**:

Year	2013	2014	2015	2016	2017
Patent Apps Filed*:	929	984	982	951	NA

*includes utility, plant, design and reissue patents. Data: USPTO, Performance & Accountability Report FY 17, Table 7: Patent Applications Filed by Residents of the United States, New Mexico, pg. 172 (2017), available at https://www.uspto.gov/sites/default/files/documents/USPTOFY17PAR.pdf.

An issued patent represents the U.S. Patent & Trademark Office's (USPTO) judgment that what is claimed is novel and not an obvious variation of anything done ever before (at least, as determined by a single examiner after performing a search). In 2017, **New Mexico residents were issued the fewest number of patents (of any kind) of all its neighbors**:



*Data: USPTO, Performance & Accountability Report FY 17, Table 8: Patents Issued to Residents of the United States, pg. 173 (2017), available at https://www.uspto.gov/sites/default/files/documents/USPTOFY17PAR.pdf

Calculating the number of patents issued per capita tells a more interesting story; while New Mexico packs more "innovative punch" than Oklahoma despite Oklahoma having nearly twice the population, New Mexico clearly lags behind its neighbors in patents being issued to residents, and Colorado takes a drastic lead in the region even over more populous Texas:

State	Population*	"Innovative Punch" (Issued Patents per Capita)
CO	5,607,154	.000623
UT	3,101,833	.000563
AZ	7,016,270	.000438
TX	28,304,596	.000401
NM	2,088,070	.000270
OK	3,930,864	.000161

*Data: U.S. Census Bureau, Table 1 Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rick: April 1, 2010 to July 1, 2017, population estimate of 2017 (accessed July 23, 2018), available at https://www.census.gov/data/tables/2017/demo/popest/state-total.html#par_textimage_1574439295

2. Less than a third of inventors in New Mexico independently own their invention.

A patent, like all personal property, can be assigned to someone else. An independent inventor is an inventor listed on a patent that is unassigned or is assigned only to individuals at the time the patent is granted. The number of independent inventors may roughly reflect those individuals that have yet to commercialize their invention, but this would be a rough indication because some individual inventors license their patent to a commercializing person or entity without assigning it. The number of independent inventors may also indicate that the inventor is paying out of their personal pocket book for the legal services. **Between a quarter and a third of inventors residing in New Mexico listed on issued patents are independent inventors**:

Year:	2010	2011	2012	2013	2014	2015
Patents Issued to NM*:	455	412	444	471	445	455
Independent Inventor**:	128	116	119	136	97	120
% Independent Inventor:	28%	28%	27%	29%	22%	26%

*The number of utility patents, design patents, plant patents, reissue patents with the residence of the first-named inventor being in New Mexico. Data: USPTO, Patent Country, State, and Year – All Patent Types (December 2015), available at https://www.uspto.gov/web/offices/ac/ido/oeip/taf/reports.htm#by_geog.
**The number of times inventors from New Mexico are named on unassigned patents or on patents assigned to individuals, patents being utility patents, design patents, plant patents, reissue patents.
Data: USPTO, Independent Inventors By State By Year All Patent Types Report January 1977-December 2015, available at https://www.uspto.gov/web/offices/ac/ido/oeip/taf/reports.htm#by_geog.

Compared with its neighbors for 2015, the most recent year of data, New Mexico had a similar proportion of independent inventors as Oklahoma and Utah, while Texas and Colorado had the lowest proportion of independent inventors in the region:

	% of Patents Issued to Independent Inventor*
OK	28%
NM	26%
UT	25%
AZ	21%
TX	16%
CO	16%

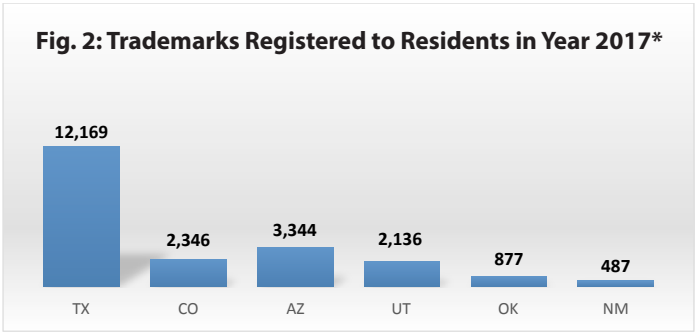
*Data: Patents Issued to New Mexicans: USPTO, Patent Country, State, and Year – All Patent Types (December 2015), available at https://www.uspto.gov/web/offices/ac/ido/oeip/taf/reports.htm#by_geog;
USPTO, Independent Inventors By State By Year All Patent Types Report January 1977-December 2015, available at https://www.uspto.gov/web/offices/ac/ido/oeip/taf/reports.htm#by_geog.

3. Of all of New Mexico's neighbors, New Mexico residents registered the fewest number of federal trademarks in 2017. [2]

The filing of a trademark registration application with the USPTO reflects that its owner has either used the mark to sell goods and services or intends to do so. New Mexico residents applied for **1,038 trademark registrations** in 2017.

A trademark that is registered with the USPTO indicates that the trademark is actually being used in commerce Congress can regulate (e.g., interstate commerce) and that the trademark is capable of distinguishing the source of the goods and services associated with the trademark (i.e., it is an identifiable brand). A registrant has likely invested time, effort and money in building and protecting its brand. In 2017, New Mexico residents registered the fewest number of trademarks of all its neighbors:

Fig. 2: Trademarks Registered to Residents in Year 2017*



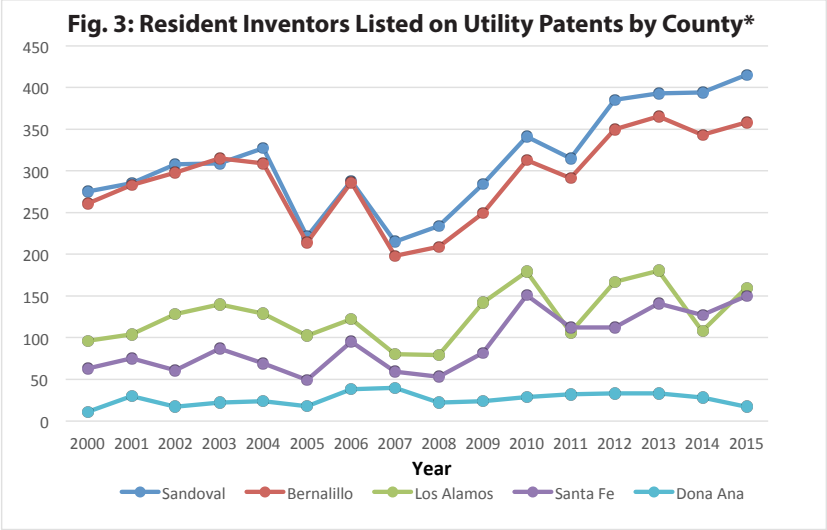
*Data: USPTO, Performance & Accountability Report FY 17, Table 20: Trademarks Registered to Residents of the United States, pg. 186 (2017), available at https://www.uspto.gov/sites/default/files/documents/USPTOFY17PAR.pdf.

Of those States, the number of registrations per capita suggests that Utah residents appear to care the most about registering their trademarks, with New Mexico and Oklahoma falling well behind the others:

State	Registered Trademarks per Capita
UT	0.00069
AZ	0.00048
TX	0.00043
CO	0.00042
NM	0.00023
OK	0.00022

4. Sandoval County is home to the most inventors in New Mexico.

Every patent has at least one inventor and many patents have more than one inventor. Fig. 2 shows the number of times a resident of a New Mexico county was named on a utility patent issued any given year since year 2000 for those five counties with the highest number. Sandoval and Bernalillo Counties have the most inventors, Sandoval County taking a clear lead since 2007, with the general trend of the top two counties moving upward:



*Data: USPTO, U.S. Resident Inventors and Their Utility Patents Breakout by State Regional Component, Count of 2000-2015 Inventors and Their Patents As Distributed by Calendar Year of Patent Grant, available at https://www.uspto.gov/web/offices/ac/ido/oeip/taf/reports.htm.

5. New Mexicans patent a wide variety of technologies and no particular technology dominates all others, but here are the top ten technologies.

Every patent is assigned a primary technology class. For the years 2011-2015, a total of 2,099 patents were issued with the first-named inventor being a New Mexico resident. The top ten classes of technologies of those patents were:

Primary Technology Class	# of NM Patents
Drug, Bio-Affecting and Body Treating Compositions	60
Semiconductor Device Manufacturing Processes	55
Radiant Energy	54
Measuring and Testing	52
Data Processing for Vehicles, Navigation and Relative Location	49

Primary Technology Class	# of NM Patents
Active Solid-State Devices	46
Optics: Measuring and Testing	45
Image Analysis	44
Molecular Biology and Microbiology	43
Optical: Systems and Elements	35
Other	1616

*Data: USPTO, Patenting By Geographic Region, Breakout by Technology Class, Count of 2011-2015 Utility Patent Grants, New Mexico, available at https://www.uspto.gov/web/offices/ac/ido/oeip/taf/reports.htm.

6. Intellectual Property litigation is incredibly rare in New Mexico and the 2017 changes to patent venue have so far not changed the number of patent cases in New Mexico.

Cases involving a patent or copyright are the exclusive jurisdiction of federal courts. *See* 28 U.S.C. § 1338(a). Cases involving a trademark can be the jurisdiction of either federal or state courts. *See* 15 U.S.C. § 1121; NMSA 1978 § 57-3B-16. Cases filed in the U.S. District Court for the District of New Mexico involving a patent, trademark and copyright are incredibly rare:

	2016	2017	Through Sept. 2018
Patent	2	2	1
Trademark	6	4	5
Copyright	3	2	5

*Based on a search in PACER for all open and/or closed cases in the District of New Mexico.

The United States Supreme Court's May 2017 opinion in *TC Heartland* refocused patent venue to exist only where the alleged infringer is either incorporated or has a "regular and established place of business," rather than anywhere the alleged infringer would be subject to personal jurisdiction under the general venue statute. *See TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1516-17 (May 22, 2017). In September 2017, the Court of Appeals for the Federal Circuit narrowed what a "regular and established place of business" is such that it is much more likely that infringers will only be sued where the infringer itself has a permanent location transacting business. *See In re Cray Inc.*, 871 F.3d 1355, 1361 (Sept. 21, 2017). While patent case filing trends have "responded dramatically" to the change in venue law in other jurisdictions, [3] New Mexico does not appear to have experienced any change.

Conclusion

Per capita, New Mexico residents are issued a relatively low number of patents and trademark registrations, and IP is rarely enforced in New Mexico courts. While the number of inventors residing in Sandoval and Bernalillo Counties is gradually increasing, these statistics indicate that New Mexico's IP health is weak relative to its neighbors. This state could be caused by several things: (1) the benefits of IP are not well known in New Mexico; (2) New Mexican businesses do not consider IP worth the expense of securing or cannot afford it; and/or (3) New Mexico businesses do not sell goods and services in the type of commerce (such as interstate commerce) required to qualify for federal registration and/or do not produce technologies they consider patentable.

As members of the State Bar, we can all help make New Mexico a land of creativity and innovation. All members of the bar, whether practicing IP or not, should discuss IP and the value of registering IP with clients. While the cost of securing IP, particularly patents, may be prohibitive of some businesses, it is difficult to imagine how any business with a revenue that depends on its brand recognition would not be able to afford the cost to at least attempt to register their trademark – the benefits of which would make or break their business should infringers piggy-back off their brand.

Endnotes

[1] See Meow Wolf WeFunder Page at: https://wefunder.com/meow.wolf and Meow Wolf Press Release at: https://meowwolf.com/wp-content/uploads/2017/08/Meow-Wolf-Concludes-Crowdfunder-Offering-In-Record-Time-17-July-17.pdf

[2] USPTO, Performance & Accountability Report FY 17, Table 19: Trademark Applications Filed by Residents of the United States, pg. 186 (2017), available at https://www.uspto.gov/sites/default/files/documents/USPTOFY17PAR.pdf.

[3] *See* Lex Machina Q4 2017 End of the Year Litigation Update, available at https://lexmachina.com/lex-machina-q4-litigation-update/.

About the Author
Justin Muehlmeyer is an associate patent attorney at Peacock Law P.C. and serves as chair of the Intellectual Property Law Section of the State Bar of New Mexico.

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Intellectual Property is a specialized field. Refer your client's intellectual property matters to a specialist who is experienced in IP prosecution, infringement, and civil litigation. **Gina T. Constant** is a registered Patent Attorney with the US Patent and Trademark Office.

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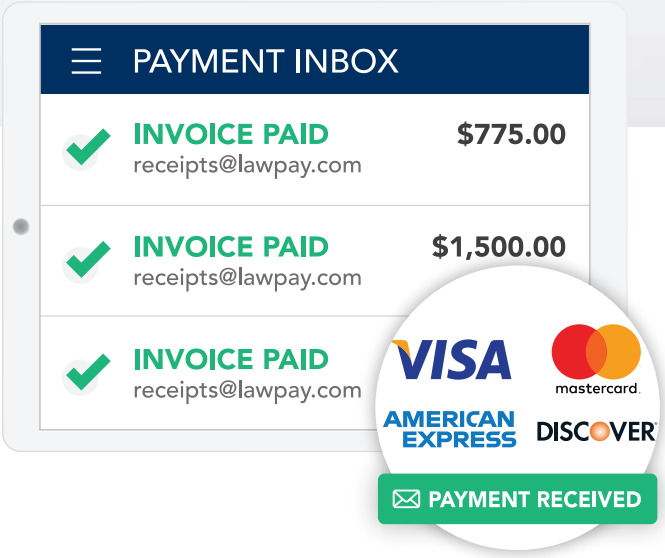

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
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Effective October 31, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

There are no proposed rule changes open for comment.

Recently Approved Rule Changes Since Release of 2018 NMRA:

Effective Date

Rules of Civil Procedure for the District Courts

1-003.2	Commencement of action; guardianship and conservatorship information sheet	07/01/2018
1-079	Public inspection and sealing of court records	07/01/2018
1-079.1	Public inspection and sealing of court records; guardianship and conservatorship proceedings	07/01/2018
1-088.1	Peremptory excusal of a district judge; recusal; procedure for exercising	03/01/2018
1-104	Courtroom closure	07/01/2018
1-140	Guardianship and conservatorship proceedings; mandatory use forms	07/01/2018
1-141	Guardianship and conservatorship proceedings; determination of persons entitled to notice of proceedings or access to court records	07/01/2018

Civil Forms

4-992	Guardianship and conservatorship information sheet; petition	07/01/2018
4-993	Order identifying persons entitled to notice and access to court records	07/01/2018
4-994	Order to secure or waive bond	07/01/2018
4-995	Conservator's notice of bonding	07/01/2018
4-995.1	Corporate surety statement	07/01/2018
4-996	Guardian's report	07/01/2018
4-997	Conservator's inventory	07/01/2018
4-998	Conservator's report	07/01/2018
4-999	Notice of hearing and rights	10/15/2018

Rules of Criminal Procedure for the District Courts

5-302A	Grand jury proceedings	04/23/2018

Local Rules for the First Judicial District Court

LR1-404	Family court services and other services for child-related disputes	09/01/2018
LR1-405	Safe exchange and supervised visitation program	09/01/2018

Local Rules for the Second Judicial District Court

LR2-401	Court clinic mediation program and other services for child-related disputes	09/01/2018
LR2-403	Safe exchange and supervised visitation	09/01/2018
LR2-Form 709	Court clinic referral order	09/01/2018

Local Rules for the Third Judicial District Court

LR3-401	Domestic relations mediation and safe exchange and supervised visitation programs	09/01/2018

Local Rules for the Fourth Judicial District Court

LR4-401	Safe exchange and supervised visitation, and domestic relations mediation	09/01/2018

Local Rules for the Fifth Judicial District Court

LR5-401	Safe exchange and supervised visitation; domestic relations mediation	09/01/2018

Local Rules for the Sixth Judicial District Court

LR6-401	Safe exchange and supervised visitation, and domestic relations mediation	09/01/2018
LR6-404	Withdrawn	09/01/2018

Local Rules for the Seventh Judicial District Court

LR7-401	Domestic relations; mediation	09/01/2018

Local Rules for the Eighth Judicial District Court

LR8-401	Safe exchange and supervised visitation; domestic relations mediation	09/01/2018

Local Rules for the Ninth Judicial District Court

LR9-405	Domestic relations mediation	09/01/2018

Local Rules for the Eleventh Judicial District Court

LR11-402	Domestic relations mediation; safe exchange and supervised visitation	09/01/2018

Local Rules for the Twelfth Judicial District Court

LR12-401	Domestic relations mediation	09/01/2018

Local Rules for the Thirteenth Judicial District Court

LR13-124	Fees non-refundable	09/01/2018
LR13-401	Domestic relations alternative dispute resolution (ADR); advisory consultation	09/01/2018
LR13-402	Domestic Relations Mediation Act; safe exchange and supervised visitation	09/01/2018

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-035
No. S-1-SC-36651 (filed September 6, 2018)

CASEY R. BAKER,
Worker-Petitioner,
v.
ENDEAVOR SERVICES, INC. and
GREAT WEST CASUALTY COMPANY,
Employer/Insurer-Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Terry S. Kramer, Workers' Compensation Judge

GERALD A. HANRAHAN
Albuquerque, New Mexico
for Petitioner

KELLY A. GENOVA
Kelly A. Genova, P.C.
Albuquerque, New Mexico
for Respondents

Opinion

Gary L. Clingman, Justice

{1} Casey R. Baker (Worker) appeals the decision by the Workers' Compensation Administration denying his request that Endeavor Services, Inc. and Great West Casualty Company (Employer) pay 100% of Worker's attorney fees pursuant to the fee-shifting provision set forth in NMSA 1978, Section 52-1-54(F)(4) (2003, amended 2013). At issue is whether Worker made an offer of judgment that was sufficient to trigger the fee-shifting provision. Worker's offer of judgment put Employer on notice that Worker was proposing an unambiguous partial settlement and that Worker intended to invoke the fee-shifting statute. We conclude that Worker made a valid offer under Section 52-1-54(F) (2003) and hold that the workers' compensation judge erred as a matter of law by declining to apply the mandatory fee-shifting provision. We therefore reverse and remand.

I. DEFICIENCIES IN THE RECORD PROPER

{2} It is the duty of this Court to decide the cases before it if the factual record is sufficient to do so. The record proper before this Court is lacking in a number of ways. However, requiring a perfect record would mean this Court would rarely decide any cases. The parties in this case do not dispute the factual findings of the workers' compensation judge, but rather the parties dispute the judge's application of the law to the facts. Unchallenged findings of fact are binding on this Court. *State ex rel. State Highway Comm'n v. Sherman*, 1971-NMSC-009, ¶¶ 2-3, 82 N.M. 316, 481 P.2d 104; *State ex rel. Thornton v. Hesselden Construction Co.*, 1969-NMSC-036 ¶ 4, 80 N.M. 121, 452 P.2d 190 ("[F]ailing to challenge any one of the trial court's findings . . . , [a party] is bound by the findings."); *Gallegos v. Kennedy*, 1968-NMSC-170, ¶ 6, 79 N.M. 590, 446 P.2d 642 ("Unchallenged findings are the facts upon which the case rests on appeal and are binding on this court."). "Unless findings are directly attacked, they are the facts in this court, and a party claiming error on the part of the trial court must be able to point clearly to the alleged error." *Sherman*, 1971-NMSC-009, ¶¶ 2-3 (citing *Morris v. Merchant*, 1967-NMSC-026, ¶ 21, 77 N.M. 411, 423 P.2d 606). Nowhere in the brief in chief, answer brief, or reply brief do the parties challenge the legitimacy of the facts presented. Instead, the parties dispute the analysis by the workers' compensation judge of the offer of judgment and the judge's application of Section 52-1-54(F)(4) (2003) to the offer. We conclude that sufficient factual certainty exists in the record before us to decide this case.

II. BACKGROUND

{3} Worker suffered injuries as a result of a compensable motor vehicle accident on October 14, 2011. On January 9, 2012, Worker filed his first workers' compensation complaint, seeking medical benefits, temporary total disability (TTD) benefits, and attorney fees. The parties participated in a mediation conference on February 17, 2012, and both parties accepted the mediator's recommended resolution of Worker's first complaint. However, a number of issues remained unresolved, including the total amount of Worker's medical expenses, Worker's preinjury weekly wage, and the compensation rate to which Worker was entitled. These issues remained unresolved until December 21, 2016, following a trial on the merits.

{4} On July 22, 2013, Dr. Balkman assessed Worker to determine whether he had reached his maximum medical improvement (MMI). *See* NMSA 1978, § 52-1-24.1 (1990) ("As used in the Workers' Compensation Act, 'date of maximum medical improvement' means the date after which further recovery from or lasting improvement to an injury can no longer be reasonably anticipated based upon reasonable medical probability as determined by a health care provider."). Once a medical care provider, like Dr. Balkman, finds a worker to be at MMI, the healing process is deemed complete, *see id.*, and the worker's permanent physical impairment can be assessed. *See* NMSA 1978, § 52-1-26 (1990, amended 2017); *Smith v. Cutler Repaving*, 1999-NMCA-030, ¶ 10, 126 N.M. 725, 974 P.2d 1182 ("Key to determining MMI is 'expert medical testimony' regarding whether the injured worker 'is more likely than not' to recover further." (citation omitted)). A medical care provider quantifies the worker's permanent impairment into a percentage and, from that percentage, the worker's permanent partial disability (PPD) is calculated. *See* NMSA 1978, § 52-1-26.1 (1990); NMSA 1978, § 52-1-26.4(D) (2003). Dr. Balkman found Worker to be at MMI with an associated whole person impairment (WPI) rating of only 5%.

{5} Employer accepted these findings and immediately began paying benefits in accordance with the July 22, 2013, MMI date and the 5% WPI rating. Dr. Balkman's findings had the effect of limiting Worker's available compensation, paid via PPD, to significantly less than what Worker believed he was entitled to. Worker contested Dr. Balkman's findings, arguing that he

had not reached MMI and was entitled to continued payment of TTD benefits, rather than PPD benefits. Ultimately Worker argued that he had not reached MMI on July 22, 2013, counter to Dr. Balkman's findings, and in the future when he did reach MMI, he would be entitled to a WPI rating of 37%. Dr. Balkman later amended her findings on May 19, 2014, and determined Worker to have a WPI of 13% but did not change the date of MMI nor agree with Worker's assertion that his injuries warranted a 37% WPI rating.

{6} On June 24, 2014, Worker was involved in a second motor vehicle accident, a rear end collision, when he was driving from his home to Dr. Balkman's office to be treated for the injuries stemming from his October 14, 2011, accident. Following the second accident, Worker filed a second workers' compensation complaint concerning many of the issues that remained unresolved from the first complaint. A second mediation occurred on September 4, 2014. Employer rejected the mediator's recommendations. The parties continued to litigate the implications of the second accident, the date of MMI, Worker's WPI, and the compensation to which Worker was entitled.

{7} On June 18, 2015, Employer changed Worker's treating physician to Dr. Reeve. Employer did not authorize Dr. Reeve to provide a second impairment assessment, reasoning that Dr. Balkman's assessment was sufficient.

{8} On November 11, 2015, Worker served Employer with an offer of judgment. In the offer of judgment, Worker included four relevant terms to settle the case:[1]

> [1] . . . Worker's weekly payment rate shall be $629.11 . . . .
>
> [2] Worker's work-related injuries and conditions have not reached [MMI].
>
> [3] Pursuant to [NMSA 1978,] § 52-1-25.1 [(2005), amended 2017)], Worker is entitled to [TTD] benefits from October 14, 2011, and continuing until MMI is reached in the future for all work-related injuries and conditions.
>
> [4] Employer . . . shall forthwith issue payment of arrears to bring Worker's TTD benefits current at the rate of $629.11 per week, *less $100.00*. [Employer is] entitled to a credit for all indemnity payments made to date to Worker, *plus $100.00*.

Additionally, Worker offered to split his attorney fees equally with Employer. Thereafter, the workers' compensation judge scheduled a settlement conference for February 1, 2016. Employer rejected Worker's offer of judgment.

{9} The parties failed to reach a settlement and proceeded to trial on December 14, 2016. About a week before trial, Worker's attorney paid the $3,219.48 cost of a second impairment assessment by Dr. Reeve. Contrary to Dr. Balkman's findings, Dr. Reeve found that Worker reached MMI on December 7, 2016, and had a WPI rating of 37%. Also prior to trial the parties stipulated that Worker's TTD compensation rate was $629.11 per week. At the end of the trial, the workers' compensation judge issued a compensation order that included the following findings and conclusions:

> [1] Worker reached [MMI] on December 7, 2016.
>
> [2] Worker has a combined thirty-seven percent (37%) impairment as a result of his work injuries.
>
> . . . .
>
> [3] The [second] motor vehicle accident was as a result of the work accident and is part of the compensable claim.
>
> . . . .
>
> [4] Worker's compensation rate is $629.11.
>
> [5] Worker is entitled to [TTD] benefits from date of accident to December 7, 2016.
>
> [6] Worker is entitled to [PPD] benefits at eighty-five percent (85%) commencing December 8, 2016 and continuing until conclusion of the benefit period unless otherwise ordered.
>
> . . . .
>
> [7] Employer is responsible for the $3,219.48 charge from Dr. Reeve for preparation of his final report.
>
> [8] Worker's attorney is entitled to a reasonable fee to be set forth under separate order.

{10} Following trial, Worker filed an application for attorney fees and asked the workers' compensation judge to order Employer to pay 100% of Worker's attorney fees under Section 52-1-54(F)(4) (2003). The workers' compensation judge awarded Worker $42,925 in attorney fees and ordered each party to pay 50% of those fees. The workers' compensation judge declined to order Employer to pay 100% of Worker's attorney fees because "Worker's Offer of Judgment failed to address material facts and issues in dispute and determined at trial."

{11} Both parties appealed to the Court of Appeals. Employer contended that the workers' compensation judge erred by awarding benefits based on an MMI date of December 7, 2016. *See Baker v. Endeavor Servs., Inc.*, A-1-CA-36142 and A-1-CA-36272, mem. op. ¶ 1 (Aug. 8, 2017) (nonprecedential). Worker filed a cross-appeal, arguing that the workers' compensation judge erred by failing to order Employer to pay 100% of Worker's attorney fees. *Id.* ¶¶ 1-2. The Court of Appeals affirmed the compensation order, including the finding that Worker reached MMI on December 7, 2016. *Id.* ¶ 1. The Court of Appeals also affirmed the order requiring each party to pay 50% of Worker's attorney fees, concluding that Worker's offer of judgment left unaddressed PPD benefits, medical benefits, "or any other benefits, aside from attorney fees, that were contested issues and which worker was ultimately awarded." *Id.* ¶¶ 1-2. The Court of Appeals held that Worker's "offer did not supply an appropriate basis for application of the fee-shifting provision." *Id.* ¶ 3.

{12} Worker filed a petition for writ of certiorari, asking this Court to review (1) whether the workers' compensation judge erred by not ordering Employer to pay 100% of Worker's attorney fees, and (2) whether the Court of Appeals opinion affirming the workers' compensation judge conflicted with Section 52-1-54(F)(4) (2003) and *Abeyta v. Bumper to Bumper Auto Salvage*, 2005-NMCA-087, 137 N.M. 800, 115 P.3d 816. We granted certiorari to review the workers' compensation judge's application of the fee-shifting provision in Section 52-1-54(F)(4) (2003) to Worker's offer of judgment.

III. DISCUSSION

{13} Employer relies on *Leonard v. Payday Professional*, 2007-NMCA-128, ¶ 23, 142 N.M. 605, 168 P.3d 177, to argue

[1]Although Worker failed to include the offer of judgment in the record before this Court, Employer does not dispute that Worker's brief in chief accurately sets forth the terms of the offer

that Worker's offer was not a valid offer of judgment under Section 52-1-54(F) (2003) because the offer failed to address two contested issues. Specifically, Employer asserts that Worker's offer of judgment did not establish either the date on which Worker reached MMI or the PPD benefit Worker was entitled to, issues that were in dispute at the time Worker made his offer. Employer notes that before Worker made his offer of judgment, Dr. Balkman had found Worker to be at MMI and assigned Worker a WPI rating. Employer does not dispute the amount of attorney fees awarded but argues that the fee-shifting provision in Section 52-1-54(F)(4) (2003) should not apply because accepting Worker's offer could not have ended the litigation in this case.

{14} Conversely, Worker argues that his offer of judgment was valid and that it was not necessary to specify the date of MMI or the PPD benefit. Worker explains that Dr. Balkman's determination of MMI, on which Employer relies, was erroneous and that Worker had not yet reached MMI at the time the offer was made. He further contends that MMI need not be established as a prerequisite to a valid offer. In support of his argument, Worker relies on *Abeyta*, 2005-NMCA-087, ¶ 13, to illustrate that an offer of judgment may be valid even if the offer is made before a worker has reached MMI.

A. Standard of Review

{15} In this case, the parties do not dispute the factual findings of the workers' compensation judge, so we need only to review the application of Section 52-1-54(F)(4) (2003) to the facts. When we review a workers' compensation judge's interpretation of statutory requirements and the application of the law to the facts, we apply a de novo standard of review. *Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 14, 146 N.M. 453, 212 P.3d 341. "We look first to the plain meaning of the statute's words, and we construe the provisions of the [Workers' Compensation] Act together to produce a harmonious whole." *Id.* (internal quotation marks and citation omitted). "Our main goal in statutory construction is to give effect to the intent of the legislature." *Grine v. Peabody Nat. Res.*, 2006-NMSC-031, ¶ 17, 140 N.M. 30, 139 P.3d 190 (internal quotation marks and citation omitted).

B. The Purpose of Section 52-1-54(F) (2003) Is to Encourage Prompt Settlement of Workers' Compensation Disputes

{16} The purpose of the Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2017), is to expeditiously and efficiently compensate injured workers while also being fair to employers. *See* NMSA 1978, § 52-5-1 (1990) (stating that the intent of the legislation is the "quick and efficient delivery of indemnity and medical benefits . . . at a reasonable cost to employers"). To aid in expeditiously disposing of claims, a mediator "evaluates all initial complaints." *See* 11.4.4.10(A) NMAC. Following a mediation conference, the mediator issues a recommended resolution of disputed issues. *See* 11.4.4.10(C)-(D) NMAC. If either party rejects the recommended resolution, then the employer or worker may serve on the opposing party an offer of judgment in accordance with Section 52-1-54(F) (2003). The pertinent portion of Section 52-1-54(F) (2003) reads,

> After a recommended resolution has been issued and rejected, but more than ten days before a trial begins, the employer or claimant may serve upon the opposing party an offer to allow a compensation order to be taken against [the employer or claimant] for the money or property or to the effect specified in [the] offer, with costs then accrued . . . .

{17} An offer of judgment is essentially an offer to stipulate to the issuance of a formal compensation order. *See* § 52-1-54(F) (2003); *see also Rivera v. Flint Energy*, 2011-NMCA-119, ¶¶ 2-3, 9, 268 P.3d 525 (discussing the formal entry of a compensation order following the employer's rejection of an offer of judgment and after a trial of the worker's claims). In an effort to promote settlement and avoid lengthy litigation, Section 52-1-54(F)(4) (2003) encourages making and accepting reasonable offers of judgment by imposing financial sanctions on a party who rejects an offer of judgment and does not obtain a more favorable ruling in the compensation order. *See Hise v. City of Albuquerque*, 2003-NMCA-015, ¶ 9, 133 N.M. 133, 61 P.3d 842; *Leo v. Cornucopia Rest.*, 1994-NMCA-099, ¶ 28, 118 N.M. 354, 881 P.2d 714. Section 52-1-54(F)(4) (2003) states specifically,

> [I]f the worker's offer was less than the amount awarded by the compensation order, the employer shall pay one hundred percent [100%] of the attorney fees to be paid the worker's attorney, and the worker shall be relieved from any responsibility for paying any portion of the worker's attorney fees.

C. Worker's Offer of Judgment Was Valid

{18} Three requirements must be met for a worker's offer of judgment to trigger the fee-shifting provision pursuant to Section 52-1-54(F)(4) (2003). *See Rivera*, 2011-NMCA-119, ¶ 3. To force the employer to pay 100% of the attorney fees, an offer of judgment must be (1) a valid offer under Section 52-1-54(F) (2003), (2) for an amount less than the award at trial, and (3) an offer which the employer rejected. *Id.* In this case, the parties dispute only whether Worker satisfied the first requirement by making a valid offer under Section 52-1-54(F) (2003). Employer does not dispute that Worker offered to accept less than he was subsequently awarded at trial or that Employer rejected Worker's offer.

{19} In *Rivera*, the Court of Appeals held that a worker's offer of judgment was not a valid offer for the purposes of Section 52-1-54(F) (2003) because it failed to provide the employer with notice that the offer was intended to trigger the fee-shifting provision of Section 52-1-54(F) (2003). *Rivera*, 2011-NMCA-119, ¶ 6. *Rivera* observed that this notice requirement stems from basic contract principles. *Id.* ¶ 8 (citing *Naranjo v. Paull*, 1990-NMCA-111, ¶¶ 14-15, 111 N.M. 165, 803 P.2d 254). "In the law of contracts an offer is a proposal setting forth the essential terms of the prospective transaction." *Naranjo*, 1990-NMCA-111, ¶ 14. Thus, "[t]he notion that a choice, to be legally binding, should be a 'knowing' choice is well-established in similar situations." *Id.* ¶ 15. *Rivera* concluded that these contract principles extend to an offer of judgment under Section 52-1-54(F)(4) (2003). *Rivera*, 2011-NMCA-119, ¶¶ 8-9.

{20} For an offer of judgment to be legally binding it must set forth language making clear the intent of the offeror and implications of acceptance by the opposing party. *See id.* ¶ 9. In this case, the offer of judgment made clear that Worker was "allow[ing] a compensation order to be taken" if Employer accepted the terms of the offer. Section 52-1-54(F) (2003); *see Rivera*, 2011-NMCA-119, ¶ 10 (holding a worker's offer invalid under Section 52-1-54(F) (2003) for failing to "put Employer on notice that the offer was one to allow a compensation order to be taken against Employer"). Worker specifically mentioned that attorney fees would be split equally if the offer was accepted. Unlike *Rivera*, 2011-NMCA-119, ¶ 9, there was no question whether Worker proposed an offer of judgment or merely an offer of

settlement because the language "offer of judgment" was used in Worker's certificate of service. This language put Employer on notice that the offer was intended to trigger the fee-shifting provision of Section 52-1-54(F) (2003); therefore, the offer was not ambiguous in that regard.

{21} Just as the offer of judgment must put the opposing party on notice of its implications, to be valid the offer must also address the critical issues raised in the complaint. *Leonard*, 2007-NMCA-128, ¶¶ 23, 25-26. If an offer of judgment does not dispose of the critical issues raised in a worker's compensation complaint, the offer is ambiguous and therefore invalid. *Id.* The offer must, at a minimum, provide a "frame of reference regarding the [opposing party's] liability." *Id.* ¶¶ 23, 25. The opposing party should be able to discern what its liability will be in order to make an informed decision to accept or reject the offer. *Id.* The terms of the offer of judgment must also allow the workers' compensation judge to ascertain whether the offeror received a more or less favorable outcome in the final compensation order compared to what was offered in the offer of judgment. *Id.* ¶ 25.

{22} The Court of Appeals in *Leonard* found critical issues to be absent from the offer of judgment and concluded that the offer "was fatally defective." *Id. Leonard* was concerned with apportioning liability for a worker's injury between two employers. *Id.* ¶¶ 1, 5. The worker in *Leonard* presented an offer that did not address either employer's liability relative to the other employer. *Id.* ¶ 26. Therefore, the employers lacked any frame of reference as to what their respective liabilities would be if they were to accept the offer. *Id.* ¶ 25. Moreover, because the offer in *Leonard* was silent regarding the apportionment of liability, the workers' compensation judge was unable to determine whether the final compensation order provided a more or less favorable outcome to the worker. *Id.* Without answering that critical question, the offer was too ambiguous to be valid. *Id.* ¶ 26.

{23} Here, although Employer points to uncertainty about the date of MMI and the rate of PPD as sufficient to invalidate the offer of judgment, these are not critical issues if the worker's healing process is incomplete. *See Abeyta*, 2005-NMCA-087, ¶ 10 ("[T]here is no basis for setting an MMI date if the healing process is still continuing."). The absence of an MMI date does not preclude an opposing party from ascertaining its potential liability set out in an offer of judgment. *See id.* ¶¶ 10-11. This reasoning of the Court of Appeals in *Abeyta* is consistent with the statutory provision that no permanent physical impairment or WPI can be deduced until the worker has completed the healing process because, until MMI is reached, no PPD benefits can be determined. *See* § 52-1-26(D) (1990). Further, to force a worker or employer to include details in an offer of judgment that are dependent on the healing process of the worker would drastically delay settlements in compensation cases. *See Abeyta*, 2005-NMCA-087, ¶ 13 (stating that authorizing only those settlements where offers of judgment are delayed until completion of the healing process would "undercut" the intent and purpose of the Workers' Compensation Act). Unlike the offer of judgment in *Leonard*, the offer of judgment in *Abeyta* was unambiguous because the employer's liability was "not susceptible to more than one interpretation" despite the absence of an MMI date. *Abeyta*, 2005-NMCA-087, ¶¶ 11-13.

{24} In this case, Worker set forth his proposed resolution of MMI and PPD in the offer of judgment which states, "Pursuant to § 52-1-25.1 [(2005)], Worker is entitled to [TTD] benefits from October 14, 2011 [date of injury], and continuing until MMI is reached in the future for all work-related injuries and conditions." Employer argues this language rendered the offer of judgment fatally ambiguous because the MMI date was not set at the time of Worker's offer. However, the language in Worker's offer of judgment was nearly identical to the language used by the worker in *Abeyta*. The worker in *Abeyta* offered to accept "TTD benefits paid for the time period from the date of injury until . . . [MMI] as determined by [the treating physician]." *Abeyta*, 2005-NMCA-087, ¶ 3 (omission in original) (internal quotation marks omitted). We recognize, as did the Court of Appeals in *Abeyta*, that the absence of an established MMI date presents a degree of risk to the employer. *See id.* ¶ 11. However, risk posed by an offer is different from ambiguity. The offers of judgment at issue in *Abeyta* and in this case are not susceptible to more than one interpretation. *See id.* ¶¶ 10-11. The Court of Appeals in *Abeyta* analyzed the language of the offer of judgment and found that, although lacking specific details, the employer understood the implications of the offer and understood the worker's intent in offering it but "found [the offer] too risky to undertake." *Id.* ¶¶ 10-12. Moreover, the workers' compensation judge in *Abeyta* was able to subsequently ascertain that the amount proposed in the worker's offer of judgment was less than what was awarded in the final compensation order. *See id.* ¶ 1. We reach the same conclusion as did the Court of Appeals in *Abeyta*. *See id.* ¶¶ 14-16.

{25} By November 11, 2015, when Worker filed the offer of judgment, Employer in anticipation of the potential for fee-shifting under Section 52-1-54(F)(4) (2003) could have filed an offer of judgment of its own. This would have exposed Worker to the same risk of fee-shifting as that to which Employer was then exposed. *See* § 52-1-54(F)(3) (2003). Or Employer could have entered into a partial settlement with Worker, effectively limiting its liability by constraining the issues to be litigated. Instead Employer took no action and stood by the July 22, 2013, MMI assessment which Worker found unreasonable. Although MMI was not yet determined and the PPD benefits and WPI rating remained unknown at the time of Worker's offer of judgment, the framework of what Worker offered was clear, and Employer was well informed as to the scope of its liability. Worker's offer was unambiguous.

{26} An argument premised on an employer's dislike of the offer of judgment is not enough to render the offer defective. An offer of judgment is like any other offer to enter into a contract. If one side does not like the terms of the contract or does not agree with the other side's assertions, no contract need be formed. But in order "to encourage settlement of compensation cases by authorizing both parties to make offers of judgment," the Workers' Compensation Act requires the imposition of sanctions on partieswho are unwilling to settle on reasonable terms. *See Abeyta*, 2005 NMCA-087, ¶ 13 (quoting *Leo*, 1994-NMCA-099, ¶ 28 (internal quotation marks omitted)).

{27} Employer also argues that Worker's offer of judgment is invalid because Employer's acceptance of the offer would not have ended the litigation. We do not read Section 52-1-54(F)(4) (2003) as requiring a worker's offer of judgment to propose the settlement of all issues in order to shift all attorney fees to the employer, nor would an employer's offer of judgment need to propose the settlement of all issues in order to shift all attorney fees to the worker under Section 52-1-54(F)(3) (2003). As

we discussed previously, as long as the offer of judgment provides a sufficient frame of reference concerning contested issues, questions raised in the complaint may be left unresolved. *See Leonard*, 2007-NMCA-128, ¶¶ 25-26. In workers' compensation cases, the possibility of litigation continues until the worker is both healed and fully compensated. Until that time, disputes regarding the worker's medical bills, compensation rate, disability rating, or any number of other issues may arise. The purpose of an offer of judgment is to incentivize resolution of the complaint, but the offer's validity does not rest on all issues related to the worker's injury being immediately and completely resolved.

{28} We conclude, based on the plain language and stated purpose of the Workers' Compensation Act and the collective reasoning of *Abeyta*, *Leonard*, and *Rivera*, that Worker made a valid offer of judgment, sufficient to trigger the fee-shifting provision set forth in Section 52-1-54(F)(4) (2003).

D. Fee-Shifting Is Mandatory If the Requirements of Section 52-1-54(F) (2003) Are Met

{29} Employer relies on *Abeyta*, 2005-NMCA-087, ¶ 20, to contend that, even if Worker's offer was valid under Section 52-1-54(F) (2003), the workers' compensation judge had discretion to award Worker only 50% of his attorney fees. Worker argues that the workers' compensation judge must apply the statute's fee-shifting provision if the requirements of Section 52-1-54(F) (2003) are met. Worker, therefore, asserts that the workers' compensation judge erred as a matter of law by declining to order Employer to pay 100% of Worker's attorney fees. We agree with Worker.

{30} The plain language of the statute is clear and unambiguous and *requires* attorney fees to be shifted to the rejecting party if the final compensation awarded to the offeror exceeds what was initially offered. *See* § 52-1-54(F)(3)-(4) (2003). This type of sanction is consistent with the intent of the statute, which incentivizes settlements in compensation cases. *See Hise*, 2003-NMCA-015, ¶ 9. We review for abuse of discretion the factual findings underlying the judge's compensation order that determined whether to impose statutory fee-shifting. *See Abeyta*, 2005-NMCA-087, ¶¶ 9, 20 (noting that "an abuse of discretion can include a discretionary decision that is premised on a misapplication of the law"). If the findings meet the requirements of Section 52-1-54(F) (2003), then fee-shifting is mandatory. *See id.*¶¶ 19-20. In *Abeyta*, there was a close factual question regarding whether the amount the worker proposed in the offer of judgment was less than the amount awarded in the final compensation order—a prerequisite to fee-shifting. *Id.* ¶ 20. The workers' compensation judge in *Abeyta* used sound discretion to determine that factual question in the worker's favor. *Id.* ¶¶ 14-16. It was not an abuse of discretion for the workers' compensation judge to find that the amount awarded in the compensation order exceeded the amount proposed in the offer of judgment. *Id.* ¶¶ 14-15.

{31} After rejecting Worker's offer of judgment, Employer incurred additional liability for costs not included in the offer of judgment. Comparing findings and conclusions from the December 21, 2016, compensation order to portions of the November 20, 2015, offer of judgment provides a basis for the workers' compensation judge to find that Worker's benefits received through the compensation order exceeded those he would have obtained under the offer of judgment. Such a finding is a prerequisite to fee-shifting.

{32} The workers' compensation judge erroneously declined to apply the fee-shifting statute because the judge concluded that Worker's offer of judgment "failed to address material facts and issues in dispute." But as we explained in the previous section, an offer of judgment need not establish the date of MMI or amount of PPD benefits if the healing process is still underway. We conclude that the workers' compensation judge erred as a matter of law by declining to apply the fee-shifting provision, Section 52-1-54(F)(4) (2003), where Worker's offer of judgment met all of the requirements to trigger fee-shifting under the statute. We therefore hold that the workers' compensation judge erred by failing to award Worker 100% of his attorney fees.

IV. CONCLUSION

{33} We reverse and remand to the Workers' Compensation Administration for further proceedings consistent with this opinion.

{34} IT IS SO ORDERED.
GARY L. CLINGMAN, Justice

WE CONCUR:
PETRA JIMENEZ MAES, Justice
CHARLES W. DANIELS, Justice
BARBARA J. VIGIL, Justice

NAKAMURA, Chief Justice (dissenting).

NAKAMURA, Chief Justice (dissenting).

{35} Worker failed to offer terms resolving all of the disputed matters necessary to determine whether his settlement offer was less than the compensation awarded. Accordingly, Worker is not entitled to fee shifting. Both the Workers' Compensation Judge (WCJ) and Court of Appeals were correct and should be affirmed. For these reasons, I dissent.

{36} "New Mexico has traditionally followed the American Rule by which each litigant is ordinarily responsible for its own attorney's fees." *Carrillo v. Compusys, Inc.*, 2002-NMCA-099, ¶ 10, 132 N.M. 710, 54 P.3d 551. Nevertheless, "it is well settled that the [L]egislature may override the American Rule by enacting a fee-shifting statute." *Id.* Section 52-1-54(F)(4) is an example of just such a statute. *Id.*

{37} "As a general rule, statutes in derogation of the common law are to be strictly construed." *Albuquerque Hilton Inn v. Haley*, 1977-NMSC-051, ¶ 7, 90 N.M. 510, 565 P.2d 1027. What is the consequence of this proposition for our assessment of Section 52-1-54(F)(4)? The "purpose" provision of the Workers' Compensation Act (WCA) bears on this question. It states that

> [i]t is the specific intent of the [L]egislature that benefit claims cases be decided on their merits and that the common law rule of 'liberal construction' based on the supposed 'remedial' basis of workers' benefits legislation shall not apply in these cases. The workers' benefit system in New Mexico is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Accordingly, the [L]egislature declares that the [WCA] . . . [is] not remedial in any sense and [is] not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand.

Section 52-5-1. This provision was enacted to provide our courts with guidance when asked to interpret the WCA. *Garcia*

v. Mt. Taylor Millwork, Inc., 1989-NMCA-100, ¶¶ 9-10, 111 N.M. 17, 801 P.2d 87. "Section 52-5-1 calls for a balanced and evenhanded construction of the [WCA]." *Gomez v. B.E. Harvey Gin Corp.*, 1990-NMSC-057, ¶ 9, 110 N.M. 100, 792 P.2d 1143. This conclusion stems, in part, from the fact that "[f]undamental fairness to both the workers and employers has long been a guideline." *Garcia*, 1989-NMCA-100, ¶ 11.

{38} What conclusions can we draw from these authorities? It seems clear that, as a general matter, we must favor neither workers nor employers when construing the WCA. In this specific case, we must consider the text of Section 52-1-54(F)(4) in a neutral and disinterested way and construe the provision in a manner that best advances the purposes and policies it was enacted to advance.

{39} Section 52-1-54(F)(4) exists "to encourage the parties to resolve their differences before hearing thus supporting the policy of judicial economy and allowing for more timely resolution of claims." *Meyers v. W. Auto*, 2002-NMCA-089, ¶ 25, 132 N.M. 675, 54 P.3d 79. It is designed to "require[] the parties to think very hard about whether continued litigation is worthwhile." *Baber v. Desert Sun Motors*, 2007-NMCA-098, ¶ 18, 142 N.M. 319, 164 P.3d 1018 (internal quotation marks and citation omitted).

{40} The Court of Appeals has embraced a pragmatic approach to resolve whether fee shifting shall be imposed: "The compensation order is . . . compared to the offer of judgment in order to determine whether attorney fees should be shifted." *Id.* ¶ 17. This comparison is exceedingly straightforward; the question is simply "Did the worker ultimately get more than he asked for?" *Meyers*, 2002-NMCA-089, ¶ 26. Despite the rudimentary nature of this analysis, complex questions regarding the applicability of the provision have arisen.

{41} In *Rivera*, the WCJ declined to apply the fee-shifting provision despite the fact that the worker's offer of settlement was less than the award he ultimately received. 2011-NMCA-119, ¶ 3. The WCJ determined that the letter submitted by the worker as the offer "did not provide sufficient specificity or adhere sufficiently to the statute to trigger the statute's fee-shifting provisions." *Id.* (internal quotation marks omitted). Specifically, the letter "did not mention the statute or state that the offer it contained was valid only for the ten-day period the statute requires." *Id.* ¶ 9. Further, it "did not refer to the statute's fee-shifting provision." *Id.* It also "did not state that accepting the offer would require [the e]mployer to have a compensation order entered against it." *Id.*

{42} For these reasons, the Court of Appeals concluded "that the [worker's] offer did not set forth any language that can support the type of agreement [the w]orker claims he intended" and further concluded that "[s]uch an omission makes the offer ambiguous as to whether [the w]orker proposed an offer of settlement or an offer of judgment." *Id.* The Court rightly speculated that the employer "could reasonably have concluded that accepting [the w]orker's offer to 'settle' the case would result in the simple dismissal of the action before the [WCA], rather than the formal entry of an order that the statute requires." *Id.* The Court held that these flaws were "fatal" and rendered the offer "incomplete" and "a nullity." *Id.* (internal quotation marks and citation omitted). *Rivera* was rightly decided but has no bearing on Worker's appeal.

{43} We are not concerned here with whether Worker's November 11, 2015 offer was a communication constituting an "offer" for purposes of Section 52-1-54(F)(4). The parties accept that Worker *did* convey an offer to Employer and that this offer *did* trigger Section 52-1-54(F)(4). The question before us is simply whether the WCJ correctly concluded that the fee-shifting provision should not apply. To answer that question, we must resolve whether Worker's offer was less than what Worker ultimately received from the WCJ's compensation award. The parties' positions as to this issue are clear. Worker contends that "the benefits [he] obtained from the compensation order . . . exceeded the benefits that Worker offered to accept . . ." Employer counters that "the offer could not actually be evaluated in terms of dollar value" as "Worker's offer of judgment did not address the issues in the case, including MMI and disability rating."

{44} Employer's argument is correct. The basis for this conclusion is explained in the writing that follows. Here, it is necessary to emphasize that the majority's erroneous resolution of this case appears to be rooted in its belief that the sole issue before us is whether Worker's offer was "valid." *See Maj. Op.* ¶ 18 (citing *Rivera* for the proposition that fee shifting under Section 52-1-54(F)(4) shall apply where (1) a valid offer is conveyed; (2) that is less than the ultimate award; and (3) which the employer rejected, and further stating that, "[i]n this case, the parties dispute only whether Worker satisfied the first requirement by making a valid offer under Section 52-1-54(F) (2003)"). According to the majority, the validity of any offer is a question that is intertwined with the question of whether that offer is "ambiguous." *See Maj. Op.* ¶ 21 (citing *Leonard* for the proposition that an offer, to be valid, "must also address the critical issues raised in the complaint" and further stating that, "[i]f an offer of judgment does not dispose of the critical issues raised in a worker's compensation complaint, the offer is ambiguous and therefore invalid."). The consequence of this analytical framework is that the question of whether an offer is valid or ambiguous becomes a matter entirely distinct from the question of whether an offer is comparatively less valuable than the award. This is error.

{45} Employer's argument here is that the terms of Worker's offer were uncertain or incomplete and, therefore, the value of his offer could not and cannot be measured against the award to decide if fee shifting under Section 52-1-54(F)(4) is appropriate. To put it more simply: the value of Worker's offer is indiscernible and, therefore, cannot be compared to the award and fee shifting cannot be imposed. The assertion that "Employer does not dispute that Worker offered to accept less than he was subsequently awarded at trial[,]" *Maj. Op.* ¶ 18, is simply incorrect. Employer *does* dispute this fact. Additionally, the majority relies on *Abeyta* for the proposition that "[t]he absence of an MMI date does not preclude an opposing party from ascertaining its potential liability set out in an offer of judgment[,]" *Maj. Op.* ¶ 23, and relies on this assertion as a major premise for its resolution of this case. This assertion and interpretation of *Abeyta* is incorrect.

{46} In *Abeyta*, the WCJ imposed the fee-shifting provision and ordered the employer to pay all of the worker's attorney fees. 2005-NMCA-087, ¶ 1. The employer appealed arguing that the WCJ erred because the worker's initial offer was "ambiguous," and "[the w]orker failed to show that his offer was less than the amount awarded in the final compensation order . . . ." *Id.* The Court of Appeals proceeded to address these arguments as conceptually distinct matters, and yet (knowingly or not) acknowledged their unity in the course of its analysis.

{47} The Court of Appeals made special note of the fact that the employer and the worker in *Abeyta* agreed (without reservation) that the worker had not reached MMI at the time he provided his offer to the employer and, therefore, the offer did not and could not specify an MMI date. *Id.* ¶¶ 10,13. The Court spent some time discussing the employer's claim that this feature of the offer rendered it ambiguous as a matter of contract law, *id.* ¶ 11, but this aspect of *Abeyta* is inessential.

{48} Our Legislature's decision to enact Section 52-1-54(F)(4) and punish employers who refuse mutually advantageous settlement offers is rooted not in belief that the law of contracts must be scrupulously upheld in the workers' compensation context. Rather, the motivation behind the statute is to encourage the maximally efficient resolution of cases. Accordingly, the touchstone for determining whether fee shifting is appropriate is a simple comparison of the value of the offer and award, a comparison that allows an empirical assessment of whether an employer has wasted the worker and the Workers' Compensation Administration's time and resources. It is this realization that lies behind the essential conclusions reached in *Abeyta*.

{49} The Court determined in *Abeyta* that the lack of an agreement as to MMI given the facts presented in *Abeyta* posed no impediment to the application of Section 52-1-54(F)(4). *Abeyta*, 2005-NMCA-087, ¶ 13. The Court reasoned that it would thwart the underlying purposes of Section 52-1-54(F)(4) to hold that parties cannot bargain around a variable (MMI) both agree is indiscernible and concluded that an employer risks the imposition of the fee-shifting provision as a penalty if it declines a settlement offer that resolves all other variables for which fixed terms can be offered and that otherwise resolves the dispute. *Abeyta*, 2005-NMCA-087, ¶ 13. These conclusions are correct.

{50} As both parties in *Abeyta* agreed that the MMI date could only be prospectively assigned, the value of the worker's settlement offer turned almost entirely on the other assignable variables to the extent that they existed, i.e., TTD, WPI, medical costs, attorney fees, etc. Because the worker offered terms as to those matters, the employer refused those terms, and the worker ultimately got a better outcome as to those terms in the award, the absence of an agreement as to MMI made only a marginal difference. The locus of the "value" of the offer was the terms for the variables that could be fixed. Because the worker offered less than he got as to those variables, the offer could be deemed less valuable than the award and it was right to punish the employer for refusing the offer and prolonging the proceedings. To be sure, leaving the question of MMI open necessarily meant that the precise value of the offer in *Abeyta* was somewhat uncertain. But, that uncertainty was tolerable and fell evenly on both parties. This reading of *Abeyta* is supported by the facts presented there.

{51} The compensation award issued in *Abeyta* derived from a stipulation between the parties that the employer's second counteroffer fully settled the matter. 2005-NMCA-087, ¶ 5; *see also id.* ¶ 13 ("[A] compensation order entered pursuant to a settlement can be utilized when evaluating whether an offer of judgment has been met under Section 52-1-54(F)."). When comparing the offer and award, the Court of Appeals focused on the fact that the TTD rate awarded exceeded the TTD rate offered and on the fact that the worker was awarded payment for medical benefits he had not requested in his offer. *Id.* ¶¶ 14-15. Because the parties stipulated that the offer fully settled the matter, we can infer that these were the only variables apart from MMI at issue in the case. And because the employer rejected a settlement offer with less valuable terms as to these variables, the Court correctly concluded that the worker's offer was less valuable than the compensation awarded. Worker's case is plainly distinguishable from *Abeyta*.

{52} Unlike *Abeyta*, the date of Worker's MMI has nearly always been vigorously disputed by the parties. Employer has insisted, since at least November 2013, that worker reached MMI on July 22, 2013. From Employer's perspective, Worker's healing process had already ended at the time he conveyed his settlement offer and he had reached MMI years earlier. Worker's case is unlike *Abeyta* in another crucial respect. Worker's MMI date was not the only term left unresolved in Worker's offer. He failed to offer terms as to his WPI rating. The record reflects that Employer has consistently contended that Dr. Balkman correctly identified Worker's WPI rating, while Worker has insisted that Dr. Balkman was wrong and that his WPI was always much higher. These disputes—the date of Worker's MMI and his WPI rating—are legally significant to whether Worker's settlement offer was less valuable than the compensation awarded. To see why this is so, we must have some general grasp of how workers' compensation benefits are calculated and the benefits calculation conducted in Worker's case.

{53} TTD payments are issued until the date of MMI. Section 52-1-25.1 (2005); *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 7, 122 N.M. 524, 928 P.2d 250 ("Eligibility for the various temporary benefits provided under the [WCA] ends at the date of MMI. From this point forward, the worker is entitled to further benefits only if he or she can establish a permanent—either partial or total—disability." (citation omitted)). "Compensation benefits, including TTD benefits, are calculated based on a worker's pre-injury 'average weekly wage.'" *Baca v. Los Lunas Cmty. Programs*, 2011-NMCA-008, ¶ 33, 149 N.M. 198, 246 P.3d 1070. "A worker is entitled to full TTD benefits if he is unable by reason of accidental injury arising out of and in the course of the worker's employment, to perform the duties of that employment prior to the date of the worker's [MMI]." *Id.* ¶ 32 (alteration in original) (internal quotation marks and citation omitted). *But see Ortiz v. BTU Block & Concrete Co.*, 1996-NMCA-097, ¶ 10, 122 N.M. 381, 925 P.2d 1 (stating that the WCA "provides for payment of [full] total disability benefits prior to [MMI] except in two enumerated circumstances").

{54} After MMI, a worker may be eligible for PPD benefits and, if eligible, will receive a percentage of the compensation rate in PPD payments. *See Hawkins v. McDonald's*, 2014-NMCA-048, ¶ 20, 323 P.3d 932 ("Once an injured worker reaches MMI, a different statutory provision of the WCA takes effect. Under Section 52-1-26(B), a worker may be eligible for PPD benefits if the worker has suffered a 'permanent impairment.' The impairment constitutes the base value for the disability benefit award."). The percentage of benefit payments increases as WPI increases. Section 52-1-26.1. "If an injured worker receives temporary disability benefits prior to an award of [PPD] benefits, the maximum period for [PPD] benefits shall be reduced by the number of weeks the worker actually receives temporary disability benefits." Section 52-1-42(B) (1990); *see Gurule v. Dicaperl Minerals Corp.*, 2006-NMCA-054, ¶ 12, 139 N.M. 521, 134 P.3d 808 (citing with approval the WCJ's determination "that the duration of a worker's benefit entitlement is based on a weekly scheme, rather than an absolute dollar amount, and that the rate of

the benefit may vary over the duration of a worker's entitlement"). Collectively, these provisions make clear that a worker's MMI and WPI are integral to assessing a worker's total entitlement to compensation. The facts of this case illustrate this point.

{55} The WCJ determined that Worker's compensation rate is $629.11, his MMI date is December 7, 2016, his WPI is 37%, and the "benefit period is 700 weeks." Worker was awarded roughly 268 weeks (October 14, 2011 through December 7, 2016) of TTD benefits, a total of approximately $168,500 ($629 a week for 268 weeks). Worker was also awarded roughly 432 weeks (the remainder of the 700 week benefit period) of PPD payments at eighty-five percent (thirty-seven percent WPI plus forty-eight percent modifier points) of the compensation rate, or approximately $231,000 (eighty-five percent of $629, a total of $535 a week for 432 weeks). As Worker's MMI extended outward, he received additional weekly TTD payments. As Worker's WPI increased, his weekly PPD payment rate increased. To see the significance of this observation, it is useful to compare what Worker would have received had the WCJ accepted Dr. Balkman's findings. This comparison is readily achieved as Worker's attorney offered this very comparison in his application for attorney fees with the Workers' Compensation Administration in an attempt to show just how much additional benefits he obtained for Worker.

{56} If Dr. Balkman's July 22, 2013 MMI determination governed, Worker would have received $629 per week in TTD payments for only ninety-two weeks, a total of (approximately) $58,000. This is nearly $110,500 dollars less than what Worker received in light of the fact that the WCJ accepted Dr. Reeve's findings. For PPD payments, if we assume the modifiers remained forty-eight percent and then added only thirteen percent WPI to reflect Dr. Balkman's revised WPI determination, Worker's weekly PPD payment would have been only $384 per week (sixty-one percent of $629). This is $150 less per week than what Worker was awarded.

{57} The WCJ was aware of the significance of MMI and WPI when he concluded that Worker was not entitled to the application of Section 52-1-54(F)(4). The WCJ specifically stated that Worker was not entitled to fee shifting because his offer did not "address material facts and issues in dispute and determined at trial." The WCJ's conclusion can be translated this way: because Worker failed to offer terms resolving all of the disputed matters bearing on Worker's entitlement to compensation benefits, Worker is not entitled to fee shifting under Section 52-1-54(F)(4) because it was (and still is) impossible to determine whether Worker's settlement offer was less than the compensation awarded. This reasoning is sound.

{58} To hold, as the majority does, that an employer should be punished for refusing a settlement offer the value of which is indiscernible and which left unresolved crucial matters relating to benefits to which Worker claimed he was entitled and which the parties vigorously disputed from nearly the inception of the proceedings is error. Our Legislature could not have intended this result. Indeed, in the wake of this case, employers will likely be confronted with some regularity by a Hobson's choice: accept uncertain settlement offers that do not propose terms sufficient to calculate liability, or reject such offers and run the risk of the fee-shifting penalty. This outcome cannot be said to reflect a construction of the WCA that is balanced and even handed to workers and employers.

{59} The majority justifies its conclusion on two closely related grounds. First, it states that "[t]he absence of an MMI date does not preclude an opposing party from ascertaining its potential liability set out in an offer of judgement" and cites *Abeyta* to support this claim. *Maj. Op.* ¶ 23. From this assertion, the majority concludes that "Employer was well informed as to the scope of its liability." *Id.* ¶ 25. Second, the majority contends that "[h]ere, although Employer points to uncertainty about the date of MMI and the rate of PPD as sufficient to invalidate the offer of judgment, these are not critical issues if the worker's healing process is incomplete." *Id.* ¶ 23. This point is repeated in later discussion. *See id.* ¶ 32 ("[A]s we explained in the previous section, an offer of judgment need not establish the date of MMI or amount of PPD benefits if the healing process is still underway."). I do not agree with these claims.

{60} Where a worker declines to offer terms as to the date of MMI, the degree of WPI, or any other term essential to calculating a Worker's entitlement to benefits, the opposing party will not be able to ascertain its liability because it will not be able to assess the value of the offer. The majority's assertions to the contrary are incorrect, and its reliance on *Abeyta* misplaced.

{61} *Abeyta* is the exception, not the rule. As already noted, it holds that where both parties agree that the MMI date is unknowable but the parties nevertheless settle all other material variables bearing on benefit entitlement, the absence of a specified MMI date produces only a tolerable range of uncertainty. This case is nothing like *Abeyta*, and the preceding review of what Worker would have received with an earlier MMI date and a lesser WPI rating reveals that Worker's failure to offer terms created meaningful uncertainty that cannot in any way be described as tolerable.

{62} It is possible that the majority believes this case is like *Abeyta* because the district court ultimately found that Worker reached MMI on December 7, 2016—one year after Worker submitted his settlement offer. This finding establishes that the WCJ did indeed find that Worker was healing at the time he submitted his settlement offer. But the WCJ's findings cannot supply the basis for the imposition of a penalty where no offer fully resolving the dispute is presented before the findings are issued. To put the point slightly differently, the trial at which the WCJ made its findings about Worker's MMI and WPI was not unnecessary. Worker, having failed to issue a settlement offer that would sufficiently resolve the disputed issues, cannot point to the outcome of trial and complain that Employer should now pay a penalty for refusing terms and unnecessarily prolonging the litigation. Terms were not offered. The litigation was not unnecessarily prolonged.

{63} Worker contends that this thinking is error as it necessarily requires him "to predict an unknown date of MMI and to prematurely assess impairment and modifier values." This contention ignores the fact that medical professionals are routinely asked, in the course of litigation, to make predictions. In fact, the doctor whose opinion was central to the dispute in *Abeyta* made a prediction that has doubtless significance here: "Dr. Marchand predicted an MMI date at a deposition taken two days before [w]orker's offer, and by the time of the hearing on attorney fees, it turned out that the MMI date was as Dr. Marchand had predicted." *Abeyta*, 2005-NMCA-087, ¶ 16. Moreover, the very question whether a worker has reached MMI is itself predictive. *See Smith v. Cutler Repaving*, 1999-NMCA-030, ¶ 12, 126 N.M. 725, 974 P.2d 1182 ("[W]hether a worker has reached MMI turns on proof of a reasonable medical probability of future

recovery and lasting improvement."). To the extent a worker must make predictions about MMI or any other matter bearing on the worker's entitlement to benefits in order to present a settlement offer the value of which an employer can assess, requiring the worker to make those predictions places no unusual burden upon them.

{64} *Leonard* is the case to which the present matter bears the most resemblance. There, the worker suffered two injuries to her back while working for two employers and filed two workers' compensation claims that were consolidated. 2007-NMCA-128 ¶¶ 1, 5. The worker made an offer to the employers that was rejected, and she later prevailed at trial. *Id.* ¶¶ 5-7. Afterwards, the worker requested that the fee-shifting provision be applied and the two employers pay 100% of her attorney fees. *Id.* ¶ 8. The WCJ rejected this request on grounds that the offer did not address "the relative responsibilities of the [e]mployers . . . to pay for surgical medical care for the [w]orker." *Id.* ¶ 23.

{65} The worker appealed and argued that the WCJ's reasoning was flawed because "her offer of judgment, if accepted, would have disposed of all issues between her and the employers." *Id.* ¶ 24. She pointed out "that neither of the employers filed a cross-claim against the other and that the employers would have had the option to move for post-litigation proceedings for reimbursement, if necessary." *Id.* The worker added that "the legislative intent of Section 52-1-54(F) is to encourage settlement in workers' compensation cases and, in light of that purpose, [w]orker's offer of judgment was not without legal effect merely because it left some issues unresolved." *Id.* The Court of Appeals was not persuaded.

{66} It acknowledged that the worker was correct that "the purpose of Section 52-1-54(F) is to encourage settlement," but determined that the worker failed to proffer an offer that specified each employer's liability and, therefore, "cannot be said to provide a more or less favorable outcome for the employers." *Leonard*, 2007-NMCA-128, ¶ 25. In other words, the worker's offer could not be compared with the award to determine if the offer was of lesser value. Worker's case is analogous to *Leonard*.

{67} Worker's offer failed to provide terms for specific, disputed matters relating to his entitlement to benefits. Such an offer provides no basis for comparison to the compensation award subsequently entered. Accordingly, Worker is not entitled to have Employer pay his attorney fees.

{68} Worker cannot protest that Employer needlessly prolonged this litigation where Worker failed to offer terms fully settling the benefit entitlement issues. The WCJ did not err when he declined to impose Section 52-1-54(F)(4). The Court of Appeals correctly affirmed the WCJ, and the Court of Appeals decision should be affirmed.

JUDITH K. NAKAMURA, Chief Justice

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