Rules of Civil Procedure for the District Courts

ARTICLE 1
Scope of Rules; One Form of Action

1-001. Scope of rules; definitions.

A. **Scope.** These rules govern the procedure in the district courts of New Mexico in all suits of a civil nature whether cognizable as cases at law or in equity except to the extent that the New Mexico Rules of Evidence are inconsistent herewith. Except where these rules explicitly provide otherwise, these rules do not apply where there are contrary statutory provisions concerning special statutory or summary proceedings. These rules shall be subject to the provisions of Rule 23-114 NMRA, the rule governing free process for civil cases. These rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action.

B. **Definitions.** As used in these rules and the civil forms approved for use with these rules:

(1) "defendant" includes a respondent;

(2) "plaintiff" includes a petitioner;

(3) "process" is the means by which jurisdiction is obtained over a person to compel the person to appear in a judicial proceeding and includes a:

(a) summons and complaint;

(b) summons and petition;

(c) writ or warrant; and

(d) mandate; and

(4) "service of process" means delivery of a summons or other process in the manner provided by Rule 1-004 NMRA of these rules.

C. **Title.** These rules shall be known as the Rules of Civil Procedure for the District Courts.

D. **Citation form.** These rules shall be cited by set and rule number of the New Mexico Rules Annotated, "NMRA", as in Rule 1-____ NMRA.

[As amended, effective January 1, 1995; March 1, 2005; as amended by Supreme Court Order 07-8300-41, effective February 25, 2008; by Supreme Court Order No. 11-8300-050, effective for cases filed on or after February 6, 2012.]

Committee commentary. — The New Mexico Constitution provides that district courts have only such "jurisdiction of special cases and proceeding as may be conferred by law." N.M. Const. Art VI, Sec. 13. As a matter of practice, but not constitutional compulsion, the Supreme Court has deferred to legislative directives concerning procedural matters in special proceedings even if they do not affect the Court's jurisdiction. However, the Supreme Court sometimes adopts procedure rules that are explicitly applicable to statutory procedures for special cases and proceedings. When this occurs, the explicit contrary rule supersedes the statutory procedures. *See Ammerman v. Hubbard Broadcasting Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976) (Procedural statutes do not apply if contradicted by a rule of procedure promulgated by the Supreme Court); NMSA Sec. 38-1-2 ("Practice statutes may be modified or suspended by rules"); NMRA Rule 1-091 ("Adopting Procedural Statutes").

Rule 1-004(A)(1) (service of summons), Rule 1-087 (Contest of Election or Nomination) and Rules 1-071.1 to 1-071.5 (Stream Adjudications) are examples of procedural rules adopted by the New Mexico Supreme Court that supersede contrary statutory provisions dealing with special statutory cases or proceedings.

Special Cases, Proceedings Defined

Special cases and proceedings are "statutory proceedings to enforce rights and remedies created by statute and which were unknown at common law." *In re Forest*, 45 N.M. 204. 207, 113 P.2d 582, 583 (1941); *VanderVossen v. City of Espanola*, 130 N.M. 287, 24 P.3d 319, Par. 15 (Ct. App. 2001).

Special Proceedings

Special proceedings include: Election Contests [*Montoya v. McManus*, 68 N.M. 381, 384, 362 P.2d 771, 773 (1961)]; Probate Proceedings [*In re Estate of Harrington*, 129 N.M. 266, 5 P.3d 1070, 2000 -NMCA- 058, Par. 14]; Zoning Proceedings [*VanderVossen v. City of Espanola*, 130 N.M. 287, 24 P.3d 319, 2001-NMCA-016, Par. 15]; Workers' Compensation Proceedings [*Holman v. Oriental Refinery*, 75 N.M. 52, 54, 400 P.2d 471, 473 (1965)]; Arbitration Proceedings *[Medina v. Foundation Reserve Ins. Co.*, 123 N.M. 380, 940 P.2d 1175, Par. 10 (N.M. 1997)]; Declaratory Judgment Proceedings [*Smith v. City of Santa Fe*, 142 N.M. 786, 171 P.3d 300, 2007-NMSC-055, Par. 13]; Adoption Proceedings [*In re Doe*, 101 N.M. 34, 37, 677 P.2d 1070, 1073 (Ct. App. 1984)]; Garnishment Proceedings [*Postal Finance Co. v. Sisneros*, 84 N.M. 724, 725, 527 P.2d 785, 786 (1973)]; Stream Adjudications [Rule 1-071.2 NMRA]; Certain Tax Proceedings [*In re Sevilleta de la Joya Grant*, 41 N.M. 305, 68 P.2d 160 (1937) (tax sales); *In re Blatt*, 41 N.M. 269, 67 P.2d 293 (1937) (suit to recover overpayment of taxes); *State v. Rosenwald Bros. Co.*, 23 N.M. 578, 170 P. 42 (1918) (challenge to tax

evaluation)]; and Condemnation Proceedings [*State v. Rosenwald Bros. Co.*, 23 N.M. 578, 170 P. 42 (1918)].

Summary Proceedings

Summary proceedings include direct Contempt, *State v. Ngo*, 130 N.M. 515, 520, 27 P.3d 1002, 1007 (Ct. App. 2001), and Proceedings to Enforce or Quash Subpoenas, *Wilson Corp. v. State ex rel. Udall*, 121 N.M. 677, 916 P.2d 1344, 1996-NMCA-049, Par. 13

Probate Proceedings

Though probate proceedings are "Special Proceedings," *e.g.*, *In re Estate of Harrington*, 2000-NMCA-058, ¶ 15, 129 N.M. 266, 5 P.3d 1070, these rules apply only in district court and do not apply directly to proceedings in probate court. *See* NMSA 1978, § 34-7-13 (rule-making power of probate judges). Moreover, the publication provisions of Rule 1-004 NMRA apply only to service of "process" which is defined as "the means by which jurisdiction is obtained over a person to compel the person to appear in a judicial proceeding." Rule 1-004(B)(3). Thus, the Rule 1-004 requirements for, and restrictions on, service by publication apply only to any aspects of probate practice in district court that require service of process as defined in Rule 1-001(B)(3) NMRA. For a discussion of the constitutional limits on the use of publication as a method for giving notice generally in probate proceedings, *see Tulsa Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988).

[Adopted by Supreme Court Order No. 11-8300-050, effective for cases filed on or after February 6, 2012.]

ANNOTATIONS

Cross references. — For district court process under witness of district judge, *see* Section 34-6-27 NMSA 1978.

For actions in metropolitan courts, *see* Section 34-8A-6 NMSA 1978.

For applicability of these rules to proceedings for removal of district attorney, *see* Section 36-1-15 NMSA 1978.

The 1995 amendment, effective January 1, 1995, added the last sentence.

The 2005 amendment, effective March 1, 2005, of this rule inserted a Paragraph number "A." before the first paragraph of the rule and added Paragraphs B, C and D.

The 2007 amendment, approved by Supreme Court Order 07-8300-41, effective February 25, 2008, provided that Rule 1-001 NMRA shall be subject to the provisions of Rule 23-114 NMRA, the rule governing free process for civil cases.

The 2011 amendment, approved by Supreme Court Order No. 11-8300-050, effective for cases filed on or after February 6, 2012, provided that the Rules of Civil Procedure do not apply to special statutory or summary proceedings where the rules conflict with statutory provisions governing such proceedings unless the rules explicitly provide otherwise; and in Paragraph A, in the first sentence, after "Rules of Evidence", deleted "or existing rules applicable to special statutory or summary proceedings" and added the second sentence.

Compiler's notes. — Prior to the enactment of present 38-1-1 NMSA 1978 by Laws 1933, ch. 84, § 1, the legislature retained the power to enact, amend, and repeal rules of court in New Mexico.

Rule 1-001 NMRA is a rule of construction and applies only when the rules are not clear and require construction. *H-B-S Partnership v. Aircoa Hospitality Services, Inc.*, 2008-NMCA-013, 143 N.M. 404, 176 P.3d 1136.

Constitution vests supreme court with control over inferior courts. — The power of the supreme court to promulgate rules regulating pleading, practice and procedure for the district courts is a power vested therein by the constitution, which grants the court superintending control over all inferior courts, and in the absence of the clearest language to the contrary in the constitution, the powers essential to the functioning of the courts are to be taken as committed solely to the supreme court to avoid a confusion in the methods of procedure and to provide uniform rules of pleading and practice. *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Rules in interest of administration of justice. — These rules are in the interest of the administration of justice and transcend in importance mere inconvenience to a party litigant. *Salitan v. Carrillo*, 69 N.M. 476, 368 P.2d 149 (1961).

Principal objective of rules is to resolve delays due to reliance on technicalities and to streamline generally and simplify procedure so that merits of the case may be decided without expensive preparation for trial on the merits which may not even be necessary. *Benson v. Export Equip. Corp.*, 49 N.M. 356, 164 P.2d 380 (1945).

Merits of case should prevail over procedural technicalities. — The general policy of the Rules of Civil Procedure requires that an adjudication on the merits rather than technicalities of procedure and form shall determine the rights of litigants. *Las Luminarias of N.M. Council of Blind v. Isengard*, 92 N.M. 297, 587 P.2d 444 (Ct. App. 1978).

Simplification of litigation procedures another objective of rules. — One of the principal purposes of these rules is to simplify litigation procedures and thus avoid technical roadblocks to a "speedy determination of litigation upon its merits" if trial is necessary. *Maxey v. Quintana*, 84 N.M. 38, 499 P.2d 356 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

These rules, many of which were taken from the federal rules, were designed to simplify judicial procedure and to promote the speedy determination of litigation on its merits. *Prager v. Prager*, 80 N.M. 773, 461 P.2d 906 (1969).

Functions of pleadings same as under federal rules. — These rules are derived from the federal rules and in all respects pertinent hereto are identical with the federal rules; the functions of the pleadings in New Mexico are the same as under the federal system, the pleadings are not determinative of the issues, and recovery may be had on grounds not asserted in the complaint. *Harbin v. Assurance Co. of Am.*, 308 F.2d 748 (10th Cir. 1962).

Special statutory proceedings are not governed by these rules where inconsistent therewith. *Trujillo v. Trujillo*, 52 N.M. 258, 197 P.2d 421 (1948).

And specifically excepted where existing rules are inconsistent. — Special statutory proceedings where existing rules are inconsistent are specifically excepted from the operation of these rules. *Holman v. Oriental Refinery*, 75 N.M. 52, 400 P.2d 471 (1965).

Special statutory proceedings are excluded from their operation where existing rules of procedure applicable thereto are inconsistent with such general rules. *Montoya v. McManus*, 68 N.M. 381, 362 P.2d 771 (1961).

Action of replevin, statutory provision. — The action of replevin is a statutory proceeding designed to take the place of the common-law actions of replevin and detinue, and a writ of replevin in an action of replevin accomplishes the same function in process as does a summons such as provided for in Rule 4(b) (now Rule 1-004 NMRA) in an ordinary civil action. *Citizens Bank v. Robinson Bros. Wrecking*, 76 N.M. 408, 415 P.2d 538 (1966).

Right to jury trial in eminent domain proceedings governed by civil rules. — The right to trial by jury and the waiver thereof in eminent domain proceedings shall be determined in the manner provided for in ordinary civil cases, cases governed by the Rules of Civil Procedure. *El Paso Elec. v. Real Estate Mart, Inc.*, 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

There is no material difference in effect of rule and 42-2-18 NMSA 1978. Both provide that these rules shall apply to eminent domain proceedings except where there are inconsistent rules or statutory provisions. *State ex rel. State Hwy. Comm'n v. Burks*, 79 N.M. 373, 443 P.2d 866 (1968).

Rules of procedure are governed by law of forum. *Satterwhite v. Stolz*, 79 N.M. 320, 442 P.2d 810 (Ct. App. 1968).

Counterclaim or cross-claim may be brought to quiet title in a mortgage foreclosure action. *Ortega, Snead, Dixon & Hanna v. Gennitti*, 93 N.M. 135, 597 P.2d 745 (1979).

Discovery provisions given liberal interpretation. — The New Mexico Rules of Civil Procedure, like the federal rules after which they are patterned, are designed to enable parties to easily discover all of the relevant facts and therefore the discovery provisions should be given as liberal an interpretation as possible in order to effectuate this design. *Carter v. Burn Constr. Co.* 85 N.M. 27, 508 P.2d 1324 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Provisions relating to jury trials applicable to workmen's compensation. — There is nothing inconsistent in applying the general rules covering jury trials to workmen's compensation cases. *Bryant v. H.B. Lynn Drilling Corp.*, 65 N.M. 177, 334 P.2d 707 (1959).

But not to venue in workmen's compensation cases. — Since the Workers' Compensation Act (Chapter 52, Article 1 NMSA 1978) is complete in itself, its provisions have not been modified with respect to the pleadings by the rules of procedure promulgated by the supreme court. *Guthrie v. Threlkeld Co.*, 52 N.M. 93, 192 P.2d 307 (1948).

Provisions regarding venue in general civil actions have no application to venue in workmen's compensation cases. *State ex rel. Cardenas v. Swope*, 58 N.M. 296, 270 P.2d 708 (1954).

Action under conversion statute, suit civil in nature. — Although the Uniform Commercial Code, 55-9-505 NMSA 1978, permits recovery in conversion, the action is nevertheless a suit of a civil nature, and the effect upon litigants of these rules is not avoided. *Charley v. Rico Motor Co.*, 82 N.M. 290, 480 P.2d 404 (Ct. App. 1971).

Election contests are excluded from operation of these rules. *Montoya v. McManus*, 68 N.M. 381, 362 P.2d 771 (1961); *Trujillo v. Trujillo*, 52 N.M. 258, 197 P.2d 421 (1948).

Administrative hearings not strictly bound by rules. — Administrative hearings, although patterned after judicial proceedings, are not strictly bound by these rules, and as such the burden of the state corporation commission (now public regulation commission) is to give a full hearing to such participants as are interested and as are qualified to appear. To allow testimony to be taken prior to a public hearing by deposition would be to imperil the right of the public who may wish to intervene subsequent to such deposition. 1953-54 Op. Att'y Gen. No. 53-5646.

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

For article, "Survey of New Mexico Law, 1982-83: Civil Procedure," see 14 N.M.L. Rev. 17 (1984).

For comment, "Survey of New Mexico Law: Civil Procedure," see 15 N.M.L. Rev. 157 (1985).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Actions § 1 et seq.; 20 Am. Jur. 2d Courts § 25 et seq.

Power of court to adopt general rule requiring pretrial conference as distinguished from exercising its discretion in each case separately, 2 A.L.R.2d 1061.

Application of civil or criminal procedural rules in federal court proceeding on motion in nature of writ of error coram nobis, 53 A.L.R. Fed. 762.

1A C.J.S. Actions §§ 130, 133; 21 C.J.S. Courts §§ 124 to 134.

1-002. One form of action.

There shall be one form of action to be known as "civil action".

ANNOTATIONS

Compiler's notes. — This rule is deemed to have superseded 105-101, C.S. 1929, which was substantially the same.

These rules are deemed to have superseded generally 105-102, C.S. 1929, relating to equitable proceedings in aid of actions at law.

Rules do not purport to abolish distinction between equity and law. *Madrid v. Spears*, 250 F.2d 51 (10th Cir. 1957).

No distinct forms of action are necessary or permissible to state a claim. *Madrid v. Spears*, 250 F.2d 51 (10th Cir. 1957).

Complaint not dismissed when plaintiff misconceives remedy. — A complaint will not be dismissed when it sets up a cause of action good either in law or equity, because the plaintiff has misconceived his remedy. *Kingston v. Walters*, 14 N.M. 368, 93 P. 700 (1908) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Actions § 14 et seq.

1A C.J.S. Actions §§ 133, 134.

ARTICLE 2
Commencement of Action; Service of Process, Pleadings, Motions and Orders

1-003. Commencement of action.

A civil action is commenced by filing a complaint with the court. Upon the filing of the complaint, the clerk shall endorse thereon the time, day, month and year that it is filed.

ANNOTATIONS

Cross references. — For commencement of action under statutes of limitation, *see* Section 37-1-13 NMSA 1978.

For commencement of action by complaint in magistrate court, *see* Rule 2-201 NMRA.

Compiler's notes. — This rule is deemed to have superseded 105-301, C.S. 1929, which was substantially the same.

Section 37-1-13 NMSA 1978 has no further usefulness, because this rule and Rule 4 (see now Rule 1-004 NMRA) cover subject and they are, therefore, exclusive. *Prieto v. Home Educ. Livelihood Program*, 94 N.M. 738, 616 P.2d 1123 (Ct. App. 1980).

To file a civil action, a complaint must be filed with a court. *Zarges v. Zarges*, 79 N.M. 494, 445 P.2d 97 (1968).

"Civil action" used interchangeably with "civil case". — Under this rule, the words "civil action" are broad and used interchangeably with the words "civil case". *Baldonado v. Navajo Freight Lines*, 90 N.M. 284, 562 P.2d 1138 (Ct. App.), rev'd on other grounds, 90 N.M. 264, 562 P.2d 497 (1977).

Filing of complaint ministerial act. — The filing of a civil complaint is a mere ministerial act that can be performed on Sunday. Such a filing ordinarily requires nothing beyond docketing the complaint and receiving the filing fee. 1961-62 Op. Att'y Gen. No. 61-56.

Lawsuit commences when original plaintiffs file complaint. — The lawsuit involved in this case was commenced when the original plaintiffs filed their complaint and not when the original defendants filed their cross-claim. *Hughes v. Joe G. Maloof & Co.*, 84 N.M. 516, 505 P.2d 859 (Ct. App. 1973).

Affidavit in an action of replevin may be treated as complaint, where it contains all the essential allegations of a complaint. *Burnham-Hanna-Munger Dry Goods Co. v. Hill*, 17 N.M. 347, 128 P. 62 (1912) (decided under former law).

Court may dismiss case for plaintiff's failure to prosecute with due diligence. — The statute of limitations is tolled by the timely filing of the complaint but the trial court, in the exercise of its inherent power and in its discretion, independent of statute, may dismiss a case for failure to prosecute when it is satisfied that plaintiff has not applied due diligence in the prosecution of his suit. *Prieto v. Home Educ. Livelihood Program*, 94 N.M. 738, 616 P.2d 1123 (Ct. App. 1980).

The test for a district court in exercising its discretion in determining whether a delay in service of process demonstrates a lack of due diligence on the part of a plaintiff is based on a standard of objective reasonableness; a showing of intentional delay is not required. *Graubard v. Balcor Co.*, 2000-NMCA-032, 128 N.M. 790, 999 P.2d 434.

Action pending until its final termination. — An action is to be regarded as pending from the time of its commencement until its final termination. *Baldonado v. Navajo Freight Lines*, 90 N.M. 284, 562 P.2d 1138 (Ct. App.), rev'd on other grounds, 90 N.M. 264, 562 P.2d 497 (1977).

Law reviews. — For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

For article, "The Death of Implied Causes of Action: The Supreme Court's Recent Bevins Jurisprudence and the Effect on State Constitutional Jurisprudence: Correctional Services Corp. v. Malesko", see 33 N.M.L. Rev. 401 (2003).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Abatement, Survival, and Revival § 12; 1 Am. Jur. 2d Actions § 57 et seq.; 20 Am. Jur. 2d Courts § 68; 61B Am. Jur. 2d Pleading § 899.

Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations, 27 A.L.R.2d 236.

Failure to make return as affecting validity of service or court's jurisdiction, 82 A.L.R.2d 668.

1A C.J.S. Actions §§ 240, 241; 71 C.J.S. Pleading §§ 407 to 411; 72 C.J.S. Process § 3.

1-003.1. Commencement of action; domestic relations cover and information sheets.

A. **Cover sheet.** A domestic relations cover sheet substantially in the form approved by the Supreme Court shall be filed with the petition initiating a domestic relations case and with a motion to reopen a closed domestic relations case.

B. **Information sheet.** A domestic relations information sheet substantially in the form approved by the Supreme Court shall be submitted with the petition initiating a domestic relations case, a motion to reopen a closed domestic relations case and with a party's first responsive pleading in a domestic relations case. A blank copy of the domestic relations information sheet shall be served on the respondent with the summons and petition. Information in the court automated information system which is obtained from the domestic relations information sheet is confidential and shall not be disclosed except that it may be disclosed to:

(1) the parties in the proceeding, unless otherwise ordered by the court;

(2) state and federal agencies required by law to collect the information disclosed; and

(3) court personnel for enforcement, data collection and record keeping purposes.

C. **Legal effect.** Information appearing on the cover and information sheets will have no legal effect in the action.

D. **Failure to comply.** The clerk will file a pleading even if it is submitted without a cover sheet or information sheet or is filed with a cover sheet or information sheet that is incomplete. If a party fails to file or complete a cover sheet, or fails to submit or complete an information sheet, the clerk will give written notice to the party of the deficiency. If a party fails to cure the deficiency within thirty (30) days, the court may enter an order which provides for dismissal of the party's claim without prejudice. The clerk shall serve a copy of the court's order of dismissal on all parties.

[Provisionally approved, effective November 1, 1999 until November 1, 2000; approved, effective November 1, 2000.]

Committee commentary. — This rule is necessary to implement the use of civil cover and information sheets as may be required for administrative purposes by the courts. This rule is similar to LR-CIV 3.1 of the Local Civil Rules of the United States District Court for the District of New Mexico.

ANNOTATIONS

Cross references. — For requirement that clerk accept for filing any paper even though it is not presented in proper form, *see* Rule 1-005(E) NMRA.

Compiler's notes. — Pursuant to a court order dated October 27, 1999, this rule is provisionally approved for twelve months effective November 1, 1999. Subsequently, by a court order dated October 23, 2000, this rule was approved and adopted in its final form, effective November 1, 2000.

1-004. Process.

A. (1) **Scope of rule.** The provisions of this rule govern the issuance and service of process in all civil actions including special statutory proceedings.

(2) **Summons; issuance.** Upon the filing of the complaint, the clerk shall issue a summons and deliver it to the plaintiff for service. Upon the request of the plaintiff, the clerk shall issue separate or additional summons. Any defendant may waive the issuance or service of summons.

B. **Summons; execution; form.** The summons shall be signed by the clerk, issued under the seal of the court and be directed to the defendant. The summons shall be substantially in the form approved by the Supreme Court and must contain:

(1) the name of the court in which the action is brought, the name of the county in which the complaint is filed, the docket number of the case, the name of the first party on each side, with an appropriate indication of the other parties, and the name of each party to whom the summons is directed;

(2) a direction that the defendant serve a responsive pleading or motion within thirty (30) days after service of the summons and file a copy of the pleading or motion with the court as provided by Rule 1-005 NMRA;

(3) a notice that unless the defendant serves and files a responsive pleading or motion, the plaintiff may apply to the court for the relief demanded in the complaint; and

(4) the name, address and telephone number of the plaintiff's attorney. If the plaintiff is not represented by an attorney, the name, address and telephone number of the plaintiff.

C. **Service of process; return.**

(1) If a summons is to be served, it shall be served together with any other pleading or paper required to be served by this rule. The plaintiff shall furnish the person making service with such copies as are necessary.

(2) Service of process shall be made with reasonable diligence, and the original summons with proof of service shall be filed with the court in accordance with the provisions of Paragraph L of this rule.

D. **Process; by whom served.** Process shall be served as follows:

(1) if the process to be served is a summons and complaint, petition or other paper, service may be made by any person who is over the age of eighteen (18) years and not a party to the action;

(2) if the process to be served is a writ of attachment, writ of replevin or writ of habeas corpus, service may be made by any person not a party to the action over the age of eighteen (18) years designated by the court to perform such service or by the sheriff of the county where the property or person may be found;

(3) if the process to be served is a writ other than a writ specified in Subparagraph (2) of this paragraph, service shall be made as provided by law or order of the court.

E. **Process; how served; generally.**

(1) Process shall be served in a manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.

(2) Service may be made, subject to the restrictions and requirements of this rule, by the methods authorized by this rule or in the manner provided for by any applicable statute, to the extent that the statute does not conflict with this rule.

(3) Service may be made by mail or commercial courier service provided that the envelope is addressed to the named defendant and further provided that the defendant or a person authorized by appointment, by law or by this rule to accept service of process upon the defendant signs a receipt for the envelope or package containing the summons and complaint, writ or other process. Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this subparagraph. For purposes of this rule "signs" includes the electronic representation of a signature.

F. **Process; personal service upon an individual.** Personal service of process shall be made upon an individual by delivering a copy of a summons and complaint or other process:

(1)

(a) to the individual personally; or if the individual refuses to accept service, by leaving the process at the location where the individual has been found; and if the individual refuses to receive such copies or permit them to be left, such action shall constitute valid service; or

(b) by mail or commercial courier service as provided in Subparagraph (3) of Paragraph E of this rule.

(2) If, after the plaintiff attempts service of process by either of the methods of service provided by Subparagraph (1) of this paragraph, the defendant has not signed for or accepted service, service may be made by delivering a copy of the process to some person residing at the usual place of abode of the defendant who is over the age of fifteen (15) years and mailing by first class mail to the defendant at the defendant's last known mailing address a copy of the process; or

(3) If service is not accomplished in accordance with Subparagraphs (1) and (2), then service of process may be made by delivering a copy of the process at the actual place of business or employment of the defendant to the person apparently in charge thereof and by mailing a copy of the summons and complaint by first class mail to the defendant at the defendant's last known mailing address and at the defendant's actual place of business or employment.

G. **Process; service on corporation or other business entity.**

(1) Service may be made upon:

(a) a domestic or foreign corporation, a limited liability company or an equivalent business entity by serving a copy of the process to an officer, a managing or a general agent or to any other agent authorized by appointment, by law or by this rule to receive service of process. If the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant;

(b) a partnership by serving a copy of the process to any general partner;

(c) an unincorporated association which is subject to suit under a common name, by serving a copy of the process to an officer, a managing or general agent or to any other agent authorized by appointment, by law or by this rule to receive service of process. If the agent is one authorized by law to receive service and the statute so requires, by also mailing a copy to the unincorporated association.

(2) If a person described in Subparagraph (a), (b) or (c) of this subparagraph refuses to accept the process, tendering service as provided in this paragraph shall constitute valid service. If none of the persons mentioned is available, service may be made by delivering a copy of the process or other papers to be served at the principal office or place of business during regular business hours to the person in charge.

(3) Service may be made on a person or entity described in Subparagraph (1) of this paragraph by mail or commercial courier service in the manner provided in Subparagraph (3) of Paragraph E of this rule.

H. **Process; service upon state and political subdivisions.**

(1) Service may be made upon the State of New Mexico or a political subdivision of the state:

(a) in any action in which the state is named a party defendant, by delivering a copy of the process to the governor and to the attorney general;

(b) in any action in which a branch, agency, bureau, department, commission or institution of the state is named a party defendant, by delivering a copy of the process to the head of the branch, agency, bureau, department, commission or institution and to the attorney general;

(c) in any action in which an officer, official, or employee of the state or one of its branches, agencies, bureaus, departments, commissions or institutions is named a party defendant, by delivering a copy of the process to the officer, official or employee and to the attorney general;

(d) in garnishment actions, service of writs of garnishment shall be made on the department of finance and administration, on the attorney general and on the head of the branch, agency, bureau, department, commission or institution. A copy of the writ of garnishment shall be delivered or served on the defendant employee in the manner and priority provided in Paragraph F of this rule;

(e) service of process on the governor, attorney general, agency, bureau, department, commission or institution may be made either by serving a copy of the process to the governor, attorney general or the chief operating officer of an entity listed in this subparagraph or to the receptionist of the state officer. A cabinet secretary, a department, bureau, agency or commission director or an executive secretary shall be considered as the chief operating officer;

(f) upon any county by serving a copy of the process to the county clerk;

(g) upon a municipal corporation by serving a copy of the process to the city clerk, town clerk or village clerk;

(h) upon a school district or school board by serving a copy of the process to the superintendent of the district;

(i) upon the board of trustees of any land grant referred to in Sections 49-1-1 through 49-10-6 NMSA 1978, process shall be served upon the president or in the president's absence upon the secretary of such board.

(2) Service may be made on a person or entity described in Subparagraph (1) of this paragraph by mail or commercial courier service in the manner provided in Subparagraph (3) of Paragraph E of this rule.

I. **Process; service upon minor, incompetent person, guardian or fiduciary.**

(1) Service shall be made:

(a) upon a minor, if there is a conservator of the estate or guardian of the minor, by serving a copy of the process to the conservator or guardian in the manner and priority provided in Paragraph F, G or J of this rule as may be appropriate. If no conservator or guardian has been appointed for the minor, service shall be made on the minor by serving a copy of the process on each person who has legal authority over the minor. If no person has legal authority over the minor, process may be served on a person designated by the court.

(b) upon an incompetent person, if there is a conservator of the estate or guardian of the incompetent person, by serving a copy of the process to the conservator or guardian in the manner and priority provided by Paragraph F of this rule. If the incompetent person does not have a conservator or guardian, process may be served on a person designated by the court.

(2) Service upon a personal representative, guardian, conservator, trustee or other fiduciary in the same manner and priority for service as provided in Paragraphs F, G or J of this rule as may be appropriate.

J. **Process; service in manner approved by court.** Upon motion, without notice, and showing by affidavit that service cannot reasonably be made as provided by this rule, the court may order service by any method or combination of methods, including publication, that is reasonably calculated under all of the circumstances to apprise the defendant of the existence and pendency of the action and afford a reasonable opportunity to appear and defend.

K. **Process; service by publication.** Service by publication may be made only pursuant to Paragraph J of this rule. A motion for service by publication shall be substantially in the form approved by the Supreme Court. A copy of the proposed notice to be published shall be attached to the motion. Service by publication shall be made once each week for three consecutive weeks unless the court for good cause shown orders otherwise. Service by publication is complete on the date of the last publication.

(1) Service by publication pursuant to this rule shall be by giving a notice of the pendency of the action in a newspaper of general circulation in the county where the action is pending. Unless a newspaper of general circulation in the county where the action is pending is the newspaper most likely to give the defendant notice of the pendency of the action, the court shall also order that a notice of pendency of the action be published in a newspaper of general circulation in the county which reasonably appears is most likely to give the defendant notice of the action.

(2) The notice of pendency of action shall contain:

(a) the caption of the case, as provided in Rule 1-008.1 NMRA, including a statement which describes the action or relief requested;

(b) the name of the defendant or, if there is more than one defendant, the name of each of the defendants against whom service by publication is sought;

(c) the name, address and telephone number of plaintiff's attorney; and

(d) a statement that a default judgment may be entered if a response is not filed.

(3) If the cause of action involves real property, the notice shall describe the property as follows:

(a) If the property has a street address, the name of the municipality or county address and the street address of the property.

(b) If the property is located in a Spanish or Mexican grant, the name of the grant.

(c) If the property has been subdivided, the subdivision description or if the property has not been subdivided the metes and bounds of the property.

(4) In actions to quiet title or in other proceedings where unknown heirs are parties, notice shall be given to the "unknown heirs of the following named deceased persons" followed by the names of the deceased persons whose unknown heirs are sought to be served. As to parties named in the alternative, the notice shall be given to "the following named defendants by name, if living; if deceased, their unknown heirs" followed by the names of the defendants. As to parties named as "unknown claimants", notice shall be given to the "unknown persons who may claim a lien, interest or title adverse to the plaintiff" followed by the names of the deceased persons whose unknown claimants are sought to be served.

L. **Proof of service of process.** The party obtaining service of process or that party's agent shall promptly file proof of service. When service is made by the sheriff or a deputy sheriff of the county in New Mexico, proof of service shall be by certificate; and when made by a person other than a sheriff or a deputy sheriff of a New Mexico county, proof of service shall be made by affidavit. Proof of service by mail or commercial courier service shall be established by filing with the court a certificate of service which shall include the date of delivery by the post office or commercial courier service and a copy of the defendant's signature receipt. Proof of service by publication shall be by affidavit of publication signed by an officer or agent of the newspaper in which the notice of the pendency of the action was published. Failure to make proof of service shall not affect the validity of service.

M. **Service of process in the United States, but outside of state.** Whenever the jurisdiction of the court over the defendant is not dependent upon service of the process within the State of New Mexico, service may be made outside the State as provided by this rule.

N. **Service of process in a foreign country.** Service upon an individual, corporation, limited liability company, partnership, unincorporated association that is subject to suit under a common name, or equivalent legal entities may be effected in a place not within the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(a) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(b) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(c) unless prohibited by the laws of the United States or the law of the foreign country, in the same manner and priority as provided for in Paragraph F, G or J of this rule as may be appropriate.

[As amended, effective January 1, 1987; October 1, 1998; March 1, 2005; as amended by Supreme Court Order No. 11-8300-050, effective for cases filed on or after February 6, 2012.]

Committee commentary.

Introduction

New Mexico Rule 1-004 has its origins in an act of the first Legislature of the State of New Mexico. 1912 N.M. Laws Ch. 26. When the New Mexico Supreme Court revamped the rules of civil procedure in 1942, 46 N.M. xix-lxxxiv (1942), largely using the 1938 Federal Rules as a model, the provisions of New Mexico Rule 4 continued to reflect some aspects of the service of process provisions of the former New Mexico provisions. Since then piecemeal amendments have occurred but there has been no previous attempt to restructure Rule 1-004 NMRA in light of evolving principles of due process and modern means of communication. The 2004 amendment to Rule 1-004 seeks to accomplish this goal.

Scope of Rule; Rule 1-004(A)(1)

Generally, statutory provisions are inapplicable if those provisions purport to set procedural requirements that contradict the Rules of Civil Procedure. *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976). Rule 1-001(A) creates

an exception to *Ammerman*, extending deference to the procedural requirements set by the legislature in special proceedings that would not exist but for creation by the legislature. The root of the Rule 1-001(A) exception for special statutory proceedings is the provision in the New Mexico Constitution giving the district courts "such jurisdiction of special cases and proceedings as may be conferred by law." N.M. Const., art. VI, § 13. The Rule 1-001(A) exception for special statutory proceedings is a prudential exception generally applied to statutory provisions that affect procedural rules even though the statutory provisions do not deal with jurisdictional matters. The Supreme Court, though, has ultimate authority over all procedural rules and thus can supersede by rule a non-jurisdictional statutory procedure in special statutory and summary proceedings. Rule 1-004(A)(1) is an exercise of that authority.

Rule 1-004 was amended in 2005 to bring New Mexico's service of process procedure in line with evolving principles of due process. Questions have arisen whether the 2005 amendments to Rule 1-004 apply in special statutory proceedings where the statute provides lesser notice requirements than Rule 1-004. *See, e.g.*, NMSA 1978, § 45-1-401 (provision of the Probate Code permitting notice by publication without court order and only requiring two weekly notices); and NMSA 1978, § 42A-1-14 (Eminent Domain Code provision providing for service by mail and by publication in manners inconsistent with Rule 1-004).

The committee is of the view that, since Rule 1-004 requirements derive from constitutional due process requirements, new subparagraph (A)(1) clarifies that the requirements of Rule 1-004 must be satisfied to validly serve a person or give them notice of the pendency of special statutory proceedings as well as civil actions.

Summons; issuance; Rule 1-004(A)(2)

"Plaintiff" includes "Petitioner" and "Defendant" includes "Respondent". *See* Rule 1-001(B)(1) and (2). The "Complaint" referred to in Rule 1-004(A) includes "Petition". *See* Rule 1-001(B)(3).

Rule 1-004(A) previously provided that the clerk shall "forthwith" issue a summons upon filing of the complaint. The word is omitted from the 2004 Amendment because it was redundant; the rule already provides that the clerk "shall" issue a summons "[u]pon the filing of the complaint".

Rule 1-004(A) previously provided that separate or additional summons may be issued "against any defendants". Because it may be necessary to serve a summons on persons not formally denominated as a defendant, for example, upon a third-party defendant under Rule 1-014 NMRA, the rule has been modified to eliminate the implication that additional summonses may issue only against defendants.

The committee considered but did not provide that a person other than the plaintiff or petitioner could request issuance of a summons.

Summons; execution; form; Rule 1-004(B)

Rule 1-011 NMRA requires that all "paper" shall contain the telephone number of the attorney or the pro-se litigant. Except for the provision requiring that the summons include the telephone number as well as the name and address of the plaintiff's attorney or the pro se plaintiff, only technical changes have been made in this section.

A form summons approved by the New Mexico Supreme Court may be found at 4-206 NMRA.

Service of Process; return; Rule 1-004(C)

"Process" is defined in Rule 1-001(B)(3) NMRA.

Sometimes a summons is not served in conjunction with the pleading instituting an action. For example, writs, warrants and mandates are not accompanied by a summons. *See* Rule 1-001(B)(3)(c) and (d) NMRA. Rule 1-004(C)(1) acknowledges that service of process sometimes does not include the service of a summons.

Rule 1-004(C)(2) is new. Unlike Federal Rule 4(m), which contains a specific time limit within which service of the summons and complaint ordinarily must be made, Rule 1-004(C)(2) provides only that service shall be made "with reasonable diligence". This reflects the standard established in New Mexico case law. *E.g., Romero v. Bachicha*, 2001 NMCA-048 Par. 23-25, 130 N.M. 610, 616, 28 P.3d 1151, 1157.

Process; by whom served; Rule 1-004(D)

Rule 1-004(D) formerly provided that process could be served by a sheriff of the county where the defendant could be found, or by any person over the age of eighteen and not a party to the action. Because the latter category necessarily includes the sheriff of a county, the reference to service by the sheriff has been omitted.

Rule 1-004(D)(2) carries over, unchanged, former Rule 1-004(D)(2).

Rule 1-004(D)(3) is new. It provides a means for determining who shall serve process when the process is a writ other than those mentioned in Rule 1-004(D)(2).

Process; how served; generally; Rule 1-004(E)

Rule 1-004(E)(1) makes explicit in the rule the general test for constitutionally-adequate service of process established in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections".).

Rule 1-004(E)(2) accepts the premise that matters of procedure are for the judiciary to determine but that legislation affecting procedure is valid unless and until contradicted by a rule of procedure promulgated by the Supreme Court. Rule 1-091 NMRA; Section 38-1-2 NMSA 1978. The section thus provides that service of process shall be made in accordance with Rule 1-004 NMRA, or in accordance with applicable statutes but shall not be accomplished by a means authorized by a statute that conflicts with Rule 1-004.

Rule 1-004(E)(3) provides a much-simplified method of service by mail. It is no longer necessary that the defendant open the mailed packet containing the summons and complaint and then voluntarily choose to accept service by returning a signed Receipt of Service of Summons and Complaint as formerly was required. Instead, service is accomplished when the summons and complaint are mailed to the named defendant in a manner that calls for the recipient to sign a receipt upon receiving the envelope containing the summons and complaint and the defendant-recipient or a person authorized by appointment or by law to accept service of process on behalf of the defendant signs the receipt upon receiving the mailed envelope or package.

Service by mail need not be at the home address or usual place of abode of the defendant. Service is complete when the receipt is signed.

This section also provides the same mechanism for service of the summons and complaint when a "commercial courier service" is utilized instead of the mails. The phrase, though not entirely self-explanatory, has been used in this context by other states without apparent problems. *See, e.g.*, Kansas Rules of Civil Procedure, KSA 60-303 (c)(1); Utah Rules of Civil Procedure 4(d)(2)(A)and (B). The Advisory Committee Note to Utah Rule 4 provides that "[t]he term ‘commercial courier service’ refers to businesses that provide for the delivery of documents. Examples of ‘commercial courier service’ include Federal Express and United Parcel Service". The committee endorses the definition provided in the Utah Advisory Committee Note.

In this context, "signs" and "signed" is equivalent to "signature" which "means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law". Rule 1-011 NMRA.

Process; personal service upon an individual; Rule 1-004(F)

In General. The 2004 Amendment makes substantial changes in Rule 1-004(F). The "post and mail" method found in the former rule has been eliminated. A provision for service at the place of work of the defendant has been added. The provision for mail service has been simplified and the rule now authorizes the use of commercial courier services as well as mail for service of process. A hierarchy of methods of service has been established. In some cases, a listed method of service cannot be used until other methods of service are attempted unsuccessfully.

Rule 1-004(F)(1)(a). This subparagraph remains the same as in the former Rule.

Rule 1-004(F)(1(b). This subparagraph authorizes service by mail or commercial courier service as provided in Rule 1-004(E)(3).

Rule 1-004(F)(2). The means of service provided in this section may only be used if there first was an attempt to serve process "by either of the methods of service provided by Subparagraph (1) of this paragraph". This means that the person serving process need only attempt one of the two methods-personal service or mail/commercial courier service before using the alternative provided in this subparagraph.

This provision allows service to a person over the age of 15 who resides at the usual place of abode of the defendant. This is the same procedure as that formerly provided in Rule 1-004(F)(1) before the 2004 amendment. The former rule, however, required only delivery of the summons and complaint to such a person for service to be valid. The 2004 amendment provides that service is not accomplished until, in addition, the person serving the summons and complaint mails a copy of the summons and complaint to the defendant at the defendant's last known mailing address. This provision allows service to a person over the age of 15 who resides at the usual place of abode of the defendant. This is the same procedure as that formerly provided in Rule 1-004(F)(1) before the 2004 amendment. The former rule, however, required only delivery of the summons and complaint to such a person for service to be valid. The 2004 amendment provides that service is not accomplished until, in addition, the person serving the summons and complaint mails a copy of the summons and complaint to the defendant at the defendant's last known mailing address. This mailing address will often, but not always, be the usual place of abode of the defendant. The cost of mailing is minimal and increases the likelihood that the defendant will get actual, timely notice of the institution of the action.

Rule 1-004(F)(1) formerly provided that if no qualified person was at the usual place of abode to accept service of process, service could be made by posting process at the abode and then mailing a copy of the process to the last known mailing address. This alternative method of service has been omitted in the 2004 amendment.

Rule 1-004(F)(3) is new. It may be used only when service of process has been attempted, unsuccessfully, in accordance with Rule 1-004(F)(1) and Rule 1-004(F)(2). Rule 1-004(F)(3) provides that service may be made by delivering a copy of the summons and complaint to the person apparently in charge of the actual place of business of the defendant and mailing a copy of the summons and complaint to the defendant both at the defendant's last known mailing address and also the defendant's actual place of business.

Colorado, R.C.P. 4(e)(2), Oregon, R.C.P. 7(d)(2)(c) and New York, N.Y. CPLR Sec. 308(2), also provide for work place service of process. The Fair Debt and Collection Practices Act, 15 U.S.C. Sec. 1692 ff, contains a provision allowing service of process at the workplace of the defendant by "any person while serving or attempting to serve legal process in connection with judicial enforcement of any debt". 15 U.S.C. Sec. 1692(a)(6)(D).

Process; Service on corporation or other business entity; Rule 1-004(G)

In addition to providing for service of process on corporations, Rule 1-004(G)(1) now includes limited liability companies as well as any "equivalent business entity" to a corporation or limited liability company. Courts should construe that phrase to assure that Rule 1-004 provides appropriate guidance about proper service of process upon legislatively-created variations on the traditional corporation.

The substance of the former provisions concerning service of process on partnerships and unincorporated associations have been carried over unchanged in Rule 1-004(G)(1)(b) and (c) of the 2004 amendment.

Process; Service upon state and political subdivisions; Rule 1-004(H)

Subparagraphs (a), (b), (c), (d) and (e) or Rule 1-004(H)(1) are substantively the same as former Rule 1-004(F) (3) and (4). They are derived from and do not vary materially from Section 38-1-7 NMSA 1978.

Subparagraphs (f), (g) and (i) are substantively the same as former Rule 1-004(F)(4), (5) and (6).

Subparagraph (h), dealing with service of process on a school district or school board is new. Former Rule 1-004 provided no guidance on the proper manner of service to such entities.

Rule 1-004(H)(2) allows service of process to the persons designated in Rule 1-004(H)(1) by means of mail or commercial courier service as provided in Rule 1-004(E)(3).

Process; Service upon minor, incapacitated person or conservator; Rule 1-004(I)

Subparagraph 1; Service on minors. The provision for service on a guardian or conservator is carried over from former Rule 1-004(F)(7) except that such service now may be in any manner provided in Paragraph F, G, or L as appropriate, rather than, as formerly, only "by delivering a copy -- to the conservator or guardian".

The provision for service upon person or persons having legal authority over a minor who does not have a guardian or conservator is new as is the provision requiring resort to the court to formulate a method of service where the minor has no guardian, conservator or person with legal authority over the minor.

Subparagraph 2; Service on incompetent persons. Rule 1-004(F)(7) formerly used the phrase "incapacitated person" to describe the party for whom a special means of service of process was appropriate. Rule 1-017(C) uses the phrase "incompetent persons" and this subparagraph adopts the language of Rule 1-017 NMRA for consistency. *See* Rule 10-104(L) NMRA (defining an "incompetent" person).

The provision for service on a guardian or conservator is carried over from former Rule 1-004(F)(7) except that such service now may be in any manner provided in Paragraph F, G or L as appropriate, rather than, as formerly, only "by delivering a copy . . . to the conservator or guardian".

The provision requiring resort to the court to formulate a method of service where the incompetent person has no guardian or conservator is new. Former Rule 1-004(F)(8) provided that if no conservator or guardian had been appointed for an incapacitated person, service upon the incapacitated person would suffice. This provided inadequate assurance that the incapacitated person would have a meaningful opportunity to defend the action. To remedy this, this subparagraph requires the court to fashion a constitutionally-adequate means of service upon the incapacitated person not represented by a guardian or conservator.

Subparagraph 3; Service on fiduciaries. This provision is carried over from former Rule 1-004(F)(9). Fiduciaries may be served in the same manner as individuals and business entities who are defendants.

Service in manner approved by court; Rule 1-004(J)

This provision is carried over, unchanged, from former Rule 1-004(L). The goal of service of process is to achieve actual notice by means that are reasonable under the circumstances. Rule 1-004(E)(1). The specific methods of service authorized in Rule 1-004 provide standard methods by which this can be accomplished, but there are myriad specific circumstances in which ad-hoc determination of the most appropriate means for serving process is called for. This rule provides broad authority for the court to fashion a constitutionally-adequate method of service under any circumstances.

Where service can be accomplished pursuant to Rule 1-004(F)(G)(H) or (I), there will seldom be need for resort to Rule 1-004(K). Where the court orders service by publication, the court should consider, pursuant to this Paragraph, whether supplemental means of service should accompany notice by publication. Where no method of service specifically provided for by Rule 1-004 is likely to satisfy or achieve the goal of actual notice, this Paragraph authorizes the court to create a method of service suited to the circumstances of the particular facts presented.

Service by publication; Rule 1-004(K)

This paragraph requires that no service by publication take place without a prior court order authorizing service by publication. This is a significant modification of prior practice in situations where statutes authorized publication without prior court approval. *See, e.g.*, Section 42-2-7(B) NMSA 1978 (authorizing service by publication in condemnation proceeding "[i]f the name or residence of any owner be unknown"); Section 45-1-401 NMSA 1978 (authorizing service by publication in probate proceedings under some circumstances and providing that the court for good cause can provide a different manner of service). Publication notice is seldom likely to achieve

actual notice and thus its use should be monitored carefully by the courts. The Supreme Court is authorized to modify statutes providing for notice by publication by requiring prior court approval for service by publication. Legislation affecting procedure is valid unless and until contradicted by a rule of procedure promulgated by the Supreme Court. Rule 1-091 NMRA; Section 38-1-2 NMSA 1978. This paragraph also provides the required content of the notice to be published, the frequency of publication and the place of publication. Omitted from the 2004 amendment is the former provision (Rule 1-004(H)(3)) requiring that publication be "in some newspaper published in the county where the cause is pending" and providing for publication in a newspaper of general circulation in the county only when "no newspaper [was] published in the county". Publication now always will include publication in a paper of general circulation in the county where the action is pending whether or not the newspaper is published in that county. Where appropriate to the goal of achieving actual notice, the court is free to require, in addition, that publication also be in a newspaper not of general circulation that is published in the county where the cause is pending.

Where the court determines that actual notice by publication is more likely to be achieved by publishing the notice elsewhere, the court must provide for additional published notice in the county that the court deems such notice is most likely to achieve the goal of actual notice to the defendant.

Former Rule 1-004(H)(7), dealing with the required content of repeated publications due to misnomers in the initial publication, has been omitted. The court that orders additional publication will craft an appropriate order concerning its content.

Former Rule 1-004(I) calling for publication to be accompanied by mail notice to persons whose residence is known has been omitted. The court that orders publication has the obligation to fashion means of service reasonably calculated to provide actual notice, Rule 1-004(E)(1), and thus can provide for mailed notice to accompany service of process by publication where reasonable. *See* Rule 1-004(J).

Proof of service; Rule 1-004(L)

The person obtaining service of process rather than the person serving process is now responsible for filing proof of service.

The means of proof of service when service is accomplished by mail or commercial courier service pursuant to Rule 1-004(F)(1)(b) and when service is made by publication pursuant to Rule 1-004(J) or (K) are provided in those paragraphs.

Service outside the state but in the United States; Rule 1-004(M)

This provision replaces former Rule 1-004(J) (Service of summons outside of state equivalent to publication). Where, as in the case of long arm jurisdiction pursuant to Section 38-1-16 NMSA 1978, service of process can be made outside of New Mexico, this rule requires that service be accomplished in the manner and priority provided in

this rule. The Committee considered but rejected a proposal that the method of service need not meet the requirements of this rule so long as it met the requirements for service of process in the place where service occurred.

Service in a foreign country; Rule 1-004(N)

Service in foreign countries is sometimes subject to treaties or other international agreements. This rule, adopted from Federal Rule 4(f) and Rule 4(h)(2) takes into account the special considerations required by international law.

[Approved, March 1, 2005; as amended by Supreme Court Order No. 11-8300-050, effective for cases filed on or after February 6, 2012.]

ANNOTATIONS

Cross references. — For service of process after ninety days after entry of final judgment, *see* Rule 1-089(E) NMRA.

For execution of process of probate court by sheriff, *see* Section 4-41-13 NMSA 1978.

For sheriff's fees, *see* Section 4-41-16 NMSA 1978.

For service on counties, *see* Section 4-46-2 NMSA 1978.

For service in proceeding to remove local officer, *see* Section 10-4-5 NMSA 1978.

For service of process on nonresident public contractors, *see* Sections 13-4-21 to 13-4-23 NMSA 1978.

For legal newspapers, *see* Section 14-11-2 NMSA 1978.

For time and manner for publication of notice of pending suit, *see* Section 14-11-10 NMSA 1978.

For service of process in suits against adverse claimants to lands in townsites, *see* Section 19-4-24 NMSA 1978.

For resisting or obstructing service being a petty misdemeanor, *see* Section 30-22-1 NMSA 1978.

For free process on proper showing of indigency, *see* Section 34-6-27 NMSA 1978.

For issuance of process by probate judges, *see* Section 34-7-13 NMSA 1978.

For issuance and service of process in garnishment, *see* Sections 35-12-2, 35-12-19 NMSA 1978.

For service when action is revived against nonresident, *see* Section 37-2-9 NMSA 1978.

For service by superintendent of insurance, *see* Section 38-1-8 NMSA 1978.

For service on domestic corporation, *see* Sections 38-1-5, 53-11-14 NMSA 1978.

For service on foreign corporation, *see* Sections 38-1-6, 53-17-9 to 53-17-11 NMSA 1978.

For when personal service may be made outside state, and its effect, *see* Section 38-1-16 NMSA 1978.

For service on nonresident motorists, *see* Sections38-1-16, 66-5-103, 66-5-104 NMSA 1978.

For suits against partnerships, *see* Section 38-4-5 NMSA 1978.

For service in kinship guardianship proceedings, *see* Section 40-10B-6 NMSA 1978.

For personal service in special alternative condemnation proceedings, *see* Section 42-2-7 NMSA 1978.

For service by publication in suit for specific performance of real estate contract, *see* Sections 42-7-2, 42-7-3 NMSA 1978.

For service of writ of habeas corpus, *see* Sections 44-1-32 to 44-1-34 NMSA 1978.

For service and notice in probate proceedings, *see* Sections 45-1-401 to 45-1-404 NMSA 1978.

For service on trustees of land grants generally, *see* Section 49-1-17 NMSA 1978.

For service on trustees of Chaperito land grants, *see* Section 49-3-2 NMSA 1978.

For service on trustees of land grants in Dona Ana County, *see* Section 49-5-2 NMSA 1978.

For free process for labor commissioner in wage claim actions, *see* Section 50-4-12 NMSA 1978.

For service on unincorporated association, *see* Section 53-10-6 NMSA 1978.

For chairman of corporation commission (now public regulation commission) being agent for service on producer, distributor, manufacturer or seller of motion pictures, *see* Section 57-5-18 NMSA 1978.

The 1998 amendment, effective for cases filed in the district courts on and after October 1, 1998, added a new Paragraph L (now Paragraph J) providing for service in manner approved by court, redesignated former Paragraphs L and M as Subparagraphs M and N respectively and made numerous gender neutral and stylistic changes.

The 2005 amendment, effective March 1, 2005, rewrote this rule. *See* the committee commentary for an analysis of the 2005 revision of this rule.

The 2011 amendment, approved by Supreme Court Order No. 11-8300-050, effective for cases filed on or after February 6, 2012, explicitly provided that the rule apply to the issuance and service of process in special statutory proceedings; added Subparagraph (1) of Paragraph A; in Paragraphs I, J, and K, added "Process" at the beginning of the title of each paragraph; and in Paragraph L, added "of process" at the end of the title of the paragraph.

Compiler's notes. — This rule is deemed to have superseded Sections 105-302, 105-303, 105-304, 105-306, 105-307, 105-308, 105-309, 105-310, 105-312, 15-313, 105-314, 105-315, 32-195, 32-3702 (compiled as Section 4-46-2 NMSA 1978) and 29-117 (compiled as Section 49-1-17 NMSA 1978) C.S. 1929.

Paragraph K of this rule is deemed to have superseded 105-313, C.S. 1929, which was substantially the same.

I. GENERAL CONSIDERATION.

Service of process is procedural and Supreme Court rule on service of process controls. *Abarca v. Hanson*, 106 N.M. 25, 738 P.2d 519 (Ct. App. 1987).

Section 37-1-13 NMSA 1978 has no further usefulness because Rule 3 (*see* now Rule 1-003 NMRA) and this rule cover subject and are exclusive. *Prieto v. Home Educ. Livelihood Program*, 94 N.M. 738, 616 P.2d 1123 (Ct. App. 1980).

Court may dismiss case for plaintiff's failure to prosecute with due diligence. — The statute of limitations is tolled by the timely filing of the complaint but the trial court, in the exercise of its inherent power and in its discretion, independent of statute, may dismiss a case for failure to prosecute when it is satisfied that plaintiff has not applied due diligence in the prosecution of his suit. *Prieto v. Home Educ. Livelihood Program*, 94 N.M. 738, 616 P.2d 1123 (Ct. App. 1980).

The test enunciated in *Prieto v. Home Education Livelihood Program*, 94 N.M. 738, 616 P.2d 1123 (Ct. App. 1980) provides for a district court to exercise its discretion in determining whether a delay in service of process demonstrates a lack of due diligence on the part of a plaintiff based on a standard of objective reasonableness, and whether the delay warrants dismissal of the complaint. *Romero v. Bachicha*, 2001-NMCA-048, 130 N.M. 610, 28 P.3d 1151.

The test for a district court in exercising its discretion in determining whether a delay in service of process demonstrates a lack of due diligence on the part of a plaintiff is based on a standard of objective reasonableness; a showing of intentional delay is not required. *Graubard v. Balcor Co.*, 2000-NMCA-032, 128 N.M. 790, 999 P.2d 434.

Including situation where original complaint named John Doe defendants. — The filing of an original complaint naming John Doe defendants does not toll the running of the statute of limitation against the defendants added in an amended complaint where there is a lack of reasonable diligence in proceeding against the John Doe defendants. *DeVargas v. State ex rel. New Mexico Dep't of Cors.*, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981).

Notice of suggestion of death. — If the court has not acquired personal jurisdiction over the persons to be served with a Rule 25(a)(1) (now Rule 1-025A(1) NMRA) suggestion of death, then this rule is the proper mechanism to effectuate proper notice, because the latter rule is jurisdictionally rooted. *Jones v. Montgomery Ward & Co.*, 104 N.M. 636, 725 P.2d 836 (Ct. App. 1985).

Where the plaintiff died before the case went to trial, his attorney was not the proper party, either under this rule or under Rule 5 (now Rule 1-005), to receive notice of suggestion of death so as to trigger the 90-day period for substitution of parties provided under Rule 25 (now Rule 1-025 NMRA). *Jones v. Montgomery Ward & Co.*, 104 N.M. 636, 725 P.2d 836 (Ct. App. 1985).

II. FORM OF SUMMONS.

Writ of replevin accomplishes same function as summons. — Where it was contended that no summons having been issued and served, the court was without jurisdiction of the defendant and the judgment was void, but a writ of replevin was issued by the clerk and served by the sheriff, the supreme court held that the writ of replevin in an action of replevin accomplishes the same function in process as does a summons in an ordinary civil action and affirmed the judgment. *Citizens Bank v. Robinson Bros. Wrecking*, 76 N.M. 408, 415 P.2d 538 (1966).

Proper form is presumed. — Under former statute it was held that where phraseology of summons did not appear from the record, it would be presumed that the clerk issued the summons in statutory form. *Bourgeious v. Santa Fe Trail Stages, Inc.*, 43 N.M. 453, 95 P.2d 204 (1939).

General appearance waives failure to endorse attorney's name. — Failure to endorse the name of plaintiff's counsel was waived by a general appearance. *Boulder, Colo., Sanitorium v. Vanston*, 14 N.M. 436, 94 P. 945 (1908).

III. SERVICE OF PROCESS.

A. IN GENERAL.

District court has no jurisdiction to issue binding judgment against a party not served in accordance with this rule who does not somehow waive the defects in service. *Trujillo v. Goodwin*, 2005-NMCA-095, 138 N.M. 48, 116 P.3d 839.

Faxing petition *does not amount to personally delivering the process, such is as required by this rule. Trujillo v. Goodwin, 2005-NMCA-095, 138 N.M. 48, 116 P.3d 839.*

Two functions are served by service by personal delivery of the papers within the state: (1) it shows that defendant has an appropriate relationship to the state and is within the power of the court generally; and (2) it gives the defendant notice of the proceeding against him. *Clark v. LeBlanc*, 92 N.M. 672, 593 P.2d 1075 (1979).

Due process requires that summons be served in a manner reasonably calculated to bring the proceedings to the defendant's attention. *Moya v. Catholic Archdiocese*, 92 N.M. 278, 587 P.2d 425 (1978), *rev'd on other grounds*, 107 N.M. 245, 755 P.2d 583 (1988).

Facts and circumstances of each case determine proper service. — Whether a summons was served in a manner reasonably calculated to bring the proceeding to the defendant's attention depends upon the facts and circumstances of each case. *Moya v. Catholic Archdiocese*, 107 N.M. 245, 755 P.2d 583 (1988).

Service reasonably calculated to give notice. — Fundamental due process requires service reasonably calculated to give parties notice, and the lack of such notice cannot be cured by an entry of a general appearance after entry of default judgment. *Abarca v. Hanson*, 106 N.M. 25, 738 P.2d 519 (Ct. App. 1987).

Process may be served on Indian allotments. — Federal statutory provisions do not preempt New Mexico authority to serve process on Indian allotments where the process served is in a case which involves neither the allotted land nor the status of the allottee as allottee. *Great Am. Ins. Co. v. Brown*, 86 N.M. 336, 524 P.2d 199 (Ct. App. 1974).

A 19-year-old minor could legally serve citations, was fully capable of properly evaluating the facts which came to her personal knowledge and was legally competent to establish the charges complained of. *City of Alamogordo v. Harris*, 65 N.M. 238, 335 P.2d 565 (1959).

But now civil process servers need not be law enforcement officers. — Subdivision (e)(1) (*see* now Paragraph D) provides that civil service need not be made by a deputized law enforcement officer whose functions include the prevention and detection of crime and the enforcement of the laws of the State of New Mexico. Thus civil process servers who do not function as police officers need not be certified by the law enforcement academy. 1976 Op. Att'y Gen. No. 76-7.

Requirements of Paragraph F(1) satisfied. — Summons and complaint were served in a manner reasonably calculated to bring the proceeding to defendant's attention,

where rolled-up copies of the summons and complaint were attached to the handle of defendant's front porch door by a rubber band, and defendant took them inside the house and read them. *Moya v. Catholic Archdiocese*, 107 N.M. 245, 755 P.2d 583 (1988).

Requirements of Paragraph F(1) not met. — A justice of the peace (now magistrate) is charged with the knowledge that posting a summons on a bulletin board in the county courthouse is not proper service. *Galindo v. Western States Collection Co.*, 82 N.M. 149, 477 P.2d 325 (Ct. App. 1970).

Defendant is "found" when served only if he is there voluntarily and not by reason of plaintiff's fraud, artifice or trick for the purpose of obtaining service. *Empire Fire & Marine Ins. Co. v. Lee*, 86 N.M. 739, 527 P.2d 502 (Ct. App. 1974).

As where he comes in answer to sheriff's telephone call. — Where the sheriff of one county telephoned defendant at his home in another and informed him that the sheriff had papers to personally serve upon him and he subsequently came to the sheriff's office and was served, defendant knew he was to be served with papers and was voluntarily in the county. *Empire Fire & Marine Ins. Co. v. Lee*, 86 N.M. 739, 527 P.2d 502 (Ct. App. 1974).

Moving to interim place changes "usual place of abode". — Where the appellant had moved prior to service, had a permanent place to move to, but had an interim place to stay awaiting the readiness of the permanent abode, then her address prior to service was not her usual place of abode. *HFC v. McDevitt*, 84 N.M. 465, 505 P.2d 60 (1973).

Service at former place of abode is invalid. — "The usual place of abode" means the customary place of abode at the very moment the writ is left posted; hence, where the writ is left posted at a former place of abode, but from which defendant had, in good faith, removed and taken up his place of abode elsewhere, service so had is ineffective and invalid. *HFC v. McDevitt*, 84 N.M. 465, 505 P.2d 60 (1973).

Copy must be left for each defendant. — Under the rule generally applied, where substituted service is made on more than one defendant residing at the same place of abode, a copy must be left for each defendant. *Hale v. Brewster*, 81 N.M. 342, 467 P.2d 8 (1970).

Subdivision (e)(1) (see now Paragraph F(2)) requires delivery of a copy of the complaint and summons to accomplish substituted service for a defendant. It must follow that, if there is more than one defendant, a complaint and a summons must be delivered for each defendant being served. *Hale v. Brewster*, 81 N.M. 342, 467 P.2d 8 (1970)(default judgment set aside).

Where railroad has no offices in state. — Under Laws 1880, ch. 3, § 6 (repealed by Laws 1905, ch. 79, § 134), railroad company which had no offices located in New Mexico, but merely owned land in the state, was not subject to process by attachment in

a personal action. *Caledonian Coal Co. v. Baker*, 196 U.S. 432, 25 S. Ct. 375, 49 L. Ed. 540 (1905).

Cross-complaints in action to foreclose mechanic's lien held served with reasonable diligence. *Daughtrey v. Carpenter*, 82 N.M. 173, 477 P.2d 807 (1970).

When service commences period for conducting adjudicatory hearing in delinquency proceedings. — The time limit set forth in Rule 10-226 NMRA for commencing an adjudicatory hearing in a delinquency proceeding involving a child not held in custody begins to run when the summons and a copy of the petition are personally served on the child, and not when a copy is given to the child's attorney. *State v. Jody C.*, 113 N.M. 80, 823 P.2d 322 (Ct. App. 1991).

Time for service of process included in period for commencement of action. — Under Rule 1-015(C) NMRA, the period for commencing an action includes the reasonable time allowed for service of process. To the extent that *Fernandez v. Char-Li-Jon, Inc.*, 119 N.M. 25, 888 P.2d 471 (Ct. App. 1994) or other similar cases appear to hold otherwise, these opinions are not to be followed. *Romero v. Bachicha*, 2001-NMCA-048, 130 N.M. 610, 28 P.3d 1151.

B. SUBSTITUTED OR CONSTRUCTIVE SERVICE.

Strict construction required. — In authorizing substituted service of process as distinguished from personal service, Subdivision (g) (now Paragraph K) of this rule requires strict construction. *Houchen v. Hubbell,* 80 N.M. 764, 461 P.2d 413 (1969); *Murray Hotel Co. v. Golding*, 54 N.M. 149, 216 P.2d 364 (1950).

Statutes authorizing substitute service are to be strictly construed. *Moya v. Catholic Archdiocese*, 92 N.M. 278, 587 P.2d 425 (1978), *rev'd on other grounds*, 107 N.M. 245, 755 P.2d 583 (1988).

Under former rule, substituted service by posting at sister's residence satisfied due process requirements since at the time of the posting the intended recipient was difficult to locate and there was evidence that he sometimes lived with his sister. *Campbell v. Bartlett*, 975 F.2d 1569 (10th Cir. 1992).

Out-of-state constructive service may be by personal service or publication. — Constructive service without the state may be had either by personal service in such other state or by publication and mailing. *In re Will of Hickok*, 61 N.M. 204, 297 P.2d 866 (1956).

Due process prohibits constructive service where feasible alternative exists. — Due process prohibits the use of constructive service where it is feasible to give notice to the defendant in some manner more likely to bring the action to his attention. *Clark v. LeBlanc*, 92 N.M. 672, 593 P.2d 1075 (1979).

Service by publication is not due process of law in strictly personal actions, but applies to all actions in which personal service is not essential, and where suits may be instituted under recognized principles of law. *State ex rel. Truitt v. District Court*, 44 N.M. 16, 96 P.2d 710, 126 A.L.R. 651 (1939).

Money judgment cannot be entered against motorist served by publication. — The trial court lacked jurisdiction to enter a default judgment against motorist who had been served solely by order of publication. *Chapman v. Farmers Ins. Group*, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Service by publication, in action for money judgment, could not have the effect of giving the court jurisdiction over nonresident corporation in an in personam action. *Pope v. Lydick Roofing Co.*, 81 N.M. 661, 472 P.2d 375 (1970).

Adoption proceedings. — Substitute service or process by publication is inadequate in adoption proceedings. *Normand ex rel. Normand v. Ray*, 107 N.M. 346, 758 P.2d 296 (1988).

For rule prior to 1959, *see* 1957-58 Op. Att'y Gen. No. 58-213; *State ex rel. Pavlo v. Scoggin,* 60 N.M. 111, 287 P.2d 998 (1955).

Personal jurisdiction may be obtained by publication in some cases. — Service by publication gives the district court jurisdiction in an in personam action if it is established that the defendant left the state and concealed himself in order to avoid service. *Clark v. LeBlanc*, 92 N.M. 672, 593 P.2d 1075 (1979).

Constructive service is sufficient for an in personam judgment where awards of alimony are made against a husband who conceals himself within the state to avoid service of process. *Clark v. LeBlanc*, 92 N.M. 672, 593 P.2d 1075 (1979).

An action for annulment is in personam, and when there is lack of personal service on the defendant within the state, the court does not have jurisdiction to hear the case. *State ex rel. Pavlo v. Scoggin*, 60 N.M. 111, 287 P.2d 998 (1955). But *see* now Section 38-1-16A(5) NMSA 1978, as to alimony, child support and property settlements.

In action to reform a lease or sublease by decreasing rental payments and allowing credit for excess payments, constructive service was not sufficient. *State ex rel. Truitt v. District Court*, 44 N.M. 16, 96 P.2d 710 (1939).

Under former rule, where action is in personam, either to cancel a deed or to reform it, neither personal service outside the state nor service through publication within New Mexico could give the court jurisdiction over the person of nonresident defendants. *Sullivan v. Albuquerque Nat'l Trust & Sav. Bank*, 51 N.M. 456, 188 P.2d 169 (1947).

But suit to quiet title is not in personam. — Suit by husband upon wife's death for an adjudication that property which stood in her name at her death but which had been

purchased with his veteran's benefits was in fact community property and not her separate estate was not an action in personam but a suit to quiet title to realty; consequently, nonresident legatees served personally outside the state were not entitled to have service quashed. *Sullivan v. Albuquerque Nat'l Trust & Sav. Bank*, 51 N.M. 456, 188 P.2d 169 (1947).

Under a statute providing for service by publication upon an unknown person in a suit to quiet title, where the service was properly completed, a judgment obtained in the quiet title action is binding upon such unknown person. *Bentz v. Peterson*, 107 N.M. 597, 762 P.2d 259 (Ct. App. 1988).

And action to set aside fraudulent deed and foreclose judgment lien is quasi in rem. — Action by judgment creditor to set aside a deed as fraudulent and to foreclose judgment lien was quasi in rem, and courts where land was located, New Mexico, obtained jurisdiction over nonresident defendant by constructive service outside state by publication. *State ex rel. Hill v. District Court*, 79 N.M. 33, 439 P.2d 551 (1968).

Where a real owner may be brought into court by name, his property may not be taken by constructive service against unknown claimants. *Mutz v. Le Sage*, 61 N.M. 219, 297 P.2d 876 (1956).

Person whose name can be readily ascertained must be so joined. — Subsection (g) (see now Paragraph K) does not permit the joinder as a defendant, under the designation "unknown claimants of interest" in a suit to quiet title, of one in possession, or whose claim of interest could have been ascertained by ordinary inquiry and diligence, thus permitting joinder as a defendant by name. *Houchen v. Hubbell*, 80 N.M. 764, 461 P.2d 413 (1969); *Murray Hotel Co. v. Golding*, 54 N.M. 149, 216 P.2d 364 (1950).

And if residence is ascertainable, service by publication is fraud. — Where one filing affidavit of nonresidence to procure service by publication states defendant's residence is unknown in order to avoid mailing copy of complaint and summons, when in fact location of residence is readily ascertainable, there is fraud upon the court, and equity will vacate a decree of divorce thus obtained. *Owens v. Owens*, 32 N.M. 445, 259 P. 822 (1927).

Knowledge of fraud by defendant must be directly alleged. — In an independent action to vacate a judgment in a suit to quiet title, it must be made to appear by direct allegation that the defendant-purchaser had knowledge of the fraud charged, that is, the alleged knowledge by the plaintiff in the quiet title suit of the identity of those served by publication therein as "unknown heirs" and his failure to name them. *Archuleta v. Landers*, 67 N.M. 422, 356 P.2d 443 (1960).

Showing for publication may be made in verified complaint. — A duly verified complaint was a "sworn pleading" in which plaintiff could make the requisite showing for

the publication of a notice of the pendency of a cause. *Singleton v. Sanabrea*, 35 N.M. 491, 2 P.2d 119 (1931).

Sufficient designation of unknown heirs. — It is sufficient to use the following form to designate unknown heirs: "Unknown heirs of the following named deceased persons" followed by the names of any and all deceased persons whose unknown heirs are desired to be served, and it is unnecessary to repeat the words "unknown heirs of" before each individual name. *Thomas v. Myers*, 52 N.M. 164, 193 P.2d 624 (1948).

Stating parties are in fact unknown suffices. — Where sworn pleading or affidavit in quiet title suit declares that those who are sued as unknown defendants are in fact unknown, the declaration to that effect suffices, and the court's decree is not invalid because the provisions as to constructive service were not followed in that respect. *Campbell v. Doherty*, 53 N.M. 280, 206 P.2d 1145 (1949).

As does stating residence is unknown. — Affidavit stating that residence of defendant was unknown was sufficient to support jurisdiction on service by publication, without showing of affiant's efforts to ascertain such residence. *Singleton v. Sanabrea*, 35 N.M. 491, 2 P.2d 119 (1931).

Based on information and belief. — Affidavit stating the fact of nonresidence on information and belief was sufficient to support jurisdiction on service by publication. *Bowers v. Brazell*, 31 N.M. 316, 244 P. 893 (1926).

Particular acts of diligence need not be shown. — Showing of diligence necessary to permit service by publication in quiet title suit does not require that particular acts constituting exhibitions of diligence be shown; an allegation of diligence as an ultimate fact is sufficient. *Campbell v. Doherty*, 53 N.M. 280, 206 P.2d 1145 (1949).

But if acts are alleged and proved, court may approve diligence used. — In absence of fraud in serving process, district court judgment approving the diligence used, although unnecessarily set out in the application, will not be disturbed by supreme court on collateral attack if the allegations of diligence are not wholly lacking in substance. *Campbell v. Doherty*, 53 N.M. 280, 206 P.2d 1145 (1949).

Supreme court would not say that the trial court committed error in holding that judgment was not void, on collateral attack, where plaintiff pleaded particular facts which he contended constituted due diligence, since the district court was, under such circumstances, authorized to determine whether due diligence had been shown and some evidence of diligence did exist. *Campbell v. Doherty*, 53 N.M. 280, 206 P.2d 1145 (1949).

Diligence shown. — Where attorney employed two process servers within a month of filing the complaint, made several attempts at service on the defendants, searched voter records, and filed a probate proceeding simultaneously with the suit in order to appoint a personal representative for the purpose of prosecuting the action against the

defendants, the plaintiff did not demonstrate a lack of due diligence. *Martinez v. Segovia*, 2003-NMCA-023, 133 N.M. 240, 62 P.3d 331.

Copy of complaint and summons need not be mailed in attachment. — In attachment proceedings in which defendant is a nonresident, it is not necessary that a copy of the complaint and summons be mailed to him. *Glasgow v. Peyton*, 22 N.M. 97, 159 P. 670 (1916). *See* Section 42-9-18 NMSA 1978.

Under former rule, personal service out-of-state equivalent to publication. *Denison v. Tocker*, 55 N.M. 184, 229 P.2d 285 (1951) (quoting Section 49-2-18 NMSA 1978 and Subdivision (i) (now Paragraph I)).

Default judgment entered before defendant is required to answer is improper. — Under former statutes, where absent defendant outside of state was personally served, he had the time required for publication plus 20 days in which to answer, and default judgment entered before that time was irregular and voidable, on motion seasonably made; a motion made more than a year later was too late. *Dallam County Bank v. Burnside*, 31 N.M. 537, 249 P. 109 (1926) (now Paragraph J of this rule as to time for defendant to appear).

C. RETURN.

Applicability of former provisions. — Section 1903, C.L. 1884, requiring all original process in any suits to be returned on the first day of the term next after its issuance, applied only to process in ordinary proceedings and not to the extraordinary remedies of habeas corpus, quo warranto, mandamus and the like, in which speed is the very essence of the remedy, where process is properly returnable at a day during the same term at which it issued. *Territory ex rel. Wade v. Ashenfelter*, 4 N.M. (Gild.) 93, 12 P. 879 (1887), *appeal dismissed*, 154 U.S. 493, 14 S. Ct. 1141, 38 L. Ed. 1079 (1893).

Sufficiency of affidavit. — An affidavit of service by a private person in the form of a certificate, to which a jurat was attached reciting that the same was subscribed and sworn to before a notary public, was not defective because it did not recite in the body that the affiant was declaring under oath. *Mitchell v. National Sur. Co.*, 206 F. 807 (D.N.M. 1913).

Failure to make return is not grounds for recalling execution. — Where default judgment was entered upon nonappearance, after personal service had been made upon defendant's statutory resident agent, the execution could not be recalled and judgment vacated for failure of process server to return the original summons with proof of service, as required by former statute. That requirement was primarily for the benefit of the court. *Bourgeious v. Santa Fe Trail Stages, Inc.*, 43 N.M. 453, 95 P.2d 204 (1939).

D. ALIAS PROCESS.

"Alias process" includes summons. — Section 105-313, C.S. 1929, identical to Subdivision (i) (see now Paragraph A), referred to "alias process" which obviously would include summons. *State ex rel. Dresden v. District Court*, 45 N.M. 119, 112 P.2d 506 (1941) (decided before 1979 amendment).

In determining the meaning of "process" as used in statutes in relation to service upon nonresident motorists, existing statutes at the time may be considered. *State ex rel. Dresden v. District Court*, 45 N.M. 119, 112 P.2d 506 (1941).

E. ON CORPORATIONS, PARTNERSHIPS AND ASSOCIATIONS.

This rule and 38-4-5 NMSA 1978 are not inconsistent, they are complementary. Section 38-4-5 NMSA 1978 appoints a partner an agent with authority to receive service of process which is plainly contemplated by Subdivision (o) (*see* now Paragraph G) of this rule, which speaks of an agent authorized "by law" or "by statute" to receive service of process. *United Nuclear Corp. v. General Atomic Co.*, 90 N.M. 97, 560 P.2d 161 (1976).

Suits may be brought by or against a partnership as such. A partnership is a distinct legal entity to the extent it may sue or be sued in the partnership name. *Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 418 P.2d 191 (1966).

Service must be on officer or agent. — Subdivision (o) (*see* now Paragraph G) provides that service may be had upon either domestic or foreign corporations by delivering a copy of the summons and complaint to an officer, the managing or general agent, or to any other agent authorized to receive service. *Crawford v. Refiners Coop. Ass'n*, 71 N.M. 1, 375 P.2d 212 (1962).

Of such rank and character that communication to defendant is reasonably certain. — Where the form of service is reasonably calculated to give the foreign defendant actual notice of the pending suit, the provision for such service is valid, and every object of the rule is satisfied where the agent is of such rank and character so that communication to the defendant is reasonably certain. *United Nuclear Corp. v. General Atomic Co.*, 90 N.M. 97, 560 P.2d 161 (1976).

Such as director of dissolved corporation. — Service upon a director of a dissolved corporation in Arizona is sufficient under the New Mexico nonresident motorist statute, and it is not necessary that service be made in the state of incorporation. *Crawford v. Refiners Coop. Ass'n*, 71 N.M. 1, 375 P.2d 212 (1962).

Or general partner. — The federal rule, which is identical insofar as pertinent to this rule, has been construed to mean that service of process on a general partner is effective service on the partnership. *United Nuclear Corp. v. General Atomic Co.*, 90 N.M. 97, 560 P.2d 161 (1976).

But not member. — The trial court did not err in vacating a default judgment under Rule 60(b)(4) (see now Rule 1-060 NMRA) where the motion for default judgment filed by plaintiff was not consistent with the return of service and the affidavit of the deputy sheriff that service of process was made on a member, not an officer or as otherwise provided in Subdivision (o) (now Paragraph G) since the court could have found the judgment void although it did not make this ruling explicit. *Gengler v. Phelps*, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Secretary of state's failure to serve. — Paragraph F(2) (see now Paragraph G) requires that service be made to an authorized agent or to the principal office or place of business of the corporation in question; where, through the secretary of state's inadvertence, this was not done, a party ought not profit from the secretary of state's failure. *Abarca v. Hanson*, 106 N.M. 25, 738 P.2d 519 (Ct. App. 1987).

F. ON STATE OFFICER, OFFICIAL, OR EMPLOYEE.

Personal service required. — Service by first class mail on members of the Educational Retirement Board of a teacher's petition for certiorari with respect to an administrative determination of the board did not satisfy the requirement for personal service. *Wirtz v. State Educ. Retirement Bd.*, 1996-NMCA-085, 122 N.M. 292, 923 P.2d 1177.

Attorney general opinions. — But now civil process servers need not be law enforcement officers. -- Subdivision (e)(1) (*see* now Paragraph D) provides that civil service need not be made by a deputized law enforcement officer whose functions include the prevention and detection of crime and the enforcement of the laws of the State of New Mexico. Thus civil process servers who do not function as police officers need not be certified by the law enforcement academy. 1976 Op. Att'y Gen. No. 76-7.

For rule prior to 1959, *see* 1957-58 Op. Att'y Gen. No. 58-213; *State ex rel. Pavlo v. Scoggin*, 60 N.M. 111, 287 P.2d 998 (1955).

Law reviews. — For article, "Annulment of Marriages in New Mexico," see 1 Nat. Resources J. 146 (1961).

For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For annual survey of New Mexico law of civil procedure, 19 N.M.L. Rev. 627 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Associations and Clubs § 58; 19 Am. Jur. 2d Corporations § 2192; 36 Am. Jur. 2d Foreign Corporations §§ 516 to 582; 56 Am. Jur. 2d Municipal Corporations, Counties and Other Political Subdivisions § 854; 62B Am. Jur. 2d Process § 1 et seq.; 73 Am. Jur. 2d Sundays and Holidays §§ 108, 126; 80 Am. Jur. 2d Wills § 933.

Sufficiency of jurat or certificate of affidavit for publication, 1 A.L.R. 1573, 116 A.L.R. 587.

Defects or informalities as to appearance or return day in summons or notice of commencement of action, 6 A.L.R. 841, 97 A.L.R. 746.

Power to amend nunc pro tunc return of service of summons in divorce suit, 7 A.L.R. 1148.

Validity of statutory provision for attorney's fees in favor of nonresidents served by publication, 11 A.L.R. 896, 90 A.L.R. 530.

Nature or subject matter of the action or proceeding in which the process issues as affecting immunity of nonresident suitor or witness, 19 A.L.R. 828.

Failure of affidavit for publication of service to state the facts required by statute as subjecting the judgment to collateral attack, 25 A.L.R. 1258.

Service of process upon actual agent of foreign corporation in action based on transactions outside of state, 30 A.L.R. 255, 96 A.L.R. 366.

Formality in authentication of process, 30 A.L.R. 700.

Constitutionality of statute providing for substituted or constructive service upon nonresident in action for tort in connection with operation of automobile, 35 A.L.R. 951, 57 A.L.R. 1239, 99 A.L.R. 130.

Jurisdiction of suit to remove cloud or quiet title upon constructive service of process against nonresident, 51 A.L.R. 754.

Attack by defendant upon attachment or garnishment as an appearance subjecting him personally to jurisdiction, 55 A.L.R. 1121, 129 A.L.R. 1240.

Nonresident requested or required to remain in state pending investigation of accident, 59 A.L.R. 51.

Waiver of immunity from service of summons by failure to attack service, or to follow up an attack, before judgment entered, 68 A.L.R. 1469.

May suit for injunction against nonresident rest upon constructive service or service out of state, 69 A.L.R. 1038.

Domicil or status of national corporation for purpose of service of process in action in state court, 69 A.L.R. 1351, 88 A.L.R. 873.

May proceedings to have incompetent person declared insane and to appoint conservator or committee of his person or estate rest on constructive service by publication, 77 A.L.R. 1229, 175 A.L.R. 1324.

Constitutionality, construction and applicability of statutes as to service of process on unincorporated association, 79 A.L.R. 305.

Joint stock companies as "corporations" for service of process, 79 A.L.R. 316.

Application for removal of cause before issuance of process, 82 A.L.R. 515.

Construction of provisions of statute as to constructive or substituted service on nonresident motorist regarding mailing copy of complaint, 82 A.L.R. 772, 96 A.L.R. 594, 125 A.L.R. 457, 138 A.L.R. 1464, 155 A.L.R. 333.

Public policy as ground for exemption of legislators from service of civil process, 85 A.L.R. 1340, 94 A.L.R. 1475.

Attorney's liability to one other than client for damage resulting from issuance or service of process, 87 A.L.R. 178.

May presence within state of bonds or other evidence of indebtedness or title sustain jurisdiction to determine rights or obligations in them in proceeding quasi in rem and without personal jurisdiction over parties affected, 87 A.L.R. 485.

Right to release judgment entered on unauthorized appearance for defendant by attorney as affected by service of process on defendant, 88 A.L.R. 69.

Constitutionality, construction and effect of statute providing for service of process upon statutory agent in actions against foreign corporations, as regards communication to corporation of fact of service, 89 A.L.R. 658.

Power of state to provide for service, other than personal, of process upon nonresident individual doing business within the state so as to subject him to judgment in personam, 91 A.L.R. 1327.

Service of process by publication against nonresident in suit for specific performance of contract relating to real property within state, 93 A.L.R. 621, 173 A.L.R. 985.

Immunity of nonresident from service of process while in state for purpose of compromising or settling controversy, 93 A.L.R. 872.

Immunity of legislators from service of civil process, 94 A.L.R. 1470.

Necessity of summons to persons affected by proceedings to purge voter's registration lists, 96 A.L.R. 1041.

Defects or informalities as to appearance or return day in summons or notice of commencement of action, 97 A.L.R. 746.

Liability of officer or his bond for neglect of deputy or assistant to make return of process, 102 A.L.R. 184, 116 A.L.R. 1064, 71 A.L.R.2d 1140.

Return of service of process in action in personam showing personal or constructive service in state as subject to attack by showing that defendant was a nonresident and was not served in state, 107 A.L.R. 1342.

Voluntary submission to service of process as collusion in divorce suit, 109 A.L.R. 840.

Service of process on officer or agent whose presence in state has been induced by fraud or misrepresentation in action against foreign corporation doing business in state, 113 A.L.R. 157.

Notification of corporation by improper person on whom process is served in action against foreign corporation doing business in state, 113 A.L.R. 170.

Admission of service in action against foreign corporation doing business in state, 113 A.L.R. 170.

Construction, application and effect of clause "outstanding" in state in statute relating to designation of agent for service of process upon foreign corporation, 119 A.L.R. 871.

Amendment of process by changing description or characterization of party from corporation to individual, partnership or other association, 121 A.L.R. 1325.

Amendment of process or pleading by changing or correcting mistake in name of party, 124 A.L.R. 86.

Substituted service, service by publication or service out of state in action in personam against resident or domestic corporation as contrary to due process of law, 132 A.L.R. 1361.

Summons as amendable to cure error or omission in naming or describing court or judge or place of court's convening, 154 A.L.R. 1019.

Who is subject to constructive or substituted service of process under statutes providing for such service on nonresident motorist, 155 A.L.R. 333, 53 A.L.R.2d 1164.

Suits and remedies against alien enemies, 156 A.L.R. 1448, 157 A.L.R. 1449.

Service of process on consul in matters relating to decedent's estate in which his nonresident national has an interest, 157 A.L.R. 124.

Effect of time of execution of waiver of service of process, 159 A.L.R. 111.

Suit to determine ownership, or protect rights, in respect of instruments not physically within state but relating to real estate therein as one in rem or quasi in rem, jurisdiction of which may rest upon constructive service, 161 A.L.R. 1073.

Constructive service of process upon nonresident in action to set aside judgment, 163 A.L.R. 504.

Injunction pendente lite in action for divorce or separation, constructive and substituted service of process, 164 A.L.R. 354.

Jurisdiction to render judgment for arrearage of alimony without personal service upon the defendant of whom court has jurisdiction in the original divorce suit, 168 A.L.R. 232.

Leaving process at residence as compliance with requirement that party be served "personally" or "in person," "personally served," etc., 172 A.L.R. 521.

Constructive service of process against nonresident in suit for specific performance of contract relating to real property within state, 173 A.L.R. 985.

Necessity, in service by leaving process at place of abode, etc., of leaving a copy of summons for each party sought to be served, 8 A.L.R.2d 343.

Construction and application of provision of Federal Motor Carrier Act requiring designation of agent for service of process, 8 A.L.R.2d 814.

What amounts to doing business in a state within statute providing for service of process in action against nonresident natural person or persons doing business in state, 10 A.L.R.2d 200.

Jurisdiction of suit involving trust as affected by service, 15 A.L.R.2d 610.

Constitutionality and construction of statute authorizing constructive or substitute service of process on foreign representative of deceased nonresident driver of motor vehicle in action arising out of accident occurring in state, 18 A.L.R.2d 544.

Immunity of nonresident defendant in criminal case from service of process, 20 A.L.R.2d 163.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 A.L.R.2d 1179.

Sufficiency of affidavit as to due diligence in attempting to learn whereabouts of party to litigation, for the purpose of obtaining service by publication, 21 A.L.R.2d 929.

Validity of legislation relating to publication of legal notices, 26 A.L.R.2d 655.

Who is an "agent authorized by appointment" to receive service of process within purview of Federal Rules of Civil Procedure and similar state rules and statutes, 26 A.L.R.2d 1086.

Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations, 27 A.L.R.2d 236.

What constitutes action affecting personal property within district of suit, so as to authorize service by publication on nonresident defendants under 28 U.S.C. § 1655, 30 A.L.R.2d 208.

Appealability of order overruling or sustaining motion to quash or set aside service of process, 30 A.L.R.2d 287.

Omission of signature of issuing officer on civil process or summons as affecting jurisdiction of the person, 37 A.L.R.2d 928.

Service of process on person in military service by serving person at civilian abode or residence, or leaving copy there, 46 A.L.R.2d 1239.

Difference between date of affidavit for service by publication and date of filing or of order for publication as affecting validity of service, 46 A.L.R.2d 1364.

Sufficiency of affidavit made by attorney or other person on behalf of plaintiff for purpose of service by publication, 47 A.L.R.2d 423.

Service of process upon dissolved domestic corporation in absence of express statutory direction, 75 A.L.R.2d 1399.

Who may serve writ, summons or notice of garnishment, 75 A.L.R.2d 1437.

State's power to subject nonresident individual other than a motorist to jurisdiction of its courts in action for tort committed within state, 78 A.L.R.2d 397.

Failure to make return as affecting validity of service or court's jurisdiction, 82 A.L.R.2d 668.

Immunity of nonresident from service of process in suit related to suit in which he is a witness, party, etc., 84 A.L.R.2d 421.

Manner of service of process upon foreign corporation which has withdrawn from state, 86 A.L.R.2d 1000.

Place or manner of delivering or depositing papers under statutes permitting service of process by leaving copy at usual place of abode or residence, 87 A.L.R.2d 1163.

Sufficiency of designation of court or place of appearance in original civil process, 93 A.L.R.2d 376.

Statutory service on nonresident motorists: return receipts, 95 A.L.R.2d 1033.

Attack on personal service as having been obtained by fraud or trickery, 98 A.L.R.2d 551.

Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons or the like, 6 A.L.R.3d 1179.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 A.L.R.3d 738.

Jurisdiction on constructive or substituted service in suit for divorce or alimony to reach property within state, 10 A.L.R.3d 212.

Civil liability of one making false or fraudulent return of process, 31 A.L.R.3d 1393.

Construction of phrase "usual place of abode," or similar terms referring to abode, residence or domicil, as used in statutes relating to service of process, 32 A.L.R.3d 112.

Validity of service of summons or complaint on Sunday or holiday, 63 A.L.R.3d 423.

In personam jurisdiction over nonresident director of forum corporation under long-arm statutes, 100 A.L.R.3d 1108.

Validity of substituted service of process upon liability insurer of unavailable tortfeasor, 17 A.L.R.4th 918.

Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in same proceeding in which abuse occurred - state cases, 82 A.L.R.4th 1115.

7 C.J.S. Associations § 49; 18 C.J.S. Corporations §§ 721 to 735; 20 C.J.S. Counties § 263; 68 C.J.S. Partnership §§ 193, 194; 72 C.J.S. Process § 1 et seq.; 83 C.J.S. Sunday §§ 42 to 44; 95 C.J.S. Wills § 369.

1-005. Service and filing of pleadings and other papers.

A. **Service; when required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every

paper relating to discovery required to be served upon a party, unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of settlement, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 1-004 NMRA.

B. **Service; how made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, or by mailing a copy to the attorney or party at the attorney's or party's last known address, or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing.

C. **Definitions.** As used in this rule:

(1) "delivery of a copy" means:

(a) handing it to the attorney or to the party;

(b) sending a copy by facsimile or electronic transmission when permitted by Rule 1-005.1 NMRA or Rule 1-005.2 NMRA;

(c) leaving it at the attorney's or party's office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or

(d) if the attorney's or party's office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; and

(2) "mailing a copy" means sending a copy by first class mail with proper postage.

D. **Service; numerous defendants**. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

E. **Filing; certificate of service.** All papers after the complaint required to be served upon a party, together with a certificate of service indicating the date and method of service, shall be filed with the court within a reasonable time after service, except that the following papers shall not be filed unless on order of the court or for use in the proceeding:

(1) summonses without completed returns;

(2) subpoenas;

(3) returns of subpoenas;

(4) interrogatories;

(5) answers or objections to interrogatories;

(6) requests for production of documents;

(7) responses to requests for production of documents;

(8) requests for admissions;

(9) responses to requests for admissions;

(10) depositions;

(11) briefs or memoranda of authorities on unopposed motions;

(12) offers of settlement when made; and

(13) mandatory and supplemental disclosures served pursuant to Rule 1-123 NMRA.

Except for the papers described in Subparagraphs (1), (10) and (11) of this paragraph, counsel shall file a certificate of service with the court within a reasonable time after service, indicating the date and method of service of any paper not filed with the court.

F. **Filing with the court defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. "Filing" shall include filing a facsimile copy or filing an electronic copy as may be permitted pursuant to Rule 1-005.1 NMRA or Rule 1-005.2 NMRA. A paper filed by electronic means in compliance with Rule 1-005.1 NMRA constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any

paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

[As amended, effective August 1, 1988; January 1, 1998; January 3, 2005; as amended by Supreme Court Order 06-8300-20, effective December 18, 2006.]

ANNOTATIONS

Cross references. — For service on an attorney after withdrawal, *see* Rule 1-089 NMRA.

For service of notice in proceedings prior to summons, *see* Section 38-1-13 NMSA 1978.

The 1997 amendment, effective January 1, 1998, inserted "offer of judgment, designation of record on appeal" in Paragraph A, divided Paragraph B into subparagraphs and added Subparagraph B(2), added "certificate of service" in the paragraph heading of Paragraph D, inserted "together with a certificate of service" and deleted "either before service or" following "court" in the introductory language of Paragraph D, added "on unopposed motions" in Subparagraph D(11), added Subparagraph D(12), rewrote the last undesignated paragraph in Paragraph D, rewrote Paragraph E, deleted former Paragraphs F and G relating to proof of service and defining "move" and "made" within a specified time, and made stylistic changes and gender neutral changes throughout the rule.

The 2004 amendment, effective January 3, 2005, substituted “a copy” for “it” in the second sentence of Paragraph B, designated the undesignated former second paragraph of Paragraph B as present Paragraph C, designated the language therein as Subparagraph (1), deleted “within this rule” preceding “means” in the introductory language of that subparagraph and added Subparagraph (2), redesignated former Paragraphs C through E as present Paragraphs D through F, and, in Paragraph E, inserted “indicating the date and method of service” in the introductory language and “and method” in the second paragraph, substituted “settlement” for “judgment” in Subparagraph (12) and deleted “(2), (3)” preceding “(10)” in the second paragraph.

The 2006 amendment, approved by Supreme Court Order 06-8300-20, effective December 18, 2006, added Subparagraph 13 of Paragraph E to provide that copies of mandatory and supplemental disclosures served pursuant to Rule 1-123 NMRA are not filed unless ordered by the court.

I. GENERAL CONSIDERATION.

Compiler's notes. — Paragraph B and Rule 1-011 NMRA are deemed to have superseded 105-705, C.S. 1929, which was substantially the same.

Paragraph E and Rule 1-011 NMRA are deemed to have superseded 105-510, C.S. 1929, which was substantially the same.

When lack of diligence in service inconsequential. — Regardless of any lack of diligence in service on defendants, failure to file suit within one year from the filing of a lien is fatal. *Daughtrey v. Carpenter*, 82 N.M. 173, 477 P.2d 807 (1970).

When due process requirements met, lien foreclosed though no service. — Where an owner has both notice and an opportunity to be heard so that the requirements of due process have been met, a materialman may foreclose his lien even though he has failed to establish jurisdiction by either personal service on the owner, or in rem by publication. *First Nat'l Bank v. Julian*, 96 N.M. 38, 627 P.2d 880 (1981).

Notice in foreclosure sales. — With respect to the kind of notice to be employed in cases of sales under execution and foreclosure, 39-5-1 NMSA 1978, rather than this rule, governs. *Production Credit Ass'n v. Williamson*, 107 N.M. 212, 755 P.2d 56 (1988).

This rule is applicable only after the court has acquired in personam jurisdiction over the person to be served. *Jones v. Montgomery Ward & Co.*, 104 N.M. 636, 725 P.2d 836 (Ct. App. 1985).

Notice of suggestion of death. — Where the plaintiff died before the case went to trial, his attorney was not the proper party, either under Rule 4 (now Rule 1-004 NMRA) or under this rule, to receive notice of suggestion of death so as to trigger the 90-day period for substitution of parties provided under Rule 25 (now Rule 1-025 NMRA). *Jones v. Montgomery Ward & Co.*, 104 N.M. 636, 725 P.2d 836 (Ct. App. 1985).

Law reviews. — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appearance § 1 et seq.; 9 Am. Jur. 2d Bankruptcy §§ 752 to 759; 23 Am. Jur. 2d Depositions and Discovery § 143; 56 Am. Jur. 2d Motions, Rules, and Orders §§ 8, 10, 12, 16, 17, 36; 61B Am. Jur. 2d Pleading §§ 899, 901, 902.

Withdrawal of pleading after delivering to proper officer as affecting question whether it is filed, 37 A.L.R. 670.

Appearance for purpose of making application for removal of cause to federal court as a general appearance, 81 A.L.R. 1219.

Affidavit of substantial defense to merits in an attachment or garnishment proceeding as general appearance, 116 A.L.R. 1215.

Construction of phrase "usual place of abode," or similar terms referring to abode, residence, or domicil, as used in statutes relating to service of process, 32 A.L.R.3d 112.

60 C.J.S. Motions and Orders §§ 11, 13 to 19; 71 C.J.S. Pleading §§ 407 to 409, 411 to 413, 416.

II. SERVICE; WHEN REQUIRED.

Service of summons with cross-claim required when parties in default. — Subdivisions (a) and (b) (see now Paragraphs A and B) do not require service of a summons with a cross-claim except on parties in default. *Fitzgerald v. Blueher Lumber Co.*, 82 N.M. 312, 481 P.2d 100 (1971); *Daughtrey v. Carpenter*, 82 N.M. 173, 477 P.2d 807 (1970).

When party not entitled to notice that pleadings amended. — Neither Rule 54(c) (see now Rule 1-054 NMRA), pertaining to default judgments, nor Subdivision (a) (see now Paragraph A) pertaining to service of pleadings, entitles defendant to notice that pleadings have been amended to allege gross negligence rather than negligence against defendant where there was no showing that the damages rested upon this charge and no relief was sought from the damages. *Gurule v. Larson*, 78 N.M. 496, 433 P.2d 81 (1967).

Failure to serve all parties. — The consequences of a failure to abide by this rule's requirement that motions be served on all parties to a lawsuit depend upon the nature of the paper involved. *Western Bank v. Fluid Assets Dev. Corp.*, 111 N.M. 458, 806 P.2d 1048 (1991).

Mortgagee first lienholder could not use the judicial system to enforce its rights in a foreclosure proceeding after deliberately failing to serve notice upon junior lienholders of record of its intention to hold the foreclosure sale, even though the junior lienholders were parties to a lawsuit brought by the mortgagee and were entitled to actual notice of the sale. *Western Bank v. Fluid Assets Dev. Corp.*, 111 N.M. 458, 806 P.2d 1048 (1991).

III. SAME; HOW MADE.

Service of pleadings and show cause order on attorney sufficient. — Service of pleadings and order to show cause made on defendant's attorney is sufficient service. *Sunshine Valley Irrigation Co. v. Sunshine Valley Conservancy Dist.*, 37 N.M. 77, 18 P.2d 251 (1932)(decided under former law).

Service of summons with cross-claim required when parties in default. — Subdivisions (a) and (b) (see now Paragraphs A and B) do not require service of a summons with a cross-claim except on parties in default. *Fitzgerald v. Blueher Lumber*

Co., 82 N.M. 312, 481 P.2d 100 (1971); *Daughtrey v. Carpenter*, 82 N.M. 173, 477 P.2d 807 (1970).

Failure to serve party or his attorney warrants dismissal. — Laws 1891, ch. 66, § 4, relating to the delivery of a copy of the declaration, filing of succession pleadings, etc., sustained the court in dismissing a cause on defendant's motion for failure of plaintiff to serve defendant or his attorney with copy of declaration within 10 days after his appearance. *German-American Ins. Co. v. Etheridge*, 8 N.M. 18, 41 P. 535 (1895)(decided under former law).

Rule inapplicable where court takes case under advisement. — Where the court has taken the case under advisement before rendition of judgment, and the court has not directed the manner of serving notice upon attorneys where judgment is about to be rendered, statute regarding notice of hearing is applicable rather than service of pleadings and papers. *R.V. Smith Supply Co. v. Black*, 43 N.M. 177, 88 P.2d 269 (1939)(decided under former law).

Waiver of notice by attorney of record. — An attorney of record may waive notice of intention to apply for order authorizing taking of deposition by oral examination out of court. *Davis v. Tarbutton*, 35 N.M. 393, 298 P. 941 (1931)(decided under former law).

Service by mail is accomplished by depositing in post office, and the time for further pleading is to be computed from that act. *Miera v. Sammons*, 31 N.M. 599, 248 P. 1096 (1926)(decided under former law).

Party relying on service by mail has burden of proving mailing. *Myers v. Kapnison*, 93 N.M. 215, 598 P.2d 1175 (Ct. App. 1979).

Unchallenged, an attorney's certificate is sufficient proof of mailing. Myers v. Kapnison, 93 N.M. 215, 598 P.2d 1175 (Ct. App. 1979).

Service at last known address proper where no designation of permanent address change. — Service upon the defendant is properly made by mailing the notice to the defendant's last known address where there is no designation of a permanent change of address sufficient to alert the district court and the plaintiff that the defendant's mail should be sent elsewhere than to his last known address. *Thompson v. Thompson*, 99 N.M. 473, 660 P.2d 115 (1983).

IV. FILING.

A court clerk lacks the discretion to reject pleadings for technical violations, and a pleading will be considered filed when delivered to the clerk. It is then up to the trial court to decide whether to allow a party to correct any deficiencies or to strike the pleadings. *Ennis v. Kmart Corp.*, 2001-NMCA-068, 131 N.M. 32, 33 P.3d 32, cert denied, 130 N.M. 722, 31 P.3d 380 (2001).

Where court clerk refused to accept pleading due to incorrect caption, trial court had discretion to allow the pleading party to correct the deficiencies, and to have the pleading considered timely filed. *Ennis v. Kmart Corp.*, 2001-NMCA-068, 131 N.M. 32, 33 P.3d 32, cert denied, 130 N.M. 722, 31 P.3d 380 (2001).

Signed motion deemed "regularly filed" paper. — A motion signed by a party or his attorney is a paper "regularly filed in a cause with the clerk of the district court". *Vosburg v. Carter*, 33 N.M. 86, 262 P. 175 (1927); *Pershing v. Ward*, 33 N.M. 91, 262 P. 177 (1927) (decided under former law).

1-005.1. Service and filing of pleadings and other papers by facsimile.

A. **Facsimile copies permitted to be filed.** Subject to the provisions of this rule, a party may file a facsimile copy of any pleading or paper by faxing a copy directly to the court or by faxing a copy to an intermediary agent who files it in person with the court. A facsimile copy of a pleading or paper has the same effect as any other filing for all procedural and statutory purposes. The filing of pleadings and other papers with the court by facsimile copy shall be made by faxing them to the clerk of the court at a number designated by the clerk, except if the paper or pleading is to be filed directly with the judge, the judge may permit the papers to be faxed to a number designated by the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Each judicial district shall designate one or more telephone numbers to receive fax filings.

B. **Facsimile service by court of notices, orders or writs.** Facsimile service may be used by the court for issuance of any notice, order or writ. The clerk shall note the date and time of successful transmission on the file copy of the notice, order or writ.

C. **Paper size and quality.** No facsimile copy shall be filed with the court unless it is on plain paper and substantially satisfies all of the requirements of Rule 1-100 NMRA.

D. **Filing pleadings or papers by facsimile.** A pleading or paper may be filed with the court by facsimile transmission if:

(1) a fee is not required to file the pleading or paper;

(2) only one copy of the pleading or paper is required to be filed;

(3) unless otherwise approved by the court, the pleading or paper is not more than ten (10) pages in length excluding the facsimile cover page; and

(4) the pleading or paper to be filed is preceded by a cover sheet with the names of the sender and the intended recipient, any applicable instructions, the voice and facsimile telephone numbers of the sender, an identification of the case, the docket number and the number of pages transmitted.

E. **Facsimile copy filed by an intermediary agent.** Facsimile copies of pleadings or papers filed in person by an intermediary agent are not subject to the restrictions of Paragraph D of this rule.

F. **Time of filing.** If facsimile transmission of a pleading or paper is begun before the close of the business day of the court in which it is being filed, it will be considered filed on that date. If facsimile transmission is begun after the close of business, the pleading or paper will be considered filed on the next court business day. For any questions of timeliness, the time and date affixed on the cover page by the court's facsimile machine will be determinative.

G. **Service by facsimile.** Any document required to be served by Paragraph A of Rule 1-005 NMRA may be served on a party or attorney by facsimile transmission if the party or attorney has:

(1) listed a facsimile telephone number on a pleading or paper filed with the court in the action;

(2) a letterhead with a facsimile telephone number; or

(3) agreed to be served with a copy of the pleading or paper by facsimile transmission.

Service by facsimile is accomplished when the transmission of the pleading or paper is completed.

H. **Demand for original.** A party shall have the right to inspect and copy any pleading or paper that has been filed or served by facsimile transmission if the pleading or paper has a statement signed under oath or affirmation or penalty of perjury.

I. **Conformed copies.** Upon request of a party, the clerk shall stamp additional copies provided by the party of any pleading filed by facsimile transmission.

[Approved, effective January 1, 1999; as amended, effective August 1, 2000; January 3, 2005.]

ANNOTATIONS

The 2000 amendment, effective August 1, 2000, added Paragraph J.

The 2004 amendment, effective January 3, 2005, substituted “service” for “transmission” twice in Paragraph B, rewrote the paragraph heading and substituted “filed with the court by facsimile transmission” for “faxed directly to the court” in the introductory language of Paragraph D, and added “unless otherwise approved by the court” in Subparagraph (3) of that paragraph, rewrote the paragraph heading and the introductory language of Paragraph G, deleted former Paragraph H, which dealt with

proof of service by facsimile, and redesignated former Paragraphs I and J as present Paragraphs H and I.

1-005.2. Electronic service and filing of pleadings and other papers.

A. **Definitions.** As used in these rules

(1) "electronic transmission" means the transfer of data from computer to computer other than by facsimile transmission;

(2) "document" includes the electronic representation of pleadings and other papers; and

(3) "EFS" means the electronic filing system approved by the Supreme Court for use by the district courts to file and serve documents by electronic transmission.

B. **Electronic filing authorized; registration by attorneys required.**

(1) A district court may, by local rule approved by the Supreme Court, implement the mandatory filing of documents by electronic transmission in accordance with this rule through the EFS by parties represented by attorneys. Self-represented parties are prohibited from electronically filing documents and shall continue to file documents through traditional methods. Parties represented by attorneys shall file documents by electronic transmission even if another party to the action is self-represented or is exempt from electronic filing under Paragraph M of this rule. For purposes of this rule, "civil actions" does not include domestic relations actions, domestic violence actions, actions sealed under Rule 1-079 NMRA, habeas corpus actions, or any proceeding filed under the Children's Court Rules.

(2) Unless exempted under Paragraph M of this rule, attorneys required to file documents by electronic transmission shall register with the EFS through the district court's web site. Every registered attorney shall provide a valid, working, and regularly checked email address for the EFS. The court shall not be responsible for inoperable email addresses or unread email sent from the EFS.

C. **Service by electronic transmission.** Any document required to be served by Paragraph A of Rule 1-005 NMRA may be served on a party or attorney by electronic transmission of the document if the party or attorney has agreed to be served with pleadings or papers by electronic mail or if the attorney for the party to be served has registered with the court's EFS. Documents filed by electronic transmission under Paragraph A of this rule may be served by an attorney through the court's EFS, or an attorney may elect to serve documents through other methods authorized by this rule, Rule 1-005 NMRA, or Rule 1-005.1 NMRA. Electronic service is accomplished when the transmission of the pleading or paper is completed. If within two (2) days after service by electronic transmission, a party served by electronic transmission notifies the sender of the electronic transmission that the pleading or paper cannot be read, the pleading or

paper shall be served by any other method authorized by Rule 1-005 NMRA designated by the party to be served. The court may serve any document by electronic transmission to an attorney who has registered with the EFS under this rule and to any other person who has agreed to receive documents by electronic transmission.

D. **Format of documents; protected personal identifier information; EFS user guide.** All documents filed by electronic transmission shall be formatted in accordance with the Rules of Civil Procedure for the District Courts and shall comply with all procedures for protected personal identifier information under Rule 1-079 NMRA. The district court may make available a user guide to provide guidance with the technical operation of the EFS. In the event of any conflicts between these rules and the user guide, the rules shall control.

E. **Electronic services fee.**

(1) In addition to any other filing fees required by law, parties required to file electronically shall pay an electronic services fee of six dollars ($6.00) per electronic transmission of one or more documents filed in any single case.

(2) Parties electing to serve a document previously filed through the EFS shall pay an electronic services fee of four dollars ($4.00) per electronic transmission of one or more documents served on one or more persons or entities in any single case.

(3) Parties electing to both file and serve documents through the EFS shall pay an electronic services fee of ten dollars ($10.00) per electronic transmission of one or more documents simultaneously filed and served on one or more persons or entities in any single case.

(4) The provisions of this paragraph shall not apply to those entities listed in Subsection C of Section 34-6-40 NMSA 1978 and to civil legal service providers as defined by Subparagraph (4) of Paragraph A of Rule 15-301.2 NMRA.

F. **Single transmission.** Whenever a rule requires multiple copies of a document to be filed only a single electronic transmission of the document is necessary. If an attorney files or serves multiple documents in a case by a single electronic transmission, the applicable electronic services fee under Paragraph E of this rule shall be charged only once regardless of the number of documents filed or parties served.

G. **Time of filing.** For purposes of filing by electronic transmission, a "day" begins at 12:01 a.m. and ends at midnight. If electronic transmission of a document is received before midnight on the day preceding the next business day of the court it will be considered filed on the immediately preceding business day of the court. For any questions of timeliness, the time and date registered by the court's computer will be determinative. For purposes of electronic filing only, the date and time that the filer submits the electronic filing envelope will serve as the filing date and time for purposes

of meeting statute of limitations or any other filing deadlines, notwithstanding rejection of the attempted filing or its placement into an error queue for additional processing.

H. **Signatures.**

(1) All electronically filed documents shall be deemed to contain the filing attorney's signature pursuant to Rule 1-011 NMRA. Attorneys filing electronically thereby certify that required signatures or approvals have been obtained before filing the document. The full, printed name of each person signing a paper document shall appear in the electronic version of the document.

(2) If a document filed by electronic transmission contains a signature block from an original paper document containing a signature, the signature in the electronic document may represent the original signature in the following ways:

(a) by scanning or other electronic reproduction of the signature; or

(b) by typing in the signature line the notation "/s/" followed by the name of the person who signed the original document;

(3) All electronically filed documents signed by the court shall be scanned or otherwise electronically produced so that the judge's original signature is shown.

I. **Demand for original; electronic conversion of paper documents.**

(1) Original paper documents filed or served electronically, including original signatures, shall be maintained by the attorney filing the document and shall be made available, upon reasonable notice, for inspection by other parties or the court. If an original paper document is filed by electronic transmission, the electronic version of the document shall conform to the original paper document. Attorneys shall retain original paper documents until final disposition of the case and the conclusion of all appeals.

(2) For cases in which electronic filing is mandatory, if an attorney who is exempt under Paragraph M of this rule or a self-represented party files a paper document with the court, the clerk shall convert such document into electronic format for filing. The filing date shall be the date on which the paper document was filed even if the document is electronically converted and filed at a later date. The clerk shall retain such paper documents as long as required by applicable statutes and court rules.

J. **Electronic file stamp and confirmation receipt; effect.** The clerk of the court's endorsement of an electronically filed document shall have the same force and effect as a manually affixed file stamp. When a document is filed through the EFS, it shall have the same force and effect as a paper document and a confirmation receipt shall be issued by the system that includes the following information:

(1) the case name and docket number;

(2) the date and time of filing as defined under Paragraph G of this rule;

(3) the document title;

(4) the document code;

(5) the name of the EFS service provider;

(6) the name of the person or entity filing the document; and

(7) the page count of the filed document.

K. **Conformed copies.** Upon request of a party, the clerk shall stamp additional paper copies provided by the party of any pleading filed by electronic transmission. A file-stamped copy of a document filed by a electronic transmission can be obtained through the court's EFS. Certified copies of a document may be obtained from the clerk's office.

L. **Proposed documents submitted to the court.**

(1) A document that a party proposes for issuance by the court shall be transmitted by electronic mail to an email address designated by the court for that purpose. A judge may direct the party to submit a hard copy of the proposed document in addition to, or in lieu of, the electronic copy. The court's user guide shall give notice of the email addresses to be used for purposes of this paragraph. The user guide also may set forth the text to be included in the subject-line and body of the email.

(2) Proposed documents shall not be electronically filed by the party's attorney in the EFS. Any party who submits proposed documents by email under this paragraph shall not engage in ex parte communications in the email and shall serve a copy of the email and attached proposed documents on all other parties to the action.

(3) If the proposed document is a summons, the party submitting the proposed summons shall first electronically file the complaint or other initiating pleading in the EFS. The clerk shall issue the summons electronically and return it by email to the party who requested it for service as provided by Rule 1-004 NMRA. Other documents issued by the clerk under this rule shall be sent to the requesting party by email, and the requesting party is responsible for electronically filing the document in the EFS and serving it on the parties as appropriate. Any document issued by a judge under this rule will be electronically filed by the court in the EFS and served on the parties as required by these rules.

M. **Requests for exemptions from local rules establishing mandatory electronic filing systems.**

(1) An attorney may file a petition with the Supreme Court requesting an exemption, for good cause shown, from any mandatory electronic filing system that may be established by this rule and any district court local rules. The petition shall set forth the specific facts offered to establish good cause for an exemption. No docket fee shall be charged for filing a petition with the Supreme Court under this subparagraph.

(2) Upon a showing of good cause, the Supreme Court may issue an order granting an exemption from the mandatory electronic filing requirements of this rule and any local rules. An exemption granted under this subparagraph remains in effect statewide for one (1) year from the date of the order and may be renewed by filing another petition in accordance with Subparagraph (1) of this paragraph.

(3) An attorney granted an exemption under this paragraph may file documents in paper format with the district court and shall not be charged an electronic filing fee under this rule or local rule for doing so. When filing paper documents under an exemption granted under this paragraph, the attorney shall attach to the document a copy of the Supreme Court exemption order. The district court clerk shall scan the attorney's paper document into the electronic filing system including the attached Supreme Court exemption order. No fee shall be charged for scanning the document. The attorney remains responsible for serving the document in accordance with these rules and shall include a copy of the Supreme Court exemption order with the document that is served.

(4) An attorney who receives an exemption under this paragraph may nevertheless file documents electronically in any district court that accepts such filings without seeking leave of the Supreme Court provided that the attorney complies with all requirements under this rule, complies with all applicable local rules for the district court's electronic filing system, and pays any applicable electronic filing fees. By doing so, the attorney does not waive the right to exercise any exemption granted under this paragraph for future filings.

N. **Technical difficulties.** Substantive rights of the parties shall not be affected when the EFS is not operating through no fault of the filing attorney.

[Approved, effective July 1, 1997; as amended, effective March 8, 1999; August 1, 2000; January 3, 2005; as amended by Supreme Court Order No. 06-8300-27, effective January 15, 2007; by Supreme Court Order No. 11-8300-035, effective for all cases filed or pending on or after September 1, 2011; by Supreme Court Order No. 11-8300-046, effective for all documents electronically filed on, after, or before November 21, 2011.]

ANNOTATIONS

Cross references. — For definition of computer generated "signature", *see* Rule 1-011 NMRA.

For service by electronic transmission in criminal cases, *see* Rule 5-103.2 NMRA.

For service by electronic transmission in the United States District Court for the District of New Mexico, *see* D.N.M.LR-CV 5.6 NMRA.

The 1999 amendment, effective March 8, 1999, rewrote Paragraph G to define "day" for the purposes of electronic transmissions and to allow electronic transmissions received by midnight on the day preceding the next business day of the court to be considered filed on the immediately preceding business day of the court.

The 2000 amendment, effective August 1, 2000, added Paragraph J.

The 2004 amendment, effective January 3, 2005, rewrote Paragraph B, added “Service by” in the heading for Paragraph C and substituted “serve” for “send”, “service” for “transmission” and “or party” for “registered” in that paragraph, inserted “with the court” in the introductory language of Paragraph D, deleted former Paragraph F, which dealt with service by electronic transmission, and redesignated former Paragraphs G and H as present Paragraphs F and G, and deleted former Paragraph I, which dealt with proof of service by electronic transmission, and redesignated former Paragraph J as present Paragraph H.

The 2006 amendment, approved by Supreme Court Order 06-8300-27, effective January 15, 2007, revised Paragraph D to require compliance with technical specifications approved by the Supreme Court instead of specifications approved by the district court in which the papers or pleadings are filed to permit electronic filing of pleadings and papers that must be accompanied by the filing of a fee.

The first 2011 amendment, approved by Supreme Court Order 11-8300-035, effective for all cases filed or pending on or after September 1, 2011, rewrote this rule to the extent that a detailed comparison is impracticable.

The second 2011 amendment, approved by Supreme Court Order No. 11-8300-046, effective for all documents electronically filed on, after, or before November 21, 2011, added the last sentence in Paragraph G, providing that for purposes of electronic filing only, the date and time that the filer submits the electronic filing envelope will serve as the filing date and time for purposes of meeting statute of limitations or any other filing deadlines, notwithstanding rejection of the attempted filing or its placement into an error queue for additional processing.

1-006. Time.

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by local rules of any district court, by order of court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, or, when the act to be done is the

filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's day, Martin Luther King, Jr's. birthday, Presidents day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday.

B. **Enlargement.** When by these rules or by a notice given thereunder or by order of court, an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion:

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 1-050, 1-052, 1-059, 1-060 or 1-062 NMRA, except to the extent and under the conditions stated in them.

C. **For motions.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

D. **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

[As amended, effective January 1, 1987; August 1, 1989; January 1, 1995.]

ANNOTATIONS

Cross references. — For failure to rule on motion as denial, *see* Section 39-1-1 NMSA 1978.

The 1995 amendment, effective January 1, 1995, in Paragraph A, inserted "by local rules of any district court" in the first sentence, inserted the language beginning "or, when the act" and ending "court inaccessible" and substituted "one of the aforementioned holidays" for "a Saturday, a Sunday or a legal holiday" in the second sentence, and added the last two sentences; deleted "or any Supreme Court rule" following "1-062" near the end of Paragraph B; substituted the present paragraph

heading in Paragraph C for "For motions; affidavits"; and substituted "the party" for "him" in two places in Paragraph D.

Compiler's notes. — Paragraph B is deemed to have superseded Trial Court Rule 105-704, derived from 105-704, C.S. 1929, and 105-508, C.S. 1929, which were substantially the same. It may also, together with the other Rules of Civil Procedure, be deemed to have superseded 105-802, C.S. 1929, relating to time for hearings.

Paragraph C is deemed to have superseded 105-702, C.S. 1929, which was substantially the same. It is also deemed to have superseded 34-340, 1929 Comp., relating to notice of motion where officers fail to pay over money.

I. GENERAL CONSIDERATION.

Distinctness of paragraphs of rule — The computation of time provision for filing periods of less than eleven days in Paragraph A of this rule and the provision allowing an extra three days if the pleading is served by mail in Paragraph D of this rule are distinct provisions of this rule. *Garza v. State Taxation & Revenue Dep't.*, 2004-NMCA-061, 135 N.M. 673, 92 P.3d 685.

Administrative appeals. — Paragraph A of this rule does apply to filing motions under Rule 1-074 R NMRA. *Garza v. State Taxation & Revenue Dep't*, 2004-NMCA-061, 135 N.M. 673, 92 P.3d 685.

Applicability to Workmen's Compensation Law. — This rule, providing the method of computation of time, should be applicable generally to the Workmen's Compensation Law. *Keilman v. Dar Tile Co.*, 74 N.M. 305, 393 P.2d 332 (1964).

The three-day mailing period of Paragraph D applies to peremptory challenges exercised under Workers' Compensation Administration Formal Hearing Rule XXIII. *Rodriguez v. El Paso Elec. Co.*, 113 N.M. 672, 831 P.2d 608 (Ct. App. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 9A Am. Jur. 2d Bankruptcy § 2170 et seq.; 20 Am. Jur. 2d Courts § 5; 56 Am. Jur. 2d Motions, Rules and Orders §§ 10, 11, 13, 14, 16, 33; 58 Am. Jur. 2d Notice §§ 34 to 36, 43, 46; 62B Am. Jur. 2d Process §§ 114-125; 74 Am. Jur. 2d Time §§ 15 to 19.

"Until" as a word of inclusion or exclusion, where one is given until a certain day to file a pleading, 16 A.L.R. 1095.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R. 1249.

Power of trial court indirectly to extend time for appeal, 89 A.L.R. 941, 149 A.L.R. 740.

Failure to file return within limitation provisions of Internal Revenue Code, excuse for, 30 A.L.R.2d 452.

Difference between date of affidavit for service by publication and date of filing or of order for publication as affecting validity of service, 46 A.L.R.2d 1364.

Time for payment of insurance premium where last day falls on Sunday or a holiday, 53 A.L.R.2d 877.

Jurisdiction or power of grand jury after expiration of term of court for which organized, 75 A.L.R.2d 544.

Future date, inclusion or exclusion of first and last day in computing the time for performance of an act or event which must take place a certain number of days before, 98 A.L.R.2d 1331.

Vacating judgment or granting new trial in civil case, consent as ground of after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

When medical expense incurred under policy providing for payment of expenses incurred within fixed period of time from date of injury, 10 A.L.R.3d 468.

Attorney's inaction as excuse for failure to timely prosecute action, 15 A.L.R.3d 674.

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 A.L.R.3d 1361.

Construction and effect of contractual or statutory provisions fixing time within which arbitration award must be made, 56 A.L.R.3d 815.

Extension of time within which spouse may elect to accept or renounce will, 59 A.L.R.3d 767.

Validity of service of summons or complaint on Sunday or holiday, 63 A.L.R.3d 423.

When is office of clerk of court inaccessible due to weather or other conditions for purpose of computing time period for filing papers under Rule 6(a) of Federal Rules of Civil Procedure, 135 A.L.R. Fed. 259.

60 C.J.S. Motions and Orders §§ 8, 18, 28; 66 C.J.S. Notice §§ 26 to 32; 71 C.J.S. Pleading §§ 98, 114, 219; 72 C.J.S. Process §§ 41, 55; 86 C.J.S. Time §§ 13, 29 to 38.

II. COMPUTATION.

Exclusion of weekends and holidays. — Paragraph A of this rule superseded 12-2-2 NMSA 1978 (see now 12-2A-7 NMSA 1978), which only extended a time period to the following Monday if the last day falls on a Sunday. Therefore, a claim under the Tort Claims Act was not barred by the two-year statute of limitations of 41-4-15 NMSA 1978 where the last day of the two-year period fell on a Saturday and the plaintiff filed her claim on the following Monday. *Dutton v. McKinley Cnty. Bd. of Comm'rs*, 113 N.M. 51, 822 P.2d 1134 (Ct. App. 1991).

Whether limitation considered procedural or substantive, etc., deemed immaterial. — Whether a case is timely filed under Subdivision (a) (see now Paragraph A) or under 12-2-2 NMSA 1978 (see now 12-2A-7 NMSA 1978) is irrelevant, since these two provisions, considered together, make it amply clear that whether a limitation is considered procedural or substantive or whether it is a limitation on the right and remedy, or on only the remedy, is immaterial so far as the method to be utilized in computing time is concerned. *Keilman v. Dar Tile Co.*, 74 N.M. 305, 393 P.2d 332 (1964).

Medical malpractice action. — The three-year limitation period of 41-5-13 NMSA 1978 may be extended by Subdivisions (a) and (e) (see now Paragraphs A and D), to allow the timely filing of a medical malpractice action. *Saiz v. Barham*, 100 N.M. 596, 673 P.2d 1329 (Ct. App. 1983).

III. ENLARGEMENT.

Motion for attorney's fees for bad faith litigation. — Where plaintiff sought attorney's fees based on a claim that defendant engaged in bad faith litigation; defendant's attorney received plaintiff's motion five days after the motion was filed; defendant filed a response to plaintiff's motion thirty-six days after plaintiff's motion was filed together with a request for an extension of time; defendant's attorney claimed that the attorney was on a three-week vacation when plaintiff's motion arrived at the attorney's office and that the motion had been misfiled by a secretary; the court noted that defendant's notice of appeal in the case, bearing the attorney's signature, had been filed within the fifteen day period for response to plaintiff's motion, at a time when the attorney asserted the attorney was on vacation; and the court denied the request for an extension of time, determining that it was not justified by excusable neglect, the court abused its discretion because the motion for attorney's fees for bad faith litigation was a new and relatively rare claim for monetary relief from defendant which defendant should not have expected. *Skeen v. Boyles*, 2009-NMCA-080, 146 N.M. 627, 213 P.3d 531.

This rule places exclusive control as to enlargement of time for pleading in court, not with counsel. *Rogers v. Lyle Adjustment Co.*, 70 N.M. 209, 372 P.2d 797 (1962).

Whatever may have been the practice, there can be no valid excuse for failure to attend at any hearing of which an attorney has been notified, or to timely arrange with the court to be excused therefrom. *Rogers v. Lyle Adjustment Co.*, 70 N.M. 209, 372 P.2d 797 (1962).

Court not allowed to extend or enlarge time under certain rules. — Under the terms of Subdivision (b) (now Paragraph B), the court cannot extend or enlarge the time for taking any action under Rule 52(B)(b) (now Rule 1-052 NMRA) except under the conditions stated in such rule. *Wagner Land & Inv. Co. v. Halderman*, 83 N.M. 628, 495 P.2d 1075 (1972).

Or change procedure. — Where the effect of rule change, as applied to a case, extended the time for filing a motion for a new trial from 10 to 12 days contrary to Rule 59(b) (now Rule 1-059 NMRA), it is clearly a change in procedure. *Marquez v. Wylie*, 78 N.M. 544, 434 P.2d 69 (1967).

Rule does not authorize trial court to extend time period fixed by statute. *Mathieson v. Hubler*, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 93 N.M. 353, 588 P.2d 554 (1978).

Subdivision (b) (now Paragraph B) may not affect extension of time limitation of 45-3-806A NMSA 1978 (relating to allowance of claims against a decedent's estate) because such an extension would be inconsistent with that statute's barring of a disallowed claim unless proceedings are commenced not later than 60 days after mailing of notice of disallowance. *Mathieson v. Hubler*, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Section 72-7-1B NMSA 1978 specifically deals with the time limits for serving a notice of appeal from a decision of the state engineer and is controlling over this section. The trial courts are without authority to extend a period of time fixed by statute. *Garbagni v. Metropolitan Inv., Inc.*, 110 N.M. 436, 796 P.2d 1132 (Ct. App. 1990).

IV. FOR MOTIONS.

Applicability. — The five-day time limit of this rule did not apply to a will contestant's petition for a formal testacy proceeding filed pursuant to 45-3-401 NMSA 1978. *Vieira v. Estate of Cantu*, 1997-NMCA-042, 123 N.M. 342, 940 P.2d 190.

Court order may alter notice period. — One-day notice of domestic relations hearing in which ex-husband was ordered to sign promissory note was appropriate where he was put on notice by prior court order that he might have to appear before court "any morning" and where no new issues were raised by ex-wife at hearing. *Wolcott v. Wolcott*, 101 N.M. 665, 687 P.2d 100 (Ct. App. 1984).

Purported notice failing to comply. — Where trial court ruled upon the question of visitation rights at the hearing on appellant's motion for summary judgment and without any pleading appellee sought the right of visitation, without any notice to appellant that the matter of visitation rights would be considered and without opportunity to meet that particular question, appellant did not have proper notice of appellee's motion to stay the execution of the judgment and appellee's purported notice of his motion to stay the

judgment did not comply with this rule. *Padgett v. Padgett*, 68 N.M. 1, 357 P.2d 335 (1960).

V. ADDITIONAL TIME AFTER SERVICE BY MAIL.

Entry of summary judgment held error. — Where service of the motion for summary judgment is by mail and judgment is entered prior to the time plaintiff could be required to interpose counter-affidavits or other opposing evidence, pursuant to Subdivision (e) (now Paragraph D) entry of summary judgment is error. *Barnett v. Cal. M., Inc.*, 79 N.M. 553, 445 P.2d 974 (1968).

Subdivision (e) (see now Paragraph D) has no application when computing time for notice of appeal because the time for appeal starts to run from entry of judgment. The rule only applies to enlarge periods of time in which a party has to act after service of a notice by mail. *Socorro Livestock Mkt., Inc. v. Orona*, 92 N.M. 236, 586 P.2d 317 (1978).

A party notified by mail of judgment entered against him in magistrate court who filed a notice of appeal 16 days later could not take advantage of the three-day extension provision of Subdivision (e) (now Paragraph D). *Socorro Livestock Mkt., Inc. v. Orona*, 92 N.M. 236, 586 P.2d 317 (1978).

ARTICLE 3
Pleadings and Motions

1-007. Pleadings allowed; form of motions.

A. **Pleadings.** There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim denominated as such; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 1-014 NMRA; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

B. **Motions and other papers.**

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

C. **Demurrers, pleas, etc., abolished.** Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

ANNOTATIONS

Cross references. — For defenses, objections and motion for judgment on the pleadings, *see* Rule 1-012 NMRA and the notes thereto for superseded defensive pleadings.

For filing of complaint to contest an election, *see* Section 1-14-3 NMSA 1978.

For the pleadings allowed in mandamus proceedings, *see* Section 44-2-11 NMSA 1978.

Compiler's notes. — This rule is deemed to have superseded 105-403, 105-407, 105-532, C.S. 1929, which were substantially the same, and a provision of 105-422, C.S. 1929, providing that when a reply is filed the cause is deemed at issue.

I. GENERAL CONSIDERATION.

General rule is that court cannot undertake to adjudicate controversy on its own motion; it can do this only when the controversy is presented to it by a party, and only if it is presented to it in the form of a proper pleading. Zarges v. Zarges, 79 N.M. 494, 445 P.2d 97 (1968).

The "and/or" phrase has been condemned repeatedly by extremely learned courts. Its use is absolutely forbidden in legal pleadings and other documents presented to a court of law. The reason for this is that the symbol is equivocal. It has not been treated with quite so much vehemence in the case of contracts and powers of attorney, but is viewed with disfavor. 1953-54 Op. Att'y Gen. No. 5630.

Law reviews. — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Accord and Satisfaction § 54; 42 Am. Jur. 2d Injunctions § 268; 56 Am. Jur. 2d Motions, Rules and Orders §§ 1, 9, 12; 61A Am. Jur. 2d Pleading §§ 1, 2, 4, 17, 19, 111, 119, 180, 420, 423, 424, 429, 665.

Admissibility as evidence of pleadings as containing admissions against interest, 14 A.L.R. 22, 90 A.L.R. 1393, 52 A.L.R.2d 516.

Admissibility of pleadings for purposes other than the establishment of the facts set out therein, 14 A.L.R. 103.

Pleading breach of warranty as to article purchased for resale and resold, 22 A.L.R. 136, 64 A.L.R. 883.

Setting up counterclaim, setoff, or recoupment in reply, 42 A.L.R. 564.

Searching record on motion for summary judgment, 91 A.L.R. 884.

Stipulation of parties as to pleading, 92 A.L.R. 673.

Appearance to demand bill of particulars or statement of claim as submission to jurisdiction, 111 A.L.R. 930.

Necessity and sufficiency of reply to answer pleading statute of limitations, 115 A.L.R. 755.

Use of and/or as rendering pleading uncertain, 154 A.L.R. 871.

Manner of pleading defense of statute of frauds, 158 A.L.R. 89.

Appealability of order entered on motion to strike pleading, 1 A.L.R.2d 422.

Claim barred by limitation as subject of setoff, counterclaim, recoupment, cross bill or cross action, 1 A.L.R.2d 630.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348, 56 A.L.R.3d 1109, 27 A.L.R.4th 61, 32 A.L.R.4th 212, 3 A.L.R.5th 237.

Effect of nonsuit, dismissal, or discontinuance of action on previous order, 11 A.L.R.2d 1407.

Failure to assert matter as counterclaim as precluding assertion thereof in subsequent action, under federal rules or similar state rules or statutes, 22 A.L.R.2d 621.

Necessity that trial court give parties notice and opportunity to be heard before ordering new trial on its own motion, 23 A.L.R.2d 852.

Court's power, on motion for judgment on the pleadings to enter judgment against movant, 48 A.L.R.2d 1175.

Proper procedure and course of action by trial court, where both parties move for judgment on the pleadings, 59 A.L.R.2d 494.

Raising defense of statute of limitations by demurrer, equivalent motion to dismiss, or by motion for judgment on pleadings, 61 A.L.R.2d 300.

Counsel's right, in summation in civil case, to point out inconsistencies between opponent's pleading and testimony, 72 A.L.R.2d 1304.

Prejudicial effect of judge's disclosure to jury of motions or proceedings in chambers in civil case, 77 A.L.R.2d 1253.

Propriety of entering summary judgment for plaintiff before defendant files or serves answer to complaint or petition, 85 A.L.R.2d 825.

Contempt by filing of false pleadings, 89 A.L.R.2d 1258.

Independent venue requirements as to cross-complaint or similar action by defendant seeking relief against a codefendant or third party, 100 A.L.R.2d 693.

Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings or directed verdict, 36 A.L.R.3d 1113.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

Modern status of the Massachusetts or business trust, 88 A.L.R.3d 704.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

60 C.J.S. Motions and Orders § 10; 71 C.J.S. Pleading §§ 2, 63 to 211, 421.

II. PLEADINGS.

Breach of trust cause of action proper if well pleaded. — Where plaintiff tries to allege and prove misconduct and breach of trust by a majority stockholder or director to the injury of the corporation and its minority stockholders, such a cause of action is proper, if well pleaded. *Pope v. Lydick Roofing Co.*, 81 N.M. 661, 472 P.2d 375 (1970).

Pleading affirmative defenses. — Defendant must plead affirmative defenses, otherwise they are not available to him. *Sena v. Sanders*, 54 N.M. 83, 214 P.2d 226 (1950).

Affirmative defense in answer denominated reply to cross-claim permissible. — The court did not err in permitting plaintiff to set up the defense of estoppel by acquiescence in his reply. The defense was an answer to the cross-claim and the third-party complaint, though the pleading was denominated a reply. *Hobson v. Miller*, 64 N.M. 215, 326 P.2d 1095 (1958).

By its very language, this rule requires a counterclaim to be a part of the answer. *Griego v. Roybal*, 79 N.M. 273, 442 P.2d 585 (1968).

Counterclaim only dismissed with plaintiff's consent in absence of order. — Because there was no court order authorizing a dismissal of the counterclaim, it could only have been dismissed by plaintiff's consent. *Griego v. Roybal*, 79 N.M. 273, 442 P.2d 585 (1968).

III. MOTIONS AND OTHER PAPERS.

Meaning of "motion". — A written request or application to the trial court for an order affecting a party's right to findings of fact and conclusions of law is a motion. *Vosburg v. Carter*, 33 N.M. 86, 262 P. 175 (1927); *Pershing v. Ward*, 33 N.M. 91, 262 P. 177 (1927) (decided prior to the adoption of this rule).

Motion to dismiss is properly allowed only where it appears that under no provable state of the facts would the plaintiff be entitled to recover or to relief, the motion being grounded upon the assertion that the complaint fails to state a claim on which relief can be given. *Ritter v. Albuquerque Gas & Elec. Co.*, 47 N.M. 329, 142 P.2d 919 (1943).

Case dismissed on motion when only questions of law presented. — Where the pleadings as well as documentary evidence indicated that the employer of an injured minor employee qualified under Workmen's Compensation Act (Chapter 52, Article 1 NMSA 1978) and that the injured employee who had not given notice of election not to become subject to the act had received compensation, the case may be dismissed on motion since only questions of law are presented. *Benson v. Export Equip. Corp.*, 49 N.M. 356, 164 P.2d 380 (1945).

Motion for judgment on pleadings must be in writing, and must specifically point out the reasons upon which it is based. *Peterson v. Foley*, 23 N.M. 491, 169 P. 300 (1917) (decided prior to the adoption of this rule).

Motion to dismiss fulfilled function of responsive pleading. — Where the plaintiff filed its petition seeking to set aside the civil investigative demands on various grounds, and the Attorney General in turn filed a motion to dismiss the petition and to enforce the demands, together with a memorandum in support of the motion which defends the issuance of the demands and responds to every argument set forth in the plaintiff's petition, the Attorney General's motion responded to every argument set forth in the plaintiff's petition, and the record fails to show any prejudice to the plaintiff; for all practical purposes, it fulfilled the function of a responsive pleading. *The Coulston Foundation v. Madrid*, 2004-NMCA-060, 135 N.M. 667, 92 P.3d 679.

Motion for continuance for cause is addressed to the discretion of the court and the court's ruling will not be reversed unless there was an abuse of discretion. *State v. Herrera*, 82 N.M. 432, 483 P.2d 313 (Ct. App.), cert. denied, 404 U.S. 880, 92 S. Ct. 217, 30 L. Ed. 2d 161 (1971).

Continuance not granted for cause occasioned by applicant's fault. — A continuance is not to be granted for any cause growing out of the fault of the party applying therefor. *Tenorio v. Nolen*, 80 N.M. 529, 458 P.2d 604 (Ct. App. 1969).

Granting or denying motion for continuance rests in the discretion of the trial court and will not be interfered with except for abuse. *Tenorio v. Nolen*, 80 N.M. 529, 458 P.2d 604 (Ct. App. 1969); *State v. Ranne*, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

And reviewed only where palpable abuse of discretion demonstrated. — The granting or denying of continuances is a matter within the sound discretion of the trial court, and such actions will be reviewed only where palpable abuse of discretion is demonstrated. *Schmider v. Sapir*, 82 N.M. 355, 482 P.2d 58 (1971).

Different variables considered when deciding upon time required for defense. — The nature of the offense, the number of witnesses, and the skill of the attorney are all variables to be taken into consideration in each case in considering the amount of time necessary to prepare a defense. *State v. Nieto*, 78 N.M. 155, 429 P.2d 353 (1967).

Lack of specificity in motion. — Where a party has timely alerted the trial court to the lack of specificity and difficulty in responding to a general motion, such as one for summary judgment, the trial court should carefully evaluate the prejudice which may result if the motion is heard or ruled upon without ordering further clarification of the grounds upon which the motion is premised. *National Excess Ins. Co. v. Bingham*, 106 N.M. 325, 742 P.2d 537 (Ct. App. 1987).

1-007.1. Motions; how presented.

A. **Requirement of written motion.** All motions, except motions made during trial, or as may be permitted by the court, shall be in writing and shall state with particularity the grounds and the relief sought.

B. **Unopposed motions.** The movant shall determine whether a motion will be opposed. If the motion will not be opposed, an order approved by all parties shall accompany the motion.

C. **Opposed motions.** The motion shall recite that the movant requested the concurrence of all parties or shall specify why no such request was made. The movant shall not assume that the nature of the motion obviates the need for concurrence from all parties unless the motion is a:

(1) motion to dismiss;

(2) motion for new trial;

(3) motion for judgment as a matter of law;

(4) motion for summary judgment;

(5) motion for relief from a final judgment, order or proceeding pursuant to Paragraph B of Rule 1-060 NMRA.

Notwithstanding the provisions of any other rule, the movant may file with any opposed motion a brief or supporting points with citations or authorities. If the motion requires consideration of facts not of record, the movant shall file copies of all affidavits, depositions or other documentary evidence to be presented in support of the motion. Motions to amend pleadings shall have attached the proposed pleading. A motion for judgment on the pleadings presenting matters outside the pleading shall comply with Rule 1-056 NMRA. A motion for new trial shall comply with Rule 1-059 NMRA.

D. **Response.** Unless otherwise specifically provided in these rules, any written response and all affidavits, depositions or other documentary evidence in support of the response shall be filed within fifteen (15) days after service of the motion. If a party fails to file a response within the prescribed time period the court may rule with or without a hearing.

E. **Separate counter-motions and cross-motions required.** Responses to motions shall be made separately from any counter-motions or cross-motions.

F. **Reply brief.** Any reply brief shall be filed within fifteen (15) days after service of any written response.

G. **Request for hearing.** A request for hearing shall be filed at the time an opposed motion is filed. The request for hearing shall be substantially in the form approved by the Supreme Court.

H. **Notice of completion of briefing**. At the expiration of all response times under this rule, the movant shall file a notice of completion of briefing. The notice alerts the judge that the motion is ready for decision.

[As amended, effective December 4, 2000; March 15, 2005; as amended by Supreme Court Order No. 08-8300-32, effective November 17, 2008.]

Committee commentary. — If a party does not respond to a motion within fifteen days as required by Paragraph D of this rule, the moving party may submit a proposed order to the judge or the judge sua sponte may enter an appropriate order. Although the specific provisions of Rule 1-058(C) NMRA are not applicable, if a party submits a proposed order to the court, a copy of the proposed order must be served on all other parties. *See* Rule 1-005 NMRA of these rules, Rules 16-303 and 16-305 of the Rules of Professional Conduct and Rule 21-300 NMRA of the Code of Judicial Conduct. After assuring the non-responding party has received notice of the proposed order, the judge may enter an appropriate order.

The notice of completion of briefing required under Paragraph H of this rule shall be filed upon the expiration of the applicable deadline for filing responses and replies under Paragraphs D or F of the rule. The Judicial Districts may adopt local rules to incorporate additional filing requirements to coincide with the filing of the notice of completion of briefing. *See, e.g.,* LR13-404(A) NMRA (adopting motion package procedure). The district court may defer ruling on the request for hearing until the court receives the notice of completion of briefing. After the court announces its decision, the court shall comply with the requirements of Rule 1-058 NMRA.

[As amended by Supreme Court Order No. 08-8300-32, effective November 17, 2008.]

ANNOTATIONS

The 2000 amendment, effective December 4, 2000, substituted "matter of law" for "notwithstanding the verdict" in Paragraph C(3) and added the last sentence in Paragraph D.

The 2005 amendment, effective March 1, 2005, substituted "matter of law" for "approved" for "initialed" in Paragraph B and added Paragraph F relating to the filing of a request for hearing with an opposed motion.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-32, effective November 17, 2008, changed "opposing counsel" to "all parties" in Paragraphs B and C; in Paragraph D, deleted language which provided that failure to respond to a motion constitutes consent to grant the motion and a waiver of notice of presentment and that the court may enter an appropriate order and added the provision that the court may rule with or without a hearing; added new Paragraphs E and H; and relettered former Paragraph E as Paragraph F and former Paragraph F as Paragraph G.

Purpose of Paragraph D of this rule is to facilitate the court's efficient disposition of motions generally. *Lujan v. City of Albuquerque*, 2003-NMCA-104, 134 N.M. 207, 75 P.3d 423.

Failure to respond to motion for summary judgment. — Dismissal with prejudice was too severe a sanction against a party who failed to respond to opponent's motion for summary judgment, failing a satisfactory explanation by the district court for ordering dismissal with prejudice. *Lujan v. City of Albuquerque*, 2003-NMCA-104, 134 N.M. 207, 75 P.3d 423.

The proper manner in which to request entry of an order granting a motion for summary judgment and to request entry of judgment of dismissal with prejudice, when the order and judgment are sought based on failure to timely respond to a motion for summary judgment, is through a written motion as provided under Paragraph A and Subparagraph (1) of Paragraph B of this rule, providing fifteen days to respond after service of the motion pursuant to Paragraph D of this rule. *Lujan v. City of Albuquerque*, 2003-NMCA-104, 134 N.M. 207, 75 P.3d 423.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Motions, Rules and Orders § 1 et seq.

60 C.J.S. Motions and Orders § 11.

1-008. General rules of pleading.

A. **Claims for relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim shall contain:

(1) proper allegations of venue, provided the name of the county stated in the complaint shall be taken to be the venue intended by the plaintiff and it shall not be necessary to state a venue in the body of the complaint or in any subsequent pleading;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for judgment for the relief to which the pleader claims to be entitled to receive. Relief in the alternative or of several different types may be demanded. Unless it is a necessary allegation of the complaint, the complaint shall not contain an allegation for damages in any specific monetary amount.

B. **Defenses; form of denials.** A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make the pleader's denials as specific denials of designated averments or paragraphs, or the pleader may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 1-011 NMRA.

C. **Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

D. **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

E. **Pleading to be concise and direct; consistency.**

(1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 1-011 NMRA.

F. **Construction of pleadings.** All pleadings shall be so construed as to do substantial justice.

[Approved, effective August 1, 1942; as amended, June 13, 1973; as amended by Supreme Court Order 07-8300-16, effective August 1, 2007.]

ANNOTATIONS

The 2007 amendment, approved by Supreme Court Order 07-8300-16, effective August 1, 2007, amended Subparagraph (3) of Paragraph A to add a new sentence prohibiting an allegation for damages in a specific amount unless it is a necessary allegation of the complaint. Rule 1-010 NMRA was also amended by Supreme Court Order 07-8300-16 to delete the same sentence.

Compiler's notes. — Paragraphs A and E(1), together with Rule 1-010, are deemed to have superseded 105-404, 105-501, 105-511 and 105-525, C.S. 1929, which were substantially the same.

Paragraphs B and C, together with Rule 1-013, are deemed to have superseded 105-416 and 105-417, C.S. 1929, which were substantially the same. Together with Rule 1-012, Paragraphs B and C are also deemed to have superseded 105-420, 1929 Comp., relating to replies and demurrers to answers.

Paragraphs C and D are deemed to have superseded 105-519, C.S. 1929, which was substantially the same. They are also deemed to have superseded 105-518, C.S. 1929, relating to effect of failure to deny.

Paragraph E(2) is deemed to have superseded 105-517, C.S. 1929, which was substantially the same. Together with Rule 1-012, Paragraph E(2) is also deemed to have superseded 105-504, C.S. 1929, relating to duplicity.

Paragraph F is deemed to have superseded 105-524, C.S. 1929, which was substantially the same.

I. GENERAL CONSIDERATION.

Pleading must be reasonably short, plain, simple, concise and direct. — When fraud is alleged, it must be particularized as Rule 9 (b) (now Rule 1-009 NMRA) requires, but pleading still must be as short, plain, simple, concise and direct as is reasonable under the circumstances, as required by this rule. *Maxey v. Quintana*, 84 N.M. 38, 499 P.2d 356 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

Long, complicated, verbose pleadings which contain numerous allegations of rumors, suppositions, slurs and innuendoes and generally disregard the requirements of the New Mexico Rules of Civil Procedure are violative of this rule. *Peoples v. Peoples*, 72 N.M. 64, 380 P.2d 513 (1963).

Purpose of pleadings is to give parties fair notice of claims and defenses and the grounds upon which they rest. *Transamerica Ins. Co. v. Sydow*, 97 N.M. 51, 636 P.2d 322 (Ct. App. 1981).

The theory of pleadings is to give the parties fair notice of the claims and defenses against them, and the grounds upon which they are based. *Schmitz v. Smentowski*, 109 N.M. 386, 785 P.2d 726 (1989).

Notice pleading does not require that every theory be denominated in the pleadings - general allegations of conduct are sufficient, as long as they show that the party is entitled to relief and the averments are set forth with sufficient detail so that the parties and the court will have a fair idea of the action about which the party is complaining and can see the basis for relief. *Schmitz v. Smentowski*, 109 N.M. 386, 785 P.2d 726 (1989).

Litigants control course of lawsuit. — Under the adversary system of jurisprudence the course of the lawsuit is controlled by the litigants except in a few limited circumstances; the initiative rests with the litigants, and the role of the trial court is to consider only those questions raised by the parties. *Wells v. Arch Hurley Conservancy Dist.*, 89 N.M. 516, 554 P.2d 678 (Ct. App. 1976).

But jurisdictional question deemed decided by court. — In a case in which the jurisdictional question is not raised by the parties or by the appellate court itself, it is presumed that the appellate court decided the jurisdictional question, and this decision becomes the law of the case. *Sangre De Cristo Dev. Corp. v. City of Santa Fe*, 84 N.M.

343, 503 P.2d 323 (1972), cert. denied, 411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 2d 400 (1973).

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For survey, "Civil Procedures in New Mexico in 1975," see 6 N.M.L. Rev. 367 (1976).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

For article, "Survey of New Mexico Law, 1982-83: Civil Procedure," see 14 N.M.L. Rev. 17 (1984).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

For article, "The Impact of Non-Mutual Collateral Estoppel on Tort Litigation Involving Several Liability," see 18 N.M.L. Rev. 559 (1988).

For article, "If at First You Do Succeed: Judicial Estoppel in New Mexico's State and Federal Courts," see 29 N.M.L. Rev. 201 (1999).

For note, "The Blaze Construction Case: An Analysis of the Blaze Construction Tax Cases and the Implication on Avoidance of Taxation In Indian Country," see 39 Nat. Resources J. 845 (1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Accord and Satisfaction § 54; 12 Am. Jur. 2d Bonds § 43; 25 Am. Jur. 2d Duress and Undue Influence §§ 22, 32; 42 Am. Jur. 2d Injunctions § 268; 61A Am. Jur. 2d Pleading § 1 et seq.

Effect of statute eliminating scienter as condition of liability for injury by dog or other animal, 1 A.L.R. 1123, 142 A.L.R. 436.

Application of doctrine of res judicata to item of single cause of action omitted from issues through ignorance, mistake or fraud, 2 A.L.R. 534, 142 A.L.R. 905.

Charges of adultery in suit for divorce, 2 A.L.R. 1033, 26 A.L.R. 541.

Sufficiency of allegation of adultery, in suit for divorce, 2 A.L.R. 1621.

Necessity of alleging husband's agency where mechanic's lien against property of married woman is sought for work performed or material furnished under a contract with her husband, 4 A.L.R. 1031.

Sufficiency of complaint of assault upon female, 6 A.L.R. 1021.

Plea or answer in civil action for assault upon female, 6 A.L.R. 1022.

Submission on agreed statement of facts or on agreed case as waiver of defects in pleading, 8 A.L.R. 1172.

Failure to furnish cars where defense is car shortage, 10 A.L.R. 362.

Action to recover against receiver for torts or negligence of receivership employees, 10 A.L.R. 1065.

Setting up in complaint same cause of action under state law and under Federal Employers' Liability Act, 12 A.L.R. 707, 36 A.L.R. 917, 89 A.L.R. 693.

Pleading in action to hold warehouseman liable for damage to or destruction of property by fire, 16 A.L.R. 301.

Admission by pleading of a parol contract as preventing pleader from taking advantage of statute of frauds, 22 A.L.R. 723.

Sufficiency of allegations to authorize recovery of attorney's fees for wrongful attachment, 25 A.L.R. 599, 65 A.L.R.2d 1426.

Right under general prayer to relief inconsistent with prayer for specific relief, 30 A.L.R. 1175.

Right to plead single cause of action as in tort and on contract, 35 A.L.R. 780.

Pleading fact to show what items of damages belonging to infant and what to parent, 37 A.L.R. 62, 32 A.L.R.2d 1060.

Fictitious or assumed name, necessity of alleging in complaint compliance with statute as to doing business under, 45 A.L.R. 270, 42 A.L.R.2d 516.

Pleading in action to recover double or treble damages against tenant committing waste, 45 A.L.R. 776.

Necessity of pleading injury to credit as element of damages, 54 A.L.R. 455.

Form of pleading necessary to raise issue of corporate existence, 55 A.L.R. 510.

Raising issue of corporate existence by plea in abatement or in bar, 55 A.L.R. 519.

Pleading in action on policy ensuing against conversion or embezzling of automobile, 55 A.L.R. 844.

Pleading injunction against threatened or anticipated nuisance, 55 A.L.R. 885.

Pleading as affecting damages for breach of covenant of seisin, 61 A.L.R. 58, 100 A.L.R. 1194.

Pleading breach of warranty as to article purchased for resale, and resold, 64 A.L.R. 888.

Necessity that party relying upon contract differing from terms of written instrument sued on plead facts entitling him to reformation, 66 A.L.R. 791.

Waiver of benefit of statute or rule by which allegation in pleading of execution or consideration of written instrument must be taken as true unless met by verified denial, 67 A.L.R. 1283.

Pleading in action based on omnibus coverage clause of automobile liability policy as to owner's consent to use of car by one driving it at time of action, 72 A.L.R. 1410, 106 A.L.R. 1251, 126 A.L.R. 544, 143 A.L.R. 1394.

Liability insurance, sufficiency of pleading as regards compliance with provision as to notice of accident claim, 76 A.L.R. 212, 123 A.L.R. 950, 18 A.L.R.2d 443.

Sufficiency of complaint in vendor's foreclosure of contract for sale of real property, 77 A.L.R. 292.

Governing law as regards presumption and burden of proof, 78 A.L.R. 883, 168 A.L.R. 191.

Pleading in action on official bond for acts or defaults occurring after termination of office, 81 A.L.R. 68.

Periodical payment of indemnity, recovery for instalments due under contract for, under complaint seeking recovery for breach of entire contract, 81 A.L.R. 388, 99 A.L.R. 1171.

Pleading in action for inducing breach of contract, 84 A.L.R. 92, 26 A.L.R.2d 1227, 96 A.L.R.3d 1294, 44 A.L.R.4th 1078.

Right to set up by plea in abatement claim for damages from wrongful seizure of property, 85 A.L.R. 657.

Sufficiency of allegations of loss of patronage or profit to permit recovery of special damages, 86 A.L.R. 848.

Pleading in proceedings to obtain declaratory judgment, 87 A.L.R. 1246.

Admission by failure to answer complaint seeking declaratory judgment, 87 A.L.R. 1247.

Necessity of alleging fact of agency in declaring upon contract made by parties through agent, 89 A.L.R. 895.

Sufficiency of pleading to permit recovery for mental or physical suffering as element of damages, 90 A.L.R. 1184.

Stipulation of parties as to sufficiency of complaint, 92 A.L.R. 673.

Necessity of pleading family purpose doctrine, 93 A.L.R. 991.

Failure to raise mechanic's lien by demurrer or answer failure to bring suit to enforce, within time prescribed as waiver, 93 A.L.R. 1462.

Necessity that promisee in action on promise to pay "when able" plead ability to pay, 94 A.L.R. 721.

Petition in proceedings for purging of voter's registration lists, 96 A.L.R. 1044.

Pleading in action for libel by motion picture, 99 A.L.R. 878.

Payment as provable under general issue or general denial, 100 A.L.R. 264.

Sufficiency of allegation of insolvency without further statement of facts, 101 A.L.R. 549.

Form and particularity of allegations to raise issue of undue influence, 107 A.L.R. 832.

Necessity of pleading good faith as defense in action against parent or relation for alienation of affections, 108 A.L.R. 418.

Necessity of alleging malice in action against parent or relative for alienation of affections, 108 A.L.R. 423.

Pleading in action to compel payment of dividends or to recover dividends wrongfully paid, 109 A.L.R. 1397.

Form and sufficiency of allegations of heirship, 110 A.L.R. 1239.

Trustee's action against third party, necessity and sufficiency of allegations in regard to trust, 112 A.L.R. 1514.

Sufficiency of complaint in action against railroad company for killing or injuring person or livestock, as regards time and direction and identification of train, 115 A.L.R. 1074.

Construction of "and/or", 118 A.L.R. 1372, 154 A.L.R. 866.

Pleading duress as a conclusion, 119 A.L.R. 997.

Pleading waiver, estoppel, and res judicata, 120 A.L.R. 8

Duplicity of plea setting up estoppel by judgment, 120 A.L.R. 137.

Pleading foreign statute, 134 A.L.R. 570.

Allegation of conspiracy as surplusage not affecting right to recover for wrong done, 152 A.L.R. 1148.

Manner of pleading defense of statute of frauds, 158 A.L.R. 89.

Failure of complaint to state cause of action for unliquidated damages as ground for dismissal of action at hearing to determine the amount of damages following plaintiff's default, 163 A.L.R. 496.

Appealability of order entered on motion to strike pleading, 1 A.L.R.2d 422.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348, 56 A.L.R.3d 1109, 27 A.L.R.4th 61, 32 A.L.R.4th 212, 3 A.L.R.5th 237.

Necessity of pleading the maker or drawer of check was given notice of its dishonor by bank, 6 A.L.R.2d 985.

Application and effect of parol evidence rule as determinable upon the pleadings, 10 A.L.R.2d 720.

Necessity and sufficiency of pleading in partition action to authorize incidental relief, 11 A.L.R.2d 1449.

Granting relief not specifically demanded in pleading or notice in rendering default judgment in divorce or separation action, 12 A.L.R.2d 340, 5 A.L.R.5th 863.

Fellow servant and assumption of risk, defenses of in actions involving injury or death of member of airplane crew, ground crew, or mechanic, 13 A.L.R.2d 1137.

Necessity and sufficiency of allegations in complaint for malicious prosecution or tort action analogous thereto that defendant or defendants acted without probable cause, 14 A.L.R.2d 264.

Aider by verdict of allegation in complaint for malicious prosecution or tort action analogous thereto that defendant or defendants acted without probable cause, 14 A.L.R.2d 279.

Pleading in action by patron of public amusement for accidental injury from cause other than assault, hazards of game or amusement, or condition of premises, 16 A.L.R.2d 912.

Pleading as to causation of alienation of affections, 19 A.L.R.2d 471.

Avoidance of release of claim for personal injuries on ground of misrepresentation as to matters of law by tortfeasor or his representative insurer, 21 A.L.R.2d 272.

Joinder in defamation action of denial and plea of truth of statement, 21 A.L.R.2d 813.

Binding effect of court's order entered after pretrial conference, 22 A.L.R.2d 599.

Failure to assert matter as counterclaim as precluding assertion thereof in subsequent action, under federal rules or similar state rules or statutes, 22 A.L.R.2d 621.

Sufficiency of description or designation of land in contract or memorandum of sale under statute of frauds, 23 A.L.R.2d 6.

Necessity and sufficiency of statement of consideration in contract or memorandum of sale of land, under statute of frauds, 23 A.L.R.2d 164.

Uniform Judicial Notice of Foreign Law Act, 23 A.L.R.2d 1437.

Seller's waiver of sales contract provision limiting time within which buyer may object to or return goods or article for defects or failure to comply with warranty or representations, 24 A.L.R.2d 717.

Pleading last clear chance doctrine, 25 A.L.R.2d 254.

Sufficiency of pleading in action relying upon imputation of perjury or false swearing as actionable per se, 38 A.L.R.2d 161.

Agency, manner and sufficiency of pleading, 45 A.L.R.2d 583.

Amendment of pleading before trial with respect to amount or nature of relief sought as ground for continuance, 56 A.L.R.2d 650.

Raising defense of statute of limitations by motion for judgment on pleadings, 61 A.L.R.2d 300.

Litigant's pleading to the merits, after objection to jurisdiction of person made under special appearance or the like has been overruled, as waiver of objection, 62 A.L.R.2d 937.

Effect of failure to plead provision of negotiable instruments law requiring renunciation of rights to be in writing, 65 A.L.R.2d 593.

Sufficiency of plaintiff's allegations in defamation action as to defendant's malice, 76 A.L.R.2d 696.

Necessity and sufficiency of allegations of tender of payment in bill by one seeking to redeem property from mortgage foreclosure, 80 A.L.R.2d 1317.

Assumption of risk and contributory negligence, distinction between, 82 A.L.R.2d 1218.

Recovery on quantum meruit where only express contract is pleaded, under Federal Rules 8 and 54 and similar state statutes or rules, 84 A.L.R.2d 1077.

Necessity and sufficiency of plaintiff's allegations as to falsity in defamation action, 85 A.L.R.2d 460.

Principal's liability for false arrest or imprisonment caused by agent or servant, 92 A.L.R.2d 15, 73 A.L.R.3d 826, 93 A.L.R.3d 826.

Sufficiency of pleading in action for libel by listing nontrader as unworthy of credit, 99 A.L.R.2d 700.

Pleading of election of remedies, 99 A.L.R.2d 1315.

Presenting of counterclaim as affecting summary judgment, 8 A.L.R.3d 1361.

Infant's misrepresentation as to his age as estopping him from disaffirming his voidable transaction, 29 A.L.R.3d 1270.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Power of court sitting as trier of fact to dismiss at close of plaintiff's evidence notwithstanding plaintiff has made out prima facie case, 55 A.L.R.3d 272.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 A.L.R.3d 933.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

Simultaneous injury to person and property as giving rise to single cause of action - modern cases, 24 A.L.R.4th 646.

Liability for injury to customer or other invitee of retail store by falling of displayed, stored, or piled objects, 61 A.L.R.4th 27.

71 C.J.S. Pleading §§ 1 to 53, 63, 95, 99, 103, 152, 155, 163.

II. CLAIMS FOR RELIEF.

Injured, third-party common law dramshop liability. — Where plaintiff alleged that defendant sold alcohol to decedents at a social function at an Indian casino despite the decedents' intoxication and, as a result, the decedents were killed in a single vehicle accident, and a third person, who was a passenger in the back seat of the vehicle, was injured; the police and the passenger were unable to determine which of the decedents was driving the vehicle at the time of the accident; plaintiff was licensed by the Indian tribe to sell and serve alcoholic beverages at the casino; and the Indian tribe had enacted an ordinance which prohibited the sale of alcohol to intoxicated persons, plaintiff stated an injured, third-party common law negligence claim against defendant on behalf of whichever decedent was not driving. *Mendoza v. Tamaya Enters., Inc.*, 2010-NMCA-074, 148 N.M. 534, 238 P.3d 903, *cert. granted*, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Injured patron common law dramshop liability. — Where plaintiff alleged that defendant sold alcohol to decedents at a social function at an Indian casino despite the decedents' intoxication and, as a result, the decedents were killed in a single vehicle accident, and a third person, who was a passenger in the back seat of the vehicle, was injured; the police and the passenger were unable to determine which of the decedents was driving the vehicle at the time of the accident; plaintiff was licensed by the Indian tribe to sell and serve alcoholic beverages at the casino; and the Indian tribe had enacted an ordinance which prohibited the sale of alcohol to intoxicated persons, plaintiff stated an injured, third-party common law negligence claim against defendant on behalf of whichever decedent was driving. *Mendoza v. Tamaya Enters., Inc.*, 2010-NMCA-074, 148 N.M. 534, 238 P.3d 903, *cert. granted*, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Express contract. — An express contract is to be enforced as written in regard to contractual obligations of the parties unless the court has determined that equity should override the express contract because of fraud, real hardship, oppression, mistake, unconscionable results, and the other grounds of righteousness, justice and morality. *Arena Res., Inc. v. OBO, Inc.*, 2010-NMCA-061, 148 N.M. 483, 238 P.3d 357.

Judgment granting equitable relief in action based on express contract. — Where plaintiff, who was the operating-interest owner, redeveloped an oilfield unit and sought reimbursement from defendant, who was a working-interest owner; plaintiff unilaterally redeveloped the unit without obtaining the consent of defendant as required by the operating agreement of the parties; the redevelopment project increased oil and gas production, enhanced the unit, and netted favorable revenue consequences for defendant; although the district court concluded that plaintiff had breached the operating agreement, the court granted judgment for plaintiff based on unjust enrichment; plaintiff's action was for breach of contract and to enforce a contractual lien; plaintiff never asserted a claim for unjust enrichment, the case was not tried on the theory of unjust enrichment, and plaintiff did not request findings of fact and conclusions of law on unjust enrichment; and the court never mentioned the existence of any evidence or entered any findings of fact that supported its conclusion of unjust enrichment or otherwise provided any basis for invoking the unjust enrichment theory in the face of the parties' express contract, the court was not permitted to exercise its equitable powers to grant plaintiff relief under the equitable unjust enrichment theory of recovery. *Arena Res., Inc. v. OBO, Inc.*, 2010-NMCA-061, 148 N.M. 483, 238 P.3d 357.

As a general rule, spouses are permitted to sue each other for intentional torts. *Papatheofanis v. Allen*, 2010-NMCA-036, 148 N.M. 791, 242 P.3d 358, *cert. granted*, 2010-NMCERT-005, 148 N.M. 574, 240 P.3d 1048.

Claims for intentional torts between spouses. — Where, during the marriage of plaintiff and defendant, defendant induced plaintiff to convey a one-half interest in the family home, which was plaintiff's solely owned property, to defendant by representing to plaintiff that if plaintiff died, the parties' child would not have an interest in the home; defendant falsely commenced a domestic violence claim against plaintiff; defendant falsely reported to plaintiff's employer that plaintiff was misusing government property at plaintiff's workplace; without the knowledge or permission of plaintiff, defendant opened credit card accounts by forging plaintiff's name on application forms, leased a vehicle using plaintiff's information, and registered a patent in defendant's name using plaintiff's intellectual property; and defendant was an attorney and a mortgage loan officer, the jury verdict in plaintiff's action against defendant finding defendant liable for fraud, breach of fiduciary duty, malicious abuse of process, and defamation was supported by substantial evidence. *Papatheofanis v. Allen*, 2010-NMCA-036, 148 N.M. 791, 242 P.3d 358, *cert. granted*, 2010-NMCERT-005, 148 N.M. 574, 240 P.3d 1048.

No subrogation between insurer and tort victim. — New Mexico law does not recognize subrogation between an insurer of a tortfeasor and the tort victim and the insurer may not step into the shoes of the tort victim to later assert claims of contribution, indemnification or subrogation against other parties who assertedly bear some responsibility for the victim's injuries. *Gulf Ins. Co. v. Cottone*, 2006-NMCA-150, 140 N.M. 728, 148 P.3d 814.

Claims outside subrogation amounts. — Potential equitable subrogation rights of an insurer do not preclude as a matter of law any claims that are independent of and

outside the subrogated amounts that the insured has against another insurer for failure to defend and indemnify. *Southwest Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co.*, 2006-NMCA-151, 140 N.M. 720, 148 P.3d 806.

Independent claim for relief. — An appellant under 72-7-1 NMSA 1978 who is able to state an independent claim for relief under Paragraph A of this rule, can also pursue that claim under the court's original jurisdiction. *Town of Silver City v. Scartaccini*, 2006-NMCA-009, 138 N.M. 813, 126 P.3d 1177.

Function of pleadings is to give fair notice of the claim asserted so as to enable the adverse party to answer and prepare for trial. *Las Luminarias of N.M. Council of Blind v. Isengard*, 92 N.M. 297, 587 P.2d 444 (Ct. App. 1978) (specially concurring opinion).

Pleading should support reasonable inference of personal jurisdiction. — Although the grounds on which personal jurisdiction is based need not be alleged in the pleadings, a pleader who seeks to bring a nonresident within the reach of 38-1-16 NMSA 1978, the "long arm statute," must state sufficient facts in the complaint to support a reasonable inference that defendant can be subjected to jurisdiction within the state. *Aetna Cas. & Sur. Co. v. Bendix Control Div.*, 101 N.M. 235, 680 P.2d 616 (Ct. App. 1984).

Complaint was sufficiently complete under this rule where it (1) alleged residency of parties, (2) charged that defendant negligently and unlawfully drove defendant's truck into plaintiff's automobile, (3) stated place of the collision, (4) alleged that defendants were partners and that truck was being driven on partnership business at time of the accident and (5) pleaded amount of damages claimed. *Veale v. Eavenson*, 52 N.M. 102, 192 P.2d 312 (1948).

Relevant to pleader's cause of action. — While a prayer for relief may be helpful in specifying the contentions of the parties, it forms no part of the pleader's cause of action, and the prevailing party should be given whatever relief he is entitled to under the facts pleaded and proved at trial. *Lett v. Westland Dev. Co.*, 112 N.M. 327, 815 P.2d 623 (1991).

Judicial notice is taken of counties comprising judicial district, and a cause entitled "In the district court of the first judicial district" is sufficient. *Friday v. Santa Fe Cent. Ry.*, 16 N.M. 434, 120 P. 316 (1910), aff'd, 232 U.S. 694, 34 S. Ct. 468, 58 L. Ed. 802 (1914) (decided under former law).

Phrase "shall contain" in Subdivision (a) (see now Paragraph A) is mandatory. *Mantz v. Follingstad*, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972).

Complaint sufficient to plead res ipsa loquitur. — Although complaint did not specifically mention res ipsa loquitur, it combined general allegations of negligence with allegations that the defendant's employee was in control of the injury-producing instrumentality, and thus complaint was sufficient to plead res ipsa loquitur. *Ciesielski v.*

Waterman, 86 N.M. 184, 521 P.2d 649 (Ct. App.), rev'd on other grounds, 87 N.M. 25, 528 P.2d 884 (1974).

False imprisonment. — Pleading stating that five of the plaintiffs were imprisoned in the union hall on August 11, 1961, is a sufficient allegation of false imprisonment. *Gonzales v. Oil, Chem. & Atomic Workers Int'l Union*, 77 N.M. 61, 419 P.2d 257 (1966).

Common-law tort. — Pleading stating that from July 24, 1961, to September 9, 1961, defendants willfully and maliciously prevented each plaintiff from going to or engaging in his employment was sufficient to allege a common-law tort. *Gonzales v. Oil, Chem. & Atomic Workers Int'l Union*, 77 N.M. 61, 419 P.2d 257 (1966).

Allegation of substantial performance held not essential. — It is not an error to omit an allegation of substantial performance in contract case so long as the allegations show appellant is entitled to relief. *Plains White Truck Co. v. Steele*, 75 N.M. 1, 399 P.2d 642 (1965).

Specific acts of negligence alleged need not be pleaded. *Clark v. Ruidoso-Hondo Valley Hosp.*, 72 N.M. 9, 380 P.2d 168 (1963), overruled on other grounds *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975).

But alleged facts must be sufficient to warrant relief. — Debtor's counterclaim for wrongful replevin, which merely alleged that replevin action was not prosecuted with effect, did not allege sufficient facts to warrant relief or necessitate a reply. *Cessna Fin. Corp. v. Mesilla Valley Flying Serv., Inc.*, 81 N.M. 10, 462 P.2d 144 (1969), cert. denied, 397 U.S. 1076, 90 S. Ct. 1521, 25 L. Ed. 2d 811 (1970).

Grounds for election contest must be completely stated. — Allegation in a notice of an election contest that "by reason of the erroneous receiving, counting, tallying, and return of the votes . . . the correct result thereof was not certified to the county canvassing board" was not a sufficiently complete statement of the specific facts on which the grounds for contest were based. *Ferran v. Trujillo*, 50 N.M. 266, 175 P.2d 998 (1946).

Conclusions do not state cause of action. — In action to enjoin defendant from practicing osteopathy and medicine without a license, averments that such practice constitutes a nuisance and is greatly detrimental to the health of the public are conclusions rather than facts and do not state a cause of action. *State v. Johnson*, 26 N.M. 20, 188 P. 1109 (1920) (decided under former law).

Defendants entitled to know basis of claims. — Defendants were entitled to know whether wage and medical claims were asserted as individual claims of the decedent or his widow or as community claims; on remand plaintiffs should be given the opportunity to amend complaint to state the basis of the wage and medical claims. *Rodgers v. Ferguson*, 89 N.M. 688, 556 P.2d 844 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Pro se pleadings of convicted felon must indicate elements of claim. — Pro se pleadings, however inartfully expressed, must tell a story from which, looking to substance rather than form, the essential elements prerequisite to the granting of the relief sought can be found or reasonably inferred. This would be the rule which would apply to law-abiding citizen appearing pro se in a civil action, and the court should not adopt a more tolerant view of petition because it emanated from a convicted felon. *Birdo v. Rodriguez*, 84 N.M. 207, 501 P.2d 195 (1972).

Notice of contest in election case takes place of conventional complaint in an ordinary lawsuit, and it must contain a plain statement of the claim showing that the pleader is entitled to relief. *Ferran v. Trujillo*, 50 N.M. 266, 175 P.2d 998 (1946).

Proper to demand legal and equitable relief. — Where complaint alleged that appellee was the owner entitled to possession of the land involved, that appellants constructed two houses and utility lines in such a manner as to encroach on her property to her damage and that appellants should be required to remove said encroachments, complaint is that type of alternative pleading which is permissible under this rule. As both legal and equitable remedies are administered by a single court, there was no error by a joinder of the causes of action. *Heaton v. Miller*, 74 N.M. 148, 391 P.2d 653 (1964).

Right to use several counts where proper relief unclear. — When a plaintiff is in real doubt as to his relief, he has the right to set forth his cause of action in several counts so as to meet the facts which are established on the trial. *Ross v. Carr*, 15 N.M. 17, 103 P. 307 (1909) (decided under former law).

Complaint not dismissed because plaintiff misconceived nature of remedy. — A complaint will not be dismissed when it sets up a cause of action which is good either in law or equity, because the plaintiff has misconceived the nature of his remedial right. *Kingston v. Walters*, 14 N.M. 368, 93 P. 700 (1908) (decided under former law).

Generally party must plead for affirmative relief. — A party generally cannot be given affirmative relief without having submitted a pleading praying for it. *Wells v. Arch Hurley Conservancy Dist.*, 89 N.M. 516, 554 P.2d 678 (Ct. App. 1976).

Or relief granted must be within theory case tried on. — A judgment may not grant relief which is neither requested by the pleadings nor within the theory on which the case was tried. *Holmes v. Faycus*, 85 N.M. 740, 516 P.2d 1123 (Ct. App. 1973).

Absent contrary pleading or proof, forum's law presumed applicable. — Absent pleading or proof to the contrary, the law of a sister state is presumed to be the same as the law of the forum. *Larson v. Occidental Fire & Cas. Co.*, 79 N.M. 562, 446 P.2d 210 (1968), overruled on other grounds *Estep v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 105, 703 P.2d 882 (1985).

Allegation neither essential nor jurisdictional not grounds for reversal. — A default judgment against a corporation may not be attacked on the sole ground that it was erroneously alleged that the corporation was organized under the laws of a given state, as such allegation was not essential or jurisdictional. *Riverside Irrigation Co. v. Cadwell*, 21 N.M. 666, 158 P. 644 (1916) (decided under former law).

III. DEFENSES AND FORM OF DENIALS.

Denial on information and belief sufficient. — A denial that the defendant has not "knowledge or information sufficient to form a belief " is sufficient to put the plaintiff to the proof of the material fact. *Clark v. Apex Gold Mining Co.*, 13 N.M. 416, 85 P. 968 (1906) (decided under former law).

A denial of facts in the complaint on information and belief raises an issue of fact, and the burden is upon plaintiff to prove his case; a motion for judgment on pleadings should not be granted. *Dugger v. Young*, 25 N.M. 671, 187 P. 552 (1920) (decided under former law).

Unless matters necessarily within pleader's knowledge. — Denial upon information and belief of matters necessarily within the knowledge of the pleader is not permissible. *Chicago, R.I. & E.P. Ry. v. Wertheim*, 15 N.M. 505, 110 P. 573 (1910) (decided under former law).

The denial of knowledge or information sufficient to form a belief as to the indebtedness and plaintiff's demand for payment is no denial at all, such facts being those which defendant must necessarily know. *Department Store Co. v. Gauss-Langenberg Hat Co.*, 17 N.M. 112, 125 P. 614 (1912) (decided under former law).

No issue of fact is raised by denial of mere conclusion of law arising from the pleaded facts. *Posey v. Dove*, 57 N.M. 200, 257 P.2d 541 (1953).

Nor by answer merely demanding strictest proof of allegations. — An answer that defendants neither admit nor deny allegations of a complaint but demand the strictest proof thereof does not put at issue any material facts in a complaint and is an insufficient denial under this rule. *Bank of N.M. v. Pinion*, 57 N.M. 428, 259 P.2d 791 (1953).

Argumentative answer. — A narration of facts in an answer in the form of new matter which could all be properly proved under the general or specific denials made by the defendant constitutes an argumentative answer. *Walters v. Battenfield*, 21 N.M. 413, 155 P. 721 (1916) (decided under former law).

Where answer prays for no affirmative relief defendant can have none. *Badaracco v. Badaracco*, 10 N.M. 761, 65 P. 153 (1901) (decided under former law).

Evidence admissible under general denial. — In actions of ejectment it is sufficient to deny plaintiff's title, and under such denial evidence of any matters tending to show that plaintiff was not vested with the title or right of possession at the time of the commencement of the action is admissible. *Chilton v. 85 Mining Co.*, 23 N.M. 451, 168 P. 1066 (1917) (decided under former law).

Payment may be proved under the general issue. *Cunningham v. Springer*, 13 N.M. 259, 82 P. 232 (1905), aff'd, 204 U.S. 647, 27 S. Ct. 301, 51 L. Ed. 662 (1907) (decided under former law).

Evidence that the maker of a promissory note had given the holder a power of attorney to collect money due him, which was to be applied to the note and the balance forwarded to the maker, and that more than enough to pay the note was collected by a messenger of the holder was admissible under the general issue, and a special plea of set-off or counterclaim was unnecessary. *Samples v. Samples*, 2 N.M. 239 (1882) (decided under former law).

IV. AFFIRMATIVE DEFENSES.

Statute of frauds. — Where sellers verbally agreed to sell a tract of land to buyers for a home site; in reliance on the agreement, buyers cashed IRA and 401-K retirement plans at a substantial penalty; with the consent of the sellers, buyers went into possession of the land, purchased a double-wide mobile home and moved the home onto the land, erected valuable temporary and permanent improvements on the land, and landscaped the property; and buyers spent approximately $85,000 in purchasing the home and making improvements, the buyers' actions were sufficient part performance in reliance on the oral agreement to take the contract outside the statute of frauds. *Beaver v. Brumlow*, 2010-NMCA-033, 148 N.M. 172, 231 P.3d 628.

Equitable estoppel against the state. — With respect to state agencies, the doctrine of equitable estoppel is only available to bar rights or actions over which an agency has discretionary authority, does not bar a state agency from executing its statutory duties, and will be applied only when an agency has engaged in a shocking degree of aggravated and overreaching conduct or when right and justice demand it. *Waters-Haskins v. N.M. Human Services Dep't*, 2009-NMSC-031, 146 N.M. 391, 210 P.3d 817, rev'g 2008-NMCA-127, 144 N.M. 853, 192 P.3d 1230.

Equitable estoppel can be asserted as a defense to bar enforcement of a food stamp overpayment claim. *Waters-Haskins v. N.M. Human Services Dep't*, 2009-NMSC-031, 2009-NMSC-031, 146 N.M. 391, 210 P.3d 817, rev'g 2008-NMCA-127, 144 N.M. 853, 192 P.3d 1230.

"Affirmative defense" defined. — An affirmative defense is that state of facts provable by defendant which will bar plaintiff's recovery once plaintiff's right to recover is otherwise established. It is a descendant of the common-law plea in "confession and avoidance", which permitted a defendant who was willing to admit that plaintiff's

declaration demonstrated a prima facie case to then go on and allege or prove additional new material that would defeat plaintiff's otherwise valid cause of action. *Bendorf v. Volkswagenwerk Aktiengesellschaft*, 88 N.M. 355, 540 P.2d 835 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975), aff'd, 90 N.M. 414, 564 P.2d 619 (Ct. App. 1977).

A provision in a contract for the carriage of goods which limits the carrier's liability is a matter of affirmative defense, as it raises matter outside the scope of plaintiff's prima facie case. *Fredenburgh v. Allied Van Lines*, 79 N.M. 593, 446 P.2d 868 (1968).

An affirmative defense is that state of facts provable by defendant which would bar plaintiff's right to recover. *Berry v. Meadows*, 103 N.M. 761, 713 P.2d 1017 (Ct. App. 1986).

An affirmative defense ordinarily refers to a state of facts provable by defendant that will bar plaintiff 's recovery once a right to recover is established. *Beyale v. Arizona Pub. Serv. Co.*, 105 N.M. 112, 729 P.2d 1366 (Ct. App. 1986).

Proper to assert affirmative defenses against sovereign. — No one would assert that in an action by the sovereign valid legal defenses should be denied the defendant. Affirmative defenses may be pleaded, and defendant is entitled to the benefit of the same if proved. *State ex rel. State Hwy. Comm'n v. Town of Grants*, 69 N.M. 145, 364 P.2d 853 (1961).

Counterclaim as answer raising affirmative defense. — It is proper for courts to treat a defendant's pleading denominated a counterclaim as an answer raising an affirmative defense, regardless of its title, if the allegations of the pleading so required. *Quirico v. Lopez*, 106 N.M. 169, 740 P.2d 1153 (1987).

Contributory negligence embraces both negligence and proximate cause. *Fitzgerald v. Valdez*, 77 N.M. 769, 427 P.2d 655 (1967).

Conventional contributory negligence is no defense when doctrine of strict liability applies, but contributory negligence in the form of assumption of risk in that the plaintiff assumed the risk of his injuries or damages by voluntarily and unreasonably proceeding to encounter a known danger is available as a defense. *Bendorf v. Volkswagenwerk Aktiengesellschaft*, 88 N.M. 355, 540 P.2d 835 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975), aff'd, 90 N.M. 414, 564 P.2d 619 (Ct. App. 1977).

Answer sufficiently alleged estoppel and waiver. — Where defendant in answer alleged that plaintiff was "estopped," had "waived strict compliance" and had accepted drilling of second well and that it would be unjust and inequitable to permit plaintiff to rely on the statute of frauds or a literal performance of the contract, the allegations of the answer adequately presented the issue in compliance with this rule. *Yucca Mining & Petroleum Co. v. Howard C. Phillips Oil Co.*, 69 N.M. 281, 365 P.2d 925 (1961).

Fraud is a defense by way of new matter, and proof of it is not admissible under the general denial. *Puritan Mfg. Co. v. Toti & Gradi*, 14 N.M. 425, 94 P. 1022 (1908) (decided under former law).

Res judicata sufficiently pleaded. — A pleading of former adjudication is sufficient if it shows scope of former adjudication and relation of parties to it; an answer pleading decree in quiet title action is sufficient in action on note and to foreclose mortgage. *Zintgraff v. Sisne*y, 31 N.M. 564, 249 P. 108 (1926) (decided under former law).

Res judicata defense rejected where no prior judgment on merits. — Where there is nothing showing a judgment on the merits in a prior replevin action, the trial court correctly rejects the defense of res judicata in a suit for conversion because of failure of proof. *Miller v. Bourdag*e, 98 N.M. 801, 653 P.2d 177 (Ct. App. 1982) (specially concurring opinion).

Claims arising after first lawsuit. — Claims that arise from circumstances that come into existence after a first lawsuit is filed are not barred because of res judicate on the ground that plaintiff should have joined them in the first law suit. *Brooks Trucking Co., Inc. v. Bull Rogers, Inc.*, 2006-NMCA-025, 139 N.M. 99, 128 P.3d 1076.

State court judgment not res judicata. — Defendant company has not established that the facts upon which its liability in the instant cases is predicated were directly adjudicated in the state court actions, and hence the judgment in the state court actions is not res judicata. *Glass v. United States Rubber Co.*, 382 F.2d 378 (10th Cir. 1967).

Election of remedies is a defense in New Mexico. A successful suit in equity precludes an action at law. *Three Rivers Land Co. v. Maddoux*, 98 N.M. 690, 652 P.2d 240 (1982), overruled on other grounds by *Universal Life Church v. Coxon*, 105 N.M. 57, 728 P.2d 467 (1986).

And no exception where court refuses amendment of complaint to include damage claim. — An exception to the doctrine of res judicata does not exist where the trial court does not allow the plaintiffs to amend their complaint in equity to include a claim for damages based on the trial court's belief that mixing questions of law and equity would be confusing. The plaintiff's recourse against an incorrect refusal of an amendment is direct attack by means of an appeal from an adverse judgment. *Three Rivers Land Co. v. Maddoux*, 98 N.M. 690, 652 P.2d 240 (1982), overruled on other grounds by *Universal Life Church v. Coxon*, 105 N.M. 57, 728 P.2d 467 (1986).

Election of remedies prevents vexatious and multiple litigation. — Election of remedies is a rule of judicial administration. Its underlying purpose is to prevent vexatious and multiple litigation of causes of action arising out of the same subject matter. *Three Rivers Land Co. v. Maddoux*, 98 N.M. 690, 652 P.2d 240 (1982), overruled on other grounds by, *Universal Life Church v. Coxon*, 105 N.M. 57, 728 P.2d 467 (1986).

Fraud, error and deception affirmative defenses. — To admit the equitable defenses of fraud, error or deception, such defenses must be pleaded; particularly is this true where the rights of third parties have intervened. *Shipley v. Ballew*, 57 N.M. 11, 252 P.2d 514 (1953).

Likewise good faith. — Under this rule a party is required to plead and prove his good faith for it to be available to him as an affirmative defense. *Witt v. Skelly Oil Co.*, 71 N.M. 411, 379 P.2d 61 (1963).

Claimed settlement agreement was affirmative defense which defendants had the burden to prove. *Arretche v. Griego*, 77 N.M. 364, 423 P.2d 407 (1967).

Likewise ratification of conversion. — In an action for conversion of chattels, subsequent ratification by the plaintiff of the acts constituting the conversion is new matter and must be pleaded as such; it cannot be shown under a general denial. *Southern Car Mfg. & Supply Co. v. Wagner*, 14 N.M. 195, 89 P. 259 (1907) (decided under former law).

And allegation as to plaintiff's failure to assert licensed status. — The defense alleging plaintiff's failure to assert his contractor's license under 60-13-30 NMSA 1978 was affirmative in nature and should have been pleaded, although the proceedings at trial injected it as an issue. *American Bldrs. Supply Corp. v. Enchanted Bldrs., Inc.*, 83 N.M. 503, 494 P.2d 165 (1972).

And contention as to lots encumbered by mortgage. — Defendants' contention that a mortgage included all lots in a subdivision including those allegedly excepted and that foreclosure should also include those lots was in the nature of an affirmative defense, which should have been affirmatively pleaded and thereafter proven at trial; failing this, defendants could not attack the trial court's findings as to the property covered by the mortgage. *Seasons, Inc. v. Atwell*, 86 N.M. 751, 527 P.2d 792 (1974).

Federal preemption is an avoidance of an otherwise valid state law claim and must be pleaded or waived. *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 899 P.2d 576 (1995).

Product misuse as affirmative defense. — There is much confusion as to whether and when product misuse by plaintiff which contributes to his injuries will be available as an affirmative defense in a products liability case. *Bendorf v. Volkswagenwerk Aktiengesellschaft*, 88 N.M. 355, 540 P.2d 835 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975), aff'd, 90 N.M. 414, 564 P.2d 619 (Ct. App. 1977).

Since automobile accidents or collisions caused by negligent driving are reasonably foreseeable, the defense of product misuse cannot be based on facts tending to prove negligent driving by plaintiff that resulted in a collision. *Bendorf v. Volkswagenwerk Aktiengesellschaft*, 88 N.M. 355, 540 P.2d 835 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975), aff'd, 90 N.M. 414, 564 P.2d 619 (Ct. App. 1977).

Basis of counterclaim identical to affirmative defense in answer. — Where the basis of the claim in counterclaim is identical to the affirmative defense in answer, the trial court was correct in ruling that the counterclaim was merely a reiteration of the affirmative defense and therefore would not be treated as a counterclaim requiring a responsive pleading. *Quirico v. Lopez*, 106 N.M. 169, 740 P.2d 1153 (1987).

Answer substantially complied with rule. — There was substantial compliance with this rule where plaintiff's answer to counterclaim specifically stated that "said contract was terminated by mutual agreement of the parties" and the pretrial order contained a statement that the plaintiff was contending that the written contract had been terminated by mutual agreement of the parties. *Plateau, Inc. v. Warren*, 80 N.M. 318, 455 P.2d 184 (1969).

Claim avoiding liability is affirmative defense. — A claim of "prior satisfaction" would be a claim avoiding liability and, thus, an affirmative defense. *Vaca v. Whitaker*, 86 N.M. 79, 519 P.2d 315 (Ct. App. 1974).

Likewise defense of justification. — The defense that defendants' easement was altered by lawful authority is an affirmative defense of justification (a plea of confession and avoidance) and rightly should be pleaded as new matter. *Posey v. Dove*, 57 N.M. 200, 257 P.2d 541 (1953).

But not denying validity of lien. — Failure of lessee's chattel mortgagee to plead "bona fide purchaser" as a defense would not estop him from denying validity of the landlord's lien as provided in the lease. *Heyde v. State Sec., Inc.*, 63 N.M. 395, 320 P.2d 747 (1958).

Notice as defense. — If notice is "placed in issue," it is plaintiff 's burden to prove it. Although plaintiff must prove notice if placed in issue, defendant has the obligation to raise the issue initially. In this respect, notice is an affirmative defense. *Beyale v. Arizona Pub. Serv. Co.*, 105 N.M. 112, 729 P.2d 1366 (Ct. App. 1986).

Trial court did not abuse its discretion in refusing to allow an employer to litigate the issue of whether an employee seeking workmen's compensation gave notice of an alleged accident where the employer first raised the issue in its opening statement and where the employee would have been prejudiced either by its inclusion as an issue in the case or by another continuance. *Beyale v. Arizona Pub. Serv. Co.*, 105 N.M. 112, 729 P.2d 1366 (Ct. App. 1986).

Recoupment as defense. — While a municipality may not assert a counterclaim against the state arising out of the same transaction or occurrence because of sovereign immunity, the municipality may clearly assert damages as a recoupment against any recovery by the state, and this constitutes not a counterclaim but a defense. *State ex rel. State Hwy. Comm'n v. Town of Grants*, 69 N.M. 145, 364 P.2d 853 (1961).

Mitigation of damages is affirmative defense which the defendant must plead, and the burden of proof is on defendant to minimize the damages. *Acme Cigarette Servs., Inc. v. Gallegos*, 91 N.M. 577, 577 P.2d 885 (Ct. App. 1978).

Set off claims not affirmative defenses. — In a suit based on the Federal Employer's Liability Act, the employer properly raised set off claims for reimbursement for payments made to the plaintiff during the pendency of the suit in post-verdict motion; set off claims were not affirmative defenses so as to be barred for failure to plead them prior to jury's verdict, although the payments to employee were made pursuant to the collective bargaining agreement between employer and employee. *Washington v. Atchison, T. & S.F. Ry.*, 114 N.M. 56, 834 P.2d 433 (Ct. App. 1992).

Objection as to real party in interest not affirmative defense. — Although an objection that a plaintiff is not a real party in interest should be made with reasonable promptness, it is not only raisable as an affirmative defense. *Santistevan v. Centinel Bank*, 96 N.M. 730, 634 P.2d 1282 (1981).

Nor is "cause" for employment termination. — Where wrongful cause for an employment termination is put in issue by the plaintiff's complaint and by his evidence, and the defendant denies these allegations, the posture of the pleadings does not require the defendant to plead "cause" as an affirmative defense; by denying the allegations, the defendant could offer evidence to prove that the termination of employment was for a cause other than the expression of political opinion and was not in violation of constitutional rights. *Sanchez v. City of Belen*, 98 N.M. 57, 644 P.2d 1046 (Ct. App. 1982).

Burden is on defendant to raise any matter constituting avoidance or affirmative defense to plaintiff's complaint. *McCasland v. Prather*, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978).

Where the trial court failed to make a finding on a material affirmative defense, such failure must be regarded as finding such material fact against appellant, who had the burden of proof. *J.A. Silversmith, Inc. v. Marchiando*, 75 N.M. 290, 404 P.2d 122 (1965).

The plea of payment is an affirmative defense, and the burden of proof is upon the party interposing this plea. *Lindberg v. Ferguson Trucking Co.*, 74 N.M. 246, 392 P.2d 586 (1964).

Defendant bore the burden of pleading and proving the affirmative defense of the statute of frauds. *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 766 P.2d 280 (1988), cert. denied, 490 U.S. 1109, 109 S. Ct. 3163, 104 L. Ed. 2d 1026 (1989).

If affirmative defense is not pleaded or otherwise properly raised it is waived. *Fredenburgh v. Allied Van Lines*, 79 N.M. 593, 446 P.2d 868 (1968); *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P.2d 290, cert. denied, 444 U.S. 911,

100 S. Ct. 222, 62 L. Ed. 2d 145 (1979); *Santistevan v. Centinel Bank*, 96 N.M. 730, 634 P.2d 1282 (1981).

Where contributory negligence was not pleaded, raised by an affirmative pleading or tried by express or implied consent, and defendant did not seek an amendment to his pleadings, that defense was waived. *Groff v. Circle K. Corp.*, 86 N.M. 531, 525 P.2d 891 (Ct. App. 1974).

Accord and satisfaction is an affirmative defense which must be affirmatively pled and upon which the party so alleging has the burden of proof. Where accord and satisfaction was neither affirmatively pled in appellant's answer nor argued at any stage of the proceedings, it was waived. *Gallup Gamerco Coal Co. v. Irwin*, 85 N.M. 673, 515 P.2d 1277 (1973).

Failure to plead an arbitration clause as a defense to a lawsuit will be considered a waiver of the party's rights arising under such clause. *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P.2d 290, cert. denied, 444 U.S. 911, 100 S. Ct. 222, 62 L. Ed. 2d 145 (1979).

And trial court may refuse instruction thereon. — A refusal to instruct on assumption of risk when it was not stated as a defense in the pleadings and was not relied on at the pretrial hearing is not error. *Skeet v. Wilson*, 76 N.M. 697, 417 P.2d 889 (1966) (decided before 1973 amendment, which deleted assumption of risk from the list of affirmative defenses).

And appellate court will not consider. — As appellees did not plead waiver or estoppel in their answer, the case was not tried on these issues and the conclusions of law did not decide them, the possibility that the proof offered at trial might support such defenses was of no concern on appeal. *Skidmore v. Eby*, 57 N.M. 669, 262 P.2d 370 (1953).

Where no affirmative defense was made of duress in the pleadings, nor was a ruling of the court invoked thereon, this question has not been preserved for review. Soens v. Riggle, 64 N.M. 121, 325 P.2d 709 (1958).

Where laches was not pleaded as an affirmative defense and where the court was satisfied to rest its judgment on the sufficiency of tax proceedings and res judicata and made no finding with respect to adverse possession, and none was requested, adverse possession is not issuable at the supreme court level. *Otero v. Sandoval*, 60 N.M. 444, 292 P.2d 319 (1956).

Where no amendment was made or sought by the parties concerning the statute of frauds, where no findings of fact or conclusions of law were submitted by the defendants based upon the defense of the statute of frauds and where the findings and conclusions and decree of the trial court were devoid of any holding based upon the statute of frauds and there was no indication in the findings, conclusions and decree of

the court as to whether the contract sustained was written or oral, then the statute of frauds cannot be asserted for the first time in the supreme court as a defense to plaintiff's complaint. *Keirsey v. Hirsch*, 58 N.M. 18, 265 P.2d 346 (1953).

Res judicata applies where defendant is sued first by the wife, a court-appointed guardian of her husband, and then later by second guardian who claims that the first guardian was defectively appointed. In the first suit and in the second the incompetent is the real party in interest, and that identity is not destroyed by any defects in the appointment of the wife as guardian; had those defects been called to the attention of the trial court they could have been remedied, but failure in this regard did not oust the court of jurisdiction. Thus, the judgment rendered in the first case is conclusive and bars the second action. *N.M. Veterans' Serv. Comm'n v. United Van Lines*, 325 F.2d 548 (10th Cir. 1963).

Plaintiff who did not raise equitable estoppel as an affirmative defense in her reply to defendants' counterclaim was barred from doing so on appeal. *McCauley v. Tom McCauley & Son*, 104 N.M. 523, 724 P.2d 232 (Ct. App. 1986).

Res judicata defense may not be raised for first time on appeal. — In New Mexico action on New York judgment awarding plaintiff only the principal and interest due on a note, defendant could not raise the affirmative defense of res judicata as barring recovery of attorney's fees in New Mexico default judgment for the first time on appeal. *Xorbox, Div. of Green & Kellogg, Inc. v. Naturita Supply Co.*, 101 N.M. 337, 681 P.2d 1114 (1984).

Trial court may permit amendment of pleadings. — While it is true that a party should set forth affirmatively the defense of the statute of limitations and that generally this defense is waived if it is not asserted in a responsive pleading under Rule 12(h) (now Rule 1-012 NMRA), trial courts may nonetheless allow the pleadings to be amended to set up this defense. *Chavez v. Kitsch*, 70 N.M. 439, 374 P.2d 497 (1962).

Or issue may be litigated and decided. — Although the defendant did not affirmatively plead illegality as a defense in its answer nor at any time during or after the hearing move to amend its answer to include this affirmative defense as provided by Rule 15(b) (now Rule 1-015 NMRA), yet the testimony of defendant's president at trial raised the issue of illegality and was litigated without objection and specifically ruled upon by the trial court, and therefore the defendant's failure to affirmatively plead or move to amend at trial does not become an issue on appeal. *Terrill v. Western Am. Life Ins. Co.*, 85 N.M. 456, 513 P.2d 390 (1973).

If it appears that a defense is available under the issues litigated and that substantial competent evidence supports its prerequisite facts found by the court, the trial court does not commit error in considering such defense and making decision on it. *Posey v. Dove*, 57 N.M. 200, 257 P.2d 541 (1953).

But opponent must not be prejudiced. — Truth is an affirmative defense to slander action, and notice of defenses must be given with sufficient particularity to adequately inform the plaintiff of the defenses he must be prepared to meet. Thus, where defendants failed to allege the affirmative defense of truth in their answer, the trial court correctly excluded evidence on this matter. *Eslinger v. Henderson*, 80 N.M. 479, 457 P.2d 998 (Ct. App. 1969).

Defendant may take advantage of plaintiff's testimony establishing affirmative defense. — Whether or not an affirmative defense is pleaded as required by this rule, a defendant may take advantage of plaintiff's testimony if the defense is established thereby. *Skeet v. Wilson*, 76 N.M. 697, 417 P.2d 889 (1967).

Or may amend pleading to conform to evidence. — Where party amended his counterclaim at conclusion of trial to insert defense of waiver, the amendment was to conform the pleadings to the evidence under Rule 15(b) (now Rule 1-015 NMRA), and not to insert an affirmative defense. *Western Farm Bureau Mut. Ins. Co. v. Lee*, 63 N.M. 59, 312 P.2d 1068 (1957).

Or raise statute of limitations by motion where defense apparent from pleading. — The defense of the statute of limitations may be raised by motion to dismiss where it is clearly apparent on the face of the pleading that the action is barred. *Roybal v. White*, 72 N.M. 285, 383 P.2d 250 (1963), overruled on other grounds by *Roberts v. Southwest Community Health Servs.*, 114 N.M. 248, 837 P.2d 442 (1992).

Laches. — Where a registered shareholder sold and transferred the shareholder's original certificate of shares in the defendant corporation; the original certificate was subsequently transferred to plaintiff in 1989; when plaintiff attempted to register the original certificate in plaintiff's name in 1990, the corporation refused to register the certificate; in 1998, a descendant of the registered shareholder inquired about buying the original certificate from plaintiff; the descendant filed an affidavit with the corporation in 2004 stating that the descendant was the successor of the estate of the registered shareholder and the corporation issued a replacement certificate to the descendant; and in 2007, when plaintiff discovered that the corporation had issued a replacement certificate to the descendant, plaintiff filed suit for fraud, plaintiff's claim against the descendant was not barred by laches because the descendant's conduct did not give rise to plaintiff's complaint concerning the corporation's refusal to register the certificate in 1990; plaintiff did not engage in unreasonable delay in filing a lawsuit after plaintiff discovered that the descendant had obtained a replacement certificate; the descendant knew that plaintiff possessed the original certificate and claimed ownership of the original certificate; and although material witnesses had died, the witnesses had died before plaintiff obtained possession of the original certificate. *Wilde v. Westland Dev. Co., Inc.*, 2010-NMCA-085, 148 N.M. 627, 241 P.3d 628.

V. EFFECT OF FAILURE TO DENY.

Generally as to effect of failure to deny. — Matter clearly averred in both complaint and cross-complaint and not denied in answer must be taken as true. *Citizens Nat'l Bank v. Davisson*, 229 U.S. 212, 33 S. Ct. 625, 57 L. Ed. 1153 (1913).

No proof is required as to that which is admitted in the pleadings. Panzer v. Panzer, 87 N.M. 29, 528 P.2d 888 (1974).

The value of the thing converted is a material allegation in trover and conversion; hence, where alleged and not denied, no proof of value is required. *Bruton v. Sakariason*, 21 N.M. 438, 155 P. 725 (1916) (decided under former law).

Effect of interpleader on amount due. — Where by its answer and interpleader appellant sought to be relieved from liability by paying into court the amount of the fund to the extent of its liability and by bringing into court another claimant of the fund, thereby compelling the two claimants to litigate their rights at their own expense, there can be no question as to the amount due, or a demurrer will lie. *Bowman Bank & Trust Co. v. First Nat'l Bank*, 18 N.M. 589, 139 P. 148 (1914) (decided under former law).

VI. PLEADING TO BE CONCISE AND DIRECT; CONSISTENCY.

Word "shall" in Subdivision (e)(1) (see now Paragraph E(1)) is mandatory. *Mantz v. Follingstad*, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972).

Claimant need not designate reliance on estoppel by name. — No specific charge is made on an original pleader to designate reliance on estoppel by name. *South Second Livestock Auction, Inc. v. Roberts*, 69 N.M. 155, 364 P.2d 859 (1961).

Affidavit in replevin treated as complaint. — Where affidavit in replevin was filed in place of a separate complaint, but affidavit contained all the essential allegations of a complaint, it should have been treated as both affidavit and complaint. *Burnham-Hanna-Munger Dry Goods Co. v. Hill*, 17 N.M. 347, 128 P. 62 (1912) (decided under former law).

No appeal where trial court grants only one of alternative prayers. — Where alternative prayers are submitted to the trial court for consideration and the trial court rules in favor of one and against the other, the submitting party has received what he sought and is not entitled to appeal. *Galvan v. Miller*, 79 N.M. 540, 445 P.2d 961 (1968).

Distinct claims based on same instrument properly in one complaint. — Two distinct and different claims based on same instrument may be stated in same complaint but in different counts. *Ross v. Carr*, 15 N.M. 17, 103 P. 307 (1909) (decided under former law).

Objection to intermingling several causes of action in one count should be made by motion to make more definite and certain. *Valdez v. Azar Bros.*, 33 N.M. 230, 264 P. 962 (1928) (decided under former law).

Doctrine of election of remedies no longer defense. — The doctrine of election of remedies is not a doctrine of substantive law but a rule of procedure or judicial administration, and it is no longer a defense as the common-law doctrine has no application under this rule. *Buhler v. Marrujo*, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974).

Plaintiffs' complaint in one district seeking compensatory and punitive damages for fraud on the part of defendant for inducing plaintiffs to enter into a contract for the purchase of certain real estate did not constitute a conclusive election of remedies to bar a suit for specific performance in another district. *Buhler v. Marrujo*, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974).

Claim of error, that two counts of complaint are inconsistent and that plaintiff should under the doctrine of election of remedies assert and rely on one, but not both, of his positions, lacks merit in view of this rule, which permits a party to state as many claims as he has regardless of consistency. *Platco Corp. v. Shaw*, 78 N.M. 36, 428 P.2d 10 (1967).

Defendants are not to be penalized for asserting defenses authorized by these rules. *Romero v. J.W. Jones Constr. Co.*, 98 N.M. 658, 651 P.2d 1302 (Ct. App. 1982).

Admissions unavoidably contained in one defense cannot be used against defendant in another. — In wrongful death action instruction that it was incumbent upon the plaintiff to establish the cause of death as alleged was proper in view of this rule because it follows therefrom that admissions unavoidably contained in one defense cannot be used against the defendant in another, for to hold otherwise would greatly impair or totally destroy the right to plead inconsistent defenses. *McMurdo v. Southern Union Gas Co.*, 56 N.M. 672, 248 P.2d 668 (1952).

Legal and equitable defenses proper. — Defendant may set up by way of answer or counterclaim both legal and equitable defenses. *Field v. Sammis*, 12 N.M. 36, 73 P. 617 (1903) (decided under former law).

Party may recover both legal and equitable relief. — This rule permits a party to state as many claims as he has regardless of consistency; thus one may recover in either damages or rescission, and the rule would also apply to claims for damages or specific performance. *Buhler v. Marrujo*, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974).

VII. CONSTRUCTION OF PLEADINGS.

Theory behind rule. — Rules of Civil Procedure reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome; the purpose of pleading is to facilitate a proper decision on the merits. Hambaugh v. Peoples, 75 N.M. 144, 401 P.2d 777 (1965).

The purpose of pleading is to facilitate proper decisions on the merits; therefore, all pleadings should be construed so as to do substantial justice. Morrison v. Wyrsch, 93 N.M. 556, 603 P.2d 295 (1979); Transamerica Ins. Co. v. Sydow, 97 N.M. 51, 636 P.2d 322 (Ct. App. 1981).

Although proper pleading is important, its importance inheres in its effectiveness as a means of accomplishing substantial justice. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

The established policy of the Rules of Civil Procedure require that the rights of litigants be determined by an adjudication on the merits rather than upon the technicalities of procedure and form. Transamerica Ins. Co. v. Sydow, 97 N.M. 51, 636 P.2d 322 (Ct. App. 1981).

The general policy on pleadings requires that an adjudication on the merits rather than technicalities of procedures and form shall determine the rights of the litigants. Sanchez v. City of Belen, 98 N.M. 57, 644 P.2d 1046 (Ct. App. 1982).

Amendments to pleadings are favored, and the right thereto should be liberally permitted in the furtherance of justice. Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965), overruled on other grounds, Lakeview Invs., Inc. v. Alamogordo Lake Village, Inc., 86 N.M. 151, 520 P.2d 1096 (1974), overruled on other grounds, Sundance Mechanical & Util. Corp. v. Atlas, 109 N.M. 683, 789 P.2d 1250 (1990).

In the promotion of justice, amendments of pleadings are to be encouraged, and provisions therefor should be construed liberally. Newbold v. Florance, 54 N.M. 296, 222 P.2d 1085 (1950).

Even after dismissal for failure to state cause of action. — After dismissal of an original complaint in action on an account for failure to state a cause of action, an amended complaint would not be barred either by res judicata or any application of the law of the case. Newbold v. Florance, 54 N.M. 296, 222 P.2d 1085 (1950).

Pleadings deemed amended by trial court. — Recovery should be allowed on quantum meruit even though suit was originally framed on express contract, and amendment to pleadings should be freely allowed to accomplish this purpose at any stage of proceedings, including considering pleadings amended to conform to proof. State ex rel. Gary v. Fireman's Fund Indem. Co., 67 N.M. 360, 355 P.2d 291 (1960).

Issues not pleaded may be considered. — Fact that complaint in action for damage to automobile contained no allegations touching on agency of defendant's employee or the master and servant doctrine did not render inadmissible testimony by plaintiff that he delivered automobile to defendant's employee, absent any claim by defendant that he would have had evidence available to meet the claim had such matter been pleaded. Hite v. Worley, 56 N.M. 83, 240 P.2d 224 (1952).

Husband's action for change of custody implicitly involved consideration of future child support if change of custody were made, and although it would have been better practice to plead for modification of child support when seeking change of custody, failure to do so did not preclude consideration of issue on due process grounds since questions of change of custody and child support are so inextricably related. Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976).

But pleader held to what has been specifically pleaded. — Under this rule, it is sufficient to plead generally a claim for relief, but once a pleader pleads specifically he will be held to what has been specifically pled. In re Doe, 87 N.M. 253, 531 P.2d 1226 (Ct. App.), cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975).

Where plaintiffs asserting a prescriptive right to flow waters through culvert and thence through lands of defendants from whom they sought recovery for flood damage pleaded some, but not all, of the elements necessary to establish the right, they would be held to those specifically stated; plea of continuous, uninterrupted, adverse and exclusive use was insufficient for failure to contain all elements; the pleading might have been sufficient had it only claimed a prescriptive right. Martinez v. Cook, 56 N.M. 343, 244 P.2d 134 (1952).

Issues preserved for review where parties file briefs and argue before district court. — Issues are preserved for review where, although a responsive pleading is not filed, both parties to an action file briefs and argue before the district court. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Limits to liberal construction of pleadings. — A court under the guise of liberal construction of a pleading cannot supply matters which the pleading does not contain, nor can the rules of pleading be totally disregarded, if there is to be an orderly disposition of cases; thus, when a party claims a statutory right, his pleading must contain all of the allegations necessary to bring him within the purview of the statute. Wells v. Arch Hurley Conservancy Dist., 89 N.M. 516, 554 P.2d 678 (Ct. App. 1976).

Prayer for relief is not part of complaint and cannot be considered as adding to the allegations. Chavez v. Potter, 58 N.M. 662, 274 P.2d 308 (1954), overruled on question of recovery in quantum meruit in suit on express contract. State ex rel. Gary v. Fireman's Fund Indem. Co., 67 N.M. 360, 355 P.2d 291, 84 A.L.R.2d 1072 (1960). See also Heth v. Armijo, 83 N.M. 498, 494 P.2d 160 (1972).

1-008.1. Pleadings and papers; captions.

Pleadings and papers filed in the district courts shall have a caption or heading which shall briefly include:

A. the name of the court as follows:

"State of New Mexico

County of _____

_____ Judicial District";

B. the names of the parties; and

C. a title which describes the cause of action or relief requested. The title of a pleading or paper shall have no legal effect in the action.

[Approved, effective March 1, 2000.]

ANNOTATIONS

Cross references. — For form of pleadings and papers, *see* Rule 1-100 NMRA.

1-009. Pleading special matters.

A. **Capacity.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

B. **Fraud, mistake and condition of the mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.

C. **Conditions precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

D. **Official document or act.** In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

E. **Judgment.** In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

F. **Time and place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

G. **Special damage.** When items of special damage are claimed, they shall be specifically stated.

H. **Statutes.** It shall not be necessary in any pleading to set forth any statute, public or private or any special matter thereof, but it shall be sufficient for the party to allege therein that the act was done by authority of such statute, or contrary to the provisions thereof, naming the subject matter of such statute, or referring thereto in some general term with convenient certainty.

I. **Copy to be served.** When any instrument of writing upon which the action or defense is founded is referred to in the pleadings, the original or a copy thereof shall be served with the pleading, if within the power or control of the party wishing to use the same. A copy of such instrument of writing need not be filed with the district court.

[As amended, effective January 1, 1987.]

ANNOTATIONS

Compiler's notes. — Paragraphs C and E together are deemed to have superseded 105-529, C.S. 1929, which was substantially the same.

Paragraph H is deemed to have superseded 105-529, C.S. 1929, which was substantially the same. Paragraph H, together with Rule 1-044 NMRA, is deemed to have superseded 105-527, C.S. 1929, which related to pleading a right derived from a private statute.

The defense that a foreign corporation lacks capacity to sue because it has failed to comply with Section 53-17-20 NMSA 1978 is waived if it is not raised as an affirmative defense by motion or answer. Capco Acquiscub, Inc. v. Greka Energy Corporation, 2008-NMCA-153, 145 N.M. 328, 198 P.3d 354.

Pleading special matters prerequisite to relying on same. — Those matters constituting an avoidance or affirmative defense not pled as required by the rules are not available as a defense. McLean v. Paddock, 78 N.M. 234, 430 P.2d 392 (1967), overruled on other grounds Duke City Lumber Co. v. Terrel, 88 N.M. 299, 540 P.2d 229 (1975).

Rule does not excuse plaintiff who lacks capacity; once capacity is challenged, a plaintiff must show capacity. Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984), overruled on other grounds Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

Mere denial of capacity not specific negative averment. — The denial in an answer of sufficient information on which to base a conclusion is not a "specific negative averment" which places in issue the capacity of a plaintiff to sue in its capacity as a corporation. Consolidated Placers, Inc. v. Grant, 48 N.M. 340, 151 P.2d 48 (1944).

Allegation of agency sufficient to withstand dismissal. — Where the amended complaint alleges that the acts complained of were done by the defendants and by their agents, the pleading was sufficient to give defendants a fair idea of what the plaintiff is complaining. No distinct forms are necessary to state a claim and the allegations of agency are sufficient to withstand a motion to dismiss. Gonzales v. Oil, Chem. & Atomic Workers Int'l Union, 77 N.M. 61, 419 P.2d 257 (1966).

Fraud allegation prerequisite to considering the issue. — As no fraud is alleged as is required by this rule, the issue is not before the court for consideration. In re Trinchera Ranch, 85 N.M. 557, 514 P.2d 608 (1973).

Circumstances constituting fraud must be alleged with particularity. Romero v. Sanchez, 83 N.M. 358, 492 P.2d 140 (1971).

Action for fraud against opponents of a shopping center was properly dismissed for failure to state a claim because the circumstances constituting the fraud were not stated with particularity. Saylor v. Valles, 2003-NMCA-037, 133 N.M. 432, 63 P.3d 1152.

Although Section 37-1-7 NMSA 1978 is applicable to both actual fraud and constructive fraud and may be grounds for equitable estoppel for purpose of tolling the statute of limitations, plaintiff has not made a case of fraudulent concealment. FDIC v. Schuchmann, 319 F.3d 1247 (10th Cir. 2003).

Same particularity as required for pleading affirmative defenses. — This rule requires the same particularity respecting the assertion of actionable fraud in a complaint as Rule 8(c) (see now Rule 1-008 NMRA), respecting pleading affirmatively to a preceding pleading. McLean v. Paddock, 78 N.M. 234, 430 P.2d 392 (1967), overruled on other grounds Duke City Lumber Co. v. Terrel, 88 N.M. 299, 540 P.2d 229 (1975).

Particularity sufficient if fraud implied from facts alleged. — To plead a claim of fraud the evidentiary details of the claim need not be alleged. There is sufficient particularity in the pleading if the facts alleged are facts from which fraud will be necessarily implied. The allegations should leave no doubt in the defendants' minds as to the claim asserted against them. Steadman v. Turner, 84 N.M. 738, 507 P.2d 799 (Ct. App. 1973); Delgado v. Costello, 91 N.M. 732, 580 P.2d 500 (Ct. App. 1978).

Where the facts pled do not limit the allegations of fraud and, in the complaints of both buyer and seller, the general and specific allegations of ongoing false representations by real estate brokers regarding cessation of negotiations are of sufficient particularity to apprise the broker of the claims asserted against him, there is sufficient particularity in the pleading from which fraud will be necessarily implied and the claim asserted is clear. Robertson v. Carmel Builders Real Estate, 2004 NMCA-056, 135 N.M. 641, 92 P.3d 653, cert. denied, 2004-NMCERT-004.

Allegations of misrepresentation, fraud and mistake were sufficient. — Where, in an action to determine defendants' right to use a road on plaintiff's property to access oil and gas wells, plaintiffs alleged that defendants falsely represented their right to cross plaintiffs' property, knowingly made false representations to deceive and mislead plaintiffs regarding defendants' production and purchase of gas from wells located on plaintiffs' property; refused to provide information requested by plaintiffs concerning defendants' claim of access; were using roads located on one production unit to gain access to wells located on other units; and breached the duty of good faith and fair dealings by using dilatory tactics and refusing to share information with plaintiffs about unitization agreements and oil and gas leases, plaintiffs' allegations were sufficient to allege issues of misrepresentation, fraud and mistake. *Kysar v. BP America Production Co.*, 2012-NMCA-036, 273 P.3d 867.

Particularity sufficient if allegations leave no doubt as to claim asserted. — The complaint alleged fraud with sufficient particularity when the allegations left no doubt in the defendants' minds as to the claim asserted against them and the facts alleged are facts from which fraud would be necessarily implied; it is therefore unnecessary to use words such as "fraud" or "fraudulent". Maxey v. Quintana, 84 N.M. 38, 499 P.2d 356 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

Allegation that insurance agent to effect sale knowingly failed to disclose meaning of coinsurance clause is sufficient allegation of the inducement element of fraud; it leaves no doubt as to the basis for the fraud claim. Delgado v. Costello, 91 N.M. 732, 580 P.2d 500 (Ct. App. 1978).

Specific words not required in pleading. — It is unnecessary even to use words such as "fraud" or "fraudulent", provided that the facts alleged are such as constitute fraud in themselves, or are facts from which fraud will be necessarily implied. Romero v. Sanchez, 83 N.M. 358, 492 P.2d 140 (1971).

Allegation of confidential relation insufficiently particular. — An alleged confidential relation arising between appellant and the decedent because of their being coadventurers does not excuse appellant from averring fraud with particularity. Fullerton v. Kaune, 72 N.M. 201, 382 P.2d 529 (1963).

Allegation that agent sells two policies with "other insurance" clauses insufficiently particular. — Plaintiff's claim that the conduct of defendant insurer's agent in selling two policies, each of which contained an "other insurance" provision, amounts to fraud is insufficient to state a basis for relief, since fraud will not necessarily be implied from such an allegation and the allegation does not inform defendants of the claim asserted against them. Bell v. Weinacker, 88 N.M. 557, 543 P.2d 1185 (Ct. App. 1975).

Sufficiently particular facts alleged to charge fraudulent concealment. — Where plaintiff's malpractice suit, against doctor who performed an incomplete tubal ligation on her, relied on doctor's fraudulent concealment of that fact after having learned of it in a

pathology report to toll the statute of limitations, and plaintiff in her pleadings specified the date of the report, its contents, and where it could be found, coupled with the specific charge that the defendant failed to tell the plaintiff that said tubal ligation was incomplete after having had knowledge of same, it was held that she adequately provided the degree of specificity required for compliance with this rule. Hardin v. Farris, 87 N.M. 143, 530 P.2d 407 (Ct. App. 1974).

Reasonably concise pleading required. — When fraud is alleged, it must be particularized as required by this rule, but it still must be as short, plain, simple, concise and direct as is reasonable under the circumstances, and as Rules 8(a) and (e) (see now Rule 1-008 NMRA) require. Maxey v. Quintana, 84 N.M. 38, 499 P.2d 356 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

Malice may be averred generally. Stewart v. Ging, 64 N.M. 270, 327 P.2d 333 (1958).

Unaffected by requirement of proof of actual malice. — Even though the New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964), case requires proof of "actual malice", it does not require specific pleading in terms of the knowledge of falsity or reckless disregard of the truth. Ramsey v. Zeigner, 79 N.M. 457, 444 P.2d 968 (1968).

Substantial compliance sufficient to plead conditions precedent. — Although insurer's amendment was entitled an affirmative defense, alleging failure to give notice of loss and file proofs thereof, it satisfies the requirements of the rule. Were it otherwise, the true spirit of the rule would be nullified. The purpose of the amendment is to raise the issue of failure to comply with a condition precedent and to enable insured to meet that issue. Gillum v. Southland Life Ins. Co., 70 N.M. 293, 373 P.2d 536 (1961).

Rule inapplicable where contract is indefinite or alternative performance is specified. Arnold v. Wells, 21 N.M. 445, 155 P. 724 (1916) (decided under former law).

Special damages must be pleaded as well as proved in a suit for slander of title. Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

Award of special damages unjustified absent plea of same. — Where the complaint does not reveal any pleading requesting special damages, nor is the complaint amended and, although a motion to amend is made, but never accepted by the court, the court's allowance of $1,088.86 as special damages is improper. Hays v. Hudson, 85 N.M. 512, 514 P.2d 31 (1973), overruled on other grounds, Maulsby v. Magnuson, 107 N.M. 223, 755 P.2d 67 (1988).

Special damages naturally but not necessarily flow from wrongful act. — Even if the term "pain and agony" is not understood to refer to the mental conditions described by the witness, there is no necessity to specially plead these conditions. The test for whether these damages must be specially pleaded is derived from the necessity to alert the defendant as to what he must defend against. Thus general damages are such as

naturally and necessarily flow from the wrongful act, while special damages are such as naturally, but do not necessarily, flow from it. Higgins v. Hermes, 89 N.M. 379, 552 P.2d 1227 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Ordinances must be pleaded and proved. — An appellate court which is not trying the case de novo on appeal from a municipal court may not take judicial notice of municipal ordinances and such ordinances are matters of fact which must be pleaded and proved the same as any other fact. Coe v. City of Albuquerque, 81 N.M. 361, 467 P.2d 27 (1970).

Pleading alleging acts contrary to statute may refer generally to statute. — Pleading stating that defendants prevented the plaintiffs from pursuing their employment and interfered with their use of the public roads, contrary to 50-2-1 and 50-2-2 NMSA 1978, is sufficient to allege a statutory violation. Gonzales v. Oil, Chem. & Atomic Workers Int'l Union, 77 N.M. 61, 419 P.2d 257 (1966).

No denial admits signature. — Failure to deny under oath the genuineness and due execution of a written instrument, mentioned in and attached to complaint, admits that it has been signed as it purports to be, notwithstanding sworn answer denying each and every allegation of the complaint. Puritan Mfg. Co. v. Toti & Gradi, 14 N.M. 425, 94 P. 1022 (1908) (decided under former law).

Denial must be specifically addressed to signature. — If an action is brought upon a promissory note purported to be signed by the defendant, a denial under oath of the genuineness and due execution does not replace the requirement that the signature be denied under oath. Oak Grove & Sierra Verde Cattle Co. v. Foster, 7 N.M. 650, 41 P. 522 (1895) (decided under former law).

Corporation estopped to deny signature of president. — In suit by payee of note which was signed by president in presence of his brother who is treasurer, the corporation is estopped to deny its signature or the authority of the president to sign for the corporation, the payee having no knowledge of any limitation of authority, especially in view of fact that similar transactions and similar notes had been acknowledged and paid. Timberlake v. Cox Bros., 39 N.M. 183, 43 P.2d 924 (1935) (decided under former law).

Corporation may deny signature through plea, affidavit of president. — Where defendant corporation, through plea and affidavit of its president, denied that it executed or authorized any person to execute promissory note in its behalf, it constituted a denial under oath, and the trial court erred in sustaining a motion to strike it out. Oak Grove & Sierra Verde Cattle Co. v. Foster, 7 N.M. 650, 41 P. 522 (1895) (decided under former law).

Denial under this rule not affirmative defense. — A denial by the alleged maker of a promissory note, under oath, of the signature thereto, charging also that the signature is a forgery, places in issue the genuineness and due execution of the same, and does not

constitute an affirmative defense. Wight v. Citizens' Bank, 17 N.M. 71, 124 P. 478 (1912) (decided under former law).

Absent denial under oath, genuineness of writing not in issue. — Where defendants have admitted execution of a note, and no denial under oath of the genuineness of the note attached as an exhibit was made, the terms of the note are self-explanatory and no material issue remaining to be determined except the unpaid balance, court properly enters summary judgment against defendants. General Acceptance Corp. v. Hollis, 75 N.M. 553, 408 P.2d 53 (1965) (decided under former law).

Writing of corporation denied by affidavit of president. — In a suit against a corporation in assumpsit on a promissory note, purporting on its face to be the obligation of the company executed by its treasurer, where the defendant pleads that it has neither executed the note nor authorized anyone to execute it in its behalf, which was verified by the affidavit of its president, such plea so verified constitutes a denial under oath. Oak Grove & Sierra Verde Cattle Co. v. Foster, 7 N.M. 650, 41 P. 522 (1895) (decided under former law).

Rule construed to allow determination on merits. — Rule 15(b) (see now Rule 1-015 NMRA) requires that the court may and should permit the pleadings to be freely amended in order to aid in the presentation of the merits of the controversy, as long as the opposing party is not actually prejudiced, and as this rule is now integrated with the New Mexico Rules of Civil Procedure, it should be construed to conform with the general tenor of the rules, i.e., to reach the merits of the controversy and not determine the case on a mere technicality. Kleeman v. Fogerson, 74 N.M. 688, 397 P.2d 716 (1964).

Original writing not required for evidence. — Where original lease was fully set out in the complaint, made a part of it, and its genuineness admitted by the pleadings, the original lease does not have to be formally offered in evidence. City of Hot Springs v. Hot Springs Fair & Racing Ass'n, 56 N.M. 317, 243 P.2d 619 (1952).

Attached writing not evidence until admitted. — The affidavit is an instrument upon which the action is founded and cannot be admitted in evidence unless attached to the complaint; but unless and until offered in evidence, it remains as it is - merely a part of the pleadings. Wagner v. Hunton, 76 N.M. 194, 413 P.2d 474 (1966).

Attachment not required where writing not basis of claim. — Where writing is merely an item of evidence in a party's claim, a copy thereof need not be attached to the complaint. Underwood v. Sapir, 58 N.M. 539, 273 P.2d 741 (1954).

Escrow agreement admissible in suit for contract damages. — In a suit not based on an escrow agreement, but instead on damages under a contract, this rule in no way operates as a bar to admission of the escrow agreement, to aid the court in ascertaining the intention of the parties as to whether the escrow provision is meant to be the

exclusive remedy in case of breach. Foster v. Colorado Radio Corp., 381 F.2d 222 (10th Cir. 1967).

Instrument of assignment admissible in action for accounting. — Where cross-complaint is not based on the instrument of assignment, the assignment, when offered in evidence, is not objectionable for failure to file such instrument, or a copy thereof, in compliance with this section. Lohman v. Reymond, 18 N.M. 225, 137 P. 375 (1913) (decided under former law).

Conditional sales contract admissible in action for default. — In action by conditional vendor to recover, for default, property sold under conditional sales contract, the contract is not basis of the action within the meaning of this rule, and is admissible, though no copy thereof is attached to the complaint, as evidence of ownership. Beebe v. Fouse, 27 N.M. 194, 199 P. 364 (1931) (decided under former law).

Notice of filing mechanic's lien admissible in foreclosure action. — In action to foreclose a mechanic's lien, a copy of the notice of lien need not be attached to the complaint, the action not being founded on the notice. Weggs v. Kreugel, 28 N.M. 24, 205 P. 730 (1922) (decided under former law).

Power of attorney admissible in action preliminary to foreclosing mortgage. — Where the action is in replevin, preliminary to foreclosure of chattel mortgage, to secure possession of a herd of cattle, and power of attorney has been given under which the mortgage was executed for mortgagor, the action is founded on the chattel mortgage and there is no necessity of attaching the power of attorney to the pleading. Laws v. Pyeatt, 40 N.M. 7, 52 P.2d 127 (1935) (decided under former law).

Orders, contracts admissible for defense of failure of consideration. — In suit on note, where defense is partial failure of consideration in that refrigerator and light plant for which note was given was destroyed by fire and was uninsured although represented to purchaser to have been insured, written orders and contracts for refrigerator and light plant are admissible in evidence, although copies were not attached to answer, since they were not the foundation of the defense. Nixon-Foster Serv. Co. v. Morrow, 41 N.M. 67, 64 P.2d 92 (1936) (decided under former law).

Written notice required as condition precedent need not be attached to plead performance. — While the giving of written notice of default as provided for in a lease is a condition precedent, in pleading performance it is sufficient to aver generally that all such conditions have been performed and it is not necessary to attach the notice or a copy thereof to the complaint. City of Hot Springs v. Hot Springs Fair & Racing Ass'n, 56 N.M. 317, 243 P.2d 619 (1952).

Inadvertent omission to attach not fatal absent prejudice. — Where plaintiffs' complaint pleads the contract and recites a copy of it is attached as an exhibit, but no copy is attached, and the same is true of the first amended complaint, such omission apparently being inadvertent, as the answer does not deny the allegation of such

attachment and in fact makes reference to the contract's having been so attached, and, moreover, defendant in his counterclaim pleads the contract and attaches a copy of it as an exhibit, then court's overruling defendant's objection to introduction of contract into evidence on the basis of this rule, if error, is harmless. Chavez v. Gribble, 83 N.M. 688, 496 P.2d 1084 (1972).

Inapplicable to statutory quiet title action. — One who, in an action to quiet title, files a complaint in statutory form need not attach thereto the instruments upon which he relies to prove his claim of title. Brown v. Gurley, 58 N.M. 153, 267 P.2d 134 (1954).

Nonattachment cured where opponent relies on same writing. — Where, in action of ejectment to recover real estate, plaintiff fails to plead either an original or copy of the contract on which his title was founded, such failure is cured by the fact that defendant claimed the same contract to be the source of his own title, and thus recognizes it as properly in evidence. Lopez v. Lucero, 39 N.M. 432, 48 P.2d 1031 (1935) (decided under former law).

Inapplicable to oral agreements, letters, agreements derived from correspondence. — This rule applies to written instruments upon which action or defense is founded and which are referred to in the pleadings, and not to a contract founded upon oral agreements, and letters, and agreements deduced from correspondence. Daughtry v. B.F. Collins Inv. Co., 28 N.M. 151, 207 P. 575 (1922) (decided under former law).

Substantial compliance sufficient. — A substantial compliance with this rule occurs where the signed note is copied in the amended complaint, pleading that note is payable to order of maker and endorsed in blank, even though the pleadings fail to show endorsements. Romero v. Hopewell, 28 N.M. 259, 210 P. 231 (1922); Miller v. Preston, 4 N.M. (Gild.) 396, 17 P. 565 (1888) (decided under former law).

Citing repealed statute not fatal to complaint. — A complaint which used the words "inverse condemnation," but cited a repealed statute, was sufficiently specific to state a claim upon which relief could be granted. Landavazo v. Sanchez, 111 N.M. 137, 802 P.2d 1283 (1990).

Nondenial admits execution of writing. — In a suit on interest coupons, where there is no plea denying under oath the execution of the coupons, they are admissible in evidence under the common-money counts, without further proof of their execution. Coler v. Board of County Comm'rs, 6 N.M. 88, 27 P. 619 (1891) (decided under former law).

Genuineness admitted absent denial under oath. — After an answer to a verified complaint on a promissory note had been stricken out as "sham and unverified," and defendant has elected not to amend, but to stand on his answer, it is not error to adjudge him in default and to render judgment against him. Pilant v. S. Hirsch & Co., 14 N.M. 11, 88 P. 1129 (1907) (decided under former law).

Writing in control of opponent admissible regardless of attachment. — Where a highway contractor's bond remains in the possession and control of the state and its agencies, and subcontractor suing thereon cannot include it in his pleading, it is not error to receive the bond in evidence. Silver v. Fidelity & Deposit Co., 40 N.M. 33, 53 P.2d 459 (1935) (decided under former law).

Law reviews. — For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M.L. Rev. 367 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Associations and Clubs § 59; 19 Am. Jur. 2d Corporations §§ 2220, 2225; 22 Am. Jur. 2d Damages § 26 et seq.; 37 Am. Jur. 2d Fraud and Deceit §§ 424 to 427; 51 Am. Jur. 2d Limitations of Actions § 459; 61A Am. Jur. 2d Pleading §§ 12, 19, 31, 32, 51, 52, 69 to 79, 127, 128, 141, 144 to 149, 168 to 173, 177, 183, 204.

Necessity and sufficiency of reply to answer pleading statute of limitations, 115 A.L.R. 755.

Pleading res judicata, 120 A.L.R. 8

Manner of pleading foreign statute, 134 A.L.R. 570.

Pleading or attempting to prove by way of setoff, counterclaim, or recoupment, related claim barred by statute of limitations, as waiver of defendant's plea of limitation against plaintiff's claim, 137 A.L.R. 324.

Amendment of pleading with respect to parties or their capacity as ground for a continuance, 67 A.L.R.2d 477.

Necessity and manner, in personal injury or death action, of pleading special damages in nature of medical, nursing, and hospital expenses, 98 A.L.R.2d 746.

Punitive damages: relationship to defendant's wealth as factor in determining propriety of award, 87 A.L.R.4th 141.

7 C.J.S. Associations §§ 40 to 44; 25 C.J.S. Damages § 131; 54 C.J.S. Limitations of Actions § 282; 71 C.J.S. Pleading §§ 9 to 14, 21, 22, 25, 27, 33, 53, 54, 76, 80, 86 to 88, 372, 375.

1-010. Form of pleadings.

A. **Caption; names of parties.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Paragraph A of Rule 1-007 NMRA. In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

B. **Paragraphs; separate statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

C. **Adoption by reference; exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

[Approved, effective August 1, 1942; as amended, effective January 1, 1987; August 1, 1989; as amended by Supreme Court Order 07-8300-16, effective August 1, 2007.]

ANNOTATIONS

The 2007 amendment, approved by Supreme Court Order 07-8300-16, effective August 1, 2007, amended Paragraph B to delete the sentence prohibiting an allegation for damages in a specific amount unless it is a necessary allegation of the complaint. See Rule 1-008 NMRA was also amended by Supreme Court Order 07-8300-16 to add the sentence deleted from this rule.

I. GENERAL CONSIDERATION.

Cross references. — For when name of defendant unknown, *see* Section 38-2-6 NMSA 1978.

Compiler's notes. — This rule in conjunction with Rule 1-008 is deemed to have superseded 105-404, 105-501, 105-511, 105-525, C.S. 1929, which were substantially the same.

Notice of contest in election case takes place of conventional complaint in an ordinary lawsuit and it must contain a plain statement of the claim showing that the pleader is entitled to relief. Ferran v. Trujillo, 50 N.M. 266, 175 P.2d 998 (1946) (decided under former law).

Law reviews. — For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pleading §§ 31 to 79, 112 to 116, 118 to 126, 129, 136, 159, 161, 180, 181 205 to 207, 209 to 211.

Propriety and effect of use of fictitious name of plaintiff in federal court, 97 A.L.R. Fed. 369.

71 C.J.S. Pleading §§ 9, 63 to 98, 371 to 375.

II. CAPTION.

All parties on one side not one party. — The New Mexico Rules of Civil Procedure, as well as the common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of a lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

III. PARAGRAPHS.

The objective of the paragraph is clarity in pleading. At the same time dilatory motions for separate paragraphing or separate statements are discouraged, since rigid requirements are not laid down. Jernigan v. New Amsterdam Cas. Co., 69 N.M. 336, 367 P.2d 519 (1961).

Multiple counts arising from one transaction considered alternative pleadings. — Where a complaint is in separate counts, and all counts arise from the same transaction or occurrence, such a complaint will be considered as a whole with the counts to be viewed as alternative pleadings of one cause of action even though against more than one defendant; each count need not be sufficient in itself nor state a claim upon which relief can be granted. Jernigan v. New Amsterdam Cas. Co., 69 N.M. 336, 367 P.2d 519 (1961).

Even flagrant violators have right to amend. — It was an abuse of discretion by the trial court to dismiss complaint without leave to amend although it disclosed flagrant disregard of this rule. Hambaugh v. Peoples, 75 N.M. 144, 401 P.2d 777 (1965); Peoples v. Peoples, 72 N.M. 64, 380 P.2d 513 (1963).

Complete statement of specific facts for contest necessary. — Allegation in notice of election contest that "by reason of the erroneous receiving, counting, tallying, and return of the votes . . . the correct result thereof was not certified to the county canvassing board" was not a sufficiently complete statement of the specific facts on which the grounds for contest were based. Ferran v. Trujillo, 50 N.M. 266, 175 P.2d 998 (1946) (decided under former law).

Request for specific money damages. — Where filing of original complaint initiating civil action preceded the effective date of this rule, a subsequent amended complaint was not subject to Subsection B's prohibition of requests for specific money damages. R.A. Peck, Inc. v. Liberty Fed. Sav. Bank, 108 N.M. 84, 766 P.2d 928 (Ct. App. 1988) (decided under former law).

IV. ADOPTION BY REFERENCE.

Pleadings from a separate case. — Paragraph C of this rule does not authorize a party to incorporate by reference pleadings from a separate case into the pleadings in the case at bar. Bronstein v. Biava, 114 N.M. 351, 838 P.2d 968 (1992).

Not necessary to attach notice of default to complaint. — While the giving of written notice of default as provided for in a lease is a condition precedent, in pleading performance it is sufficient to aver generally that all such conditions have been performed and it is not necessary to attach the notice or copy thereof to the complaint. City of Hot Springs v. Hot Springs Fair & Racing Ass'n, 56 N.M. 317, 243 P.2d 619 (1952).

1-011. Signing of pleadings, motions and other papers; sanctions; self-affirmation in lieu of notarization.

A. **Signing of pleadings, motions, and other papers; sanctions**. Every pleading, motion and other paper of a party represented by an attorney, shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address and telephone number. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading, motion or other paper is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or other paper had not been served. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. For a willful violation of this rule an attorney or party may be subjected to appropriate disciplinary or other action. Similar action may be taken if scandalous or indecent matter is inserted. A "signature" means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law.

B. **Self-affirmation in lieu of notarization.** Any person required or permitted under these rules to provide a written sworn statement, including a declaration, verification, certificate, oath, affirmation, acknowledgment, or affidavit may do so without the need for notarization by a notary public. Such a statement must state the date of execution, be signed by the person, and recite in writing that it is affirmed by the person under penalty of perjury under the laws of the State of New Mexico to be true and correct.

[As amended, effective January 1, 1995; March 1, 2005; as amended by Supreme Court Order 07-8300-40, effective February 25, 2008; by Supreme Court Order 08-8300-022, effective September 12, 2008.]

Committee commentary. — New Mexico has enacted an Electronic Authentication Documentation Act which provides for the Secretary of State to register electronic signatures using the public key technology. *See* Section 14-15-4 NMSA 1978.

Committee commentary for 2008 amendment. — The 2008 amendment to Rule 1-011 NMRA provides that any written sworn statement required or permitted under the Rules of Civil Procedure for the District Courts may be accomplished by a signed statement affirmed by the person under penalty of perjury without the need for notarization. *See* Section 30-25-1 NMSA 1978 ("Perjury consists of making a false statement under oath or affirmation, material to the issue or matter involved in the course of any judicial, administrative, legislative or other official proceeding, knowing such statement to be untrue."). Although Paragraph B now permits self-affirmation of documents in lieu of notarization, the rule change is not intended to alter any statutory requirements that may exist for notarizing documents to be filed with the courts or other governmental agencies. Moreover, nothing in the 2008 amendment prohibits a person from using a notary, and many of the Civil Forms for use in the district courts still include the option for notarization. The 2008 amendment simply provides an alternative method for providing written sworn statements that may be permitted or required under these rules.

ANNOTATIONS

Cross references. — For verification of petition in divorce actions, *see* Section 40-4-6 NMSA 1978.

For verification of pleadings in action for seizure of illegal oil, *see* Section 70-2-32 NMSA 1978.

The 1997 amendment, effective January 1, 1997, added the last sentence defining "signature".

The 2008 amendment, approved by Supreme Court Order 08-8300-022, effective September 12, 2008, deleted language in Subsection A which provided that pleadings need not be verified or accompanied by affidavit and that abolished the rule in equity that averments of an answer must be overcome by two witness or one witness and other corroborating circumstances; added Subsection B; and added the Committee comment for the 2008 amendment.

Compiler's notes. — This rule, in conjunction with Rule 1-005, is deemed to have superseded 105-510 and 105-705, C.S. 1929. It is further deemed to partially supersede 105-415, C.S. 1929, and to supersede 105-424, 105-425, 105-821, C.S. 1929.

Sanctions. – The district court's imposition of sanctions on plaintiff was appropriate where plaintiff agreed to purchase property subject to the right of defendants to reside on the property until the closing on the sale; plaintiff made a partial payment of the purchase price and the seller executed, but did not deliver, a deed on December 11, 2003; plaintiff filed an unlawful detainer action in December; but plaintiff did not pay the balance of the purchase price until May 26, 2003, the closing occurred when plaintiff paid the balance of the purchase price and plaintiff could not have pleaded with good

cause that the transaction was closed in December. Benavidez v. Benavidez, 2006-NMCA-138, 140 N.M. 637, 145 P.3d 117.

Purpose. — The primary goal of this rule is to deter baseless filings in district court by testing the conduct of counsel. Rivera v. Brazos Lodge Corp., 111 N.M. 670, 808 P.2d 955 (1991).

The objectives sought by this rule and the wording of the rule primarily place a moral obligation upon the lawyer to satisfy himself that there are good grounds for the action or defense. This requires honesty and good faith in pleading. Rivera v. Brazos Lodge Corp., 111 N.M. 670, 808 P.2d 955 (1991).

The "good ground" provision in this rule is to be measured by subjective standards at the time of the signing of the pleading. Any violation depends on what the attorney or litigant knew and believed at the relevant time and involves the question of whether the litigant or attorney was aware that a particular pleading should not have been brought. Rivera v. Brazos Lodge Corp., 111 N.M. 670, 808 P.2d 955 (1991).

The "good ground" provision of this rule is measured by a subjective standard: Any violation depends on what the attorney or litigant knew and believed at the relevant time (the signing of the pleading) and involves the question of whether the litigant or attorney was aware that a particular pleading should not have been brought. Lowe v. Bloom, 112 N.M. 203, 813 P.2d 480 (1991).

Husband signing pleading as attorney-in-fact equivalent to wife signing. — Where defendant did not personally sign the answer in the prior suit, in which appeared the admission of the debt later sued upon, but in her answer in the later suit she admitted her deceased husband signed the answer in the prior suit as attorney for her and himself, and no question had been raised as to his authority to sign the answer as her attorney or to make the admission on her behalf, then his signature on her behalf to the answer in the prior suit had the same effect as if she had personally signed. Smith v. Walcott, 85 N.M. 351, 512 P.2d 679 (1973).

Where an appellant is obviously present before the court and vigorously pursuing his case - although his name is missing from the caption of the case and he has erroneously designated someone else as the appellant - the court and all those concerned may yet have sufficient knowledge of the parties and their positions to hear the merits of the case. Mitchell v. Dona Ana Sav. & Loan Ass'n, 111 N.M. 257, 804 P.2d 1076 (1991).

Pleading stricken when required verification omitted. — Where a verification is required and is omitted, the pleading may be stricken out or judgment may be had on the pleadings. Hyde v. Bryan, 24 N.M. 457, 174 P. 419 (1918)(decided under former law).

Where the attorney objected to the judgment which included sanction, and the court also gave him notice through the order to show cause, this afforded the attorney not only the essential facts but also the notice and an opportunity to be heard; the attorney was afforded all the process he was due. Dona Ana Sav. & Loan Ass'n v. Mitchell, 113 N.M. 576, 829 P.2d 655 (Ct. App. 1991).

Sworn statement not required. — Service of a sworn statement before imposing sanctions is not required. Dona Ana Sav. & Loan Ass'n v. Mitchell, 113 N.M. 576, 829 P.2d 655 (Ct. App. 1991).

Motion to vacate a judgment need not be verified. Sheppard v. Sandfer, 44 N.M. 357, 102 P.2d 668 (1940)(decided under former law).

District court improperly imposed sanctions against an attorney for willfully failing to disclose the pendency of an action in another state involving the same issue, where the sanction awarded was based on what the attorney failed to disclose to the court, as opposed to a defect in his pleading. Cherryhomes v. Vogel, 111 N.M. 229, 804 P.2d 420 (Ct. App. 1990).

Sanctions should be entered against an attorney rather than a party for violation of the "good ground" requirement of this rule only when a pleading or other paper is unsupported by existing law rather than unsupported by facts. Rivera v. Brazos Lodge Corp., 111 N.M. 670, 808 P.2d 955 (1991).

Sanctions for filing attorney charging lien. — Where attorney significantly contributed to client's ultimate recovery on the client's claim, which client obtained after the attorney was discharged, the attorney's charging lien for a contingent fee based on the recovery stated a colorable claim and the attorney was not subject to sanctions. Rangel v. Save Mart, Inc., 2006-NMCA-120, 140 N.M. 395, 142 P.3d 983.

Sanction for excessive fee. — Where attorney recovered a $5,000 medical payment, attorney made a substantial contribution to the client's ultimate recovery of an additional $18,000, which the client obtained after the attorney was discharged, the attorney's claim for a 40% contingent fee on the recovery was not so unreasonable as to warrant sanctions. Rangel v. Save Mart, Inc., 2006-NMCA-120, 140 N.M. 395, 142 P.3d 983.

Procedural due process. — Rule 11 sanctions should be imposed rarely, they should be levied only if the mandates of procedural due process are obeyed. Rivera v. Brazos Lodge Corp., 111 N.M. 670, 808 P.2d 955 (1991).

Determining whether process is due in a Rule 11 case requires an application of familiar principles of due process. The timing and content of the notice and the nature of the hearing will depend upon an evaluation of all the circumstances and an appropriate accommodation of the competing interests involved. Rivera v. Brazos Lodge Corp., 111 N.M. 670, 808 P.2d 955 (1991).

Appellate review of Rule 11 determination. — An appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a trial court's Rule 11 determination. An abuse of discretion will be found when the trial court's decision is clearly untenable or contrary to logic and reason. Rivera v. Brazos Lodge Corp., 111 N.M. 670, 808 P.2d 955 (1991).

Case was remanded to the district court for the entry of findings and conclusions on the imposition of Rule 11 sanctions, where the supreme court was unable to review whether an abuse of discretion occurred in the imposition of sanctions for the filing of plaintiff's complaint without speculation about the subjective knowledge of the relevant facts and applicable law held by plaintiff and his attorney at the time of filing. Rivera v. Brazos Lodge Corp., 111 N.M. 670, 808 P.2d 955 (1991).

Evidence of willful violation lacking. — An earlier action for attorney fees was disposed of through a voluntary dismissal without prejudice and with no answer having been filed. The later filing of a malpractice claim against the plaintiffs in the earlier action was not a violation of this rule. Whether the claim for malpractice was a compulsory counterclaim in the earlier action was a question on which reasonable lawyers and judges could have differed. Lowe v. Bloom, 112 N.M. 203, 813 P.2d 480 (1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61B Am. Jur. 2d Pleading §§ 881 to 898.

Sufficiency of verification of pleading by person other than party to action, 7 A.L.R. 4

Perjury in verifying pleadings, 7 A.L.R. 1283.

Civil liability of attorney for abuse of process, 97 A.L.R.3d 688.

Comment Note - General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 95 A.L.R. Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for defamation, 95 A.L.R. Fed. 181.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in action for wrongful discharge from employment, 96 A.L.R. Fed. 13.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for securities fraud, 97 A.L.R. Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for infliction of emotional distress, 98 A.L.R. Fed. 442.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in antitrust actions, 99 A.L.R. Fed. 573.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 100 A.L.R. Fed. 556.

71 C.J.S. Pleading §§ 339 to 366.

1-012. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on the pleadings.

A. **When presented.** A defendant shall serve his answer within thirty (30) days after the service of the summons and complaint upon him. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within thirty (30) days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within thirty (30) days after service of the answer, or, if a reply is ordered by the court, within thirty (30) days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten (10) days after the court's action;

(2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ten (10) days after the service of the more definite statement.

B. **How presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) insufficiency of process;

(5) insufficiency of service of process;

(6) failure to state a claim upon which relief can be granted;

(7) failure to join a party under Rule 1-019 NMRA.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense in Subparagraph (6) of this paragraph to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 1-056 NMRA, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 1-056 NMRA. Motions shall be prepared and submitted in the manner required by Rule 1-007.1 NMRA.

C. **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 1-056 NMRA, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 1-056 NMRA.

D. **Preliminary hearings.** The defenses specifically enumerated in Subparagraphs (1) to (7) in Paragraph B of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in Paragraph C of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

E. **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten (10) days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

F. **Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty (30) days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

G. **Consolidation of defenses in motion.** A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter

make a motion based on the defense or objection so omitted, except a motion as provided in Subparagraph (2) of Paragraph H of this rule on any of the grounds there stated.

H. **Waiver or preservation of certain defenses.**

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process or insufficiency of service of process is waived:

(a) if omitted from a motion in the circumstances described in Paragraph G of this rule; or

(b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 1-015 NMRA to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 1-019 NMRA and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 1-007 NMRA, or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestions of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

[As amended, effective August 1, 1989.]

ANNOTATIONS

Cross references. — For certain defenses not allowed for injuries to employees, *see* Section 52-1-8 NMSA 1978.

For determining validity of actions of irrigation district, time to answer petitions, *see* Section 73-11-8 NMSA 1978.

Compiler's notes. — Paragraph A is deemed to have superseded 105-423, C.S. 1929, which was substantially the same. It is also deemed to have superseded 105-420, C.S. 1929, with Rule 1-008 NMRA, relating to replies and demurrers to the answer. It is also deemed to have superseded former Trial Court Rule 105-703a, relating to tolling of the time to plead.

Paragraph B is deemed to have superseded 105-409 to 105-415, C.S. 1929, relating to pleas in abatement, demurrers and waiver of defects not apparent on the face of the pleading. It is also deemed to have superseded former Trial Court Rule 105-408, relating to order of defensive pleadings and motions.

Paragraph E is deemed to have superseded 105-503 and 105-504, C.S. 1929, which were substantially the same.

Paragraph F is deemed to have superseded 105-503 and 105-504, C.S. 1929, which were substantially the same.

Paragraph H is deemed to have superseded 105-415, C.S. 1929, which was substantially the same.

I. GENERAL CONSIDERATION.

Waiver of sovereign immunity for bodily injury or property damage in a Tribal-State Class III Gaming Compact cannot be construed to mean or include emotional injury resulting from the invasion of privacy. Holguin v. Tsay Corporation, 2009-NMCA-056, 146 N.M. 346, 210 P.3d 243.

Malicious abuse of process. — It is not necessary for the defendant to have initiated judicial proceedings against the plaintiff in order to state a claim for malicious abuse of process. Durham v. Guest, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19, overruling in part, DeVaney v. Thriftway Marketing Corp., 1998-NMSC-001, 124 N.M. 512, 953 P.2d 277.

The elements of the tort of malicious abuse of process are the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; a primary motive in the use of process to accomplish an illegitimate end; and damages. An improper use of process may be shown by filing a complaint without probable cause or an irregularity or impropriety suggesting extortion, delay, harassment or other conduct formerly actionable under the tort of abuse of process. A use of process is deemed to be irregular or improper if it involves a procedural irregularity or a misuse or procedural devices such as discovery, subpoenas, and attachments, or indicates the wrongful use of proceedings, such as an extortion attempt. Durham v. Guest, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19, overruling in part, DeVaney v. Thriftway Marketing Corp., 1998-NMSC-001, 124 N.M. 512, 953 P.2d 277.

Malicious abuse of process in arbitration proceedings. — For purposes of the tort of malicious abuse of process, arbitration proceedings are judicial proceedings, and the improper use of process in an arbitration proceeding to accomplish an illegitimate end may form the basis of a malicious abuse of process claim. Durham v. Guest, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19, reversing, 2007-NMCA-144, 142 N.M. 817, 171 P.3d 756.

The plaintiffs' allegation that the defendant issued a subpoena during an arbitration proceeding for the purpose of extortion is sufficient to state a malicious abuse of process claim when the defendant did not initiate the arbitration proceeding against the plaintiffs. Durham v. Guest, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19, reversing

2007-NMCA-144, 142 N.M. 817, 171 P.3d 756, and overruling in part, DeVaney v. Thriftway Marketing Corp., 1998-NMSC-001, 124 N.M. 512, 953 P.2d 277.

Claim for indemnifiction. — Where the plaintiff alleged that the plaintiff rented a truck to individual lessees who suffered injuries in a rollover accident that was caused by a defective tire that was manufactured by the defendant; the plaintiff settled an action filed by the lessees for personal injuries and obtained a release of all claims from the lessees; but the plaintiff did not allege that the defendant's liability was discharged by the release obtained from the lessees, the plaintiff properly pled a cause of action against the defendant for indemnification. Budget Rent-A-Car Systems, Inc. v. Bridgestone, 2009-NMCA-013, 145 N.M. 623, 203 P.3d 154.

Trial evidence can establish the district court's jurisdiction over a defendant following an improperly denied motion to dismiss. Capco Acquiscub, Inc. v. Greka Energy Corporation, 2008-NMCA-153, 145 N.M. 328, 198 P.3d 354.

Supplemental allegations to support standing. — For purposes of ruling on a motion to dismiss for want of standing, the court may allow the plaintiff to supply particularized allegations of fact by affidavit to support the plaintiff's standing. Protection and Advocacy System v. City of Albuquerque, 2008-NMCA-149, 145 N.M. 156, 195 P.3d 1.

Individual standing. — Individuals who alleged that they had been diagnosed with mental illness and other facts to show that they met the criteria for the application to them of a proposed municipal assisted out patient treatment ordinance which provided for the taking of mentally ill persons in to custody who refused to be examined by a physician or who refused to comply with court-ordered treatment and who alleged that the ordinance denied individuals the right to refuse treatment contrary to state law which protected the right of mentally ill persons with capacity to refuse treatment, sufficiently alleged a credible threat of injury stemming from the ordinance and had standing to challenge the ordinance. Protection and Advocacy System v. City of Albuquerque, 2008-NMCA-149, 145 N.M. 156, 195 P.3d 1.

Organizational standing. — The protection and advocacy system established by Congress in 42 U.S.C. §§ 10801 to 10851 to protect and advocate the rights of individuals with mental illness whose constituents have standing to sue in their own right also has standing to challenge the proposed adoption of a municipal assisted out patient treatment ordinance which provided for the taking in to custody of mentally ill persons who refused to be examined by a physician or who refused to comply with court-ordered treatment. Protection and Advocacy System v. City of Albuquerque, 2008-NMCA-149, 145 N.M. 156, 195 P.3d 1.

Forum-selection contract clauses are properly treated as venue defenses. Ferrell v. Allstate Insurance Company, 2008-NMSC-042, 144 N.M. 405, reversing 2007-NMCA-017, 141 N.M. 72, 150 P.3d 1022.

Firefighter's rule does not bar plaintiff's claim for intentional infliction of emotional distress. — A firefighter may recover damages if such damages were proximately caused by intentional conduct, or reckless conduct, provided that the harm to the firefighter exceeded the scope of risks inherent in the firefighter's professional duties. Baldonado v. El Paso Natural Gas Company, 2008-NMSC-005, 143 N.M. 373, 176 P.3d 1105.

Claim that fees imposed an excise tax. — The trial court erred in dismissing complaint alleging fee structure in animal control ordinance was primarily a revenue matter because the issue of whether license and permit fees were reasonable presented a question of fact requiring the district court to weigh evidence. Rio Grande Kennel Club v. City of Albuquerque, 2008-NMCA-093, 144 N.M. 636, 190 P.3d 1131.

Claim that animal control ordinance infringes on interstate commerce. — The trial court erred in dismissing complaint because the issue of whether the mandatory spay and neuter provisions of the city's animal control ordinance would prohibit and eliminate the flow of business commerce as it relates to the sale of well-bred pets presented a question of fact requiring the district court to weigh evidence. Rio Grande Kennel Club v. City of Albuquerque, 2008-NMCA-093, 144 N.M. 636, 190 P.3d 1131.

Firefighter's rule. — A firefighter may recover damages if such damages were proximately caused by intentional conduct, or reckless conduct, provided that the harm to the firefighter exceeded the scope of risks inherent in the firefighter's professional duties. Baldonado v. El Paso Natural Gas Company, 2008-NMSC-005, 143 N.M. 288, 176 P.3d 277, reversing 2008-NMCA-010, 143 N.M. 297, 176 P.3d 266.

Failure to plead statutory bar to payment. — Where the defendants did not plead payment as a defense or move to amend their defense and filed a motion for summary judgment on the ground that the plaintiff was statutorily barred from seeking payment from the defendants and where the plaintiff did not object at the time to payment being used as a defense, the court property granted summary judgment on the ground that there was a statutory bar to payment. Alliance Health of Santa Teresa, Inc. v. Natl. Presto Industries, Inc., 2007-NMCA-157, 143 N.M. 133, 173 P.3d 55.

Malicious abuse of process based on procedural impropriety. — A malicious abuse of process claim based on procedural impropriety does not depend upon the outcome of the underlying lawsuit and recovery by the plaintiff is not an absolute defense to a malicious abuse of process claim founded on a procedural improprieity. Fleetwood Retail Corp. of N.M. v. Ledoux, 2007-NMSC-047, 142 N.M. 150, 164 P.3d 31.

Malicious abuse of process based on probable cause. — A malicious abuse of process claim based on probable cause is not a claim-by-claim inquiry, but is determined as to the lawsuit in its entirety and any recovery by the plaintiff is an absolute defense to a malicious abuse of process claim founded on lack of probable cause. Fleetwood Retail Corp. of N.M. v. Ledoux, 2007-NMSC-047, 142 N.M. 150, 164 P.3d 31.

Breach of contract claim dismissed. — The district court did not err when it dismissed plaintiff's breach of contract claim because defendant never entered into the contract from which the breach of contract claim originated. Healthsource, Inc. v. X-Ray Associates, 2005-NMCA-097, 138 N.M. 70, 116 P.3d 861, cert. denied, 2005-NMCERT-007.

Principal objective of rules is to resolve delays due to reliance on technicalities and to streamline generally and simplify procedures so that merits of the case may be decided without expensive preparation for trial on the merits which may not be even necessary. Benson v. Export Equip. Corp., 49 N.M. 356, 164 P.2d 380 (1945).

Applicability of summary judgment. — The trial court's authority to grant summary judgment under Rule 1-056 NMRA is not limited by a motion to dismiss under this rule when the opposing party had reasonable notice of the issues underlying the summary judgment, together with the opportunity to be heard, and failed to make a specific allegation of prejudice at the appropriate time. Aldridge ex rel. Aldridge v. Mims, 118 N.M. 661, 884 P.2d 817 (Ct. App. 1994).

Review of summary judgment. — When a party admits, for purposes of a summary judgment motion, the veracity of the allegations in the complaint, a reviewing court should consider the facts pleaded as undisputed and determine if a basis is present to decide the issues as a matter of law. GCM, Inc. v. Kentucky Cent. Life Ins. Co., 1997-NMSC-052, 124 N.M. 186, 947 P.2d 143.

Dismissal is legal, not evidentiary determination. — Petitioners' suggestions that a dismissal was premature and should have awaited a hearing on the facts were without merit, since a dismissal under the rule is a legal, not an evidentiary, determination. Johnson v. Francke, 105 N.M. 564, 734 P.2d 804 (Ct. App. 1987).

An indispensable party is one whose interests will necessarily be affected by the judgment so that complete and final justice cannot be done between the parties without affecting those rights. Jemko, Inc. v. Liaghat, 106 N.M. 50, 738 P.2d 922 (Ct. App. 1987).

The purpose of a motion to dismiss for failure to state a claim for relief is to test the legal sufficiency of the claim, not the facts that support it, and the possibility of recovery based on a state of facts provable under the claims bars dismissal. Trujillo v. Berry, 106 N.M. 86, 738 P.2d 1331 (Ct. App. 1987).

Question reviewed is whether facts state claim. — The question on review of a Paragraph B(6) dismissal is whether the facts as stated in a complaint state a claim for relief. Blea v. City of Espanola, 117 N.M. 217, 870 P.2d 755 (Ct. App. 1994).

Review of dismissal for mootness. — Since the district court dismissed the de novo appeal from an administrative ruling on the grounds of mootness, the summary judgment standard of review by which the movant must show there is no issue of

material fact and the movant is entitled to judgment as a matter of law was inappropriate. The summary judgment standard is required only when the motion amounts to one on which the merits of the case will be decided, such as a motion to dismiss for failure to state a claim upon which relief can be granted or a motion for judgment on the pleadings, not when a claim is moot because of an event which occurs separate from the merits of the case. The standard of review for mootness is one of substantial evidence in support of the district court's finding. United Nuclear Corp. v. State ex rel. Martinez, 117 N.M. 232, 870 P.2d 1390 (Ct. App. 1994).

Review of municipal board's determination. — Absent a statute providing otherwise, municipal personnel board's determinations are reviewable at the district court level only by writ of certiorari for arbitrariness, capriciousness, fraud, or lack of substantial evidence. Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 907 P.2d 182 (1995).

Doctrine of priority jurisdiction. — Where two suits between the same parties over the same controversy are brought in courts of concurrent jurisdiction, the court that first acquires jurisdiction retains jurisdiction over the whole controversy to the exclusion or abatement of the second suit. Priority jurisdiction serves the same purpose as res judicata, but operates where there is not a final judgment and instead there is a pending case. Cruz v. FTS Construction, Inc., 2006-NMCA-109, 140 N.M. 284, 142 P.3d 365, cert. granted, 2006-NMCERT-008.

II. WHEN PRESENTED.

Res judicata. — A defendant must act expeditiously to object to claim-splitting and may not simply rely on a generally stated res judicata defense in the answer to the complaint for protection against assertions of waiver and acquiescence. Concerned Residents of S.F. North, Inc., v. Santa Fe Estates, Inc., 2008-NMCA-042, 143 N.M.811, 182 P.3d 794.

Motion to dismiss tests legal sufficiency of complaint. — The motion to dismiss, which takes the allegations of the complaint to be true, questions the legal sufficiency of the complaint and is not properly used to attack the complaint upon grounds of indefiniteness and uncertainty. Carroll v. Bunt, 50 N.M. 127, 172 P.2d 116 (1946).

Determination that complaint is legally sufficient not required. — While a determination that a proposed complaint in intervention is legally sufficient - so as to withstand a motion to dismiss for failure to state a claim - is not required before the trial court may grant an application to intervene, it is certainly permissible for the court to scrutinize the proffered complaint to see whether it states a cause of action. Solon ex rel. Ponce v. WEK Drilling Co., 113 N.M. 566, 829 P.2d 645 (1992).

Failure to comply with Paragraph A disallows filing of counterclaim. — Where defendant did not comply with Subdivision (a) (see now Paragraph A) nor seek leave of court to set up the counterclaim by amendment due to an oversight, inadvertence or excusable neglect, the trial court properly disallowed the filing of the counterclaim.

Echols v. N.C. Ribble Co., 85 N.M. 240, 511 P.2d 566 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

Affirmative allegations in answer may not require reply. — Where cross-complainant alleged that a certain release of claims against an insolvent's estate was made only on one condition, while cross-defendant charged that the release was made on the same and another condition, such allegations presented a complete issue, and no reply was necessary. Affirmative allegations in an answer are not necessarily new matter requiring a replication. Lohman v. Reymond, 18 N.M. 225, 137 P. 375 (1913) (decided under former law).

Default judgment unavailable when party fails to reply. — In city's suit to recover license tax from hotel operator whose answer asserted illegality of tax and payment, to which there was no reply, defendant, waiving all defenses except payment, was not entitled to judgment by default for failure to reply to new matter in answer, without proof of payment, the question of payment having been put in issue by the answer. City of Raton v. Seaberg, 41 N.M. 459, 70 P.2d 906 (1937) (decided under former law).

Order sustaining motion to dismiss not final judgment. — An order which sustains motion to dismiss, though excepted to, is not a final judgment and therefore is not res judicata. Carroll v. Bunt, 50 N.M. 127, 172 P.2d 116 (1946).

III. HOW PRESENTED.

The defense of lack of personal jurisdiction is not waived by asserting it with other defenses in an answer or motion. Capco Acquiscub, Inc. v. Greka Energy Corporation, 2008-NMCA-153, 145 N.M. 328, 198 P.3d 354.

Rules of preservation apply. — In reviewing a dismissal under Paragraph B(6) of this rule for failure to state a claim, the normal rules of preservation apply. Therefore, it must appear that plaintiffs presented an argument below and invoked a ruling of the district court on the matter. Liberty Mut. Ins. Co. v. Salgado, 2005-NMCA-144, 138 N.M. 685, 125 P.3d 664.

Paragraph B supersedes 105-412, 1929 Comp. — Section 105-412, C.S. 1929, and authorities based thereon are superseded by Subdivision (b) (see now Paragraph B) so that the authority no longer controls. Ritter v. Albuquerque Gas & Elec. Co., 47 N.M. 329, 142 P.2d 919 (1943).

Motion is not a responsive pleading under Subdivision (b) (see now Paragraph B). Apodaca v. Unknown Heirs of Tome Land Grant, 98 N.M. 620, 651 P.2d 1264 (1982).

Paragraph B(1) motion sufficient notice to court of meritorious defense. — Though a valid arbitration defense does not divest the court of jurisdiction, and is not properly raised by a Subdivision (b)(1) (see now Paragraph B(1)) motion, such a motion

was sufficient to put the court on notice that a meritorious defense existed. Dean Witter Reynolds, Inc. v. Roven, 94 N.M. 273, 609 P.2d 720 (1980).

Assertion of failure to state claim made by motion or defense. — An assertion of failure to state a claim upon which relief can be granted can be made either by motion or by affirmative defense. Schwartzman v. Schwartzman Packing Co., 99 N.M. 436, 659 P.2d 888 (1983).

Purpose of motion under Subdivision (b)(6) (see now Paragraph B(6)) is to test the formal sufficiency of the statement of the claim for relief, i.e., to test the law of the claim, not the facts that support it. McCasland v. Prather, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978); Trujillo v. Puro, 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984); Rubio ex rel. Rubio v. Carlsbad Mun. School Dist., 106 N.M. 446, 744 P.2d 919 (Ct. App. 1987); Eturriaga v. Valdez, 109 N.M. 205, 784 P.2d 24 (1989).

Personnel board's administrative decision. — Unless otherwise provided by statute, the correct procedure to appeal a personnel board's administrative decision is to petition the district court for a writ of certiorari. Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 907 P.2d 182 (1995).

Motion to dismiss tests the legal sufficiency of the complaint. Three Rivers Land Co. v. Maddoux, 98 N.M. 690, 652 P.2d 240 (1982), overruled on other grounds Universal Life Church v. Coxon, 105 N.M. 57, 728 P.2d 467 (1986).

A motion to dismiss under Subparagraph B(6) tests the legal sufficiency of the complaint, not the facts that support it. Thompson v. Montgomery & Andrews, 112 N.M. 463, 816 P.2d 532 (Ct. App. 1991).

Affirmative defense of res judicata may properly be raised in a motion to dismiss. Universal Life Church v. Coxon, 105 N.M. 57, 728 P.2d 467 (1986), cert. denied, 482 U.S. 905, 107 S. Ct. 2482, 96 L. Ed. 2d 374 (1987) (overruling Three Rivers Land Co. v. Maddox, annotated in 1986 replacement pamphlet).

Sovereign immunity defense incidental to motion. — The defense of sovereign immunity may properly be raised incident to a motion to dismiss for failure to state a claim upon which relief can be granted. Hern v. Crist, 105 N.M. 645, 735 P.2d 1151 (Ct. App. 1987).

Raising statute of limitations defense in motion to dismiss. — The defense of the statute of limitations may be raised by a motion to dismiss where it is clearly apparent on the face of the pleading that the action is barred. Apodaca v. Unknown Heirs of Tome Land Grant, 98 N.M. 620, 651 P.2d 1264 (1982).

Motion to dismiss is inappropriate pleading with which to raise election of remedies, as a motion to dismiss tests the legal sufficiency of the complaint. Three

Rivers Land Co. v. Maddoux, 98 N.M. 690, 652 P.2d 240 (1982), overruled on other grounds Universal Life Church v. Coxon, 105 N.M. 57, 728 P.2d 467 (1986).

But dismissal motion appropriate in libel action where published material privileged or protected. — In actions for alleged libel or defamation, motions to dismiss for failure to state a claim under Subdivision (b)(6) (see now Paragraph B(6)) and summary judgment have been recognized as appropriate modes of obtaining dismissal of suits, where the published material is held as a matter of law to be privileged or constitutionally protected. Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981).

Jurisdiction of subject matter cannot be conferred by consent, much less can it be waived. Zarges v. Zarges, 79 N.M. 494, 445 P.2d 97 (1968).

Burden of establishing jurisdiction. — A party asserting jurisdiction has the burden of establishing jurisdiction when faced with a timely motion to dismiss under Paragraph B(2) of this rule. Campos Enters., Inc. v. Edwin K. Williams & Co., 1998-NMCA-131, 125 N.M. 691, 964 P.2d 855, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998).

Jurisdictional challenge requires supporting evidence. — An unverified motion to dismiss on jurisdictional grounds, not supported by affidavits or other sworn testimony, is not a sufficient challenge to plaintiff's allegations of jurisdictional facts. Aetna Cas. & Sur. Co. v. Bendix Control Div., 101 N.M. 235, 680 P.2d 616 (Ct. App. 1984).

Where jurisdictional allegations are properly and adequately traversed and challenged, plaintiff has burden to prove them at the hearing on a motion to dismiss. State ex rel. Anaya v. Columbia Research Corp., 92 N.M. 104, 583 P.2d 468 (1978).

For purposes of motion to dismiss, material allegations of complaint are admitted. Buhler v. Marrujo, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974).

But inferences drawn from allegations not admitted. — Pursuant to a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, only the allegations of the complaint are to be considered, and those allegations that are correctly pleaded are to be viewed as admitted where legal conclusions or inferences that may be drawn from the allegations by the pleader are not admitted. McNutt v. New Mexico State Tribune Co., 88 N.M. 162, 538 P.2d 804 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Pleading must state "cause of action". — With all of the rules of liberality prevailing in favor of a pleader, the pleading must state a "cause of action" in the sense that it must show "that the pleader is entitled to relief," and therefore, it is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant and the court can obtain a fair idea of what the plaintiff is complaining and can see that there is some legal basis for recovery. Kisella v. Dunn, 58 N.M. 695, 275 P.2d 181 (1954).

Objection to pleadings valid only when failure to allege material matter. — An objection to a complaint, or a cross-complaint, that it does not state facts sufficient to constitute a cause of action is good only when there is a total failure to allege some matter which is essential to the relief sought, and is not good when the allegations are simply incomplete, indefinite or statements of conclusions of law or fact. Pillsbury v. Blumenthal, 58 N.M. 422, 272 P.2d 326 (1954); Michelet v. Cole, 20 N.M. 357, 149 P. 310 (1915).

Sufficiency of objection. — Demurrers (now motions to dismiss) on the ground that the answer did not state facts sufficient to constitute any defense were sufficient. State ex rel. Walker v. Hinkle, 37 N.M. 444, 24 P.2d 286 (1933); GMAC v. Ballard, 37 N.M. 61, 17 P.2d 946 (1932); Worthington v. Tipton, 24 N.M. 89, 172 P. 1048 (1918); Evants v. Taylor, 18 N.M. 371, 137 P. 583 (1913) (decided under former law).

Motion to dismiss for failure to state claim is granted infrequently. Las Luminarias of N.M. Council of Blind v. Isengard, 92 N.M. 297, 587 P.2d 444 (Ct. App. 1978).

Only when there is total failure to allege matter essential to relief sought should a motion to dismiss for failure to state a claim be granted. Las Luminarias of N.M. Council of Blind v. Isengard, 92 N.M. 297, 587 P.2d 444 (Ct. App. 1978).

Or plaintiff unable to prove facts meriting relief on claim. — A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. McCasland v. Prather, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978).

Failure to state cause of action has no jurisdictional effect. — The failure of a complaint to state a cause of action does not interfere with or detract from the court's subject-matter jurisdiction. Such a failure has no jurisdictional effect. Sundance Mechanical & Util. Corp. v. Atlas, 109 N.M. 683, 789 P.2d 1250 (1990).

Subcontractor's failure to state a claim upon which relief could be granted by alleging in his crossclaim that he was duly licensed as a contractor did not deprive the district court of jurisdiction to enter a default judgment on the crossclaim. Sundance Mechanical & Util. Corp. v. Atlas, 109 N.M. 683, 789 P.2d 1250 (1990).

Standard for granting of motion to dismiss. — A motion to dismiss is properly granted only when it appears that plaintiff cannot recover under any state of facts provable under the claim. McCormick v. United Nuclear Corp., 87 N.M. 274, 532 P.2d 203 (Ct. App. 1974); Delgado v. Costello, 91 N.M. 732, 580 P.2d 500 (Ct. App. 1978); Eldridge v. Sandoval County, 92 N.M. 152, 584 P.2d 199 (Ct. App. 1978).

The motion is properly granted only when it appears that plaintiff cannot recover under any state of facts provable under the claim made by plaintiff. Villegas v. American Smelting & Ref. Co., 89 N.M. 387, 552 P.2d 1235 (Ct. App. 1976).

Motion to dismiss under Subdivision (b)(6) (see now Paragraph B(6)) is properly granted only when it appears that the plaintiff is not entitled to relief under any state of facts provable under the claim. Buhler v. Marrujo, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974); Church v. Church, 96 N.M. 388, 630 P.2d 1243 (Ct. App. 1981); State ex rel. Risk Mgt. Div. of Dep't of Fin. & Admin. v. Gathman-Matotan Architects & Planners, Inc., 98 N.M. 790, 653 P.2d 166 (Ct. App. 1982).

A motion to dismiss under Subdivision (b)(6) (see now Paragraph B(6)) is properly granted only when it appears that plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim. C & H Constr. & Paving, Inc. v. Foundation Reserve Ins. Co., 85 N.M. 374, 512 P.2d 947 (1973); Las Luminarias of N.M. Council of Blind v. Isengard, 92 N.M. 297, 587 P.2d 444 (Ct. App. 1978); Burke v. Permian Ford-Lincoln-Mercury, 95 N.M. 314, 621 P.2d 1119 (1981); Emery v. University of N.M. Medical Center, 96 N.M. 144, 628 P.2d 1140 (Ct. App. 1981); Environmental Imp. Div. v. Aguayo, 99 N.M. 497, 660 P.2d 587 (1983).

When the dismissal of a suit is for failure to state a claim upon which relief can be granted, the issue is whether the plaintiff would be entitled to recover under any state of facts provable under the claim that is made. Tapia v. McKenzie, 83 N.M. 116, 489 P.2d 181 (Ct. App. 1971).

The motion to dismiss a complaint should be granted only if it appears that upon no facts provable under the complaint could plaintiff recover or be entitled to relief. Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966), overruled on other grounds Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982).

A motion to dismiss a complaint is properly granted only when it appears that under no state of facts provable under the claim could plaintiff recover or be entitled to relief. Gonzales v. Gackle Drilling Co., 70 N.M. 131, 371 P.2d 605 (1962).

A complaint will not be dismissed on motion therefor unless it appears that under no state of facts provable under the claim could plaintiff recover or be entitled to relief. Chavez v. Sedillo, 59 N.M. 357, 284 P.2d 1026 (1955).

The motion to dismiss is properly allowed only where it appears that under no provable state of the facts would the plaintiff be entitled to recovery or relief, the motion being grounded upon the assertion that the complaint fails to state a claim on which relief could be given. Ritter v. Albuquerque Gas & Elec. Co., 47 N.M. 329, 142 P.2d 919 (1943).

Standard of review for Subparagraph B(6) motion. — Because the trial court considered matters outside the pleadings, an action to dismiss for failure to state a claim upon which relief can be granted had to be treated as a motion for summary judgment. The applicable standard of review, therefore, was that for summary judgment, and not the Subparagraph B(6) standard of accepting all well-pleaded facts as true and determining whether a claim has been stated upon which relief can be granted based

solely on the pleadings. V.P. Clarence Co. v. Colgate, 115 N.M. 471, 853 P.2d 722 (1993).

Motion tests legal sufficiency of complaint. — A motion to dismiss a complaint for failure to state a claim upon which relief can be granted merely tests the legal sufficiency of the complaint. McNutt v. New Mexico State Tribune Co., 88 N.M. 162, 538 P.2d 804 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

The purpose of a motion under Subdivision (b)(6) (see now Paragraph B(6)) is to test the formal sufficiency of the statement of the claim, that is, to test the law of the claim, not the facts that support it. Gonzales v. United States Fid. & Guar. Co., 99 N.M. 432, 659 P.2d 318 (Ct. App. 1983).

Motion for failure to state claim admits well-pleaded facts. — A motion to dismiss for failure to state a claim upon which relief can be granted admits well pleaded facts. Stryker v. Barbers Super Mkts., Inc., 81 N.M. 44, 462 P.2d 629 (Ct. App. 1969).

And to accept as true all facts well pleaded. — The trial court having granted a motion to dismiss for failure to state a claim upon which relief can be granted, the applicable rule to be followed is to accept as true all facts well pleaded and question only whether the plaintiff might prevail under any state of facts provable under the claim. Gomez v. Board of Educ., 85 N.M. 708, 516 P.2d 679 (1973); Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 106 N.M. 757, 750 P.2d 118 (1988).

In considering a motion to dismiss for failure to state a claim for which relief can be granted, all facts well pleaded must be accepted as true, and the motion may be granted only when it appears the plaintiff cannot be entitled to relief under any state of facts provable under the claim. Runyan v. Jaramillo, 90 N.M. 629, 567 P.2d 478 (1977); Candelaria v. Robinson, 93 N.M. 786, 606 P.2d 196 (Ct. App. 1980); State ex rel. Risk Mgt. Div. of Dep't of Fin. & Admin. v. Gathman-Matotan Architects & Planners, Inc., 98 N.M. 790, 653 P.2d 166 (Ct. App. 1982).

The applicable rule in granting a motion to dismiss on the pleadings is to accept for purposes of the motion to dismiss as true all facts well pleaded and question only whether plaintiff might prevail under any state of facts provable under the claim. Groendyke Transp., Inc. v. New Mexico SCC, 85 N.M. 718, 516 P.2d 689 (1973).

In considering whether a complaint states a claim upon which relief can be granted, courts accept as true all facts well pleaded. Ramsey v. Zeigner, 79 N.M. 457, 444 P.2d 968 (1968); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966), overruled on other grounds Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982).

In considering whether a complaint states a cause of action, the court must accept as true all facts well pleaded. Jones v. International Union of Operating Engr's Local 876, 72 N.M. 322, 383 P.2d 571 (1963); McCasland v. Prather, 92 N.M. 192, 585 P.2d 336

(Ct. App. 1978); Las Luminarias of N.M. Council of Blind v. Isengard, 92 N.M. 297, 587 P.2d 444 (Ct. App. 1978).

When considering a motion to dismiss under Subdivision (b)(6) (see now Paragraph B(6)), the well pleaded facts alleged in the complaint are taken as true. The motion should not be granted unless the court determines that the plaintiffs cannot obtain relief under any state of facts provable under the alleged claims. State ex rel. Risk Mgt. Div. of Dep't of Fin. & Admin. v. Gathman-Matotan Architects & Planners, Inc., 98 N.M. 790, 653 P.2d 166 (Ct. App. 1982).

A motion to dismiss under Paragraph B(6) is properly granted only when it appears that plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim. In ruling upon a motion to dismiss for failure to state a claim upon which relief may be granted, all facts which are well pled are assumed true, and the complaint must be construed in a light most favorable to the party opposing the motion and with all doubts resolved in favor of the sufficiency of the complaint. Shea v. H.S. Pickrell Co., 106 N.M. 683, 748 P.2d 980 (Ct. App. 1987).

For purposes of a motion to dismiss under Subdivision B(6), all well-pleaded facts in the complaint are taken as true. Fasulo v. State Farm Mut. Auto. Ins. Co., 108 N.M. 807, 780 P.2d 633 (1989).

The supreme court, in reviewing the dismissal of a complaint for failure to state a claim upon which relief may be granted, accepts as true all facts well pleaded and questions only whether the plaintiff might prevail under any state of facts provable under the claim. California First Bank v. State, 111 N.M. 64, 801 P.2d 646 (1990).

Facts well pleaded treated as facts upon which case rests. — Where a complaint is challenged on the ground that it fails to state a claim upon which relief can be granted, facts well pleaded are to be treated as the facts upon which the case rests. Balizer v. Shaver, 82 N.M. 347, 481 P.2d 709 (Ct. App. 1971).

Complaint construed in favor of opposition before motion denied. — In denying a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, the complaint must be construed in a light most favorable to opposing party and with all doubts resolved in favor of its sufficiency. Pillsbury v. Blumenthal, 58 N.M. 422, 272 P.2d 326 (1954).

Denial of motion not adjudication on merits. — The denial by the trial court of the defendants' motion to dismiss does not constitute an adjudication on the merits and does not operate as res judicata so as to restrict the trial court's consideration of the subsequent motions for summary judgment. McNutt v. New Mexico State Tribune Co., 88 N.M. 162, 538 P.2d 804 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Dismissal of contract claim under Subdivision (b)(6) (see now Paragraph B(6)) is legal, not evidentiary, determination. Vigil v. Arzola, 101 N.M. 687, 687 P.2d 1038 (1984).

Motion improper where complaint sought to void judgment in another suit. — Defendants' motion to dismiss plaintiffs' complaint should not have been granted where the complaint sought not only to have the judgment in another suit declared void, but sought other relief, including the equitable relief which was granted. The complaint should not have been dismissed for failure to state a claim upon which relief could be granted. Apodaca v. Town of Tome Land Grant, 83 N.M. 55, 488 P.2d 105 (1971).

As well as where party not named. — Defendants' motion to dismiss plaintiffs' complaint should not have been granted where at least one of the named plaintiffs in the suit in question was not named as a party in another suit. Apodaca v. Town of Tome Land Grant, 83 N.M. 55, 488 P.2d 105 (1971).

Error to dismiss where defendant's motion admits all material allegations. — Defendant's motion to dismiss admitted all well pleaded material allegations. Defendant's admissions established liability for the death of plaintiff's husband and sufficiently established plaintiff's right to compensation. The trial court erred in dismissing the petition for failure to state a claim upon which relief could be granted. Villegas v. American Smelting & Ref. Co., 89 N.M. 387, 552 P.2d 1235 (Ct. App. 1976).

And error to dismiss where provable fact exists. — A motion to dismiss is properly granted only when it appears that plaintiff cannot recover under any state of facts provable under the claim. That decedent was last injuriously exposed to the hazards of employment resultant in cancer while employed by the first of two companies operating a uranium mine was a fact provable under plaintiff's claim and the judgment dismissing the complaint against first company was reversed. McCormick v. United Nuclear Corp., 87 N.M. 274, 532 P.2d 203 (Ct. App. 1974).

Improperly granted against conversion claim. — The trial court erred in granting a dismissal motion where defendant's counterclaim alleged sufficient facts to state a claim for conversion. AAA Auto Sales & Rental, Inc. v. Security Fed. Sav. & Loan Ass'n, 114 N.M. 761, 845 P.2d 855 (Ct. App. 1992).

Subsequent motion to dismiss nullity where original rendered functus officio. — The trial court's order of January 31, 1974, dismissing the complaint as to certain of the plaintiffs was a nullity since the prior motion to dismiss of July 11, 1972, was rendered functus officio by the court's order denying it on November 6, 1972. McNutt v. New Mexico State Tribune Co., 88 N.M. 162, 538 P.2d 804 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Possibility of recovery bars dismissal. — As there are circumstances where a failure to read a contract, before signing it, does not bar recovery for fraud, therefore, under facts provable under the claim, plaintiff might recover even though he failed to read the

contract, and the trial court erred in dismissing on this ground. Pattison v. Ford, 82 N.M. 605, 485 P.2d 361 (Ct. App. 1971).

Motion to dismiss available where only questions of law present. — Where the pleadings (as well as documentary evidence) indicated that the employer of an injured minor employee qualified under Workmen's Compensation Act and that the injured employee who had not given notice of election not to come under the act had received compensation, the case could be dismissed on motion since only questions of law were presented. Benson v. Export Equip. Corp., 49 N.M. 356, 164 P.2d 380 (1945).

Allegations of dismissed complaint taken as true for appeal purposes. — Where a trial court grants a motion to dismiss for failure to state a claim, the allegations of the complaint must be taken as true for the purposes of an appeal. Bottijliso v. Hutchison Fruit Co., 96 N.M. 789, 635 P.2d 992 (Ct. App. 1981), overruled on other grounds, Michaels v. Anglo Am. Auto Auctions, Inc., 117 N.M. 91, 869 P.2d 279 (1994).

In order to survive motion to dismiss tort claim under Paragraph B(6) of this rule, a plaintiff must allege all three elements: wilful conduct in the employer's conduct, the employer's state of mind, and a casual connection between the employer's intent and the injury. Morales v. Reynolds, 2004-NMCA-098, 136 N.M. 280, 97 P.3d 612, cert. denied, 2004-NMCERT-008.

Paragraph B inapplicable to Workmen's Compensation Act. — The supreme court held that Subdivision (b) (see now Paragraph B) was inconsistent with the express provisions of the Workmen's Compensation Act, and that so far as pleadings are concerned, the Workmen's Compensation Act is complete in itself and the provisions thereof have not been modified by the rules. Henriquez v. Schall, 68 N.M. 86, 358 P.2d 1001 (1961).

Since the Workmen's Compensation Act is complete in itself its provisions have not been modified with respect to the pleadings by the Rules of Procedure promulgated by the supreme court. Guthrie v. Threlkeld Co., 52 N.M. 93, 102 P.2d 307 (1948).

Motion to dismiss proper when Workmen's Compensation Act not involved. — When plaintiff's claim shows on its face that defendant was not at time of the accident engaged in extra-hazardous occupation so as to bring it under Workmen's Compensation Act, motion to dismiss is proper. Hernandez v. Border Truck Line, 49 N.M. 396, 165 P.2d 120 (1946).

Motion to dismiss for sovereign immunity proper. — The plaintiff's naming of the Pueblo of Acoma as the defendant, together with the long recognized policy of judicial notice of Pueblo Indian tribes, established the factual basis for the Pueblo's motion to dismiss on the grounds of sovereign immunity. No sworn testimony was necessary to establish that the defendant was indeed a Pueblo Indian tribe. Padilla v. Pueblo of Acoma, 107 N.M. 174, 754 P.2d 845 (1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989).

Objections to complaint raised throughout proceedings. — The objection that the complaint fails to state a cause of action may be raised at any stage of the proceedings, even for the first time in the supreme court. Jernigan v. Clark & Day Exploration Co., 65 N.M. 355, 337 P.2d 614 (1959).

Under Code 1915, § 4114 (105-415, C.S. 1929), an objection that the complaint fails to state facts sufficient to constitute a cause of action can be raised at any time. Jamison v. McMillen, 26 N.M. 231, 190 P. 726 (1920) (decided under former law).

Including jurisdictional questions. — Failure of complaint to show any interest in plaintiff entitling him to relief is a failure to state facts sufficient to constitute a cause of action, a jurisdictional question which may be raised at any time. Asplund v. Hannett, 31 N.M. 641, 249 P. 1074 (1926) (decided under former law).

But if defendant fails to object to the complaint and litigates the material facts omitted therefrom, he cannot after judgment raise the question of the insufficiency of the complaint, and on appeal the complaint would be amended to conform to the facts proven. Jamison v. McMillen, 26 N.M. 231, 190 P. 726 (1920) (decided under former law).

Possibility that complaint if amended would afford relief will not aid plaintiff. — If the plaintiff elects to stand upon a complaint, as drawn, unless it states a cause of action so viewed, the possibility that it might have been amended to state a claim upon which relief could be granted will not aid the plaintiff. Martinez v. Cook, 56 N.M. 343, 244 P.2d 134 (1952); Eyring v. Board of Regents, 59 N.M. 3, 277 P.2d 550 (1954).

Waiving objection by answering on merits abandons motion. — Defect appearing on face of complaint was a ground of demurrer (now motion to dismiss) under Code 1915, § 4110, 105-411, C.S. 1929. Defendants abandoned their demurrer (motion) by answering on the merits after their demurrer (motion) was overruled. Defendants, having waived the objection, could not take advantage of it upon trial by objecting to admission of evidence. To have made the objection available, defendants should have stood upon their demurrer (motion). Territory ex rel. Baca v. Baca, 18 N.M. 63, 134 P. 212 (1913) (decided under former law).

Effect of affirmative action joined with jurisdictional defense. — Subdivision (b) (see now Paragraph B) provides that a jurisdictional defense is not waived by being joined with other defenses and objections. It does not refer to an affirmative action being joined with a jurisdictional defense. Where defendants' third-party complaint was a permissive pleading, such action invoked the jurisdiction of the district court over the defendants personally, and therefore waived the defense of jurisdiction over the person of each defendant. Williams v. Arcoa Int'l, Inc., 86 N.M. 288, 523 P.2d 23 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

Claim of no jurisdiction over person not waived when joined with other defenses. Williams v. Arcoa Int'l, Inc., 86 N.M. 288, 523 P.2d 23 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

A challenge to venue cannot be raised after filing an answer to the complaint; therefore, the defendant's venue argument failed. Manouchehri v. Heim, 1997-NMCA-052, 123 N.M. 439, 941 P.2d 978.

Denial in answer of sufficient information does not constitute negative averment. — The denial in an answer of sufficient information on which to base a conclusion is not a specific negative averment which places in issue the capacity of a plaintiff to sue in its capacity as a corporation. A denial in an answer of information or knowledge sufficient to form a belief as to the truth of an allegation of plaintiff's corporate existence does not put such allegation in issue. Consolidated Placers, Inc. v. Grant, 48 N.M. 340, 151 P.2d 48 (1944).

Default judgment brought where propriety of motion unresolved. — In an action in attachment where defendant appears and moves to quash a writ, but does not plead to the complaint, a judgment by default on the case in chief may be properly entered against him, although the motion to quash the writ is still undetermined. First Nat'l Bank v. George, 26 N.M. 46, 189 P. 240 (1920). See also Enfield v. Stewart, 24 N.M. 472, 174 P. 428 (1918) (decided under former law).

Motion to set aside default constituted motion to dismiss. — The trial court's dismissal of a forfeiture petition without requiring the respondent to answer was not error since the respondent's motion to set aside the default judgment and for return of the property constituted a motion to dismiss and no answer was required. Albuquerque Police Dep't v. Martinez, 120 N.M. 408, 902 P.2d 563 (Ct. App. 1995).

Motion treated as summary judgment although mislabeled. — A motion will be treated as one for summary judgment when certain criteria are met even though the motion is called one for failure to state a claim upon which relief can be granted. Shriners Hosps. for Crippled Children v. Kirby Cattle Co., 89 N.M. 169, 548 P.2d 449 (1976).

When motion to dismiss treated as summary judgment. — When matters outside the pleadings are presented to and not excluded by the court, a motion to dismiss is treated as one for summary judgment. Gonzales v. Gackle Drilling Co., 70 N.M. 131, 371 P.2d 605 (1962).

Where matters outside the pleadings are considered on a motion to dismiss for failure to state a claim, the motion becomes one for summary judgment. Knippel v. Northern Communications, Inc., 97 N.M. 401, 640 P.2d 507 (Ct. App. 1982).

Where the trial court granted defendant's motion to dismiss for failure to state a claim upon which relief could be granted because the court had considered matters presented

therein in a prior action, the disposition would be treated as a summary judgment as provided for in Paragraph C. Citizens Bank v. Teel, 106 N.M. 290, 742 P.2d 502 (1987).

When a Paragraph B(6) motion to dismiss, upon the presentation of matters outside the pleadings, is treated as a motion for summary judgment, the standard of review is whether there exists a genuine issue of material fact, instead of accepting all well-pleaded facts as true and ascertaining whether the plaintiff is entitled to relief on the pleadings. Graff v. Glennen, 106 N.M. 668, 748 P.2d 511 (1988).

Defendant's motion to dismiss for failure to state a claim upon which relief can be granted was correctly treated as a motion for summary judgment, even though no answer to the amended complaint was filed, where matters outside the pleadings were presented to the trial court and both parties had adequate notice to present all pertinent material at the hearing. Peck v. Title USA Ins. Corp., 108 N.M. 30, 766 P.2d 290 (1988).

The general rule is that where matters outside of the pleadings are considered, a motion to dismiss is treated as a motion for summary judgment. DiMatteo v. County of Dona Ana ex rel. Board of County Comm'rs, 109 N.M. 374, 785 P.2d 285 (Ct. App. 1989).

Conversion of motion to dismiss to one for summary judgment. — When a Rule 1-012B NMRA motion to dismiss is converted into a summary judgment motion and the movant has satisfied its burden under Rule 1-056 NMRA, establishing a prima facie case for summary judgment, the opposing party must come forward and show the existence of a genuine issue of material fact rendering summary judgment inappropriate. Hern v. Crist, 105 N.M. 645, 735 P.2d 1151 (Ct. App. 1987).

IV. MOTION FOR JUDGMENT ON THE PLEADINGS.

The district court is not required to consider the merits of plaintiff's allegations when deciding a motion to dismiss. — The federal dismissal standard under Federal Rule of Civil Procedure 12(b)(6) is not applicable to the notice-pleading requirement of Rule 1-012(B)(6) NMRA. In considering a motion to dismiss, the district court tests the legal sufficiency of the complaint, not the factual allegations of the complaint, which, for purposes of ruling on the motion, the court must accept as true. *Madrid v. Vill. of Chama*, 2012-NMCA-071, 283 P.3d 871, cert. denied, 2012-NMCERT-006.

Plaintiff's factual allegations satisfied the notice requirement of the rule. — Where plaintiff's employment with the municipality was terminated; plaintiff sued the municipality for breach of an implied employment contract; plaintiff's complaint alleged that the municipal ordinance and other documents, which set forth the reasons for just cause termination, established an implied contract, that the municipality breached the implied contract by failing to warn employees of the offenses that could result in disciplinary action, failing to conduct an impartial investigation, and failing to conduct pre-termination and post-termination hearings in accordance with the ordinance, that the municipality issued a termination letter after the deadline set in the ordinance, and that the mayor was allowed to attend the post-termination hearing; and that municipality

breached the covenant of good faith and fair dealing contained in the implied contract, plaintiff's complaint stated a claim for breach of implied contract and breach of covenant of good faith and fair dealing upon which relief could be granted, because the complaint set forth factual allegations of the incidents giving rise to plaintiff's claims and gave the municipality adequate notice of the legal claims asserted against it. *Madrid v. Vill. of Chama*, 2012-NMCA-071, 283 P.3d 871, cert. denied, 2012-NMCERT-006.

Waiver of sovereign immunity. — Where decedent was employed in the gift shop of a tribal casino; the manager of the gift shop, decedent and another employee consumed a quart of rum at work; at the end of decedent's shift, decedent clocked out and returned to the gift shop to talk to the manager about a promotion; and decedent left the casino and was killed in an automobile accident, to the extent that decedent was not within the scope of employment for purposes of the Workers' Compensation Act, plaintiffs' wrongful death claim on behalf of decedent, who was a person lawfully on the premises with the permission of the casino, was well pleaded as a claim that fell under the waiver of tribal sovereign immunity provision of the Indian Gaming Compact and dismissal of the wrongful death claim was not proper. *Guzman v. Laguna Development Corp.*, 2009-NMCA-116, 147 N.M. 244, 219 P.3d 12.

Judicial immunity. — Where plaintiff was the subject of an abuse and neglect proceeding that resulted in plaintiff's placement with adoptive parents; plaintiff's adoptive mother relinquished custody of plaintiff to the Children, Youth and Families Department which filed a petition for court-ordered family services on plaintiff's behalf; the court appointed an attorney to represent plaintiff during the proceeding pursuant to a youth-attorney contract; the district court permitted the attorney to withdraw as plaintiff's counsel; the matter was dismissed because plaintiff reached the age of eighteen; and plaintiff alleged that the Administrative Office of the Courts, the Twelfth Judicial District Court, state employees and the Department breached the youth-attorney contract and violated plaintiff's constitutional rights by failing to arrange for competent counsel for plaintiff, oversee the attorney's performance, and ensure that substitute counsel was provided after the attorney was allowed to withdraw, the defendants were entitled to judicial immunity because the acts alleged by plaintiff were judicial functions. *Hunnicutt v. Sewell*, 2009-NMCA-121, 147 N.M. 272, 219 P.3d 529.

Motion to dismiss treated as motion for summary judgment. — See Emery v. University of N.M. Medical Center, 96 N.M. 144, 628 P.2d 1140 (Ct. App. 1981); Hollars v. Southern Pac. Transp. Co., 110 N.M. 103, 792 P.2d 1146 (Ct. App. 1989).

Where summary judgment motion serves same function as Paragraph C motion. — Where a motion for summary judgment is made solely on the pleadings without supporting affidavits, it serves the same function as a motion for judgment on the pleadings. Matkins v. Zero Refrigerated Lines, 93 N.M. 511, 602 P.2d 195 (Ct. App. 1979).

Burden of proof where jurisdiction challenged. — Once the question of jurisdiction is properly raised under Paragraph B(2) of this rule, the burden of supporting the

jurisdictional allegations shifts to the party asserting jurisdiction, although, if there is no evidentiary hearing, the burden on that party is somewhat lessened in that the trial court will consider the affidavits in the light most favorable to that party. Tercero v. Roman Catholic Diocese, 1999-NMCA-052, 127 N.M. 294, 980 P.2d 77, rev'd on other grounds, 2002-NMSC-018, 132 N.M. 312, 48 P.3d 50.

Where court considers matters outside pleading, summary judgment appropriate. — Where both parties filed a motion for judgment in accordance with this rule and trial court considered a copy of a grant of a right-of-way easement, and certain answers made by appellant to interrogatories, motion was considered as being one for summary judgment under Rule 56 (see now Rule 1-056 NMRA). Wheeler v. Board of County Comm'rs, 74 N.M. 165, 391 P.2d 664 (1964).

When matters outside the pleadings are considered on a motion to dismiss, the motion will be treated as one for summary judgment. Transamerica Ins. Co. v. Sydow, 97 N.M. 51, 636 P.2d 322 (Ct. App. 1981).

And error not to permit adverse party opportunity to present material. — To treat a motion to dismiss as a motion for summary judgment without permitting the adverse party a reasonable opportunity to present pertinent material is error. Santistevan v. Centinel Bank, 96 N.M. 734, 634 P.2d 1286 (Ct. App. 1980), aff'd in part, rev'd on other grounds, 96 N.M. 730, 634 P.2d 1282 (1981).

Summary judgment appropriate motion to dismiss divorce action. — Where the court considered the proceedings in a prior divorce action between defendant and her former husband in addition to the pleadings of the present action, case was dismissed under Rule 56 (see now Rule 1-056 NMRA), not this rule. Richardson Ford Sales v. Cummins, 74 N.M. 271, 393 P.2d 11 (1964).

Scope of indemnity. – Where lease covered restaurant portion only of lessor's property and required lessee to indemnify lessor from claims arising from lessee's operation of the restaurant, but did not exclude coverage for lessor's own negligence, the indemnification was broad enough to permit lessor to state a claim against the lessee for indemnification from the claim of a restaurant customer who was injured in lessor's parking lot. Krieger v. Wilson Corporation, 2006-NMCA-034, 139 N.M. 274, 131 P.3d 661, cert. granted, 2006-NMCERT-003.

Scope of insurance coverage. – Where lease covered restaurant portion only of lessor's property and required lessee to indemnify lessor from claims arising from lessee's operation of the restaurant and where lessee's insurance policy, which did not name lessor as an insured, provided coverage for liabilities that lessee assumed under the lease, lessee's obligation to indemnify lessor was broad enough to permit lessor to state a claim against the lessee's insuror for indemnification against the claim of a restaurant customer who was injured in the lessor's parking lot. Krieger v. Wilson Corporation, 2006-NMCA-034, 139 N.M. 274, 131 P.3d 661, cert. granted, 2006-NMCERT-003.

Church autonomy doctrine. – A claim of constitutional immunity based on the church autonomy doctrine should be treated in the first instance as a motion to dismiss for failure to state a cause of action under Rule 1-012(B)(6) NMRA, rather than as a motion for summary judgment under Rule 1-056 NMRA, because the court does in fact have jurisdiction to consider the constitutional claim. Celnik v. Congregation B'Nai Israel, 2006-NMCA-039, 139 N.M. 252, 131 P.3d 102.

Breach of implied contract in private procurement process. — A disappointed bidder is not barred as a matter of law from bringing a claim based on an implied-in-fact contract in the context of the private procurement process because an implied-in-fact contract may arise in the private procurement process if a solicitor of bids makes specific representations regarding the processes by which it will select a bid and a bidder reasonably relies on those representations in deciding to bid. *Orion Technical Res., LLC v. Los Alamos Nat'l Sec., LLC*, 2012-NMCA-097, ____ P.3d ____.

Where defendant issued a request for proposals for a subcontract to provide vendor management and staff augmentation services; and plaintiff alleged that defendant had an implied-in-fact contract with plaintiff that arose out of the RFP process when defendant assured bidders that the solicitation process would be fair, competitive, and negotiated, that plaintiff relied on the implied-in-fact contract when it submitted a bid, and that defendant breached the implied-in-fact contract when defendant deviated from the selection process and criteria set out in its RFP and source selection plan by engaging in discussions with one bidder and awarding the contract to a bidder that did not meet the requirements of the RFP and by failing to follow established customs and norms of procurement and acquisitions practices that provide for a full, open, and competitive process, plaintiff's claim for breach of implied-in-fact contract was not barred as a matter of law. *Orion Technical Res., LLC v. Los Alamos Nat'l Sec., LLC,* 2012-NMCA-097, ____ P.3d ____.

Damages for breach of implied contract in private procurement process. — A disappointed bidder in a private procurement process may pursue a claim for expectation damages as well as reliance damages. *Orion Technical Res., LLC v. Los Alamos Nat'l Sec., LLC*, 2012-NMCA-097, ____ P.3d ____.

V. MOTION FOR MORE DEFINITE STATEMENT.

Paragraph E offers greater particularity. — Subdivision (e) (see now Paragraph E) offers to the party who desires greater particularity before answering whatever aid is needed. Ritter v. Albuquerque Gas & Elec. Co., 47 N.M. 329, 142 P.2d 919 (1943).

Supplying definite statement voluntarily does not limit its effect. Kisella v. Dunn, 58 N.M. 695, 275 P.2d 181 (1954).

Motion in order where allegations verbose, etc. and procedural rule disregarded. — Where complaints disclose flagrant disregard of Rule 10(b) (see now Rule 1-010 NMRA) and it also appears that many of the allegations contain verbose, redundant and

immaterial allegations which makes framing of a responsive pleading exceedingly difficult, a more definite statement of the claims is in order under Subdivision (e) (see now Paragraph E). Peoples v. Peoples, 72 N.M. 64, 380 P.2d 513 (1963).

But motion denied where defendants fully informed of cause of action. — Where a bank statement itemizing all credits and debits from the time an account was opened until it was closed is attached to a complaint of a bank against joint depositors to recover moneys from an overdraft, defendants were fully informed of the basis, nature and purpose of plaintiff's cause of action and the denial of a motion for more definite statement was proper. Bank of N.M. v. Pinion, 57 N.M. 428, 259 P.2d 791 (1953).

Intermingling of counts should be raised by motion to make more definite and certain. Valdez v. Azar Bros., 33 N.M. 230, 264 P. 962 (1928).

VI. MOTION TO STRIKE.

Generally. — Complaints that are replete with redundant, immaterial, impertinent and scandalous matter are properly stricken under Subdivision (f) (see now Paragraph F). Peoples v. Peoples, 72 N.M. 64, 380 P.2d 513 (1963).

Amended answer. — District court did not err when it did not accept portions of an amended answer to an amended complaint which changed responses to identical allegations in the original complaint and the district court did not abuse its discretion in striking such portions. Gonzales v. Lopez, 2002-NMCA-086, 132 N.M. 558, 52 P.3d 418.

Entire complaint not stricken. — Generally, the entire complaint will not be stricken under Subdivision (f) (see now Paragraph F). Only those matters improperly pleaded, or which have no bearing on the lawsuit, should be stricken. Peoples v. Peoples, 72 N.M. 64, 380 P.2d 513 (1963); DiMatteo v. County of Dona Ana ex rel. Board of County Comm'rs, 109 N.M. 374, 785 P.2d 285 (Ct. App. 1989).

If movant knows of specific matters, then motion unnecessary. — It is not error to overrule a motion to make more definite and certain, if the matters sought to be made more specific are within the knowledge of the movant. Sherman v. Hicks, 14 N.M. 439, 94 P. 959 (1908) (decided under former law).

When court errs in striking defense. — The trial court erred in striking the defense that a settlement between the parties to an accident, without an express reservation of rights against the party executing the release, operates as an accord and satisfaction of all claims arising out of the accident and bars either party from later suing the other (or the employer of the other under a respondeat superior theory). Harrison v. Lucero, 86 N.M. 581, 525 P.2d 941 (Ct. App. 1974).

No review of court's refusal to strike if movant not prejudiced. — The court's refusal to strike out portions of a complaint as redundant or as legal conclusions will not

be reviewed, where not prejudicial to the substantial rights of the moving party. Smith v. Hicks, 14 N.M. 560, 98 P. 138 (1908) (decided under former law).

VII. WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

Waiver of defense of lack of jurisdiction by conduct. — Where the defendant's conduct, which included the filing of a motion for summary judgment and a motion to dismiss and participation in certain aspects of the pretrial process, was defensive in nature and did not entail a request for affirmative relief from the trial court, the defendant did not waive the defendant's defense of lack of personal jurisdiction. Capco Acquiscub, Inc. v. Greka Energy Corporation, 2008-NMCA-153, 145 N.M. 328, 198 P.3d 354.

Courts generally hold that failure to plead affirmative defense results in waiver of that defense and that it is excluded as an issue. United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 597 P.2d 290, cert. denied, 444 U.S. 911, 100 S. Ct. 222, 62 L. Ed. 2d 145 (1979).

Although the summons served upon a father in a termination of parental rights action did not meet the requirements of Paragraph C, there was no showing that the father was prejudiced by the various errors in the notice. Ronald A. v. State ex rel. Human Servs. Dep't, 110 N.M. 454, 794 P.2d 371 (Ct. App. 1990).

Question of improper joinder waived unless raised before or by answer. — Where objection to the joinder of an unrelated claim by third-party complaint is not made until the conclusion of plaintiff's case, the question of improper joinder is waived unless the question is waived unless the question is raised by motion before answer or by the answer itself, and such objection comes too late if made after trial has commenced on the merits. Hancock v. Berger, 77 N.M. 321, 422 P.2d 359 (1967).

Failure to plead defense of statute of limitations amounts to a waiver under Subdivision (h) (see now Paragraph H) and it is error for the trial court to consider the same as long as the pleadings have not been amended. Electric Supply Co. v. United States Fid. & Guar. Co., 79 N.M. 722, 449 P.2d 324 (1969).

Failure to plead arbitration clause as a defense considered waiver of the party's rights arising under such clause. United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 597 P.2d 290, cert. denied, 444 U.S. 911, 100 S. Ct. 222, 62 L. Ed. 2d 145 (1979).

Failure to raise defense of insufficiency of service of process. — Defendants failed to state a legal defense by failing to raise insufficiency of service of process in accordance with the procedures of Paragraphs G and H(1), and by alerting the trial court to defendants' failure before a trial on the merits, plaintiff validly asserted her defense to defendants' "insufficient defense," i.e., she did not waive her waiver argument. Rupp v. Hurley, 1999-NMCA-057, 127 N.M. 222, 979 P.2d 733.

Amendment of pleadings to include defense discretionary. — While it is true that under Rule 8(c) (see now Rule 1-008 NMRA) a party should set forth affirmatively the defense of the statute of limitations, and generally this defense is waived if it is not asserted in a responsive pleading under Subdivision (h) (see now Paragraph H), trial courts may allow the pleadings to be amended to set up this defense. Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1962); Berry v. Meadows, 103 N.M. 761, 713 P.2d 1017 (Ct. App. 1986) (decided under former law).

Court may allow amendment of pleadings to set up statute of limitations defense, although generally it is true the defense is waived under Subdivision (h) (see now Paragraph H) if not asserted in a responsive pleading. Apodaca v. Unknown Heirs of Tome Land Grant, 98 N.M. 620, 651 P.2d 1264 (1982).

Question of capacity to sue waived after answer. — The capacity of plaintiff to sue is raised by answer or motion except when jurisdiction of the court is involved; question of capacity is waived after answer is filed. Hugh K. Gale Post No. 2182 VFW v. Norris, 53 N.M. 58, 201 P.2d 777 (1949) (decided under former law).

An attack on subject matter jurisdiction may be made at any time in the proceedings. It may be made for the first time upon appeal, or it may be made by a collateral attack in the same or other proceedings long after the judgment has been entered. Chavez v. County of Valencia, 86 N.M. 205, 521 P.2d 1154 (1974).

Although jurisdiction over the person can clearly be waived, subject matter jurisdiction can be raised at any time during the proceedings. Kalosha v. Novick, 84 N.M. 502, 505 P.2d 845 (1973).

All affirmative defenses must be raised either in the responsive pleading to a complaint or by separate motion, and be decided prior to the entry of judgment; the only defense which is not waived by failure to assert it prior to judgment is lack of subject-matter jurisdiction, and that defense may even be raised for the first time on appeal. Mundy & Mundy, Inc. v. Adams, 93 N.M. 534, 602 P.2d 1021 (1979).

Procedure on appeal where no written order exists. — Even though the trial court had not entered a written order on a party's subject matter jurisdiction claim raised pursuant to a motion under Paragraph B(1), and, as a general rule, only review of formal written orders or judgments from which an appellant has timely appealed is authorized, the court of appeals determined that it would be a waste of resources, both for the litigants and for the court, not to address the claim. Harrington v. Bannigan, 2000-NMCA-058, 129 N.M. 266, 5 P.3d 1070.

Claim of waiver waived upon failure to object to amended motion. — Where defendant failed to join a challenge to personal jurisdiction in his initial motion to dismiss for lack of venue, but subsequently filed an amended motion adding the former defense, plaintiff's claim of waiver of the jurisdictional defense was itself waived by her failure to

raise any objection to defendant's amended motion at a hearing thereon. Robinson-Vargo v. Funyak, 1997-NMCA-095, 123 N.M. 822, 945 P.2d 1040.

Affirmation defense in counterclaim. — In a village's water dispute, the village, as a defendant in a counterclaim filed by the opponent, properly raised the defense of laches as an affirmative defense because as a plaintiff defending against a counterclaim, the village was, for all practical purposes, litigating in the capacity of a defendant. Village of Wagon Mound v. Mora Trust, 2003-NMCA-035, 133 N.M. 373, 62 P.3d 1255, cert. denied, 133 N.M. 413, 63 P.3d 516 (2003).

Summary judgment — Where plaintiff contends that, even if there is no finding of a waiver of sovereign immunity, all four of her waiver arguments, when combined together, create a genuine issue of fact as to whether a waiver existed, an express waiver of sovereign immunity cannot be pierced together through inference and implication, combined with a sue or be sued clause that is not made effective due to unmet requirements and therefore, summary judgment was appropriate and there are no genuine issues of fact as to the existence of a waiver. Sanchez v. Santa Ana Golf Club, Inc., 2005-NMCA-003, 136 N.M. 682, 104 P.3d 548, cert. denied, 2005-NMCERT-001.

Failure to state a claim. — Where plaintiff, who had allegedly been raped by other students, sued the university for breach of contract for failure to investigate the sexual assault, to provide a school free from harassment and hostility, and to provide reasonable support to her after the assault and where the only express contract between the university and plaintiff was plaintiff's athletic scholarship agreement in which the university agreed to provide financial aid and not to increase, reduce, or cancel the promised aid due to plaintiff's athletic performance or ability, plaintiff's complaint based on the scholarship agreement failed to state a cognizable claim for breach of contract because it did not contain allegations that the university breached its contractual duty to provide scholarship assistance in the form of financial assistance. Ruegsegger v. Western NM University Bd. of Regents, 2007-NMCA-030, 141 N.M. 306, 154 P.3d 681, cert. denied, 2006-NMCERT-011.

Where plaintiff, who had allegedly been raped by other students, sued the university for breach of contract to provide a school free from harassment and hostility, and to provide reasonable support to her after the assault on the theory that the university student handbook constituted an implied contract and where the student handbook stated that it was not to be regarded as a contract and did not contain references to investigatory procedures, investigatory rights, or supportive services, the handbook consisted of guidelines for the operation of the university and did not constitute an implied contract or guarantee the rights asserted by plaintiff and plaintiff's complaint based on the terms of the terms of the handbook failed to state a cognizable claim for breach of contract. Ruegsegger v. Western NM University Bd. of Regents, 2007-NMCA-030, 141 N.M. 306, 154 P.3d 681, cert. denied, 2006-NMCERT-011.

Medical malpractice dismissed. - Where patient who committed suicide had consulted defendant psychiatrist during five office visits and thereafter the patient failed to attend scheduled appointments with defendant, then voluntarily hospitalized himself as an inpatient, where the patient consented to treatment from a new psychiatrist, then voluntarily submitted to outpatient treatment at the hospital by the same psychiatrist and then voluntarily continued further treatment from a psychologist and never called or returned to defendant for any purpose, defendant and the patient did not have a special relationship, defendant did not have the ability to control the patient, and defendant did not owe a duty of care to the patient the breach of which would render defendant liable for the patient's death. Estate of Haar v. Ulwelling, 2007-NMCA-032, 141 N.M. 252, 154 P.3d 67.

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For article, "'To Purify the Bar': A Constitutional Approach to Non-Professional Misconduct," see 5 Nat. Resources J. 299 (1965).

For comment on Reed v. Melnick, 81 N.M. 14, 462 P.2d 148 (Ct. App. 1969), see 1 N.M.L. Rev. 615 (1971).

For article, "Mandamus in New Mexico," see 4 N.M.L. Rev. 155 (1974).

For article, "The Writ of Prohibition in New Mexico," see 5 N.M.L. Rev. 91 (1974).

For article, "The Impact of Non-Mutual Collateral Estoppel on Tort Litigation Involving Several Liability," see 18 N.M.L. Rev. 559 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appearance § 1; 9 Am. Jur. 2d Bankruptcy §§ 760 to 766; 61A Am. Jur. 2d Pleading §§ 220 to 248, 278, 279, 333 to 337, 347, 348.

Appealability of order entered on motion to strike pleading, 1 A.L.R.2d 422.

Application and effect of parol evidence rule as determinable upon the pleadings, 10 A.L.R.2d 720.

Appealability of order overruling motion for judgment on pleadings, 14 A.L.R.2d 460.

Punishment of civil contempt in other than divorce cases by striking pleading or entering default judgment or dismissal against contemner, 14 A.L.R.2d 580.

Statute of frauds raised by a motion to strike testimony after failure to object to parol evidence, 15 A.L.R.2d 1330.

Pleading last clear chance doctrine, 25 A.L.R.2d 254.

Objection before judgment to jurisdiction of court over subject matter as constituting general appearance, 25 A.L.R.2d 833.

Manner and sufficiency of pleading agency in contract action, 45 A.L.R.2d 583.

Court's power, on motion for judgment on the pleadings, to enter judgment against the movant, 48 A.L.R.2d 1175.

Proper procedure and course of action by trial court, where both parties move for a judgment on the pleadings, 59 A.L.R.2d 494.

Raising defense of statute of limitations by demurrer, equivalent motion to dismiss, or by motion for judgment on pleadings, 61 A.L.R.2d 300.

Litigant's participation on merits, after objection to jurisdiction of person made under special appearance or the like has been overruled, as waiver of objection, 62 A.L.R.2d 937.

Propriety of entering summary judgment for plaintiff before defendant files or serves answer to complaint or petition, 85 A.L.R.2d 825.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

Dismissal of action for plaintiff's failure or refusal to obey court order relating to pleadings or parties, 3 A.L.R.5th 237.

What, other than affidavits, constitutes "matters outside the pleadings," which may convert motion under Federal Rule of Civil Procedure 12(b)(c), into motion for summary judgment, 2 A.L.R. Fed. 1027.

Joinder of counterclaim under Rule 13(a) or 13(b) of Federal Rules of Civil Procedure with jurisdictional defense under Rule 12(b) as waiver of such defense, 17 A.L.R. Fed. 388.

Necessity of oral argument on motion for summary judgment or judgment on pleadings in federal court, 105 A.L.R. Fed. 755.

27 C.J.S. Dismissal and Nonsuit § 67; 71 C.J.S. Pleading §§ 99, 112 to 116, 121 to 129, 264 to 268, 424 to 449, 463 to 482, 498, 508, 560 to 586.

1-013. Counterclaim and cross-claim.

A. **Compulsory counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:

(1) at the time the action was commenced the claim was the subject of another pending action; or

(2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

B. **Permissive counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

C. **Counterclaim exceeding opposing claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

D. **Counterclaim against the state.** These rules shall not be construed to enlarge beyond the limits fixed by law the right to assert counterclaims or to claim credits against the state or an officer or agency thereof.

E. **Counterclaim maturing or acquired after pleading.** A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

F. **Omitted counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

G. **Cross-claim against coparty.** A pleading may state as a cross-claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

H. **Additional parties may be brought in.** When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as parties as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

I. **Separate trials; separate judgments.** If the court orders separate trial as provided in Paragraph B of Rule 1-042 NMRA, judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Paragraph B of Rule 1-054 NMRA, when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

ANNOTATIONS

Cross references. — For third-party practice, *see* Rule 1-014 NMRA.

For joinder of necessary persons, *see* Rule 1-019 NMRA.

For permissive joinder, *see* Rule 1-020 NMRA.

For dismissal of counterclaims and cross-claims, *see* Rule 1-041 NMRA.

For the effect of statute of limitations, *see* 37-1-15 NMSA 1978.

Compiler's notes. — Paragraphs A, B, F, G and H are deemed to have superseded 105-405, C.S. 1929, relating to cross-complaints and new parties, and 105-417, C.S. 1929, relating to counterclaims as part of the answer.

Compulsory counterclaim. — Legal malpractice claim regarding underlying litigation is not a compulsory counterclaim to an attorney charging lien. Computer One, Inc. v. Grisham & Lawless, 2008-NMSC-038, 144 N.M. 424, 188 P.3d 1175, rev'g 2007-NMCA-079, 141 N.M. 869, 161 P.3d 914.

Opposing parties. — Where plaintiff responded to the attorney charging lien filed by plaintiff's former attorneys, alleging that the lien was not enforceable and disputed the lien in a hearing before the court, plaintiff was in a adversarial relationship with plaintiff's former attorneys and plaintiff was required to assert legal malpractice claims arising out of the same transaction as compulsory counterclaims to the attorney charging lien. Computer One, Inc. v. Grisham & Lawless, P.A., 2007-NMCA-079, 141 N.M. 869, 161 P.3d 914, cert. granted, 2007-NMCERT-006.

Same claim. — In determining whether two actions raise the same claim, the court uses the transactional approach and views a claim in factual terms, regardless of what substantive law governs a claim or the legal theories that were actually raised in prior actions. Computer One, Inc. v. Grisham & Lawless, P.A., 2007-NMCA-079, 141 N.M. 869, 161 P.3d 914, cert. granted, 2007-NMCERT-006.

Plaintiff's objections to the attorney charging lien filed by plaintiff's former attorneys and plaintiff's legal malpractice claims against the attorneys arose out of the same transaction because the objections and the claims involved the same underlying facts of the attorneys' representation of plaintiff in plaintiff's breach of contract claim against a third party and the settlement of plaintiff's claim and associated attorney fees

and the facts of both claims would form a convenient unit for trial. Computer One, Inc. v. Grisham & Lawless, P.A., 2007-NMCA-079, 141 N.M. 869, 161 P.3d 914, cert. granted, 2007-NMCERT-006.

Overriding emphasis of rule is on consolidation and expeditious resolution, where that is fair, of all the claims between the parties in one proceeding. The controlling philosophy is that, so far as fairness and convenience permit, the various parties should be allowed and encouraged to resolve all their pending disputes within the bounds of the one litigation. Ortega, Snead, Dixon & Hanna v. Gennitti, 93 N.M. 135, 597 P.2d 745 (1979).

Parties on one side of suit remain separate. — These rules, as well as the common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of a lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

Pleading for affirmative relief prerequisite for award of same. — Where defendant asks for no affirmative relief either by counterclaim or cross-claim, yet court admits evidence with respect to prior transactions and occurrences which are not pleaded, judgment cannot properly be based thereon since evidence as to the previous transactions is inadmissible. Ross v. Daniel, 53 N.M. 70, 201 P.2d 993 (1949).

Failure to plead setoff no bar to recovery of same. — Under Rule 16 (see now Rule 1-016 NMRA), relating to pretrial procedure, it is expressly provided that the court may make an order, which, when entered, shall control subsequent course of the action, and as appellants are aware that appellee's claimed right to set off the repair bill is an issue in the cause and matters pertaining to the repair bill have been litigated without objection on appellants' part, and likewise the issue is a subject of findings and conclusions requested by appellants, appellee's failure to plead this setoff under this rule does not bar their recovery of this setoff. Charley v. Rico Motor Co., 82 N.M. 290, 480 P.2d 404 (Ct. App. 1971).

Surety benefits from setoff due principal if principal made party. — Where, in an action against a surety, there is a credit setoff due the principal from the creditor, and the principal is made a party, the surety is entitled to such credit setoff. National Sur. Co. v. George E. Breece Lumber Co., 60 F.2d 847 (10th Cir. 1932) (decided under former law).

Whether counterclaim will be considered compulsory is determined by the "logical relationship" test of compulsoriness: whether a "logical relationship" exists between the claim and any prior action. Heffern v. First Interstate Bank, 99 N.M. 531, 660 P.2d 621 (Ct. App. 1983); Slide-A-Ride of Las Cruces, Inc. v. Citizens Bank, 105 N.M. 433, 733 P.2d 1316 (1987); Aguilar v. Valley Fed. Sav. Bank, 95 Bankr. 208 (Bankr. D.N.M. 1989).

Logical relationship of claims. — New Mexico has adopted a logical relationship test to determine whether a claim is compulsory under Paragraph A. A logical relationship will be found if both the claim and the counterclaim have a common origin and subject matter. In the present case the claim for malpractice and the claim for legal fees have a common origin (the opinion letter) and a common subject matter (the performance of legal services). The two claims are logically related, and, absent some other consideration, the claim for legal malpractice was a compulsory counterclaim to the law firm's claim for legal fees. Brunacini v. Kavanagh, 117 N.M. 122, 869 P.2d 821 (Ct. App. 1993).

"Opposing party". — An "opposing party", within the meaning of Paragraph A, must be one who asserts a claim against the prospective counterclaimant in the first instance. Bennett v. Kisluk, 112 N.M. 221, 814 P.2d 89 (1991).

Subdivision (a) (see now Paragraph A) applies where prior action ended in default judgment or stipulated judgment, even though no pleading was filed by the party with the counterclaim. Heffern v. First Interstate Bank, 99 N.M. 531, 660 P.2d 621 (Ct. App. 1983).

Right to jury trial of legal issues in compulsory counterclaim. — See Evans Fin. Corp. v. Strasser, 99 N.M. 788, 664 P.2d 986 (1983).

Compulsory counterclaim lost if not timely filed. — Subdivision (a) (see now Paragraph A) requires that a party failing to plead any mandatory counterclaim to a cause of action cannot raise the same in a second and separate action. Terry v. Pipkin, 66 N.M. 4, 340 P.2d 840 (1959).

Even if prior action ended in default judgment. — Failure to plead a compulsory counterclaim bars a later action on that claim, even if the prior action ended in a default judgment. Bentz v. Peterson, 107 N.M. 597, 762 P.2d 259 (Ct. App. 1988).

Compulsory counterclaim should be filed in small claims court. — A party should have asserted his claim for damages as a compulsory counterclaim in the small claims court, unless the jurisdictional limitation on the amount which may be involved in a case in that court operates to make inapplicable to counterclaims in that court the compulsory counterclaims provisions of this rule. Reger v. Grimson, 76 N.M. 688, 417 P.2d 882 (1966).

Unless jurisdictional amount would thereby be surpassed. — Absent legislation compelling, or at least authorizing, a transfer of the case to the district court, a defendant in a small claims court case need not plead his counterclaim, which is in an amount in excess of the jurisdiction of the small claims court. Reger v. Grimson, 76 N.M. 688, 417 P.2d 882 (1966).

Interpleader claimant may counterclaim in tort against stakeholder. — Where plaintiff insurance company brings interpleader action to determine which of competing

claims to proceeds of a life insurance policy is the correct one, defendant who is one of claimants is not precluded from asserting counterclaim in tort for unreasonable delay, in bad faith, in making payments on the contract, despite plaintiff's contention that, as a stakeholder in an interpleader action, it is not an opposing party against whom a counterclaim can be filed. Travelers Ins. Co. v. Montoya, 90 N.M. 556, 566 P.2d 105 (Ct. App. 1977).

Legal malpractice is compulsory counterclaim to action for fees. — A claim for legal malpractice is a compulsory counterclaim that must be asserted by a defendant in a civil action brought by his or her former attorneys to collect unpaid legal fees. Brunacini v. Kavanagh, 117 N.M. 122, 869 P.2d 821 (Ct. App. 1993).

Prerequisites listed for survival of counterclaim from jurisdictional defect of complaint. — In those exceptional cases where a counterclaim may survive the jurisdictional failure of a complaint, at least three premises must exist. Jurisdiction must exist within the scope of the allegations of the counterclaim; the claim made in the counterclaim must be independent of that made in the main case; and, lastly, affirmative relief must be sought. Sangre De Cristo Dev. Corp. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 323 (1972), cert. denied, 411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 2d 400 (1973).

Right to sue separately on separate theories remains. — There is nothing in Subdivision (a) (see now Paragraph A) or any of the other rules which requires a modification of the long-standing right to sue on one theory, and, when it has been determined that the wrong remedy has been adopted, to then sue on another theory. Terry v. Pipkin, 66 N.M. 4, 340 P.2d 840 (1959).

Counterclaims not limited by commercial code. — There is no language in 55-9-505 NMSA 1978, or elsewhere in the commercial code, which would preclude the full exercise of the right to interpose counterclaims under this rule. Charley v. Rico Motor Co., 82 N.M. 290, 480 P.2d 404 (Ct. App. 1971).

No provision authorizes filing counterclaim to counterclaim. — There is no provision for filing a counterclaim to a counterclaim, or mandatory requirement to amend a complaint to include additional theories as a result of the filing of a counterclaim. Terry v. Pipkin, 66 N.M. 4, 340 P.2d 840 (1959).

Counterclaim does not revive extinguished lien. — The lien created by statute authorizing recordation of a transcript of the docket thereof is a right as distinguished from a remedy, and if the remedy of foreclosure of the judgment lien prayed for in a counterclaim is barred, the lien has been extinguished. Pugh v. Heating & Plumbing Fin. Corp., 49 N.M. 234, 161 P.2d 714 (1945).

Open account defendant need not counterclaim to have account credited. — A defendant in an action on an open account need not counterclaim for purpose of

showing that certain entries should have been credited to the account. Heron v. Gaylor, 46 N.M. 230, 126 P.2d 295 (1942) (decided under former law).

Essentials of separately maintainable cause are necessary to allow permissive counterclaim. Dinkle v. Denton, 68 N.M. 108, 359 P.2d 345 (1961).

Offset claimed in bankruptcy for attorney fees deemed permissive counterclaim. — The nature of the offset claimed by defendant in bankruptcy suit for attorney's fees and expenses incurred by him when, in his capacity as accommodation indemnitor, he has guaranteed a performance bond for bankrupt parties is that of a permissive counterclaim as permitted under Subdivision (b) (see now Paragraph B). Dinkle v. Denton, 68 N.M. 108, 359 P.2d 345 (1961).

A cross-claim for indemnification filed by retailer-defendant against manufacturer-defendant sets forth a claim that arises out of the occurrence that is the subject matter stated in plaintiff's strict products claim. Trujillo v. Berry, 106 N.M. 86, 738 P.2d 1331 (Ct. App. 1987).

Claim barred by limitation usable as counterclaim to extent of amount of complaint. — To an action on contract, any other cause of action on contract, though barred by limitation, may be interposed as a counterclaim, but no judgment for excess can be had. Great W. Oil Co. v. Bailey, 35 N.M. 277, 295 P. 298 (1930) (decided under former law).

Setoff derived from new matter available. — Promissory note, though made in final settlement of the account between the parties, can be met by defense of setoff as to new matter constituting a cause of action in favor of defendant. Staab v. Ortiz, 3 N.M. (Gild.) 33, 1 P. 857 (1884) (decided under former law).

Counterclaim or cross-claim to quiet title allowed in mortgage foreclosure action, as there is nothing specific nor inherent in 42-6-1 NMSA 1978 at variance with the unrestrictive counterclaim provisions of this rule. Ortega, Snead, Dixon & Hanna v. Gennitti, 93 N.M. 135, 597 P.2d 745 (1979).

Subdivision (f) (see now Paragraph F) governs counterclaim amendments exclusively. Morrison v. Wyrsch, 93 N.M. 556, 603 P.2d 295 (1979).

Unnecessary for pleader to plead oversight, inadvertence or excusable neglect in his amended pleading once the court has allowed the addition. Morrison v. Wyrsch, 93 N.M. 556, 603 P.2d 295 (1979).

Contingent obligation cannot be pleaded as setoff. Staab v. Ortiz, 3 N.M. (Gild.) 33, 1 P. 857 (1884) (decided under former law).

Unexcused untimely filing of counterclaim not allowed. — Where defendant does not comply with Rule 12(a) (see now Rule 1-012 NMRA), nor seek leave of court to set

up the counterclaim by amendment due to oversight, inadvertence or excusable neglect, as provided in Subdivision (f) (see now Paragraph F), the trial court properly disallows the filing of the counterclaim. Echols v. N.C. Ribble Co., 85 N.M. 240, 511 P.2d 566 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

Court has discretion to deny cross-claim. — Although both this rule and Rule 14 (see now Rule 1-014 NMRA) permit some discretion on the part of the court, there must be sound reason for the exercise of such discretion to deny the relief made possible thereunder. An abuse of discretion is said to occur when the court exceeds the bounds of reason, all circumstances before it being considered. GECC v. Hatcher, 84 N.M. 467, 505 P.2d 62 (1973).

Proper exercise of discretion. — When the cross-claim is brought seven years after judgment, and four years after affirmance on appeal, the trial court has sound reason for dismissing the cross-claim in the exercise of its discretion. GECC v. Hatcher, 84 N.M. 467, 505 P.2d 62 (1973).

Discretion exercised by weighing judicial economy against possible prejudice. — The decision whether to allow a cross-claim that meets the test of Subdivision (g) (see now Paragraph G) is a matter of judicial discretion. No precise standards have been formulated. Generally, most courts balance the interests of judicial economy and the general policy of avoiding multiple suits relating to the same events against the possibilities of prejudice or surprise to the other parties and decide the question of timeliness accordingly. GECC v. Hatcher, 84 N.M. 467, 505 P.2d 62 (1973).

Cross-claim liberally operated to further judicial economy. — The cross-claim rule should be given a liberal construction to vest full and complete jurisdiction in the court to determine the entire controversy and not merely a part of it. Hughes v. Joe G. Maloof & Co., 84 N.M. 516, 505 P.2d 859 (Ct. App. 1973).

By settling related claims in single action. — This rule is a reflection of the federal equity practice and the general policy behind allowing cross-claims is to avoid multiple suits and to encourage the determination of the entire controversy among the parties before the court with a minimum of procedural steps. In keeping with this policy the courts generally have construed Subdivision (g) (see now Paragraph G) liberally in order to settle as many related claims as possible in a single action. GECC v. Hatcher, 84 N.M. 467, 505 P.2d 62 (1973).

Cross-claim part of original suit. — This rule contemplates an original action and, as the cross-claim must arise out of the transaction or occurrence that is the subject matter of the original action, the original complaint and the cross-claim constitute but one suit; therefore, even though the claim of the original plaintiffs has been dismissed, neither the pleadings nor parties have changed in connection with the cross-claim. The cross-claim that remains is part of the original suit, and not a new lawsuit. Hughes v. Joe G. Maloof & Co., 84 N.M. 516, 505 P.2d 859 (Ct. App. 1973).

Cross-claims dismissed upon dismissal of complaint for lack of jurisdiction. — If the original claim in connection with which the cross-claim arises is dismissed for lack of jurisdiction, the dismissal carries with it the cross-claim, unless the latter is supported by independent jurisdictional grounds. Louis Lyster Gen. Contractor v. City of Las Vegas, 83 N.M. 138, 489 P.2d 646 (1971).

Venue change not available for cross-claim notwithstanding dismissal of original claim. — There is no right to a change of venue upon dismissal of the original claim under the concept of continuing jurisdiction as the cross-claim is ancillary to the original claim, to which it is related, and when the original claim is dismissed the court does not lose jurisdiction over a cross-claim even though there is no independent jurisdictional basis for the cross-claim. Hughes v. Joe G. Maloof & Co., 84 N.M. 516, 505 P.2d 859 (Ct. App. 1973).

Cross-claim permitted to recover indemnity, contribution. — Payment might well be a condition to the judgment, but is not grounds for a dismissal of a cross-claim or a third-party complaint for the recovery of either indemnity or contribution. This rule and Rule 14 (see now Rule 1-014 NMRA) permit the determination of a third-party claim although a money judgment for indemnity must be subject to cross-claimant's actual loss, and a money judgment for contribution would be subject to the conditions of 41-3-2 NMSA 1978. Board of Educ. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969).

Setoff available to assignee in cross-action. — Where a note, executed and delivered by the maker to payee, is after maturity transferred and assigned to transferee who becomes indebted to makers on other matters, and transferee assigns note to assignee, setoff which would have been available against transferee is also available to the makers in a cross-action by the assignee on the note. Turkenkoph v. Te Beest, 55 N.M. 279, 232 P.2d 684 (1951).

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For comment, "Assignments - Maker's Defenses Cut Off - Uniform Commercial Code § 9-206," see 5 Nat. Resources J. 408 (1965).

For article, "The Impact of the Revised New Mexico Class Action Rules Upon Consumers," see 9 N.M.L. Rev. 263 (1979).

For article, "The Impact of Non-Mutual Collateral Estoppel on Tort Litigation Involving Several Liability," see 18 N.M.L. Rev. 559 (1988).

For case note, "CIVIL PROCEDURE - New Mexico Adopts the Modern View of Collateral Estoppel: Silva v. State," see 18 N.M.L. Rev. 597 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Abatement, Survival and Revival § 27 et seq.; 8 Am. Jur. 2d Automobiles and Highway Traffic §§ 953, 957; 14

Am. Jur. 2d Carriers § 1135; 20 Am. Jur. 2d Counterclaim, Recoupment and Setoff §§ 1, 2 et seq., 56 et seq.; 59 Am. Jur. 2d Parties §§ 96 et seq., 179 et seq.; 61A Am. Jur. 2d Pleading §§ 410, 414, 415.

Agent's right to offset his own claim against collection made for principal, 2 A.L.R. 132.

Counterclaim or setoff as affecting rule as to part payment of a liquidated and undisputed debt, 4 A.L.R. 474, 53 A.L.R. 768.

Right to set off claim of individual partner against claim against partnership, 5 A.L.R. 1541, 55 A.L.R. 566.

Availability as setoff or counterclaim of claim in favor of one alone of several defendants, 10 A.L.R. 1252, 81 A.L.R. 781.

Right to set off claim of firm against indebtedness of individual partner, 27 A.L.R. 112, 60 A.L.R. 584.

Attorney's lien as subject to setoff against judgment, 34 A.L.R. 323, 51 A.L.R. 1268.

Right of stockholder to set off indebtedness of corporation against statutory superadded liability, 40 A.L.R. 1183, 98 A.L.R. 659.

Setting up counterclaim, setoff, or recoupment in reply, 42 A.L.R. 564.

Right of defendant in action for injury to person or property to set up by cross-complaint claim for injury to his person or property against codefendant, 43 A.L.R. 879.

Right of transferor of stock in action against him by creditor to file cross-action against transferee, 45 A.L.R. 174, 141 A.L.R. 1351.

Right in action for assault and battery to set off, recoup or counterclaim damages sustained by defendant in the affray, 47 A.L.R. 1095.

Factor's right of setoff against proceeds of consignment, 52 A.L.R. 811.

Right of defendant in action by undisclosed principal to avail himself of defenses or setoffs that would have been available in an action by the agent in his own right on the contract, 53 A.L.R. 414.

Judgment as a contract within statute in relation to setoff or counterclaim, 55 A.L.R. 469.

Payments by stockholders applicable upon double liability, 56 A.L.R. 527, 83 A.L.R. 147, 120 A.L.R. 511.

Equitable setoff of claim of one person and claim of his debtor against another, 57 A.L.R. 778, 93 A.L.R. 1164.

Right to voluntary dismissal of suit without prejudice before trial as affected by filing counterclaim after motion for dismissal, 71 A.L.R. 1001.

Voluntary dismissal of cross-bill or counterclaim, right of defendant to take, 74 A.L.R. 587.

What amounts to bringing of suit within limited time required by mechanic's lien statute, 75 A.L.R. 695.

Right to set up by cross-complaint claim for damages on wrongful seizure of property, 85 A.L.R. 656.

Right to dismissal as affected by filing of, or as affecting, cross-complaint, counterclaim, intervention and the like, 90 A.L.R. 387.

Necessity of process against plaintiff when cross-bill or answer in nature of cross-bill comes in, 96 A.L.R. 990.

Statutory right of setoff or counterclaim as affected by defendant's conduct inducing delay in bringing action until after maturity of the claim, or assignment to defendant of the claim, against plaintiff, 137 A.L.R. 1180.

Claim barred by limitation as subject of setoff, cross-bill or cross-action, 1 A.L.R.2d 630.

Claim for wrongful death as subject of counterclaim or cross-action in negligence action against decedent's estate, and vice versa, 6 A.L.R.2d 256.

Cause of action in tort as counterclaim in tort action, 10 A.L.R.2d 1167.

Sufficiency of cross-bill in partition action to authorize incidental relief, 11 A.L.R.2d 1449.

Misrepresentation as to loan commitment on real estate as ground of action, counterclaim or rescission by vendee, 14 A.L.R.2d 1347.

Failure to assert matter as counterclaim as precluding assertion thereof in subsequent action, under federal rules or similar state rules or statutes, 22 A.L.R.2d 621.

Rights and remedies of tenant upon landlord's breach of covenant to repair, 28 A.L.R.2d 446.

Permissibility of counterclaim or cross-action for divorce where plaintiff's action is one other than for divorce, separation or annulment, 30 A.L.R.2d 795.

Right of counterclaim, setoff, and the like of defendant against partners individually, in action to enforce partnership claim, 39 A.L.R.2d 295.

Right of defendant in action for property damage, personal injury or death, to bring in new parties as cross-defendants to his counterclaim or the like, 46 A.L.R.2d 1253.

What statute of limitations governs action or claim for affirmative relief against usurious obligation or to recover usurious payment, 48 A.L.R.2d 401.

Dismissal of plaintiff's case for want of prosecution as affecting defendant's counterclaim, setoff or recoupment, or intervenor's claim for affirmative relief, 48 A.L.R.2d 748.

Waiver or estoppel with respect to debtor's assertion, as setoff or counterclaim against assignee, of claim valid as against assignor, 51 A.L.R.2d 886.

Estoppel of defendant to deny plaintiff's corporate existence by filing counterclaim or cross-action against it, 51 A.L.R.2d 1449.

Availability of setoff, counterclaim or the like to recover either penalty for usury in, or usurious interest paid on, separate transaction or instrument, 54 A.L.R.2d 1344.

Validity, construction and effect of statute providing a "cooling off period" or lapse of time prior to filing of complaint, hearing or entry of decree in divorce suit, 62 A.L.R.2d 1262.

Independent venue requirements as to cross-complaint or similar action by defendant seeking relief against a codefendant or third party, 100 A.L.R.2d 693.

Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A.L.R.3d 1321.

May action for malicious prosecution be based on cross-complaint or cross-action in civil suit, 65 A.L.R.3d 901.

Appealability of order dismissing counterclaim, 86 A.L.R.3d 944.

Right of party litigant to defend or counterclaim on ground that opposing party or his attorney is engaged in unauthorized practice of law, 7 A.L.R.4th 1146.

Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in same proceeding in which abuse occurred - state cases, 82 A.L.R.4th 1115.

Who is an "opposing party" against whom a counterclaim can be filed under Federal Civil Procedure Rule 13(a) or (b), 1 A.L.R. Fed. 815.

Claim as to which right to demand arbitration exists as subject of compulsory counterclaim under Federal Rules of Civil Procedure 13(a), 2 A.L.R. Fed. 1051.

Joinder of counterclaim under Rule 13(a) or (b) of Federal Rules of Civil Procedure with jurisdictional defense under Rule 12(b) as waiver of such defense, 17 A.L.R. Fed. 388.

Effect of filing as separate federal action claim that would be compulsory counterclaim in pending federal action, 81 A.L.R. Fed. 240.

50 C.J.S. Judgments §§ 776, 777; 67A C.J.S. Parties §§ 88 to 111; 71 C.J.S. Pleading §§ 167 to 176; 80 C.J.S. Setoff and Counterclaim §§ 1, 13, 27, 36, 61.

1-014. Third-party practice.

A. **When defendant may bring in third party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than ten (10) days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 1-012 NMRA and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 1-013 NMRA. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 1-012 NMRA and his counterclaims and cross-claims as provided in Rule 1-013 NMRA. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

B. **When plaintiff may bring in third party.** When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

ANNOTATIONS

Cross references. — For joinder of third-party claims, *see* Rule 1-018 NMRA.

For rule relating to interpleader, *see* Rule 1-022 NMRA.

For intervention, *see* Rule 1-024 NMRA.

For dismissal of third-party claims, *see* Rule 1-041 NMRA.

For separate trials on third-party claims, *see* Rule 1-042 NMRA.

The right of a party to implead a third party does not create a cause of action for indemnity against the third party. N.M. Public School Ins. Authority v. Gallagher, 2007-NMCA-142, 142 N.M. 760, 170 P.3d 998, 2007-NMCERT-010.

Purpose of rule is to facilitate judicial economy by allowing a defendant to bring in a party who would be liable to him in the event the original plaintiff prevails. First Nat'l Bank v. Espinoza, 95 N.M. 20, 618 P.2d 364 (1980).

Rule permissive. — Rule 14 of the Federal Rules of Civil Procedure, which is identical to this rule for all practical purposes, is permissive and gives plaintiff a choice as to whether he will amend his pleadings to ask for relief against the third-party defendant. Salazar v. Murphy, 66 N.M. 25, 340 P.2d 1075 (1959).

Secondary liability contemplated. — This rule and Rule 18(a) (see now Rule 1-018 NMRA) limit third-party complaints to cases where there is a secondary liability against the third-party defendant arising out of the plaintiff's claim against the original defendant. Hancock v. Berger, 77 N.M. 321, 422 P.2d 359 (1967).

Under Subdivision (a) (see now Paragraph A) it is necessary that the third-party defendant be secondarily liable to the original defendant in the event the original defendant is held liable to the plaintiff. First Nat'l Bank v. Espinoza, 95 N.M. 20, 618 P.2d 364 (1980).

When third party may be brought in. — Paragraph A does not authorize a defendant to bring into a lawsuit every party against whom he may have a claim arising from the transaction at issue between the defendant and the plaintiff. Traditionally, the third-party defendant must be secondarily liable to the defendant third-party plaintiff on a theory such as contribution or indemnity, if the defendant is held liable to the plaintiff. Grain Dealers Mut. Ins. Co. v. Reed, 105 N.M. 586, 734 P.2d 1269 (1987).

In order to support a joinder under this rule, the third party defendants must be liable to the defendant if the defendant is found to be liable to the plaintiff. United States Fire Ins. Co. v. Aeronautics, Inc., 107 N.M. 320, 757 P.2d 790 (1988).

Derivative liability required. — In an action by a landlord against the franchisees of an ice cream store for breach of a lease agreement, the franchisees' claim against the

franchisor was not derivative of the landlord's claim and was not the proper subject of a third-party complaint. Yelin v. Carvel Corp., 119 N.M. 554, 893 P.2d 450 (1995).

To whom third party must be liable. — Paragraph A does not authorize a defendant to bring into a lawsuit a third party who may be liable to the plaintiff. Grain Dealers Mut. Ins. Co. v. Reed, 105 N.M. 586, 734 P.2d 1269 (1987).

Defendant cannot by right bring third-party defendants into suit under rule. — If third-party defendants are primarily liable to the plaintiff, a defendant can raise this as a defense in the plaintiff's suit against him, but he cannot by right bring them into the suit under this rule. First Nat'l Bank v. Espinoza, 95 N.M. 20, 618 P.2d 364 (1980).

When impleader should be denied. — Impleader should be denied when the substantive basis for relief appears doubtful to the court, and where the presence of a third party would complicate rather than simplify the determination of the case. Yates Exploration, Inc. v. Valley Imp. Ass'n, 108 N.M. 405, 773 P.2d 350 (1989).

Indemnity and contribution. — This rule and Rule 13 (see now Rule 1-013 NMRA), permit determination of third-party claim for indemnity, although money judgment for indemnity must be subject to cross-claimant's actual loss, and money judgment for contribution would be subject to conditions of 41-3-2 NMSA 1978. Board of Educ. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1979).

Payment on judgment might well be a condition, but would not be grounds for a dismissal of a cross-claim or a third-party complaint for the recovery of either indemnity or contribution. Board of Educ. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969).

Assertion of comparative negligence theory. — A third-party complaint that previously would have been allowed under joint tortfeasor contribution theories must now be allowed, under liberal construction of the rules of procedure, to assert a comparative negligence theory or a breach of contract indemnity claim, in order to assure that each person at fault bears only his proportionate share of liability. Tipton v. Texaco, Inc., 103 N.M. 689, 712 P.2d 1351 (1985).

Apportionment of settling tortfeasor's negligence. — A tortfeasor defendant cannot force a settling tortfeasor to have his negligence apportioned by a jury as a third party defendant rather than as a non-party witness. Wilson v. Gillis, 105 N.M. 259, 731 P.2d 955 (Ct. App. 1986).

Third-party claims properly joined. — In an action by an automobile passenger against a truck owner and a truck driver, third-party claims by the truck owner and driver against the automobile driver for property damage and personal injury were properly joined, since the claims arose out of the same transaction, and the liability of the truck owner, the truck driver and the automobile driver were dependent upon the same operative facts. Navajo Freight Lines v. Baldonado, 90 N.M. 264, 562 P.2d 497 (1977).

Objection waived. Third-party defendant waived objection to trial of issue, allegedly improperly joined, between herself and third-party plaintiff, by failure to timely object thereto, where she first objected to joinder of the unrelated claim by third-party complaint at conclusion of plaintiff's case and by request for a conclusion of law at the end of the entire case. Hancock v. Berger, 77 N.M. 321, 422 P.2d 359 (1967).

Dismissal improper. — Third-party complaint initiated by defendant insured in personal injury case against his insurer alleged a genuine cause of action, and order summarily dismissing third-party complaint was improper. Satterwhite v. Stolz, 79 N.M. 320, 442 P.2d 810 (Ct. App. 1968).

Where guest in first vehicle brought suit against owner and driver of second vehicle, who thereupon filed third-party complaint against driver of first vehicle, under liberal rules of pleading amendment of this complaint so as to state that acts of third-party defendant contributed to collision and plaintiff's resulting injury should have been allowed (even though amendment should have stated that such acts proximately caused the accident), and motion to strike third-party complaint for failure to state cause of action denied; whether third-party defendant was guilty of such negligence as to be liable under guest statute would depend on evidence adduced at trial. Downing v. Dillard, 55 N.M. 267, 232 P.2d 140 (1951).

Federal suit not res judicata. — Dismissal with prejudice of third-party complaint brought in federal court because of plaintiff's failure to prosecute was not res judicata of plaintiff's right to bring action in state court against previous third-party defendant. Salazar v. Murphy, 66 N.M. 25, 340 P.2d 1075 (1959).

Third-party defendant in federal court suit, wherein judgment could not be had against him for lack of diversity, was not entitled to summary judgment based on the federal court case on res judicata grounds in subsequent suit brought against him by plaintiff in state court. Williams v. Miller, 58 N.M. 472, 272 P.2d 676 (1954). See also Williams v. Miller, 61 N.M. 326, 300 P.2d 480 (1956).

Peremptory challenges. — It was proper to allow five peremptory challenges to third-party defendant in addition to those allowed original defendant in the action, where there was another controversy distinct from that of original parties plaintiff and defendant. Lambert v. Donelly, 74 N.M. 453, 394 P.2d 735 (1964); American Ins. Co. v. Foutz & Bursum, 60 N.M. 351, 291 P.2d 1081 (1955).

Law reviews. — For comment, "Products Liability - Strict Liability in Torts," see 2 N.M.L. Rev. 91 (1972).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Automobiles and Highway Traffic § 1045; 14 Am. Jur. 2d Carriers § 1135; 18 Am. Jur. 2d Contribution §§ 117, 124; 59 Am. Jur. 2d Parties §§ 99 et seq., 179 et seq.

Right of one brought into action as a party by original defendant upon ground that he is or may be liable to latter in respect to matter in suit to raise or contest issues with plaintiff, 78 A.L.R. 327.

Defendant's right to bring in third person asserted to be solely liable to the plaintiff, 168 A.L.R. 600.

Right of defendant in action for personal injury or death to bring in joint tort-feasor for purpose of asserting right of contribution, 11 A.L.R.2d 228, 95 A.L.R.2d 1096.

Joinder as defendants, in tort action based on condition of sidewalk or highway, of municipal corporation and abutting property owner or occupant, 15 A.L.R.2d 1293.

Right of retailer sued by consumer for breach of implied warranty of wholesomeness or fitness of food or drink, to bring in as a party defendant the wholesaler or manufacturer from whom article was procured, 24 A.L.R.2d 913.

Independent venue requirements as to cross-complaint or similar action by defendant seeking relief against a codefendant or third party, 100 A.L.R.2d 693.

Loan receipt or agreement between insured and insurer for a loan repayable to expense of recovery from other insurer or from carrier or other person causing loss, 13 A.L.R.3d 42.

67A C.J.S. Parties §§ 88 to 111.

1-015. Amended and supplemental pleadings.

A. **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty (20) days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

B. **Amendments to conform to the evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

C. **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

D. **Supplemental pleadings.** Upon motion of a party, the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

E. **All matters set forth in one pleading.** In every complaint, answer or reply, amendatory or supplemental, the party shall set forth in one entire pleading all matters which, by the rules of pleading, may be set forth in such pleading, and which may be necessary to the proper determination of the action or defense.

ANNOTATIONS

Cross references. — For striking out pleading after failure to answer interrogatories, *see* Rule 1-037 NMRA.

Compiler's notes. — Paragraph A and Rule 1-042 NMRA are deemed to have superseded 105-604, C.S. 1929, relating to amendments and dividing misjoined causes of action. Paragraph A is also deemed to have superseded 105-613 and 105-616, C.S. 1929, authorizing the plaintiff to strike part of his complaint and providing for pleading after amendment, respectively.

Paragraph B is deemed to have superseded 105-601 to 105-603, C.S. 1929, relating to variances between allegations and proof and failure of proof. See also the notes to Rule 1-060.

Paragraph D is deemed to have superseded 105-612, C.S. 1929, relating to the same subject matter.

Paragraph E is deemed to have superseded 105-614, C.S. 1929, which was identical therewith. See 105-615, C.S. 1929, relating to the construction of 105-614, C.S. 1929.

I. GENERAL CONSIDERATION.

Rule 1-015 NMRA permits the voluntary dismissal of individual claims that make up an action. Gates v. N.M. Taxation & Revenue Dept., 2008-NMCA-023, 143 N.M. 446, 176 P.3d 1169.

II. AMENDMENTS.

A. IN GENERAL.

Rule 1-015 NMRA does not apply to proceedings in children's court. — Where the parent was charged with neglect and abandonment of the parent's children; at the end of the hearing, after all evidence had been presented, CYFD asserted in its closing argument that there was sufficient evidence to support a finding of abuse; the court considered CYFD's argument as a motion to amend to conform to the evidence pursuant to Rule 1-015 NMRA and granted the motion to amend the petition to include a claim of abuse; the court did not hear the issue of abuse; and the court found that the parent neglected and abused the children, the parent's due process rights were violated by the amendment procedure because the court erred by relying on Rule 1-015 NMRA and by not holding a hearing on the abuse issue as required by Section 32A-1-18 NMSA 1978. *State of N.M. ex rel. CYFD v. Steve C.,* 2012-NMCA-045, 277 P.3d 484.

Denial of motion to amend was not an abuse of discretion. — Where plaintiff sued defendant for negligence, and two years after plaintiff initiated the litigation and a month after the hearings on defendant's motions for summary judgment addressed to plaintiff's negligence theory, plaintiff filed a motion for leave to file a second amended complaint to add intentional tort claims and the amendment would have prejudiced the defendant, the trial court did not abuse its discretion in denying the motion to amend. *Crespin v. Albuquerque Baseball Club, LLC*, 2009-NMCA-105, 147 N.M. 62, 216 P.3d 827, *cert. granted*, 2009-NMCERT-009.

Timeliness. — Where plaintiff filed its motion and proposed amended complaint that included new theories and causes of action 20 months after filing the original complaint, seven months after the scheduling order was entered, three months after the deadline for motions established by the scheduling order, one month after discovery had been completed, and two months before trial, the court did not abuse its discretion in denying plaintiff's motion to amend. Roark v. Farmers Group, Inc., 2007-NMCA-074, 142 N.M. 59, 162 P.3d 896, cert. denied, 2007-NMCERT-006.

Joint Powers Agreement Act. — Where a motion to amend to add a Joint Powers Agreement Act claim was insufficient and futile on its face, granting the motion would have served no purpose. Paragon Foundation, Inc. v. N.M. Livestock Board, 2006-NMCA-004, 138 N.M. 761, 126 P.3d 577, cert. denied, 2006-NMCERT-001.

Supplemental pleadings and amended pleadings are different in that a supplemental pleading relates to facts which arose after the original pleading was filed, whereas an amended pleading includes matters that occurred before. Electric Supply Co. v. United States Fid. & Guar. Co., 79 N.M. 722, 449 P.2d 324 (1969).

Newly discovered existing facts are brought in by amendment. — Facts newly discovered but previously existing are properly brought in by amended, not supplemental, pleading. Colcott v. Sutherland, 36 N.M. 370, 16 P.2d 399 (1932).

A party may amend his pleadings one time as a matter of right under the conditions of the first sentence of Subdivision (a) (see now Paragraph A). Martinez v. Cook, 57 N.M. 263, 258 P.2d 375 (1953).

It is the intent of the rule to allow one amendment of a complaint as a matter of right when no answer is served during the pleading stage of litigation. Moffat v. Branch, 2002-NMCA-067, 132 N.M. 412, 49 P.3d 673.

If no responsive pleading has been filed. — When plaintiff filed her motion to amend, summary judgment had not been entered and no responsive pleading had been filed under this rule, she was entitled to amend as a matter of right, and although leave of court was not necessary to file an amended complaint, it was error to deny such leave when timely requested by motion. Jacobson v. State Farm Mut. Auto. Ins. Co., 81 N.M. 600, 471 P.2d 170 (1970).

Subdivision (a) (see now Paragraph A) authorizes a party to amend his pleading as a matter of course at any time before a responsive pleading is served; hence, the trial court did not err in permitting the plaintiff to amend its complaint to include a second count at a time when the defendant had not filed a responsive pleading. Platco Corp. v. Shaw, 78 N.M. 36, 428 P.2d 10 (1967).

After foreclosure of a deed of trust, and bill filed for redemption, an amended bill praying for a cancellation of trustee's deed and quieting of plaintiff's title, tendered before

answer filed, should have been permitted under 2685, subd. 81, 1897 Comp. (105-604, C.S. 1929). Bremen Mining & Milling Co. v. Bremen, 13 N.M. 111, 79 P. 806 (1905).

Permission to amend a pleading need not be obtained if the pleading is one to which no responsive pleading is permitted, the action has not been placed on the trial calendar, and the amendment is made within 20 days after the pleading is served. In re Pulver, 117 N.M. 329, 871 P.2d 985 (Ct. App. 1994).

After the filing of a responsive pleading, amendments may be made only by permission of the court. Vernon Co. v. Reed, 78 N.M. 554, 434 P.2d 376 (1967).

In the absence of consent by the adverse party to the amendment proposed, the pleading could only be amended by leave of the court. State v. Hodnett, 79 N.M. 761, 449 P.2d 669 (Ct. App. 1968).

Or adverse party's written consent. — Under Subdivision (a) (see now Paragraph A), defendant had the right to amend his answer by leave of court or by written consent of the adverse party. Atol v. Schifani, 83 N.M. 316, 491 P.2d 533 (Ct. App. 1971).

Proper amendment of summary judgment motions. — Since motions must be directed to specific parties, a movant has the option to amend the summary judgment motion to add additional parties or to change parties, if necessary, with the motion relating back to the date of the original motion if the party has received such notice so that he will not be prejudiced. By failing to amend his motion, defendant failed to make a summary judgment motion against this plaintiff. Thus, the summary judgment motion granted must be reversed. Perea v. Snyder, 117 N.M. 774, 877 P.2d 580 (Ct. App. 1994).

But motion for summary judgment is not a responsive pleading within the meaning of Subdivision (a) (see now Paragraph A). Jacobson v. State Farm Mut. Auto. Ins. Co., 81 N.M. 600, 471 P.2d 170 (1970).

Nor is motion to dismiss. — Plaintiffs should have been allowed to amend as a matter of course because a motion to dismiss is not a responsive pleading within Subdivision (a) (see now Paragraph A). Buhler v. Marrujo, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974).

Neither the filing nor granting of such a motion before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper, and a motion for leave to amend (though unnecessary) must be granted if filed. Malone v. Swift Fresh Meats Co., 91 N.M. 359, 574 P.2d 283 (1978).

Or complaining that pleadings do not comply with rules. — Motions complaining that complaints failed to comply with the rules, contained matter that should be stricken thereunder, failed to state a cause of action, etc., are not responsive pleadings. Peoples v. Peoples, 72 N.M. 64, 380 P.2d 513 (1963).

But court's permission is necessary if right to amend was specifically denied. — When plaintiffs' complaints have been dismissed without leave and with the right to amend specifically denied, plaintiffs may not file an amended pleading without the court's permission. Peoples v. Peoples, 72 N.M. 64, 380 P.2d 513 (1963).

Or summary judgment has been granted. — This rule had no bearing where decision granting defendant's motion for summary judgment had already been announced. At that stage of the proceeding the granting or denial of the motion to amend was within the discretion of the court. Hamilton v. Hughes, 64 N.M. 1, 322 P.2d 335 (1958).

Amendment to add individual members of Board. — Because the individual members of the Public Employees Retirement Board were on notice of a proceeding, and because the claim to be asserted in the amended pleading would arise out of conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, plaintiff may move to amend his complaint to add the individual members of the Board. Gill v. PERA, 2004-NMSC-016, 135 N.M. 472, 90 P.3d 491.

Leave of court not required where original complaint never served. — Where service of the original complaint upon the defendant was never perfected under this rule, the plaintiffs were not required to seek leave of the court to file an amended complaint. Campbell v. Benson, 97 N.M. 147, 637 P.2d 578 (Ct. App. 1981), overruled on other grounds Safeco Ins. Co. of Am. v. United States Fid. & Guar. Co., 101 N.M. 148, 679 P.2d 816 (1984).

Final amendment verification rectifying earlier insufficiency. — Although the human services department failed to obtain the court's permission prior to filing its amended petitions to terminate parental rights, the court granted permission to file the final amended petition and verification prior to the commencement of trial. Allowance of this amendment rectified any insufficiency in the earlier pleadings not being verified. The court, therefor, was not deprived of subject matter jurisdiction. Laurie R. v. New Mexico Human Servs. Dep't, 107 N.M. 529, 760 P.2d 1295 (Ct. App. 1988).

One additional opportunity to withstand motions should be given. — Counsel for plaintiffs must strictly conform in any amendments undertaken with these rules in all their details. However, that they should have at least one additional opportunity to attempt to draft a complaint that will withstand proper motions is in the spirit of the rules. Peoples v. Peoples, 72 N.M. 64, 380 P.2d 513 (1963).

Election to amend waives error in ruling or original pleading. — Where pleader elected to amend after demurrer had been sustained, he waived the right to allege error on the ruling. Bremen Mining & Milling Co. v. Bremen, 13 N.M. 111, 79 P. 806 (1905).

Pleadings are the means to assist, not deter, the disposition of litigation on the merits. Dale J. Bellamah Corp. v. City of Santa Fe, 88 N.M. 288, 540 P.2d 218 (1975).

Amendments to pleadings are favored, and the right thereto should be liberally permitted in the furtherance of justice. Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965), overruled on other grounds, Sundance Mechanical & Util. Corp. v. Atlas, 109 N.M. 683, 789 P.2d 1250 (1990); Camp v. Bernalillo County Medical Center, 96 N.M. 611, 633 P.2d 719 (Ct. App. 1981), overruled on other grounds Lakeview Invs., Inc. v. Alamogordo Lake Village, Inc., 86 N.M. 151, 520 P.2d 1096 (1974).

And should be freely allowed. — Under Subdivision (a) (see now Paragraph A) amendments are to be freely allowed so that the ends of justice may be accomplished. Davis v. Severson, 71 N.M. 480, 379 P.2d 774 (1963).

Subdivision (a) (see now Paragraph A), which provides that leave to amend shall be freely given when justice so requires, is the same as former Rule 15(a), Fed. R. Civ. P. (now see Rule 1-015). Coastal Plains Oil Co. v. Douglas, 69 N.M. 68, 364 P.2d 131 (1961).

Laws 1865, ch. 27, §§ 26, 27 and 120, providing for amendments to pleadings, showed a liberal legislative intention to allow all such amendments which might be necessary in furtherance of the attainment of substantial justice between parties by disregarding technical objections and trying cases upon their merits. Sanchez y Contraes v. Candelaria, 5 N.M. 400, 23 P. 239 (1890).

This liberality extends to replevin actions. Vigil v. Johnson, 60 N.M. 273, 291 P.2d 312 (1955).

And eminent domain proceedings. — See State ex rel. State Hwy Comm'n v. Grenko, 80 N.M. 691, 460 P.2d 56 (1969).

And occupational disease disablement cases. — Subdivision (a) (see now Paragraph A), providing for freely granting of leave to amend when justice requires, is applicable to proceedings under the Occupational Disease Disablement Law. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

And mandamus. — While office of mandamus is to afford a speedy remedy and to avoid delay, this does not mean that court is without power to extend time within which a respondent may answer, or that the answer may not be amended; leave to amend should be freely given when justice demands. State ex rel. Fitzhugh v. City Council of Hot Springs, 56 N.M. 118, 241 P.2d 100 (1952).

Parties-plaintiff may be stricken. — Under 1911, C.L. 1881, allowing plaintiff to amend by striking out parties-plaintiff before trial and without objection was proper if defendant was not prejudiced thereby and if it was necessary to determine the real question in controversy. Neher v. Armijo, 9 N.M. 325, 54 P. 236 (1898).

And new cause of action may be alleged. — A new cause of action founded on facts not completely foreign to those pleaded originally may be alleged in an amended complaint. Newbold v. Florance, 54 N.M. 296, 222 P.2d 1085 (1950).

Recovery should be allowed on quantum meruit even though the suit was originally framed on express contract, and amendment to pleadings should be freely allowed to accomplish this purpose at any stage of the proceeding, including considering the pleadings amended to conform to the proof. Montgomery v. Cook, 76 N.M. 199, 413 P.2d 477 (1966); State ex rel. Gary v. Fireman's Fund Indem. Co., 67 N.M. 360, 355 P.2d 291 (1960); Honaker v. Ralph Pool's Albuquerque Auto Sales, Inc., 74 N.M. 458, 394 P.2d 978 (1964).

Although denying right to change theory is discretionary. — A ruling that plaintiff could not change its theory of the case from that upon which the complaint was framed was discretionary with the court, as was the refusal to permit the amendment. State ex rel. State Hwy. Comm'n v. Weatherly, 67 N.M. 97, 352 P.2d 1010 (1960).

Amendment should be allowed to state if claims are individual or community. — Defendants were entitled to know whether wage and medical claims were asserted as individual claims of the decedent or his widow, or as community claims, and on reversal and remand of defendants' award of summary judgment, the plaintiffs should be given the opportunity to amend to state the basis of the wage and medical claims. Rodgers v. Ferguson, 89 N.M. 688, 556 P.2d 844 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

And allegations as to credits claimed by defendant may be stricken. — A complaint to an action on an account stated may be amended by striking out allegations with respect to credits claimed by defendants. Brown & Manzanares Co. v. Gise, 14 N.M. 282, 91 P. 716 (1907).

And defense of statute of limitations may be allowed. — While it is true that under Rule 8(c) (see now Rule 1-008 NMRA) a party should set forth affirmatively the defense of the statute of limitations, and generally this defense is waived if it is not asserted in a responsive pleading under Rule 12(h) (see now Rule 1-012 NMRA), trial courts may allow the pleadings to be amended to set up this defense. Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1962).

But reply to counterclaim may be refused where delay not excused. — When the record does not show that the failure to file a reply to a counterclaim for more than a year was due to oversight, inadvertence or excusable neglect or that the interests of justice required the allowance of appellant's request, the trial court does not err in denying a motion to file a reply. Coastal Plains Oil Co. v. Douglas, 69 N.M. 68, 364 P.2d 131 (1961) (not deciding if Paragraph A of this rule applies if there is no pleading to amend).

Answer may be amended by interlineation, where trial court permits. Home Owners' Loan Corp. v. Reavis, 46 N.M. 197, 125 P.2d 709 (1942).

Amendments of pleadings are within the sound discretion of the trial court and should be freely permitted where justice requires. State ex rel. State Hwy. Comm'n v. Grenko, 80 N.M. 691, 460 P.2d 56 (1969) (eminent domain proceedings).

The allowance or denial of motions to amend under this rule is a matter within the sound discretion of the trial court. State ex rel. Pennsylvania Transformer Div. v. Electric City Supply Co., 74 N.M. 295, 393 P.2d 325 (1964).

Even though there had been a lengthy delay between the filing of the original answer and the notice of intent to amend three days before the trial, the granting or denying of the amendment was a matter within the sound discretion of the trial court. Gillum v. Southland Life Ins. Co., 70 N.M. 293, 373 P.2d 536 (1961).

Amended answer. — District court did not err when it did not accept portions of an amended answer to an amended complaint which changed responses to identical allegations in the original complaint and the district court did not abuse its discretion in striking such portions. Gonzales v. Lopez, 2002-NMCA-086, 132 N.M. 558, 52 P.3d 418.

Liberality of court discretion exercised for amended pleadings. — Liberality, with which this rule is to be viewed, applies mainly to the manner in which the court's discretion shall be exercised in permitting amended pleadings. Raven v. Marsh, 94 N.M. 116, 607 P.2d 654 (Ct. App. 1980).

Ruling is only reversible for abuse of discretion. — A motion to amend is addressed to the discretion of the trial court, and on review the court's ruling will not be disturbed unless an abuse of discretion has occurred. Constructors, Ltd. v. Garcia, 86 N.M. 117, 520 P.2d 273 (1974).

A motion to amend is addressed to the sound discretion of the trial court and on review the ruling of the court will not be disturbed unless there is a clear showing of abuse of discretion. Montano v. House of Carpets, Inc., 84 N.M. 129, 500 P.2d 414 (1972).

Amendments of pleadings should be permitted with liberality in the furtherance of justice, but such applications are addressed to the sound discretion of the court, and its action in denying permission to amend is subject to review only for a clear abuse of discretion. Cantrell v. Dendahl, 83 N.M. 583, 494 P.2d 1400 (Ct. App. 1972); In re Will of Stern, 61 N.M. 446, 301 P.2d 1094 (1956); Vernon Co. v. Reed, 78 N.M. 554, 434 P.2d 376 (1967); State v. Hodnett, 79 N.M. 761, 449 P.2d 669 (Ct. App. 1968); Atol v. Schifani, 83 N.M. 316, 491 P.2d 533 (Ct. App. 1971).

Allowance of trial amendments is within discretion of trial court, and where such discretion is not abused, the refusal to allow such an amendment will not warrant a reversal of the judgment. Klasner v. Klasner, 23 N.M. 627, 170 P. 745 (1918).

Denial of a motion to amend will be reversed only upon a showing of clear abuse of discretion. Slide-A-Ride of Las Cruces, Inc. v. Citizens Bank, 105 N.M. 433, 733 P.2d 1316 (1987).

Motions to amend are addressed to the sound discretion of the trial court, and will be reviewed on appeal only for abuse of discretion. An abuse of discretion occurs when the court exceeds the bounds of reason, considering all the circumstances before it. Rivera v. King, 108 N.M. 5, 765 P.2d 1187 (Ct. App. 1988).

Amendments are within the trial court's discretion and will be reversed on appeal only for abuse of discretion. Schmitz v. Smentowski, 109 N.M. 386, 785 P.2d 726 (1989).

"Abuse of discretion" controls district court ruling. — Whether a district court grants or denies a motion to amend, the rule remains the same: "abuse of discretion" controls. Newman v. Basin Motor Co., 98 N.M. 39, 644 P.2d 553 (Ct. App. 1982).

Where amendments have been previously allowed. — Whether a third opportunity to amend should be granted rests in the trial court's discretion, and its ruling will be reviewed only on the question of abuse of discretion. Hambaugh v. Peoples, 75 N.M. 144, 401 P.2d 777 (1965).

Amendment of pleadings after the first time rests in the sound discretion of the trial court subject to the supreme court's review of such discretion. Martinez v. Cook, 57 N.M. 263, 258 P.2d 375 (1953).

Where complaint had been twice amended and on the last adverse ruling the plaintiffs, represented by competent counsel, of their own free will determined to stand on their last pleading and brought the case to the supreme court for review and the dismissal of the second amended complaint was affirmed, on remand the trial court did not abuse its discretion in denying the plaintiffs' motion for leave to further amend. Martinez v. Cook, 57 N.M. 263, 258 P.2d 375 (1953).

Discretion held not abused. — Trial court did not err in allowing defendant in action for sales commission to amend his answer at the commencement of the trial as to assert an affirmative defense. Montano v. House of Carpets, Inc., 84 N.M. 129, 500 P.2d 414 (1972).

Where although plaintiffs moved to amend as soon as the ordinance and building code came to their attention, they did not invoke a ruling on their motion prior to trial, and instead proceeded to trial when only one of plaintiffs' witnesses remained to testify before a ruling was invoked, the court held there was no abuse of discretion in denying

the amendment at that stage of the trial. Cantrell v. Dendahl, 83 N.M. 583, 494 P.2d 1400 (Ct. App. 1972).

Where the materiality of the proposed additional exhibits to the pretrial order depended on the proposed amendment, which the trial court, in its discretion, properly disallowed, there was no error in not permitting the addition of these exhibits. Cantrell v. Dendahl, 83 N.M. 583, 494 P.2d 1400 (Ct. App. 1972).

Where a long period of time had elapsed between the filing of the answers and the request for permission to amend, and no showing of prejudice was made, there is no abuse of discretion by the trial court in refusing motion to amend. Pope v. Lydick Roofing Co., 81 N.M. 661, 472 P.2d 375 (1970).

The trial court did not err in allowing the state to amend its map by showing access roads extending to defendants' boundaries and awarding damages based on the state's agreement where the highway commission during the trial obtained an easement over federally owned lands and agreed to construct the necessary connecting link so as to provide access between the defendants' two tracts to the highway system by way of a county road. The admission of the amendment to correct an honest mistake and to prevent a windfall to the defendants was not an abuse of discretion. State ex rel. State Hwy. Comm'n v. Grenko, 80 N.M. 691, 460 P.2d 56 (1969).

Where the trial judge rules that joinder of a conspiracy action against an insurance company with the plaintiff's malpractice action would be confusing to the jury, that decision does not exceed the bounds of reason, and is not a clear abuse of discretion. Clancy v. Gooding, 98 N.M. 252, 647 P.2d 885 (Ct. App. 1982).

Trial court did not abuse its discretion in denying a motion to amend filed almost five years after the original complaint, where the hearing on the motion was held a month before a trial setting in the case, and plaintiff's brief did not explain how she was prejudiced by the denial of her motion. Rivera v. King, 108 N.M. 5, 765 P.2d 1187 (Ct. App. 1988).

The court did not abuse its discretion by refusing to allow an oral motion to amend, two years after an initial complaint was filed and subsequent to its grant of summary judgment to the defendant. Lunn v. Time Ins. Co., 110 N.M. 73, 792 P.2d 405, cert. denied, 498 U.S. 958, 111 S. Ct. 387, 112 L. Ed. 2d 397 (1990).

The district court did not abuse its discretion in denying the plaintiffs leave to amend their complaint under Paragraph A of this rule where the plaintiffs counsel admitted that the facts underlying the motion to amend were “always there” and plaintiffs were just “bundling them in a different theory,” the case had already had a three-year delay in getting to trial, and the proposed amendment would cause a further continuance to allow the defendant time to assess its position, develop facts and a defense, and determine if it could assert third-party claims. Apodaca v. AAA Gas Co., 2003-NMCA-085, 134 N.M. 77, 73 P.3d 215.

Where plaintiff did not alert the trial court's attention to the motion to amend until 10 days before the case was set to go trail, the trial court's decision to deny the motion to amend was reasonable. Matrix Production Co. v. Ricks Exploration Inc., 2004-NMCA-135, 136 N.M. 593, 102 P.3d 1285, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097 (N.M. 2004).

Discretion held abused. — Where numerous grievous wrongs are attempted to be asserted on behalf of plaintiffs occupying positions of relative difficulty, represented principally by nonresident counsel unfamiliar with New Mexico rules of practice and procedure and opposed by experienced local counsel, plaintiffs should not have been denied a third attempt to state a claim upon which relief could be had, and the court abused its discretion in ruling otherwise. Hambaugh v. Peoples, 75 N.M. 144, 401 P.2d 777 (1965).

Denial of motion to amend complaint in tort suit to allege that defendant had transferred realty in contemplation of insolvency so that any judgment against him would be an empty one was an abuse of discretion. Fitzhugh v. Plant, 57 N.M. 153, 255 P.2d 683 (1953).

Where a court allowed a plaintiff to amend the pleadings during trial to include a new theory of negligence but prevented the defendant from preparing a defense to that theory, the court abused its discretion in the allowance of the amendment. Camp v. Bernalillo County Medical Center, 96 N.M. 611, 633 P.2d 719 (Ct. App. 1981).

Denial based on mistake of law is not exercise of sound discretion. — Where counsel for plaintiff requested permission to amend by striking the allegation of doing business in the state and alleging that while agents solicited in the state, acceptance of the order was at the home office of the company in a foreign state, and the record makes it equally clear that the court so understood the request but construed the previous decisions to hold that mere solicitation of the contract in this state by an agent amounted to the transaction of business and that any action thereon is barred, the court erred. Denial of the request to amend was not, under the circumstances, a denial in the exercise of a sound judicial discretion, but the denial rested upon an erroneous construction of applicable law. Vernon Co. v. Reed, 78 N.M. 554, 434 P.2d 376 (1967).

The right to amend should be permitted with liberality in the furtherance of justice, and is addressed to the sound discretion of the trial court; where the trial court denied the request to amend upon an erroneous construction of applicable law regarding questions of consideration in stating a claim for relief, plaintiff should be granted the right to file his first amended complaint in furtherance of justice. Kirby Cattle Co. v. Shriners Hosps. for Crippled Children, 88 N.M. 605, 544 P.2d 1170 (Ct. App. 1975), rev'd on other grounds, 89 N.M. 169, 548 P.2d 449 (1976) (trial court's construction of applicable law correct).

And proceeding to trial while motion is pending is abuse of discretion. — Where record clearly shows that defendant called the pendency of the motion to amend to the attention of the trial court, that the trial court proceeded to trial despite the pendency of

the motion and that the pending motion sought to amend the issues to be tried, since amendments to pleadings are favored and should be liberally permitted in the furtherance of justice, the trial court abused its discretion in proceeding to trial despite the pendency of such motion. Atol v. Schifani, 83 N.M. 316, 491 P.2d 533 (Ct. App. 1971).

Court may pass on apparent insufficiency or futility of amended pleading. — While ordinarily the courts on motion to amend will not pass on the sufficiency of the amended pleading, the New Mexico Supreme Court thinks the better reasoning, applied in the federal courts, is that a court may do so when the insufficiency or futility of the pleading is apparent on its face. State ex rel. Pennsylvania Transformer Div. v. Electric City Supply Co., 74 N.M. 295, 393 P.2d 325 (1964).

Ruling based on proper reason will not be reversed for other erroneous reason. — If the trial court stated a reason upon which it could properly disallow the amendment to the complaint, its ruling is not to be reversed because it stated another allegedly erroneous reason. Cantrell v. Dendahl, 83 N.M. 583, 494 P.2d 1400 (Ct. App. 1972).

For review, time and nature of proposed amendment must be shown. — Supreme court cannot decide whether trial court erred in denying motion to amend the answer where it is not shown whether request was made before, during or after the trial, nor what the nature of the amendment was, and where it is not indicated that the amendment was one permitted under this rule. Bounds v. Carner, 53 N.M. 234, 205 P.2d 216 (1949).

Party objecting to amendment must show prejudice. — Even if a party objects to another party's amendment, the trial court is required to allow the amendment freely, if the objecting party fails to show that he will be prejudiced by the amendment. Crumpacker v. DeNaples, 1998-NMCA-169, 126 N.M. 288, 968 P.2d 799, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

Amendments which alter or change theory of case not permitted on appeal. Houston v. Young, 94 N.M. 308, 610 P.2d 195 (1980).

B. CONFORMING TO EVIDENCE.

Material variance between pleading and proof precludes recovery. — A variance between the pleading and proof of a party litigant which precludes a recovery means a substantial and material difference, in that they depart from each other upon a material phase of the cause of action or defense. Epstein v. Waas, 28 N.M. 608, 216 P. 506 (1923).

But minor variances between the pleadings and the evidence are generally disregarded if they do not prejudice or mislead the opposing party. Johnson v. Mercantile Ins. Co. of Am., 47 N.M. 47, 133 P.2d 708 (1943).

In action to recover compensation under Federal Employers' Liability Act (45 U.S.C. § 51 et seq.), variance between allegation that injury resulted from negligent pushing, by fellow employee, of truck against jamb of doorway causing steel shafting or bars to fall off truck and break plaintiff's leg, and proof showing that fellow employee pushed the shafting and bars causing them to fall off the truck was not fatal where employer was not misled. Tillian v. Atchison, T. & S.F. Ry., 40 N.M. 80, 55 P.2d 34 (1935).

Immaterial or inconsequential variances which do not mislead or prejudice the opposite party should be disregarded. Epstein v. Waas, 28 N.M. 608, 216 P. 506 (1923).

And such variances are cured. — Where services were proved as rendered at the request of the defendant, while the complaint was for services sold and delivered, Laws 1897, ch. 73, § 78 (105-601, C.S. 1929) cured the variance. Bushnell v. Coggshall, 10 N.M. 601, 62 P. 1101 (1900).

Absence of pleading is immaterial where not objected to. — Subdivision (b) (see now Paragraph B) follows the rule which long obtained in New Mexico to the effect that an absence of pleading supporting the proof becomes immaterial when the matter is litigated without objection to the deficiency in the pleading. George v. Jensen, 49 N.M. 410, 165 P.2d 129 (1946).

An issue has been litigated with consent. — A party may not, after consenting to litigate an issuable defense not pleaded, later, and upon failing to sustain the issue through want of proof, insist that the defense was not available because not pleaded. Csanyi v. Csanyi, 82 N.M. 411, 483 P.2d 292 (1971).

Subdivision (b) (see now Paragraph B), identical to Rule 15(b), Fed. R. Civ. P., is but declaratory of the rule in this jurisdiction that absence of a pleading to support the proof is waived when a party litigates the issue without objection. Posey v. Dove, 57 N.M. 200, 257 P.2d 541 (1953); George v. Jensen, 49 N.M. 410, 165 P.2d 129 (1946); Page & Wirtz Constr. Co. v. Solomon, 110 N.M. 206, 794 P.2d 349 (1990).

Or pretrial order states issue is pending for trial. — Failure to incorporate a previously filed counterclaim into an amended answer as required by Subdivision (e) (see now Paragraph E) is not a sound basis for its dismissal where there is neither surprise nor prejudice, or where the pretrial order regularly entered states the issues of the counterclaim to be pending for trial or where such issues are actually tried without objection. Beibelle v. Norero, 85 N.M. 182, 510 P.2d 506 (1973).

Under Rule 16 (see now Rule 1-016 NMRA), relating to pretrial procedure, it is expressly provided that the court may make an order, which, when entered, shall control subsequent course of the action, and where appellants were aware that appellee's claimed right to set off a repair bill was an issue in the cause and matters pertaining to the repair bill were litigated without objection on appellants' part, and likewise the issue was a subject of findings and conclusions requested by appellants, appellee's failure to

plead this setoff under Rule 13 (see now Rule 1-013 NMRA) did not bar their recovery of this setoff. Charley v. Rico Motor Co., 82 N.M. 290, 480 P.2d 404 (Ct. App. 1971).

Amendment or consent to litigation of issue is necessary for jurisdiction. — Where on a claim of slander of title to plaintiffs' property by reason of defendant filing for record an invalid materialman's lien which affected the marketability of plaintiffs' property, because the complaint alleged general damages, but not special damages, it failed to state a claim for relief, the trial court lacked jurisdiction to enter judgment on the complaint unless the omitted element of special damages was supplied by amendment of the complaint or by litigation of the issue of special damages without objection by the opposing party. Branch v. Mays, 89 N.M. 536, 554 P.2d 1297 (Ct. App. 1976).

Or to bring defense before court. — At a commitment hearing, where the state did not give its consent, express or implied, to trial of an issue not raised in defendant's pleadings, neither party made a motion for amendment of the pleadings, nor did the court allow any such amendment sua sponte, this issue was not properly before the trial court. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975).

Subdivision (b) (see now Paragraph B) could not apply where defendant sought to raise fraud as a defense to action for anticipatory breach of contract although there were admitted technical defects in his pleading, because the issue of fraud was not tried by express or implied consent nor did defendant seek an amendment. American Inst. of Mktg. Sys. v. Keith, 82 N.M. 699, 487 P.2d 127 (1971).

Where contributory negligence was not pleaded, raised by an affirmative pleading or tried by express or implied consent and defendant did not seek an amendment to his pleadings, the affirmative defense of contributory negligence was waived. Groff v. Circle K. Corp., 86 N.M. 531, 525 P.2d 891 (Ct. App. 1974).

Instruction is proper only if plaintiff pleads the theory or it is tried by express or implied consent. Rice v. Gideon, 86 N.M. 560, 525 P.2d 920 (Ct. App.), cert. quashed, 87 N.M. 299, 532 P.2d 888 (1974).

Unpled issue not tried by implied consent. — Since the evidence admitted without objection was relevant to both a pled issue and an unpled issue, the unpled issue was not litigated under implied consent. McKay v. Kimble, 117 N.M. 258, 871 P.2d 22 (Ct. App. 1994).

Amendment should be allowed as to litigated issues. — If a material fact has been omitted from the pleadings, but the fact is litigated as if it had been put in issue by the pleadings, then it is the duty of the trial court to amend the complaint in aid of the judgment so as to allege the omitted fact. Wynne v. Pino, 78 N.M. 520, 433 P.2d 499 (1967).

Under Subdivision (b) (see now Paragraph B) an amendment to set forth defenses proved though not pleaded should be allowed upon timely motion. Skeet v. Wilson, 76 N.M. 697, 417 P.2d 889 (1966).

There is wide latitude given district courts to amend pleadings to conform to the evidence. South Second Livestock Auction, Inc. v. Roberts, 69 N.M. 155, 364 P.2d 859 (1961).

Subdivision (b) (see now Paragraph B) requires that the court may and should permit the pleadings to be freely amended in order to aid in the presentation of the merits of the controversy, as long as the opposing party is not actually prejudiced, and Rule 9(k) (see now Rule 1-009), now integrated with the Rules of Civil Procedure, should be construed to conform with the general tenor of the rules, i.e., to reach the merits of the controversy and not determine the case on a mere technicality. Kleeman v. Fogerson, 74 N.M. 688, 397 P.2d 716 (1964).

To correct factual discrepancy in pleadings. — Assignment of error on court's allowance of amendment to correct factual discrepancy in pleadings was denied, where the court had permitted amendment of the pleadings to conform to the evidence, as is permissible under Subdivision (b) (see now Paragraph B). Vigil v. Johnson, 60 N.M. 273, 291 P.2d 312 (1955) (replevin action).

Where pleading was drawn on misinformation. — When a bill in equity was drawn on misinformation as to the real facts, which were only disclosed at the trial, complainants were entitled to amend their bill on final hearing so that the pleadings would conform to the facts by leave of the court. Perea v. Gallegos, 5 N.M. 102, 20 P. 105 (1889).

In workmen's compensation case. — By Subdivision (b) (see now Paragraph B), specifically made applicable to workmen's compensation cases arising on and after July 1, 1959, the trial court is given wide discretion in its allowance of amendments to conform to the evidence. Winter v. Roberson Constr. Co., 70 N.M. 187, 372 P.2d 381 (1962).

To increase amount sued for. — Trial court had authority to allow an amendment to increase the amount sued for where defendant did not show any prejudice to his defense as a result of the amendment. Measday v. Sweazea, 78 N.M. 781, 438 P.2d 525 (Ct. App. 1968).

To allow recovery on quantum meruit. — Recovery should be allowed on quantum meruit even though the suit was originally framed on express contract, and amendment to pleadings should be freely allowed to accomplish this purpose at any stage of the proceeding, including considering the pleadings amended to conform to the proof. Montgomery v. Cook, 76 N.M. 199, 413 P.2d 477 (1977); State ex rel. Gary v. Fireman's Fund Indem. Co., 67 N.M. 360, 355 P.2d 291 (1960); Honaker v. Ralph Pool's Albuquerque Auto Sales, Inc., 74 N.M. 458, 394 P.2d 978 (1964).

To name other persons charged with illegal voting. — Amendment of petition for election contest was properly allowed after testimony was closed, so as to name other persons charged with illegal voting. Berry v. Hull, 6 N.M. 643, 30 P. 936 (1892).

Or to assert defense of limitations. — The amendment of pleadings for the purpose of asserting the statute of limitations is a matter resting within the sound discretion of the trial court. Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1962).

Appellees, who failed to plead the statute of limitations as an affirmative defense in their answer, have waived this defense under Rule 12(h) (see now Rule 1-012 NMRA), and this defense, having been waived, cannot be revived unless appellees are relieved from their default by the trial court upon a motion to amend the answer so as to plead the defense of the statute of limitations. Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1962).

A trial court may allow pleadings to be amended to set up the statute of limitations defense, although generally it is true the defense is waived under Rule 12(h) (see now Paragraph H of Rule 1-012 NMRA) if not asserted in a responsive pleading. Apodaca v. Unknown Heirs of Tome Land Grant, 98 N.M. 620, 651 P.2d 1264 (1982).

Or defense of waiver. — Where party amended his counterclaim at conclusion of trial to insert defense of waiver, the court held that the amendment was to conform the pleadings to the evidence under Subdivision (b) (see now Paragraph B) and not to insert an affirmative defense under Rule 8(c) (see now Rule 1-008 NMRA). Western Farm Bureau Mut. Ins. Co. v. Lee, 63 N.M. 59, 312 P.2d 1068 (1957).

Or defense of fraud. — Where, after plaintiff has rested case and defendant raises defense of fraud, not in pleadings, notifies court and plaintiff, and plaintiff is not surprised nor prejudiced and in fact presents witnesses in defense, it is proper, after judgment is entered, to move for an amendment of the pleadings to conform to the evidence on fraud. Citizens Bank v. C & H Constr. & Paving Co., 89 N.M. 360, 552 P.2d 796 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976), modified State ex rel. Citizens Bank v. Fowlie, 90 N.M. 208, 561 P.2d 208 (1977).

Or pleadings are treated as amended to include litigated issues. — Where issues not within the pleadings are fully litigated without objection, the pleadings are treated as amended by the trial court or the appellate court so as to put in issue all litigated issues. Luvaul v. Holmes, 63 N.M. 193, 315 P.2d 837 (1957); Bauer v. Bates Lumber Co., 84 N.M. 391, 503 P.2d 1169 (Ct. App.), cert. denied, 84 N.M. 390, 503 P.2d 1168 (1972).

Issues tried by express or implied consent of the parties will be treated as if they had been raised in the pleadings. Terry v. Terry, 82 N.M. 113, 476 P.2d 772 (1970).

When an issue was tried by express or implied consent of the parties, then the trial court was obliged to treat this issue in all respects as if it had been raised in the

pleadings, even had the complaint not been amended. Wynne v. Pino, 78 N.M. 520, 433 P.2d 499 (1967).

Such as balance due. — Where the complaint did not specifically allege a balance due, the evidence was not within the pleadings, and appellant did not amend his complaint to conform to the evidence, this was not fatal, as an actual amendment need not be made. Failure so to amend does not affect the result of the trial of these issues. Luvaul v. Holmes, 63 N.M. 193, 315 P.2d 837 (1957).

Or amount advanced to defendant. — Where defendant argued that the court found and allowed recovery to plaintiffs on account of money advanced to defendant of a larger amount than was sued for in their complaint, but evidence supporting the amount found to have been advanced was admitted without objection, it was not error for the court to treat the complaint amended in this regard to conform to the proof. Allsup v. Space, 69 N.M. 353, 367 P.2d 531 (1961).

Or greater danger from breach. — Where subcontractor did not object to evidence that subcontractor's breach resulted in greater danger to contractor than original cross-complaint specified, the trial court could treat the cross-complaint as amended to conform with the evidence admitted without objection and made findings accordingly. Tyner v. DiPaolo, 76 N.M. 483, 416 P.2d 150 (1966).

Or requirement of contractor's license. — Where appellants made no objection to evidence of contractor's license and raised neither the jurisdiction nor the limitation question at trial, and requested no findings on either question, the requirement of the allegation of a contractor's license was a matter of public policy and did not otherwise bear any relation to the cause of action; an appellant cannot object to appellate court treating an issue tried with consent of the parties as though it had been raised by the pleadings. Daughtrey v. Carpenter, 82 N.M. 173, 477 P.2d 807 (1970).

Affirmative defense should be pleaded as new matter. — The defense that defendants' easement was altered by lawful authority is an affirmative defense of justification, a plea of confession and avoidance, and rightly should be pleaded as new matter. Posey v. Dove, 57 N.M. 200, 257 P.2d 541 (1953) (see Paragraph C of Rule 1-008).

And is not available if not pleaded. — Those matters constituting an avoidance or affirmative defense not pleaded as required by the rules are not available as a defense. McLean v. Paddock, 78 N.M. 234, 430 P.2d 392 (1967), overruled on other grounds Duke City Lumber Co. v. Terrel, 88 N.M. 299, 540 P.2d 229 (1975).

If there is no finding or pleading on issue, no amendment will be implied. — Where mitigation of damages, as a defense to appellant's counterclaim, did not appear in plaintiff-cross-appellee's requested findings and conclusions, and where appellant made no mention of any theory of mitigation of damages, the pleadings will not be

considered amended to conform to the proof. Moya v. Fidelity & Cas. Co., 75 N.M. 462, 406 P.2d 173 (1965).

But issue may be passed on if evidence supports it. — If it appears that a defense complained of is available under the issues litigated, and that substantial competent evidence supports its prerequisite facts found by the court, the trial court does not commit error in considering such defense and making decision on it. Posey v. Dove, 57 N.M. 200, 257 P.2d 541 (1953).

Such as invalidity of ordinance. — In an action by plaintiff-landowner seeking to enjoin defendants, city, city council and city planning commission from reconsidering a zoning ordinance, although defendants failed to plead the invalidity of the ordinance as an affirmative defense but rather entered an oral general denial, and although defendants failed to amend their answer to include this affirmative defense during or after the hearing on the merits, where the evidence as to the invalidity of the ordinance was presented without objection (although its import was not recognized until later), the issue was subsequently argued, and the trial court specifically ruled upon that issue in its findings of fact and conclusions of law, Subdivision (b) (see now Paragraph B) was held to be sufficiently broad to allow amendment of the pleadings to conform to the issues and evidence raised during trial, failure to amend did not affect the result of the trial of these issues and the issue of the invalidity of the ordinance was properly before the court. Dale J. Bellamah Corp. v. City of Santa Fe, 88 N.M. 288, 540 P.2d 218 (1975).

Or equitable estoppel. — Although equitable estoppel is an affirmative defense and must be pleaded in the answer, which the appellant failed to do, the supreme court has the authority to review the issue notwithstanding appellant's failure to plead same in the lower court. Hall v. Bryant, 66 N.M. 280, 347 P.2d 171 (1959).

Or adverse possession. — If defense of adverse possession is litigated without a plea, absence of a special plea is cured. Conway v. San Miguel County Bd. of Educ., 59 N.M. 242, 282 P.2d 719 (1955).

Failure to amend does not affect result on litigated issues. — Even if district court was without jurisdiction to modify its previous custody decree, since plaintiff's motion to modify failed to specifically allege that a change of circumstances had occurred, where the question that was litigated, and in which the defendant fully participated, was whether the custody provisions should be changed, and where defendant claimed no surprise and made no objection to the custody issue being heard, it was not necessary for plaintiff to formally move to amend his pleadings, because failure so to amend does not affect the result of the trial on the issues litigated. Terry v. Terry, 82 N.M. 113, 476 P.2d 772 (1970).

Failure to formally amend the pleadings will not jeopardize a verdict or judgment based upon competent evidence. If an amendment to the pleadings to conform to the proof

should have been made, the appellate court will presume that it is so made to support the judgment. Kleeman v. Fogerson, 74 N.M. 688, 397 P.2d 716 (1964).

It is unimportant if party was put on notice of issue. — Where during defendant's cross-examination of plaintiff, plaintiff announced that his complaint alleged punitive damages and defendant made no objection to this comment, and during the trial of the case defendant made no objection to any evidence which might bear on the issue of fraud or bad faith, defendant was put on notice of the issue of punitive damages. The fact that an amendment to the complaint was not actually made to use the words "punitive damages" is unimportant. Curtiss v. Aetna Life Ins. Co., 90 N.M. 105, 560 P.2d 169 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Where issues are tried by express or implied consent of the parties, that is, upon the admission, without objection, of evidence upon an issue not pleaded, the pleadings will be treated as if they had been amended and the issue raised thereby, and the fact that the amendment was not actually made is unimportant. Aguayo v. Village of Chama, 79 N.M. 729, 449 P.2d 331 (1969).

Where issues are tried by express or implied consent of the parties, they will be treated as if they had been raised in the pleadings. That the amendments were not actually made is unimportant. Berkstresser v. Voight, 63 N.M. 470, 321 P.2d 1115 (1958).

And failure to amend is not an issue on appeal. — Where the defendant did not affirmatively plead illegality as a defense in its answer as required by Rule 8(c) (see now Rule 1-008 NMRA) nor did the defendant at any time during or after the hearing move to amend its answer to include this affirmative defense as provided by Subdivision (b) (see now Paragraph B), but the testimony of defendant's president at trial raised the issue of illegality and was litigated without objection and specifically ruled upon by the trial court, the defendant's failure to affirmatively plead or move to amend at trial does not become an issue on appeal. Terrill v. Western Am. Life Ins. Co., 85 N.M. 456, 513 P.2d 390 (1973).

Pleading will be treated in all respects as amended. — Where the court permitted an amendment to the pleadings to conform to the evidence, the complaint will be treated in all respects as so amended, and a failure to formally amend the pleadings does not affect the result of the trial on such issues. Irwin v. Lamar, 74 N.M. 811, 399 P.2d 400 (1964).

Amendment to conform caption of complaint to evidence and remainder of the pleading is proper even after trial on the merits. Roybal v. Morris, 100 N.M. 305, 669 P.2d 1100 (Ct. App. 1983).

The test should be whether the defendant would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory. Wynne v. Pino, 78 N.M. 520, 433 P.2d 499 (1967).

Amendment allowed where no prejudice to opposing party. — When an amendment of the pleadings to conform to the proof presented at trial is asked, and there is no express or implied consent to the amendment, the test is whether prejudice would result to the opposing party if the amendment were allowed, i.e., whether the party would have a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory. Camp v. Bernalillo County Medical Center, 96 N.M. 611, 633 P.2d 719 (Ct. App. 1981).

Because defendant knew of plaintiff's claims through his discovery requests, pretrial motions, trial brief, and requested jury instructions, defendant had a fair opportunity to defend, and therefore was not prejudiced by trial court's order allowing plaintiff to amend pleadings to conform to evidence. Enriquez v. Cochran, 1998-NMCA-157, 126 N.M. 196, 967 P.2d 1136, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

Evidence on pleaded issue does not authorize amendment as to another issue. — The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried. There is no authorization within Subdivision (b) (see now Paragraph B) to allow an amendment to the pleadings to conform to proof merely because evidence presented which is competent and relevant to the issue created by the pleadings may incidentally tend to prove another fact not in issue. Moya v. Fidelity & Cas. Co., 75 N.M. 462, 406 P.2d 173 (1965).

Trial court may not amend sua sponte to give itself jurisdiction. — A trial court does not have the power sua sponte to exercise its own jurisdiction of the subject matter by its own amendment of a party's pleadings, since in order that jurisdiction may be exercised, there must be a case legally before the court; if a material element is omitted, no legal cause of action is stated and no jurisdiction to render a judgment arises. Branch v. Mays, 89 N.M. 536, 554 P.2d 1297 (Ct. App. 1976).

Judgment may not grant relief not requested nor within theory of trial. — A judgment may not grant relief which is neither requested by the pleadings nor within the theory on which the case was tried. Federal Nat'l Mtg. Ass'n v. Rose Realty, Inc., 79 N.M. 281, 442 P.2d 593 (1968); Holmes v. Faycus, 85 N.M. 740, 516 P.2d 1123 (Ct. App. 1973).

And amendment after judgment stating a new cause of action or a new defense is not permissible under the guise of conforming the pleadings to the proof and the court was right in striking the amendments from the records and reinstating the original judgment. Wynne v. Pino, 78 N.M. 520, 433 P.2d 499 (1967).

Since there was no consent to trial of unrecognized issue. — The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore, an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record - introduced as relevant to some other issue - which would support the amendment. This principle is

sound, since it cannot be fairly said that there is any implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial. Wynne v. Pino, 78 N.M. 520, 433 P.2d 499 (1967).

But inconsistent claims may be stated. — In an original complaint or in an amended complaint a party may plead inconsistent claims. Honaker v. Ralph Pool's Albuquerque Auto Sales, Inc., 74 N.M. 458, 394 P.2d 978 (1964).

And there is no room for the application of the doctrine of election of remedies under applicable rules of procedure. Honaker v. Ralph Pool's Albuquerque Auto Sales, Inc., 74 N.M. 458, 394 P.2d 978 (1964) (complaint for rescission amended to seek damages for fraud).

Failure to object to evidence is implied consent to litigating issue. — Where bailment theory of relief in negligence case was not raised by pleadings, but facts necessary to support such theory were presented in evidence at trial without objection by opposing party, such issue was tried by implied consent. White v. Wayne A. Lowdermilk, Inc., 85 N.M. 100, 509 P.2d 575 (Ct. App. 1973).

In the absence of any objection to evidence on an issue not raised by the pleadings, the party failing to object has impliedly consented to the amendment of the pleading to conform to the evidence. In re Sedillo, 84 N.M. 10, 498 P.2d 1353 (1972) (disbarment proceeding).

Where the evidence relative to the question of delivery was in large part developed by the defendant, and evidence relative to this question, which was developed by the plaintiff, was received without objection, then insofar as the fact of delivery was litigated, it was done with the implied consent of defendant. Wynne v. Pino, 78 N.M. 520, 433 P.2d 499 (1967).

As is broaching issue on cross-examination. — Where defendants failed to plead waiver of mechanic's liens as an affirmative defense, but intervenors broached the issue when they asked defendant's witness during cross-examination about the existence, identification and usage of the lien waivers, the issue was tried by implied consent during cross-examination, and defendant on redirect could pursue the issue. Objection made by intervenors at the end of the testimony upon redirect was not timely. George M. Morris Constr. Co. v. Four Seasons Motor Inn, Inc., 90 N.M. 654, 567 P.2d 965 (1977).

Unless evidence is relevant to another issue. — Implied consent usually is found where one party raises an issue material to the other party's case, or where evidence is introduced without objection. However, consent cannot be implied where the evidence introduced is relevant to some other issue and the parties do not squarely recognize it as an issue in the trial. Rice v. Gideon, 86 N.M. 560, 525 P.2d 920 (Ct. App.), cert. quashed, 87 N.M. 299, 532 P.2d 888 (1974).

Objecting party does not impliedly consent to trial of issue. — The recognized cases of "implied consent" under Subdivision (b) (see now Paragraph B) are those where the evidence is introduced without objection or when it is introduced by the party who would be in a position to complain of its irrelevancy. Where a party properly objects to the introduction of evidence as being irrelevant or collateral to the pleading, he cannot be considered as having impliedly consented to trial of the issue under this rule. Neither can he be said to have waived his objection by combatting the objectionable evidence within the scope it was introduced. Landers v. Atchison, T. & S.F. Ry., 68 N.M. 130, 359 P.2d 522 (1961).

If there is objection, pleading may be amended. — The phrase in the third sentence of Subdivision (b) (see now Paragraph B), that the court may allow the pleadings to be amended, has been interpreted by the court of appeals to mean that the court may allow the pleadings to be amended when the proponent of evidence objected to seeks or offers an amendment. Branch v. Mays, 89 N.M. 536, 554 P.2d 1297 (Ct. App. 1976).

But amendment will not be implied. — Where evidence on an issue not in the pleadings has been admitted over objection and the pleadings have not been amended, no amendment can be implied. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975); McLean v. Paddock, 78 N.M. 234, 430 P.2d 392 (1967), overruled on other grounds Duke City Lumber Co. v. Terrel, 88 N.M. 299, 540 P.2d 229 (1975).

Appellant cannot take advantage of appellee's proof for first time on appeal. — Although failure to plead matter which constitutes an affirmative defense does not preclude a party from taking advantage of the opposing party's proof, if the proof establishes the defense, appellant cannot take advantage of appellee's proof for the first time on appeal. Fredenburgh v. Allied Van Lines, 79 N.M. 593, 446 P.2d 868 (1968).

Where trial court did not rely on amended complaint. — Defendant's contention that the trial court erred in permitting plaintiff to amend his complaint to conform to the evidence was without merit where the trial court neither considered nor based its judgment on the allegations in the amended complaint to which evidence defendant objected at the trial and defendant made no showing that he was prejudiced by the allowance of the amendment. Silva v. Noble, 85 N.M. 677, 515 P.2d 1281 (1973).

C. RELATION BACK.

Failure to assert a meritorious defense. — Where the plaintiff proposes to amend its complaint to add the defendant as a party, the defendant’s failure to set forth a meritorious defense is not grounds for the court to deny the defendant’s motion to vacate. Capco Acquiscub, Inc. v. Greka Energy Corporation, 2008-NMCA-153, 145 N.M. 328, 198 P.3d 354.

Amendment adding defendant at the close of the trial. — Where the defendant was a named party in a case that was consolidated with a second case in which the defendant’s subsidiaries were named defendants; the defendant had notice of the

claims against its subsidiaries in the second case; the complaint in the second case did not contain any allegations with respect to the defendant; the plaintiff in the second case never served the defendant with process; and the defendant participated in the consolidated proceedings, the trial court denied the defendant due process by permitting the plaintiff in the second case to amend its complaint at the close of the trial of the second case to name the defendant as a party to the second case and by immediately entering a money judgment against the defendant in the second case. Capco Acquiscub, Inc. v. Greka Energy Corporation, 2008-NMCA-153, 145 N.M. 328, 198 P.3d 354.

Paragraph C contains at least two notice requirements, both of which must be satisfied within the limitations period. Romero v. Ole Tires, Inc., 101 N.M. 759, 688 P.2d 1263 (Ct. App. 1984).

Under Paragraph C, it is not enough that a defendant is aware that an action may be brought by the plaintiff. Rather, Subparagraph C(1) requires that a plaintiff prove that the defendant received notice of the institution of the action. Romero v. Bachicha, 2001-NMCA-048, 130 N.M. 610, 28 P.3d 1151.

"Changing" construed. — The word "changing", in Paragraph C should be given a liberal construction, so that amendments adding or dropping parties, as well as amendments substituting parties, fall within the rule. Romero v. Ole Tires, Inc., 101 N.M. 759, 688 P.2d 1263 (Ct. App. 1984).

"Mistake" construed. — The word "mistake", as used in Paragraph C, does not ordinarily encompass failure to include a proper party as a result of lack of knowledge that the party exists. Romero v. Ole Tires, Inc., 101 N.M. 759, 688 P.2d 1263 (Ct. App. 1984).

To relate back, claim for relief must have been made in time. — The test of whether an amended pleading relates back to the original pleading is whether a "claim for relief " was made or attempted within the statutory period. Brito v. Carpenter, 81 N.M. 716, 472 P.2d 979 (1970).

Amendment relates back to original complaint date. — Where the allegations in the amended complaint had to do with the conduct, transaction or occurrence set forth in the original complaint, they relate back to the date in the original complaint. Dellaria & Carnes v. Farmers Ins. Exch., 2004-NMCA-132, 136 N.M. 552, 102 P.3d 111.

Omitted counterclaim. — The strong liberal amendment policy expressed in this rule indicates that an omitted counterclaim should relate back provided it arose from the same conduct, transaction, or occurrence set forth in the original pleading. State Sav. & Loan Ass'n v. Rendon, 103 N.M. 698, 712 P.2d 1360 (1986).

General wrong and general conduct causing it control. — Under Paragraph C the general wrong suffered and the general conduct causing the wrong are the controlling considerations. Scott v. Newsom, 74 N.M. 399, 394 P.2d 253 (1964).

Rather than legal theory of action. — Under Paragraph C the specified conduct of the defendant, upon which the plaintiff relies to enforce his claim, is to be examined rather than the theory of law upon which the action is brought. Scott v. Newsom, 74 N.M. 399, 394 P.2d 253 (1964).

Thus, pleading statute of frauds does not prevent relation back. — Where the plea of the statute of frauds was merely an allegation of an additional legal theory which originally was not relied upon and it arose out of the transaction or occurrence set forth in the original answer, merely adding new consequences, the amendment should relate back. If the amendment had introduced an entirely different claim for relief, then the relation back theory would be inapplicable. Carney v. McGinnis, 68 N.M. 68, 358 P.2d 694 (1961).

And amended occupational disease disablement claim relates back. — All that is required by 52-3-42 NMSA 1978 is the timely filing of a complaint. An amended claim may relate back to the date of the original claim if such amended claim arose out of the same conduct, transaction or occurrence as the claim set forth in the original complaint. If it did, it will be related back to the date of the filing of the original complaint. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

Correction of earlier complaint by later one. — Where plaintiff suffered two falls and sued on the second fall and the subsequent injuries that it caused, but misstated the dates of the second fall in the original complaint, the trial court correctly allowed an amended complaint, relating back to the original complaint, with the correct date of the second fall. Bagwell v. Shady Grove Truck Stop, 104 N.M. 14, 715 P.2d 462 (Ct. App. 1986).

Relation back allowed where parties with real interest had sufficient notice. — Where no one had been appointed personal representative at the time plaintiff's original complaint against persons she thought were representatives was filed, and she then filed an amended complaint after the statute of limitations had run, naming decedent's insurer and "John Doe" as the unknown personal representative of decedent's estate as defendants, the amendment related back because, before the expiration of the statute of limitations, the parties with a real interest in the estate had received sufficient notice of the mistaken identity and they would not be prejudiced in maintaining a defense on the merits. Macias v. Jaramillo, 2000-NMCA-086, 129 N.M. 578, 11 P.3d 153.

Amended complaint alleging libel not permitted to relate back to fiduciary breach count. — Where original complaint alleged a breach of contractual and fiduciary duties, a count in an amended complaint alleging libel will not be permitted to "relate back" under Paragraph C. Raven v. Marsh, 94 N.M. 116, 607 P.2d 654 (Ct. App. 1980).

Former time limit in 3-21-9 NMSA 1978 not extended by this rule. — This rule, governing the relation back of amended pleadings, cannot be construed to extend the former 30-day time limit of 3-21-9 NMSA 1978 for appeal from a decision of the zoning authority. Citizens for Los Alamos, Inc. v. Incorporated County of Los Alamos, 104 N.M. 571, 725 P.2d 250 (1986).

Amendment of affidavit in replevin relates back to the date of the original affidavit. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

No relation back where original complaint deemed nullity. — Where an amended complaint seeks damages against the state, the department of corrections and its employees under the Tort Claims Act (41-4-1 through 41-4-27 NMSA 1978), and where the original complaint is a nullity, there is no relation back. DeVargas v. State ex rel. New Mexico Dep't of Cors., 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981), cert. quashed, 97 N.M. 563, 642 P.2d 166 (1982).

An amendment to a complaint which is filed after the statute of limitations has run does not relate back to the original filing where the original complaint does not state a cause of action. DeVargas v. State ex rel. New Mexico Dep't of Cors., 97 N.M. 563, 642 P.2d 166 (1982).

Nor where lack of reasonable diligence in proceeding against original John Doe defendants. — The filing of an original complaint naming John Doe defendants does not toll the running of the statute of limitation against defendants added in an amended complaint where there is a lack of reasonable diligence in proceeding against the John Doe defendants. DeVargas v. State ex rel. New Mexico Dep't of Cors., 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981), cert. quashed, 97 N.M. 563, 642 P.2d 166 (1982).

New party must have received timely notice. — An amendment changing parties relates back only if the new party received the requisite notice within the period provided by law for commencing the action against him. The personal representative of a tort-feasor should be put in no worse position as to defending stale claims than the tort-feasor, had he lived. Mercer v. Morgan, 86 N.M. 711, 526 P.2d 1304 (Ct. App. 1974).

The amended complaint against the defendant did not "relate back" to the date of filing the original complaint since the defendant was not affiliated with or related to either of originally named defendants and had no notice of the suit within the three year limitations period. Fernandez v. Char-Li-Jon, Inc., 119 N.M. 25, 888 P.2d 471 (Ct. App. 1994).

Where the plaintiff waited until after an incorrect name in his complaint was amended before serving the defendant, the defendant was not a party to the action, and the court would not assume that the defendant had sufficient notice under Subparagraphs C(1) and (2), but required the plaintiff to bear his burden of proving that adequate notice was

given within the period for commencing the action. Romero v. Bachicha, 2001-NMCA-048, 130 N.M. 610, 28 P.3d 1151.

The period includes time for service. — Under Rule 1-015(C) NMRA, the period for commencing an action includes the reasonable time allowed under Rule 1-004(F) NMRA for service of process. To the extent that *Fernandez v. Char-Li-Jon, Inc.*, 119 N.M. 25, 888 P.2d 471 (Ct. App. 1994) or other similar cases appear to hold otherwise, these opinions are not to be followed. Romero v. Bachicha, 2001-NMCA-048, 130 N.M. 610, 28 P.3d 1151.

Relation back only where identity of interests between old and new defendants. — An amendment may relate back to the filing of the action only when there is such an identity of interest between the old and new defendants that relation back is not prejudicial to the party to be added. Galion v. Conmaco Int'l, Inc., 99 N.M. 403, 658 P.2d 1130 (1983).

As between parent company and subsidiary. — Where a parent company and its subsidiary have a substantial identity of interest, Paragraph C permits the relation back of an amendment to the complaint to substitute defendants as long as service of process has been effected within the reasonable time allowed under the Rules of Civil Procedure, even though the limitations period has expired. Galion v. Conmaco, Int'l, Inc., 99 N.M. 403, 658 P.2d 1130 (1983).

Or between natural parents of deceased tort victim and personal representatives. — Although 41-2-3 NMSA 1978 requires that every wrongful death action shall be brought by the personal representatives, an action for malpractice and wrongful death brought under the Tort Claims Act (41-4-1 through 41-4-27 NMSA 1978) by the natural parents of a deceased girl within the limitation period was not barred because the parents failed to secure court appointment as personal representatives within the two-year limitation period of 41-4-15 NMSA 1978, due to the operation of Paragraph C and Rule 1-017 (real party in interest). Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

Representation by counsel involved since inception. — The fact that both the original defendants and the defendants sought to be added were represented by counsel who were involved in the litigation since its inception was a significant factor in evaluating the identity of interest shared by the original and the new defendants, in determining whether an amendment relates back to the original complaint. Rivera v. King, 108 N.M. 5, 765 P.2d 1187 (Ct. App. 1988).

Effect of Paragraph C on personal representative resulting in abatement of action. — See Valdez v. Ballenger, 91 N.M. 785, 581 P.2d 1280 (1978).

And complaint against dead or nonexistent defendant cannot be amended after period. — A suit brought against a defendant who is already deceased is a nullity and of no legal effect, and therefore where an action is brought against a defendant who is

dead or nonexistent, the complaint may not be amended after the period of the statute of limitations has expired so as to bring in a defendant having the capacity to be sued; the rule of relation back would not apply since there could be no suit to relate back to. Mercer v. Morgan, 86 N.M. 711, 526 P.2d 1304 (Ct. App. 1974).

Filing amended complaint does not automatically revive right to jury trial. — When a jury has been waived by failure to make timely demand the right to a jury trial is not automatically revived by the filing of an amended pleading. Griego v. Roybal, 79 N.M. 273, 442 P.2d 585 (1968).

Where amendment pleads no new issues and arose from same occurrence. — Demand for jury trial was not timely made where original complaint was in the nature of a suit for an accounting and amended complaint, though given label of "trover and conversion," pleaded no new issues and arose out of the same conduct, transaction or occurrence set out in the original complaint. Brown v. Dougherty, 74 N.M. 80, 390 P.2d 665 (1964).

III. SUPPLEMENTAL PLEADINGS.

Supplemental pleadings and amended pleadings are different in that a supplemental pleading relates to facts which arose after the original pleading was filed, whereas an amended pleading includes matters that occurred before. Electric Supply Co. v. United States Fid. & Guar. Co., 79 N.M. 722, 449 P.2d 324 (1969).

A supplemental pleading alleges facts arising after the original pleading was filed, whereas an amended pleading includes facts that occurred before. Cagan v. Village of Angel Fire, 2005-NMCA-059, 137 N.M. 570, 113 P.3d 393.

Newly discovered existing facts are brought in by amendment. — Facts newly discovered but previously existing are properly brought in by amended, not supplemental, pleading. Colcott v. Sutherland, 36 N.M. 370, 16 P.2d 399 (1932).

Supplemental pleading may be filed after remand by appellate court. — Supplemental bill may be filed after case has been remanded by appellate court for the purpose of obtaining further evidence. Rio Grande Dam & Irrigation Co. v. United States, 215 U.S. 266, 30 S. Ct. 97, 54 L. Ed. 190 (1909).

And may ask different relief. — Another or different order of relief from that asked in the original complaint may be prayed in a supplemental complaint. Atchison, T. & S.F. Ry. v. Citizens' Traction & Power Co., 25 N.M. 345, 182 P. 871 (1919).

Section 2685, subd. 87, C.L. 1897 (105-612, C.S. 1929), allowed the allegation in a supplemental complaint of such facts as authorized other and different relief. United States v. Rio Grande Dam & Irrigation Co., 13 N.M. 386, 85 P. 393 (1906), aff'd, 215 U.S. 266, 30 S. Ct. 97, 54 L. Ed. 190 (1909).

Failure to file supplemental pleading does not waive defense based on subsequent happenings. — Subdivision (d) (see now Paragraph D) has to do with supplemental pleadings, and there is nothing therein that would require the parties to have applied to the court to file a supplemental answer, alleging an accord and satisfaction, or that, failing to do so, the right to rely upon happenings since the date of the answers would be waived, as Rule 12(h) (see now Rule 1-012 NMRA) does not contemplate a waiver under these circumstances. Electric Supply Co. v. United States Fid. & Guar. Co., 79 N.M. 722, 449 P.2d 324 (1969) (defense properly considered in connection with motion for summary judgment).

Pleadings in federal court before remand to state court. — Pleadings filed in federal court, while the federal court has jurisdiction, become part of the state court record on remand. State ex rel. Village of Los Ranchos De Albuquerque v. City of Albuquerque, 119 N.M. 169, 889 P.2d 204 (Ct. App. 1993), rev'd on other grounds, 119 N.M. 150, 889 P.2d 185 (1994).

Formerly, no notice was required if supplemental pleading was filed and served in term. — Where a supplemental complaint was filed in term time and on the same day that it was served on defendant's counsel, no notice of hearing of the application for leave to file was necessary. United States v. Rio Grande Dam & Irrigation Co., 13 N.M. 386, 85 P. 393 (1906), aff'd, 215 U.S. 266, 30 S. Ct. 97, 54 L. Ed. 190 (1909).

IV. SETTING FORTH ALL MATTERS.

Purpose of Subdivision (e) (see now Paragraph E) is to prevent surprise and prejudice and to serve the convenience of court, counsel and litigants by avoiding the necessity of rummaging through court files to discover operative pleadings scattered about therein. Biebelle v. Norero, 85 N.M. 182, 510 P.2d 506 (1973).

Subdivision (e) (see now Paragraph E) is not applicable where there were no supplemental pleadings. Curtis Mfg. Co. v. Barela, 76 N.M. 392, 415 P.2d 361 (1966).

All matters in original not carried forward are abandoned. — In every amendatory or supplemental pleading filed by a party it is necessary for him to restate his entire cause of action, defense or reply, and all matters set forth in his original pleading and not carried forward are abandoned, and a judgment for the defendant dismissing a cause on the merits is res judicata only as to such matters as were carried forward into the amendatory complaint. Albright v. Albright, 21 N.M. 606, 157 P. 662 (1916).

Cause of action must be restated in supplemental pleading. — It is necessary for a pleader filing a supplemental pleading to restate his entire cause of action, defense or reply, and all matters not carried forward are abandoned. Albright v. Albright, 21 N.M. 606, 157 P. 662 (1916).

Including issue on which case is remanded. — Where plaintiff fails to tender as an issue in his supplemental complaint the only matter the court was given jurisdiction to

ascertain on remand, the plaintiff must be held to have abandoned all the allegations in his original complaint not carried forward into his amended or supplemental complaint. Primus v. Clark, 58 N.M. 588, 273 P.2d 963 (1954).

And counterclaim must be part of amended answer. — Subdivision (e) (see now Paragraph E) requires a party to set forth in one entire pleading all matters which are necessary to be determined; the failure to reallege allegations of an original pleading constitutes an abandonment of those allegations not realleged. Since Rule 7(a) (see now Rule 1-007 NMRA) requires a counterclaim to be a part of an answer, it is apparent that Subdivision (e) (see now Paragraph E) requires a counterclaim, if there is one, to be a part of an amended answer. Griego v. Roybal, 79 N.M. 273, 442 P.2d 585 (1968).

Unless counterclaim is set for trial or tried without objection. — Failure to incorporate a previously filed counterclaim into an amended answer as required by Subdivision (e) (see now Paragraph E) is not a sound basis for its dismissal where there is neither surprise nor prejudice, or where the pretrial order regularly entered states the issues of the counterclaim to be pending for trial (Rule 16 (see now Rule 1-016 NMRA)) or where such issues are actually tried without objection (Subdivision (b) (see now Paragraph B)). Biebelle v. Norero, 85 N.M. 182, 510 P.2d 506 (1973) (dismissal of counterclaim held harmless error).

But striking of an amended complaint leaves the original complaint in force. State ex rel. Peteet v. Frenger, 34 N.M. 151, 278 P. 208 (1929).

And seeking additional damages does not abandon original complaint. — A supplemental complaint which does not purport to abandon an original complaint, but on the other hand purports to sue for damages in addition to those sued for in the original complaint, does not operate as an abandonment of the original complaint. Weeks v. Bailey, 35 N.M. 417, 300 P. 358 (1931).

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M.L. Rev. 367 (1976).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

For article, "Survey of New Mexico Law, 1982-83: Civil Procedure," see 14 N.M.L. Rev. 17 (1984).

For article, "The Impact of Non-Mutual Collateral Estoppel on Tort Litigation Involving Several Liability," see 18 N.M.L. Rev. 559 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 9A Am. Jur. 2d Bankruptcy § 756; 12 Am. Jur. 2d Bills and Notes § 650; 61A Am. Jur. 2d Pleading §§ 745 to 787; 61B Am. Jur. 2d Pleading §§ 789 to 880.

Pleading last clear chance doctrine, 25 A.L.R.2d 254.

Amendment of pleading to assert statute of limitations, 59 A.L.R.2d 169.

Timely suit to enforce policy as interrupting limitation against claimant's amended pleading to reform it, or vice versa, 92 A.L.R.2d 168.

Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 A.L.R.3d 933.

Amendment of pleading after limitation has run, so as to set up subsequent appointment as executor or administrator of plaintiff who professed to bring the action in that capacity without previous valid appointment, 27 A.L.R.4th 198.

Amendment of pleading to add, substitute or change capacity of party plaintiff as relating back to date of original pleading under Rule 15(c) of Federal Rules of Civil Procedure so as to avoid bar of limitations, 12 A.L.R. Fed. 233, 100 A.L.R. Fed. 880.

What constitutes "prejudice" to party who objects to evidence outside issues made by pleadings so as to preclude amendment of pleadings under Rule 15(b) of Federal Rules of Civil Procedure, 20 A.L.R. Fed. 448.

Rule 15(c), Federal Rules of Civil Procedure, or state law as governing relation back of amended pleading, 100 A.L.R. Fed. 880.

71 C.J.S. Pleading §§ 275 to 338.

1-016. Pretrial conferences; scheduling; management.

A. **Pretrial conferences; objectives.** In any action the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating the settlement of the case.

B. **Scheduling and planning.** Except in categories of actions exempted by local district court rule as inappropriate, the judge may, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time:

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order shall also include:

(4) provisions for disclosure or discovery of electronically stored information;

(5) any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production;

(6) the date or dates for conferences before trial and a final pretrial conference;

(7) a trial date not later than eighteen (18) months after the date the scheduling order is filed; and

(8) any other matters appropriate in the circumstances of the case.

The pretrial scheduling order shall be filed as soon as practicable but in no event more than one hundred twenty (120) days after filing of the complaint. A scheduling order shall not be modified except by order of the court upon a showing of good cause.

If a pretrial scheduling order is not entered, the court shall set the case for trial in a timely manner, but no later than eighteen (18) months after the filing of the complaint.

For good cause shown, the court may extend the time for commencement for trial beyond the time standards set forth in this paragraph or may modify the scheduling order.

C. **Subjects to be discussed at pretrial conferences.** The participants at any conference under this rule may consider and take action with respect to:

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems;

(11) the limitation of the number of expert witnesses; and

(12) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants reasonably anticipate may be discussed.

D. **Final pretrial conference.** Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

E. **Pretrial orders.** After any pretrial conference is held pursuant to this rule, an order shall be entered reciting any action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

F. **Sanctions.** If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the court's own initiative, may make such orders with regard thereto as are just, including any of the orders provided in Subparagraphs (b), (c) or (d) of Subparagraph (2), of Paragraph B of Rule 1-037. In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

[As amended, effective January 1, 1990; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

Committee commentary for 2009 Amendments. *See* the 2009 committee commentary to Rule 1-026 NMRA for additional information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

ANNOTATIONS

The 2009 amendment, approved by Supreme Court Order 09-8300-007, effective May 15, 2009, in Paragraph B, added Subparagraphs (4) and (5) and relettered former Subparagraphs (4), (5) and (6) as Subparagraphs (6), (7) and (8) respectively.

Generally. — Under this rule, a procedure is provided for a pretrial conference for the simplification of the issues to be tried. This task is accomplished through obtaining admissions of fact and documents which can be agreed upon, or which would not be relied upon at trial, and for the clarification of other questions looking toward a prompt and clear approach to the controverted issues. Benson v. Export Equip. Corp., 49 N.M. 356, 164 P.2d 380 (1945).

Parties are expected to disclose at a pretrial hearing all the legal and factual issues which they intend to raise in the lawsuit. United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 597 P.2d 290, cert. denied, 444 U.S. 911, 100 S. Ct. 222, 62 L. Ed. 2d 145 (1979).

Rule was framed upon Federal Rule of Civil Procedure 16. Johnson v. Citizens Cas. Co., 63 N.M. 460, 321 P.2d 640 (1958).

Purpose. — The justification behind this rule is to prevent surprise and to get away from the "sporting" theory of justice. State ex rel. State Hwy. Dep't v. Branchau, 90 N.M. 496, 565 P.2d 1013 (1977); Martinez v. Rio Rancho Estates, Inc., 93 N.M. 187, 598 P.2d 649 (Ct. App. 1979).

The purpose of the Federal Rules of Civil Procedure was to get away from a "sporting" theory of justice and to minimize the often fatal technicalities of common-law pleading. The pretrial conference and the resulting pretrial order must be examined in this light. Tobeck v. United Nuclear-Homestake Partners, 85 N.M. 431, 512 P.2d 1267 (Ct. App. 1973).

Theory generally. — One of the chief purposes of pretrial procedure, and the principal usefulness of a pretrial order, is to formulate the issues to be litigated at the trial. The parties are bound by the pretrial order. They may not later inject an issue not raised at the pretrial conference. Otherwise, the primary objective of pretrial procedure would be defeated. Johnson v. Citizens Cas. Co., 63 N.M. 460, 321 P.2d 640 (1958).

Purpose of pretrial conference is to simplify the issues, amend the pleadings where necessary and to avoid unnecessary proof of facts at the trial. Johnson v. Citizens Cas. Co., 63 N.M. 460, 321 P.2d 640 (1958).

Difference of summary judgment motion. — It is the purpose of the pretrial conference to simplify the issues, shape up the testimonial and documentary evidence and generally clear the decks for the trial, while the function of the summary judgment motion is to sift the proofs pro and con as submitted in the various affidavits and exhibits attached thereto, so that a determination may be made, without the expense and delay of a trial, that there are or are not real, as distinct from mere fictitious or paper, issues which must be disposed of in the traditional manner by trial to the court or jury. Becker v. Hidalgo, 89 N.M. 627, 556 P.2d 35 (1976). As to summary judgment, see Rule 1-056.

Mere listing of contested issues in pretrial order does not preclude summary judgment on defendant's motion after a hearing. Becker v. Hidalgo, 89 N.M. 627, 556 P.2d 35 (1976).

Since the trial court has some discretion at trial to modify the issues delimited in a pretrial order, its discretion exists at earlier stages as well, so that if issues of fact determined at the conference later dissolve into issues of law before trial, summary judgment is appropriate upon proper motion and hearing. Becker v. Hidalgo, 89 N.M. 627, 556 P.2d 35 (1976).

But trial court cannot decide disputed issues of material fact at a pretrial conference, or upon a motion for summary judgment, but must leave their decision to the fact trier. Buffington v. Continental Cas. Co., 69 N.M. 365, 367 P.2d 539 (1961).

And rule confers no special power of dismissal not otherwise contained in the rules. Buffington v. Continental Cas. Co., 69 N.M. 365, 367 P.2d 539 (1961).

Pretrial order should control subsequent cause of action, unless modified at the trial to prevent manifest injustice. Johnson v. Citizens Cas. Co., 63 N.M. 460, 321 P.2d 640 (1958).

A pretrial order, made and entered without objection, and to which no motion to modify has been made, controls the subsequent course of the action. Ortega, Snead, Dixon & Hanna v. Gennitti, 93 N.M. 135, 597 P.2d 745 (1979).

Scope of order. — A pretrial order may properly limit the issues for trial to those not disposed of by admissions or stipulation of counsel. Berkstresser v. Voight, 63 N.M. 470, 321 P.2d 1115 (1958).

Effect thereof. — A pretrial order determines the issues and becomes the law of the case. State ex rel. State Hwy. Dep't v. Branchau, 90 N.M. 496, 565 P.2d 1013 (1977).

Where pretrial order is made and entered without any objections or exceptions thereto, and thereafter, no motion having been made to modify the same, the course of trial is controlled by the issues framed in the original order; it becomes the law of the case and the trial judge is bound thereby. Johnson v. Citizens Cas. Co., 63 N.M. 460, 321 P.2d 640 (1958). See also Transwestern Pipe Line Co. v. Yandell, 69 N.M. 448, 367 P.2d 938 (1961).

Discretion to modify such orders. — As set forth in this rule, the test for modification of pretrial orders is the prevention of manifest injustice, which determination is within the discretion of the trial court; but such decision is reviewable for an abuse of that discretion. State ex rel. State Hwy. Dep't v. Branchau, 90 N.M. 496, 565 P.2d 1013 (1977).

The trial court's decision to modify a pretrial order due to manifest injustice involves a number of factors: 1) whether trial is imminient, 2) whether the request is opposed, 3) whether the non-moving party would be prejudiced, 4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, 5) the foreseeability of the need for additional discovery in light of the time allowed for discovery, and 6) the likelihood that the discovery will lead to relevant evidence. Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

Appellate review of the balancing of the factors is limited to deciding if the trial court committed a clear error in judgment and the reviewing court should not substitute its balance of the factors for that of the trial court. Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

Or to change mind about applicable law. — Where pleadings are superseded by a pretrial order, the pretrial order becomes the pattern governing the lawsuit and it becomes the law of the case, this fact does not prevent the trial judge from changing his mind about applicable law to prevent perpetuating error rather than facilitating the trial of

the lawsuit on the genuine issues of fact and the law of the case. Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972).

Pretrial order amendable when no unfairness. — The trial court, in its discretion, may amend a pretrial order when no unfairness will result. El Paso Elec. Co. v. Real Estate Mart, Inc., 98 N.M. 570, 651 P.2d 105 (Ct. App. 1982).

Movant bears burden to modify order. — The movant bears the burden of demonstrating a manifest injustice sufficient to warrant modification of a pretrial order. Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

Binding effect of stipulation. — Where parties reduce their respective rights and priorities to writing and stipulate that a judgment may be entered in conformity thereto, such contract, if lawful, has a binding effect on the judgment that may be entered. It has all the binding effect of findings of fact and conclusions of law made by the court upon evidence, and more. A court may modify its findings in apt time, but it cannot change or modify a contract of the parties. Freedman v. Perea, 85 N.M. 745, 517 P.2d 67 (1973).

Relief may be afforded from stipulation which has been entered into as the result of inadvertence, improvidence or excusable neglect, provided that the situation has not materially changed to the prejudice of the antagonist and that the one seeking relief has been reasonably diligent in doing so. Relief may also be had from a stipulation where there has been a change in conditions or unforeseen developments which would render its enforcement inequitable, provided there has been diligence in discovering the facts relative to the disputed matter, the application is timely and the opposing party has not so changed his position as to be prejudiced to a greater extent than the applicant. Ballard v. Miller, 87 N.M. 86, 529 P.2d 752 (1974).

Courts may set aside stipulations where a mistake of fact is clearly shown, on such terms as will meet the justice of the particular case; but in order to warrant relief, the mistake must be of a material character such as will change the legal rights of the parties and the mistake must be one which could not have been avoided by the exercise of ordinary care. Ballard v. Miller, 87 N.M. 86, 529 P.2d 752 (1974).

Construction of pretrial stipulation of facts. — Pretrial stipulation of facts must be given a fair and reasonable construction in order to effect the intent of the parties. To seek the intention of the parties, the language should not be so construed as to give it the effect of an admission of a fact obviously intended to be controverted. Neither should it be so construed as to constitute a waiver of a right not plainly intended to be relinquished. Crabtree v. Measday, 85 N.M. 20, 508 P.2d 1317 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Right to explain. — Plaintiff had a right to explain to the jury his recollection of the facts and circumstances surrounding the execution and initialing of an accident report, and where the sole fact stipulated was that either party, if he desired, could introduce plaintiff 's accident report in evidence without objection, then the trial court erred in its

order in which it estopped plaintiff from the right of explanation of the accident report or its correctness. Crabtree v. Measday, 85 N.M. 20, 508 P.2d 1317 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Trial court has authority to compel disclosure of witnesses at pretrial conference. Beverly v. Conquistadores, Inc., 88 N.M. 119, 537 P.2d 1015 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Or after pretrial order. — The trial court may permit a departure from the strict terms of a pretrial order, insofar as names of witnesses are concerned, at its discretion. Tobeck v. United Nuclear-Homestake Partners, 85 N.M. 431, 512 P.2d 1267 (Ct. App. 1973).

Rebuttal witnesses are not usually required to be listed in pretrial orders because they cannot be anticipated to testify at the trial. Martinez v. Rio Rancho Estates, Inc., 93 N.M. 187, 598 P.2d 649 (Ct. App. 1979).

Rebuttal witnesses need not be listed in the pretrial order; rebuttal witnesses are those witnesses whose testimony reasonably cannot be anticipated before the time of trial. El Paso Elec. Co. v. Real Estate Mart, Inc., 98 N.M. 570, 651 P.2d 105 (Ct. App. 1982).

Trial court abuses its discretion in permitting witness not listed on pretrial order to testify when the opposing party is unaware of the additional witness until after trial starts and has no time to object to or discover the contents of the witness' testimony. State ex rel. State Hwy. Dep't v. Branchau, 90 N.M. 496, 565 P.2d 1013 (1977).

Where no discovery opportunity, unfair to allow unlisted witness' testimony. — Where there is no chance to pursue discovery, it is unfair to allow a witness not listed in the pretrial order to testify. El Paso Elec. Co. v. Real Estate Mart, Inc., 98 N.M. 570, 651 P.2d 105 (Ct. App. 1982).

Discretion not abused when witness not in pretrial order not allowed to testify. — A trial court does not abuse its discretion when it refuses to allow the testimony of a witness not included in the pretrial order, when that witness is not presenting rebuttal evidence. Wirth v. Commercial Resources, Inc., 96 N.M. 340, 630 P.2d 292 (Ct. App. 1981).

It is not up to the party resisting a motion to modify a pretrial order to allow additional witnesses to seek discovery in order to fully develop and counter what the proponent hopes to prove. The proponent, when it becomes aware of the need for unnamed witnesses, should fully identify the witness or witnesses, provide the substance of what he or they will testify to, and then make him or them available for deposition without notice. Gallegos v. Yeargin W. Constructors, 104 N.M. 623, 725 P.2d 599 (Ct. App. 1986).

Effect of pretrial order on testimony by expert. — Where the pretrial conference concluded with the trial judge imposing a 10-day limit on advising opposing counsel of

expert witnesses to be called, and opposing counsel was notified four or five days before trial that an expert had been located, the pretrial order controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice, and because of the broad discretion given to the trial judge in deciding whether to allow modification of the pretrial order, the trial court judge's refusal to permit the testimony of the new expert did not constitute an abuse of discretion. Herrera v. Springer Corp., 89 N.M. 45, 546 P.2d 1202 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

When a plaintiff admits that he learned of a witness' expertise several days before trial but took no action to advise the opposing counsel or to have the name included in the list of witnesses contained in the pretrial order, the court acts well within its discretionary powers in refusing to disregard the limitations of the pretrial order each time the witness is called. Martinez v. Rio Rancho Estates, Inc., 93 N.M. 187, 598 P.2d 649 (Ct. App. 1979).

Substantial compliance. — There was substantial compliance with Rule 8(c) (see now Rule 1-008 NMRA) where plaintiff's answer specifically stated that "said contract was terminated by mutual agreement of the parties" and the pretrial order contained a statement that the plaintiff was contending that the written contract had been terminated by mutual agreement of the parties. Plateau, Inc. v. Warren, 80 N.M. 318, 455 P.2d 184 (1969).

Where counterclaim not properly pleaded. — Under this rule relating to pretrial procedure, it is expressly provided that the court may make an order, which, when entered, shall control subsequent course of the action; so that where appellants were aware that appellee's claimed right to set off a repair bill was an issue in the case and matters pertaining to the repair bill were litigated without objection on appellants' part, and likewise the issue was a subject of findings and conclusions requested by appellants, appellee's failure to plead this counterclaim under Rule 13 (see now Rule 1-013 NMRA) did not bar their recovery of this counterclaim. Charley v. Rico Motor Co., 82 N.M. 290, 480 P.2d 404 (Ct. App. 1971).

Failure to incorporate a previously filed counterclaim into an amended answer as required by Rule 15(e) (see now Rule 1-015 NMRA) is not a sound basis for its dismissal where there is neither surprise nor prejudice, or where the pretrial order regularly entered states the issues of a counterclaim to be pending for trial pursuant to this rule or where such issues are actually tried without objection under Rule 15(b) (see now Rule 1-015 NMRA). Biebelle v. Norero, 85 N.M. 182, 510 P.2d 506 (1973).

Failure to file order under rule does not constitute reversible error, particularly where no prejudice is asserted or established. State ex rel. State Hwy. Comm'n v. Chavez, 80 N.M. 394, 456 P.2d 868 (1969).

Law reviews. — For note, "Civil Procedure - New Mexico's Recognition of the Motion *In Limine,*" see 8 N.M.L. Rev. 211 (1978).

For article, "The Impact of Non-Mutual Collateral Estoppel on Tort Litigation Involving Several Liability," see 18 N.M.L. Rev. 559 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62A Am. Jur. 2d Pretrial Conference and Procedure §§ 12 to 49.

Pretrial conference procedure as affecting right to discovery, 161 A.L.R. 1151.

Suppression before indictment or trial of confession unlawfully obtained, 1 A.L.R.2d 1012.

Power of court to adopt general rule requiring pretrial conference, 2 A.L.R.2d 1061.

Disclosure, in pretrial proceedings, of trade secret, formula or the like, 17 A.L.R.2d 383.

Binding effect of court's order entered after pretrial conference, 22 A.L.R.2d 599.

Appealability of order entered in connection with pretrial conference, 95 A.L.R.2d 1361.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings, 58 A.L.R.4th 653.

Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings, 63 A.L.R.4th 712.

Validity and effect of local district court rules providing for use of alternative dispute resolution procedures as pretrial settlement mechanisms, 86 A.L.R. Fed. 211.

Imposition of sanctions under Rule 16(f), Federal Rules of Civil Procedure, for failing to obey scheduling or pretrial order, 90 A.L.R. Fed. 157.

Consideration at trial, under Rule 16 of Federal Rules of Civil Procedure, of issues not fixed for trial in pretrial order, 117 A.L.R. Fed. 515.

88 C.J.S. Trial § 17(2).

ARTICLE 4
Parties

1-017. Parties plaintiff and defendant; capacity.

A. **Real party in interest.** Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a

party with whom or in whose name a contract has been made for the benefit of another or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. Where it appears that an action, by reason of honest mistake, is not prosecuted in the name of the real party in interest, the court may allow a reasonable time for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

B. **Capacity to sue or be sued.** The capacity of an individual, including those acting in a representative capacity, to sue or be sued shall be determined by the law of this state. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized, unless some statute of this state provides to the contrary.

C. **Infants or incompetent persons.** When an infant or incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

D. **Collection agencies.** Collection agencies may take assignments of claims in their own names as real parties in interest for the purpose of billing and collection and bringing suit in their own names; provided that no suit authorized by this section may be instituted on behalf of a collection agency in any court unless the collection agency appears by a licensed attorney-at-law.

[As amended, effective January 1, 1997.]

ANNOTATIONS

Cross references. — For service of process on insane or incompetent person, *see* Section 38-1-12 NMSA 1978.

For suit by or against partners, *see* Section 38-4-5 NMSA 1978.

For suits by or against infants, *see* Sections 38-4-7 to 38-4-13 NMSA 1978.

For suits by or against incapacitated persons, *see*Sections 38-4-14 to 38-4-17 NMSA 1978.

For provision for appointment of guardian ad litem for insane spouse sued in divorce action, *see* Section 40-4-10 NMSA 1978.

For prosecution of ejectment suit, *see* Section 42-4-4 NMSA 1978.

For prosecution of quiet title suit by committee when there are numerous claimants, *see* Section 42-6-3 NMSA 1978.

For provisions of Probate Code relating to protection of persons under disability and their property, *see* Sections 45-5-101 to 45-5-502 NMSA 1978.

For right of certain unincorporated associations to sue or be sued, *see* Sections 53-10-5, 53-10-6 NMSA 1978.

For parties to actions against limited partnerships, *see* Section 54-2-26 NMSA 1978.

For right of collection agencies to take assignments as real parties in interest, *see* Section 61-18A-26 NMSA 1978.

For capacity of parties in magistrate court, *see* Rule 2-401 NMRA.

The 1997 amendment, effective January 1, 1997, added Paragraph D and made gender neutral changes in Paragraphs A and C.

Compiler's notes. — Paragraph A is deemed to have superseded 105-103 and 105-104, C.S. 1929, which were substantially the same.

Paragraph C is deemed to have superseded 105-202, C.S. 1929, relating to suits brought by infants' next friend, 105-205, C.S. 1929, relating to appointment of guardian for defendant, 85-302, C.S. 1929, relating to commencement and prosecution of suit against insane or incompetent person and 85-303, C.S. 1929, relating to appointment of guardian ad litem for insane or incompetent defendant.

I. GENERAL CONSIDERATION.

No standing based on economic injury. — Where plaintiffs alleged purely economic interests that would be harmed by a ban on cockfighting, including reduced gross receipts, loss of employees, and a threat to the viability of their businesses, plaintiffs had no standing to challenge the constitutionality of 30-18-1 NMSA 1978 because the constitution does not protect plaintiffs' right to engage in particular business activities so as to avoid economic loss. *N.M. Gamefowl Assn., Inc. v. State of N.M. ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67.

No standing based on spectator interest in cockfighting. — Where plaintiffs alleged past attendance at cockfights and that the ban on cockfighting would prevent them from future attendance at events plaintiffs considered to be an aspect of cultural expression, plaintiffs had no standing to challenge the constitutionality of 30-18-1 NMSA 1978 because there is no credible threat of prosecution related to mere attendance at

cockfighting. *N.M. Gamefowl Assn., Inc. v. State of N.M. ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67.

No third party standing. — Where plaintiffs alleged past attendance at cockfights and that the ban on cockfighting would prevent them from future attendance at events plaintiffs considered to be an aspect of cultural expression and alleged that persons who intend to participate in cockfighting would be injured, but provided no reason why a person who has violated 30-18-1 NMSA 1978 cannot challenge the constitutionality of the statute, plaintiffs had no third-party standing to challenge the constitutionality of Section 30-18-1. *N.M. Gamefowl Assn., Inc. v. State of N.M. ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67.

Associational standing. — Where members of the plaintiff association owned and equipped cocks for the purpose of fighting; the purpose of the association was to keep cockfighting legal; and the association's remedy to have the ban on cockfighting declared unconstitutional addressed the injury claimed by the entire membership of the association, the association had associational standing to challenge the constitutionality of 30-18-1 NMSA 1978. *N.M. Gamefowl Assn., Inc. v. State of N.M. ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67.

The standing doctrine is not derived from the state constitution and is not jurisdictional. American Civil Liberties Union of New Mexico v. City of Albuquerque, 2008-NMSC-045, 144 N.M. 471, 188 P.3d 1222, affirming 2007-NMCA-092, 142 N.M. 259, 164 P.3d 958.

Traditional standing jurisprudence affirmed. — The court will not depart from the traditional standing analysis that requires a showing of injury in fact, causation, and redressability. American Civil Liberties Union of New Mexico v. City of Albuquerque, 2008-NMSC-045, 144 N.M. 471, 188 P.3d 1222, affirming 2007-NMCA-092, 142 N.M. 259, 164 P.3d 958.

Law reviews. — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For note commenting on Safeco Ins. Co. of America v. United States Fid. & Guar. Co., 101 N.M. 148, 679 P.2d 816 (1984), see 16 N.M.L. Rev. 119 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments §§ 62, 181 to 185; 6 Am. Jur. 2d Associations and Clubs §§ 49, 53; 8 Am. Jur. 2d Automobiles and Highway Traffic §§ 1105, 1107 to 1109; 14 Am. Jur. 2d Carriers § 1135; 17A Am. Jur. 2d Contracts §§ 425, 464; 18 Am. Jur. 2d Cooperative Associations §§ 3, 53; 18B Am. Jur. 2d Corporations § 1288; 36 Am. Jur. 2d Fraternal Orders and Benefit Societies § 185; 41 Am. Jur. 2d Incompetent Persons §§ 115 to 121; 42 Am. Jur. 2d Infants §§ 8 to 13, 155; 59 Am. Jur. 2d Parties § 1 et seq.

Will, right of beneficiary to enforce contract between third persons to provide for him, 2 A.L.R. 1193, 33 A.L.R. 739, 73 A.L.R. 1395.

Enforceability by purchaser of business, of covenant of third person with his vendor not to engage in similar business, 4 A.L.R. 1078, 22 A.L.R. 754.

Eminent domain, wife or widow as necessary party to proceeding to condemn her husband's real property, 5 A.L.R. 1347, 101 A.L.R. 697.

Right of manufacturer to enforce contract as to resale price, made by retailer with middleman, 7 A.L.R. 449, 19 A.L.R. 925, 32 A.L.R. 1087, 103 A.L.R. 1331, 125 A.L.R. 1335.

Right of next friend to compensation for services rendered to infant in the litigation, 9 A.L.R. 1537.

Divorce or separation, enforcement by third person as beneficiary of contract between husband and wife to prevent or end, 11 A.L.R. 287.

Who may maintain action to recover back excessive freight charge, 13 A.L.R. 289.

Right of assignee of aggrieved party to maintain action to recover excessive freight charges, 13 A.L.R. 298.

Necessity of appointment of guardian ad litem for minor who is a party in an action for divorce or annulment of marriage, 17 A.L.R. 900.

Shares of corporate stock as within statute enabling assignee to maintain action in his own name, 23 A.L.R. 1322.

Mortgagee or other lienholder as entitled to maintain action against third person for damage to property, 37 A.L.R. 1120.

Individual creditor's right to enforce corporate officer's liability for incurring excessive debts, 43 A.L.R. 1147.

Who may maintain action to recover multiple damages against tenant committing waste, 45 A.L.R. 774.

Right of third person to maintain action at law on sealed instrument, 47 A.L.R. 5, 170 A.L.R. 1299.

Right of one giving trust receipt to maintain action for purchase price against one to whom he sells, 49 A.L.R. 314, 87 A.L.R. 302, 101 A.L.R. 453, 168 A.L.R. 359.

Proper name in which to sue branch banks, 50 A.L.R. 1355, 136 A.L.R. 471.

Suit to recover dividends wrongfully paid, or to enforce liability of directors for wrongfully declaring them, 55 A.L.R. 8, 76 A.L.R. 885, 109 A.L.R. 1381.

Action on behalf of creditors to recover corporate dividends wrongfully paid, 55 A.L.R. 120, 76 A.L.R. 885, 109 A.L.R. 1381.

Suit to compel payment of dividends, 55 A.L.R. 140, 76 A.L.R. 885, 109 A.L.R. 1381.

Power of municipality to transfer or assign its right to enforce assessment or lien for local improvements, 55 A.L.R. 667.

Right of owner to sue on fire or marine policy taken out by bailee, warehouseman or carrier, 61 A.L.R. 720.

Who may enforce subscription to stock in corporation to be formed, 61 A.L.R. 1504.

Right of trustees to maintain suit to administer or enforce charitable trust, 62 A.L.R. 901, 124 A.L.R. 1237.

Duty of one learning of action instituted in his name without authority, 63 A.L.R. 1068.

Bondholder's right to maintain action against trustee for money received by trustee to discharge bond or coupon, 64 A.L.R. 1186.

Rendition of judgment against one not a formal party, who has assumed the defense, 65 A.L.R. 1134.

Reassembling jury after discharge, for purpose of amendment of verdict as to parties, 66 A.L.R. 549.

Right of bondholders to maintain action to prevent use by another corporation of corporate name, 66 A.L.R. 1030, 72 A.L.R.3d 8.

Parties in action for breach of contract as to devise or bequest of property as compensation for services, 69 A.L.R. 104, 106 A.L.R. 742.

Availability in action by third person for damages against public contractor, of provisions in contract as to care to be exercised or precautions to be taken for protection of third persons, 69 A.L.R. 522.

Right of undisclosed principal to recover against telegraph company because of delay or mistake, 72 A.L.R. 1198.

Who may recover indemnity granted by omnibus coverage clause in automobile liability insurance, 72 A.L.R. 1434, 106 A.L.R. 1251, 126 A.L.R. 544, 143 A.L.R. 1394.

Right of person furnishing material or labor to maintain action on contractor's bond to owner or public body, or on owner's bond to mortgagee, 77 A.L.R. 21, 118 A.L.R. 57.

Party plaintiff in action against partner, for profits earned subsequently to death or dissolution, 80 A.L.R. 12, 80 A.L.R. 92, 55 A.L.R.2d 1391.

Right of third person to enforce contract between others for his benefit, 81 A.L.R. 1271, 148 A.L.R. 359.

Inducing breach of contract, who may maintain action for, 84 A.L.R. 43, 84 A.L.R. 92, 26 A.L.R.2d 1227, 96 A.L.R.3d 1294, 44 A.L.R.4th 1078.

Corporation paying tax wrongfully exacted on shares of its stock as proper party to maintain action for its recovery, 84 A.L.R. 107.

Parties plaintiff in action against indemnity or liability insurer, by injured person, under statutory or policy provisions, 85 A.L.R. 20, 106 A.L.R. 516.

Who may petition for declaratory judgment, 87 A.L.R. 1243.

Taxpayer's right of action for sale of bonds of municipality at less than par, in violation of statute, 91 A.L.R. 7, 162 A.L.R. 396.

Proper party plaintiff in actions by reciprocal insurance association, or on behalf of it, 94 A.L.R. 851, 141 A.L.R. 765, 145 A.L.R. 1121.

Right of individual employee to sue for breach of collective labor agreement, 95 A.L.R. 41.

Who may enforce collective labor agreements, 95 A.L.R. 51.

Proper party defendant in action for refusal of depository to deliver instrument or property placed in escrow, notwithstanding performance of conditions of delivery, 95 A.L.R. 298.

Proper party plaintiff to action against tort-feasor for damages to insured property where insurer is entitled to subrogation to extent of loss paid by it, 96 A.L.R. 864, 157 A.L.R. 1242.

Who may bring action to purge registration lists, 96 A.L.R. 1047.

Right of creditors or stockholders of insolvent bank in charge of liquidating officer who refuses or fails to enforce liability of third persons to bank, to maintain action for that purpose, and conditions of such right, 97 A.L.R. 169, 116 A.L.R. 783.

Water user as necessary or proper party to litigation involving right of ditch or canal company or irrigation of drainage district from which he takes water, 100 A.L.R. 561.

Ward's right, after majority, to maintain action on contracts entered into by guardian on ward's behalf, 102 A.L.R. 269.

Insurance - right of third person to sue upon promise made by beneficiary to insured to pay proceeds to third person, 102 A.L.R. 594.

Removal of disability, statute providing that an insane person, minor or other person under disability may bring suit within specified time after removal of disability as affecting right to bring action before disability removed, 109 A.L.R. 954.

Heir or next of kin, standing to attack gift or conveyance made by ancestor in his lifetime, as affected by will by which he is disinherited in whole or part, 112 A.L.R. 1405.

Violation of statute relating to bucket-shops or bucket-shop transactions, as ground of action by customer or patron, 113 A.L.R. 853.

Who may maintain action against bank directors or officers for civil liability for damages resulting from false reports or statements, 114 A.L.R. 478.

Holders of mortgage or other lien upon an undivided interest in real property as a necessary or proper party to a suit for partition, 126 A.L.R. 414.

Unauthorized prosecution of suit in name of another as ground of action in tort, 146 A.L.R. 1125.

Right of vendee under executory contract to bring action against third person for damage to land, 151 A.L.R. 938.

Right of creditors to maintain action in interest of decedent's estate, 158 A.L.R. 729.

Massachusetts or business trust, 159 A.L.R. 219.

Necessary and proper parties in action growing out of delay in performance of timber contract, 164 A.L.R. 461.

Mortgage or lienholder as proper or necessary party to suit in respect of contract for sale of mortgaged property, 164 A.L.R. 1044.

Who may enforce insurance policy containing facility of payment clause, 166 A.L.R. 28.

Who may assert right of privacy, 168 A.L.R. 454, 11 A.L.R.3d 1296, 57 A.L.R.3d 16.

Parties to action to enforce contract for joint, mutual or reciprocal wills, 169 A.L.R. 53.

Dissolved corporation as indispensable party to stockholder's derivative action, 172 A.L.R. 691.

Validity, construction and application of restrictions on right of action by individual holder of series of corporate bonds or other obligations, 174 A.L.R. 435.

Representation of several claimants in action against carrier of public utility to recover overcharges, 1 A.L.R.2d 160.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348, 56 A.L.R.3d 1109, 27 A.L.R.4th 61, 32 A.L.R.4th 212, 3 A.L.R.5th 237.

Who may complain of underassessment or nonassessment of property for taxation, 5 A.L.R.2d 576, 9 A.L.R.4th 428.

Change in party after statute of limitations has run, 8 A.L.R.2d 6, 119 A.L.R. 1356.

Trust beneficiaries as necessary parties to action relating to trust or its property, 9 A.L.R.2d 10.

Right of third person not named in bond or other contract conditioned for support of, or services to, another, to recover thereon, 11 A.L.R.2d 1010.

Validity and enforceability of contract in consideration of naming child, 21 A.L.R.2d 1061.

Right of owner's employee injured by subcontractor to recovery against general contractor for breach of contract between the latter and the owner requiring contractor and subcontractors to carry insurance, 22 A.L.R.2d 647.

Necessary parties defendant to action to set aside conveyance in fraud of creditors, 24 A.L.R.2d 395.

Necessary parties defendant to suit to prevent or remove obstruction or interference with easement of way, 28 A.L.R.2d 409.

Who may enforce guaranty, 41 A.L.R.2d 1213.

Conflict of laws as to proper party plaintiff in contract action, 62 A.L.R.2d 486.

Amendment of pleadings with respect to parties or their capacity as ground for continuance, 67 A.L.R.2d 477.

Conditional vendor's or vendee's recovery against third person for damage to or destruction of property, 67 A.L.R.2d 582.

Capacity of one who is mentally incompetent but not so adjudicated to sue in his own name, 71 A.L.R.2d 1247.

Guardian's capacity to sue or be sued outside state where appointed, 94 A.L.R.2d 162.

Proper party plaintiff, under real party in interest statute, to action against tort-feasor for damage to insured property where insured has paid part of loss, 13 A.L.R.3d 140.

Proper party plaintiff, under real party in interest statute, to action against tort-feasor for damage to insured property where loss is entirely covered by insurance, 13 A.L.R.3d 229.

Illegitimate child's right to enforce promise to support or provide for him, 20 A.L.R.3d 500.

Child's right of action against third person who causes parent to desert, or otherwise neglect his parental duty, 60 A.L.R.3d 924.

Right to private action under State Consumer Protection Act, 62 A.L.R.3d 169.

Bailor's right of direct action against bailee's theft insurer for loss of bailed property, 64 A.L.R.3d 1207.

Proper party plaintiff in action for injury to common areas of condominium development, 69 A.L.R.3d 1148.

Necessary or proper parties to suit or proceeding to establish private boundary line, 73 A.L.R.3d 948.

Right in absence of express statutory authorization, of one convicted of crime and imprisoned or paroled, to prosecute civil action, 74 A.L.R.3d 680.

Defamation of class or group as actionable by individual member, 52 A.L.R.4th 618.

Sexual child abuser's civil liability to child's parent, 54 A.L.R.4th 93.

Parent's right to recover for loss of consortium in connection with injury to child, 54 A.L.R.4th 112.

Right of putative father to visitation with child born out of wedlock, 58 A.L.R.5th 669.

What is "cause" justifying discharge from employment of returning serviceman reemployed under § 9 of the Military Selective Service Act of 1967 (50 U.S.C. Appendix § 459), 9 A.L.R. Fed. 225.

43 C.J.S. Infants §§ 223 to 225; 57 C.J.S. Mental Health § 254 et seq.; 67A C.J.S. Parties §§ 8 to 32, 41, 42, 88 to 111.

II. REAL PARTY IN INTEREST.

Effect of enumeration. — Enumeration in Subdivision (a) (see now Paragraph A) does not qualify but merely supplements the statement that the action shall be brought in the name of the real party in interest, and thus also makes those persons enumerated real parties in interest within the meaning of this rule. Iriart v. Johnson, 75 N.M. 745, 411 P.2d 226 (1965).

Rules construed together. — This rule must be read with Rules 18(a), 19(a) and 23(b) (see now Rules 1-018, 1-019, and 1-023.1 NMRA). Prager v. Prager, 80 N.M. 773, 461 P.2d 906 (1969).

New Mexico makes no distinction between necessary and indispensable parties; if a person's interests are necessarily affected by a judgment, such person is an indispensable party. State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co., 78 N.M. 359, 431 P.2d 737 (1967). See also Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957).

Test for real party in interest. — Whether one is the real party in interest is to be determined by whether one is the owner of the right being enforced or is in a position to discharge the defendant from the liability being asserted in the suit. State v. Barker, 51 N.M. 51, 178 P.2d 401 (1947); Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957); United States v. Bureau of Revenue, 69 N.M. 101, 364 P.2d 356 (1961); Sturgeon v. Clark, 69 N.M. 132, 364 P.2d 757 (1961); Hall v. Teal, 77 N.M. 780, 427 P.2d 662 (1967); State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co., 78 N.M. 359, 431 P.2d 737 (1967); Jesko v. Stauffer Chem. Co., 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976); Edwards v. Mesch, 107 N.M. 704, 763 P.2d 1169 (1988); Moody v. Stribling, 1999-NMCA-094, 127 N.M. 630, 985 P.2d 1210, cert. denied, 127 N.M. 389, 981 P.2d 1207 (1999).

A real party in interest is determined by whether one is the owner of the right being enforced and is in a position to discharge the defendant from the liability being asserted in the suit. L.R. Property Mgt., Inc. v. Grebe, 96 N.M. 22, 627 P.2d 864 (1981); Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984), overruled on other grounds Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

Invasion of private right prerequisite to suit. — There must be an invasion of some private right of the complaining party before he has standing to sue. State ex rel. Overton v. New Mexico State Tax Comm'n, 81 N.M. 28, 462 P.2d 613 (1969).

Standing to challenge constitutionality of statute. — Public officer as such does not have such interest as would entitle him to question constitutionality of a statute so as to refuse to comply with its provisions; only a person whose rights have been adversely

affected has right to attack constitutionality of an act of the legislature. State ex rel. Overton v. New Mexico State Tax Comm'n, 81 N.M. 28, 462 P.2d 613 (1969).

Protection of property rights. — One possessing general property rights in a chattel or chose may qualify as a real party in interest in a suit or action essential to the protection of such rights, even if another likewise may qualify as a real party in interest in a suit or action relating to the same chattel or chose, if essential to the protection of a special property right therein. Turner v. New Brunswick Fire Ins. Co., 45 N.M. 126, 112 P.2d 511 (1941).

Party omitted by mistake. — The relation-back provision of Paragraph A applies to admit a new plaintiff when the failure to include such party as an original plaintiff was an honest mistake. Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co., 1999-NMCA-109, 127 N.M. 603, 985 P.2d 1183, cert. denied, 127 N.M. 391, 981 P.2d 1209 (1999).

Substitution of child as real party in interest. — Where it was held that human services department was without standing to maintain action on behalf of twenty-year-old child, child could be substituted as real party in interest with no effect on his substantive rights, if, on remand, it was determined that the department's error was an honest mistake. State ex rel. Salazar v. Roybal, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548, cert. denied, 125 N.M. 322, 961 P.2d 167 (1998).

One who is not party to contract cannot maintain a suit upon it. L.R. Property Mgt., Inc. v. Grebe, 96 N.M. 22, 627 P.2d 864 (1981).

Suit by payee of notes. — Where payee of promissory notes is in possession, he is entitled to sue thereon in his own name as a real party in interest, irrespective of ownership. Spears v. Sutherland, 37 N.M. 356, 23 P.2d 622 (1933).

Suit on separate notes. — In suit on one of two separate promissory notes given by two persons in exchange for joint interest in oil and gas lease, maker of other note was neither a necessary nor a proper party to the action. Good v. Harris, 77 N.M. 178, 420 P.2d 767 (1966).

Payee of draft. — One who holds a draft made payable to himself may maintain an action thereon in his own name, against the acceptor of such draft, even if he has no beneficial interest in the proceeds. Merchants' Nat'l Bank v. Otero, 24 N.M. 598, 175 P. 781 (1918); Eagle Mining & Imp. Co. v. Lund, 14 N.M. 417, 94 P. 949 (1908).

"Interested person" in decedent's estate. — If one has a property right in the estate of a decedent, he is an "interested person" under 45-1-201(A)(19) NMSA 1978; and if he qualifies as such, he also would constitute an owner of a right being enforced under the first prong of this rule. Rienhardt v. Kelly, 1996-NMCA-050, 121 N.M. 694, 917 P.2d 963.

Tenant and not creditors as party in interest. — In suit by tenant and his creditors against landlord for sums expended on behalf of landlord by tenant in repair of premises, tenant was real party in interest, even though he assigned his rights to proceeds to creditors. Hall v. Teal, 77 N.M. 780, 427 P.2d 662 (1967).

Action by assignor. — Assignment for security leaves assignor the equitable and beneficial owner of the chose assigned, and he could maintain an action in his own name as the real party in interest under § 105-103, C.S. 1929. Turner v. New Brunswick Fire Ins. Co., 45 N.M. 126, 112 P.2d 511 (1941).

Assignee holding claim to account. — Assignee of an account who is the real and legal holder of the claim is real party in interest. Prior v. Rio Grande Irrigation & Colonization Co., 10 N.M. 711, 65 P. 171 (1901).

Equitable assignee. — Equitable assignee of a chose in action may bring an action in his own name to enforce his rights. Barnett v. Wedgewood, 28 N.M. 312, 211 P. 601 (1922).

Party assigning interests after commencement. — Although Paragraph A of this rule controls where an interest has been transferred prior to commencement of an action, Rule 1-025(C) NMRA becomes the applicable provision where a party commences the action but subsequently transfers its interests by assignment. Daniels Ins., Inc. v. Daon Corp., 106 N.M. 328, 742 P.2d 540 (Ct. App. 1987).

Assignment of interest before entry of judgment. — If a successful litigant assigned his interest after trial and announcement of decision, but before entry of judgment, judgment could be entered in name of litigant of record, and assignees did not need to be substituted as parties. Dietz v. Hughes, 39 N.M. 349, 47 P.2d 417 (1935).

Right of insured to sue on policy. — After property of insured was burned and he assigned to his creditors as security for debts separate amounts of face of policy from money due or to become due from insurer, with power in assignees to collect amount assigned from insurer, insured alone had right to maintain a single action to recover full amount of policy, where such policy remained with him. Turner v. New Brunswick Fire Ins. Co., 45 N.M. 126, 112 P.2d 511 (1941).

Beneficiary of an insurance policy is the real party in interest, and a suit may be brought in his name against the sureties on an administrator's bond, to recover proceeds collected on policy. Conway v. Carter, 11 N.M. 419, 68 P. 941 (1902).

Insured and insurer as necessary parties. — Where cause of action was based upon the alleged negligence on the part of defendant resulting in damage to the plaintiff's automobile, and plaintiff assigned an interest in the recovery of damages to the insurer, both plaintiff and the insurer were necessary parties to any action prosecuted for recovery on account of damage done to the plaintiff's automobile. Sellman v. Haddock,

62 N.M. 391, 310 P.2d 1045 (1957); Home Fire & Marine Ins. Co. v. Pan Am. Petroleum Corp., 72 N.M. 163, 381 P.2d 675 (1963).

Insurer necessary party plaintiff. — Insurer that has paid its insured for a loss, in whole or in part, is a necessary and indispensable party to an action to recover the amounts paid from a third party allegedly responsible therefor. Torres v. Gamble, 75 N.M. 741, 410 P.2d 959 (1966).

Insurer real party in interest. — Where plaintiff insurance company paid entire loss for accident caused by person driving the insured's car with insured's permission after defendant (driver's insurer) denied coverage, and then sought reimbursement from defendant, plaintiff, with equitable subrogation rights, was a real party in interest; neither insured nor driver was. State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co., 78 N.M. 359, 431 P.2d 737 (1967).

Where plaintiff insurer indemnified and paid liquor wholesaler in full settlement and satisfaction of all liability under bond on behalf of defendant, wholesaler was not indispensable party to litigation, since he had no interest which could be affected by judgment between parties; plaintiff, owner of right sought to be enforced, was real party in interest. American Gen. Cos. v. Jaramillo, 88 N.M. 182, 538 P.2d 1204 (Ct. App. 1975).

Joinder not to be disclosed to jury. — When subrogated insurers are required by this rule to be joined as parties and the case is to be tried before a jury, the fact of the insurer's joinder is not to be disclosed to the jury; if it is the insured who has been joined, the requirement shall be the same. Safeco Ins. Co. of Am. v. United States Fid. & Guar. Co., 101 N.M. 148, 679 P.2d 816 (1984).

Partner without interest in suit. — Partner who disclaimed any interest in automobile damaged in collision and admitted ownership in plaintiff, was no longer a necessary party to suit because he had no interest in outcome of the litigation. Sturgeon v. Clark, 69 N.M. 132, 364 P.2d 757 (1961).

Corporation's interest not shown. — This rule requires that every action must be prosecuted in the name of the real party in interest; therefore, judgment on basis of oral agreement to which individual was party, in favor of plaintiff-corporation, was error, as there was no evidence adduced to prove corporation's interest or enforceable right. Family Farm & N. 10 Riding Academy, Inc. v. Cain, 85 N.M. 770, 517 P.2d 905 (1974).

Individual not entitled to compensation for damages to corporation. — Plaintiff, majority shareholder in close corporation, could not be given award of compensatory damages when it was based on losses sustained by corporation, a separate entity. London v. Bruskas, 64 N.M. 73, 324 P.2d 424 (1958).

Business corporation was properly joined as a defendant in derivative action, although it was the real party in interest, where plaintiffs' verified complaint, alleging that

defendants controlled corporation and were guilty of fraudulent acts, that a deadlock existed and that defendants had refused to act and a demand that they bring suit would be futile, complied with requirements of Rule 23(b) (see now Rule 1-023.1 NMRA). Prager v. Prager, 80 N.M. 773, 461 P.2d 906 (1969).

Community property. — Under former community property laws, where property was listed in wife's name but was determined to be community property of husband and wife, husband, as head of the community, was the real party in interest and the proper party to bring the action. Overton v. Benton, 60 N.M. 348, 291 P.2d 636 (1955).

Suit to compel reduction in land valuation. — Under former law, board of county commissioners was not the real party in interest in mandamus proceeding to compel tax assessor to place a reduced valuation on lands; landowners were the proper parties. Board of Comm'rs v. Hubbell, 28 N.M. 634, 216 P.2d 496 (1923).

County assessor had no duty to protect taxpayers or veterans against wrongful discrimination, and was not a proper party to represent other persons in action brought by attorney general for assessor in order to question constitutionality of certain statute. State ex rel. Overton v. New Mexico State Tax Comm'n, 81 N.M. 28, 462 P.2d 613 (1969).

Right of conservancy district to sue. — When vested water right of owners of artesian water conservancy district is in question, be it definition, modification or adjudication of such rights, district has not only standing, but duty to participate in litigation affecting those rights. State ex rel. Reynolds v. Lewis, 84 N.M. 768, 508 P.2d 577 (1973).

Injunction by conservancy district. — Artesian conservancy district was proper party plaintiff for maintaining suit to enjoin use of water from an unlawfully drilled well, even though the district as such did not own lands or water rights appurtenant thereto. Pecos Valley Artesian Conservancy Dist. v. Peters, 50 N.M. 165, 173 P.2d 490 (1945).

Personal representative in wrongful death statute is real party in interest. Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984), overruled on other grounds Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

Although action not barred by parents' failure to secure appointment as personal representatives. — Although 41-2-3 NMSA 1978 requires that every wrongful death action shall be brought by the personal representatives, an action for malpractice and wrongful death brought under the Tort Claims Act by the natural parents of a deceased girl within the limitation period was not barred because the parents failed to secure court appointment as personal representatives within the two-year limitation period of 41-4-15 NMSA 1978, due to the operation of Rules 1-015 NMRA (relation back of amendments) and Paragraph A of this rule. Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

Substitution of decedent as real party in interest. — While a dead person cannot obtain relief, an action filed naming a dead person can remain viable with an allowable substitution of the real party in interest to pursue the claim even after the applicable statute of limitations period has run. Martinez v. Segovia, 2003-NMCA-023, 133 N.M. 240, 62 P.3d 331.

Legal fund not counsel's client. — In these days of prepaid insurance plans for hospital, medical, dental, as well as legal and innumerable other services, it would be as ludicrous to say that a legal fund is the counsel's client as to pretend that an insurance company that pays one's medical bills is the doctor's patient. Speer v. Cimosz, 97 N.M. 602, 642 P.2d 205 (Ct. App. 1982).

Bankruptcy trustee as real party in interest. — Where plaintiff did not schedule its legal malpractice and breach of contract claims against defendant in its Chapter 11 bankruptcy petition, or bring them to the attention of the trustee or the court, the claims were unscheduled property that became property of the trustee; as such, trustee, and not plaintiff, was the "real party in interest" with standing under this rule. Edwards v. Franchini, 1998-NMCA-128, 125 N.M. 734, 965 P.2d 318, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998), and cert. denied, 526 U.S. 1124, 119 S. Ct. 1780, 143 L. Ed. 2d 808 (1999).

State not necessary party. — In action against former labor commissioner to prevent enforcement of allegedly illegal order by him in his official capacity, state was not a necessary party. City of Albuquerque v. Burrell, 64 N.M. 204, 326 P.2d 1088 (1958).

Recovery on bond after election recount. — Where bond had been given in an election contest to obtain recount of votes, after insufficient error was shown to change result, the state was mere nominal obligee of the bond and not the real party in interest in action to recover mileage and fees due sheriff and election officials after recount. State v. Barker, 51 N.M. 51, 178 P.2d 401 (1947).

Territory as trustee for university. — As the territory, in action to obtain title to land in private ownership for the use and benefit of the university, thereby created an express trust, it could maintain suit as trustee, without joining the board of regents of the university. Territory v. Crary, 15 N.M. 213, 103 P. 986 (1909).

United States proper party to declaratory judgment suit. — Where United States advanced amount of former emergency school tax assessed, to corporation furnishing services and materials to it, which tax was paid by corporation under protest, United States had a financial interest and was proper party to seek a declaratory judgment that neither it nor corporation were subject to such tax. United States v. Bureau of Revenue, 69 N.M. 101, 364 P.2d 356 (1961).

Trover brought by United States. — Action of trover by United States for cutting and appropriating trees from public lands would fail where such lands were not public, for

plaintiff would not be real party in interest. United States v. Saucier, 5 N.M. 569, 25 P. 791 (1891).

Time for raising absence of indispensable party. — Objection that an indispensable party was absent from the case may be made, if not before, in the supreme court. Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957).

Lack of interest of one plaintiff not fatal. — Where there are two plaintiffs, and only one is the real party in interest, the entire action will not fail. Hall v. Teal, 77 N.M. 780, 427 P.2d 662 (1967).

Motion to dismiss not abandoned. — Defendant did not abandon its motion to dismiss one of the plaintiffs as a party, on the basis that he had no financial interest in the litigation and was not a real party in interest, by taking an appeal before the trial court ruled on its motion, since issue was raised in its requested findings and conclusions; as issue was never decided by the trial court, the cause would be remanded. Jesko v. Stauffer Chem. Co., 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976).

III. CAPACITY TO SUE OR BE SUED.

As a general rule, spouses are permitted to sue each other for intentional torts. *Papatheofanis v. Allen*, 2010-NMCA-036, 148 N.M. 791, 242 P.3d 358, *cert. granted*, 2010-NMCERT-005, 148 N.M. 574, 240 P.3d 1048.

Claims for intentional torts between spouses. — Where, during the marriage of plaintiff and defendant, defendant induced plaintiff to convey a one-half interest in the family home, which was plaintiff's solely owned property, to defendant by representing to plaintiff that if plaintiff died, the parties' child would not have an interest in the home; defendant falsely commenced a domestic violence claim against plaintiff; defendant falsely reported to plaintiff's employer that plaintiff was misusing government property at plaintiff's workplace; without the knowledge or permission of plaintiff, defendant opened credit card accounts by forging plaintiff's name on application forms, leased a vehicle using plaintiff's information, and registered a patent in defendant's name using plaintiff's intellectual property; and defendant was an attorney and a mortgage loan officer, the jury verdict in plaintiff's action against defendant finding defendant liable for fraud, breach of fiduciary duty, malicious abuse of process, and defamation was supported by substantial evidence. *Papatheofanis v. Allen*, 2010-NMCA-036, 148 N.M. 791, 242 P.3d 358, *cert. granted*, 2010-NMCERT-005, 148 N.M. 574, 240 P.3d 1048.

Municipal corporation had capacity to seek injunction against former labor commissioner to prevent his insisting on city paying minimum wage rates promulgated by him under various construction contracts. City of Albuquerque v. Burrell, 64 N.M. 204, 326 P.2d 1088 (1958).

Dissolved corporation subject to suit. — Defendant out-of-state corporation, although dissolved, was subject to suit and service of process. Crawford v. Refiners Coop. Ass'n, 71 N.M. 1, 375 P.2d 212 (1962).

Absent a contractual or statutory provision, an insurance carrier cannot be sued directly and cannot be joined as a party defendant. Chapman v. Farmers Ins. Group, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Unincorporated association. — Since an unincorporated association made up of veteran taxpayers was not a legal entity, its right to bring an action could only be permitted under Rule 23 (see now Rule 1-023 NMRA). State ex rel. Overton v. New Mexico State Tax Comm'n, 81 N.M. 28, 462 P.2d 613 (1969).

Suit not maintainable. — Suit by Indian against another Indian for damages arising out of automobile collision in the pueblo in which they resided was not within jurisdiction of New Mexico court, where title to pueblo land was in the Indian tribe and had never been extinguished. Valdez v. Johnson, 68 N.M. 476, 362 P.2d 1004 (1961).

IV. INFANTS OR INCOMPETENT PERSONS.

This rule permits parent to bring cause of action on behalf of minor child, but does not require it. Jaramillo v. Heaton, 2004-NMCA-123, 136 N.M. 498, 100 P.3d 204, cert. denied, 2004-NMCERT-010.

Subdivision (c) (see now Paragraph C) does not prevent minor from filing lawsuit; it merely provides alternatives. Howie v. Stevens, 102 N.M. 300, 694 P.2d 1365 (Ct. App. 1984).

The court has power, either inherent or express under Paragraph C, to appoint a guardian ad litem for a minor plaintiff, whether or not the child is "otherwise represented." When such an appointment is made, however, the duties of the guardian, since they are not defined by statute, will, if not specified by the court, remain unclear and may well vary from case to case. Collins ex rel. Collins v. Tabet, 111 N.M. 391, 806 P.2d 40 (1991).

Attorney is required for infant not otherwise represented in an action, and it would be plain error for the court to proceed in the absence of counsel. Wasson v. Wasson, 92 N.M. 162, 584 P.2d 713 (Ct. App. 1978).

Protecting interests of principal in suit involving power of attorney. — Under circumstances wherein a party who has given a power of attorney is subsequently alleged to have become incompetent, and the agent under the power of attorney asserts legal claims which if successful will divest his principal of property, the trial court has a duty to inquire into the present status of the mental condition of the principal and, if necessary, appoint a guardian ad litem to protect and represent the present interests

of the principal in the litigation. Roybal v. Morris, 100 N.M. 305, 669 P.2d 1100 (Ct. App. 1983).

Suit or defense on child's behalf not unauthorized law practice. — The provision of this rule allowing a child's representative to sue or defend on the child's behalf does not constitute an exception to the general prohibition against unauthorized practice of law. Chisholm v. Rueckhaus, 1997-NMCA-112, 124 N.M. 255, 948 P.2d 707, cert. denied, 124 N.M. 268, 949 P.2d 282 (1997).

Errors in guardian's appointment not jurisdictional. — In action brought to recover damages for personal injury sustained in collision, wherein husband of plaintiff was rendered incompetent, errors in plaintiff wife's appointment as his guardian did not go to jurisdiction of court, as the incompetent injured husband was the real party in interest; if attack on wife's right to sue as guardian of her husband had been made, court could have appointed next friend or guardian ad item to proceed with suit under Rule 17(c), Fed. R. Civ. P., which in all important respects is identical with this rule. New Mexico Veterans' Serv. Comm'n v. United Van Lines, 325 F.2d 548 (10th Cir. 1963).

Children's court's failure to appoint guardian not jurisdictional. — In a proceeding to terminate a minor mother's parental rights, failure of the children's court to appoint a guardian ad litem for the mother did not deprive the court of jurisdiction since the court appointed counsel to represent her pursuant to Paragraph C. State ex rel. Children, Youth & Families Dep't v. Lilli L., 1996-NMCA-014, 121 N.M. 376, 911 P.2d 884.

Visitation challenged by child's parents. — When a petition for grandparent visitation is challenged by the child's parents, the trial court should consider whether it would be beneficial to appoint a guardian ad litem to represent the child in the face of conflicting family interests. Lucero v. Hart, 120 N.M. 794, 907 P.2d 198 (Ct. App. 1995).

Suit by minor against trustee not barred by laches. — Defense of laches is predicated upon the doctrine of estoppel, and a beneficiary of a trust who is under a legal incapacity such as infancy is not barred by laches from holding a trustee liable for a breach of trust so long as the incapacity continues. Iriart v. Johnson, 75 N.M. 745, 411 P.2d 226 (1965).

Guardian immune from liability. — A guardian ad litem, appointed in connection with court approval of a settlement involving a minor, is absolutely immune from liability for his or her actions taken pursuant to the appointment, provided that the appointment contemplates investigation on behalf of the court into the fairness and reasonableness of the settlement in its effect on the minor. Collins ex rel. Collins v. Tabet, 111 N.M. 391, 806 P.2d 40 (1991).

Guardian not entitled to quasi-judicial immunity. — An attorney who is privately retained as a guardian ad litem to advocate approval of a settlement in an action by the child to recover damages is not entitled to quasi-judicial immunity. Collins ex rel. Collins v. Tabet, 111 N.M. 391, 806 P.2d 40 (1991).

Guardian not immune from liability. — If the appointment of a guardian ad litem does not contemplate actions on behalf of the court but instead representation of the minor as an advocate, or if the guardian departs from the scope of appointment as a functionary of the court and instead assumes the role of a private advocate for the child's position, then the guardian is not immune and may be held liable under ordinary principles of malpractice. Collins ex rel. Collins v. Tabet, 111 N.M. 391, 806 P.2d 40 (1991).

1-018. Joinder of claims and remedies.

A. **Joinder of claims.** The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 1-019, 1-020 and 1-022 NMRA are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 1-013 and 1-014 NMRA respectively are satisfied.

B. **Joinder of remedies; fraudulent conveyances.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

ANNOTATIONS

Cross references. — For representation of class, *see* Rule 1-023 NMRA.

For cost sanctions for unjustifiably bringing several suits, *see* 39-2-3 NMSA 1978.

For the authority of the chief of the labor and industrial bureau to join assigned wage claims, *see* Section 50-4-11 NMSA 1978.

Compiler's notes. — This rule is deemed to have superseded 105-406, C.S. 1929, which was substantially the same.

Liberally construed to prevent multiple suits between same parties. — Permitting the adjudication of all phases of litigation involving the same parties in one action avoids a multiplicity of suits. For this reason these rules are to be liberally construed so as to guarantee bona fide complaints to be carried to an adjudication on the merits. Prager v. Prager, 80 N.M. 773, 461 P.2d 906 (1969).

Substantive rights unaffected. — This rule and Rules 19 and 20 (see now Rules 1-019 and 1-020 NMRA) are procedural and do not control substantive rights. Chapman

v. Farmers Ins. Group, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Plaintiff may join claim against third-party defendant if claim arises from same transaction as original complaint. — Rule 14(a) (see now Rule 1-014 NMRA) and Subdivision (a) (see now Paragraph A) read together limit joinder by original plaintiff in third-party complaints to cases where there is a secondary liability against the third-party defendant arising out of the plaintiffs claim against the original defendant. Hancock v. Berger, 77 N.M. 321, 422 P.2d 359 (1967).

Third-party plaintiffs may join claims arising from same transaction against third-party defendant. — In an action by an automobile passenger against a truck owner and a truck driver, third-party claims by the truck owner and driver against the automobile driver for property damage and personal injury were properly joined, because the claims arose out of the same transaction, and the liability of the truck owner, the truck driver and the automobile driver were dependent upon the same operative facts. Navajo Freight Lines v. Baldonado, 90 N.M. 264, 562 P.2d 497 (1977).

Wife's personal injury claim properly joined to husband's economic loss claim. — Count in which wife seeks recovery for physical injury, pain and suffering and count in which husband, as representative of marital community, seeks damages for economic and personal loss to himself and to community are properly joined. Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952).

Joinder of claims subject to rules concerning parties. — Subdivision (a) (see now Paragraph A) permits a party to join as many claims as he has against an opposing party. This rule operates in conjunction with Rule 17(a) (see now Rule 1-017 NMRA), which provides that suits shall be brought in the name of the real party in interest, and Rule 19(a) (see now Rule 1-019 NMRA), which provides that a person who should be a plaintiff but refuses may be joined as either a defendant or an involuntary plaintiff. Prager v. Prager, 80 N.M. 773, 461 P.2d 906 (1969).

Joined causes of action must each affect all parties to the suit. Lockhart v. Christian, 29 N.M. 143, 219 P. 490 (1923)(decided under former law).

Cause against members individually improperly joined with claim against members collectively. — A taxpayer cannot set up a cause of action against the individual members of the school board to recover, on behalf of the school district, money paid out by such members, and in the same complaint seek to enjoin them officially from making further payments of school funds, as the charges are not against them in the same character. Board of Educ. v. Seay, 24 N.M. 74, 172 P. 1040 (1918)(decided under former law).

Separate causes against husband and wife improperly joined. — A count for money loaned to husband is misjoined with another count for money loaned to wife. Johnson v. Yelverton, 31 N.M. 568, 249 P. 99 (1926)(decided under former law).

Action to quiet the properly joined with action to enjoin trespass. — Joinder of causes of action in a complaint seeking to quiet title and to restrain repeated trespasses to land is authorized. Pueblo of Nambe v. Romero, 10 N.M. 58, 61 P. 122 (1900)(decided under former law).

Plaintiffs in action to quiet title could join slander of title count to the quiet title count. Den-Gar Enters. v. Romero, 94 N.M. 425, 611 P.2d 1119 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Legal and equitable causes properly joined. — A plaintiff may unite in the same complaint several causes of action, both legal and equitable. Porter v. Alamocitos Land & Live Stock Co., 32 N.M. 344, 256 P. 179 (1925)(decided under former law).

Money judgment properly joined with foreclosure decree. — District court, in ordinary suit to foreclose real estate mortgage, had jurisdiction to render personal judgment against mortgagor for full amount of indebtedness claimed, and to authorize immediate issuance of execution upon such judgment in same decree as that in which the mortgage was foreclosed. Porter v. Alamocitos Land & Live Stock Co., 32 N.M. 344, 256 P. 179 (1925).

Right to jury depends on primary emphasis of action. — Although 105-406, C.S. 1929, permitted the joining of equitable and legal causes of action, in suit for damages and an injunction, if the damages were merely incidental and dependent upon the right to an injunction, the court could, without jury, assess the damages already sustained; if the action was primarily for a money judgment, it was triable by jury, notwithstanding that injunction was asked against a further violation of rights. Mogollon Gold & Copper Co. v. Stout, 14 N.M. 245, 91 P. 724 (1907)(decided under former law).

Money judgment not prerequisite for action to set aside fraudulent conveyance. — Where legal remedy is plain, adequate and complete, a creditor must exhaust that remedy before equitable relief can be granted, but, in view of Subdivision (b) (see now Paragraph B), if the remedy at law is not plain, adequate, and complete, or if the creditor has a trust in his favor, he may maintain an action to set aside a conveyance for fraud without first having obtained judgment. Fitzhugh v. Plant, 57 N.M. 153, 255 P.2d 683 (1953).

Adjudication of title not prerequisite to seeking accounting. — An action to quiet title could be joined with action for an accounting for rents and revenues derived from such land. Title need not be adjudicated prior to seeking accounting. Harlan v. Sparks, 125 F.2d 502 (10th Cir. 1942).

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For comment, "Insurance: Joinder of Defendant's Insurer, A Resolution of the 'Sellman' Problem," see 1 N.M.L. Rev. 375 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Actions § 65 et seq.; 20 Am. Jur. 2d Counterclaim, Recoupment and Setoff § 69.

Joinder of cause of action against party causing injury with cause of action against latter's insurer or indemnitor, 7 A.L.R. 1003.

Joinder of cause of action for breach of contract with cause of action for fraud inducing contract, 10 A.L.R. 756.

Joinder of causes of action under Federal Employers' Liability Act with action under state death statute, 13 A.L.R. 159, 66 A.L.R. 429.

Joint action for wrongs directly affecting both husband and wife arising from same act, 25 A.L.R. 743.

Right to plead single cause of action as in tort and on contract, 35 A.L.R. 780.

Inconsistency of action for damages for fraud and suit to establish constructive trust based on same transaction, 43 A.L.R. 177.

Joinder of action for injury to two tugs engaged in towage service, 54 A.L.R. 222.

Action to recover and to enforce liability of directors for corporate dividends wrongfully paid, 55 A.L.R. 122, 76 A.L.R. 885, 109 A.L.R. 1381.

Right to reformation of contract and other relief in same action or suit, 66 A.L.R. 776.

Joinder of sureties on different bonds relating to same matter in one action, 106 A.L.R. 90, 137 A.L.R. 1044.

Joinder of causes of action in suit under Declaratory Judgment Act, 110 A.L.R. 817.

Propriety and effect of including and plaintiff's pleading in action for negligence diverse or contradictory allegations as to status or legal relationship as between parties or as between party and third person, 115 A.L.R. 178.

Tort damaging real property as creating single cause of action or multiple causes of action in respect of different portions of land of same owner affected thereby, 117 A.L.R. 1216.

Waiver or estoppel as to joinder of claims to separate parcels in suit to quiet title or to remove cloud on title, or to determine adverse claims to land, 118 A.L.R. 1400.

Joinder of causes of action for invasion of right of privacy, 168 A.L.R. 466, 11 A.L.R.3d 1296, 57 A.L.R.3d 16.

Former stockholder's right to join suit on behalf of corporation with suit to recover stock, 168 A.L.R. 913.

Joinder of different degrees of negligence or wrongdoing in complaint seeking recovery for an injury, 173 A.L.R. 1231.

Joinder of actions by injured third person against insurer and insured under policy of compulsory indemnity or liability insurance, 20 A.L.R.2d 1097.

Joinder of cause of action for pain and suffering of decedent with cause of action for wrongful death, 35 A.L.R.2d 1377.

Right to join action against principal debtor and action against guarantor, 53 A.L.R.2d 522.

Appealability of order sustaining demurrer, or its equivalent, to complaint on ground of misjoinder or nonjoinder of parties or misjoinder of causes of action, 56 A.L.R.2d 1238.

Federal Civil Procedure, Rule 18(b) and like state rules or statutes pertaining to joinder in a single action of two claims although one was previously cognizable only after the other had been prosecuted to a conclusion, 61 A.L.R.2d 688.

Punitive damages: power of equity court to award, 58 A.L.R.4th 844.

When must loss-of-consortium claim be joined with underlying personal injury claim, 60 A.L.R.4th 1174.

1A C.J.S. Actions §§ 135 to 176.

1-019. Joinder of persons needed for just adjudication.

A. **Persons to be joined if feasible.** A person who is subject to service of process shall be joined as a party in the action if:

(1) in his absence complete relief cannot be accorded among those already parties; or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:

(a) as a practical matter impair or impede his ability to protect that interest; or

(b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

B. **Determination by court whenever joinder not feasible.** If a person as described in Subparagraph (1) or (2) of Paragraph A of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

C. **Pleading reasons for nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subparagraph (1) or (2) of Paragraph A of this rule who are not joined, and the reasons why they are not joined.

D. **Exception of class actions.** This rule is subject to the provisions of Rule 1-023 NMRA.

ANNOTATIONS

Cross references. — For real parties in interest, *see* Rule 1-017 NMRA.

For joinder of claims and remedies, *see* Rule 1-018 NMRA.

For permissive joinder of parties, *see* Rule 1-020 NMRA.

For rule relating to misjoinder and nonjoinder, *see* Rule 1-021 NMRA.

For interpleader, *see* Rule 1-022 NMRA.

For class actions, *see* Rule 1-023 NMRA.

For derivative action by shareholders, *see* Rule 1-023.1 NMRA.

For rule relating to intervention, *see* Rule 1-024 NMRA.

For parties defendant where several persons are liable on contract, judgment or statute, *see* Section 38-4-2 NMSA 1978.

For joint and several liability on contracts, and suit on joint obligations or assumptions by partners and others, *see* Section 38-4-3 NMSA 1978.

For provision relating to suits against partnerships or partners, *see* Section 38-4-5 NMSA 1978.

For parties to partition, *see* Section 42-5-2 NMSA 1978.

For nature of partner's liability, *see* 54-1A-1 NMSA 1978, et seq.

Compiler's notes. — Rules 1-019 to 1-021 NMRA are deemed to have superseded 105-105, C.S. 1929, relating to joinder of plaintiffs; 105-106, C.S. 1929, relating to persons who may be defendants; 105-107, C.S. 1929, relating to joinder of parties, and making persons refusing to join defendants; and 105-108, C.S. 1929, relating to joinder of defendants.

Paragraph B is deemed to have superseded 105-607, C.S. 1929, relating to bringing in new parties.

I. GENERAL CONSIDERATION.

Three-part analysis. — This rule has been synthesized into a three-part analysis: (1) whether a party is necessary to the litigation; (2) whether a necessary party can be joined; and (3) whether the litigation can proceed if a necessary party cannot be joined. Little v. Gill, 2003-NMCA-103, 134 N.M. 321, 76 P.3d 639.

Rule requires practical analysis. — Simon Neustadt Family Center v. Bludworth, 97 N.M. 500, 641 P.2d 531 (Ct. App. 1982), overruled on other grounds Melnick v. State Farm Mut. Auto. Ins. Co., 106 N.M. 726, 749 P.2d 1105 (1988).

Construction of rules together. — Rule 17(a) (see now Rule 1-017 NMRA) must be read with Rules 18(a), 19(a) and 23(b) (see now Rules 1-018, 1-019 and 1-023.1 NMRA). Prager v. Prager, 80 N.M. 773, 461 P.2d 906 (1969).

Rules procedural. — This rule and Rules 18 and 20 (see now Rules 1-018 and 1-020 NMRA) are procedural and do not control substantive rights. Chapman v. Farmers Ins. Group, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Parties not identical. — These rules, as well as common understanding of what is meant by a party to a lawsuit, are inconsistent with position that all parties on one side of lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

Party participating in adjudicatory hearing is party to proceedings on appeal. — The last employer of a claimant for unemployment compensation, where it participates in the adjudicatory hearing before the employment security commission (now

employment security department), is a party to the proceedings in the district court on appeal, and that court may properly deny a commission (department) motion to dismiss for failure to join the last employer. Abernathy v. Employment Sec. Comm'n, 93 N.M. 71, 596 P.2d 514 (1979).

Party raising claim on appeal. — When a Rule 19 claim is raised for the first time on appeal, the analysis differs from when it is raised before a judgment is entered. C.E. Alexander & Sons v. DEC Int'l, Inc., 112 N.M. 89, 811 P.2d 899 (1991).

Party added after time to file petition has expired. — Where an indispensable or necessary party is subject to service of process and is otherwise capable of being joined as a party to a proceeding under 3-21-9 NMSA 1978 challenging the issuance of a zoning variance, the district court has jurisdiction to add such party to the proceeding after the time to file the petition has expired. State ex rel. Sweet v. Village of Jemez Springs, Inc., 114 N.M. 297, 837 P.2d 1380 (Ct. App. 1992).

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For comment on Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957), see 1 N.M.L. Rev. 375 (1971).

For article, "The Writ of Prohibition in New Mexico," see 5 N.M.L. Rev. 91 (1974).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

For case note, "CIVIL PROCEDURE - New Mexico Adopts the Modern View of Collateral Estoppel: Silva v. State," see 18 N.M.L. Rev. 597 (1988).

For survey of 1990-91 appellate procedure, see 22 N.M.L. Rev. 623 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Automobiles and Highway Traffic § 1105, 1107 to 1109; 14 Am. Jur. 2d Carriers § 1135; 59 Am. Jur. 2d Parties §§ 92 et seq., 236.

Necessity of serving process upon correspondent in divorce suit, 1 A.L.R. 1414.

Joinder in action by or against cotenant for wrongful removal of timber, 2 A.L.R. 1001, 41 A.L.R. 582.

Right to costs in both actions where parties who might have been sued jointly are sued separately, 6 A.L.R. 623.

Necessity of joining tenant as party to make foreclosure terminate lease, 14 A.L.R. 664.

Corporation as necessary party in specific performance of contract for sale of corporate stock, 22 A.L.R. 1072, 130 A.L.R. 920.

Joinder of cotenants in action for rents and profits or use and occupation against cotenant in possession, 27 A.L.R. 245, 51 A.L.R.2d 388.

Receiver for corporation as necessary party dependent in stockholder's action for protection of himself and other stockholders, 29 A.L.R. 1506.

May acts of independent tort-feasors, each of which alone causes or tends to produce some damage, be combined to create a joint liability, 35 A.L.R. 409, 91 A.L.R. 759.

Parties defendant in action to foreclose vendor's lien after vendee's death, 35 A.L.R. 935.

Grantee of property as necessary party defendant in action against mortgagor on note secured by mortgage, 41 A.L.R. 323.

Joinder, in one action at law, of persons not jointly liable, one or other of whom is liable to plaintiff, 41 A.L.R. 1223.

Necessary parties in reformation of contract or instrument as against third persons, 44 A.L.R. 119, 79 A.L.R.2d 1180.

Abatement by pendency of another action as affected by addition or omission of parties defendant in second suit, 44 A.L.R. 806.

Dissolution or combination of municipality with another municipal body as affecting proper party defendant to action by creditor of dissolved corporation to enforce payment, 47 A.L.R. 145.

Parties plaintiff to actions based on libel or slander of a firm or its members, 52 A.L.R. 912.

Directors as necessary parties to action to compel payment of dividends, 55 A.L.R. 141, 76 A.L.R. 885, 109 A.L.R. 1381.

Necessity in action by creditor against estate of deceased partner of joining surviving partners, 61 A.L.R. 1418.

Joinder of parties under statutes as to survival of liability on joint obligation, 67 A.L.R. 637.

Conflict of laws as to joinder of defendants, or as to the character of liability as joint or several, or joint and several, 77 A.L.R. 1108.

Right of one brought into action as a party by original defendant upon ground that he is or may be liable to latter in respect of matter in suit, to raise or contest issues with plaintiff, 78 A.L.R. 327.

Right of defendant in action for personal injury or death to bring in joint tort-feasor not made a party by plaintiff, 78 A.L.R. 580, 132 A.L.R. 1424.

Statutory or contractual provision giving injured or damaged person right of action against liability insurer as affecting his right to joint insurer and insured as defendants, 85 A.L.R. 41, 106 A.L.R. 516.

Parties defendant in action for declaratory judgment, 87 A.L.R. 1244.

Necessary parties defendant in actions on contracts of reciprocal insurance association, 94 A.L.R. 854, 141 A.L.R. 765, 145 A.L.R. 1121.

Joinder as parties defendant in action for refusal of depositary to deliver notwithstanding performance of conditions of delivery of depositary and other party to escrow agreement, 95 A.L.R. 298.

Action by insured and insurer jointly against third person causing injury to insured property where insurer is entitled to subrogation to extent of loss paid by it, 96 A.L.R. 879, 157 A.L.R. 1242.

Parties defendant in proceedings to purge voter's registration lists, 96 A.L.R. 1047.

Necessity of making obligee party to action on bond of contractor for public work by laborer, materialman or subcontractor, 96 A.L.R. 1185.

Water user as necessary or proper party to litigation involving right of ditch or canal company or irrigation or drainage district from which he takes water, 100 A.L.R. 561.

Joinder in one action of sureties on different bonds relating to same matter, 106 A.L.R. 90, 137 A.L.R. 1044.

Concerted action or agreement to resist enforcement of statute because of doubt as to its constitutionality or construction, as ground for joinder of defendants in action by governmental authorities, 107 A.L.R. 670.

Joinder of parties in suit under Declaratory Judgments Act, 110 A.L.R. 817.

Necessary and proper parties to declaratory judgment proceeding to determine validity of statute or ordinance, 114 A.L.R. 1366.

Joinder of undisclosed principal and agent in same action, 118 A.L.R. 701.

Joinder of owners of separate parcels in suit to quiet, or to remove cloud on title or to determine adverse claims to land, 118 A.L.R. 1400.

Joinder of manufacturer or packer and retailer or other middleman as defendants in action for injury to person or damage to property of purchaser or consumer of defective article, 119 A.L.R. 1356.

Necessity that living parties of the same class as unborn contingent remaindermen be parties to give court jurisdiction under doctrine of representation in respect of interest, 120 A.L.R. 876.

Nonresident's duty to furnish security for costs as affected by joinder or addition of resident, 158 A.L.R. 737.

Defendant's right to bring in third person asserted to be solely liable to plaintiff, 160 A.L.R. 600.

Joinder of lessor and lessee as defendants in action for damages resulting from lessee's sale of intoxicating liquor, 169 A.L.R. 1203.

Dissolved corporation as indispensable party to stockholders' derivative action, 172 A.L.R. 691.

Joinder as defendants in tort action based on condition of sidewalk or highway of municipal corporation and abutting property owner or occupant, 15 A.L.R.2d 1293.

Appeal from order with respect to motion for joinder of parties, 16 A.L.R.2d 1023.

Joinder of insurer and insured under policy of compulsory indemnity or liability insurance in action by injured third person, 20 A.L.R.2d 1097.

Joinder of several persons in action for slander, 26 A.L.R.2d 1031.

Joinder, in injunction action to restrain or abate nuisance, of persons contributing thereto through separate and independent acts, 45 A.L.R.2d 1284.

Joinder in tort action based on respondeat superior, 59 A.L.R.2d 1066.

Declaratory Judgments Act, construction, application and effect of § 11 that all persons who have or claim any interest which would be affected by the declaration shall be made parties, 71 A.L.R.2d 723.

Statute permitting commencement of new action within specified time after failure of prior action not on merits, applicability, or affected by change in parties, 13 A.L.R.3d 848.

Third person as proper party defendant to suit for divorce which involves property rights, 63 A.L.R.3d 373.

Modern status of the Massachusetts or business trust, 88 A.L.R.3d 704.

Illegality as basis for denying remedy of specific performance for breach of contract, 58 A.L.R.5th 387.

67A C.J.S. Parties §§ 33 to 55.

II. NECESSARY PARTIES.

A. IN GENERAL.

Courts do not favor leaving a party without a remedy because of an ideal desire to have all interested persons before the court. Grady v. Mullins, 99 N.M. 614, 661 P.2d 1313 (1983).

Whether joinder required determined in context. — A determination of whether Paragraph A requires joinder of a particular person must be made in the context of the particular litigation. State ex rel. Blanchard v. City Comm'rs, 106 N.M. 769, 750 P.2d 469 (Ct. App. 1988).

New Mexico makes no distinction between necessary and indispensable parties; if person's interests are necessarily affected by judgment, such person is indispensable party. State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co., 78 N.M. 359, 431 P.2d 737 (1967).

Necessary parties and indispensable parties are synonymous terms in this state. Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957).

"Necessary parties". — Persons having an interest in controversy, and who ought to be made parties in order that court may finally determine entire controversy and do complete justice by adjusting all rights involved, are commonly termed "necessary parties." State ex rel. Walker v. Hastings, 79 N.M. 338, 443 P.2d 508 (Ct. App. 1968).

This rule does not require joinder of every person who might have standing to challenge an action, and neither does 44-6-12 NMSA 1978; requiring the joinder of every citizen or taxpayer in the suit would defeat the purpose of the Declaratory Judgment Act. San Juan Water Comm'n v. Taxpayers & Water Users, 116 N.M. 106, 860 P.2d 748 (1993).

Person necessarily affected as indispensable parties. — All persons whose interests will necessarily be affected by judgment or order in particular case are necessary and indispensable parties, and court cannot proceed to judgment without such parties. Meeker v. Walker, 80 N.M. 280, 454 P.2d 762 (1969); American Trust & Sav. Bank v. Scobee, 29 N.M. 436, 224 P. 788 (1924); Burguete v. Del Curto, 49 N.M.

292, 163 P.2d 257 (1945); State ex rel. Del Curto v. District Court, 51 N.M. 297, 183 P.2d 607 (1947); Sullivan v. Albuquerque Nat'l Trust & Sav. Bank, 51 N.M. 456, 188 P.2d 169 (1947); Keirsey v. Hirsch, 58 N.M. 18, 265 P.2d 346 (1953); Swayze v. Bartlett, 58 N.M. 504, 273 P.2d 367 (1954); State ex rel. Skinner v. District Court, 60 N.M. 255, 291 P.2d 301 (1955); Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957); State ex rel. Reynolds v. W.S. Ranch Co., 69 N.M. 169, 364 P.2d 1036 (1961); State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962); State ex rel. Clinton Realty Co. v. Scarborough, 78 N.M. 132, 429 P.2d 330 (1967); State ex rel. Walker v. Hastings, 79 N.M. 338, 443 P.2d 508 (Ct. App. 1968).

Indispensable party is one whose interests will be necessarily affected by judgment in particular case. Sanford v. Stoll, 86 N.M. 6, 518 P.2d 1210 (Ct. App. 1974); Home Fire & Marine Ins. Co. v. Schultz, 80 N.M. 517, 458 P.2d 592 (1969).

Test for indispensability. — Tests for indispensability are whether person owns right being enforced and whether he is in position to release and discharge defendant from liability being asserted. Crego Block Co. v. D.H. Overmyer Co., 80 N.M. 541, 458 P.2d 793 (1969)See also catchline, "Test for Real Party in Interest," in notes to Rule 1-017.

Nonjoinder results in dismissal where interests of absent party or litigants significantly impaired. — The adoption of this rule, as amended, mitigated the harshness of prior provisions of the rule. The revision has not, however, extinguished the rule that the nonjoinder of a party will result in the dismissal of a cause of action, where the party's absence will prevent the court from granting complete relief, significantly impair the interests of the absent party or expose litigants to possible multiple liability or inconsistent obligations. Montoya v. Department of Fin. & Admin., 98 N.M. 408, 649 P.2d 476 (Ct. App. 1982).

Joinder of necessary party could be accomplished at any stage of proceedings. Eldridge v. Salazar, 81 N.M. 128, 464 P.2d 547 (1970).

Court cannot proceed to judgment in absence of indispensable party. Herrera v. Springer Corp., 85 N.M. 6, 508 P.2d 1303 (Ct. App. 1973), rev'd on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973).

Because former department of hospitals and institutions was not joined in commitment hearing, trial court properly refused to render judgment concerning constitutional adequacy of treatment provided by state hospital. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975).

Where party seeks relief from court of equity, he must have before the court all parties whose rights may be affected by relief sought. United States Fid. & Guar. Co. v. Raton Natural Gas Co., 86 N.M. 160, 521 P.2d 122 (1974).

Under the current rule, which articulates a balancing test to determine whether a suit can continue without a party and leaves to the court's discretion the performance of that

test, the supreme court does not consider the test of indispensability to be jurisdictional. C.E. Alexander & Sons v. DEC Int'l, Inc., 112 N.M. 89, 811 P.2d 899 (1991), overruling precedent to the contrary, including Holguin v. Elephant Butte Irrigation Dist., 91 N.M. 398, 575 P.2d 88 (1977).

Absent necessary parties suit inherently defective. — Where necessary parties cannot for any reason be brought before court, there is nothing to be done except to dismiss the bill, for the suit is inherently defective. State ex rel. Walker v. Hastings, 79 N.M. 338, 443 P.2d 508 (Ct. App. 1968); State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962).

Absence of commissioner of public lands, when not only a necessary but an indispensable party, completely deprived court of jurisdiction to proceed in absence of such party, and any judgment rendered in his absence would be a nullity and subject to collateral attack. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962).

Plaintiff could not prevail on claim that county commissioners either did not legally give permission for defendant to build pipeline or that such permission was misconstrued by defendant and trial court, since trial court lacked jurisdiction because of absence of county commissioners, who were necessary parties to suit attacking their actions. Perez v. Gallegos, 87 N.M. 161, 530 P.2d 1155 (1974).

Opportunity to join. — If a timely objection is made for nonjoinder of a necessary party, when joinder is feasible the claimant should be given an opportunity to add the nonjoined person and if he fails to do so the claim should be dismissed. G.E.W. Mechanical Contractors v. Johnston Co., 115 N.M. 727, 858 P.2d 103 (Ct. App. 1993).

Raising absence on appeal. — Objection that indispensable party was absent from case may be made, if not before, in supreme court. Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957).

Joinder not feasible. — Trial court did not abuse its discretion in dismissing a complaint without prejudice on the ground that the plaintiff failed to join an Indian tribe as a necessary and indispensable party, even though sovereign immunity precluded joinder of the tribe. Golden Oil Co. v. Chace Oil Co., 2000-NMCA-005, 128 N.M. 526, 994 P.2d 772.

Dismissal where deceased defendant not substituted. — Trial court did not abuse its discretion in dismissing plaintiff’s complaint against defendant tortfeasor’s insurer where defendant tortfeasor died during the pendency of the action and plaintiff did not move to substitute another defendant. Little v. Gill, 2003-NMCA-103, 134 N.M. 321, 76 P.3d 639.

B. PARTIES INDISPENSABLE.

Tribe is an indispensable party to quiet title action involving tribal land. — Where a pueblo purchased land outside the boundaries of the pueblo and plaintiff filed suit against the pueblo and other defendants to quiet title to the land, the pueblo was a necessary party to the litigation and an indispensable party to plaintiff's claims against the other defendants and because the pueblo was immune from suit under the doctrine of tribal sovereign immunity and could not be joined, plaintiff's claims against the other defendants could not be maintained. *Armijo v. Pueblo of Laguna*, 2011-NMCA-006, 149 N.M. 234, 247 P.3d 1119, *cert. denied*, 2010-NMCERT-012, 150 N.M. 492, 263 P.3d 269.

In an action to declare a road a public road, the county in which the road is located is an indispensable party. Percha Creek Mining, LLC v. Fust, 2008-NMCA-100, 144 N.M. 569, 189 P.3d 702.

Tribes indispensable parties to Indian gaming legislation challenge. — Dismissal of an action attacking the legality of legislation authorizing Indian gaming in New Mexico (11-13-1 and 11-13-2 NMSA 1978) was required because the plaintiffs cannot join certain indispensable parties, namely the various Tribes and Pueblos that have gaming compacts with the state. State ex rel. Coll v. Johnson, 1999-NMSC-036, 128 N.M. 154, 990 P.2d 1277.

Heirs indispensable to suit to enforce contract with decedent. — Determination of basic issue involved in suit by purchaser's administratrix for specific enforcement of contract, which would vest in heirs' legal title to property involved, affected heirs' interests and they were indispensable parties to suit. Keirsey v. Hirsch, 58 N.M. 18, 265 P.2d 346 (1953) See also, State ex rel. Skinner v. District Court, 60 N.M. 255, 291 P.2d 301 (1955);.

Liquor license purchaser indispensable in suit to delay transfer. — Purchaser of liquor license under order of district court in connection with foreclosure sale of motel was an indispensable party to mandamus action brought by creditors of former licensees to preclude transfer of license until debts owed to said creditors were paid; court was without jurisdiction to proceed in petitioner's absence. State ex rel. Clinton Realty Co. v. Scarborough, 78 N.M. 132, 429 P.2d 330 (1967).

Co-trustee was an indispensable party to a foreclosure action brought against a judgment debtor and another trustee, where the co-trustee's rights were affected by the judgment ordering foreclosure, and his rights differed from those of the other defendants. Armendaris Water Dev. Co. v. Rainwater, 109 N.M. 71, 781 P.2d 799 (Ct. App. 1989).

Title company necessary party in foreclosure suit. — In action by beneficiaries to foreclose deed of trust, title company named as trustee in deed of trust and holder of agreement by beneficiaries that deed of trust was to be subordinated to mortgage on land, and which had insured mortgaged land, was necessary party. Eldridge v. Salazar, 81 N.M. 128, 464 P.2d 547 (1970).

Insurer necessary party to suit against third person. — Insurer that has paid its insured for loss, in whole or in part, is necessary and indispensable party to an action to recover amounts paid from third party allegedly responsible therefor. United States Fid. & Guar. Co. v. Raton Natural Gas Co., 86 N.M. 160, 521 P.2d 122 (1974); Torres v. Gamble, 75 N.M. 741, 410 P.2d 959 (1966).

Insured was indispensable party in declaratory judgment suit brought by insurer to establish breach of contract by insured in failing to cooperate with defense of tort suit, where judgment would relieve insurer from contract obligations to defend and to pay any judgment rendered against insured. Home Fire & Marine Ins. Co. v. Schultz, 80 N.M. 517, 458 P.2d 592 (1969).

Employee indispensable party in employer's insurer's suit against third party. — Where an employer's insurer has paid workmen's compensation benefits to an injured employee who has a cause of action against a third party who is allegedly liable for the employee's injuries, but the employee declines to prosecute the suit or assign her cause of action to the insurer, the insurer may bring suit against the third party by joining the employee as an indispensable party under this rule. The employee then becomes an involuntary plaintiff in order to avoid the injustice of depriving the insurer of its statutory right to reimbursement under former 52-1-56C NMSA 1978. Continental Cas. Co. v. Wueschinski, 95 N.M. 733, 625 P.2d 1250 (Ct. App. 1981).

Insured and insurer as necessary parties. — Where cause of action was based upon alleged negligence on part of defendant resulting in damage to plaintiff's automobile and plaintiff assigned an interest in recovery of damages to insurer, both plaintiff and insurer were necessary parties to any action prosecuted for recovery on account of damage done to plaintiff's automobile. Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957), distinguished, Home Fire & Marine Ins. Co. v. Pan Am. Petroleum Corp., 72 N.M. 163, 381 P.2d 675 (1963).

Commissioner of public lands necessary party to state lease controversy. — In controversy concerning legality of state lease, eligibility of lessee thereunder, performance of lease, reservations, if any, in lease, or matter of public policy requiring passage thereon by commissioner of public lands, then commissioner is not only a necessary party, but is an indispensable party. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962).

In an action to enjoin and restrain state game commission from authorizing its permittees and licensees to go upon state leased lands of plaintiff for purpose of hunting wild game thereon, commissioner of public lands was an indispensable party. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962).

Highway commission indispensable where its contract involved. — Highway commission, as party to contract which was to be interpreted in resolution of dispute and under which defendant was acting, had an interest in controversy which any final

judgment or decree entered would affect, and was therefore an indispensable party. State ex rel. Walker v. Hastings, 79 N.M. 338, 443 P.2d 508 (Ct. App. 1968).

United States indispensable party in suit over water use. — Since relief sought, in suit to enjoin federal officials from using certain waters, would reach beyond right to waters claimed, affecting public domain and treasury and interfering with public administration, United States was an indispensable party. Elephant Butte Irrigation Dist. v. Gatlin, 61 N.M. 58, 294 P.2d 628 (1956).

And necessary party in challenge to taxability of federal contractor. — Where United States advanced amount assessed under former Emergency School Tax Act to corporation furnishing services and materials to it, which amount was paid by corporation under protest, United States had a financial interest in cause of action and was proper and necessary party to seek declaratory judgment that neither it nor corporation were subject to such tax. United States v. Bureau of Revenue, 69 N.M. 101, 364 P.2d 356 (1961).

Joinder of closely held corporation properly required. — Where action was brought, alleging fraud and negligence in connection with financing and purchasing of oil royalty interests by corporation owned and controlled by plaintiff, his wife and children, trial court did not abuse its discretion by requiring that corporation be joined as an indispensable party; plaintiff, having refused to amend so as to join corporation, could not be heard to complain. Meeker v. Walker, 80 N.M. 280, 454 P.2d 762 (1969).

Utility's customers in action to enjoin them from receiving service. — Customers of an electric utility are indispensable parties in respect of an action to enjoin them from receiving electric utility service. Springer Elec. Coop. v. City of Raton, 99 N.M. 625, 661 P.2d 1324 (1983).

Applicant for zoning variance indispensable party. — Where party seeks to overturn a decision authorizing a zoning variance, the applicant for the variance is an indispensable or necessary party. State ex rel. Sweet v. Village of Jemez Springs, Inc., 114 N.M. 297, 837 P.2d 1380 (Ct. App. 1992).

Tribes indispensable parties to IGRA action. — In action by gamblers against financial institutions and government agencies, the Indian casinos were indispensable parties because of their need to protect the legal interests; however, because sovereign immunity prevented the tribes' joinder, the suits had to be dismissed. Srader v. Verant, 1998-NMSC-025, 125 N.M. 521, 964 P.2d 82.

C. PARTIES NOT INDISPENSABLE.

Creditors of plaintiff are not indispensable parties to action merely because they may have right to subject possible recovery by such plaintiff to payment of their accounts. Irwin v. Lamar, 74 N.M. 811, 399 P.2d 400 (1964).

Bank not indispensable in tort suit over repossession. — Bank was not indispensable party in suit for conversion and invasion of privacy relating to repossession of plaintiff's automobile by defendant, who had been authorized by bank to contact plaintiff for collection purposes. Sanford v. Stoll, 86 N.M. 6, 518 P.2d 1210 (Ct. App. 1974).

Contractor not indispensable party in mechanic's lien foreclosure suit. — See Crego Block Co. v. D.H. Overmyer Co., 80 N.M. 541, 458 P.2d 793 (1969).

Mineral rights purchasers not required in foreclosure. — Purchasers of mineral interests after fee simple estate was assessed for taxes were not indispensable parties to foreclosure of tax lien. Coulter v. Gough, 80 N.M. 312, 454 P.2d 969 (1969).

Maker of different note not necessary party. — In suit on one of two separate promissory notes given by two persons in exchange for joint interest in oil and gas lease, maker of other note was neither necessary nor proper party to action. Good v. Harris, 77 N.M. 178, 420 P.2d 767 (1966).

Assignor not indispensable in suit on note. — In suit based upon note payable to A and B, where A has assigned his interest in note to B, A is not a necessary or indispensable party. Good v. Harris, 77 N.M. 178, 420 P.2d 767 (1966).

Owners with similar claims not necessary to quiet title suit. — In quiet title action brought by owners of some of the property bordering 20 foot wide strip next to railway right-of-way, ownership of which was at issue, wherein plaintiffs' property was held to extend to railroad right-of-way, owners of other lots or blocks bordering strip in question were not indispensable parties. Alston v. Clinton, 73 N.M. 341, 388 P.2d 64 (1963).

Insurance agency partner was not an indispensable party in an action brought against other agency partners, because it is permissible in all cases of joint obligations by partners to bring and to prosecute suit against any one or more of the individual partners, and the plaintiff was under no obligation to sue more than one of them. Gallegos v. Citizens Ins. Agency, 108 N.M. 722, 779 P.2d 99 (1989).

Partner without interest in suit not necessary party. — Partner who disclaimed any interest in automobile damaged in collision and admitted ownership in plaintiff, was no longer a necessary party to suit because he had no interest in outcome of the litigation. Sturgeon v. Clark, 69 N.M. 132, 364 P.2d 757 (1961).

Corporations not necessary to suit by individual. — Where plaintiff's claims were personal to her and did not involve injuries to corporations in which she had an interest, the corporations were not indispensable parties. Moody v. Stribling, 1999-NMCA-094, 127 N.M. 630, 985 P.2d 1210, cert. denied, 127 N.M. 389, 981 P.2d 1207 (1999).

Corporation not necessary party to suit on partners' account. — Corporation running feed store was not necessary or indispensable party to suit filed by plaintiff on

account for which plaintiff claimed partners who formerly operated feed store were alone liable. Anderson, Clayton & Co. v. Swallows, 84 N.M. 486, 505 P.2d 431 (1973).

Corporate owner not prejudiced by failure to join. — Defendants cannot prevail on their indispensable-party claim because they have not shown any prejudice to corporate owner resulting from failure to join company as a party at trial. Additionally, 100% of the fault has been apportioned among other parties without joining the corporation. Reichert v. Atler, 117 N.M. 628, 875 P.2d 384 (Ct. App. 1992), aff'd, 117 N.M. 623, 875 P.2d 379 (1994).

Receiver not indispensable where agent, not company, liable. — Where liability for return of unearned premium due local insurance agent rested upon general insurance agent and not insurance company, company's receiver was not indispensable party to action. Insurance, Inc. v. Furneaux, 62 N.M. 249, 308 P.2d 577 (1957).

Minor decedent's father not necessary to suit over insurance proceeds. — In action brought by administratrix, mother of minor decedent, against decedent's employer to determine rights to proceeds of group life insurance policy, where statutory beneficiary of policy was decedent's estate, proceeds were properly payable to administratrix, regardless of absence of decedent's father from the action; father was not an indispensable party, and his claim to the proceeds or any portion thereof was properly determinable by court having jurisdiction of the estate. Bauer v. Bates Lumber Co., 84 N.M. 391, 503 P.2d 1169 (Ct. App.), cert. denied, 84 N.M. 390, 503 P.2d 1168 (1972).

Insured not indispensable to insurer's subrogation suit. — Where plaintiff insurer indemnified and paid insured liquor wholesaler in full settlement and satisfaction of all liability for misappropriation under bond on behalf of insured's employee (defendant), wholesaler was not indispensable party to litigation since he had no interest which could be affected by judgment between parties; plaintiff, owner of right sought to be enforced, was real party in interest. American Gen. Cos. v. Jaramillo, 88 N.M. 182, 538 P.2d 1204 (Ct. App. 1975).

Workmen's compensation insurer who had paid compensation was not indispensable party in workman's action against third party. Springer Corp. v. Herrera, 85 N.M. 201, 510 P.2d 1072 (1973).

Retirement board held not indispensable party in workers' compensation action. — Public employees' retirement board was not an indispensable or necessary party in a workers' compensation action, where the board computed and voluntarily authorized the payment of disability benefits to the claimant, and the trial court neither directed nor ordered the board to refrain from or take any action, nor did the court interpret or construe the Public Employees' Retirement Act. Montney v. State ex rel. State Hwy. Dep't, 108 N.M. 326, 772 P.2d 360 (Ct. App. 1989).

Former husband not indispensable in dispute over another's child. — Where decree in divorce case to which husband was a party found that no children were born of the union, thereby determining that husband was not the father of child whose custody was subject of custody action, father was not a necessary and indispensable party to that action. Torres v. Gonzales, 80 N.M. 35, 450 P.2d 921 (1969).

Persons with ministerial duties in paying judgment are not indispensable parties, although they may be proper parties. State ex rel. State Hwy. Comm'n v. Quesenberry, 74 N.M. 30, 390 P.2d 273 (1964).

Commissioner of public lands was not indispensable party in dispute between private parties concerning assignment of interest in land purchased from state under deferred payment contract. Ballard v. Echols, 81 N.M. 564, 469 P.2d 713 (1970).

Applicants not indispensable to compel application disclosure. — Applicants for the position of city planner were not indispensable parties to a newspaper's mandamus action to compel the city to disclose all applications, resumes and references received for the position, where it was not shown that the applicants either had or claimed any right of privacy or how joinder of the applicants was needed for a just adjudication of the petition for writ of mandamus. State ex rel. Blanchard v. City Comm'rs, 106 N.M. 769, 750 P.2d 469 (Ct. App. 1988).

Where no public issues involved. — Cross complaint of lessee of state land for trespass did not require presence of land commissioner as an indispensable party, where no issues relating to public policy or enforcement of state lease were involved. Sproles v. McDonald, 70 N.M. 168, 372 P.2d 122 (1962).

State not necessary party. — In action against former labor commissioner to prevent enforcement of allegedly illegal order by him in his official capacity, state was not a necessary party. City of Albuquerque v. Burrell, 64 N.M. 204, 326 P.2d 1088 (1958).

State not indispensable party where subrogation right for medical payments not affected. — Where the trial court concluded that the defendants sustained no substantial risk of double or multiple liability and limited its decree in such a way so as not to affect the state's right of subrogation under 27-2-23 NMSA 1978, it was not error for the court to refuse to dismiss the complaint for failure to join the state as an indispensable party under this rule. Methola v. County of Eddy, 96 N.M. 274, 629 P.2d 350 (Ct. App. 1981).

Nor personnel board in appeal from administrative determination of state employee employment status. — The state personnel board is not an indispensable party to an appeal from a final order making an administrative determination as to the employment status of a state employee. Montoya v. Department of Fin. & Admin., 98 N.M. 408, 649 P.2d 476 (Ct. App. 1982).

The Commissioner of Public Lands was not an indispensable party to an action involving the partition of state grazing leases. Sims v. Sims, 1996-NMSC-078, 122 N.M. 618, 930 P.2d 153.

1-020. Permissive joinder of parties.

A. **Permissive joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

B. **Separate trials.** The court may make such orders as will prevent a party from being embarrassed, delayed or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

ANNOTATIONS

Cross references. — For ejectment, *see* Section 42-4-4 NMSA 1978.

For quieting titles, *see* Section 42-6-6 NMSA 1978.

For quo warranto proceedings, *see* Section 44-3-3 NMSA 1978.

For mechanics' liens, *see* Section 48-2-14 NMSA 1978.

For public service commission orders, *see* Section 62-11-1 NMSA 1978.

For liens on oil and gas wells and pipelines, *see* Section 70-4-9 NMSA 1978.

Compiler's notes. — Paragraph A is deemed to have superseded 105-105, C.S. 1929, relating to joinder of plaintiffs, and 105-108, C.S. 1929, relating to joinder of defendants. Paragraph B, together with Rules 1-040 and 1-055 NMRA, is deemed to have superseded 105-807, C.S. 1929, relating to order of docketing and trial; 105-819, C.S. 1929, relating to trials in absence of a party and to separate trials; and 105-820, C.S. 1929, relating to advancing causes for trial.

No control of substantive rights by rules. — Rules 18, 19 and 20 (see now Rules 1-018, 1-019 and 1-020 NMRA) are procedural and do not control substantive rights.

Chapman v. Farmers Ins. Group, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Definition of "party". — These rules, as well as the common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of the lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

Indispensable party to taxpayer's injunction suit. — Firm which contracted with county to construct courthouse and jail was an indispensable party to taxpayer's suit to enjoin board of county commissioners from paying it for such work. Walrath v. Board of County Comm'rs, 18 N.M. 101, 134 P. 204 (1913).

Corporation not necessary or indispensable party. — Where debt had been incurred by partnership before its incorporation, the corporation itself was not a necessary or indispensable party to the suit filed by plaintiff on an account for which plaintiff claimed the partners were alone liable. Anderson, Clayton & Co. v. Swallows, 84 N.M. 486, 505 P.2d 431 (1973).

Direct suit against insurance carrier. — Absent a contractual or statutory provision authorizing the action, an insurance carrier cannot be sued directly and cannot be joined as a party defendant. Chapman v. Farmers Ins. Group, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Intervention by taxpayer. — Under 105-106, C.S. 1929, taxpayer may intervene in an appeal by a claimant feeling aggrieved by action of city council in refusing to fund warrants issued by city. Miller v. City of Socorro, 9 N.M. 416, 54 P. 756 (1898).

Misjoinder of husband and wife. — A count of money loaned to husband and another count for money loaned to wife were a misjoinder of causes and a misjoinder of parties, and demurrer should be sustained on both grounds. Johnson v. Yelverton, 31 N.M. 568, 249 P. 99 (1926).

Joinder of claims arising out of same transaction. — This rule clearly provides for the joinder in one action of persons severally asserting claims arising out of the same transaction or occurrence, if any question of law or fact common to all will arise in the action. This rule clearly considers the parties as retaining their identities as separate parties. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

Avoidance of multiplicity of suits. — Permitting the adjudication of all phases of litigation involving the same parties in one action avoids a multiplicity of suits. For this reason, rules of civil procedure are to be liberally construed so as to guarantee bona fide complaints to be carried to an adjudication on the merits. Prager v. Prager, 80 N.M. 773, 461 P.2d 906 (1969).

Counterclaim or cross-claim to quiet title allowed in mortgage foreclosure action. Ortega, Snead, Dixon & Hanna v. Gennitti, 93 N.M. 135, 597 P.2d 745 (1979).

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For case note, "CIVIL PROCEDURE - New Mexico Adopts the Modern View of Collateral Estoppel: Silva v. State," see 18 N.M.L. Rev. 597 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Automobiles and Highway Traffic § 1045; 14 Am. Jur. 2d Carriers § 1135; 22A Am. Jur. 2d Declaratory Judgments § 211; 59 Am. Jur. 2d Parties § 92; 75 Am. Jur. 2d Trial §§ 120 to 127, 138, 139, 152, 153.

Joinder of parties or causes of action in suits under the Federal Employers' Liability Act, 13 A.L.R. 159.

Right of defendant sued jointly with another or others in action for personal injury or death, to separate trial, 17 A.L.R. 734.

Joinder, in one action at law, of persons not jointly liable, one or the other of whom is liable to the plaintiff, 41 A.L.R. 1223.

Right of one to notice and hearing on motion to add him as a party, or substitute him for an original party, to pending action or proceeding, 69 A.L.R. 1247.

Conflict of laws as to joinder of defendants, or as to the character of liability as joint or several, or joint and several, 77 A.L.R. 1108.

Right of one brought into action as a party by original defendant upon the ground that he is or may be liable to the latter in respect of the matter in suit, to raise or contest issues with plaintiff, 78 A.L.R. 327.

Joinder of insurer and insured in action by injured person, 85 A.L.R. 41, 106 A.L.R. 516, 20 A.L.R.2d 1097.

Right of several parties having similar interests to join as relators in mandamus proceeding, 87 A.L.R. 528.

Joinder in tort action of parties severally, but not jointly, liable, 94 A.L.R. 539.

Right to join as defendants in action based on wrongful or negligent act of servant, where master's liability rests on doctrine of respondeat superior, 98 A.L.R. 1057, 59 A.L.R.2d 1066.

Joinder in one action of sureties on different bonds relating to same matter, 106 A.L.R. 90, 137 A.L.R. 1044.

Concerted action or agreement to resist enforcement of a statute because of doubt as to its constitutionality or construction, as ground for joinder of defendants in action or suit by governmental authorities, 107 A.L.R. 670.

Joinder of manufacturer or packer and retailer or other middleman as defendants in action for injury to person or damage to property of purchaser or consumer of defective article, 110 A.L.R. 1356, 119 A.L.R. 1356.

Right to join state (or officer who represents state) in mortgage foreclosure suit to cut off interest acquired by state subject to the mortgage, 113 A.L.R. 1511.

Right to join agent and undisclosed principal in same action, 118 A.L.R. 701.

Necessity in suit to foreclose mortgage on property of decedent of joining as parties devisees or heirs of decedent, and effect of failure to do so, 119 A.L.R. 807.

Right of defendant in action for personal injury or death to bring in a joint tort-feasor not made a party by plaintiff, 132 A.L.R. 1424.

Joinder or representation of several claimants in action against carrier or utility to recover overcharge, 1 A.L.R.2d 160.

Right of plaintiff suing jointly with others to separate trial or order of severance, 99 A.L.R.2d 670.

Applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on the merits, 13 A.L.R.3d 848.

67A C.J.S. Parties §§ 33 to 36, 41 to 51; 88 C.J.S. Trial §§ 7 to 10.

1-021. Misjoinder and nonjoinder of parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

ANNOTATIONS

Cross references. — For provision on separate trials, *see* Rule 1-042 NMRA.

Compiler's notes. — This rule is deemed to have superseded 105-515, C.S. 1929, relating to misjoinder and nonjoinder in contract actions. Together with Rule 1-019, this rule is also deemed to have superseded 105-607, C.S. 1929, relating to bringing in new parties, and together with Rules 1-019 and 1-020 NMRA, this rule is deemed to have superseded 105-107, C.S. 1929, relating to joinder of persons who refuse to join in suit.

Nonjoinder may require dismissal. — Both vendors and escrow agent were necessary parties in suit brought by purchasers for recovery of deposit placed in escrow, and cause was necessarily dismissed for want of jurisdiction where purchasers refused to amend to bring in the vendors. Loyd v. Southwest Underwriters, 50 N.M. 66, 169 P.2d 238 (1946).

Proper to join as individual wife who was at trial in representative capacity. — Where husband and wife were lessors of certain property, joinder of wife after trial in her individual capacity as an indispensable party plaintiff was proper in suit brought after husband's death against lessees and guarantors to recover unpaid and holdover rent, since wife had appeared at trial in her capacity as administratrix of husband's estate. Shirley v. Venaglia, 86 N.M. 721, 527 P.2d 316 (1974).

Necessary party may be joined at any stage of proceedings. — Joinder of title company which was necessary party to beneficiaries' action could be accomplished at any stage of the proceedings. Eldridge v. Salazar, 81 N.M. 128, 464 P.2d 547 (1970).

Even if it would have been better to require the joining of an administrator prior to trial, this rule permits this at any stage of the action. Smith v. Castleman, 81 N.M. 1, 462 P.2d 135 (1969).

Necessary and nonprejudicial joinder relates back. — After trial in an action for specific performance, where failure to join necessary and indispensable parties did not result in prejudice to previously named parties, the complaint may be formally amended by adding originally omitted parties, with the amendment relating back to the substitution of administratrix as plaintiff, and all proceedings thereafter. State ex rel. Skinner v. District Court, 60 N.M. 255, 291 P.2d 301 (1955).

Dismissal of defendant held within discretion of trial court. — Where one of defendants had been called as an adverse witness by plaintiff, subsequent dismissal of that defendant, with codefendant's consent at that time, was within wide discretion of trial judge. Silva v. Haake, 56 N.M. 497, 245 P.2d 835 (1952).

All parties on one side of lawsuit not one party. — These rules, as well as the common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of a lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

Nonjoinable claims should be severed, not dismissed. — Where a plaintiff seeks relief under various nonjoinable statutory and common-law claims, the trial court errs in

dismissing the statutory claims without prejudice, when it merely should sever them from the other claims. Ortega v. Shube, 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979), overruled on other grounds Bracken v. Yates Petroleum Corp., 107 N.M. 463, 760 P.2d 155 (1988).

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Automobiles and Highway Traffic § 1045; 14 Am. Jur. 2d Carriers § 1135; 59 Am. Jur. 2d Parties §§ 252 et seq., 259 et seq.

Misjoinder of parties as ground for plea in abatement, 1 A.L.R. 362.

Appealability of order sustaining demurrer, or its equivalent, to complaint on ground of misjoinder or nonjoinder of parties or misjoinder of causes of action, 56 A.L.R.2d 1238.

Dismissal, under Rule 71A(i)(3) of Federal Rules of Civil Procedure, of defendant unnecessarily or improperly joined in condemnation action, 57 A.L.R. Fed. 490.

67A C.J.S. Parties §§ 139 to 161.

1-022. Interpleader.

A. **Who may interplead.** Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 1-020.

B. **Order to interplead.** Upon the filing of any complaint, cross-claim or counterclaim by way of interpleader pursuant to Paragraph A of this rule, the district court shall take full and complete jurisdiction of the matter or thing in dispute and shall order all who have or claim an interest therein to interplead in said action within the time now by law allowed for plea and answer. Service of a copy of such order shall be made as provided in these rules for service on adverse parties.

C. **Service upon nonresidents.** In any action under the provisions of this rule, where it is made to appear to the satisfaction of the court by affidavit filed in said cause,

that any person claiming an interest in or to any property in the custody of said court, is in fact a nonresident of New Mexico, the court shall order service to be made upon such nonresident by publication.

D. **Disposition.** The decree of the district court shall determine the disposition of the matter or thing in dispute and shall be binding upon all parties to the action on whom service has been made.

ANNOTATIONS

Cross references. — For joinder of persons and parties, *see* Rules 1-019 and 1-020 NMRA.

For intervention, *see* Rule 1-024 NMRA.

For bailee under document of title requiring interpleader of conflicting claims, *see* Section 55-7-603 NMSA 1978.

Compiler's notes. — This rule is deemed to have superseded Laws 1931, ch. 156, relating to interpleading in actions upon contract or for the recovery of personal property where a third party, without collusion, had or made a claim to the subject of the action, and Laws 1933, ch. 8, § 1, relating to interpleading where two or more persons severally claimed the same debt or thing.

Paragraph B is deemed to have superseded Laws 1933, ch. 8, § 2, which was substantially the same.

Paragraph C is deemed to have superseded Laws 1933, ch. 8, § 3, which was substantially the same.

Paragraph D is deemed to have superseded Laws 1933, ch. 8, § 4, which was substantially the same.

I. GENERAL CONSIDERATION.

Denial of liability by plaintiff not improper. — The filing of an interpleader action does not constitute an irrevocable admission of liability to the extent of the funds deposited, thereby precluding a trial judge from granting a motion for dismissal and withdrawal of the funds; as interpleader relief under this rule now provides for a new and more liberal joinder in the alternative, it is no longer a ground for objection that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. Fireman's Ins. Co. v. Bustani, 105 N.M. 760, 737 P.2d 541 (1987).

Not general shield from negligence liability. — Bank improperly contended that by interpleading the amount in dispute of joint account it could absolve itself of any liability, since the named party to the account had a reserved right to continue her suit against

the bank for possible negligence in its addition of one of the co-owner's to the account. Johnston v. Sunwest Bank, 116 N.M. 422, 863 P.2d 1043 (1993).

II. WHO MAY INTERPLEAD.

Generally. — Party substituted as defendant in replevin could not complain on appeal that Laws 1931, ch. 156, authorizing such procedure, was inapplicable, in the absence of objection in the trial court. Shaffer v. McCulloh, 38 N.M. 179, 29 P.2d 486 (1934). See Rule 46, N.M.R. Civ. P

Intervener held bound by an adjudication of title to the property in suit to which he was a party claiming ownership. McClendon v. Dean, 45 N.M. 496, 117 P.2d 250 (1941)(decided under former law).

In an interpleader suit, it was held that the amount due could not be the subject of controversy between a claimant and one petitioning for interpleader, and where such controversy existed, it presented an insuperable objection to its prosecution. Bowman Bank & Trust Co. v. First Nat'l Bank, 18 N.M. 589, 139 P. 148 (1914)(decided under former law).

Parties on one side not deemed to be one party. — These rules, as well as the common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of a lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

Oil lease assignee may interplead nonparticipating mineral interest as to delay rental payments. HNG Fossil Fuels Co. v. Roach, 99 N.M. 216, 656 P.2d 879 (1982).

And, by interpleading lessor, assignee does not breach nonwarranty clause. — Merely by interpleading the lessor of an oil and gas lease in order to receive clarification as to his entitlement to delay rentals, an assignee does not breach the nonwarranty clause in the lease. HNG Fossil Fuels Co. v. Roach, 99 N.M. 216, 656 P.2d 879 (1982).

Claimants in workmen's compensation. — Where, aside from the amount paid into court being inadequate, the employer and workmen's compensation insurer asserted an absence of liability to the deceased workman's dependent mother, and, so far as could be determined, never, either before or after filing for interpleader of claimants, actually offered to the workman's minor daughter the amount to which she was entitled; under this rule, this action was permissible, although such procedure differs from a true interpleader. Employers Mut. Liab. Ins. Co. v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963).

Right of counterclaim by insurance claimant not precluded. — Where plaintiff insurance company brought interpleader action to determine which of competing claims to proceeds of a life insurance policy was the correct one, defendant who was one of claimants was not precluded from asserting counterclaim in tort for unreasonable delay, in bad faith, in making payments on the contract, despite plaintiff's contention that, as

stakeholder in an interpleader action, it was not an opposing party against whom a counterclaim could be filed. Travelers Ins. Co. v. Montoya, 90 N.M. 556, 566 P.2d 105 (Ct. App. 1977).

Interpleader proper action. — Bank faced with competing claims to a fee properly resorted to interpleading action and did not violate fiduciary duty to pay the fee to one party. Bank of New York v. Regional Housing Authority, 2005-NMCA-116, 138 N.M. 389, 120 P.3d 471.

Law reviews. — For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For case note, "CIVIL PROCEDURE - New Mexico Adopts the Modern View of Collateral Estoppel: Silva v. State," see 18 N.M.L. Rev. 597 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Interpleader §§ 1, 7 to 9, 13, 17, 30, 45.

Judgment debtor's right to interplead, 48 A.L.R. 966.

Bank's right to interplead rival claimants to deposit, 60 A.L.R. 719.

Nature and extent of relief of successful intervener or interpleader in attachment, 66 A.L.R. 908.

Right of owner to maintain bill of interpleader against contractor and lien claimants and others in respect to fund arising from construction contracts, 70 A.L.R. 515.

Interpleader where one claimant asserts an adverse and paramount title, 97 A.L.R. 996.

Warehouseman's right to interplead rival claimants to goods stored or their proceeds, 100 A.L.R. 425.

When insurance company deemed to be a disinterested stakeholder for purposes of bill of interpleader, 108 A.L.R. 267.

Right to interpleader by obligor in bond or other contract the obligation or benefit which extends to a class, 108 A.L.R. 1250.

Same person as stakeholder and claimant, bill of interpleader as affected by fact that same person, in different capacities, is both stakeholder and one of the rival claimants, 144 A.L.R. 1154.

Interpleader by executor and administrator, 152 A.L.R. 1122.

Interpleading claimants under facility of payment clause in insurance policy, 166 A.L.R. 85.

Allowance of interest on interpleaded or impleaded disputed funds, 15 A.L.R.2d 473.

Jurisdiction and venue of federal court, under federal interpleader statutes to entertain cross-claim by one interpleaded party against another, 17 A.L.R.2d 741.

Corporation's right to interplead claimants to dividends, 46 A.L.R.2d 980.

Allowance of attorney's fees to party interpleading claimants to funds or property, 48 A.L.R.2d 190.

Stakeholder's liability for loss of interpleaded funds after they leave stakeholder's control, 7 A.L.R.5th 976.

48 C.J.S. Interpleader §§ 13, 29, 49 to 52.

1-023. Class actions.

A. **Prerequisites to a class action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

B. **Class actions maintainable.** An action may be maintained as a class action if the prerequisites of Paragraph A of this rule are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(d) the difficulties likely to be encountered in the management of a class action.

C. **Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subparagraph may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under Subparagraph (3) of Paragraph B of this rule, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

(a) the court will exclude the member from the class if the member so requests by a specified date;

(b) the judgment whether favorable or not, will include all members who do not request exclusion; and

(c) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under Subparagraph (1) or (2) of Paragraph B of this rule, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the

class. The judgment in an action maintained as a class action under Subparagraph (3) of Paragraph B of this rule, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Subparagraph (2) of Paragraph C of this rule was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate:

(a) an action may be brought or maintained as a class action with respect to particular issues; or

(b) a class may be divided into subclasses and each subclass treated as a class,

and the provisions of this rule shall then be construed and applied accordingly.

D. **Orders in conduct of actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such a manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters. The orders may be combined with an order under Rule 1-016 NMRA, and may be altered or amended as may be desirable from time to time.

E. **Dismissal or compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

F. **Appeals.** The Court of Appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten (10) days after entry of the order. An appeal does not

stay proceedings in the district court unless the district judge or the Court of Appeals so orders.

G. **Residual funds to named organization.**

(1) For purposes of Subparagraph (2) of this paragraph, "residual funds" are

(a) unclaimed funds, including uncashed checks and other unclaimed payments, that remain after payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements or dispositions to implement the relief granted, whether such payments are drawn from a common fund or directly from the judgment debtor’s own funds; or

(b) if it is impossible or economically impractical to distribute the common fund to the class at all, the entire common fund after payment of all approved expenses, litigation costs, attorneys' fees, and other court-approved disbursements or dispositions to implement the relief granted, whether such payments are drawn from a common fund or directly from the judgment debtor’s own funds.

(2) Either in its order entering a judgment or approving a proposed settlement of a class action certified under this rule that establishes a process for identifying and compensating members of the class or by a subsequent order entered when residual funds are determined to exist, the court shall provide for the disbursement of residual funds, if any, to one or more of the following entities:

(a) nonprofit organizations that support projects that benefit the class or similarly situated persons consistent with the goals of the underlying causes of action on which relief was based;

(b) educational entities that provide training, teaching and legal services that further the goals of the underlying causes of action on which relief was based;

(c) nonprofit organizations that provide legal services to low income persons;

(d) the entity administering the IOLTA fund under Rule 24-109 NMRA, to support activities and programs that promote access to the civil justice system for low income residents of New Mexico; and

(e) the entity administering the pro hac vice fund under Rule 24-106 NMRA, to support activities and programs that promote access to the civil justice system for low income residents of New Mexico.

(3) Nothing in this paragraph is intended to prevent the parties to a class action from proposing, or the trial court from approving, a settlement that does not create residual funds.

[As amended, effective July 1, 1995; December 4, 2000; as amended by Supreme Court Order No. 11-8300-016, effective May 11, 2011.]

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added Subparagraph B(3) and made related changes, rewrote Subparagraphs C(1) and C(2), added the last sentence in Subparagraph C(3), and deleted former Paragraph F relating to assessment of costs and damages.

The 2000 amendment, effective December 4, 2000, added Paragraph F.

The 2011 amendment, approved by Supreme Court Order No. 11-8300-016, effective May 11, 2011, added Paragraph G to define "residual funds", provide for the distribution of residual funds to specified organizations and entities, and to permit the parties to a class to propose settlements that do not create residual funds.

Contract term implied by law or determined by the intent of the parties. — Where plaintiffs, who were royalty owners, brought a class action lawsuit claiming that defendant underpaid royalties by improperly deducting the costs and expenses associated with placing natural gas in a marketable condition, class certification depended upon whether the marketable condition rule was implied in the contracts as a matter of law or on the parties' intent. If the marketable condition rule was implied by law, certification was appropriate. If the marketable condition rule depended upon extrinsic evidence to demonstrate the parties' intent, individual contract issues might predominate over common questions and certification would be inappropriate. *Ideal v. Burlington Res. Oil & Gas Co. LP*, 2010-NMSC-022, 148 N.M. 228, 233 P.3d 362.

Denial of class certification was not binding on absent class members. — Virtual representation is limited to absent class members only in situations where the class has been properly certified and conducted. Virtual representation does not apply to precertification decisions, including denial of class certification. *Ideal v. Burlington Res. Oil & Gas Co. LP*, 2010-NMSC-022, 148 N.M. 228, 233 P.3d 362.

Absent class members are not precluded from relitigating decision not to certify a class. — Where plaintiffs were absent class members of a prior precertification decision not to certify a class, plaintiffs were not members of the prior class action and are not precluded from relitigating the issue of class certification. *Ideal v. Burlington Res. Oil & Gas Co. LP*, 2010-NMSC-022, 148 N.M. 228, 233 P.3d 362.

Preclusion of absent class members by precertification decisions would deny due process. — Where plaintiffs were absent class members of a prior precertification decision not to certify a class; and prior to a case being certified, absent class members are not offered a right to be heard, are given no notice, and are given no opportunity to opt out, to hold that absent members are precluded from bringing their claims without

affording them these rights would deny them due process. *Ideal v. Burlington Res. Oil & Gas Co. LP*, 2010-NMSC-022, 148 N.M. 228, 233 P.3d 362.

Analysis of choice of law and conflict of law decisions. — The district court is not required to set forth the details of the court's analysis in resolving potential choice of law and conflict of law issues. *Ideal v. Burlington Res. Oil & Gas Co. LP*, 2010-NMSC-022, 148 N.M. 228, 233 P.3d 362.

New Mexico law applied. — Where plaintiffs, who were royalty owners, brought a class action lawsuit claiming that defendant underpaid royalties by improperly deducting the costs and expenses associated with placing natural gas in a marketable condition; the land was located in New Mexico; the production occurred in New Mexico and the oil and gas leases conveyed an interest in real property in New Mexico, the district court properly held that New Mexico law applied because New Mexico had significant contacts that created a state interest. *Ideal v. Burlington Res. Oil & Gas Co. LP*, 2010-NMSC-022, 148 N.M. 228, 233 P.3d 362.

Certification under Rule 1-023(B)(2) where monetary damages are sought. — When class certification prerequisites are satisfied and declaratory or injunctive relief is sought as an integral part of the relief for the class, then Rule 1-023(B)(2) is applicable regardless of the presence or dominance of additional prayers for damages relief for class members. Davis v. Devon Energy Corporation, 2009-NMSC-048, 147 N.M. 157, 218 P.3d 75.

Defendants acted on grounds applicable to all class members. — In a class action, where plaintiff royalty owners alleged that defendant gas producers improperly deducted from plaintiffs' royalty payments the costs of making coalbed methane gas marketable; plaintiffs sought damages for breach of their individual royalty agreements; and the district court found that defendants deducted certain costs uniformly in all royalty agreements, regardless of the language of the agreements, the court properly certified the class under Rule 1-023(B)(2) because the district court was in a position to declare the rights of the parties on a class-wide basis with respect to the propriety of the deductions. Davis v. Devon Energy Corporation, 2009-NMSC-048, 147 N.M. 157, 218 P.3d 75.

Court ruling created common question of law with respect to damage claims under individualized contracts. — In a class action, where plaintiff royalty owners alleged that defendant gas producers improperly deducted from plaintiffs' royalty payments the costs of making coalbed methane gas marketable; plaintiffs sought damages for breach of their individual royalty agreements; and the district court ruled that, as a matter of law, the marketable condition rule, which incorporates the duty to put coalbed methane gas in a marketable condition, had been incorporated in the existing duty to market, the district court's ruling was sufficient to certify the class under Rule 1-023(B)(3) because the provisions of each royalty agreement were irrelevant under the marketable condition rule and the district court's ruling raised the common issue of whether the costs deducted by defendants were necessary to make the

coalbed methane gas marketable. Davis v. Devon Energy Corporation, 2009-NMSC-048, 147 N.M. 157, 218 P.3d 75.

Entering findings of fact and conclusions of law is not a prerequisite to appellate review of class certification orders. Davis v. Devon Energy Corporation, 2009-NMSC-048, 147 N.M. 157, 218 P.3d 75.

Approval of a class action settlement. — Where, after the Court of Appeals reversed and remanded the district court's final order, which confirmed certification of the class for settlement purposes and approved the settlement, for further findings on whether the settlement was fair and reasonable and whether the class should be certified for settlement purposes, the parties sought to implement the final order in the interest of achieving a class-wide settlement, the Court of Appeals' decision will be set aside and the district court's final order will be affirmed. Platte v. First Colony Life Insurance Company, 2008-NMSC-058, 145 N.M. 77, 194 P.3d 108.

Standard to determine actual conflicts between states' laws. — The standard for determining when an actual conflict exists between states' laws such that application of the forum state's law is inappropriate for a class action is more than a mere hypothetical conflict or uncertainty based on the lack of foreign appellate precedent; rather, proof of an actual conflict is required. Ferrell v. Allstate Insurance Company, 2008-NMSC-042, 144 N.M. 405, reversing 2007-NMCA-017, 141 N.M. 72, 150 P.3d 1022.

Standard to determine applicable law. — After determining that an actual conflict of laws exists, the court should apply the principles of the Restatement (Second) of Conflicts of Laws (1971) to determine what law applies to the disputed issue. Ferrell v. Allstate Insurance Company, 2008-NMSC-042, 144 N.M. 405, reversing 2007-NMCA-017, 141 N.M. 72, 150 P.3d 1022.

Contractual prohibition of class actions. — Contractual prohibition of class relief, as applied to claims that would be economically inefficient to bring on an individual basis, is contrary to the fundamental public policy of New Mexico to provide a forum for the resolution of all consumer claims and is unenforceable in New Mexico. Fiser v. Dell Computer Corporation, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215, reversing 2007-NMCA-087, 142 N.M. 331, 165 P.3d 328.

Unnamed class members in op-out class actions have a right to appeal the approval of a settlement. Rivera-Platte v. First Colony Life Ins. Co., 2007-NMCA-158, 143 N.M. 158, 173 P.3d 765, cert. granted, 2007-NMCERT-011.

Certification of settlement-only class. — In settlement-only classes, the district court must consider the certification requirements and make finds that certification was proper. Rivera-Platte v. First Colony Life Ins. Co., 2007-NMCA-158, 143 N.M. 158, 173 P.3d 765,cert. granted, 2007-NMCERT-011.

Factors for determining fairness of settlement. — Before approving a settlement, the court should examine the settlement process, including the adequacy of discovery, the fairness of the process afforded objectors, and the fairness and honesty of the negotiation; the risks of litigation, including the merits and complexities of the parties' claims and the potential duration and cost of trial; the reasonableness of the settlement in light of the risks of litigation and the possible recovery at trial; and the class members' reaction to the settlement. Rivera-Platte v. First Colony Life Ins. Co., 2007-NMCA-158, 143 N.M. 158, 173 P.3d 765, cert. granted, 2007-NMCERT-011.

In determining whether class certification is appropriate, the court must avoid examining the merits of the moving party's case at the time class certification is sought. Armijo v. Wal-Mart Stores, Inc., 2007-NMCA-120, 142 N.M. 557, 168 P.3d 129, cert. denied, 2007-NMCERT-009.

Class definition. — A class definition that presents a question based on the merits of plaintiff's case is improper. Armijo v. Wal-Mart Stores, Inc., 2007-NMCA-120, 142 N.M. 557, 168 P.3d 129, cert. denied, 2007-NMCERT-009.

Paragraph B(3) is essentially identical to its federal counterpart, Rule 23(b) of the Federal Rules of Civil Procedure. Romero v. Philip Morris, Inc., 2005-NMCA-035, 137 N.M. 229, 109 P.3d 768.

Purpose of rule. — This rule is a device to save court and party resources and promote litigation economy by litigating common questions of law and fact at one time. Romero v. Philip Morris, Inc., 2005-NMCA-035, 137 N.M. 229, 109 P.3d 768.

A beneficial and primary purpose of the procedure under this rule is to address class members' claims in one proceeding where joinder outside of the class action setting is impracticable. Romero v. Philip Morris, Inc., 2005-NMCA-035, 137 N.M. 229, 109 P.3d 768.

This rule is a remedial procedural device, which will be interpreted liberally. Romero v. Philip Morris, Inc., 2005-NMCA-035, 137 N.M. 229, 109 P.3d 768.

Court may not simply assume conformance with this rule. Romero v. Philip Morris, Inc, 2005-NMCA-035, 137 N.M. 229, 109 P.3d 768.

And party seeking certification has burden of showing that each prerequisite of this rule is met. Romero v. Philip Morris, Inc., 2005-NMCA-035, 137 N.M. 229, 109 P.3d 768.

Antitrust Act. — This rule does not, as written, abridge a defendant's substantive rights under the Antitrust Act. Romero v. Philip Morris, Inc., 2005-NMCA-035, 137 N.M. 229, 109 P.3d 768.

Application of rule to filing date of cases. — While it is true that the Supreme Court could have indicated that Paragraph F of this rule applies to cases filed after a specific date, its failure to do so is of no significance. Starko, Inc. v. Cimarron Health Plan, Inc., 2005-NMCA-040, 137 N.M. 310, 110 P.3d 526, cert. denied, 2005-NMCERT-004.

Omission of the language "effective date", or language in the rule that says the rule applies to cases filed after a certain date, cannot be given a particular meaning. Starko, Inc. v. Cimarron Health Plan, Inc., 2005-NMCA-040, 137 N.M. 310, 110 P.3d 526, cert. denied, 2005-NMCERT-004.

Appeal unavailable. — Where case was pending within the meaning of N.M. Const., art. IV,' 34, at the time Paragraph F of this rule became effective, an appeal under the rule is not available. Starko, Inc. v. Cimarron Health Plan, Inc., 2005-NMCA-040, 137 N.M. 310, 110 P.3d 526, cert. denied, 2005-NMCERT-004.

An appeal of a grant or denial of class certification under Paragraph F of this rule is not available in a class action where the rule became effective after the original suit was filed, but before the appealing defendants became parties in the case. Starko, Inc. v. Cimarron Health Plan, Inc., 2005-NMCA-040, 137 N.M. 310, 110 P.3d 526, cert. denied, 2005-NMCERT-004.

This rule is identical to its federal counterpart. Berry v. Federal Kemper Life Assurance Co., 2004-NMCA-116, 136 N.M. 454, 99 P.3d 1164, cert. denied, 136 N.M. 515, 100 P.3d 672.

Because Paragraph A of this rule and, in particular, Paragraph B(3) of this rule, are essentially identical to their federal counterparts, federal law is looked for guidance in determining the appropriate legal standards to apply to the rule. Brooks v. Norwest Corp., 2004-NMCA-134, 136 N.M. 599, 103 P.3d 39, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097 (N.M. 2004).

Class actions aggregate many claims into single proceeding, potentially saving the courts from dealing with large numbers of individual claims involving similar factual and legal patterns. Berry v. Federal Kemper Life Assurance Co., 2004-NMCA-116, 136 N.M. 454, 99 P.3d 1164, cert. denied, 136 N.M. 515, 100 P.3d 672.

All class actions must meet the minimum requirements of Paragraph A of this rule, commonly referred to as numerosity, commonality, typicality, and adequacy of representation. Berry v. Federal Kemper Life Assurance Co., 2004-NMCA-116, 136 N.M. 454, 99 P.3d 1164, cert. denied, 136 N.M. 515, 100 P.3d 672.

Burden of proof. — Plaintiffs bear the burden to show that all four prerequisites of Paragraph A of this rule and at least one of the requirements of Paragraph B of this rule are met. Brooks v. Norwest Corp., 2004-NMCA-134, 136 N.M. 599, 103 P.3d 39, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097 (N.M. 2004).

An implicit primary requirement of this rule, often referred to as the "definiteness" requirement, is that plaintiffs bear the burden to demonstrate the existence of an identifiable class that is capable of ascertainment under some objective standard. Brooks v. Norwest Corp., 2004-NMCA-134, 136 N.M. 599, 103 P.3d 39, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097 (N.M. 2004).

Imprecise, vague, or broad class definitions that include persons with little connection to the claims will fail to meet the definiteness requirement. Brooks v. Norwest Corp., 2004-NMCA-134, 136 N.M. 599, 103 P.3d 39, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097 (N.M. 2004).

Dismissal of action. — Although the dismissal of a class action because of management difficulties is generally disfavored, dismissal is warranted where individual issues predominate to make the class action unmanageable, even if no alternative remedy exists. Brooks v. Norwest Corp., 2004-NMCA-134, 136 N.M. 599, 103 P.3d 39, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097 (N.M. 2004).

If complaint fails to meet requirements of this rule, termination of the action would be proper only insofar as it seeks relief on behalf of the class. Balizer v. Shaver, 82 N.M. 347, 481 P.2d 709 (Ct. App. 1971).

Due process requires notice to persons affected by class action. — Due process under both state and federal constitutions requires that a person affected by a class action be given notice of the action, and the absence of such notice requires a dismissal of the complaint. Eastham v. Public Employees' Retirement Ass'n Bd., 89 N.M. 399, 553 P.2d 679 (1976).

Due process not violated by adding defendants. — Where, in a class action, pharmacists sued HSD to enforce their rights to reimbursement under Subsection B of Section 27-2-16 NMSA 1978; the court certified the class before managed care organizations were added as defendants; the organizations challenged the class certification; and the court granted discovery on the issue of whether the organizations were subject to the previous class certification, held a hearing where the parties argued the issue, and more than two years after plaintiffs moved to add the organizations, the court held that class certification was proper as to the organizations, no violation of the organizations' due process rights occurred. *Starko, Inc. v. Presbyterian Health Plan,* Inc., 2012-NMCA-053, 276 P.3d 252, cert. granted, 2012-NMCERT-003.

Class certification was proper. — Where, in a class action, pharmacists sued HSD and managed care organizations to enforce pharmacists' rights to reimbursement under Subsection B of Section 27-2-16 NMSA 1978; the department entered into provider contracts with the organizations to provide medical care and pharmacy services; the organizations entered into contracts with pharmacists to provide pharmacy services; the number of pharmacists who were class members was between two and three hundred; the pharmacists were widely dispersed across the state; the relationship of each pharmacist to the department and the organizations and the facts necessary to decide

the case as to each class member were essentially the same; each class member sought an interpretation of Subsection B that required either the department or the organizations to pay; there was no evidence that the interests of any individual class member were contrary to those of the entire class; to prevail, each class member needed a holding on all critical issues common to all class members; judicial resources would be saved by certification; the number of class members was manageable; and the damages of each class member could be calculated in a similar manner, the court did not abuse its discretion in finding that the requirements of Paragraph A of Rule 1-023 NMRA were met. *Starko, Inc. v. Presbyterian Health Plan, Inc.,* 2012-NMCA-053, 276 P.3d 252, cert. granted, 2012-NMCERT-003.

Primary considerations regarding numerosity are whether there are so many potential plaintiffs that they cannot be joined as a practical matter, and whether there are other obstacles, such as personal jurisdiction issues, to individual joinder. Berry v. Federal Kemper Life Assurance Co., 2004-NMCA-116, 136 N.M. 454, 99 P.3d 1164, cert. denied, 136 N.M. 515, 100 P.3d 672.

Numerosity should not depend on number of class members who may ultimately seek a recovery. Berry v. Federal Kemper Life Assurance Co., 2004-NMCA-116, 136 N.M. 454, 99 P.3d 1164, cert. denied, 136 N.M. 515, 100 P.3d 672.

Commonality requirement of Paragraph A(2) is relatively easily met because it is deemed to require only that a single issue be common to the class. Berry v. Federal Kemper Life Assurance Co., 2004-NMCA-116, 136 N.M. 454, 99 P.3d 1164, cert. denied, 136 N.M. 515, 100 P.3d 672.

Typicality requirement of Paragraph A(3) is used to gauge in general how well the proposed class representative's case matches the class factual allegations and legal theories. Berry v. Federal Kemper Life Assurance Co., 2004-NMCA-116, 136 N.M. 454, 99 P.3d 1164, cert. denied, 136 N.M. 515, 100 P.3d 672.

"Typicality" refers to claims of class representatives. – Even assuming that the class representatives did not perform all of the same functions performed by all members of the class, the defendants failed to demonstrate how differences in job duties would make the claims or defenses of the class representatives with regard to overtime compensation significantly different from the claims and defenses of any class members. Salcido v. Farmers Ins. Exchange, 2004-NMCA-006, 134 N.M. 797, 82 P.3d 968.

What constitutes adequate representation under Paragraph A(4) is question of fact that depends on the circumstances of each case. Berry v. Federal Kemper Life Assurance Co., 2004-NMCA-116, 136 N.M. 454, 99 P.3d 1164, cert. denied, 136 N.M. 515, 100 P.3d 672.

Weighing of matters pertinent to findings. — Paragraph B(3) of this rule does provide a list of “matters pertinent to the findings” but it does not explain how they are to

be weighed in individual cases. Berry v. Federal Kemper Life Assurance Co., 2004-NMCA-116, 136 N.M. 454, 99 P.3d 1164, cert. denied, 136 N.M. 515, 100 P.3d 672.

Predominance is not determined by simple quantitative measure of time that may be spent on common rather than individual issues, though that calculation can be a factor properly taken into account. Berry v. Federal Kemper Life Assurance Co., 2004-NMCA-116, 136 N.M. 454, 99 P.3d 1164, cert. denied, 136 N.M. 515, 100 P.3d 672.

Hearing on class action certification. — District court is not required to hold an evidentiary hearing prior to certifying a class. Murken v. Solv-Ex Corporation, 2006-NMCA-064, 139 N.M. 625, 136 P.3d 1035.

Although this rule does not require that class certification order contain findings of fact, courts are encouraged to request and enter factual findings to facilitate meaningful review. Salcido v. Farmers Ins. Exchange, 2004-NMCA-006, 134 N.M. 797, 82 P.3d 968.

All parties on one side of lawsuit not necessarily one party. — These rules, as well as the common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of a lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

No abuse of discretion. – District court did not abuse discretion in certifying class for settlement purposes where district court considered the possibility that individual class members might have large claims that would not be well suited to class adjudication and nevertheless determined that a class action was the superior method of adjudication, there was no other pending litigation brought by shareholders, New Mexico was a desirable forum because the corporate defendant was a New Mexico corporation and one individual defendant was a New Mexico citizen. Murken v. Solv-Ex Corporation, 2006-NMCA-064, 139 N.M. 625, 136 P.3d 1035.

Standing to object to settlement. — A non-settling defendant in a class action does not have standing to object to a court-approved settlement entered into by the class plaintiffs and another defendant unless the non-settling defendant can show legal prejudice caused by the settlement. Murken v. Solv-Ex Corporation, 2006-NMCA-065, 139 N.M. 625, 136 P.3d 1035.

Notice of appeal not untimely when filed on thirty-first day following the entry of an order, as the time for its entry was extended by virtue of the fact that the thirtieth day was a Sunday. James v. Brumlop, 94 N.M. 291, 609 P.2d 1247 (Ct. App. 1980).

Guidelines for appellate review of class certification decisions. – New Mexico courts will ordinarily grant review of class certification decisions: (1) when there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court's discretion over class

certification; (2) when the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; and (3) when the district court's class certification decision is manifestly erroneous. Salcido v. Farmers Ins. Exchange, 2004-NMCA-006, 134 N.M. 797, 82 P.3d 968.

There was no indication that the district court's certification of the class would sound the death knell for overtime pay litigation resulting from irresistible pressure on the defendant to settle the matter where the defendant had been defending multiple class action suits throughout the country and had voluntarily stipulated to consolidation of similar claims in a multi-district litigation. Salcido v. Farmers Ins. Exchange, 2004-NMCA-006, 134 N.M. 797, 82 P.3d 968.

Review of class certification on grounds of adequacy of representation is disfavored where further discovery may change the scope and contour of the putative class, because the district court is empowered to amend a class certification order at any time prior to reaching a decision on the merits under Subparagraph (1) of Paragraph C of this rule. Salcido v. Farmers Ins. Exchange, 2004-NMCA-006, 134 N.M. 797, 82 P.3d 968.

Doctrine of vicarious or virtual exhaustion of remedies does not apply. — The Tax Administration Act provides the exclusive remedies for tax refunds and requires taxpayers to individually seek a refund. Each member of the class of taxpayers challenging the constitutionality of a tax must individually exhaust their administrative remedies and only after individual exhaustion by each class member can the district court have jurisdiction over the class. The doctrine of vicarious or virtual exhaustion of remedies that allows a class action for tax refunds to proceed when only a few members of the proposed class have exhausted their administrative remedies does not apply to proceedings under the Tax Administration Act. U.S. Xpress, Inc. v. N.M Taxation & Revenue Dept., 2006-NMSC-017, 139 N.M. 589, 136 P.3d 999.

Law reviews. — For article, "1975 Amendments to the New Mexico Business Corporations Act," see 6 N.M.L. Rev. 57 (1975).

For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M.L. Rev. 367 (1976).

For note, "The Future of Class Actions in New Mexico," see 7 N.M.L. Rev. 225 (1977).

For note, "State Securities Law: A Valuable Tool for Regulating Investment Land Sales," see 7 N.M.L. Rev. 265 (1977).

For article, "The Impact of the Revised New Mexico Class Action Rules Upon Consumers," see 9 N.M.L. Rev. 263 (1979).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 Am. Jur. 2d Parties §§ 43 to 91.

Specific performance of compromise and settlement agreement, 48 A.L.R.2d 1211.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Attorneys' fees in class actions, 38 A.L.R.3d 1384.

Amount of attorney's compensation in absence of contract or statute fixing amount, 57 A.L.R.3d 475.

Construction of provision in compromise and settlement agreement for payment of costs as part of settlement, 71 A.L.R.3d 909.

Propriety of class action in state courts to recover taxes, 10 A.L.R.4th 655.

Absent or unnamed class members in class action in state court as subject to discovery, 28 A.L.R.4th 986.

Propriety of attorney acting as both counsel and class member or representative, 37 A.L.R.4th 751.

Inverse condemnation state court class actions, 49 A.L.R.4th 618.

Class actions in state mass tort suits, 53 A.L.R.4th 1220.

Timeliness of application to intervene made under Rule 24 of Federal Rules of Civil Procedure after denial of class certification for intervenors, 46 A.L.R. Fed. 864.

Propriety of notice of voluntary dismissal or compromise of class action, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, 52 A.L.R. Fed. 457.

Jurisdiction of district court to entertain class actions by consumers pursuant to provisions of Magnuson-Moss Federal Warranty Act (15 USCS § 2301 et seq.), 54 A.L.R. Fed. 919.

Propriety, under Rule 23 of the Federal Rules of Civil Procedure, of class action for violation of Truth in Lending Act (15 USCS § 1601 et seq.), 61 A.L.R. Fed. 603.

Association of persons as proper representative of class under Rule 23 of Federal Rules of Civil Procedure governing maintenance of class actions, 63 A.L.R. Fed. 361.

Notice to potential class members of right to "opt-in" to class action, under § 16(b) of Fair Labor Standards Act (29 USCS § 216(b)), 67 A.L.R. Fed. 282.

Notice of proposed dismissal or compromise of class action to absent putative class members in uncertified class action under Rule 23(e) of Federal Rules of Civil Procedure, 68 A.L.R. Fed. 290.

Typicality requirement of Rule 23(a)(3) of Federal Rules of Civil Procedure as to class representative in class action based on unlawful discrimination, 74 A.L.R. Fed. 42.

Permissibility of action against a class of defendants under Rule 23(b)(2) of Federal Rules of Civil Procedure, 85 A.L.R. Fed. 263.

Propriety of allowing class member to opt out in class action certified under subsections (b)(1) or (b)(2) of Rule 23 of Federal Rules of Civil Procedure, 146 A.L.R. Fed. 563.

67A C.J.S. Parties §§ 21 to 32.

1-023.1. Derivative actions by shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

[As amended, effective July 1, 1995.]

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, made gender neutral changes throughout the rule.

Standing to bring individual action. — Where plaintiffs and defendant were equal shareholders in a closely held corporation; the corporation purchased residential property where defendant could reside and run the corporate business; defendant made all payments on the purchase price of the residential property; the corporation ceased to operate, but the corporation was not dissolved and the assets were not divided among the shareholders; defendant, as president of the corporation, executed a deed

conveying the residential property to defendant, and defendant took cash out of the residential property through the refinancing of the residential property, plaintiffs had standing to sue defendant on individual claims for a breach of fiduciary duty in the sale of corporate assets in violation of Section 53-15-1 NMSA 1978. *Clark v. Sims*, 2009-NMCA-118, 147 N.M. 252, 219 P.3d 20.

A stockholder who directly attacks the fairness or validity of a merger alleges a direct injury to the stockholders, not the corporation, and has standing to pursue the shareholder's direct claims. *Rael v. Page*, 2009-NMCA-123, 147 N.M. 306, 222 P.3d 678.

Where plaintiff, who was a shareholder in a corporation that had been merged out of existence, claimed that the merger was unfair and resulted in an unfair share price paid to shareholders because the directors of the corporation breached fiduciary duties by engaging in self-interested negotiations with potential buyers of the corporation, devaluing the corporation for personal gain, and conducting unfair and misleading voting processes, plaintiff alleged a direct injury to the shareholders and plaintiff had standing to pursue plaintiff's direct claims against the directors for damages. *Rael v. Page*, 2009-NMCA-123, 147 N.M. 306, 222 P.3d 678.

Action for accounting should not be maintained by shareholders in their individual capacities. A derivative action is required. Schwartzman v. Schwartzman Packing Co., 99 N.M. 436, 659 P.2d 888 (1983).

Procedural safeguards of rule received. – Assuming that this rule applied to a "derivative" action by trust beneficiaries, the beneficiaries received all the procedural safeguards required by the rule, including notice and the opportunity to object, where they were properly served with notice of the trial court's hearing and were advised of its purposes. In re Norwest Bank of New Mexico, N.A., 2003-NMCA-128, 134 N.M. 516, 80 P.3d 98, cert. denied, 2003-NMCERT-002.

Failure to apply rule not prejudicial where party objected under another rule. – Where the record demonstrated that the notice and opportunity to be heard given to trust beneficiaries more than comported with due process and the purposes of this rule, a determination by the Court that the rule should have been applied would make no difference, because the beneficiaries were given the benefits of a hearing under the rule. In re Norwest Bank of New Mexico, N.A., 2003-NMCA-128, 134 N.M. 516, 80 P.3d 98, cert. denied, 2003-NMCERT-002.

Law reviews. — For article, "The Impact of the Revised New Mexico Class Action Rules Upon Consumers," see 9 N.M.L. Rev. 263 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 Am. Jur. 2d Parties §§ 43 to 91.

Diversity of citizenship as ground of jurisdiction of federal courts in stockholders' derivative action against directors where corporation is a citizen of same state as plaintiffs, under 28 U.S.C. § 1401, 18 A.L.R.2d 1022.

Pending action or existing cause of action, statute regulating stockholders' actions as applicable to, 32 A.L.R.2d 851.

Specific performance of compromise and settlement agreement, 48 A.L.R.2d 1211.

Diversity of citizenship for purposes of federal jurisdiction, in stockholders' derivative action, 68 A.L.R.2d 824.

Intervention by other stockholders in stockholder's derivative action, 69 A.L.R.2d 562.

Second or successive stockholder's derivative action, 70 A.L.R.2d 1305.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Communications by corporation as privileged in stockholders' action, 34 A.L.R.3d 1106.

Attorneys' fees in class actions, 38 A.L.R.3d 1384.

Amount of attorney's compensation in absence of contract or statute fixing amount, 57 A.L.R.3d 475.

Allowance of punitive damages in stockholder's derivative action, 67 A.L.R.3d 350.

Construction of provision in compromise and settlement agreement for payment of costs as part of settlement, 71 A.L.R.3d 909.

Negligence, nonfeasance, or ratification of wrongdoing as excusing demand on directors as prerequisite to bringing of stockholder's derivative suit on behalf of corporation, 99 A.L.R.3d 1034.

Propriety of termination of properly initiated derivative action by "independent committee" appointed by board of directors whose actions (or inaction) are under attack, 22 A.L.R.4th 1206.

Right to jury trial in stockholder's derivative action, 32 A.L.R.4th 1111.

18 C.J.S. Corporations §§ 397 to 413; 67A C.J.S. Parties §§ 21 to 32.

1-024. Intervention.

A. **Intervention of right.** Upon timely application anyone shall be permitted to intervene in an action:

(1) when a statute confers an unconditional right to intervene; or

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

B. **Permissive intervention.** Upon timely application anyone may be permitted to intervene in an action:

(1) when a statute confers a conditional right to intervene; or

(2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.

In exercising its discretion pursuant to this paragraph the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

C. **Procedure.** A person desiring to intervene pursuant to Paragraph A or B of this rule shall serve a motion to intervene upon the parties as provided in Rule 1-005 NMRA. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

[As amended, effective July 1, 1995.]

ANNOTATIONS

Cross references. — For joinder of parties, *see* Rules 1-019 and 1-020 NMRA.

For class actions, *see* Rule 1-023 NMRA.

For intervention in suit on bond of public contractor, *see* Section 13-4-19 NMSA 1978.

For intervention in partition proceedings, *see* Section 42-5-4 NMSA 1978.

For intervention by attorney in quiet title action, *see* Section 42-6-10 NMSA 1978.

For intervention in attachment proceedings, *see* Section 42-9-29 NMSA 1978.

Compiler's notes. — This rule is deemed to have superseded 105-1501 to 105-1503, C.S. 1929, which were substantially the same as Paragraphs A to C.

The 1995 amendment, effective July 1, 1995, made gender neutral changes in Subparagraph A(2), added the last sentence in Paragraph C, and deleted former Paragraph D, which provided for simplified intervention by members of a class.

Timeliness of motion to intervene. — Intervenor's motion to intervene was not timely and was properly denied, even if the intervenor had a right to intervene, where the intervenor's president was made aware of the pending litigation four months after the complaint was filed and intervenor did not file a motion to intervene for more that sixteen months after the complaint was filed. Nellis v. Mid-Century Ins. Co., 2007-NMCA-090, 142 N.M. 115, 163 P.3d 502.

Statutory authorization required. — Intervention under Paragraph A(1) of this rule is not allowed in the absence of direct statutory authorization. Wilson v. Massachusetts Mutual Life Ins. Co., 2004-NMCA-051, 135 N.M. 506, 90 P.3d 525, cert. denied, 2004-NMCERT-004.

Federal courts applying federal counterpart to this rule have granted intervention where a statute provides for such intervention. Wilson v. Massachusetts Mutual Life Ins. Co., 2004-NMCA-051, 135 N.M. 506, 90 P.3d 525, cert. denied, 2004-NMCERT-004.

Intervention defined. — Intervention is an act or proceeding whereby a person is permitted to become a party in an action between other persons, after which the litigation proceeds with the original and intervening parties. Richins v. Mayfield, 85 N.M. 578, 514 P.2d 854 (1973); State ex rel. Attorney Gen. v. Reese, 78 N.M. 241, 430 P.2d 399 (1967).

Where trust beneficiaries were effectively accorded the rights to object under Rule 1-023.1 NMRA, any error the trial court might have made in interpreting the beneficiaries' objection as a motion to intervene would not have changed the result. In re Norwest Bank of New Mexico, N.A., 2003-NMCA-128, 134 N.M. 516, 80 P.3d 98, cert. denied, 2003-NMCERT-002.

Parties on same side of suit remain separate. — These rules, as well as the common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of a lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

Timeliness circumstantially determined. — Just when an application to intervene is timely must depend on the circumstances of each case. Tom Fields, Ltd. v. Tigner, 61 N.M. 382, 301 P.2d 322 (1956).

A key consideration in determining timeliness of intervention is whether the effort to intervene occurred shortly after the would-be intervenor discovered such action was necessary to protect its interests. Thriftway Mktg. Corp. v. State, 111 N.M. 763, 810 P.2d 349 (Ct. App. 1990).

A crucial factor in determining if motion to intervene is timely is whether the intervenor knew of its interest and could have sought to intervene earlier in the proceedings. In re Norwest Bank of New Mexico, N.A., 2003-NMCA-128, 134 N.M. 516, 80 P.3d 98, cert. denied, 2003-NMCERT-002.

Prejudice as factor in timeliness determination. – The trial court must consider whether permitting intervention will prejudice the existing parties, particularly with respect to additional delay. Where the litigation is of great complexity, permitting intervention may be more prejudicial to existing litigants. In re Norwest Bank of New Mexico, N.A., 2003-NMCA-128, 134 N.M. 516, 80 P.3d 98, cert. denied, 2003-NMCERT-002.

Within discretion of trial court. — Timeliness is a threshold requirement for intervention and the timeliness of an application for intervention depends upon the circumstances of each case as timeliness is a matter peculiarly within the discretion of the trial court. Apodaca v. Town of Tome Land Grant, 86 N.M. 132, 520 P.2d 552 (1974).

Assuming that the trust beneficiaries' challenge to the settlement agreement constituted a motion to intervene and that the beneficiaries were entitled to the leeway given to intervenors as of right, there was no abuse of discretion in the trial court's refusal to permit intervention where the beneficiaries were given ample opportunity to become parties before the trial, were given timely notice of the trial, and chose not to intervene to protect their interests. In re Norwest Bank of New Mexico, N.A., 2003-NMCA-128, 134 N.M. 516, 80 P.3d 98, cert. denied, 2003-NMCERT-002.

Where the intervenors have presented no factual basis whatsoever to support their argument that they did not know of their interest and could not have intervened at an earlier time, the intervenors did not meet their threshold burden of showing that their motion to intervene was timely, and therefore, the district court did not abuse its discretion in finding that the intervenors' motion to intervene was untimely. Murken v. Solv-Ex Corp., 2005-NMCA-137, 138 N.M. 653, 124 P.3d 1192.

Court may scrutinize complaint for a cause of action. — While a determination that a proposed complaint in intervention is legally sufficient - so as to withstand a motion to dismiss for failure to state a claim under Paragraph B(6) of Rule 1-012 NMRA - is not required before the trial court may grant an application to intervene, it is certainly permissible for the court to scrutinize the proffered complaint to see whether it states a cause of action. Solon ex rel. Ponce v. WEK Drilling Co., 113 N.M. 566, 829 P.2d 645 (1992).

Exercise governed by equitable principles. — The timeliness of such an application depends upon the circumstances of each case, and in the absence of a specific statutory provision fixing the time within which the right to intervene must be exercised, the timeliness is governed by equitable principles. Richins v. Mayfield, 85 N.M. 578, 514 P.2d 854 (1973).

Undue delay considered. — An intervening party may not demand time to file intervention petition if granting such time would delay hearing. Clark v. Rosenwald, 31 N.M. 443, 247 P. 306 (1925) (decided under former law).

Generally, intervention must take place while action is pending and will not be permitted after commencement of trial; therefore, it is the general rule that intervention will not be allowed after a final judgment or decree has been entered. Richins v. Mayfield, 85 N.M. 578, 514 P.2d 854 (1973).

Generally, a motion to intervene will not be granted after a final judgment has been entered, absent unusual circumstances, but it should not be automatically denied. Nesbit v. City of Albuquerque, 91 N.M. 455, 575 P.2d 1340 (1977).

Discretion to deny intervention of right carefully exercised. — Intervention will not normally be allowed after trial has commenced; however, trial courts should be more circumspect in their exercise of discretion when the intervention is of right rather than permissive. Apodaca v. Town of Tome Land Grant, 86 N.M. 132, 520 P.2d 552 (1974).

Unclaimed Property Act. — Since there is an absence of any specific authority for intervention in New Mexico's Unclaimed Property Act, such a right under Paragraph A(1) of this rule is not recognized. Wilson v. Massachusetts Mutual Life Ins. Co., 2004-NMCA-051, 135 N.M. 506, 90 P.3d 525, cert. denied, 2004-NMCERT-004.

Where certificates awarded to policyholders in class action suit settlement are not property under the Unclaimed Property Act, New Mexico failed to establish that it had an interest in the settlement necessary for intervention under Paragraph A(2) of this rule. Wilson v. Massachusetts Mutual Life Ins. Co., 2004-NMCA-051, 135 N.M. 506, 90 P.3d 525, cert. denied, 2004-NMCERT-004.

Intervention improper in settled matter. — This rule concerns intervention on timely application and relates to those situations where the question in controversy is pending and has not been settled, therefore intervention order subsequent to mandamus and levy of tax is improper. Speer v. Sierra County Comm'rs, 80 N.M. 741, 461 P.2d 156 (1969).

Denial proper after commencement of complex trial. — Denial of application for intervention where such application was not filed until four and one-half years after complex litigation started involving numerous parties, much pretrial discovery and a number of motions and indeed not until after the trial had started, was not an abuse of discretion. Apodaca v. Town of Tome Land Grant, 86 N.M. 132, 520 P.2d 552 (1974).

Full opportunity to present claim, though motion denied. — The court essentially allowed a party to intervene, since it heard her claims and allowed her to fully develop her case before the court. She did obtain a full hearing of her claims, and the court did not abuse its discretion in denying her motion to intervene. Ruybalid v. Segura, 107 N.M. 660, 763 P.2d 369 (Ct. App. 1988).

Intervention after default. — An uninsured motorist insurer's intervention in an action by its insured against the uninsured motorist after the insurer learned of the entry of a default judgment against the uninsured motorist was not untimely since, until the default, the insurer's interests could have been adequately represented by the uninsured motorist. Burge v. Mid-Continent Cas. Co., 1997-NMSC-009, 123 N.M. 1, 933 P.2d 210.

Intervention untimely after announcement of decision. — Where judgment creditor attempts to intervene in suit to foreclose chattel mortgage after trial has concluded and court has announced its decision and called for requested findings from parties, petition is untimely and denial thereof is not abuse of discretion. Tom Fields, Ltd. v. Tigner, 61 N.M. 382, 301 P.2d 322 (1956).

Intervention after verdict improper for spurious class members. — Intervention by members of a spurious class after a verdict by the jury is not allowed absent extraordinary or unusual circumstances. Absent said circumstances, granting intervention is an abuse of discretion. Valley Utils., Inc. v. O'Hare, 89 N.M. 262, 550 P.2d 274 (1976).

Intervention can be timely after trial. — Municipal judge does not waive his right to intervene where, in action to force his recall election, he has filed as amicus curiae but, believing his interests to be protected by defendant city commission and by filing as amicus curiae, does not seek to intervene until after trial when district court announces its intended decision, but before it renders a final judgment, at which time judge learns that city commission did not intend to appeal from announced adverse ruling. The judge is allowed to intervene at that point since his interests are no longer protected by city commission. Cooper v. Albuquerque City Comm'n, 85 N.M. 786, 518 P.2d 275 (1974).

Where intervention sole means to protect right. — In certain instances intervention will be allowed, even after a final judgment where it is necessary to preserve a right which cannot otherwise be protected; hence, the trial judge must find that the right or interest cannot otherwise be protected, except by intervention. Richins v. Mayfield, 85 N.M. 578, 514 P.2d 854 (1973).

Intervention after final judgment. — An attempt to intervene after final judgment has been issued by the district court should not be allowed in the absence of extraordinary or unusual circumstances. Thriftway Mktg. Corp. v. State, 111 N.M. 763, 810 P.2d 349 (Ct. App. 1990).

Intervention on appeal authorized. — Where the plaintiff in error did not make taxpayers who were real parties in interest defendants, they may be permitted to intervene in an appeal by one aggrieved by the action of the city council in refusing to fund warrants issued by the city and unpaid. Miller v. City of Socorro, 9 N.M. 416, 54 P. 756 (1898) (decided under former law).

Intervention may be allowed even at the appellate level in appropriate cases. Thriftway Mktg. Corp. v. State, 111 N.M. 763, 810 P.2d 349 (Ct. App. 1990).

Intervention on appeal was timely filed. — Indian tribe political chapter's motion to intervene on appeal in a liquor license transfer case was timely filed, where the proposed transfer site was located within the geographical boundaries of the chapter, and the chapter wished to argue on behalf of the state's position on appeal. Thriftway Mktg. Corp. v. State, 111 N.M. 763, 810 P.2d 349 (Ct. App. 1990).

Intervention as party-plaintiff by defendant insurer conditionally authorized. — An insurance company, claiming a right to reimbursement for funds expended, can intervene as a party-plaintiff when the same company is the insurance carrier for the defendants only under such conditions as would properly protect all the parties to the litigation. To protect the parties, the intervention should not be made final until the main case is ready for judgment. In the interim the company is precluded from participating as a party-plaintiff. Varney v. Taylor, 71 N.M. 444, 379 P.2d 84 (1963), criticized, Herrera v. Springer Corp., 85 N.M. 6, 508 P.2d 1303 (Ct. App. 1973).

Sufficiency of interest circumstantially determined. — An interest to permit intervention must be determined from the facts in each case. Stovall v. Vesely, 38 N.M. 415, 34 P.2d 862 (1934) (decided under former law).

Interests of intervenor in litigation must be direct, not contingent. First Nat'l Bank v. Clark, 21 N.M. 151, 153 P. 69, 1916C L.R.A. 33 (1915). See also Gomez v. Ulibarri, 24 N.M. 562, 174 P. 737 (1918); C.J.L. Meyer & Sons Co. v. Black, 4 N.M. (Gild.) 352, 16 P. 620 (1888); Field v. Sammis, 12 N.M. 36, 73 P. 617 (1903); Baca v. Anaya, 14 N.M. 382, 94 P. 1017 (1908) (decided under former law).

In order to establish an interest in the pending action a party seeking to intervene must show that it has an interest that is significant, direct rather than contingent, and based on a right belonging to the proposed intervenor rather than an existing party to the suit. Cordova v. State ex rel. Human Servs. Dep't, 109 N.M. 420, 785 P.2d 1039 (Ct. App. 1989).

Because the county treasurer's motion to intervene alleged only a general interest in the litigation and did not allege nonfeasance or other improper conduct on the part of the director or the division in valuing the property involved herein, nor raised any issue concerning nondisbursement or the improper disbursement of funds derived from tax assessments levied against mining properties or property used in connection therewith, the county treasurer failed to overcome the presumption of adequacy of representation

in actions by property owners against the Director of the Property Tax Division of the State Department of Taxation and Revenue. Chino Mines Co. v. Del Curto, 114 N.M. 521, 842 P.2d 738 (Ct. App. 1992).

Interests of persons as taxpayers and as representatives of the potential life of the unborn did not entitle them to intervene in a suit challenging the contitutionality of a rule of the human services department prohibiting state funding for certain abortions. New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841, cert. denied, 526 U.S. 1020, 119 S. Ct. 1256, 143 L. Ed. 2d 352 (1999).

Where intervening party raises same questions of fact and law. — Decision to permit intervention by state was within the court's discretion where the state's complaint raised the same questions of fact and law under the New Mexico Subdivision Act that were raised in the county's complaint seeking redress for violation of the Act. State ex rel. Stratton v. Alto Land & Cattle Co., 113 N.M. 276, 824 P.2d 1078 (Ct. App. 1991).

Prima facie showing of interest insufficient for intervention. — In an action under 41-2-3 NMSA 1978, an alleged natural father established a prima facie showing of an interest but failed to make a showing of inadequate representation by the child's mother that would warrant his intervention. Dominguez v. Rogers, 100 N.M. 605, 673 P.2d 1338 (Ct. App. 1983).

Judgment and independent equitable proceedings not required to intervene. — A creditor may file an intervening petition where a debtor's funds are in custodia legis to have funds applied to his claim, independent proceedings in equity not being required; his claim need not have been first reduced to judgment. Fuqua v. Trego, 47 N.M. 34, 133 P.2d 344 (1943).

Intervention not conditioned on prior consideration of claim. — Petitioners, as to any interest which they might have in premises sought to be foreclosed, where they are not made party defendants, are entitled reasonably to intervene to assert and protect such interest, and need not move for an early consideration of their petition in order to preserve their rights. State ex rel. Lebeck v. Chavez, 45 N.M. 161, 113 P.2d 179 (1941) (decided under former law).

Foster parents failed to establish a basis for intervention as a matter of right in proceedings to terminate the rights of the natural parents, where their motion did not comply with the requirements of Paragraph C, or adequately apprise the children's court of the claims sought to be raised by intervention. Cordova v. State ex rel. Human Servs. Dep't, 109 N.M. 420, 785 P.2d 1039 (Ct. App. 1989).

Orders denying intervention deemed final. — Orders denying applications to intervene, whether permissive or as of right, are final orders and thus appealable. Apodaca v. Town of Tome Land Grant, 86 N.M. 132, 520 P.2d 552 (1974).

Timely objection required for relief from irregular intervention proceedings. — Intervention proceedings quite obviously not in conformity with this rule, in that no written motion is ever served and that intervention is granted solely on oral motion on the day of trial, are not grounds for a new trial absent timely objection at trial. New Mexico Selling Co. v. Cresenda Corp., 74 N.M. 409, 394 P.2d 260 (1964).

An order denying intervention is fundamentally interlocutory, although it is deemed final for purposes of allowing it to be immediately appealed. Appeal of order denying intervention does not divest district court of jurisdiction over the merits of the case. Murken v. Solv-Ex Corporation, 2006-NMCA-064, 139 N.M. 625, 136 P.3d 1035.

Law reviews. — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For article, "The Impact of the Revised New Mexico Class Action Rules Upon Consumers," see 9 N.M.L. Rev. 263 (1979).

For comment, "Statutory Notice in Zoning Actions: Nesbit v. City of Albuquerque," see 10 N.M.L. Rev. 177 (1979-80).

For note, "Title Insurance - New Mexico Sets the Date for Determination of Value in Title Insurance Cases: Hartman v. Shambaugh," see 12 N.M.L. Rev. 833 (1982).

For note, "Family Law - A Limitation on Grandparental Rights in New Mexico: Christian Placement Service v. Gordon," see 17 N.M.L. Rev. 207 (1987).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

For article, "The Impact of Non-Mutual Collateral Estoppel on Tort Litigation Involving Several Liability," see 18 N.M.L. Rev. 559 (1988).

For article, "Supplemental Jurisdiction over Claims in Intervention," see 23 N.M.L. Rev. 57 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Automobiles and Highway Traffic § 1045; 14 Am. Jur. 2d Carriers § 1135; 19 Am. Jur. 2d Corporations §§ 2235 to 2242; 2407 to 2417; 59 Am. Jur. 2d Parties § 124 et seq.

Corporation having name similar to proposed name as entitled to intervene in proceeding by other corporation for change of name, 72 A.L.R.3d 8.

Assertion of fiduciary status of parties to litigation as basis for intervention by one claiming beneficial interest as trust beneficiary, 2 A.L.R.2d 227.

Right of defendant in action for personal injury or death to bring in joint tort-feasor for purpose of asserting right of contribution, 11 A.L.R.2d 228, 95 A.L.R.2d 1096.

Appealability of order granting or denying right of intervention, 15 A.L.R.2d 336.

Right of retailer sued by consumer for breach of implied warranty of wholesomeness or fitness of food or drink, to bring in as a party defendant the wholesaler or manufacturer from whom the article was procured, 24 A.L.R.2d 913.

Intervention by stockholder for purpose of interposing defense for corporation, 33 A.L.R.2d 473.

Time within which right to intervene may be exercised, 37 A.L.R.2d 1306.

Right to intervene in court review of zoning proceeding, 46 A.L.R.2d 1059.

Dismissal of plaintiff's case for want of prosecution as affecting defendant's counterclaim, setoff, or recoupment or intervener's claim for affirmative relief, 48 A.L.R.2d 748.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

Intervention by other stockholders in stockholder's derivative action, 69 A.L.R.2d 562.

Right of attorney general to intervene in will contest case involving charitable trust, 74 A.L.R.2d 1066.

When is representation of applicant's interest by existing parties inadequate and applicant bound by judgment so as to be entitled to intervention as of right under Federal Rule 24(a)(2) and similar state statutes or rules, 84 A.L.R.2d 1412.

Discretionary intervention in action between union and union member, 93 A.L.R.2d 1037.

Loan receipt or agreement between insured and insurer for a loan repayable to extent of recovery from other insurer or carrier or other person causing loss, 13 A.L.R.3d 42.

Similar frauds practiced on various persons as basis of representative suit, 53 A.L.R.3d 534.

Bringing in or intervention of third person in suit for divorce which involves property rights, 63 A.L.R.3d 373.

Existence and extent of right of litigant in civil case, or of criminal defendant, to represent himself before state appellate courts, 24 A.L.R.4th 430.

Timeliness of application to intervene made under Rule 24 of Federal Rules of Civil Procedure after denial of class certification for intervenors, 46 A.L.R. Fed. 864.

Timeliness of application for intervention as of right under Rule 24(a) of Federal Rules of Civil Procedure, 57 A.L.R. Fed. 150.

Employee's right to intervene in federal judicial proceeding concerning labor arbitration, 59 A.L.R. Fed. 733.

What is "interest" relating to property or transaction which is subject of action sufficient to satisfy that requirement for intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure, 73 A.L.R. Fed. 448.

When is interest of proposed intervenor inadequately represented by existing party so as to satisfy that requirement for intervention as of right under Rule 24(a)(2) of Federal Rules of Civil Procedure, 74 A.L.R. Fed. 327.

General considerations in determining what constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure, 74 A.L.R. Fed. 632.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in employment discrimination actions, 74 A.L.R. Fed. 895.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving disclosure of information, 75 A.L.R. Fed. 145.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions relating to school desegregation, 75 A.L.R. Fed. 231.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions relating to securities and commodities laws, 75 A.L.R. Fed. 426.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving government-supported housing and welfare programs, 75 A.L.R. Fed. 570.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving contracts, 75 A.L.R. Fed. 769.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving insurance, 75 A.L.R. Fed. 869.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in personal injury or death actions, 76 A.L.R. Fed. 174.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in zoning and other actions relating to real property, 76 A.L.R. Fed. 388.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions relating to banks and banking, 76 A.L.R. Fed. 546.

What constitutes impairment of attorney's interest in his fee to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure, 76 A.L.R. Fed. 639.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in environmental actions, 76 A.L.R. Fed. 762.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions relating to patents, copyrights, and trademarks, 76 A.L.R. Fed. 837.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in labor actions, 77 A.L.R. Fed. 201.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving energy, 77 A.L.R. Fed. 541.

What constitutes impairment of proposed intervenor's interest to support intervention as a matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in antitrust actions, 78 A.L.R. Fed. 385.

What constitutes impairment of proposed intervenor's interest to support intervention as a matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving ships and shipping, 78 A.L.R. Fed. 630.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving government food and drug regulations, 80 A.L.R. Fed. 907.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving bankruptcy, 82 A.L.R. Fed. 435.

Right to intervene in federal hazardous waste enforcement action, 100 A.L.R. Fed. 35.

When is intervention as matter of right appropriate under Rule 24(a)(2) of Federal Rules of Civil Procedure in civil rights action, 132 A.L.R. Fed. 147.

Construction and application of 28 USCA § 2403 (and similar predecessor provisions), concerning intervention by United States or by state in certain federal court cases involving constitutionality of statutes, 147 A.L.R. Fed. 613.

67A C.J.S. Parties §§ 68 to 87.

1-025. Substitution of parties.

A. **Death.**

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 1-005 NMRA and upon persons not parties in the manner provided in Rule 1-004 NMRA for the service of a summons. Unless the motion for substitution is made not later than ninety (90) days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

B. **Incompetency.** If a party becomes incompetent, the court upon motion served as provided in Paragraph A of this rule may allow the action to be continued by or against his representative.

C. **Transfer of interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with

the original party. Service of the motion shall be made as provided in Paragraph A of this rule.

D. **Public officers; death or separation from office.**

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

ANNOTATIONS

Cross references. — For substitution of combined municipal organization in pending court proceedings, *see* Section 3-16-17 NMSA 1978.

For survival and revivor of suit, action or proceedings by or against head of agency or other state officer despite executive reorganization, *see* Section 9-1-10 NMSA 1978.

For general provisions on survival, abatement and revivor of actions, *see* Sections 37-2-1 to 37-2-17 NMSA 1978.

For statute authorizing action against survivors of persons liable on contract, judgment or statute, *see* Section 38-4-2 NMSA 1978.

For death of party between verdict and judgment, *see* Section 39-1-3 NMSA 1978.

For union of conservancy districts, *see* Section 73-17-2 NMSA 1978.

Compiler's notes. — Paragraph A is deemed to have superseded 105-1208, C.S. 1929, relating to persons eligible to make motion for substitution, and 105-1209, C.S. 1929, relating to revival of the action.

Paragraph D is deemed to have superseded former Trial Court Rule 105-1220, relating to the effect of the death of a public officer on an action to which he is a party, providing for notice of proposed substitutions and prohibiting the assessment of the costs of substitution.

All parties on one side of lawsuit not necessarily one party. — These rules, as well as the common understanding of what is meant by a party to a lawsuit are inconsistent

with the position that all parties on one side of a lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

Use of Rule 1-004 where court without personal jurisdiction over those to be served with suggestion of death. — If the court has not acquired personal jurisdiction over the persons to be served with a suggestion of death, then Rule 4 (now Rule 1-004 NMRA) is the proper mechanism to effectuate proper notice, because the latter rule is jurisdictionally rooted. Jones v. Montgomery Ward & Co., 104 N.M. 636, 725 P.2d 836 (Ct. App. 1985).

Proper party to receive notice of suggestion of death. — Where the plaintiff died before the case went to trial, his attorney was not the proper party, either under Rule 4 (now Rule 1-004 NMRA) or under Rule 5 (now Rule 1-005 NMRA), to receive notice of suggestion of death so as to trigger the 90-day period for substitution of parties provided under this rule. Jones v. Montgomery Ward & Co., 104 N.M. 636, 725 P.2d 836 (Ct. App. 1985).

Party assigning interests after commencement. — Although Rule 1-017(A) NMRA controls where an interest has been transferred prior to commencement of an action, Paragraph C of this rule becomes the applicable provision where a party commences the action but subsequently transfers its interests by assignment. Daniels Ins., Inc. v. Daon Corp., 106 N.M. 328, 742 P.2d 540 (Ct. App. 1987).

Assignment by partner. — Under Paragraph C of this rule, as a matter of law, substitution of parties cannot be predicated upon the written assignment by one limited partner in the chose in action (the rights in the cause of action) owned by the partnership without joinder or consent of the remaining partner in the same partnership property, but an invalid or ineffective assignment, may be validated by ratification. Daniels Ins., Inc. v. Daon Corp., 106 N.M. 328, 742 P.2d 540 (Ct. App. 1987).

Court's discretion in substituting successor in interest. — Substitution of a successor in interest under Paragraph C is within the sound discretion of the trial court. Daniels Ins., Inc. v. Daon Corp., 106 N.M. 328, 742 P.2d 540 (Ct. App. 1987).

Supplemental complaint against transferee proper. — Where railway was acquired by new owner subsequent to first trial, it was proper to file supplemental complaint against new owner. Atchison, T. & S.F. Ry. v. Citizens' Traction & Power Co., 25 N.M. 345, 182 P. 871 (1919) (decided under former law).

Dismissal where deceased defendant not substituted. — Trial court did not abuse its discretion in dismissing plaintiff’s complaint against defendant tortfeasor’s insurer where defendant tortfeasor died during the pendency of the action and plaintiff did not move to substitute another defendant. Little v. Gill, 2003-NMCA-103, 134 N.M. 321, 76 P.3d 639.

Identical to federal rule. — In construing Paragraph A(1) of this rule, courts may look to federal law for guidance because it is identical to its federal counterpart. Henry v. Daniel, 2004-NMCA-016, 135 N.M. 261, 87 P.3d 541, cert. denied, 2004-NMCERT-002.

Suggestion of death must be properly served on any successor non-parties to commence running of the ninety days. Henry v. Daniel, 2004-NMCA-016, 135 N.M. 261, 87 P.3d 541, cert. denied, 2004-NMCERT-002.

Law reviews. — For annual survey of New Mexico law of civil procedure, 19 N.M.L. Rev. 627 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Abatement, Survival and Revival §§ 10, 17; 8 Am. Jur. 2d Automobiles and Highway Traffic § 958; 14 Am. Jur. 2d Carriers § 1135; 59 Am. Jur. 2d Parties §§ 210 et seq., 258.

Survival of right of grantor to maintain suit to set aside conveyance, 2 A.L.R. 431, 33 A.L.R. 51.

Survival of action or cause of action for alienation of affections or criminal conversation, 14 A.L.R. 693, 24 A.L.R. 488, 57 A.L.R. 351.

Death of principal defendant as abating or dissolving garnishment or attachment, 21 A.L.R. 272, 131 A.L.R. 1146.

Death of obligor as affecting executory obligation in consideration of promise to marry obligor, 34 A.L.R. 86.

Survival of action or cause of action for breach of contract to marry, 34 A.L.R. 1363.

Effect of death of one of joint payees of bill or note, 57 A.L.R. 600.

Abatement of action which does not survive by death of party pending appeal or writ of error, 62 A.L.R. 1048.

Survival of liability on joint obligation, 67 A.L.R. 608.

Right of one to notice and hearing on motion to add him as a party, 69 A.L.R. 1247.

Does a right of action on bond to recover for damages personal in their nature, and not affecting property rights, survive principal's death, 70 A.L.R. 122.

Survival of cause of action for personal injury or death against tort-feasor killed in the same accident, 70 A.L.R. 1319.

Survivability or assignability of action or cause of action in tort for damages for fraudulently procuring purchase or sale of property, 76 A.L.R. 403.

Survival of claim for usury against estate of usurer, 78 A.L.R. 451.

Survival upon death of wrongdoer of husband's or parent's action or right of action for consequential damages arising from injury to wife or minor child, 78 A.L.R. 593.

Relation between survivability of cause of action and abatability of pending action, 92 A.L.R. 956.

Necessary parties defendant in suit for removal of trustee under deed of trust receiving bonds or other obligations, and appointment of substitute, 98 A.L.R. 1140.

Substitution, or addition, as plaintiff, after limitation period, of assignee, or trustee in bankruptcy, in action commenced by assignor, or bankrupt, within limitation period, but after assignment or bankruptcy, 105 A.L.R. 610.

What actions or causes of action involve injury to reputation within statutes relating to survival of causes of action or abatement of actions. 117 A.L.R. 574.

Assignability or survivability of cause of action to enforce civil liability under securities acts, 133 A.L.R. 1038.

Abatement or survival, upon death of party, of action or cause of action based on libel or slander, 134 A.L.R. 717.

Construction and application of statutory provision that, in case of transfer of subject matter of action pendente lite, the action may proceed in name of original party, or that the transferee may be substituted, 149 A.L.R. 829.

Right of substitution of successive personal representatives as party plaintiff, 164 A.L.R. 702.

Priority between devisee under devise pursuant to testator's agreement and third person claiming under or through testator's unrecorded deed, 7 A.L.R.2d 544.

Appealability of order granting or denying substitution of parties, 16 A.L.R.2d 1057.

Conflict of laws as regards survival of cause of action and revival of pending action upon death of party, 42 A.L.R.2d 1170.

Parties to action for specific performance of contract for conveyance of realty after death of party to the contract, 43 A.L.R.2d 938.

Right to attack validity of marriage after death of party thereto, 47 A.L.R.2d 1393.

Effect of death of appellant upon appeal from judgment of mental incompetence against him, 54 A.L.R.2d 1161.

Death of principal as exoneration, defense or ground for relief, of sureties on bail or appearance bond, 63 A.L.R.2d 830.

Opinion evidence as to cause of death, disease or injury, admissibility of, 66 A.L.R.2d 1082.

Real estate mortgage executed by one of joint tenants as enforceable after his death, 67 A.L.R.2d 999.

Capacity of one who is mentally incompetent but not so adjudicated to sue in his own name, 71 A.L.R.2d 1247.

Relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like, 72 A.L.R.2d 342.

Construction of Federal Rule 25(a)(1) as permitting substitution, as a party, of personal representative of a nonresident decedent, 79 A.L.R.2d 532.

Right of trustee in bankruptcy, or his assignee, to sue on turnover order in state court, 84 A.L.R.2d 668.

Enforceability, under statute of frauds provision as to contracts not to be performed within a year, of oral employment contract for more than one year but specifically made terminable upon death of either party, 88 A.L.R.2d 701.

Annulment of marriage, mental incompetency of defendant at time of action as precluding, 97 A.L.R.2d 483.

Enforceability of warrant of attorney to confess judgment against assignee, guarantor, or other party obligating himself for performance of primary contract, 5 A.L.R.3d 426.

Bank's right to apply or set off deposit against debt of depositor not due at time of his death, 7 A.L.R.3d 908.

Validity and effect of agreement that debt or legal obligation contemporaneously or subsequently incurred shall be canceled by death of creditor or obligee, 11 A.L.R.3d 1427.

Applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on merits, 13 A.L.R.3d 848.

Official death certificate as evidence of cause of death in civil or criminal action, 21 A.L.R.3d 418.

Attorney's death prior to final adjudication or settlement of case as affecting compensation under contingent fee contract, 33 A.L.R.3d 1375.

Validity, construction and effect of clause in franchise contract prohibiting transfer of franchise or contract, 59 A.L.R.3d 244.

Modern status of rule denying a common-law recovery for wrongful death, 61 A.L.R.3d 906.

Conservator or guardian for an incompetent, priority and preference in appointment of, 65 A.L.R.3d 991.

Sufficiency of suggestion of death of party, filed under Rule 25(a)(1) of Federal Rules of Civil Procedure, governing substitutions of party after death, 105 A.L.R. Fed. 816.

67A C.J.S. Parties §§ 58 to 64.

ARTICLE 5
Depositions and Discovery

1-026. General provisions governing discovery.

A. **Discovery methods.** Parties may obtain discovery by any of the following methods: depositions; interrogatories; requests for production or to enter land; physical and mental examinations and requests for admission.

B. **Scope of discovery.** Unless otherwise limited by the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery of any information, not privileged, which is relevant to the subject matter involved in the pending action. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. A party responding to discovery requests shall provide all non-privileged responsive information then known to the party, subject to the limitations in these rules or as ordered by the court.

(2) Limitations. The court shall limit use of discovery methods set forth in this rule if it determines that:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(b) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(c) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

(3) Witnesses and exhibits. Parties may obtain discovery of the identity of each person expected to be called as a witness at trial, the subject matter of the witness's expected testimony and the substance of the witness's testimony. Parties may also discover the name, address and telephone number of each individual likely to have discoverable information that another party may use to support its claims or defenses as well as the subjects of such information. Parties may obtain a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that a party may use to support its claims or defenses.

(4) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. For purposes of this paragraph, an application for insurance is not part of an insurance agreement.

(5) Trial preparation materials. Subject to the provisions of Subparagraph (6) of this paragraph, a party may obtain discovery of documents, electronically stored information and tangible things otherwise discoverable under Subparagraph (1) of this paragraph and prepared in anticipation of litigation or for trial by or for another party or that party's representative (including the party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement that the party made concerning the action or its subject matter. Upon request, a person not a party may obtain without the required showing a statement that the person made concerning the action or its subject matter. If the request is refused, the person may move for a court order compelling production of the statement. The provisions of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement is:

(a) a written statement signed, adopted or approved by the person making it, or

(b) a contemporaneous, substantially verbatim recital of an oral statement by a person.

(6) Experts.

(a) A party may through interrogatories and requests for production discover the identity of each person the other party may call as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. In addition, a party may discover the qualifications of the expert, including a copy of or the name and address of the custodian of any reports prepared by the expert regarding the pending action, a list of all publications authored by the witness within the preceding ten (10) years, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years.

(b) A party may depose any person who has been identified as an expert whose opinions may be presented at trial.

(c) A party may discover facts known or opinions held by an expert that another party has retained or specially employed in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 1-035 NMRA or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(d) Unless manifest injustice would result, the party seeking discovery shall pay the expert a reasonable fee related to the deposition or for time spent in responding to discovery under this subparagraph

(7) Claims of privilege or protection of trial preparation materials.

(a) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection pursuant to Subparagraph (5) of this paragraph as trial preparation materials, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(b) Information produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. By motion, a receiving party may promptly present the information to the court for in camera review and a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

C. **Protective orders.** Upon motion by any party or interested person for good cause, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:

(1) prohibiting the disclosure or discovery;

(2) limiting the terms or conditions of the disclosure or discovery;

(3) designating the time or place of the disclosure or discovery;

(4) directing the method of discovery including a method different than the party seeking discovery selected;

(5) barring or limiting inquiry into certain matters;

(6) directing that discovery be conducted with no one present except persons designated by the court;

(7) sealing disclosures, responses or deposition transcripts;

(8) authorizing, prohibiting or limiting the discovery of a trade secret or other confidential research, development or commercial information; and

(9) directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may order that any party or person provide or permit discovery. The provisions of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion.

A motion filed pursuant to Paragraph C of this rule shall set forth or attach a copy of the discovery request at issue.

D. **Sequence and timing of discovery.** Unless the court for good cause orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not delay any other party's discovery. A party responding to discovery requests may not refuse to provide responsive information on grounds that discovery is continuing or that future scheduling deadlines exist such as those for exchange of trial witness and exhibits lists.

E. **Supplementation of responses.** A duty to supplement responses may be imposed by order of the court, agreement of the parties or at any time prior to trial through new requests for supplementation of prior responses. In addition, a party has a duty to seasonably supplement or amend a prior response to an interrogatory, request for production, or request for admission if a party learns that the response is materially

incomplete or incorrect and if additional or corrective information has not otherwise been made known to the parties during the discovery process or in writing.

F. **Discovery conference.** At any time the court may direct the attorneys for the parties to appear for a discovery conference. The court shall also conduct a discovery conference upon motion by any party, unless the court determines that good cause exists not to conduct such a conference.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. Upon request of a party or when good cause otherwise exists, the court shall establish deadlines for identifying expert witnesses and conducting discovery related to expert testimony. An order may be altered or amended for good cause or by stipulation of the parties with court approval.

The court may combine the discovery conference with a pretrial conference authorized by Rule 1-016 NMRA.

[As amended, effective October 15, 1986; August 1, 1989; January 1, 1998; May 1, 2002; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

Committee Commentary for 2009 Amendments. — The 2009 amendments to Rule 1-026 NMRA consist of numerous changes as described below.

Stylistic and Grammatical Changes

The stylistic and grammatical changes to Rule 1-026 are numerous. Unless otherwise noted below, these changes were not intended to impact the substantive provisions of Rule 1-026.

Discovery Methods. The new language in Rule 1-026(A) is more concise. The provisions for requests for production or to enter land apply to both Rule 1-034, which has to do with such discovery requests made upon parties, as well as Rule 1-045, which has to do with such discovery via a subpoena to non-parties.

Scope of Discovery. The amendments consolidate the prior language in Rule 1-026(B)(1) to express the well-established standard for liberal pretrial discovery. *E.g., Marchiondo v. Brown,* 98 N.M. 394, 649 P.2d 462 (1982). The parties may obtain discovery of any information not privileged which is relevant to the subject matter involved in the pending litigation. The amendment retains the provision that the information sought need not be admissible at trial if the information appears to be reasonably calculated to lead to the discovery of admissible evidence. The rule further explains that parties responding to discovery requests seeking such information must provide responsive information then known to the party and may not delay discovery of

such information simply because discovery is not complete or future pretrial deadlines may exist.

Witnesses and Exhibits. This paragraph explicitly provides for discovery related to witnesses, documents, electronically stored information, and tangible things. One of the principal purposes of these provisions is to facilitate early discovery of necessary pretrial information to focus later discovery. Early identification of potential witnesses and exhibits should expedite the litigation process.

Insurance information. Although Rule 1-026(B)(4) does not include an insurance application as part of an insurance agreement, such applications may be discoverable when reasonably calculated to lead to the discovery of admissible evidence. The revisions to Rule 1-026(B)(4) are not intended to change existing law governing the admissibility of information concerning insurance agreements. The Rules of Evidence continue to control the admissibility of insurance information.

Expert Discovery. Rule 1-026(B)(4) concerns discovery of experts. The previous rule required a court order for taking a deposition of an expert, a procedure not uniformly followed. The rule now provides for requests for production and interrogatories as well as depositions of experts without court order.

Privilege Issues. These revisions consist mostly of stylistic changes. It is desirable that a party comply with the provisions of Rule 1-026(B)(7)(a) by producing a privilege log of any information being withheld from discovery on the grounds of privilege. The provisions in Rule 1-026(B)(7)(b) are new. They are modeled after amendments to the Federal Rules of Civil Procedure adopted with provisions for the discovery of electronically-stored information as explained in more detail below.

Protective Orders. The amendments consist essentially of stylistic changes with one notable exception. The rule previously provided that a party or other person could seek a protective order from the court in which the action is pending or, alternatively, on matters relating to a deposition, from a court in the district where the deposition is to be taken. The provision applicable “to the district where the deposition is to be taken” is a vestige from the adoption of portions of the federal rule, which envisions discovery outside the federal district of the pending action. The federal rule has a nationwide application. New Mexico has a much smaller geographic area, and consequently, the committee felt that the burdens imposed by requiring parties or non-parties to seek a protective order in the district court where the action is filed did not outweigh the judicial economy and consistency of having that particular court decide the issue.

Supplementation. The amendments to Paragraph E concern a party’s duty to supplement and amend discovery responses. The rule does not require supplementation or amendment if the additional or corrective information has otherwise been made known to the parties during the discovery process or in writing. The amendment does not otherwise significantly change the substantive requirements of the existing rule; it is intended to restate those requirements more concisely.

Discovery Conferences. The revisions streamline the procedures applicable to discovery conferences and eliminate provisions that litigants were not typically following in routine practice. The rule provides parties the opportunity to have the court enter scheduling deadlines related to expert witnesses.

Discovery of Electronically Stored Information. In September, 2005, the Committee on Rules of Practice and Procedure proposed amendments to the Federal Rules of Civil Procedure. The committee found that discovery of electronically stored information "raises markedly different issues from conventional discovery of paper records" and that existing discovery rules "provide inadequate guidance to litigants, judges, and lawyers in determining discovery rights and obligations in particular cases." *September 2005 Report of the Committee on Rules of Practice and Procedure.* The advisory committee submitted proposed amendments to Federal Rules 16, 26, 33, 34, 37, 45 and Form 35 to address these problems. The proposals were adopted and went into effect in the federal courts in December, 2006.

The New Mexico Rules of Civil Procedure for the District Courts Committee reviewed these new federal rules and the advisory committee's accompanying commentary. With three substantive changes and additional minor editing changes, the committee recommended that New Mexico amend Rules 1-016, 1-026, 1-033, 1-034, 1-037 and 1-045 of the New Mexico Rules of Civil Procedure for the District Courts to incorporate the new federal rules concerning discovery of electronically stored information.

One recommended change occurs in Rule 1-026(B)(7)(b) NMRA, which deals with the assertion of privilege or other protection for information already produced by a party. Both Federal Rule 26(b)(5)(B) and Rule 1-026(B)(7)(b) provide that the party who is notified that the party has received information subject to the claim of privilege or protection must sequester it and not use it until the claim is resolved. Federal Rule 26(b)(5)(B) provides that the party in possession of the disputed information "may promptly present the information to the court under seal for a determination of the claim." Because New Mexico law provides that documents are sealed only after a motion to seal has been made and granted, see, e.g., Thomas v. Thomas, 1999-NMCA-135, 128 N.M. 177, 991 P.2d 7 (Ct. App. 1999) (noting that a party sought a protective order to seal the district court record of the proceedings); LR2-111 NMRA ("... a court may seal a file or other record upon a party's written motion or the court's own motion, and showing of good cause."), New Mexico Rule 1-026(B)(7)(b) provides instead: "By motion, a receiving party may promptly present the information to the court for in camera review and determination of the claim." The committee does not intend that the adoption of Rule 1-026(B)(7) will otherwise affect the burdens of production and persuasion that apply when claims of privilege are made. See Rule Rule 1-026(B)(7)(a)); see also Pina v. Espinoza, 2001-NMCA-055, 130 N.M. 661, 29 P.3d 1062.

The second change is the omission from the amendments to New Mexico Rule 1-037 of that portion of the 2006 amendment that added Rule 37(f) to the Federal Rule. Federal Rule 37(f) provides:

(f) **Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

The committee is of the view that nothing in the nature of discovery of electronically stored information requires curtailment of the existing discretion of the district court to determine an appropriate sanction for violation of discovery rules.

The third change is the omission of a provision in Federal Rule 26(b)(2)(B), which provides:

(B) **Specific Limitations on Electronically Stored Information.** A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

The committee is of the view that the discovery of electronically stored information should be subject to the same provisions in these rules for motions to compel discovery and motions for protective orders that currently govern the discovery of non-electronic information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

ANNOTATIONS

Cross references. — For restrictions on statements of injured patients, *see* 41-1-1 and 41-1-2 NMSA 1978.

The 1987 amendment, effective Oct. 15, 1986, substituted "Subparagraph (b) of Subparagraph (5)" for "Subparagraph (a) of Subparagraph (5)" in Subparagraphs (7)(a) and (7)(b) of Paragraph B.

The 1989 amendment, effective for cases filed in the district courts on or after August 1, 1989, added the last sentence in Paragraph C and, in Paragraph E, substituted "seasonably" for "reasonably" near the beginning of Subparagraph (2).

The 1997 amendment, effective January 1, 1998, inserted "under rule 1-034 or Rule 1-045(A)(1)(c)" in Paragraph A, substituted "the burden of expense of the proposed discovery outweighs its likely benefit" for "the discovery is unduly burdensome or expensive" in Subparagraph B(2)(c), inserted "disclosure or" in Subparagraphs C(1), C(2) and C(4), substituted "revealed or be revealed" for "disclosed or be disclosed" in

Subparagraph C (7), substituted "discovery at issue" for "question and response at issue" in the last undesignated paragraph in Paragraph C, and made stylistic changes and gender neutral changes throughout the rule.

The 2002 amendment, effective May 1, 2002, added Paragraph B(8).

The 2009 amendment, approved by Supreme Court Order 09-8300-007, effective May 15, 2009, in Paragraph A, after "Plaintiff may obtain discovery by", changed "one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of document or things or permission to enter upon land or other property, under Rule 12-034 or Rule 1-045(A)(1)(c) NMRA, for inspection or other purposes" to "any of the following methods: depositions; interrogatories; requests for production or to enter land"; in Paragraph B, in the first line, after "otherwise limited by", deleted "order of"; in Subparagraph (1) of Paragraph B, after "Parties may obtain discovery", deleted "regarding any matter" and added "of any information", after "which is relevant to the subject matter involved in the pending action", deleted the former qualification concerning whether the information relates to the claim or defense of the party seeking discover or to the claim or defense of any other party, and added the last sentence; in Subparagraph (2) of Paragraph B, at the beginning of the sentence, deleted "frequency or extent of" and added "court shall limit", after "discovery methods set forth in", changed "Paragraph A of this rule shall be limited by the court" to "this rule"; in Paragraph B, added Subparagraph (3), relettered former Subparagraphs (3), (4) and (5) as Subparagraphs (4), (5) and (6), and relettered former Subparagraph (8) as Subparagraph (7); in Subparagraph (4) of Paragraph B, deleted the former second sentence, which provided that information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial, and in the second sentence, after "an application for insurance", changed "shall not be treated as part of an insurance agreement" to "is not part of an insurance agreement"; in Subparagraph (5) of Paragraph B, in the first sentence, after "a party may obtain discovery of documents", added "electronically stored information" and in the first and second sentences of the second paragraph, after "the required showing a statement", in two places, added "that the party made", after "its subject matter", in two places, deleted "previously made by that party", in the third sentence of the second paragraph, after "the party may move for a court order", added "compelling production of the statement", and in the last sentence, after "a statement", deleted "previously made"; in Subparagraph (5)(b) of Paragraph B, at the beginning of the sentence, changed "stenographic, mechanical, electronic or other recording, or a transcription thereof, which is a" to "contemporaneous", and after "oral statement by a person", deleted "making it and contemporaneously recorded"; in Paragraph B, deleted former Subparagraph (5), which provided that discovery of facts known or opinions held by experts, otherwise discoverable and acquired or developed in anticipation of litigation or for trial could be obtained only as provided in Subparagraphs (5)(a) and (5)(b); in Subparagraph 6(a) of Paragraph B, in the first sentence, after "A party may through interrogatories", deleted "require any other party to identify each person whom" and added "and requests for production discover the identity of each person" and after "the other party", deleted "expects to" and added "may", and added the last sentence; in

Subparagraph (6)(b) of Paragraph B, deleted the former sentence, which provided that upon motion the court may order further discovery by other means, subject to such restrictions as to scope and provisions concerning fees or expenses as the court may deem appropriate, and added the new sentence; in Subparagraph (6)(d) of Paragraph B, after "Unless manifest injustice would result", changed "the court shall require that the party seeking discover pay the expert a reasonable fee for time spent in responding to discovery under Subparagraph (b) of Subparagraph (5) and under Subparagraph (6), of" to "the party seeking discovery shall pay the expert a reasonable fee related to the deposition or for time spent in responding to discovery under", and deleted former Subparagraph (7)(b) of Paragraph B, which provided for the payment of a fair portion of the fees and expenses reasonably incurred by a party in obtaining facts and options from an expert; in Subparagraph (7)(a) of Paragraph B, after "Subparagraph (5) of this paragraph", added "as trial preparation materials"; added Subparagraph (7)(b) of Paragraph B; in Paragraph C, in the first sentence, between "Upon motion by" and "may make any order", changed "party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken" to "any party or interested person for good cause, the court"; in Paragraph C, in Subparagraph (1), changed "that the disclosure or discovery not be had" to "prohibiting the disclosure of discovery"; in Paragraph C, in Subparagraph (2), changed "that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place" to "limiting the terms or conditions of the disclosure or discovery"; in Paragraph C, added Subparagraph (3) and in Subparagraph (4), deleted the former sentence, which provided that the discovery may be had only by a method of discovery other that that selected by the party seeking discovery and adds the new sentence; in Paragraph C, in Subparagraph (5), changed "that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters" to "barring or limiting inquiry into certain matters"; in Paragraph C, in Subparagraph (7), deleted the former sentence, which provided that a deposition after being sealed could be opened only by order of the court and adds the new sentence; in Paragraph C, in Subparagraph (8), added "authorizing, prohibiting or limiting the discovery" and deleted "not be revealed or be revealed only in a designated way"; in the second to the last paragraph of Paragraph C, after "the court may", deleted "on such terms and conditions as are just"; in Paragraph D, after "Unless the court", deleted "upon motion, for the convenience of parties and witnesses and in the interests of justice" and added "for good cause", and added the last sentence; in Paragraph E, deleted the first sentence, which provided that a party who responds to a request for discovery with a response that was complete when made is under no duty to supplement the response except with respect to the identity of persons expected to be called as witnesses at trial, the subject matter on which the party is expected to testify and the substance of the testimony and except with respect to information which renders the response incorrect when made or if the response though correct when made is no longer true, and added the last sentence; in Paragraph F, in the first sentence, after "At any time", deleted "after commencement of an action" and in the second sentence, after "The court shall", added "also conduct a discovery conference upon motion by any party, unless the court determines that good cause exists not to

conduct such a conference", deleted the remainder of the sentence, which specified the contents of the motion, deleted the third sentence, which provided the attorneys for the parties are under a duty to participate in framing a discovery plan if one attorney proposes a discovery plan, deleted the fourth sentence, which provided for notice to all parties, and deleted the fifth sentence, which provided for the service of objections and additions to matters in the motion; in Paragraph F, in the second subparagraph, added the second sentence, and in the last sentence, after "An order may be altered or amended", deleted "whenever justice so requires" and added "for good cause or by stipulation of the parties with court approval"; and in Paragraph F, in the last subparagraph, deleted "Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference".

Procedure and guidelines for protecting trade secrets. Pincheira v. Allstate Ins. Co., 2008-NMSC-049, 144 N.M. 601, 190 P.3d 322, affirming 2007-NMCA-094, 142 N.M. 283, 164 P.3d 982.

Undue hardship. — The passage of time or the exposure of original documents to hantivirus and water damage may create undue hardship in obtaining the substantial equivalent of information contained in work product. S.F. Pacific Gold Corp. v. United Nuclear Corp., 2007-NMCA-133, 143 N.M. 215, 175 P.3d 309.

Presumption in favor of discovery. — The deposition rules intend a liberal pretrial discovery to enable the parties to obtain the fullest possible knowledge of the facts before trial; although a trial court's decision to limit discovery will not be disturbed except for an abuse of discretion, the presumption is in favor of discovery. Where the conduct of defendant's attorney during the taking of the first deposition thwarted the intent of the discovery rule and prevented plaintiff from obtaining knowledge of at least some of the facts, it was an abuse of discretion to limit discovery in the second deposition to questions appearing on specified pages of the first deposition. Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977)(decided before 1979 amendment).

The general rule governing discovery is toward liberality rather than limitations. Ruiz v. Southern Pac. Transp. Co., 97 N.M. 194, 638 P.2d 406 (Ct. App. 1981).

The pretrial discovery rules, including this rule, intend a liberal pretrial discovery, to enable the parties to obtain the fullest possible knowledge of the facts before trial. Notwithstanding any objections, the presumption is in favor of discovery. Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982).

Requirements of rule met. — Where February 25, 2004, letter from the city to plaintiffs indicates compliance with the court's written order to identify the expert and describe generally the nature of his expected testimony, and expert's report, which reportedly was completed on March 9, 2004, was provided to plaintiffs on the same day, the combination of the letter and the report met the requirements of this rule. New Mexicans for Free Enterprise v. City of Santa Fe, 2006-NMCA-007, 138 N.M. 785, 126 P.3d 1149.

Summary of grounds for expert's opinion sufficient. — Where expert's report has a methodology section and appendices and identifies the public data sets used for the analysis, this is clearly enough to suffice as a "summary" of the grounds for his opinion. New Mexicans for Free Enterprise v. City of Santa Fe, 2006-NMCA-007, 138 N.M. 785, 126 P.3d 1149.

Right to examine defendant as to all issues in pleadings. — As to all issues made by the pleadings in the case, plaintiff had the right to examine defendant fully and exhaustively; such a right is basically fundamental to our system of jurisprudence, and no court has power to restrict or limit it. Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977)(decided before 1979 amendment).

Term "relevant" interpreted liberally in antitrust cases. — The term "relevant" is subject to a broad interpretation as it is generally used in the discovery context, but it is also given a particularly liberal interpretation for purposes of discovery in antitrust cases. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

"Subject matter" of action liberally construed. — Subdivision (b) (see now Paragraph B) does not require a strict interpretation of "subject matter" such as negligence, proximate cause, injuries and damages as opposed to the entire process of the litigation, including collection of a judgment; the subject matter should not be delimited by technical or confining definitions. Thus, matter relevant to the subject matter of the action could conceivably include information concerning the fund available to pay any judgment, specifically, public liability insurance. Fort v. Neal, 79 N.M. 479, 444 P.2d 990 (1968)(decided before 1979 amendment).

Information on sales of allegedly injurious drug discoverable in products liability suit. — In a products liability suit against a drug manufacturer, an interrogatory requesting information on the amount and dollar volume of sales of the drug alleged to have caused the injury should be allowed. Such information is relevant and is not privileged or a trade secret. Richards v. Upjohn Co., 95 N.M. 675, 625 P.2d 1192 (Ct. App.), cert. denied, 94 N.M. 675, 615 P.2d 992 (1980).

But rule forbids discovery of insurance coverage. — Subdivision (b) (see now Paragraph B) cannot be used to force a party to disclose the amount of insurance coverage available to satisfy judgments that may be recovered in civil actions. Fort v. Neal, 79 N.M. 479, 444 P.2d 990 (1968)(decided before 1979 amendment).

Scope of attorney-client privilege. — The attorney-client privilege should only be applied to protect communications, not facts. Perhaps an expert's report may under some circumstances amount to a communication falling within the scope of the privilege, but his observations and conclusions themselves, whether or not contained in a report, are facts which, if relevant, constitute evidence, and such expert's testimony has no blanket protection under the attorney-client privilege. State ex rel. State Hwy. Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966).

Statements plaintiff sought, though they fell outside the scope of the attorney-client privilege, were the statements of witnesses whose identity was known and who could have been deposed by plaintiff or their statements obtained directly, and therefore the statements were not proper objects for discovery techniques. Carter v. Burn Constr. Co., 85 N.M. 27, 508 P.2d 1324 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Application of work-product privilege. — The work-product privilege does not apply to documents subpoenaed by a grand jury where such documents were not prepared for the client in anticipation of litigation. Vargas v. United States, 727 F.2d 941 (10th Cir. 1984), cert. denied, 469 U.S. 819, 105 S. Ct. 90, 83 L. Ed. 2d 37 (1984).

Graphs, maps, charts, and reports pertaining generally to waterflood and well production information prepared by employees of the defendant oil company were not prepared pursuant to the request, direction, or supervision of legal counsel and were not subject to the work product rule. Hartman v. Texaco, Inc., 1997-NMCA-032, 123 N.M. 220, 937 P.2d 979.

Party seeking lawyer's work product must show good cause. — A burden rests upon the party who seeks the production and inspection by subpoena or court order of any information, memoranda, briefs, communications, reports, statements or other writings prepared by a lawyer or at his direction for his own use in prosecuting his client's case to establish that there is good cause why said desired material should be made available to him. To establish good cause a party must show that the material sought is not available upon the exercise of diligent effort and that it is necessary for the preparation of his case or that the denial of the production and inspection of the material sought will unfairly prejudice his case or cause him undue hardship or injustice. Carter v. Burn Constr. Co., 85 N.M. 27, 508 P.2d 1324 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Statements obtained by hospital after incident raising litigation possibility constitute attorney work product. — Statements obtained by a hospital employee from various persons involved in the treatment of a patient constitute attorney work product when those statements are obtained shortly after an incident in the patient's treatment that raises the possibility of litigation and are obtained for and on behalf of the hospital's attorney in anticipation of such litigation. Knight v. Presbyterian Hosp. Center, 98 N.M. 523, 650 P.2d 45 (Ct. App. 1982).

But any pretrial statement obtainable upon showing substantial need and undue hardship. — Any statement "prepared in anticipation of litigation" by and for a party's attorney, whether or not a work product, can be obtained upon a showing of substantial need and undue hardship. "Good cause" is no longer required. Knight v. Presbyterian Hosp. Center, 98 N.M. 523, 650 P.2d 45 (Ct. App. 1982).

Procedure as to privilege. — All discovery, including discovery under Rule 1-045 NMRA, is limited by this rule to the acquisition of information "regarding any matter, not

privileged, which is relevant to the subject matter involved in the pending action". Thus, once a privilege is asserted in response to interrogatories, counsel cannot unilaterally disregard the privilege and then issue subpoenas to sidestep the procedure outlined in Rule 1-033 NMRA for resolving the dispute. Wallis v. Smith, 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682, cert. denied, 130 N.M. 254, 23 P.3d 929 (2001).

Limitation on deposition proper only as provided by rules. — Upon motion of plaintiff to compel discovery, the trial court was in error to limit the examination of defendant to the subject matter of questions that appeared on 10 pages of the deposition and to order that the examination shall not extend beyond those questions; there is no rule of law that allows a district court to limit the examination of a witness absent a motion by the opposing party pursuant to Subdivision (c) (see now Paragraph C) (formerly Rule 30(b)) and Rule 30(d) (see now Rule 1-030 NMRA). Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977).

Rights of deponent's attorney. — Prior to the taking of the deposition, the attorney for a deponent may ascertain what the deponent knows and the extent and limitation of his memory, but he does not have the right to go beyond proper objections; if necessary, he can seek relief from the court pursuant to Subdivision (c) (see now Paragraph C) (formerly Rule 30(b)) and Rule 30(d) (see now Rule 1-030 NMRA). Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977).

During the taking of a deposition the attorney for the deponent has the right to object to questions asked and state his reasons, without comment, to protect the rights of the deponent, but he should not continuously object to questions asked that are relevant to the issues in the case on insubstantial grounds, nor teach the deponent what he ought to know, nor suggest and dictate answers to the deponent nor wrongfully interfere with the progress of the deposition, since it is equally necessary to ensure the due administration of justice and the proper protection of the rights of the parties. Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977).

Court order required to delay or quash taking deposition. — Motions to quash the taking of a deposition or for protective orders, or to terminate or limit examinations under Rule 30 (see now this rule) do not have the effect of automatically accomplishing what is sought therein. The rule specifically provides for protective orders which the court may make, upon proper motion by the party on whom notice has been served. Such motions must be made prior to the date designated for the taking of the deposition, and until an order is made in connection therewith, there is nothing to delay the taking of deposition. Wieneke v. Chalmers, 73 N.M. 8, 385 P.2d 65 (1963).

Party seeking protective order to stay taking of deposition of witness to perpetuate testimony until court first determined competency of witness must file such motion prior to the date designated for the taking of the deposition; until a protective order is issued, there is nothing to delay the taking of the deposition. Bartow v. Kernan, 101 N.M. 532, 685 P.2d 387 (Ct. App. 1984).

Plaintiff seeking to exclude affidavit of physician filed in support of defendant's motion for partial summary judgment, because physician had previously treated plaintiff, had burden of establishing that the physician was in fact hired as an expert within purview of Subdivision (B)(3)(b) (see now Paragraph B(6)) of this rule. Trujillo v. Puro, 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984).

Subpoena must be shown unreasonable to allow quashing. — Before the trial court can enter a protective order quashing a subpoena, or modify the subpoena, there must be some showing that the subpoena is unreasonable and oppressive; that burden rests upon the party seeking to quash. Blake v. Blake, 102 N.M. 354, 695 P.2d 838 (Ct. App. 1985).

Release of information obtained through discovery. — Those who obtain information through discovery should not be restrained from disclosing that information absent a showing of good cause why disclosure of particular information would be inappropriate. Does I ex rel. Doe II v. Roman Catholic Church of Archdiocese of Santa Fe, Inc., 1996-NMCA-094, 122 N.M. 307, 924 P.2d 273.

Protection granted in light of liberal discovery policy. — The discretion granted to the trial court in Rule 30(b) (see now Paragraph C of this rule) to issue protective orders must be read in the light of the purpose of these rules, which is to permit discovery. Salitan v. Carrillo, 69 N.M. 476, 368 P.2d 149 (1961); Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982).

Power to be flexible depending on circumstances. — Power of the court under Rule 30(b) (see now Paragraph C of this rule) to make protective orders must be flexible according to the particular facts and issues of the case, the relative positions of the parties, the necessity of mutual discovery and the overall fairness to the parties themselves. State ex rel. New Mexico State Hwy. Comm'n v. Taira, 78 N.M. 276, 430 P.2d 773 (1967).

Protective order erroneously granted. — Trial court erred in granting a blanket protective order covering 66,000 pages of documents, where movant did not assert a specific privilege covering the documents, or point out with particularity the basis for according confidentiality to any particular document. Krahling v. Executive Life Ins. Co., 1998-NMCA-071, 125 N.M. 228, 959 P.2d 562.

Protective order improper where relevant inquiry unduly restricted. — Third-party vendee of land allegedly the subject of an option contract between plaintiff and vendor is not entitled to a protective order that his deposition not be taken by plaintiff on grounds that he is not a party, and would be subject to annoyance, embarrassment and oppression, since under plaintiff's first refusal theory, plaintiff has the right to discover whether third party made a bona fide offer to purchase defendants' land, and all matters relevant thereto. Kirby Cattle Co. v. Shriners Hosps. for Crippled Children, 88 N.M. 605, 544 P.2d 1170 (Ct. App. 1975), rev'd on other grounds, 89 N.M. 169, 548 P.2d 449 (1976).

Denial of protective order held not appealable. — Order denying motion for protective order which sought to have court order a stay in taking of deposition of patient was not an appealable final judgment, and was not appealable as interlocutory order where order did not comply with 39-3-4 NMSA 1978. Bartow v. Kernan, 101 N.M. 532, 685 P.2d 387 (Ct. App. 1984).

Denial of protective order not an abuse of discretion. — Where a county sought to circumvent the procedure outlined in State ex rel. Newsome v. Alarid, 90 N.M. 790, 568 P.2d 1236 (1977) for in camera review of disputed documents requested under the Inspection of Public Records Act by filing a motion for a protective order and asserting to the district court that it could only consider the settlement records if the motion for protective order was granted, the county's decision to bypass established procedure effectively obstructed full review by the district court and the court of appeals and the district court did not abuse its discretion in denying the motion for protective order. Board of Comm'rs v. Las Cruces Sun-News, 2003-NMCA-102, 134 N.M. 281, 76 P.3d 36.

Court determines whether party pays opposing party's attorney's travel costs to out-of-state deposition. — A district court has discretion to determine whether one party will pay the costs for the opposing party's attorney to travel to an out-of-state deposition and the district court's determination will not be overturned absent an abuse of discretion. State ex rel. California v. Ramirez, 99 N.M. 92, 654 P.2d 545 (1982).

Such as where resident obligor provides strong defense to out-of-state child support obligation. — Where a resident obligor of an out-of-state child support obligation has provided evidence that constitutes a strong and convincing defense to the payment of support, the district court may order that the case be continued to allow the out-of-state obligee the opportunity to provide further evidence, either by appearing in person or by providing deposition testimony. Furthermore, the district court may order that if the obligee chooses to provide evidence by a deposition, then the petitioner-obligee must pay the costs of the obligor's attorney to travel to an out-of-state deposition. It would be unjust and inequitable to limit interrogation to written questions under these circumstances. State ex rel. California v. Ramirez, 99 N.M. 92, 654 P.2d 545 (1982).

Deponent may refuse to answer questions tending to incriminate him. — The defendant did not willfully fail to answer questions propounded during a deposition where he claimed the privilege of the U.S. Const., amend. V, seeking a ruling of the court pursuant to Rule 30(b) (see now Paragraph C of this rule) on whether the answers to questions propounded would reasonably tend to incriminate him and are privileged. Defendant's refusal to answer depositional questions was with substantial justification, and therefore the trial court improperly assessed attorneys' fees and costs against him. Rainbo Baking Co. v. Apodaca, 88 N.M. 501, 542 P.2d 1191 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Summary judgment premature where rendered before information in exclusive control of defamer examined. — The finding of summary judgment is premature where it is rendered before the thoughts, editorial processes and other information in the exclusive control of an alleged defamer can be examined. Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982).

Remedies for the violation of discovery rules or orders are discretionary with the trial court. Chavez v. Board of County Comm'rs, 2001-NMCA-065, 130 N.M. 753, 31 P.3d 1027.

Prejudice required. — A party is not entitled to relief for a discovery violation unless the party has been prejudiced by the violation. Chavez v. Board of County Comm'rs, 2001-NMCA-065, 130 N.M. 753, 31 P.3d 1027.

Sample remedies cases. — Where plaintiff supplemented her answer to defendants' interrogatory approximately one week before trial, indicating the content of her proposed expert witness's testimony and there was no evidence that plaintiff acted willfully or in bad faith, the trial court was within its discretion in limiting the expert's testimony to rebuttal, rather than imposing dismissal as a sanction. Chavez v. Board of County Comm'rs, 2001-NMCA-065, 130 N.M. 753, 31 P.3d 1027.

Some law enforcement investigative materials are immune from discovery. — The expression of legislative intent in Section 14-2-1(A)(4) NMSA 1978 of the Inspection of Public Records Act to protect police investigative materials in an on-going criminal investigation from disclosure creates an immunity from discovery of some police investigative materials in civil litigation which requires the district court to balance the interests at stake and requires the party seeking to preclude disclosure to prove that the investigative materials requested are confidential because the materials meet the policy interest expressed in Section 14-2-1(A)(4) NMSA 1978. Estate of Romero v. City of Santa Fe, 2006-NMSC-028, 139 N.M. 671, 137 P3d 611.

Law reviews. — For comment, "Discovery - Disclosure of Existence and Policy Limits of Liability Insurance," see 7 Nat. Resources J. 313 (1967).

For article, "Survey of New Mexico Law, 1979-80: Civil Procedure," see 11 N.M.L. Rev. 53 (1981).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For note, "Discovery - Executive Privilege - Overcoming Executive Privilege to Discover the Investigative Materials of the 1980 New Mexico Penitentiary Riot: State ex rel. Attorney General v. First Judicial District," see 12 N.M.L. Rev. 861 (1982).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For note, "Evidence: Protecting Privileged Information - A New Procedure for Resolving Claims of the Physician-Patient Privilege in New Mexico - *Pina v. Espinoza*," see 32 N.M.L. Rev. 453 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 88 et seq.; 23 Am. Jur. 2d Depositions and Discovery §§ 1 to 198.

Jurisdiction of action involving inspection of books of foreign corporation, 155 A.L.R. 1244, 72 A.L.R.2d 1222.

Pretrial conference procedure as affecting right to discovery, 161 A.L.R. 751.

Blood grouping tests, 163 A.L.R. 939, 46 A.L.R.2d 1000.

Constitutionality, construction and effect of statute or regulation relating specifically to divulgence of information acquired by public officers or employees, 165 A.L.R. 1302.

Compelling production of object in custody of court or officer for use in evidence, 170 A.L.R. 334.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348, 27 A.L.R.4th 61, 32 A.L.R.4th 212, 3 A.L.R.5th 237.

Necessity and sufficiency under statutes and rules governing modern pretrial discovery practice, of "designation" of documents, etc., in application or motion, 8 A.L.R.2d 1134.

Discovery and inspection of article or premises in aid of action to recover for personal injury or death, 13 A.L.R.2d 657.

Discovery or inspection of trade secret, formula or the like, 17 A.L.R.2d 383.

Mode of establishing that information obtained by illegal wire tapping has or has not led to evidence introduced by prosecution, 28 A.L.R.2d 1055.

Fingerprints, palm prints or bare footprints as evidence, 28 A.L.R.2d 1115, 45 A.L.R.4th 1178.

Statements of parties or witnesses as subject to pretrial or other disclosure production or inspection, 73 A.L.R.2d 12.

Reports of treating physician delivered to litigant's own attorney as subject of pretrial or other disclosure, production or inspection, 82 A.L.R.2d 1162.

Construction of statute or rule admitting in evidence deposition of witness absent or distant from place of trial, 94 A.L.R.2d 1172.

Discovery, inspection, and copying of photographs of article or premises the condition of which gave rise to instant litigation, 95 A.L.R.2d 1061.

Mandamus or prohibition as available to compel or to prevent discovery proceedings, 95 A.L.R.2d 1229.

Discovery in aid of arbitration proceedings, 98 A.L.R.2d 1247.

Right of defendant in criminal case to inspection or production of contradictory statement or document of prosecution's witness for purpose of impeaching him, 7 A.L.R.3d 181.

Pretrial examination or discovery to ascertain from defendant in action for injury, death or damages, existence and amount of liability insurance and insurer's identity, 13 A.L.R.3d 822.

Scope of defendant's duty of pretrial discovery in medical malpractice action, 15 A.L.R.3d 1446.

Disclosure of name, identity, address, occupation or business of client as violation of attorney-client privilege, 16 A.L.R.3d 1047.

Compelling party to disclose information in hands of affiliated or subsidiary corporation, or independent contractor, not made party to suit, 19 A.L.R.3d 1134.

Physician-patient privilege, commencing action involving physical condition of plaintiff or decedent as waiving, as to discovery proceedings, 21 A.L.R.3d 912.

Application of privilege attending statements made in course of judicial proceedings to pretrial deposition and discovery proceedings, 23 A.L.R.3d 1172.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.3d 1401.

Personal representative's loss of rights under dead man's statute by prior institution of discovery proceedings, 35 A.L.R.3d 955.

Assertion of privilege in pretrial discovery proceedings as precluding waiver of privilege at trial, 36 A.L.R.3d 1367.

Admissibility of physician's testimony as to patient's statements or declarations, other than res gestae, during medical examination, 37 A.L.R.3d 778.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 A.L.R.3d 1373.

Confidentiality of proceedings or reports of judicial inquiry board or commission, 5 A.L.R.4th 730.

Formal sufficiency of response to request for admissions under state discovery rules, 8 A.L.R.4th 728.

Attorney's conduct in delaying or obstructing discovery as basis for contempt proceeding, 8 A.L.R.4th 1181.

Propriety of discovery order permitting "destructive testing" of chattel in civil case, 11 A.L.R.4th 1245.

Photographs of civil litigant realized by opponent's surveillance as subject to pretrial discovery, 19 A.L.R.4th 1236.

Work product privilege as applying to material prepared for terminated litigation or for claim which did not result in litigation, 27 A.L.R.4th 568.

Abuse of process action based on misuse of discovery or deposition procedures after commencement of civil action without seizure of person or property, 33 A.L.R.4th 650.

Right of independent expert to refuse to testify as to expert opinion, 50 A.L.R.4th 680.

Discovery: right to ex parte interview with injured party's treating physician, 50 A.L.R.4th 714.

Discovery of defendant's sales, earnings, or profits on issue of punitive damages in tort action, 54 A.L.R.4th 998.

Insured-insurer communications as privileged, 55 A.L.R.4th 336.

Discovery of identity of blood donor, 56 A.L.R.4th 755.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings, 58 A.L.R.4th 653.

Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings, 63 A.L.R.4th 712.

Discovery, in civil proceeding, of records of criminal investigation by state grand jury, 69 A.L.R.4th 298.

Discovery of trade secret in state court action, 75 A.L.R.4th 1009.

Propriety and extent of state court protective order restricting party's right to disclose discovered information to others engaged in similar litigation, 83 A.L.R.4th 987.

Discoverability of traffic accident reports and derivative information, 84 A.L.R.4th 15.

Right of defendant in criminal contempt proceeding to obtain information by deposition, 33 A.L.R.5th 761.

Existence and nature of cause of action for equitable bill of discovery, 37 A.L.R.5th 645.

Use of Freedom of Information Act (5 USCS § 552) as substitute for, or as means of, supplementing discovery procedures available to litigants in federal civil, criminal or administrative proceedings, 57 A.L.R. Fed. 903.

Power of court under 5 USCS § 552(a)(4)(B) to examine agency records in camera to determine propriety of withholding records, 60 A.L.R. Fed. 416.

Right of immune jury witness to obtain access to government affidavits and other supporting materials in order to challenge legality of court-ordered wiretap or electronic surveillance which provided basis for questions asked in grand jury proceedings, 60 A.L.R. Fed. 706.

Fraud exception to work product privilege in federal courts, 64 A.L.R. Fed. 470.

Restriction on dissemination of information obtained through pretrial discovery proceedings as violating Federal Constitution's First Amendment - federal cases, 81 A.L.R. Fed. 471.

Protection from discovery of attorney's opinion work product under Rule 26(b)(3), Federal Rules of Civil Procedure, 84 A.L.R. Fed. 779.

Modification of protective order entered pursuant to Rule 26(c), Federal Rules of Civil Procedure, 85 A.L.R. Fed. 538.

Academic peer review privilege in federal court, 85 A.L.R. Fed. 691.

Illegal drugs or narcotics involved in alleged offense as subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure, 109 A.L.R. Fed. 363.

Propriety and scope of protective order against disclosure of material already entered into evidence in federal court trial, 138 A.L.R. Fed. 153.

Crime-fraud exception to work product privilege in federal courts, 178 A.L.R. Fed. 87.

26A C.J.S. Depositions §§ 33, 58, 61, 66 to 69, 72, 73, 88 to 100; 27 C.J.S. Discovery §§ 5, 7, 8, 55.

1-027. Depositions before action or pending appeal.

A. **Before action.**

(1) A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court may file a verified petition in the district court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show:

(a) that the petitioner expects to be a party to an action cognizable in a court but is presently unable to bring it or cause it to be brought;

(b) the subject matter of the expected action and his interest therein;

(c) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it;

(d) the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and

(e) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty (20) days before the date of hearing the notice shall be served either within or without the state in the manner provided in Rule 1-004 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise and shall appoint, for persons not served in the manner provided in Rule 1-004 NMRA, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Paragraph C of Rule 1-017 NMRA apply.

(3) If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules, and

the court may make orders of the character provided for by Rules 1-034 and 1-035. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) If a deposition to perpetuate testimony is taken under these rules, it may be used in any action involving the same subject matter subsequently brought, in accordance with the provisions of Rule 1-032 NMRA.

B. **Pending appeal.** If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show:

(1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; and

(2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 1-034 and 1-035, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

C. **Perpetuation by action.** This rule does not limit the power of a court to entertain an action to perpetuate testimony.

ANNOTATIONS

Cross references. — For subpoena for taking depositions, *see* Rule 1-045 NMRA.

Compiler's notes. — Paragraph A and Rules 1-028, 1-030 and 1-045 NMRA are deemed to supersede 45-201, C.S. 1929, relating to when testimony may be perpetuated; 45-202, C.S. 1929, relating to petition for commission to perpetuate testimony; 45-203, C.S. 1929, relating to issuance of commission and to whom it is addressed; 45-204, C.S. 1929, relating to notice; 45-205, C.S. 1929, relating to compelling attendance of witnesses; 45-206, C.S. 1929, relating to officer present at deposition; 45-207, C.S. 1929, relating to testimony; 45-208, C.S. 1929, relating to testimony to be signed and sworn to; 45-209, C.S. 1929, relating to adjournments; 45-210, C.S. 1929, relating to certificate of officer and return to county court clerk; 45-211, C.S. 1929, relating to return of depositions by mail; 45-212, C.S. 1929, relating to duty of recorder; 45-213, C.S. 1929, relating to use of testimony as evidence; 45-214, C.S. 1929, relating to exceptions to testimony.

Court order required to stay taking of deposition. — Party seeking protective order to stay taking of deposition of witness to perpetuate testimony until court first determined competency of witness must file such motion prior to the date designated for the taking of the deposition; until a protective order is issued, there is nothing to delay the taking of the deposition. Bartow v. Kernan, 101 N.M. 532, 685 P.2d 387 (Ct. App. 1984).

Trial court is vested with discretion in making its decision whether to limit discovery, bearing in mind that the presumption is in favor of discovery. Salitan v. Carrillo, 69 N.M. 476, 368 P.2d 149 (1961).

Imposition of protective provisions and conditions. — The courts, in enforcing the rules of civil procedure with respect to depositions and discovery, have the right to impose protective provisions and conditions. State ex rel. New Mexico State Hwy. Comm'n v. Taira, 78 N.M. 276, 430 P.2d 773 (1967).

Deposition of out-of-state party. — In an action by New York plaintiffs against New Mexico defendants, an order by the trial court requiring that defendant may take plaintiff's deposition on written interrogatories, or that the deposition may be taken on oral examination in New York City at defendant's expense or in Las Cruces, upon defendant's advancing expense money for travel by air and other expenses, should have been coupled with provisions for the filing of an adequate cost bond and terms whereby reasonable travel expenses would be ultimately reflected in the taxable costs. Salitan v. Carrillo, 69 N.M. 476, 368 P.2d 149 (1961).

In an action for the face value of drafts in the amount of $1,076.50, the fact that the amount involved was relatively small in proportion to the expenses of travel between New Mexico and New York was not a special circumstance or undue hardship as to be a basis for an exercise of the trial court's discretion in issuing a protective order requiring depositions be taken in New York City or that written interrogatories be taken, or that, if depositions were taken in New Mexico, appellant pay appellee's reasonable travel expenses. Salitan v. Carrillo, 69 N.M. 476, 368 P.2d 149 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 118 to 129.

Right to discovery as regards facts relating to amount of damages, 88 A.L.R. 504.

Claimant's deposition or statement taken by municipality or other political subdivision as statutory notice of claim for injury or as waiver, 41 A.L.R.2d 883.

Admissibility in evidence of deposition as against one not a party at time of its taking, 4 A.L.R.3d 1075.

Confidentiality of proceedings or reports of judicial inquiry board or commission, 5 A.L.R.4th 730.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 A.L.R.5th 577.

Right to perpetuation to testimony under Rule 27 of Federal Rules of Civil Procedure, 60 A.L.R. Fed. 924.

26A C.J.S. Depositions §§ 3 to 46, 51 to 57, 60, 88 to 98.

1-028. Persons before whom depositions may be taken.

A. **Within the United States.** Depositions shall be taken before an officer authorized to administer oaths by the laws of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

B. **In foreign countries.** In a foreign country, depositions may be taken:

(1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States;

(2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony; or

(3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the country)." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. **Disqualification for interest.** Subject to Rule 1-029 NMRA, no deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

[As amended, effective February 1, 2001.]

ANNOTATIONS

Cross references. — For power of notaries public to take depositions, *see* Section 14-12A-1 NMSA 1978.

For taking of depositions within state for use outside state, see 38-8-1 to 38-8-3 NMSA 1978.

For fees for clerk, witnesses and officer taking deposition, *see* Section 39-2-8 NMSA 1978.

The 2000 amendment, effective February 1, 2001, in Paragraph A, deleted "Within the United States or within a terriory or insular possession subject to the dominion of the United States" at the beginning of the first sentence and deleted "of the United States" following "oaths by the laws" in the middle of the first sentence; and in Paragraph C, inserted "Subject to Rule 1-029 NMRA".

Compiler's notes. — This rule, together with Rules 1-030, 1-031, 1-032 and 1-045 NMRA, is deemed to have superseded 45-101 to 45-119, C.S. 1929 (36-5-21 to 36-5-39, 1953 Comp., now repealed), insofar as those provisions related to the taking of depositions for use in the district courts.

This rule, together with Rules 1-027, 1-030 and 1-045 NMRA, is deemed to have superseded 45-201 to 45-214, C.S. 1929, relating to perpetuation of testimony and use of same.

This rule, together with Rules 1-030 and 1-032 NMRA, is deemed to have superseded 45-401 to 45-406 and 45-408, C.S. 1929, relating to the taking of testimony to be used in pending civil cause by oral examination, under certain circumstances, and use of same.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 15 to 18, 110 to 117.

Subpoena duces tecum for production of items held by a foreign custodian in another country, 82 A.L.R.2d 1403.

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 A.L.R.3d 483.

Grounds for disqualification of criminal defendant's chosen and preferred attorney in federal prosecution, 127 A.L.R. Fed. 67.

26A C.J.S. Depositions §§ 17 to 21, 28, 58.

1-029. Stipulations regarding discovery procedure.

Unless the court orders otherwise, or previous orders of the court conflict, the parties may by written stipulation:

A. provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and

B. modify the procedures provided by these rules for other methods of discovery.

ANNOTATIONS

Cross references. — For use of depositions, *see* Rules 1-027 and 1-032 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Use of videotape to take deposition for presentation at civil trial in state court, 66 A.L.R.3d 637.

26A C.J.S. Depositions § 105; 83 C.J.S. Stipulations § 10.

1-030. Depositions upon oral examination.

A. **When depositions may be taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. The parties shall confer in good faith regarding the date, time and place of each deposition to be taken. A party serving a notice of deposition shall make a good faith effort to avoid scheduling conflicts of parties, witnesses and counsel. Leave of court, granted with or without notice, shall be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty (30) days after service of the summons and complaint upon any defendant or service made under Paragraph F of Rule 1-004 NMRA, except that leave is not required

(1) if a defendant has served a notice of taking deposition or otherwise sought discovery; or

(2) if the notice

(a) states that the person to be examined will be unavailable for examination or is about to go out of the state and will be unavailable for examination in the state unless the person's deposition is taken before expiration of the thirty (30) day period; and

(b) sets forth facts to support the statement.

If a party shows that, when the party was served with notice under this subparagraph, the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

The attendance of witnesses may be compelled by subpoena as provided in Rule 1-045 NMRA. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

B. **Notice of examination: general requirements; special notice; nonstenographic recording; production of documents and things; deposition of organization; deposition by telephone.**

(1) A party desiring to take the deposition of any person upon oral examination shall give at least ten (10) days notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 1-028 NMRA and shall begin with a statement on the record by the officer that includes

(a) the officer's name and business address;

(b) the date, time and place of the deposition;

(c) the name of the deponent;

(d) the administration of the oath or affirmation to the deponent; and

(e) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (a) through (c) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning

the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 1-034 NMRA for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 1-034 NMRA shall apply to the request.

(6) A party may, in the party's notice and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph does not preclude taking a deposition by any other procedure authorized in these rules.

(7) A deposition may be taken by telephone or other remote electronic means.

C. **Examination and cross-examination; record of examination; oath; objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under the New Mexico Rules of Evidence, except Rules 11-103 and 11-615 NMRA. The examination shall commence at the time and place specified in the notice or within thirty (30) minutes after the time specified. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. If the deposition is to be stenographically recorded, the court reporter shall administer the oath or affirmation to the deponent. The testimony shall be taken stenographically or recorded by any other method authorized by Subparagraph (2) of Paragraph B of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. Any party who shows a document to the witness during examination shall provide a copy to all other parties before the deposition begins or when the document is shown to the witness. The officer may go off the record only with the agreement of all parties, which shall not be unreasonably withheld. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

D. **Objections; duration; motion to terminate or limit examination.**

(1) Any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. Objections to form or foundation may be made only by stating "objection -- form", or "objection -- foundation". No specification of the defect in the form or foundation of the question or the answer shall be stated unless requested by the party propounding the question. Argumentative interruptions shall not be permitted. When a question is pending, or a document has been presented to the deponent, no one may interrupt the deposition until the answer is given, except when necessary to preserve a privilege, to enforce a limitation directed by the court or to present a motion under Subparagraph (2) of this paragraph.

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition of a person other than an expert witness is limited to one day and lasting no more than seven (7) hours on the record. The court must allow additional time consistent with Subparagraph (2) of Paragraph B of Rule 1-026 NMRA if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

(3) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Paragraph C of Rule 1-026 NMRA. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of this rule apply to depositions being taken for use outside New Mexico. The provisions of Subparagraph (4) of Paragraph A of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion.

E. **Review by witness; changes; signing.** If requested by the deponent or a party before completion of the deposition, the deponent shall have thirty (30) days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by Subparagraph (1) of Paragraph F of this rule whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

F. **Certification and delivery by officer; exhibits; copies.**

(1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall securely seal the deposition and

exhibits in an envelope or package with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering or deterioration. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and attached to and returned with the deposition. Documents and things produced for inspection may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may

(a) offer copies to be marked for identification and attached to the deposition and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals; or

(b) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if attached to the deposition. Any party may move for an order that the original be attached to the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) Any party filing a deposition shall give prompt notice of its filing to all other parties.

G. **Failure to attend or to serve subpoena; expenses; notice of non-appearance.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(3) If a motion for protective order and notice of non-appearance are filed and actual notice of the non-appearance is given to all parties at least three (3) days before the scheduled deposition, then the failure of a deponent or managing agent or a party to

appear at the time and place designated shall not be considered a willful failure to appear within the meaning of Paragraph D of Rule 1-037 NMRA or contemptible conduct under Paragraph E of Rule 1-045 NMRA, unless the court finds that the motion is frivolous or for dilatory purposes.

H. **Final disposition of depositions.** After a judgment in a civil action becomes final, or the case is otherwise finally closed, the original deposition may be destroyed.

[As amended, effective October 15, 1986; August 1, 1988; January 1, 1999; May 1, 2002; November 1, 2002; February 16, 2004; as amended by Supreme Court Order 06-8300-07, effective May 1, 2006; by Supreme Court Order No. 11-8300-052, effective for cases filed or pending on or after February 17, 2012.]

ANNOTATIONS

Cross references. — For scope of deposition, *see* Rule 1-026 NMRA.

For use of depositions, *see* Rules 1-027 and 1-032 NMRA.

For stipulations concerning depositions, *see* Rule 1-029 NMRA.

For the effect of irregularities in taking depositions, *see* Rule 1-032 NMRA.

For sanctions for noncompliance, *see* Rule 1-037 NMRA.

For subpoena for taking depositions, *see* Rule 1-045 NMRA.

For taxing deposition fees as costs, *see* 39-2-7 NMSA 1978.

For the fees for recording depositions, *see* 39-2-8 NMSA 1978.

For qualifications of the officer presiding over the deposition, *see* Rule 1-028 NMRA.

For the duty of each party and each party's attorney's to participate in good faith in the framing of a discovery plan, *see* Paragraph F of Rule 1-026 NMRA.

Compiler's notes. — Paragraphs A to F, and H, together with Rule 1-028 NMRA, are deemed to have superseded 45-401 to 45-406, and 45-408, C.S. 1929, which dealt with the same subject matter.

Paragraph I of this rule, together with Rules 1-028, 1-031, 1-032 and 1-045 NMRA, is deemed to have superseded 45-101 to 45-119, C.S. 1929 (36-5-21 to 36-5-39, 1953 Comp., now repealed), insofar as those provisions related to the taking of depositions for use in the district courts.

The 1998 amendment, effective January 1, 1999, amended this rule to conform more closely to Rule 30 of the Federal Rules of Civil Procedure; the amendment rewrote Paragraphs A through C and E; in Paragraph D substituted "during a deposition" for "during the taking of the deposition"; in Paragraph F deleted references to filing from the heading, made gender neutral changes, and inserted "transcript or other recording of the" in Subparagraph (2); in Paragraph G made gender neutral changes and added Subparagraph (3); deleted former Paragraphs H and I, relating to what constitutes reasonable notice and opening of depositions; and redesignated former Paragraph J as present Paragraph H, rewriting that paragraph.

The first 2002 amendment, effective May 1, 2002, added Paragraph D(1) and designated the existing text of Paragraph D as Paragraph D(2).

The second 2002 amendment, effective November 1, 2002, rewrote Paragraph B(7) which formerly read "The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 1-028(A), 1-037(A)(1) and 1-037(B)(1) NMRA, a deposition taken by such means is taken in the county and at a place where the deponent is to answer questions".

The 2003 amendment, effective February 16, 2004, substituted “shall” for “must” in the second and last sentences of Paragraph A and in the first sentence of Subparagraph (1) of Paragraph D, inserted the third sentence of Paragraph C, inserted “and delivery” and deleted “notice of transcription” in the introductory language of Paragraph F, substituted the present second and third sentences for the former second and third sentences in Subparagraph (1) of that paragraph, which formerly read “if the deposition is transcribed, the officer shall provide the original of the deposition to the party ordering the transcription and shall give notice thereof to all parties. The party receiving the original shall maintain it, without alteration, until final disposition of the case in which it was taken or other order of the court”, substituted “attached to and returned with the deposition. Documents and things produced for inspection” for “annexed to and returned with the deposition, and” near the end of that subparagraph, substituted “attached” for “annexed” in Subparagraphs (1)(a) and (1)(b) of that Paragraph F, and deleted “and returned with” preceding “the deposition” in the last sentence of Subparagraph (1)(b) of that paragraph.

The 2006 amendment, approved by Supreme Court Order 06-8300-07, effective May 1, 2006, deleted the second sentence and added a new second and third sentence of Paragraph A requiring the parties to confer in good faith as to the scheduling of depositions to avoid scheduling conflicts of the parties, witnesses and counsel; added a new second sentence of Paragraph C requiring the examination to begin within thirty (30) minutes of the time scheduled; added the next to last sentence of Paragraph C requiring the exchange of documents before a deposition begins and providing that the officer taking the statement may go off the record only with the agreement of all parties, which shall not be unreasonably withheld; revised Subparagraph (1) of Paragraph D relating to the form of objections and interruptions; added Subparagraph (2) of

Paragraph D relating to the length of time for a deposition; and relettererd Subparagraph (3) of Paragraph D as Subparagraph (2).

The 2011 amendment, approved by Supreme Court Order No. 11-8300-052, effective for cases filed or pending on or after February 17, 2012, in Paragraph B, deleted "notice of non-appearance" in the heading; in Paragraph C, changed "Paragraph B(2)" to "Subparagraph (2) of Paragraph B"; in Paragraph E, changed Paragraph F(1)" to "Subparagraph (1) of Paragraph F"; in Paragraph G, deleted "notice of non-appearance" in the heading; and made formatting changes throughout the rule.

Court did not abuse its discretion by granting summary judgment without the benefit of a deposition where on June 2, 2004, the district court permitted plaintiffs to depose prior to a hearing on the motion for summary judgment, the court granted summary judgment on August 18, 2004, and the deposition transcript was returned on September 14, 2004. Paragon Foundation, Inc. v. N.M. Livestock Board, 2006-NMCA-004, 138 N.M. 761, 126 P.3d 577, cert. denied, 2006-NMCERT-001.

Nature of taking of deposition. — The taking of a deposition by oral examination is not a special proceeding nor an end in itself but is merely in aid of some civil cause pending. Davis v. Tarbutton, 35 N.M. 393, 298 P. 941 (1931).

Burden on party taking deposition to comply with rules. — Rule 32(C)(4) (see now Rule 1-032 NMRA) and subdivision (E) (see now Paragraph E) of this rule were designed to put the burden on the party who takes the deposition to comply with the rules to avoid problems. If the party who has the burden fails to comply with the rules, the duty shifts to the opposing party to comply with the rules in order to protect his rights. Lawyers should not use these rules lackadaisically, especially so when use of a deposition at trial is an essential ingredient. Garcia v. Co-Con, Inc., 96 N.M. 308, 629 P.2d 1237 (Ct. App. 1981).

Use of repetitious depositions within discretion of trial court. — The rules do not forbid plaintiff to retake the deposition of defendant; however, the use of repetitious depositions rests in the sound discretion of the trial court. Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977).

Likewise continuance of trial to permit additional discovery. — Rule 26 (now this rule) should be construed so as to secure the just, speedy and inexpensive determination of every action. If in the sound discretion of the trial judge a trial should be continued so as to permit additional discovery; particularly where the need results from a previous failure to respond to efforts to take a deposition, the determination so made should not be reversed; whether a trial should be interrupted so as to permit further discovery must lie in the sound discretion of the trial judge. Wieneke v. Chalmers, 73 N.M. 8, 385 P.2d 65 (1963).

Party may lose right to take depositions. — Counsel is entitled of right to take depositions of any witness after commencement of his action, but where plaintiff had

been warned and admonished on several occasions by the court to take whatever depositions he desired and to get ready for trial, where he was granted a continuance for the express purpose of taking depositions and where he was then again advised by the court to get ready for trial, it cannot be said the court abused its discretion in denying the plaintiff's motion to dismiss without prejudice and granting the defendant's motion to dismiss with prejudice. Emmco Ins. Co. v. Walker, 57 N.M. 525, 260 P.2d 712 (1953).

But delay in taking deposition not determinative. — Although two years passed after action was filed before defendant moved to take plaintiff's deposition, authorization of deposition was within trial judge's discretion where most of delay occurred before local lawyer entered the case for the defendant and where during most of the time of delay plaintiff had not taken affirmative action to bring the case to trial. Wieneke v. Chalmers, 73 N.M. 8, 385 P.2d 65 (1963).

Parties on same side of suit remain separate. — These rules, as well as the common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of a lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

Notice of examination may be waived. — An attorney of record may waive notice of intention to apply for order authorizing taking of testimony by oral examination out of court. Davis v. Tarbutton, 35 N.M. 393, 298 P. 941 (1931)(decided under former law).

Scope of examination not limited absent specified showing. — The power of the court under Subdivision (d) (see now Paragraph D) to limit the scope of an examination should not be exercised in the absence of a showing that the examination is being conducted in bad faith and in such a manner as unreasonably to annoy, embarrass or oppress the opposite party. Salitan v. Carrillo, 69 N.M. 476, 368 P.2d 149 (1961).

Motion by opposing party prerequisite for order to limit scope of deposition. — The trial court errs in limiting, upon motion of plaintiff, the examination of defendant to the subject matter of questions that appear on 10 pages of the deposition and in ordering that the examination shall not extend beyond those questions; there is no rule of law that allows a district court to limit the examination of a witness, absent a motion by the opposing party pursuant to Subdivision (b) (see now Rule 1-026) and Subdivision (d) (see now Paragraph D). Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977).

Deponent's attorney may not limit examination by improper conduct. — Prior to the taking of the deposition, the attorney for a deponent may ascertain, as a guide to his examination, what the deponent knows and the extent and limitation of his memory, but he does not have the right to go beyond proper objection; if necessary, he can seek relief from the court pursuant to Subdivision (b) (see now Rule 1-026 NMRA) and Subdivision (d) (see now Paragraph D). Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977).

Waiver of objections to manner of taking deposition. — The taking of a deposition includes all steps necessary to obtain the testimony of the witness and the issuance of the commission, and joinder in the proceeding and submitting of cross-interrogatories amounts to a waiver of objections to the commission to take the deposition. Palatine Ins. Co. v. Santa Fe Mercantile Co., 13 N.M. 241, 82 P. 363 (1905) (decided under former law).

Employers may be present at discovery proceedings conducted by the environmental improvement division under these rules where the testimony of employees is taken by private depositions. Kent Nowlin Constr., Inc. v. Environmental Imp. Div., 99 N.M. 294, 657 P.2d 621 (1982).

Ruling on short notice denying motion to quash deposition no excuse for nonappearance. — Where, on at least two occasions, appellant filed motion to quash depositions, and then did not appear even though the court had not ruled in one instance, and in the other did so on short notice from appellee, there were no grounds for complaint by appellant concerning the short notice since the court had not entered an order on the motion on the date set for the hearing. Wieneke v. Chalmers, 73 N.M. 8, 385 P.2d 65 (1963).

Insufficient excuse for failure to appear at deposition. — Bald, unsupported statement that to appear at a deposition was "utterly impossible for personal reasons" is no excuse for failing to appear. Wieneke v. Chalmers, 73 N.M. 8, 385 P.2d 65 (1963).

Absent special circumstances nonresident plaintiff must submit to deposition in forum. — The general rule is that a nonresident plaintiff should make himself available and must submit to oral examination in the forum in which he has brought his action, absent a showing of special circumstances or undue hardship. Salitan v. Carrillo, 69 N.M. 476, 368 P.2d 149 (1961).

Right of clerk in sister state to administer binding oaths. — Since Laws 1891, ch. 28, § 6 (45-108, C.S. 1929, now superseded by these rules), recognized the right of a clerk of the district court of a sister state to administer oaths, such clerk could swear a lien-claimant to his claim. Genest v. Las Vegas Masonic Bldg. Ass'n, 11 N.M. 251, 67 P. 743 (1902) (decided under former law).

Signatures mandatory unless waived or sufficiently explained. — Where the word "shall" is used in Subdivision (e) (see now Paragraph E) it is mandatory; therefore, Subdivision (e) (see now Paragraph E) requires signing unless signature is waived or the reasons for no signature are stated as provided in the rule. Crabtree v. Measday, 85 N.M. 20, 508 P.2d 1317 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

There are two methods under which waiver of signature by parties is accomplished: (1) by stipulation of the parties that the signature is waived; and (2) absent a stipulation, by failure to file motion to suppress with reasonable promptness

after the lack of signature is, or with due diligence, might have been ascertained. Garcia v. Co-Con, Inc., 96 N.M. 308, 629 P.2d 1237 (Ct. App. 1981).

And silence following voiced agreement constitutes waiver. — Mere physical presence alone of an opposing lawyer who cross-examined the witnesses does not constitute a waiver of signature. However, silence amounts to assent when one lawyer says "it is stipulated and agreed," and the opposing lawyer remains silent. Garcia v. Co-Con, Inc., 96 N.M. 308, 629 P.2d 1237 (Ct. App. 1981).

As does failure to suppress where absence of signature known. — Where the plaintiff not only had ample time to ascertain the absence of a deponent's signature but also had actual knowledge within time to file a motion to suppress the deposition, but failed to do so, he waives the error. Garcia v. Co-Con, Inc., 96 N.M. 308, 629 P.2d 1237 (Ct. App. 1981).

Unsigned depositions inadmissible. — Depositions are not admissible in evidence where the witness has not signed the deposition and the signature of the witness has not been waived by the party objecting to the deposition, or the provisions for use of the deposition where it is not signed have not been met. Crabtree v. Measday, 85 N.M. 20, 508 P.2d 1317 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Oaths administered over telephone. — Generally, a court reporter may not administer oaths over the telephone. Paragraph B(7) does not change the general rule, and the court reporter must administer the oath and take the deposition in the witness' presence. 1988 Op. Att'y Gen. No. 88-81.

Law reviews. — For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982) and 13 N.M.L. Rev. 251 (1983).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 88 et seq.; 23 Am. Jur. 2d Depositions and Discovery §§ 84, 85, 139 to 167, 192 to 198.

Form, particularity and manner of designation required in subpoena duces tecum for production of corporate books, records and documents, 23 A.L.R.2d 862.

Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books and papers, or the like, 37 A.L.R.2d 586.

Claimant's deposition or statement taken by municipality or other political subdivision as statutory notice of claim for injury or as waiver thereof, 41 A.L.R.2d 883.

Right to take depositions in perpetual remembrance for use in pending action, where statute does not expressly grant or deny such right, 70 A.L.R.2d 674.

Construction and effect of Rules 30(b), (d), 31(d), of the Federal Rules of Civil Procedure, and similar state statutes and rules, relating to preventing, limiting, or terminating the taking of depositions, 70 A.L.R.2d 685.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 A.L.R.2d 308.

Availability of writ of prohibition to prevent illegal or unauthorized taking of depositions, 73 A.L.R.2d 1169.

Time and place, under pretrial discovery procedure, for inspection and copying of opposing litigant's books, records and papers, 83 A.L.R.2d 302.

Who is a "managing agent" of a corporate party whose discovery deposition may be taken under Federal Rules of Civil Procedure or state counterparts, 98 A.L.R.2d 622.

Taking deposition or serving interrogatories in civil case as waiver of incompetency, 23 A.L.R.3d 389.

Use of videotape to take deposition for presentation at civil trial in state court, 66 A.L.R.3d 637.

Permissibility and standards for use of audio recording to take deposition in state civil case, 13 A.L.R.4th 775.

Dismissal of state court action for failure or refusal of plaintiff to appear or answer questions at deposition or oral examination, 32 A.L.R.4th 212.

26A C.J.S. Depositions §§ 21, 27, 35, 39, 41, 51 to 57, 59, 60, 64 to 72, 75(1) to (4), 79 to 81, 83, 99 to 105; 27 C.J.S. Discovery § 4.

1-030.1. Audiotaped and videotaped depositions.

A. **Definition; "stenographic recording".** As used in these rules, "stenographic recording" or "stenographically recorded" shall mean reporting by simultaneous verbatim reporting.

B. **Copies.** At the request of any party to the proceeding or the deponent, a party who notices an audiotape or videotape deposition shall promptly:

(1) permit any other party or the deponent to review a copy of the audiotape or videotape and the original exhibits, if any; and

(2) furnish a copy of the audiotape or videotape in the format in which it was recorded to the requesting party on receipt of payment of the reasonable cost of making the copy.

C. **Audio-video deposition requirements.** If a proceeding is to be recorded by audiotape or videotape, unless the court otherwise orders or the parties otherwise stipulate:

(1) it shall be recorded in accordance with Paragraph B of Rule 1-030 NMRA;

(2) each witness, attorney and other person attending the deposition shall be identified on tape or on camera at the commencement of the deposition. Only the deponent and demonstrative materials used during the deposition will be videotaped;

(3) unless physically incapacitated, the deponent shall be seated at a table or in a witness box except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background, with appropriate lighting. Lighting, camera angle, lens setting and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. At both audiotaped and videotaped depositions, sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent;

(4) the officer conducting the deposition may only go off the record with the agreement of the parties, which shall not be unreasonably withheld. When the parties go off the record, the audio or video operator will state on the tape "going off the record, the time is _____". At this point no audio or video recording shall be made. When going back on the record, the operator will state on the tape "going back on the record, the time is _____";

(5) if the length of a deposition requires the use of more than one tape, the end of each tape and the beginning of each succeeding tape shall be announced on the audiotape or videotape;

(6) the audio or video operator shall use a counter on the recording equipment and shall prepare a log, cross-referenced to counter numbers, that identifies the positions on the tape: at which examination by different counsel begins and ends; at which exhibits are identified; and at which any interruption of continuous tape recording occurs, whether for recesses, "off the record" discussions, mechanical failure or otherwise;

(7) at the conclusion of the deposition, a statement shall be made on the audiotape or videotape that the deposition is ended. The operator shall mark as "original" and consecutively number each tape;

(8) the original audio or video recording may not be edited or altered. Copies of the audiotape or videotape may be redacted as may be appropriate for use in court.

D. **Approval of audiotaped or videotaped deposition.** If there is no stenographic transcription of the deposition, the attorney or self-represented party in possession of the audiotape or videotape promptly shall provide a copy of the tape to the deponent, unless the deponent and all parties attending the deposition have agreed on the record to waive review, correction and certification by the deponent. Within thirty (30) days after receipt of the audiotape or videotape, if there are changes in form or substance, the deponent shall sign a statement reciting such changes and the reasons given by the deponent for making them. If the deponent fails to provide a timely signed statement, no changes may later be made to the deposition.

E. **Use in court proceedings.** A party desiring to use an audiotaped or videotaped deposition pursuant to Rule 1-032 NMRA shall be responsible for having available appropriate playback equipment and an operator.

[Approved, effective February 16, 2004; as amended by Supreme Court Order 06-8300-07, effective May 1, 2006.]

Committee commentary. —

Comment A. In general.

The 2006 amendment added "the officer conducting the deposition may only go off the record with the agreement of the parties, which shall not be unreasonably withheld" to Subparagraph (4) of Paragraph C. A similar provision was added to Paragraph C of Rule 1-030 NMRA. *See* Rule 1-028 NMRA for officers before whom a deposition may be taken.

In 1999, Rule 1-030 NMRA was amended to permit parties to audiotape or videotape depositions without prior permission of the court, unless the court ordered otherwise on motion of a party opposed to recordation by audio or video means.

Experience with the 1999 rule brought problems to light. First, there were no standards for assuring that audio or visual machine operators would accurately record the deposition. Second, other rules dealing with deposition procedures, such as the provision allowing the deponent to review and make corrections of the official record of the deposition, proved cumbersome when applied to audiotaped or videotaped depositions.

In conjunction with changes made in other rules, Rule 1-030.1 NMRA improves the administration of the use of video and audiotaped depositions in court proceedings. Rule 1-030.1(C) establishes standard procedures for conducting audiotaped and videotaped depositions unless the parties agree otherwise or the court orders otherwise. Rule 1-030.1(D) specifies the procedure for providing copies and for securing approval of depositions when an audiotaped or videotaped deposition is taken. Finally, Rule 1-032(C) NMRA provides for the method of presentation of audiotaped or videotaped depositions in court proceedings.

Comment B. Audiotaped and videotaped depositions.

A party need not get prior court approval in order to audiotape or videotape a deposition. The party noticing a deposition is required to designate in the notice the method by which the deposition is to be taken. Rule 1-030(B)(2) NMRA.

Comment C. Simultaneous verbatim reporting of audiotaped or videotaped depositions.

There are no existing provisions for licensing and certifying persons who operate audiotape and videotape equipment to record depositions. (Only certified court monitors of "in-court" proceedings are currently regulated and certified. *See* Rule 22-201 NMRA). Until regulations assuring competence of audio and video operators and the accuracy of the audio or video record exists, accuracy can best be assured by requiring compliance with the requirements set forth in Rules 1-030(C) and 1-030.1(C) NMRA and supplemental court orders, if any.

Comment D. Cost of recording depositions.

The party taking the deposition will be responsible for payment of the cost of the deposition in the format specified in the notice. Rule 1-030(B)(2) NMRA. If another party designates another method to record the testimony, the additional record will be made at that party's expense unless otherwise ordered by the court. *See* Rule 1-030(B)(3) NMRA.

Comment E. Procedures and requirements for recording audio or video depositions.

Because audio and video depositions can take place without prior court approval, there is a need to set general standards for conducting such depositions. Rule 1-030.1(C) does this. The court may, on motion, modify these standards or add to them.

Comment F. Approval of audiotaped or videotaped depositions.

While the original audiotapes or videotapes cannot be physically altered, Rule 1-030.1(C)(8) NMRA, the deponent may review the recording and, in a separate writing, note substantive or formal changes in the recorded testimony and the reasons therefor. Rule 1-030.1(D) NMRA. If a stenographic recording was made by a certified court reporter, a statement reciting changes to the stenographic recording should be made pursuant to Rule 1-030(E) NMRA.

Cross references. — For qualifications of the officer presiding over the deposition, *see* Rule 1-028 NMRA.

1-031. Depositions on written questions.

A. **Serving questions; notice.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 1-045 NMRA. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:

(1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs; and

(2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Subparagraph (6) of Paragraph B of Rule 1-030 NMRA.

Within thirty (30) days after the notice and written questions are served, a party may serve cross-questions upon all other parties. Within ten (10) days after being served with cross-questions, a party may serve redirect questions upon all other parties. Within ten (10) days after being served with redirect questions, a party may serve recross-questions upon all other parties. The court may for cause shown enlarge or shorten the time.

B. **Officer to take responses and prepare record.** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Paragraphs C, E and F of Rule 1-030 NMRA, to take the testimony of the witness in response to the questions and to prepare, certify and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

C. **Notice of filing.** When the deposition is filed, the party taking it shall promptly give notice thereof to all other parties.

ANNOTATIONS

Compiler's notes. — This rule, together with Rules 1-028, 1-030, 1-032 and 1-045 NMRA, is deemed to have superseded 45-101 to 45-119, C.S. 1929 (36-5-21 to 36-5-39, 1953 Comp., now repealed), insofar as those provisions related to the taking of depositions for use in the district courts.

Additional subquestions require prior notice to party. — Pursuant to Subdivision (a) (see now Paragraph A) certain written interrogatories were submitted by the employer to the doctor and at the time they were answered several additional oral subquestions

were asked by the reporter which were improper for the reporter to ask without prior notice to claimant, thereby giving him an opportunity to cross-examine. Thompson v. Banes Co., 71 N.M. 154, 376 P.2d 574 (1962) (decided before 1979 amendment).

Where undue hardship exists, examination outside forum permitted. — Upon a showing of special circumstances of undue hardship, a defendant may be required to examine plaintiff outside of the forum, and this may be by written interrogatories if they are suitable and appropriate for the purpose of eliciting the information to which defendant is entitled. Salitan v. Carrillo, 69 N.M. 476, 368 P.2d 149 (1961) (decided before 1979 amendment).

Written interrogation of out-of-state obligee unjust where resident obligor provides strong defense. — Where a resident obligor of an out-of-state child support obligation has provided evidence that constitutes a strong and convincing defense to the payment of support, the district court may order that the case be continued to allow the out-of-state obligee the opportunity to provide further evidence, either by appearing in person or by providing deposition testimony. Furthermore, the district court may order that if the obligee chooses to provide evidence by a deposition, then the petitioner-obligee must pay the costs of the obligor's attorney to travel to an out-of-state deposition. It would be unjust and inequitable to limit interrogation to written questions under these circumstances. State ex rel. California v. Ramirez, 99 N.M. 92, 654 P.2d 545 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs §§ 46 to 48; 23 Am. Jur. 2d Depositions and Discovery §§ 168 to 173.

Conviction in another jurisdiction as disqualifying witness, 2 A.L.R.2d 579.

Time for filing and serving discovery interrogatories, 74 A.L.R.2d 534.

Propriety of considering answers to interrogatories in determining motion for summary judgment, 74 A.L.R.2d 984.

Answer to interrogatory merely referring to other documents or sources of information, 96 A.L.R.2d 598.

Party's right to use, as evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent, 13 A.L.R.3d 1312.

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 A.L.R.3d 483.

Taking deposition or serving interrogatories in civil case as waiver of incompetency, 23 A.L.R.3d 389.

Tort or statutory liability for failure or refusal of witness to give testimony, 61 A.L.R.3d 1297.

Propriety, on impeaching credibility of witness in civil case by showing former conviction, of questions relating to nature and extent of punishment, 67 A.L.R.3d 761.

Answers to interrogatories as limiting answering party's proof at state trial, 86 A.L.R.3d 1089.

26A C.J.S. Depositions §§ 47 to 57, 65, 80.

1-032. Use of depositions in court proceedings.

A. **Use of depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any other purpose permitted by the Rules of Evidence;

(2) the deposition of a party or of anyone who at the time of taking the deposition was an officer, director or managing agent, or a person designated under Subparagraph (6) of Paragraph B of Rule 1-030 NMRA or Subparagraph A of Rule 1-031 NMRA to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose;

(3) the deposition of a witness, whether or not a party, may be used by any party for any purpose upon stipulation of the parties or if the court finds:

(a) that the witness is dead;

(b) that the witness is at a greater distance than one hundred (100) miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition;

(c) that the witness is one hundred miles or less from the place of trial or hearing, if an order was entered prior to the deposition permitting the use of the deposition at trial and the notice of deposition sets forth that the proponent intended to use the deposition at trial;

(d) that the witness is unable to attend or testify because of age, illness, infirmity or imprisonment;

(e) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(f) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used;

(4) if only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 1-025 NMRA does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any state and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the New Mexico Rules of Evidence.

B. **Objections to admissibility.** Subject to the provisions of Paragraph B of Rule 1-028 NMRA and Subparagraph (3) of Paragraph D of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

C. **Form of presentation.** Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

D. **Effect of errors and irregularities in depositions.**

(1) **As to notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice and filed in the action.

(2) **As to disqualification of officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the

disqualification becomes known or could be discovered with reasonable diligence. Such objections should be served on the party giving notice and filed in the action.

(3) **As to taking of deposition.**

(a) Objections to the competency of a witness or to the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(b) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation or in the conduct of parties and errors of any kind which might be obviated, removed or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(c) Objections to the form of written questions submitted under Rule 1-031 NMRA are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five (5) days after service of the last questions authorized.

(4) **As to completion and return of deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the officer under Rules 1-030 NMRA and 1-031 NMRA are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

[As amended, effective October 15, 1986; February 16, 2004; January 20, 2005.]

ANNOTATIONS

Cross references. — For the definition of "stenographic recording" or "stenographically recorded" see Rule 1-030.1 NMRA

For provisions on depositions for use in foreign states, see 38-8-1 to 38-8-3 NMSA 1978

The 2003 amendment, effective February 16, 2004, added “or for any other purpose permitted by the Rules of Evidence” in Subparagraph (1) and substituted “the offeror” for “him” in the first sentence of Subparagraph (4) of Paragraph A, inserted Paragraph C, redesignated former Paragraph C as Paragraph D, and added the introductory language in Subparagraphs (1) through (4) of that paragraph.

The 2004 amendment, effective January 20, 2005, substituted “Paragraph D” for “Paragraph C” in Paragraph B.

Compiler's notes. — This rule, together with Rules 1-028, 1-030, 1-031 and 1-045 NMRA, is deemed to have superseded 45-101 to 45-119, C.S. 1929 (36-5-21 to 36-5-39, 1953 Comp., now repealed), insofar as those provisions related to the taking of depositions for use in the district court.

Hearsay and immaterial evidence not rendered admissible by presence in deposition. — Where a deposition and the portions thereof which were offered on rebuttal tenders include matters which are largely hearsay and matters which could not possibly relate to the question at issue, deposition was properly refused. Glass v. Stratoflex, Inc., 76 N.M. 595, 417 P.2d 201 (1966).

Court may refuse unnecessarily repetitious deposition. — Unnecessary repetition is a valid ground for refusing to admit a deposition as part of party's case. Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

Rule does not override laws of evidence and court's discretion. — Rule 26(d)(2) (see now Paragraph A(2) of this rule) provides that a deposition of an adverse party may be used "for any purpose," but blind reliance on that portion of this rule does not establish error when the court refuses to admit portions of a deposition; that permissive rule does not override the other rules of evidence and the discretion of the trial court. Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

Depositions not intended to substitute for witness at trial. — Depositions may only be used when the witness is unavailable or where exceptional circumstances necessitate their use; Rule 26(d)(3) (see now Paragraph A(3) of this rule) contemplates such use and was not intended to permit depositions to substitute at the trial for the witness himself. Niederstadt v. Ancho Rico Consol. Mines, 88 N.M. 48, 536 P.2d 1104 (Ct. App.), cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

Implicit in Subdivision (A)(3) (see now Paragraph A(3)) is condition that witness be unavailable to testify in person; so the use of a deposition must be denied where there is no showing of unavailability. Arenivas v. Continental Oil Co., 102 N.M. 106, 692 P.2d 31 (Ct. App. 1983).

Showing of unavailability of witness. — A showing that the witness resided beyond 100 miles at some recent earlier time is sufficient to admit the deposition under Subdivision (a)(3) (see now Paragraph A(3)). Dial v. Dial, 103 N.M. 133, 703 P.2d 910 (Ct. App. 1985).

Party seeking admission of deposition testimony in lieu of in court testimony has the burden of showing the witness is unavailable. Based on plaintiff's affidavit stating she was unable to locate witness despite good faith attempts to do so and the fact witness was defendants' daughter, the district court concluded the requisite good-faith effort to locate the witness had been made and the deposition may be admitted. Reichert v. Atler, 117 N.M. 628, 875 P.2d 384 (Ct. App. 1992), aff'd, 117 N.M. 623, 875 P.2d 379 (1994).

Deposition of party taken by adverse party may not be used in evidence by deponent, in the absence of any of the special circumstances listed in Rule 26(d)(3) (see now Paragraph A(3) of this rule). Albuquerque Nat'l Bank v. Clifford Indus., Inc., 91 N.M. 178, 571 P.2d 1181 (1977).

When Rule 26 (now this rule) is considered as a whole, it is clear that it was not intended to nor does it permit a deposed party to use his own deposition, under normal circumstances, in his own case-in-chief. Albuquerque Nat'l Bank v. Clifford Indus., Inc., 91 N.M. 178, 571 P.2d 1181 (1977).

Generally as to use of deposition taken in former action. — A debt barred by the statute of limitations is revived by an admission that it is unpaid, made in writing and signed by the party to be charged, even though the admission is made in a deposition taken for use in a particular case other than the case between the same parties on the same subject, in which the admission is used as evidence of the revival of the debt. Joyce-Pruit Co. v. Meadows, 31 N.M. 336, 244 P. 889 (1925) (decided under former law).

Depositions taken out of territory. — Under Laws 1865, ch. 32, § 1, depositions could be taken out of the territory to be used in probate courts. Gildersleeve v. Atkinson, 6 N.M. 250, 27 P. 477 (1891) (decided under Special Act).

Proper to stipulate regarding use of deposition. — No objection having been made to any question, the trial court did not err in admitting a deposition under stipulation that it could be read in evidence by either party "subject to such objections and exceptions as may be made to such questions and answers, as if the witness * * * were present in person and testified in said cause." Cheek v. Radio Station KGFL, 47 N.M. 79, 135 P.2d 510 (1943).

Unsigned deposition. — A deposition is not admissible in evidence where the witness has not signed same and party objecting to the deposition has not waived objection to such omission, or where provisions for use of unsigned deposition have not been met. Crabtree v. Measday, 85 N.M. 20, 508 P.2d 1317 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Burden on party taking deposition to comply with rules. — Rule 30(E) (see now Rule 1-030 NMRA) and Paragraph (C)(4) (see now Paragraph C(4)) of this rule were designed to put the burden on the party who takes the deposition to comply with the rules to avoid problems. If the party who has the burden fails to comply with the rules, the duty shifts to the opposing party to comply with the rules in order to protect his rights. Lawyers should not use these rules lackadaisically, especially so when use of a deposition at trial is an essential ingredient. Garcia v. Co-Con, Inc., 96 N.M. 308, 629 P.2d 1237 (Ct. App. 1981).

Absence of signature waived where known, but no motion to suppress. — Where the plaintiff not only had ample time to ascertain the absence of a deponent's signature

but also had actual knowledge within time to file a motion to suppress the deposition, but failed to do so, he waives the error. Garcia v. Co-Con, Inc., 96 N.M. 308, 629 P.2d 1237 (Ct. App. 1981).

Depositions entitled to same consideration as other testimony. — Nothing in Rule 26 (now this rule) concerning depositions indicates that deposition testimony is to have a lesser effect than testimony presented "live" at trial or that deposition testimony is insufficient to raise a conflict in the evidence; deposition testimony is entitled to the same consideration as any other testimony. Martinez v. Universal Constructors, Inc., 83 N.M. 283, 491 P.2d 171 (Ct. App. 1971).

Generally as to specificity of objection. — An objectionable question and answer contained in a deposition cannot be reached by a general objection to the deposition itself. Texas, S.F. & N. Ry. v. Saxton, 7 N.M. 302, 34 P. 532 (1893) (decided under former law).

Objections at trial timely. — Plaintiff has no duty before trial to take steps to open the deposition and inspect it; therefore, objections made at trial to the use of the deposition were made with reasonable promptness and due diligence within the meaning of this rule. Crabtree v. Measday, 85 N.M. 20, 508 P.2d 1317 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Party may lose right to object. — The plaintiff could not claim reversible error because the trial court considered medical depositions which were not properly before it because they had not been introduced into evidence; since no objection was made to the use of the depositions as evidence by the trial court, the plaintiff relied on a part of one of the depositions and he pointed to nothing in the depositions which might be considered as prejudicial error. There being sufficient competent evidence to support the findings and judgment, the admission of incompetent evidence not shown to be prejudicial was not reversible error. Medina v. Zia Co., 88 N.M. 615, 544 P.2d 1180 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 111 to 115, 193 to 196.

Waiver of incompetency of witness as to transactions with decedent by taking his deposition, 64 A.L.R. 1164, 107 A.L.R. 482, 159 A.L.R. 411.

Introduction of deposition by party other than the one at whose instance it was taken, 134 A.L.R. 212.

Introduction in evidence of deposition of deceased party by adverse party as affecting the latter's statutory disqualification to testify against deceased's representative, 158 A.L.R. 306.

Impeachment of witness by evidence or inquiry as to arrest, accusation or prosecution, 20 A.L.R.2d 1421.

Admissibility of deposition of child of tender years, 30 A.L.R.2d 771.

Propriety and effect of jury in civil case taking depositions to jury room during deliberations, 57 A.L.R.2d 1011.

Admissibility in evidence of deposition as against one not a party at time of its taking, 4 A.L.R.3d 1075.

Party's right to use as evidence, in evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent, 13 A.L.R.3d 1312.

Taking deposition or serving interrogatories in civil case as waiver of incompetency of witness, 23 A.L.R.3d 389.

Admissibility of deposition, under Rule 32(a)(3)(B) of Federal Rules of Civil Procedure, where court finds that witness is more than 100 miles from place of trial or hearing, 71 A.L.R. Fed. 382.

Use, in federal criminal prosecution, of deposition of absent witness taken in foreign country, as affected by Federal Rule of Criminal Procedure 15(b) and (d) requiring presence of accused and that deposition be taken in manner provided in civil actions, 105 A.L.R. Fed. 537.

26A C.J.S. Depositions §§ 19, 56, 93, 99, 105.

1-033. Interrogatories to parties.

A. **Number.** Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding fifty (50) in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Subparagraph (2) of Paragraph B of Rule 1-026 NMRA.

B. **Service.** Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. In cases involving multiple parties, the party serving interrogatories shall serve notice upon all parties who have appeared in the action that interrogatories have been served. A party propounding the interrogatories shall, upon request of any party, furnish to such party a copy of the interrogatories, answers and objections, if any.

C. **Answers and objections.**

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within thirty (30) days after the service of the interrogatories, except that a defendant may serve answers or objections within forty-five (45) days after service of the summons and complaint upon that defendant. A shorter or longer time may be directed by the court or agreed to in writing by the parties subject to Rule 1-029 NMRA.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 1-037 NMRA with respect to any objection to or other failure to answer an interrogatory.

D. **Scope; use at trial.** Interrogatories may relate to any matters which can be inquired into under Paragraph B of Rule 1-026 NMRA, and the answers may be used to the extent permitted by the Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

E. **Option to produce business records.** Where the answer to an interrogatory may be derived or ascertained from the business records, including the electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

[As amended, effective January 1, 2002; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

Committee Commentary for 2009 Amendments. —

See the 2009 Committee Commentary to Rule 1-026 NMRA for additional information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

ANNOTATIONS

Cross references. — For use of interrogatories in small loan business investigations, *see* Section 58-15-9 NMSA 1978.

For use of interrogatories in public service commission proceedings, *see* Section 62-10-10 NMSA 1978.

For use of interrogatories in hearings pending before state engineer (director of water resources division), *see* Section 72-2-13 NMSA 1978.

The 2001 amendment, effective February 1, 2002, divided and redesignated former Paragraph A as Paragraphs A through C, redesignated former Paragraphs B and C as Paragraphs D and E; in Paragraph A, inserted "Without leave of court or writtten stipulation" and "not exceeding fifty (50) in number including all discrete subparts" in the first sentence and added the last sentence; in Paragraph C, inserted the subparagraph designations and added Subparagraph (4); and added the last sentence in Paragraph E.

The 2009 amendment, approved by Supreme Court Order 09-8300-007, effective May 15, 2009, in Paragraph E, after "business records", added "including the electronically stored information".

Compiler's notes. — This rule is deemed to have superseded 45-509, C.S. 1929, relating to the serving of interrogatories on the adverse party.

Term "available" in this rule, embodies only two limitations: (1) a party obviously cannot be required to produce materials which he is incapable of procuring; and (2) in general, a party should not be required to obtain, collect or turn over materials which the opposing party is equally capable of obtaining on its own. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

And mere possession by different party not determinative. — It is immaterial under this rule and Rule 34 (now see Rule 1-034 NMRA) that the party subject to the discovery orders does not own the documents, or that it did not prepare or direct the production of the documents, or that it does not have actual physical possession of

them. The mere fact that the documents are in the possession of an individual or entity which is different or separate from that of the named party is not determinative of the question of availability or control. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Documents and information in the separate possession of partners are subject to production in a suit in which only the partnership is named as a party. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Information on sales of allegedly injurious drug discoverable in products liability suit. — In a products liability suit against a drug manufacturer, an interrogatory requesting information on the amount and dollar volume of sales of the drug alleged to have caused the injury should be allowed. Such information is relevant and is not privileged or a trade secret. Richards v. Upjohn Co., 95 N.M. 675, 625 P.2d 1192 (Ct. App.), cert. denied, 94 N.M. 675, 615 P.2d 992 (1980).

Attorney may answer interrogatories as an agent of a private corporation but verification must state that the attorney made answers to the interrogatories with personal knowledge that such answers were true and correct. Lackey v. Mesa Petroleum Co., 90 N.M. 65, 559 P.2d 1192 (Ct. App. 1976).

Verification of answers. — Where an oath is required to verify answers to interrogatories by an officer or agent of a private corporation, the verification must state the truth of the answers. Lackey v. Mesa Petroleum Co., 90 N.M. 65, 559 P.2d 1192 (Ct. App. 1976).

Answers on information and belief inadequate. — Answers to interrogatories, based solely on information and belief, are not sufficient to assist claim for summary judgment; the answers must be made under oath. Lackey v. Mesa Petroleum Co., 90 N.M. 65, 559 P.2d 1192 (Ct. App. 1976).

Party cannot answer an interrogatory simply by reference to another equally unresponsive answer. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Failure to timely file objections to interrogatories operates as waiver of any objections the party might have. This rule is generally applicable regardless of how outrageous or how embarrassing the questions may be. When a party fails to file timely objections, the only defense that it has remaining to it is that it gave a sufficient answer to the interrogatories. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

And evidence of lack of good faith. — The failure to immediately raise an objection to interrogatories is itself evidence of a lack of good faith. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Hearing on objections required. — Ruling by trial court on defendant's objections to certain interrogatories without granting plaintiffs a hearing was erroneous. Lackey v. Mesa Petroleum Co., 90 N.M. 65, 559 P.2d 1192 (Ct. App. 1976) (decided before 1979 amendment).

General objections insufficient. — General objections made by defendant to plaintiff's interrogatories, to the effect that they were oppressive, not reasonably calculated to the discovery of admissible evidence, called for legal opinions and conclusions and the like, were not sufficient, and court's order sustaining such objections was erroneous. Lackey v. Mesa Petroleum Co., 90 N.M. 65, 559 P.2d 1192 (Ct. App. 1976).

Procedure as to privilege. — All discovery, including discovery under Rule 1-045 NMRA, is limited by Rule 1-026 NMRA to the acquisition of information "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action". Thus, once a privilege is asserted in response to interrogatories, counsel cannot unilaterally disregard the privilege and then issue subpoenas to sidestep the procedure outlined in this rule for resolving the dispute. Wallis v. Smith, 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682, cert. denied, 130 N.M. 254, 23 P.3d 929 (2001).

Attempted answer to interrogatories as "appearance" in suit. — Garnishee's attempt to answer interrogatories in a letter to the clerk, a copy of which he sent to appellee's counsel, and payment into court of what he thought was owing, clearly indicated an intention to meet the obligations of a party to a lawsuit and to submit to court's jurisdiction, and constituted an appearance within the scope of Rule 55(b) (see now Rule 1-055), hence, he was entitled to notice of motion for default judgment. Mayfield v. Sparton S.W., Inc., 81 N.M. 681, 472 P.2d 646 (1970).

Effect of adverse party's answers. — A party is not bound on the day of trial by the opposite party's answers to written interrogatories. Crabtree v. Measday, 85 N.M. 20, 508 P.2d 1317 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Use of answers to interrogatories. — Answers to written interrogatories may be used by a party against the party who made the answers, or admissions in those answers may be used against the party answering; however, the answers cannot be used by the party making them to establish an affirmative claim or defense because they are not subject to cross-examination, and confrontation and cross-examination are basic ingredients of a fair trial. Crabtree v. Measday, 85 N.M. 20, 508 P.2d 1317 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Defendant could not introduce into evidence her answers to interrogatories propounded by plaintiff when she was unable to attend and testify because of illness,

under the circumstances of the case. Crabtree v. Measday, 85 N.M. 20, 508 P.2d 1317 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Right of interrogee when part of answers offered in evidence. — When the party submitting written interrogatories offers in evidence part of the answers thereto, the interrogee has a right to introduce, or to have introduced, all of the interrogatories which are relevant to, or which tend to explain or correct, the answers submitted. Albuquerque Nat'l Bank v. Clifford Indus., Inc., 91 N.M. 178, 571 P.2d 1181 (1977).

Triable issue presented. — In considering a motion for summary judgment, the record must be viewed in the light most favorable to the party opposing the motion, and all doubts as to the existence of a triable issue must be decided against the movant; where, from the meager record, the pleadings and answers to interrogatories of the respective parties presented a triable issue of a material fact, summary judgment should not have been granted. Allied Bldg. Credits, Inc. v. Koff, 70 N.M. 343, 373 P.2d 914 (1962).

Law reviews. — For comment, "Discovery - Disclosure of Existence and Policy Limits of Liability Insurance," see 7 Nat. Resources J. 313 (1967).

For article, "The Impact of the Revised New Mexico Class Action Rules Upon Consumers," see 9 N.M.L. Rev. 263 (1979).

For article, "Survey of New Mexico Law, 1979-80: Civil Procedure," see 11 N.M.L. Rev. 53 (1981).

For annual survey of New Mexico law relating to Civil Procedure, see 12 N.M.L. Rev. 97 (1982).

For annual survey of New Mexico law relating to Civil Procedure, see 13 N.M.L. Rev. 251 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 168, 199 to 210.

Corporation party, 66 A.L.R. 1269.

Right of party to order for examination of, or to propose interrogatories to, adverse party in respect to matters within knowledge of former, 95 A.L.R. 241.

Jurisdiction to require a nonresident party to an action to submit to adverse examination, 154 A.L.R. 849.

Subpoena duces tecum, form, particularity and manner of designation required in, for production of corporate books, records and documents, 23 A.L.R.2d 862.

Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books and papers or the like, 37 A.L.R.2d 586.

Garnishee's pleading, answering interrogatories or the like, as affecting his right to assert court's lack of jurisdiction, 41 A.L.R.2d 1093.

Time for filing and serving discovery interrogatories, 74 A.L.R.2d 534.

Propriety of considering answers to interrogatories in determining motion for summary judgment, 74 A.L.R.2d 984.

Subpoena duces tecum for production of items held by a foreign custodian in another country, 82 A.L.R.2d 1403.

Time and place, under pretrial discovery procedure, for inspection and copying of opposing litigant's books, records and papers, 83 A.L.R.2d 302.

Answer to interrogatory merely referring to other documents or source of information, 96 A.L.R.2d 598.

Party's right to use, as evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent, 13 A.L.R.3d 1312.

Taking deposition or serving interrogatories in civil case as waiver of incompetency, 23 A.L.R.3d 389.

Self-incrimination, privilege against, as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 A.L.R.3d 1373.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

Confidentiality of proceedings or reports of judicial inquiry board or commission, 5 A.L.R.4th 730.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 A.L.R.5th 577.

26A C.J.S. Depositions §§ 47 to 50; 27 C.J.S. Discovery §§ 55, 57, 69.

1-034. Production of documents and things and entry upon land for inspection and other purposes.

A. **Scope.** Any party may serve on any other party a request:

(1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test or sample any designated documents , electronically stored information any tangible things which constitute or contain matters within the scope of Rule 1-026 NMRA and which are in the possession, custody or control of the party upon whom the request is served; or

(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon, within the scope of Rule 1-026 NMRA.

B. **Procedure.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within thirty (30) days after the service of the request, except that a defendant may serve a response within forty-five (45) days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for objection. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information, or if no form was specified in the request, the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 1-037 NMRA with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders,

(1) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(2) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(3) a party need not produce the same electronically stored information in more than one form.

C. **Persons not parties.** A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 1-045 NMRA.

[As amended, effective January 1, 1998; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

Committee Commentary for 2009 Amendments. — *See* the 2009 Committee Commentary to Rule 1-026 NMRA for additional information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

ANNOTATIONS

Cross references. — For subpoena for production of documentary evidence, *see* Rule 1-045 NMRA.

The 1997 amendment, effective January 1, 1998, substituted "the requestor's behalf" for "his behalf" in Subparagraph A(1), added the last undesignated paragraph in Paragraph B, and rewrote Paragraph C.

The 2009 amendment, approved by Supreme Court Order 09-8300-007, effective May 15, 2009, in Subparagraph (1) of Paragraph A, after "inspect", changed "and copy any designated document, including writings, drawings, graphs, charts, photographs, phono records and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonable usable form, or to inspect and copy, test or sample" to "copy, test or sample any designated documents, electronically stored information or"; in Paragraph B, in the first subparagraph, added the last sentence; in Paragraph B, in the second subparagraph, in the third sentence, after "unless the request is objected to", deleted "in which event" and added "including an objection to the requested form or forms for producing electronically stored information, stating" and added the fifth sentence; in Paragraph B, in the third subparagraph, added "Unless the parties otherwise agree, or the court otherwise orders", and added Subparagraphs (2) and (3).

Compiler's notes. — This rule and Rule 1-037 NMRA are deemed to supersede 105-831, C.S. 1929, relating to inspection of papers of opposite party; 105-832, C.S. 1929, relating to a party's refusal to follow discovery offer; and 105-833, C.S. 1929, relating to vacation of the discovery order.

Definition of "parties". — These rules, as well as the common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of a lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

"Good cause" required by the rule is that of the movant, not the respondent. State ex rel. New Mexico State Hwy. Comm'n v. Taira, 78 N.M. 276, 430 P.2d 773 (1967) (decided before 1979 amendment).

Scope of examination under this rule is as broad as that under Rules 26(b) or 33 (see now Rules 1-026 and 1-033 NMRA). Davis v. Westland Dev. Co., 81 N.M. 296, 466 P.2d 862 (1970).

Term "control" in this rule embodies only two limitations: (1) a party obviously cannot be required to produce materials which he is incapable of procuring; and (2) in general, a party should not be required to obtain, collect or turn over materials which the opposing party is equally capable of obtaining on its own. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

And mere possession by different party not determinative. — It is immaterial under this rule and Rule 33 (see now Rule 1-033 NMRA), that the party subject to the discovery orders does not own the documents, or that it did not prepare or direct the production of the documents, or that it does not have actual physical possession of them. The mere fact that the documents are in the possession of an individual or entity which is different or separate from that of the named party is not determinative of the question of availability or control. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Documents and information in the separate possession of partners are subject to production in a suit in which only the partnership is named as a party. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Discovery from adverse party's experts. — Although as a general rule a party will not be allowed to obtain discovery from the adverse party's experts, a guarded relaxation of this doctrine in favor of the condemnee may, at times, be proper, at least in condemnation actions by the government. State ex rel. New Mexico State Hwy. Comm'n v. Taira, 78 N.M. 276, 430 P.2d 773 (1967).

Court's refusal to allow 30 days for discovery not abuse of discretion. — The trial court does not abuse its discretion when it refuses to allow 30 days for discovery where the motion to produce is filed three days prior to a hearing on a motion to dismiss, and where the plaintiff has filed only a motion to produce but nothing more, the plaintiff not specifying what this production will show or how it can affect the trial court's ruling. Roberts v. Piper Aircraft Corp., 100 N.M. 363, 670 P.2d 974 (Ct. App. 1983).

Willful failure to produce documents. — Where defendant's attempts to comply with court's order to produce documents came substantially after appointed time for their submission, where trips were made to have documents examined without advance

notice and where none of defendant's actions were performed with a true effort to comply with court's order, failure to produce documents was willful. Rio Grande Gas Co. v. Gilbert, 83 N.M. 274, 491 P.2d 162 (1971).

Imposing of protection provisions and conditions. — The courts, in enforcing the rules with respect to depositions and discovery, have the right to impose protective provisions and conditions. State ex rel. New Mexico State Hwy. Comm'n v. Taira, 78 N.M. 276, 430 P.2d 773 (1967).

Law reviews. — For comment, "Discovery - Disclosure of Existence and Policy Limits of Liability Insurance," see 7 Nat. Resources J. 313 (1967).

For article, "The Impact of the Revised New Mexico Class Action Rules Upon Consumers," see 9 N.M.L. Rev. 263 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 253 to 281.

Self-serving declarations in answers to bill of discovery, 1 A.L.R. 52.

Admissibility of the whole of answers to bills of discovery containing admissions, 1 A.L.R. 88.

Evidence necessary to overcome self-serving declarations in answers to bills of discovery, 1 A.L.R. 124.

Power to compel disclosure of ingredients or formula of patent or proprietary medicine, 1 A.L.R. 1476.

Validity of statute making concealment of or failure to produce books or papers presumptive evidence, 4 A.L.R. 471.

Inconvenience or expense as excuse for disobeying subpoena duces tecum, 9 A.L.R. 163.

Insurer's right to bill of discovery under terms of policy providing for autopsy, 15 A.L.R. 620, 88 A.L.R. 984, 30 A.L.R.2d 837.

Power to compel production of corporate books to aid in assessing holder of stock or his estate, 23 A.L.R. 1351.

Unlawful means by which the knowledge of the existence of papers or documents was acquired as affecting right to enforce their production, 24 A.L.R. 1429.

Presentation of claim to executor or administrator as condition precedent to suit for discovery, 34 A.L.R. 370.

Creditor's right to inspect books and records under constitutional or statutory provision relating specifically to corporations, 35 A.L.R. 752.

Permissible scope of inspection of books, records or documents, 58 A.L.R. 1263.

Right to discovery as regards facts relating to amount of damages, 88 A.L.R. 504.

Right of creditor to inspect books or papers of corporation in hands of receiver, 92 A.L.R. 1047.

Constitutionality of statute providing for inspection of books and records in supplementary proceedings, 106 A.L.R. 383.

Appearance to obtain relief in respect of statutory examination as submission to jurisdiction, 111 A.L.R. 934.

Right of beneficiary or claimant of estate to inspect books and papers in hands of trustees, executor, administrator or guardian, and conditions of such rights, 118 A.L.R. 269.

Self-incrimination privilege as justification for refusal to comply with order or subpoena requiring production of books or documents of private corporation, 120 A.L.R. 1102.

Bill of discovery or statutory remedy for discovery as available for purpose of determining who should be sued, 125 A.L.R. 861.

Practice or procedure for testing validity or scope of the command of subpoena duces tecum, 130 A.L.R. 327.

Attorney as agent within statute providing for discovery examination of party or his agent, 136 A.L.R. 1502.

Production, in response to call therefor by adverse party, of document otherwise inadmissible in evidence, as making it admissible, 151 A.L.R. 1006.

Jurisdiction of action involving inspection of books of foreign corporation, 155 A.L.R. 1244, 72 A.L.R.2d 1222.

Pretrial conference procedure as affecting right to discovery, 161 A.L.R. 1151.

Use of subpoena to compel production or use as evidence of records of writings or objects in custody of court or officer thereof, 170 A.L.R. 334.

Necessity of sufficiency under statutes and rules governing modern pretrial discovery practice, of "designation" of documents, etc., in application or motion, 8 A.L.R.2d 1134.

Discovery and inspection of article or premises the condition of which is alleged to have caused personal injury or death, 13 A.L.R.2d 657.

Discovery or inspection of trade secret, formula or the like, 17 A.L.R.2d 383.

Form, particularity and manner of designation required in subpoena duces tecum for production of corporate books, records and documents, 23 A.L.R.2d 862.

Fingerprints, palm prints or bare footprints as evidence, 28 A.L.R.2d 1115, 45 A.L.R.4th 1178.

Court's power to determine government's claim of privilege that official information contains state secrets or other matters, disclosure of which is against public interest, 32 A.L.R.2d 391.

Privilege of custodian, apart from statute or rule, from disclosure, in civil action, of official police records and reports, 36 A.L.R.2d 1318.

Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books and papers or the like, 37 A.L.R.2d 586.

Names and addresses of witnesses to accident or incident as subject of pretrial discovery, 37 A.L.R.2d 1152.

Propriety of compelling witness to testify, in pretrial proceeding, as to matters which would be prohibited in trial testimony by dead man's statute, 42 A.L.R.2d 578.

"Employee" within statute permitting examination, as adverse witness, of employee of party, 56 A.L.R.2d 1108.

Discovery and inspection of income tax return in actions between private individuals, 70 A.L.R.2d 240.

Federal Rules of Civil Procedure, construction and effect of Rules 30(b), (d), 31(d) and similar state statutes and rules, relating to preventing, limiting or terminating the taking of depositions, 70 A.L.R.2d 685.

Statements of parties or witnesses as subject of pretrial or other disclosure, production or inspection, 73 A.L.R.2d 12.

Time for filing and serving discovery interrogatories, 74 A.L.R.2d 534.

Pretrial discovery to secure opposing party's private reports or records as to previous accidents or incidents involving the same place or premises, 74 A.L.R.2d 876.

Taxation of costs and expenses in proceedings for discovery or inspection, 76 A.L.R.2d 953.

Physician's report delivered to litigant's own attorney as subject of pretrial or other disclosure, production or inspection, 82 A.L.R.2d 1162.

Time and place, under pretrial discovery procedure, for inspection and copying of opposing litigant's books, records and papers, 83 A.L.R.2d 302.

Pretrial deposition-discovery of opinions of opponents expert witnesses of, 86 A.L.R.2d 138, 33 A.L.R. Fed. 403.

Propriety of discovery interrogatories calling for continuing answers, 88 A.L.R.2d 657.

Right to elicit expert testimony from adverse party called as witness, 88 A.L.R.2d 1186.

Discovery, inspection and copying of photographs of article or premises which gave rise to litigation, 95 A.L.R.2d 1061.

Mandamus or prohibition as available to compel or to prevent discovery proceedings, 95 A.L.R.2d 1229.

Pretrial discovery of engineering reports of opponent, 97 A.L.R.2d 770.

"Managing agent" of a corporate party whose discovery-deposition may be taken under Federal Rules of Civil Procedure or state counterparts, 98 A.L.R.2d 622.

Discovery in aid of arbitration proceedings, 98 A.L.R.2d 1247.

Discovery and inspection of articles and premises in civil actions other than for personal injury or death, 4 A.L.R.3d 762.

Insurance, pretrial examination or discovery to ascertain from defendant in action for injury, death or damages, existence and amount of liability insurance and insurer's identity, 13 A.L.R.3d 822.

Party's right to use, as evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent, 13 A.L.R.3d 1312.

Scope of defendant's duty of pretrial discovery in medical malpractice action, 15 A.L.R.3d 1446.

Disclosure of name, identity, address, occupation or business of client as violation of attorney-client privilege, 16 A.L.R.3d 1047.

Discovery, in civil case, of material which is or may be designed for use in impeachment, 18 A.L.R.3d 922.

Pretrial discovery of identity of witnesses whom adverse party plans to call to testify at civil trial, 19 A.L.R.3d 1114.

Compelling party to disclose information in hands of affiliated or subsidiary corporation, or independent contractor, not made party to suit, 19 A.L.R.3d 1134.

Discovery, in products liability case, of defendant's knowledge as to injury to or complaints by others than plaintiff, related to product, 20 A.L.R.3d 1430.

Commencing action involving condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings, 21 A.L.R.3d 912.

Application of privilege attending statements made in course of judicial proceedings to pretrial deposition and discovery procedures, 23 A.L.R.3d 1172.

Pretrial discovery or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.3d 1401.

Pretrial discovery of defendant's financial worth on issue of damages, 27 A.L.R.3d 1375.

Confidentiality of proceedings or reports of judicial inquiry board or commission, 5 A.L.R.4th 730.

Insured-insurer communications as privileged, 55 A.L.R.4th 336.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings, 58 A.L.R.4th 653.

Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings, 63 A.L.R.4th 712.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 A.L.R.5th 577.

Power of court under 5 USCS § 552(a)(4)(B) to examine agency records in camera to determine propriety of withholding records, 60 A.L.R. Fed. 416.

Right of immune jury witness to obtain access to government affidavits and other supporting materials in order to challenge legality of court-ordered wiretap or electronic surveillance which provided basis for questions asked in grand jury proceedings, 60 A.L.R. Fed. 706.

Independent action against nonparty for production of documents and things or permission to enter upon land (Rule 34(c) of Federal Rules of Civil Procedure), 62 A.L.R. Fed. 935.

27 C.J.S. Discovery §§ 72 to 109.

1-035. Physical and mental examination of persons.

A. **Order for examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

B. **Report of examining physician.**

(1) If requested by the party against whom an order is made under Paragraph A of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This paragraph applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This paragraph does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

[As amended, effective January 1, 1995.]

ANNOTATIONS

The 1995 amendment, effective January 1, 1995, substituted "suitably licensed or certified examiner" for "physician" in the first sentence in Paragraph A, substituted "examiner" for "examining physician" in the first sentence and "an examiner" for "a physician" in the last sentence in Paragraph B(1), substituted "an examiner" for "an examining physician" and "the examiner" for "the physician" in Paragraph B(3), and made gender neutral changes throughout the rule.

Applicability. — This rule applies only where an examination has been ordered by the court pursuant thereto and the person examined has requested delivery of a copy of the report of that examination. State ex rel. Miller v. Tackett, 68 N.M. 318, 361 P.2d 724 (1961).

Court may refuse psychological examination of party's fiancee in child custody hearing. — The trial court does not abuse its discretion in a child custody hearing in refusing to order a psychological examination of a party's fiancee, who is not a party to the proceeding. Lopez v. Lopez, 97 N.M. 332, 639 P.2d 1186 (1981).

Court order required to stay taking of deposition. — Party seeking protective order to stay taking of deposition of witness to perpetuate testimony until court first determined competency of witness must file such motion prior to the date designated for the taking of the deposition; until a protective order is issued, there is nothing to delay the taking of the deposition. Bartow v. Kernan, 101 N.M. 532, 685 P.2d 387 (Ct. App. 1984).

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Civil Procedure," see 11 N.M.L. Rev. 53 (1981).

For annual survey of New Mexico law relating to Civil Procedure, see 13 N.M.L. Rev. 251 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 282 to 313.

Compulsory examination for venereal disease, 2 A.L.R. 1332, 22 A.L.R. 1189.

Duty of one seeking compensation under Workmen's Compensation Act to submit to X-ray examination, 6 A.L.R. 1270, 41 A.L.R. 866.

Power to require plaintiff to submit to physical examination, 51 A.L.R. 138, 68 A.L.R. 635, 91 A.L.R. 1295, 125 A.L.R. 879.

Blood test to establish identity or relationship, 115 A.L.R. 167, 163 A.L.R. 939.

Physical examination of party in action in federal court, 131 A.L.R. 810.

Nature, extent and conduct of physical examination of party to action or proceeding to recover for personal injury or disability, 135 A.L.R. 883.

Blood grouping tests, 163 A.L.R. 939, 46 A.L.R.2d 1000.

Requiring party to submit to physical examination or test as violation of constitutional rights, 164 A.L.R. 967, 25 A.L.R.2d 1407.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348, 56 A.L.R.3d 1109, 27 A.L.R.4th 61, 32 A.L.R.4th 212, 3 A.L.R.5th 237.

Admissibility of X-ray report made by physician taking or interpreting X-ray pictures, 6 A.L.R.2d 406.

Fingerprints, palm prints or bare footprints as evidence, 28 A.L.R.2d 1115, 45 A.L.R 4th 1178.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

Federal Rule of Civil Procedure 35(b)(1) and (2) and similar state statutes and rules pertaining to reports of physician's examination, 36 A.L.R.2d 946.

Power to require physical examination of injured person in action by his parent or spouse to recover for his injury, 62 A.L.R.2d 1291.

Admissibility in civil action of electroencephalogram, electrocardiogram or other record made by instrument used in medical test, or of report based upon such test, 66 A.L.R.2d 536.

Right to copy of physician's report of pretrial examination where there is no specific statute or rule providing therefor, 70 A.L.R.2d 384.

Court's power to order physical examination of personal injury plaintiff as affected by distance or location of place of examination, 71 A.L.R.2d 973.

Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident, 89 A.L.R.2d 1001.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 A.L.R.3d 1244.

Right of party to have his attorney or physician, or a court reporter, present during his physical or mental examination by a court appointed expert, 7 A.L.R.3d 881.

Timeliness of application for compulsory physical examination of injured party in personal injury action, 9 A.L.R.3d 1146.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery, 21 A.L.R.3d 912.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.3d 1401.

Right of defendant in personal injury action to designate physician to conduct medical examination of plaintiff, 33 A.L.R.3d 1012.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

Right of party to have attorney or physician present during physical or mental examination at instance of opposing party, 84 A.L.R.4th 558.

27 C.J.S. Discovery §§ 110, 111.

1-036. Requests for admissions.

A. **Request for admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Paragraph B of Rule 1-026 NMRA set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty (30) days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five (45) days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give

lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Paragraph C of Rule 1-037 NMRA, deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Subparagraph (4) of Paragraph A of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion.

B. **Effect of admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 1-016 NMRA governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

ANNOTATIONS

Cross references. — For assessment of costs on failure to admit, *see* Rule 1-037 NMRA.

For proceedings on motion for summary judgment, *see* Rule 1-056 NMRA.

Compiler's notes. — Paragraph A and Rule 1-037 are deemed to have superseded 105-834, C.S. 1929, which was substantially the same.

Request for admission of facts is discovery procedure; thus, such a request does not toll the two-year period for taking action to bring a trial to its final determination, which period is provided by Rule 41(e) (see now Rule 1-041 NMRA). Sender v. Montoya, 73 N.M. 287, 387 P.2d 860 (1963)But see; State ex rel. Reynolds v. Molybdenum Corp. of Am., 83 N.M. 690, 496 P.2d 1086 (1972).

Rule is not self-executing and if one would take advantage of its provisions all the facts necessary to invoke the consequences must be made in some way to appear. Robinson v. Navajo Freight Lines, 70 N.M. 215, 372 P.2d 801 (1962).

Use at trial of requests and responses subject to evidence rules. — As evidence, requests for admissions and responses thereto are subject to the rules of admissibility, and must be tendered under the rules for introducing evidence. Robinson v. Navajo Freight Lines, 70 N.M. 215, 372 P.2d 801 (1962).

The copy of the answer served upon party must be sworn. Robinson v. Navajo Freight Lines, 70 N.M. 215, 372 P.2d 801 (1962) (decided before 1979 amendment).

Response within reasonable time proper absent specification or motion. — This rule provides two methods by which the requesting party can have the time period designated - specification in the request and on motion and notice. The rule indicates that the reference to 10 days is merely a limitation on the former method which is not applicable if the latter method is employed, and in view of the defendant's failure to employ either method, the plaintiff cannot be held accountable if he has responded within a reasonable time. Apodaca v. Gordon, 86 N.M. 210, 521 P.2d 1159 (Ct. App. 1974) (decided before 1979 amendment).

Failure to answer request admits all matters therein. — Where plaintiff serves upon defendant a written request for the admission of facts and genuineness of documents, which request is never answered, each of the matters included in this request is deemed admitted. Aetna Life Ins. Co. v. Nix, 85 N.M. 415, 512 P.2d 1251 (1973).

Specific denial required. — An averment that neither admits nor denies the remaining allegations of the request but demands the strictest proof thereof fails to put at issue any material fact alleged in the request. Aktiengesellschaft Der Harlander, etc. v. Lawrence Walker Cotton Co., 60 N.M. 154, 288 P.2d 691 (1955).

Time and signatures requirements demand strict compliance. — The unexcused late filing of an answer to requests for admissions or the filing of an unsworn answer is equivalent to the filing of no answer providing correct procedure is complied with in making the requests for admissions. Robinson v. Navajo Freight Lines, 70 N.M. 215, 372 P.2d 801 (1962) (decided before 1979 amendment).

An unexcused failure to file a timely, sworn response is the equivalent of filing no response and that matters requested are thereby deemed admitted. Morrison v. Wyrsch, 93 N.M. 556, 603 P.2d 295 (1979) (decided under pre-1979 rule).

Denial on belief of matter within personal knowledge improper. — A matter of which party has personal knowledge, or a matter which is presumptively within his knowledge, cannot be denied on information or belief, but must be answered positively or such denial may be disregarded as an evasion. Aktiengesellschaft Der Harlander, etc v. Lawrence Walker Cotton Co., 60 N.M. 154, 288 P.2d 691 (1955).

Requests and responses not part of trial record until introduced in evidence. — While requests for admissions and responses thereto are part of the entire record, in the sense that any interrogatory or deposition becomes a part of the record because all are

filed in the clerk's office, they do not become part of the trial record proper until introduced in evidence. Robinson v. Navajo Freight Lines, 70 N.M. 215, 372 P.2d 801 (1962).

Parties on same side of suit remain separate. — These rules, as well as the common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of a lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

Failure to request withdrawal of erroneous admission. — Despite its argument that its admission as to its lack of knowledge of an injured employee's preexisting physical impairment was a typographical error, where the defendant - employer did not seek permission from the trial court for leave to amend or withdraw the admission, the admission was binding in its effect. Schreck v. Plastech Research Div., 107 N.M. 786, 765 P.2d 759 (Ct. App. 1988) (decided under pre-1988 version of 52-2-6 NMSA 1978).

Law reviews. — For comment on Sender v. Montoya, 73 N.M. 287, 387 P.2d 860 (1963), see 4 Nat. Resources J. 413 (1964).

For case note, "CIVIL PROCEDURE - New Mexico Adopts the Modern View of Collateral Estoppel: Silva v. State," see 18 N.M.L. Rev. 597 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 314 to 356.

Judicial stipulation or formal admission of facts by counsel as available upon subsequent trial, 100 A.L.R. 775.

What constitutes a "denial" within Federal Rules of Civil Procedure, Rule 36 pertaining to admissions before trial, 36 A.L.R.2d 1192.

Time for filing responses to requests for admissions; allowance of additional time, 93 A.L.R.2d 757.

Admissions to prevent continuance sought to secure testimony of absent witnesses in civil case, 15 A.L.R.3d 1272.

Party's duty, under Federal Rules of Civil Procedure 36(a) and similar state statutes and rules, to respond to requests for admission of facts not within his personal knowledge, 20 A.L.R.3d 756.

Accused's right to discovery or inspection of "rap sheets" or similar police records about prosecution witnesses, 95 A.L.R.3d 832.

Formal sufficiency of response to request for admissions under state discovery rules, 8 A.L.R.4th 728.

Permissible scope, respecting nature of inquiry, of demand for admissions under modern state civil rules of procedure, 42 A.L.R.4th 489.

Extension of time for serving response to request for admissions under Rule 36(a), as amended, of Federal Rules of Civil Procedure, 46 A.L.R. Fed. 821.

Withdrawal or amendment of admissions under Rule 36(b) of Federal Rules of Civil Procedure, 64 A.L.R. Fed. 746.

27 C.J.S. Discovery §§ 113 to 131, 133.

1-037. Failure to make discovery; sanctions.

A. **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) An application for an order to a deponent who is not a party but whose deposition is being taken within the state or for an order to a party may be made to the court where the action is pending. If a deposition is being taken outside the state, whether of a party or a nonparty, this shall not preclude the seeking of appropriate relief in the jurisdiction where the deposition is being taken.

(2) If a deponent fails to answer a question propounded or submitted under Rule 1-030 NMRA or Rule 1-031 NMRA, or a corporation or other entity fails to make a designation under Rule 1-030 NMRA or Rule 1-031 NMRA, or a party fails to answer an interrogatory submitted under Rule 1-033 NMRA, or if a party, in response to a request for inspection submitted under Rule 1-034 NMRA, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 1-026 NMRA.

(3) For purposes of this paragraph an evasive or incomplete answer is to be treated as a failure to answer.

(4) If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless

the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Any motion filed pursuant to this paragraph shall state that counsel has made a good faith effort to resolve the issue with opposing counsel prior to filing a motion to compel discovery. A motion filed pursuant to this paragraph shall set forth or have attached the interrogatory or the request for production or admission, and any response thereto.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the moving party or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. **Failure to comply with order.**

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by a court with jurisdiction, the failure may be considered a contempt of that court.

(2) If a party or an officer, director or managing agent of a party or a person designated under Rule 1-030 NMRA or Rule 1-031 NMRA to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Paragraph A of this rule or Rule 1-035 NMRA, or if a party fails to obey an order under Rule 1-026 NMRA, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(c) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(d) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(e) where a party has failed to comply with an order under Rule 1-035 NMRA requiring that party to produce another for examination, such orders as are listed in Subparagraphs (a), (b) and (c) of Subparagraph (2) of this paragraph, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C. **Expenses on failure to admit.** If a party fails to admit the genuineness of any documents or the truth of any matters as requested under Rule 1-036 NMRA, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that:

(1) the request was held objectionable pursuant to Rule 1-036 NMRA;

(2) the admission sought was of no substantial importance;

(3) the party failing to admit had reasonable grounds to believe that the party might prevail on the matter; or

(4) there was another good reason for the failure to admit.

D. **Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.** If a party or an officer, director or managing agent of a party or a person designated under Rule 1-030 NMRA or Rule 1-031 NMRA to testify on behalf of a party fails:

(1) to appear before the officer who is to take the deposition, after being served with a proper notice;

(2) to serve answers or objections to interrogatories submitted under Rule 1-033 NMRA, after proper service of the interrogatories; or

(3) to serve a written response to a request for inspection submitted under Rule 1-034 NMRA, after proper service of the request,

the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Subparagraphs (a), (b) and (c) of Subparagraph (2) of Paragraph B of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this paragraph may not be excused on the grounds that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 1-026 NMRA.

[As amended, effective October 15, 1986; August 1, 1988; August 1, 1989; January 1, 1998; as amended by Supreme Court Order 09-8300-007, effective May 15, 2009.]

Committee Commentary for 2009 Amendments. —

A number of amendments to the Rules of Civil Procedure for the District Courts were approved in 2009 to incorporate provisions from the Federal Rules of Civil Procedure addressing the discovery of electronically stored information. *See* the 2009 Committee Commentary to Rule 1-026 NMRA for additional information. However, one difference between the New Mexico and federal rules pertaining to electronic discovery is the omission of that portion of Federal Rule 37(f) commonly referred to as the “safe harbor” provision, which provides:

(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

The committee is of the view that nothing in the nature of the discovery of electronically stored information requires curtailment of the existing discretion of the district court to determine an appropriate sanction for violation of discovery rules. But even without inclusion of the federal “safe harbor” provision, the committee is of the view that New Mexico’s civil discovery rules should not treat the routine, good-faith purging of electronic files any differently than the good-faith, routine destruction of paper files according to an established records retention schedule. The destruction of electronic information pursuant to the routine, good-faith operation of an electronic information system is, of course, something the district court can take into account when considering a request for discovery sanctions. However, regardless of the form of information sought within the context of discovery, a bad faith approach to discovery warrants the imposition of sanctions. *See United Nuclear Corp. v. General Atomic Co.,* 96 N.M. 155, 241, 629 P.2d 231, 317 (1980)(“When a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of

the other litigants.”). Indeed, even under the federal safe harbor provision, one may be sanctioned for the bad faith destruction of electronically stored information.

[Adopted by Supreme Court Order 09-8300-007, effective May 15, 2009.]

ANNOTATIONS

The 1997 amendment, effective January 1, 1998, substituted "by a court with jurisdiction" for "by the court in which the action is pending" in Subparagraph B(1) and made gender neutral changes throughout the rule.

The 2009 amendment, approved by Supreme Court Order 09-8300-007, effective May 15, 2009, added the references to "NMRA".

Compiler's notes. — Paragraph C of this Rule and Rule 1-036 NMRA are deemed to have superseded 105-834, C.S. 1929, containing similar provisions relating to failure of a party to make an admission.

I. GENERAL CONSIDERATION.

Compliance with rules expected. — When plaintiff in a civil action files a lawsuit, his adversaries are entitled to generally understand that he will proceed in a lawful manner and that compliance will be had with the Rules of Civil Procedure, including those relating to discovery. Pizza Hut of Santa Fe, Inc. v. Branch, 89 N.M. 325, 552 P.2d 227 (Ct. App. 1976); Doanbuy Lease & Co. v. Melcher, 83 N.M. 82, 488 P.2d 339 (1971).

Power of court to initiate proceedings hereunder. — Trial courts have supervisory control over their dockets and inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases, and the trial judge has such inherent supervisory control that he can initiate proceedings under this rule. Pizza Hut of Santa Fe, Inc. v. Branch, 89 N.M. 325, 552 P.2d 227 (Ct. App. 1976); Miller v. City of Albuquerque, 88 N.M. 324, 540 P.2d 254 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

Written court order not required as basis for sanctions. — A court order issued under Paragraph A is not a prerequisite to imposition of Paragraph B sanctions because any clearly articulated order requiring or permitting discovery can provide the basis of sanctions for noncompliance; moreover, the order to provide or permit discovery need not be written, but can be made orally from the bench. Marchman v. NCNB Tex. Nat'l. Bank, 120 N.M. 74, 898 P.2d 709 (1995).

Power to impose sanctions at any time. — Because the award of sanctions is not an order on the judgment, the court is not limited by the statutory bar of fourteen years, and a party may be held accountable for an abuse of the discovery process under the court's inherent powers to impose sanctions at any time, subject to constitutional

limitations or equitable defenses. Gonzales v. Surgidev Corp., 120 N.M. 151, 899 P.2d 594 (1995).

Authority of administrative tribunals. — Paragraph B, together with the procedural components of the Rules Governing Discipline, authorizes the disciplinary board and its duly appointed hearing committees to impose discovery sanctions under appropriate circumstances. In re Chavez, 2000-NMSC-015, 129 N.M. 035, 1 P.3d 417.

No notice required before sanctions imposed. — Nothing in this rule requires notice before imposition of sanctions. Thornfield v. First State Bank, 103 N.M. 229, 704 P.2d 1105 (Ct. App. 1985).

Punitive damages distinguished. — Since the factual information available to the court and jury at the time of trial did not support sanctions against the defendant, sanctions could not have been included in an award of punitive damages, and an award of sanctions more than two years after the final judgment, based on discovery violations, did not duplicate the award for punitive damages; even if available information had been sufficient to sustain sanctions at the time of the trial, the sanctions would not have been subsumed by the award of punitive damages since such damages concern the defendant's misconduct toward the injured party and are noncompensatory, and civil sanctions concern the defendant's conduct toward the tribunal and are compensatory. Gonzales v. Surgidev Corp., 120 N.M. 151, 899 P.2d 594 (1995).

Law reviews. — For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M.L. Rev. 367 (1976).

For article, "New Mexico Restraint of Trade Statutes - A Legislative Proposal," see 9 N.M.L. Rev. 1 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 357 to 399; 24 Am. Jur. 2d Dismissal, Discontinuance and Nonsuit § 59.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348, 27 A.L.R.4th 61, 32 A.L.R.4th 212, 3 A.L.R.5th 237.

Default decree in divorce action as estoppel or res judicata with respect of marital property rights, 22 A.L.R.2d 724.

Power of court, in absence of express authority, to grant relief from judgment by default in divorce action, 22 A.L.R.2d 1312.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

Construction and application of state statute or rule subjecting party making untrue allegations or denials to payment of costs or attorneys' fees, 68 A.L.R.3d 209.

Attorney's conduct in delaying or obstructing discovery as basis for contempt proceeding, 8 A.L.R.4th 1181.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order for production of documents or other objects, 26 A.L.R.4th 849.

Dismissal of state court action for failure or refusal of plaintiff to obey request or order for production of documents or other objects, 27 A.L.R.4th 61.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions, 30 A.L.R.4th 9.

Dismissal of state court action for failure or refusal of plaintiff to appear or answer questions at deposition or oral examination, 32 A.L.R.4th 212.

Propriety of allowing state court civil litigant to call expert witness whose name and address was not disclosed during pretrial discovery proceedings, 58 A.L.R.4th 653.

Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings, 63 A.L.R.4th 712.

Right of defendant in criminal contempt proceeding to obtain information by deposition, 33 A.L.R.5th 761.

Existence and nature of cause of action for equitable bill of discovery, 37 A.L.R.5th 645.

Sanctions for failure to make discovery under Federal Civil Procedure Rule 37 as affected by defaulting party's good faith attempts to comply, 2 A.L.R. Fed. 811.

Effect upon court's jurisdiction of informer's suit, under 31 USCS § 232, of fact that informer was source of information possessed by government prior to suit, 49 A.L.R. Fed. 847.

Lack of notice to contemnor at time of contemptuous conduct of possible criminal contempt sanctions as affecting prosecution for contempt in federal court, 76 A.L.R. Fed. 797.

Federal district court's power to impose sanctions on non-parties for abusing discovery process, 149 A.L.R. Fed. 589.

27 C.J.S. Discovery § 79.

II. MOTION FOR ORDER.

Protection from self-incrimination. — Defendant had the right to refuse to answer certain interrogatories in a civil suit until he was protected against use of his compelled

answers, and evidence derived therefrom, in any subsequent criminal case in which he might be a defendant; absent such protection, if defendant were compelled to answer, his answers would be inadmissible against him in a later criminal prosecution. Rainbo Baking Co. v. Apodaca, 88 N.M. 501, 542 P.2d 1191 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Where defendant was not given any protection against later criminal prosecution, he had the right to refuse to orally answer several interrogatories, as well as those questions which extended beyond court order. Rainbo Baking Co. v. Apodaca, 88 N.M. 501, 542 P.2d 1191 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Substantial justification for refusal to answer. — Defendant's refusal to answer questions propounded during a deposition, where he claimed the privilege under U.S. Const., amend. V, seeking a court ruling pursuant to Rule 30(b) (see now Rule 1-026 NMRA) on whether the answers to questions propounded would reasonably tend to incriminate him and were privileged, was with substantial justification, and the trial court improperly assessed attorneys' fees and costs against him. Rainbo Baking Co. v. Apodaca, 88 N.M. 501, 542 P.2d 1191 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Response affidavit to summary judgment improperly struck. — Defendant had a duty to resist plaintiffs' motion for summary judgment with whatever evidentiary material he could produce, and the trial court was bound to consider such evidence in arriving at its decision to grant or deny the motion; the trial court mistakenly struck defendant's response affidavit on grounds that he had allegedly refused to furnish certain information contained therein to plaintiffs during discovery proceedings. Rainbo Baking Co. v. Apodaca, 88 N.M. 501, 542 P.2d 1191 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

III. FAILURE TO COMPLY WITH ORDER.

Constitutional to impose sanctions without hearing where party warned and hearing not necessary. — Where a party has been warned that failure to comply with the court's discovery orders may result in the imposition of sanctions under this rule, and where the court, pursuant to Rule 43(c) (see now Rule 1-043 NMRA) has determined that an evidentiary hearing under the circumstances is not necessary before ruling on a motion to impose sanctions, the imposition of such sanctions does not amount to a denial of due process. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

And only unreasonable sanction unconstitutional. — It is only where the sanction invoked is more stern than reasonably necessary, so as to rise to the level of a reprisal, that a denial of due process results. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Court cannot hold party in contempt until discovery order entered and disregarded. — A district court may not hold a party in contempt unless and until the district court has entered a discovery order compelling the party to act and the district court's order has been disregarded. Bellamah Corp. v. Rio Vista Apts., 99 N.M. 188, 656 P.2d 238 (1982).

Factors to be considered by court. — In determining the nature of sanctions to be imposed for noncompliance with discovery orders, the trial court must balance the nature of the offense, the potential prejudice to the parties, the effectiveness of the sanction, and the imperative that the integrity of the court's orders and the judicial process must be protected. Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

Choice of sanctions under this rule lies within sound discretion of trial court. Only an abuse of that discretion will warrant reversal. Although the severest of the sanctions should be imposed only in extreme circumstances, in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where they are clearly warranted. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Choice of sanctions imposed under this rule lies within the sound discretion of the trial court and only a clear abuse of discretion will warrant reversal of the choice of sanctions. Pittard v. Four Seasons Motor Inn, Inc., 101 N.M. 723, 688 P.2d 333 (Ct. App. 1984); Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

The choice of sanctions lies within the discretion of the trial court, and it will be reversed only for an abuse of discretion. Smith v. FDC Corp., 109 N.M. 514, 787 P.2d 433 (1990).

And court need not exhaust lesser sanctions. — Although the severest of sanctions should be imposed only when the court in its discretion determines that none of the lesser sanctions available to it would truly be appropriate, the court need not exhaust the lesser sanctions. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981); Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

But severe sanctions only imposed when party willfully at fault. — This rule applies to any failure to comply with discovery orders of the type specified. However, the sanctions provided by Subdivision (B)(2) (see now Paragraph B(2)), entailing the denial of an opportunity for a hearing on the merits, may only be imposed when the failure to comply is due to the willfulness, bad faith or fault of the disobedient party. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Severe sanctions, such as denying a party the right to a hearing on the merits, should be imposed only where there is a willful or bad faith failure to comply with a discovery order. Pittard v. Four Seasons Motor Inn, Inc., 101 N.M. 723, 688 P.2d 333 (Ct. App. 1984).

Under Paragraph B(2), a prerequisite to applying extreme discovery sanctions (such as entry of default or dismissal of a case), without a hearing on the merits, is a finding by the trial court that plaintiff's failure to comply involves a conscious or intentional failure, as distinguished from an accidental or involuntary noncompliance. Bishop v. Lloyd McKee Motors, Inc., 105 N.M. 399, 733 P.2d 368 (Ct. App. 1987).

Such as where illicit attempt to conceal information, or gross disregard for discovery. — The willfulness required to sustain the severe sanctions of this rule may be predicated upon either an illicit attempt to conceal damaging information, or a gross disregard for the requirements of the discovery process. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Conscious, intentional failure to comply with discovery requests and orders. — Dismissal of medical malpractice claims was warranted where there was a clear showing that plaintiffs' actions constituted conscious, intentional failures to comply with discovery requests and with the order of the district court, and were not accidental or involuntary actions on plaintiffs' part. Allred ex rel. Allred v. Board of Regents, 1997-NMCA-070, 123 N.M. 545, 943 P.2d 579.

In imposing stringent sanctions, courts are free to consider the general deterrent effect their orders may have on the instant case and on other litigation, provided that the party on whom they are imposed is, in some sense, at fault. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

False answers to deposition questions may be subject to Subsection D sanctions. Reed v. Furr's Supermarkets, Inc., 2000-NMCA-091, 129 N.M. 639, 11 P.3d 603, cert. denied, 129 N.M. 599, 11 P.3d 563 (2000).

A false interrogatory answer may be subject to Subsection D sanctions. Sandoval v. Martinez, 109 N.M. 5, 780 P.2d 1152 (Ct. App. 1989).

Contempt citation not improper. — Where defendant city's administrative officer directed certain deponents to comply with the directions of its attorney with regard to attendance or nonattendance, and the attorney failed to produce these deponents after proper notice and court order, there was nothing showing an abuse of discretion on the court's part in holding the attorney in contempt. Miller v. City of Albuquerque, 88 N.M. 324, 540 P.2d 254 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

Award of attorneys' fees for depositions was not abuse of discretion when imposed because of a sustained and deliberate disobedience of court orders concerning discovery. Miller v. City of Albuquerque, 88 N.M. 324, 540 P.2d 254 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

Dismissal for failure to comply with order. — Just as it is proper for a trial court to dismiss an action for failure of the plaintiff to appear for deposition under Subdivision (d) (see now Paragraph D), it is also proper to dismiss an action for failure of a plaintiff to comply with an order of the court in this case, an order to answer interrogatories. Pizza Hut of Santa Fe, Inc. v. Branch, 89 N.M. 325, 552 P.2d 227 (Ct. App. 1976).

Dismissal for willful noncompliance. — A district court may impose the sanction of dismissal for violation of discovery orders under Paragraph B when the failure to comply is due to the willfulness, bad faith, or fault of the disobedient party. Medina v. Foundation Reserve Ins. Co., 117 N.M. 163, 870 P.2d 125 (Ct. App. 1994).

The district court expressly found that the plaintiff willfully failed to comply with discovery obligations, willfully violated a discovery order, and repeatedly gave false and misleading information to the defendant; thus the plaintiff's flagrant disregard for his discovery obligations clearly justifies the sanction of dismissal. Medina v. Foundation Reserve Ins. Co., 117 N.M. 163, 870 P.2d 125 (Ct. App. 1994).

Willfulness necessary to support dismissal of complaint under Subdivision (B)(2) (see now Paragraph B(2)) is a conscious or intentional failure to comply with a court order or request, as distinguished from accidental or involuntary noncompliance, and no wrongful intent need be shown. Thornfield v. First State Bank, 103 N.M. 229, 704 P.2d 1105 (Ct. App. 1985).

But the ultimate importance of the information is not. — When a plaintiff misrepresents information during discovery, dismissal is not dependent upon whether the information goes to the merits of the case nor upon the ultimate importance of the false or deceptive information. Reed v. Furr's Supermarkets, Inc., 2000-NMCA-091, 129 N.M. 639, 11 P.3d 603, cert. denied, 129 N.M. 599, 11 P.3d 563 (2000).

Dismissal as to all defendants. — Appellate court would not say that trial court abused its discretion in dismissing as to all defendants for failure to plaintiff to obey court order to answer interrogatories. Pizza Hut of Santa Fe, Inc. v. Branch, 89 N.M. 325, 552 P.2d 227 (Ct. App. 1976).

Dismissal with prejudice was not warranted where plaintiff had supplied the required discovery before her complaint was dismissed, and the evidence did not support a finding that she willfully failed to comply with the order compelling discovery. Lopez v. Wal-Mart Stores, Inc., 108 N.M. 259, 771 P.2d 192 (Ct. App. 1989).

Dismissal with prejudice was the appropriate sanction where plaintiff lied in answers to interrogatories, and the answers (1) were not direct assertions of material

elements of a claim or defense and (2) deceived defendants about the existence of discoverable information that could have been critical to preparation for trial. Sandoval v. Martinez, 109 N.M. 5, 780 P.2d 1152 (Ct. App. 1989).

Dismissal must be for discovery abuse. — Paragraph D does not empower a judge to dismiss a claim because of perjury regarding the material issues in the case. The purpose of the rule is to curb discovery abuse which would impair preparation for trial, as opposed to merely outlining which issues are in dispute. Bustillos v. Construction Contracting, 116 N.M. 673, 866 P.2d 401 (Ct. App. 1993).

Plaintiff's credibility. — District court's assessment of credibility as it relates to abuse of the discovery process is merely a determination of whether the party was providing answers that obstructed the discovery process. This determination, while it does involve credibility and truthfulness, does not preempt trial on the merits because the district court is not deciding the truth of the merits or the ultimate facts of the case. Reed v. Furr's Supermarkets, Inc., 2000-NMCA-091, 129 N.M. 639, 11 P.3d 603, cert. denied, 129 N.M. 599, 11 P.3d 563 (2000).

Default judgment justified. — Where defendant's attempts to comply with court's order to produce documents came substantially after appointed time for their submission, where trips were made to have documents examined without advance notice and where none of defendant's actions were performed in a true effort to comply with court's order, failure to produce documents was willful and justified default judgment; denial of motion to vacate same did not constitute an abuse of discretion. Rio Grande Gas Co. v. Gilbert, 83 N.M. 274, 491 P.2d 162 (1971).

Deliberately storing documents in foreign country may be basis of default judgment. — Where there is substantial evidence to support a finding that a party followed a deliberate policy of storing documents in a foreign country, and that this policy amounted to courting legal impediments to their production, this finding may be the basis for the imposition of such a discovery sanction as a default judgment. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

And, upon default, complaint's allegations taken as true. — When a party takes a cavalier approach to its discovery obligations, the entry of a default judgment is an appropriate sanction. Upon the default, the allegations of the complaint are taken as true. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Court may enter default judgment sua sponte. — The sanction of judgment by default, pursuant to Subdivision (B)(2) (see now Paragraph B(2)), is available with or without a request by the party entitled to the judgment: The court may enter the judgment sua sponte. Thornfield v. First State Bank, 103 N.M. 229, 704 P.2d 1105 (Ct. App. 1985).

Authority of different judges of same court. — Prior oral interlocutory order, made by one judge, staying discovery depositions pending decision on a motion to dismiss, did not divest another judge of the same court of authority to enter a subsequent interlocutory order concerning depositions in the same case, or to enter orders imposing sanctions when his discovery orders were violated. Miller v. City of Albuquerque, 88 N.M. 324, 540 P.2d 254 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

An order requiring that the judgment be paid by a nonparty is not an appropriate sanction for violation of a discovery order. Smith v. FDC Corp., 109 N.M. 514, 787 P.2d 433 (1990).

Intimidation of witnesses. — A court finding that a party had intimidated witnesses and caused them to fail to appear at their scheduled depositions, in violation of the court's order, was sufficient to support an award of expenses and fees in pursuing a motion for sanctions. Marchman v. NCNB Tex. Nat'l. Bank, 120 N.M. 74, 898 P.2d 709 (1995).

Failure to supplement disclosure of witnesses. — The failure to comply with the duty to seasonably supplement the disclosure of witnesses subjects a party to the discovery sanctions. Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

IV. EXPENSES ON FAILURE TO ADMIT.

Order and findings mandatory. — Compliance with Subdivision (c) (see now Paragraph C) is mandatory, and trial court must enter an order either requiring payment of the expenses or finding that there were good reasons for denying such expenses or that the admissions sought were of no substantial importance; however, this does not mean that the trial court has no discretion in the matter. Schrib v. Seidenberg, 80 N.M. 573, 458 P.2d 825 (Ct. App. 1969).

Where defendant admitted one and denied five requested findings, and trial court denied motion for reasonable expenses incurred in proving the facts, case would be remanded for compliance with Subdivision (c) (see now Paragraph C). Schrib v. Seidenberg, 80 N.M. 573, 458 P.2d 825 (Ct. App. 1969).

Obstructive behavior as factor. — So long as an award of attorney fees under Subsection A of 40-4-7 NMSA 1978 does not duplicate a sanction imposed for discovery abuse, obstructive behavior of a party during litigation is an appropriate factor for consideration in making such an award. Hakkila v. Hakkila, 112 N.M. 172, 812 P.2d 1320 (Ct. App. 1991).

V. FAILURE TO ATTEND OR SERVE ANSWERS.

"Willful failure". — Wrongful intent to disregard the requirements of this rule is not necessary to constitute a willful failure to appear, but willful failure does imply a conscious or intentional failure, as distinguished from an accidental or involuntary

noncompliance. Kalosha v. Novick, 77 N.M. 627, 426 P.2d 598 (1967); Sandoval v. United Nuclear Corp., 105 N.M. 105, 729 P.2d 503 (Ct. App. 1986).

Misunderstanding or misapprehension does not import willfulness. Kalosha v. Novick, 77 N.M. 627, 426 P.2d 598 (1967).

Failure to comply by reason of the intervention of foreign law, ill health, financial inability or absence from the country cannot be said to constitute a willful failure. Kalosha v. Novick, 77 N.M. 627, 426 P.2d 598 (1967).

Absent willful failure, sanctions of this rule are not applicable and cannot properly be imposed (reversing dismissal of complaint with prejudice for failure of deponents, Russian citizens, to appear before officer for depositions). Kalosha v. Novick, 77 N.M. 627, 426 P.2d 598 (1967).

Sanction for inadequate answers. — Where defendant's responses were both inadequate and inaccurate, and the shortcomings were material, trial court had the power to impose a sanction without first ordering compliance under Paragraph A. Enriquez v. Cochran, 1998-NMCA-157, 126 N.M. 196, 967 P.2d 1136, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

Mere statement did not excuse failure to appear for deposition. — Bold, unsupported statement that to appear at a deposition was "utterly impossible for personal reasons" was no excuse for failure to appear. Wieneke v. Chalmers, 73 N.M. 8, 385 P.2d 65 (1963).

Dismissal with prejudice authorized. — Rule 41(b) (see now Rule 1-041 NMRA) deals with sanctions available for use during the trial, whereas Subdivision (d) (see now Paragraph D) spells out sanctions for failure to give a deposition or answer interrogatories, and is adequate in itself to allow a dismissal with prejudice. Chalmers v. Hughes, 83 N.M. 314, 491 P.2d 531 (1971).

Failure to attend deposition sufficient cause for dismissal. — Mere failure of a party to attend his deposition is adequate in itself to allow dismissal with prejudice. Pizza Hut of Santa Fe, Inc. v. Branch, 89 N.M. 325, 552 P.2d 227 (Ct. App. 1976).

Actions amounting to refusal to appear. — Where the statements of the corporate plaintiff's president, who was an attorney, consisted of evasions, expressions of hostility, insults, admonitions, objections, demands that counsel explain what bearing questions had upon the issues as prerequisites to answering, arguments, statements of inability to remember which strained credulity to the breaking point and refusals to answer questions, president's actions amounted to a refusal to appear and the action was not improperly dismissed. Doanbuy Lease & Co. v. Melcher, 83 N.M. 82, 488 P.2d 339 (1971).

Condition for vacating dismissal not improper. — It was not an abuse of discretion for trial court to require that plaintiff pay attorney's fees and expenses as a condition for vacating order of dismissal made for plaintiff's failure to answer interrogatories. Pizza Hut of Santa Fe, Inc. v. Branch, 89 N.M. 325, 552 P.2d 227 (Ct. App. 1976).

Res judicata effect of dismissal with prejudice. — Dismissal with prejudice, in alleged landowner's previous quiet title suit against plaintiff and others, after landowner had twice refused to permit her deposition to be taken, constituted an adjudication on the merits and was res judicata in plaintiff's later quiet title suit against purchasers from alleged landowner; such dismissal quieted title in plaintiff and extinguished any claim to title which alleged landowner might have had. Chalmers v. Hughes, 83 N.M. 314, 491 P.2d 531 (1971).

Default judgment was properly entered where, for 10 months, defendants failed to comply with the Rules of Civil Procedure relating to discovery and in addition filed a consent to withdrawal of their attorneys and failed to obtain other attorneys, failed to appear at the hearing on the motion for default judgment and failed to show any cause, oral or written, why default judgment should not be entered. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Lesser sanctions proper. — For violation of Subdivision (d) (see now Paragraph D), court is not limited to imposing the drastic sanction of default or no sanction at all; court had authority to impose lesser sanction of payment of attorneys' fees. Miller v. City of Albuquerque, 88 N.M. 324, 540 P.2d 254 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

Contempt order separate from order to pay attorneys' fees. — Contention that a court order that defendant and his attorney pay certain attorneys' fees was an improper modification of court's contempt order pending on appeal was without foundation, where, at the hearing in which plaintiffs sought attorneys' fees under this rule, judge pointed out it was beyond court's jurisdiction to modify the contempt order, and the record showed that order concerning attorneys' fees was separate and distinct from the contempt order. Miller v. City of Albuquerque, 88 N.M. 324, 540 P.2d 254 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

Excludable alien status excusing noncompliance. — Termination of an employee's workmen's compensation benefits for failure to appear for a scheduled deposition was reversible error where his status as an excludable alien made him legally not eligible to enter the United States, constituting an excuse for noncompliance, and alternative methods of discovery were available and could have been utilized. Sandoval v. United Nuclear Corp., 105 N.M. 105, 729 P.2d 503 (Ct. App. 1986).

Baseless objection may justify default sanction. — Serving a baseless objection in response to an interrogatory or a request for production may amount to a failure to respond which would justify the sanction of default in the absence of a court order compelling discovery. The circumstances, however, would have to be particularly

egregious to justify sanctions under Paragraph D. State ex rel. New Mexico State Police Dep't v. One 1978 Buick, 108 N.M. 612, 775 P.2d 1329 (Ct. App. 1989).

Objections held not failure to respond. — Litigant's objections were not the equivalent of a failure to respond in a civil forfeiture case, where he had a colorable claim that he could not be compelled to provide information that could be used against him in a forfeiture proceeding predicated on offenses allegedly committed by him, even in the absence of a threat of criminal prosecution. State ex rel. New Mexico State Police Dep't v. One 1978 Buick, 108 N.M. 612, 775 P.2d 1329 (Ct. App. 1989); State ex rel. Albuquerque Police Dep't v. One Black 1983 Chevrolet Van, 120 N.M. 280, 901 P.2d 211 (Ct. App. 1995).

ARTICLE 6
Trials

1-038. Jury trial in civil actions.

A. **Jury demand.** In civil actions any party may demand a trial by jury of any issue triable of right by serving upon the other parties a demand therefor in writing after the commencement of the action and not later than ten (10) days after service of the last pleading directed to such issue, and filing the demand as required by Paragraph D of Rule 1-005 NMRA.

B. **Jury; twelve-person or six-person juries.**

(1) A jury of either six persons or twelve persons may be demanded.

(2) Unless a party, in the party's demand for trial by jury, specifically demands trial by a jury of twelve persons, the party shall be deemed to have consented to trial by a jury of six persons under the conditions and provisions hereinafter set out.

(3) If any party initially demands a six-person jury, any other party may demand a twelve-person jury by serving upon the other party or parties a demand therefor in writing after the commencement of the action and not later than ten (10) days after service of a six-person jury demand or after service of the last pleading directed to such issue, whichever is later.

C. **Payment of jury fees.** Any party initially demanding a jury of six persons shall, at the time of filing of the jury demand, deposit with the clerk of the court a non-refundable jury fee of one hundred fifty dollar ($150.00), and after the first day of trial shall deposit one hundred fifty dollar ($150.00) additional upon commencement of court on each subsequent day the attendance of the jury is required for the trial. Any party initially demanding a jury of twelve persons shall, at the time of filing the jury demand, deposit with the clerk of the court a non-refundable jury fee of three hundred dollars ($300.00), and after the first day of trial, shall deposit three hundred dollars ($300.00) additional

upon commencement of court upon each subsequent day the attendance of the jury is required for the trial. If a jury of six persons has been initially demanded and another party subsequently files a demand for a jury of twelve persons, each party shall deposit with the clerk of the court for and on account of jury fees the sum of one hundred fifty dollar ($150.00) and each party shall deposit one hundred fifty dollar ($150.00) additional upon commencement of court upon each subsequent day the attendance of the jury is required for the trial.

D. **Waiver.** Trial by jury is waived by:

(1) failing to file and serve a demand as required by this rule;

(2) failing to make a jury fee deposit as required by this rule;

(3) failing to appear at trial;

(4) filing a waiver of jury trial; or

(5) oral consent, in open court, entered in the record. A demand for trial by jury may not be withdrawn without the consent of the parties.

E. **Challenges in civil cases.** The court shall permit the parties to a case to express in the record of trial any challenge to a juror for cause. The court shall rule upon the challenge and may excuse any juror for good cause. Challenges for good cause and peremptory challenges will be made outside the hearing of the jury. The party making a challenge will not be announced or disclosed to the jury panel but each challenge will be recorded by the clerk. The opposing parties will alternately exercise peremptory challenges. In cases tried before a jury of six, each party may challenge three jurors peremptorily. In cases tried before a jury of twelve, each party may challenge five jurors peremptorily. When there are two or more parties defendant, or parties plaintiff, they will exercise their peremptory challenges jointly and if all cannot agree on a challenge desired by one party on a side, that challenge shall not be permitted. However, if the relief sought by or against the parties on the same side of a civil case differs, or if their interests are diverse, or if cross-claims are to be tried, the court shall allow each such party on that side of the suit three peremptory challenges if the case is to be tried before a jury of six or five peremptory challenges if the case is to be tried before a jury of twelve.

F. **Six-member jury; majority verdict.** In civil cases tried to a jury of six persons, when the jury, or as many as five of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreperson; the verdict must be in writing, signed by the foreperson and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is the juror's verdict; if upon such inquiry or polling, more than one of the jurors disagree

thereto, the jury must be sent out again but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case.

G. **Majority verdict in civil causes tried before a jury of twelve.** In civil causes tried before a jury of twelve, when the jury, or as many as ten of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreperson; the verdict must be in writing, signed by the foreperson and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is the juror's verdict; if upon such inquiry or polling more than two of the jurors disagree thereto, the jury must be sent out again but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case.

H. **Costs.** Jury fees paid by a party shall be taxed as a part of the costs of the case against the party losing the case.

I. **Stipulation to jury.** Notwithstanding any other provisions of this rule, if a six-person jury has been demanded and no other party has made a timely demand for a jury of twelve persons, all parties may, by unanimous agreement, file a stipulation to trial by a jury of twelve persons. Such stipulation shall be filed no later than thirty (30) days prior to the commencement of trial. In such a case, the jury fee shall be divided pro rata among all the parties.

J. **Dismissal of party demanding jury or withdrawal of jury demand.** When any party who has demanded a jury has been dismissed from a lawsuit or withdraws the party's jury demand prior to the commencement of trial, the district court shall apportion the payment of the jury fee among the remaining parties who desire the matter be tried to a jury as shall be fair and just under the circumstances. Nothing contained in this rule shall require the district court to apportion any amount of the jury fee against any particular party.

K. **Non-refundable jury fees.** Jury fees may not be refunded by the clerk, but shall be deposited in the manner provided by law.

[As amended, effective August 1, 1989; August 27, 1999; February 1, 2001; as amended by Supreme Court Order No. 08-8300-34, effective December 15, 2008.]

ANNOTATIONS

Cross references. — For trial by jury or court, *see* Rule 1-039 NMRA.

For juries of less than 12, *see* Rule 1-048 NMRA.

For waiver of trial by jury, *see* Rule 1-052 NMRA.

For constitutional right to trial by jury, *see* N.M. Const., art. II, § 12.

For right to jury trial in the metropolitan court, *see* Section 34-8A-5 NMSA 1978.

For jury and witness fee fund, *see* Section 34-9-11 NMSA 1978.

The 1999 amendment, effective August 27, 1999, in Paragraph C, substituted "a non-refundable jury fee" for "for and on account of jury fees the sum" in the first and second sentences and substituted "the attendance of the jury is required for the trial" for "the jury shall be engaged in trial of the same" in all three sentences; added Paragraph K; and made stylistic changes.

The 2000 amendment, effective February 1, 2001, in Paragraph A, deleted "a jury by" following "triable of right by" and inserted "and filing the demand as required by Paragraph D of Rule 1-005 NMRA"; rewrote Paragraph D; and, in Paragraph H, substituted "Jury fees" for "In civil cases the fees of a".

The 2008 amendment, approved by Supreme Court Order No. 08-8300-34, effective December 15, 2008, in Paragraph C, increased the jury fee for a jury of six persons from $100.00 to $150.00; increased the jury fee for a jury of twelve persons from $200.00 to $300.00; and increased the jury fee to be paid by each party if a party demands that the initial jury of six persons be increased to a jury of twelve persons from $100.00 to $150.00.

Compiler's notes. — Paragraph B, which prior to amendment is deemed to have superseded Trial Court Rule 105-812, derived from 105-812, C.S. 1929, relating to notice of jury trial and placing of the cause upon the jury trial docket.

Together with Rule 1-040 NMRA, Paragraph B of this rule is deemed to have superseded 105-814, C.S. 1929, relating to calling of the docket and waiver of jury trial.

If and when the trial court reverses its ruling on a challenge of a juror for cause, the court should ask the party whose challenge was overruled if that party wishes to use a peremptory challenge retroactively. Benavidez v. City of Gallup, 2007-NMSC-026, 141 N.M. 808, 161 P.3d 853.

Constitutionality. — Subdivision (d) (see now Paragraph D) does not contravene N.M. Const., art. II, § 12, and is a reasonable procedural regulation. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

Rules not precluded by constitutional guaranty. — Constitutional guaranty of the right of trial by jury does not preclude the adoption of reasonable rules of court providing that a litigant shall not be entitled to a jury trial unless he makes demand within the time and in the manner specified. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

Right of jury trial provisional. — Right of jury trial on any issue of fact presented by the pleadings is provisional, and if the evidence fails to form such issue of fact, the right of jury trial disappears. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966).

Complaint of legal nature. — Where plaintiff's amended complaint was legal in nature, not equitable, and timely demand was made for the trial by jury, plaintiff was entitled to trial by jury as of right. Barber's Super Mkts., Inc. v. Stryker, 84 N.M. 181, 500 P.2d 1304 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972).

Suit to establish trust. — In a suit primarily to establish a trust and right to damages, plaintiff was not entitled to a jury trial as a matter of right. Drake v. Rueckhaus, 68 N.M. 209, 360 P.2d 395 (1961).

Right to jury trial in eminent domain proceedings determined by civil rules. — The right to trial by jury and the waiver thereof in eminent domain proceedings shall be determined in the manner provided for in ordinary civil cases, cases governed by the Rules of Civil Procedure. El Paso Elec. v. Real Estate Mart, Inc., 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

And property interests of each condemnee constitute separate claim. — In an eminent domain proceeding, the property interests of one condemnee are a claim separate from another. Therefore, each party who waives trial by jury shall be tried by the court separately (or together, unless severance is ordered) and a demand for jury trial made by certain defendants does not act as a demand for other defendants. El Paso Elec. v. Real Estate Mart, Inc., 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

Each defendant seeking adverse interests must impose burden upon other. — To have "adverse, antagonistic or different interests" in a lawsuit, each defendant must seek to impose upon another a burden or responsibility which would relieve the other of liability in the case. Strickland v. Roosevelt County Rural Elec. Coop., 94 N.M. 459, 612 P.2d 689 (Ct. App. 1980), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

One is entitled to demand jury trial of right when contesting a will. Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Right to jury trial of legal issues in compulsory counterclaim. — See Evans Fin. Corp. v. Strasser, 99 N.M. 788, 664 P.2d 986 (1983).

Six-member jury unless specific demand for 12-member jury. — Unless specific demand is made for a jury of 12, the parties are considered to have agreed to a jury of six. Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Trial de novo on appeal. — On appeals from justice of the peace courts (now magistrate courts), district court is not bound by rules and procedure applicable thereto,

and trial de novo in district court does not presuppose a jury trial if other considerations which would require it are absent. Reece v. Montano, 48 N.M. 1, 144 P.2d 461 (1943).

Amendment creating jury issues. — Under this rule, when a party amends his pleading so as to create jury issues, he is entitled to a jury trial upon timely demand, this rule also applies where a claim is completely changed from an equitable proceeding to one at law. Barber's Super Mkts., Inc. v. Stryker, 84 N.M. 181, 500 P.2d 1304 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972).

No waiver absent basis for choice. — In suit to quiet title to certain real estate, where originally defendants failed to plead possession and sought affirmative equitable relief, they had no basis for choice on whether to demand or waive a jury, and accordingly had not waived right to jury trial; their amended answer alleging possession and abandoning request for affirmative equitable relief placed these defendants for the first time in a position to demand a jury, so that their jury demand was timely made under Subdivision (d) of this rule (see now Paragraph D). Griego v. Roybal, 79 N.M. 273, 442 P.2d 585 (1968).

Failure to timely serve demand for jury. — Where, after trial court sustained motion to strike plaintiff's demand for jury trial for failure to timely serve same on defendants, a further motion was filed by plaintiff to set aside this order, to which motion was attached a copy of the jury docket listing the case, but there was no showing that defendant's counsel were present at the call of the jury docket or had notice of fact that the case was listed upon the docket until after time for service of demand had expired, trial court had broad discretion in determining whether to grant a jury trial under the facts and circumstances. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

Where there is proof that an answer was mailed on November 22, 1978, the fact that this answer was not received until November 27, 1978, does not aid the plaintiff's untimely demand for a jury trial because service is complete upon mailing; therefore, a jury demand, served on December 5, 1978, is not served within 10 days of service of the answer and is waived. Myers v. Kapnison, 93 N.M. 215, 598 P.2d 1175 (Ct. App. 1979).

Where defendant failed to file a timely request for a jury trial pursuant to this rule, defendant's argument that their failure to exercise a demand for a jury trial results from the lack of clarity in plaintiff's complaint as to the nature of the action failed where the language of plaintiff's complaint was sufficient to fairly give notice to defendants that the action against them sounded in tort. Foster v. Luce, 115 N.M. 331, 850 P.2d 1034 (Ct. App. 1993).

Time of jury element in probate proceeding. — In a probate proceeding, the jury demand may be filed not later than ten days after service of the objections, provided that such date is a reasonable amount of time prior to the date set for hearing and the district court does not find that the jury demand was filed solely for purposes of delay or

other improper purpose. Estate of Lytton v. Lozoya, 2001-NMCA-030, 130 N.M. 258, 23 P.3d 933.

Where no jury demand for strategic purposes, court may later deny new trial. — The denial of a motion for a new trial does not constitute an abuse of discretion where a demand for a jury trial was initially not filed at the time of the commencement of the action as a matter of trial strategy. El Paso Elec. v. Real Estate Mart, Inc., 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

Party abandons motion to strike jury demand by proceeding to trial by jury. — Where the movant fails to proceed to seek a determination of his motion to strike a jury demand, but proceeds to trial by jury, this conduct constitutes a waiver or abandonment of his motion, precluding its consideration in an appeal. Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981)(specially concurring opinion).

Party does not always lose right to jury trial by failing to comply with demand procedures. Peay v. Ortega, 101 N.M. 564, 686 P.2d 254 (1984).

Burden on plaintiff to show abuse of discretion. — Trial court's ruling denying motion to set aside order for jury trial was presumed to be valid and the burden rested on plaintiff to show the manner in which court abused its discretion. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

Waiver of jury in quiet title suit. — Right to jury trial granted to one in possession of real estate in suit to deprive him of same, as guaranteed by N.M. Const., art. II, § 12, can be waived by defendant in possession affirmatively seeking to quiet title in himself. Griego v. Roybal, 79 N.M. 273, 442 P.2d 585 (1968).

Jury waived. — Under 105-814, C.S. 1929 (now superseded), where defendant was in court when case was set for trial with consent of the parties and did not demand a jury, and afterwards the case was submitted on the date set for such trial, the defendant, then making no objection to the proceedings and not demanding a jury, was not in a position to complain that there was no submission to a jury. Porter v. Alamocitos Land & Live Stock Co., 32 N.M. 344, 256 P. 179 (1925).

Waiver of jury trial by conduct. — Since the claimant was aware that the trial court intended to conduct a bench trial, but failed to inform the trial court that she wanted a jury trial, her conduct amply demonstrated that she intended to waive the right to a jury trial; therefore, the purpose of this rule was fulfilled. Hull v. Feinstein, 2003-NMCA-052, 133 N.M. 531, 65 P.3d 266, cert. denied, 133 N.M. 539, 65 P.3d 1094 (2003).

Effect of amending pleading on previous waiver. — When a jury has been waived by failure to make timely demand, the right to a jury trial is not automatically revived by the filing of an amended pleading; party who amends his pleadings is entitled to a jury trial only as to new issues raised by the amended pleading. Griego v. Roybal, 79 N.M.

273, 442 P.2d 585 (1968); Davis v. Severson, 71 N.M. 480, 379 P.2d 774 (1963); Morrison v. Wyrsch, 93 N.M. 556, 603 P.2d 295 (1979).

Allowance of amendment of plaintiff's complaint did not imply that court thought new or different issues were raised thereby, or that right to jury trial previously waived was thereby revived. Davis v. Severson, 71 N.M. 480, 379 P.2d 774 (1963).

Discretion of trial court to grant jury trial after waiver. — The granting of motion for trial by jury was a matter within the discretion of the trial court, even though a jury had been waived pursuant to this rule. Alford v. Drum, 68 N.M. 298, 361 P.2d 451 (1961).

Affirmative waiver. — Under former version of rule, before a party could call upon his adversary to file an election as to whether he demanded a jury trial, he had to first affirmatively waive a jury by filing with the court clerk a written notice to that effect, and notice directing the other party to elect was not enough to inform him of that waiver. Pouliot v. Box, 56 N.M. 566, 246 P.2d 1050 (1952).

Equalization of peremptory challenges unauthorized. — Paragraph E does not authorize an equalization of peremptory challenges and does not violate the right to equal protection under the New Mexico or federal constitutions. Gallegos ex rel. Gallegos v. Southwest Community Health Servs., 117 N.M. 481, 872 P.2d 899 (Ct. App. 1994).

Peremptory challenges by multiple parties. — Where multiple plaintiffs employed the same attorneys, relief sought did not differ and nothing indicated that plaintiffs' interests were diverse, the trial court did not err in limiting the plaintiffs to five peremptory challenges. Trotter v. Callens, 89 N.M. 19, 546 P.2d 867 (Ct. App.), cert. denied, 89 N.M. 207, 549 P.2d 285 (1976).

Right to peremptory challenges in civil cases, something unknown to the common law, is not a right to select but to reject jurors, and, for its scope, the court had to look to former statute; thus, opposite parties, though plural, were required to join in exercise of their peremptory challenges. Morris v. Cartwright, 57 N.M. 328, 258 P.2d 719 (1953).

Defendants were held to have diverse interests, and therefore it was not error to award each one five peremptory challenges. Carraro v. Wells Fargo Mtg. & Equity, 106 N.M. 442, 744 P.2d 915 (Ct. App. 1987).

If the interests of multiple parties on the same side of the lawsuit are diverse, the trial court shall allow each party on that side of the lawsuit five peremptory challenges. Because the decision necessarily must be made before the beginning of the trial, the trial court's decision is based on the pleadings in the case and the assertions of the parties. Gallegos ex rel. Gallegos v. Southwest Community Health Servs., 117 N.M. 481, 872 P.2d 899 (Ct. App. 1994).

A solitary plaintiff was not entitled to additional challenges even though the two defendants were awarded five challenges each. Carraro v. Wells Fargo Mtg. & Equity, 106 N.M. 442, 744 P.2d 915 (Ct. App. 1987).

"Different relief" is not defined in the rule, but the legislature did not intend the phrase to mean simply different causes of action that seek different money damages. Rather, the phrase refers to situations where the relief requested by one party conflicts with the relief sought by another party. Apodaca v. AAA Gas Co., 2003-NMCA-085, 134 N.M. 77, 73 P.3d 215.

Different plaintiffs that request money damages are not asking for "different relief." Apodaca v. AAA Gas Co., 2003-NMCA-085, 134 N.M. 77, 73 P.3d 215.

"Different relief" means different forms of relief such as mandamus, money damages, prospective injunctions and declaratory judgment; the relief sought may also be "different" where one plaintiff seeks a form of injunctive relief that is contrary to the injunctive relief sought by another plaintiff. Apodaca v. AAA Gas Co., 2003-NMCA-085, 134 N.M. 77, 73 P.3d 215.

Separate peremptory challenges given one of multiple defendants. — In medical malpractice action against three physicians, trial court properly granted defendant five separate peremptory challenges in addition to five joint challenges for other defendants where his interests were antagonistic to those of other defendants based on pleadings and effect of comparative negligence doctrine. Sewell v. Wilson, 101 N.M. 486, 684 P.2d 1151 (Ct. App. 1984).

Granting additional jury challenges. — A trial court should consider the following factors in determining whether to grant additional jury challenges: (1) whether the parties employed the same attorneys, (2) whether separate answers were filed; (3) whether the parties' interests were antagonistic; and, (4) in a negligence claim, whether different independent acts of negligence are alleged in a suit governed by comparative negligence. Gallegos v. Citizens Ins. Agency, 108 N.M. 722, 779 P.2d 99 (1989).

The determination of whether to grant additional jury challenges rests within the sound discretion of the trial court. Gallegos v. Citizens Ins. Agency, 108 N.M. 722, 779 P.2d 99 (1989).

Written answers to special interrogatories not modifiable by oral answers. — Written answers made by a jury to special interrogatories cannot be modified by oral answers of the jurors to questions by the court. Sanchez v. Martinez, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982).

Verdict should express clear intent of jury to award damages. — The verdict should leave no question as to the clear intent of the jury to render an award of damages and as to the amount of damages. Casarez v. Garcia, 99 N.M. 508, 660 P.2d 598 (Ct. App. 1983).

Final verdict takes effect upon discharge of jury. — The second sentence of subsection F reflects the general rule that there is no final verdict until the jury has been discharged. Hurst v. Citadel, Ltd., 111 N.M. 566, 807 P.2d 750 (Ct. App. 1991).

Jury polling improper to determine damage award amount or to reveal factual determinations. — Polling of a jury is not proper to determine the amount of a damage award or for the purpose of revealing its determination of factual issues, since jury verdicts are required to be written. Sanchez v. Martinez, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982).

There was no basis for taxing jury costs against plaintiff under this rule where no jury was selected to try the case. Read v. Western Farm Bureau Mut. Ins. Co., 90 N.M. 369, 563 P.2d 1162 (Ct. App. 1977).

Awarding jury costs to plaintiff held error. — See Carraro v. Wells Fargo Mtg. & Equity, 106 N.M. 442, 744 P.2d 915 (Ct. App. 1987).

Refund of jury fees. — Under this rule, prior to amendment, a refund of jury fees was apparently prohibited except in the one situation set forth, as otherwise parties might merely make deposits for the purpose of gaining settlements or postponing trial of the case. 1943-44 Op. Att'y Gen. No. 4600.

Setting case for trial. — Under 105-812, C.S. 1929 (now superseded), it was not reversible error to set the case for trial before the issues were made up, where it was not tried at the time or place fixed, but was actually tried at a later time and different place without objection. Owen v. Thompson, 29 N.M. 517, 224 P. 405 (1924).

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For survey, "Article VII of the New Probate Code: In pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

For note, "Undue Influence in Wills - Evidence - Testators' Position Changes After In re Will of Ferrill," see 13 N.M.L. Rev. 753 (1983).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 9 Am. Jur. 2d Bankruptcy §§ 573 to 578; 22 Am. Jur. 2d Declaratory Judgments § 230; 47 Am. Jur. 2d Jury § 3 et seq.

Statute requiring claims for carriers' refund of overcharges to be submitted to public service commission as infringement of right to jury trial, 3 A.L.R. 203.

Right to jury trial in proceeding for removal of public officer, 3 A.L.R. 232, 8 A.L.R. 1476.

Statute providing for revocation of license of physician, surgeon or dentist as denial of right to trial by jury, 5 A.L.R. 94, 79 A.L.R. 323.

Statute conferring on chancery courts power to abate public nuisances as invasion of constitutional guaranty of jury trial, 5 A.L.R. 1480, 22 A.L.R. 542, 75 A.L.R. 1298.

Request by both parties for directed verdict as waiver of submission to jury, 18 A.L.R. 1433, 68 A.L.R.2d 300.

Statute requiring appellate review of evidence, 19 A.L.R. 746, 24 A.L.R. 1267, 33 A.L.R. 10.

Attorney's right to jury trial where he is charged with failure to turn over money or property to client, 22 A.L.R. 1501.

Statutes giving right to jury trial in contempt proceedings for violating injunction in industrial disputes, 27 A.L.R. 423, 35 A.L.R. 460, 97 A.L.R. 1333, 106 A.L.R. 361, 120 A.L.R. 316, 124 A.L.R. 751, 127 A.L.R. 868.

Statute providing for injunctions against nuisance arising from violation of liquor law as denying right of trial by jury, 49 A.L.R. 642.

Reduction or increase of verdict by court without giving party affected option to submit to new trial, 53 A.L.R. 779, 95 A.L.R. 1163.

Will contest, 62 A.L.R. 82.

Statute providing for consolidation or merger of public utility corporations as invasion of right to jury trial, 66 A.L.R. 1568.

Statute or rule of court providing for summary judgment in absence of affidavit of merits as infringement of right to jury trial, 69 A.L.R. 1031, 120 A.L.R. 1400.

Equity jurisdiction to cancel insurance policy, upon ground within incontestable clause prior to termination of period, as depriving beneficiary of right to jury trial, 73 A.L.R. 1533, 111 A.L.R. 1275.

Constitutionality, construction and effect of statute providing for jury trial in disbarment proceedings, 78 A.L.R. 1323.

Statute in relation to subject matter or form of instructions by court as impairing constitutional right to jury trial, 80 A.L.R. 906.

Injunction against unlicensed practice of profession, or conduct of business without license, 81 A.L.R. 297, 92 A.L.R. 173.

Declaratory judgment action as infringement of right to jury trial, 87 A.L.R. 1209.

Statute prohibiting new trial on ground of inadequacy of damages, 88 A.L.R. 954.

Deprivation of jury trial as objection to injunction to prevent unlicensed practice of law, 94 A.L.R. 364.

Suit in equity against several insurers issuing fire insurance policies covering same risk as infringement of right to jury trial, 98 A.L.R. 181.

Right to jury trial in original quo warranto proceedings in appellate court, 98 A.L.R. 237.

Waiver of right to jury trial as operative after expiration of term during which it was made or as regards subsequent trial, 106 A.L.R. 203.

Statute providing for supplementary proceedings as an infringement of right to jury trial, 106 A.L.R. 383.

Validity and effect of plan or practice of consulting preferences of persons eligible for jury service as regards periods or times of service or character of actions, 112 A.L.R. 995.

Right to jury trial of issues as to personal judgment for deficiency in suit for foreclosure of mortgage, 112 A.L.R. 1492.

Right to jury trial in suit to remove cloud, quiet title or determine adverse claims, 117 A.L.R. 9

Nature and effect of jury's verdict in equity, 156 A.L.R. 1147.

Eligibility of women as jurors, 157 A.L.R. 461.

Constitutional validity of statute providing for in rem or summary foreclosure of delinquent tax liens on real property, 160 A.L.R. 1026.

Right to jury trial in action concerning failure of purchaser to remove timber within time fixed by timber contract, 164 A.L.R. 461.

Right to jury trial as to fact essential to action or defense but not involving merits thereof, 170 A.L.R. 383.

Jury trial in action for declaratory relief, 13 A.L.R.2d 777, 33 A.L.R.4th 146.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

Constitutional right to jury trial in proceeding for adjudication of incompetency or insanity, 33 A.L.R.2d 1145.

Mandamus or prohibition or remedy to enforce right to jury trial, 41 A.L.R.2d 780.

Arbitration statute as denial of jury trial, 55 A.L.R.2d 432.

Withdrawal or disregard of waiver of jury trial in civil action, 64 A.L.R.2d 506, 9 A.L.R.4th 1041.

Request by each party for directed verdict as waiving submission of fact questions to jury, 68 A.L.R.2d 300.

Indoctrination by court of persons summoned for jury service, 89 A.L.R.2d 197.

Rule or statute requiring opposing party's consent to withdrawal of demand for jury trial, 90 A.L.R.2d 1162.

Sufficiency of waiver of full jury, 93 A.L.R.2d 410.

Constitutionality of statutes providing for custody or commitment of incorrigible children without jury trial, 100 A.L.R.2d 1241.

How to obtain jury trial in eminent domain, waiver, 12 A.L.R.3d 7.

Right to jury trial in summary proceedings for destruction of gambling devices, 14 A.L.R.3d 366.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A.L.R.3d 1321.

Issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393.

Constitutionality of statute imposing liability upon estate or relatives of insane person for his support in asylum, 20 A.L.R.3d 363.

Statute creating municipal liability for mob or riot as violating right to trial by jury, 26 A.L.R.3d 1142.

Number of peremptory challenges allowable in civil cases where there are more than two parties involved, 32 A.L.R.3d 747.

Automobile guests statutes as infringement of right to trial by jury, 66 A.L.R.3d 532.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

Right to jury trial in action for retaliatory discharge from employment, 52 A.L.R.4th 1141.

Effect of juror's false or erroneous answer on voir dire regarding previous claims or actions against himself or his family, 66 A.L.R.4th 509.

Validity of law or rule requiring state court party who requests jury trial in civil case to pay costs associated with jury, 68 A.L.R.4th 343.

Prospective juror's connection with insurance company as ground for challenge for cause, 9 A.L.R.5th 102.

Contractual jury trial waivers in state civil cases, 42 A.L.R.5th 53.

Distribution and exercise of peremptory challenges in federal civil cases under 28 USCS § 1870, 50 A.L.R. Fed. 350.

Sufficiency of demand for jury trial under Rule 38(b) of Federal Rules of Civil Procedure, 73 A.L.R. Fed. 698.

50 C.J.S. Juries §§ 8, 10, 12, 14, 17, 28, to 30, 178, 182.

1-039. Trial by jury or by the court.

A. **By the court.** All issues not set for trial to a jury as provided in Rule 1-038 shall be tried by the court; but notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

B. **Advisory jury and trial by consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury; or the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

ANNOTATIONS

Cross references. — For submission of questions to a jury on adjudication of water rights, *see* Section 72-4-17 NMSA 1978.

Right of jury limited. — This rule authorizes the parties to agree to permit a jury, rather than the court, to decide the case, but it does not purport to change the substantive law regarding the relief permitted under a particular cause of action. McLelland v. United Wis. Life Ins. Co., 1999-NMCA-055, 127 N.M. 303, 980 P.2d 86.

One is entitled to demand jury trial of right when contesting a will. Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Trial court's denial of jury trial. — Where trial court's reasons for denying a motion for a jury trial, made after the time for demanding a jury has passed, are not shown by the record, nor does the record disclose what was submitted or considered by the court in ruling upon the motion, the trial court's ruling is presumed valid and the burden rests upon appellant to show the manner in which the court abused its discretion. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

Trial court may abuse its discretion in not granting a jury trial after a litigant has impliedly waived the right by failure to comply with rules governing the method of effecting such right, where the opposing party would not have been prejudiced, the trial would not have been delayed, or business of the court would not have been inconvenienced by granting the jury trial. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

Although the defendant, at least initially, had consented to a jury trial of a laches issue, her motion for dismissal at the close of the plaintiff's case in chief and her explicit casting of the laches issue as an equitable issue for decision by the court, without objection by the plaintiff, make it clear that the parties never expressly or impliedly consented to a jury trial of the issue. Therefore, Rule 39(B) was not applicable to the laches issue as it developed at trial, so that it was proper for the trial court to decide the issue when the defendant, following the court's declaration of a mistrial, renewed her motion to dismiss under Rule 41(B). Garcia v. Garcia, 111 N.M. 581, 808 P.2d 31 (1991).

No abuse of discretion where plaintiff knew answer was filed. — The trial court did not abuse its discretion in refusing to order a jury trial because of the plaintiff's delay in filing a jury demand where the plaintiff knew, on November 20, 1978, that an answer had been filed on November 3, 1978, yet did nothing toward obtaining a jury trial until December 5, 1978, when the jury demand was filed. Myers v. Kapnison, 93 N.M. 215, 598 P.2d 1175 (Ct. App. 1979).

Where opposing party not prejudiced, court may waive time limitation for jury demand. — Rules or statutes limiting the time for filing a demand for jury trial, although mandatory in terms, are not always so regarded. It is the rule in this and in other jurisdictions that where the opposing party is not prejudiced, the court, in its discretion, may waive the delay, and its refusal to enforce the time limitation is not reversible error. Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Where no jury demand for strategic purposes, court may later deny new trial. — The denial of a motion for a new trial does not constitute an abuse of discretion where a demand for a jury trial was initially not filed at the time of the commencement of the action as a matter of trial strategy. El Paso Elec. v. Real Estate Mart, Inc., 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

Exercise of discretion distinguished. — The fact that one trial court exercises discretion in a certain manner does not compel a reversal when another trial court does not exercise discretion in the same manner. Aspen Landscaping, Inc. v. Longford Homes of N.M., Inc., 2004-NMCA-063, 135 N.M. 607, 72 P.3d 53, cert. denied, 2004-NMCERT-005.

It is within a trial court's discretion to impanel an advisory jury and such a decision is not reviewable absent a clear abuse of discretion. Keeth Gas Co. v. Jackson Creek Cattle Co., 91 N.M. 87, 570 P.2d 918 (1977).

Question whether jury to be considered totally advisory. — Where the order granting a jury stated that upon the court's motion and the defendant's motion, all claims would be tried by an advisory jury, and the accompanying letter stated the jury was entitled to an advisory jury because some of the relief sought was equitable in nature, it was unclear whether the jury was a totally advisory jury under this rule or whether it was impaneled upon the judge's own motion. Keeth Gas Co. v. Jackson Creek Cattle Co., 91 N.M. 87, 570 P.2d 918 (1977).

Where the jury is not solely advisory, Rule 52 B(a) (see now Rule 1-052 NMRA), requiring findings of fact and conclusions of law, is not applicable. Keeth Gas Co. v. Jackson Creek Cattle Co., 91 N.M. 87, 570 P.2d 918 (1977).

Where the jury functioned in two capacities, both as a jury of right and as an advisory jury, since the court made its own determination, accepting and rejecting in part the jury's findings and then entered its final decree, the court fulfilled all of its responsibilities and did not misuse the jury. Keeth Gas Co. v. Jackson Creek Cattle Co., 91 N.M. 87, 570 P.2d 918 (1977).

Court may accept or reject in whole or in part the advisory jury verdict because the responsibility for the final determination of all questions of fact and law remains with the trial court. Keeth Gas Co. v. Jackson Creek Cattle Co., 91 N.M. 87, 570 P.2d 918 (1977).

Review of case employing advisory jury. — On appeal from a case where the trial judge has impaneled an advisory jury, review is directed to the decision of the trial court as if there had been no jury. Keeth Gas Co. v. Jackson Creek Cattle Co., 91 N.M. 87, 570 P.2d 918 (1977).

Court may not withdraw legal issues from jury even if equitable issues involved. — Under Subdivision (b) (see now Paragraph B) of this rule, once the parties consent to try an issue before a jury and the court orders a jury trial pursuant to the stipulation, the trial court cannot withdraw the legal issues from the jury on the ground that there are also equitable issues involved. Peay v. Ortega, 101 N.M. 564, 686 P.2d 254 (1984).

Possible jury prejudice. — A trial court is not obliged to search the mind and conscience of every juror to determine possible prejudice by every irregularity which

arises during the course of a trial. State v. Thayer, 80 N.M. 579, 458 P.2d 831 (Ct. App. 1969).

Law reviews. — For note, "Undue Influence in Wills - Evidence - Testators' Position Changes After In re Will of Ferrill," see 13 N.M.L. Rev. 753 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 1246; 75B Am. Jur. 2d Trial § 1956.

Questions for jury in action on policy insuring against theft of automobile, 14 A.L.R. 221.

Substantial performance of contract for manufacture or sale of article as question for jury, 19 A.L.R. 822.

Presumption from derailment as requiring submission of question of negligence to jury in action by passenger notwithstanding uncontradicted evidence negativing negligence, 23 A.L.R. 1214.

Question for jury as to degree of force which owner is justified in using in defense of habitation or property, 25 A.L.R. 542, 32 A.L.R. 1541, 34 A.L.R. 1488.

Question for court as to whether there is any evidence of malice in case of privileged communication so as to require submission of question of malice to jury, 26 A.L.R. 852.

Duty and liability of master to servant injured by horse belonging to master as question for jury, 26 A.L.R. 890, 42 A.L.R. 226, 60 A.L.R. 468.

Husband's liability for necessaries furnished wife, question to whom credit was given as for jury, 27 A.L.R. 578.

Determination of question relating to foreign law as one of law or of fact, 34 A.L.R. 1447.

Question for jury as to alteration of note which is claimed to release parties not personally consenting, 44 A.L.R. 1254.

Question for jury as to breach of tenant's covenant as to repairs, 45 A.L.R. 82, 20 A.L.R. 782.

Estoppel by silence as to interest in real property as question for jury, 50 A.L.R. 971.

Introduction of extrinsic evidence as to intention as affecting province of court or jury as to construction of written contract, 65 A.L.R. 648.

Construction and effect of foreign statute as question for court or jury, 68 A.L.R. 809.

Question for jury as to establishment of boundary line by oral agreement or acquiescence, 69 A.L.R. 1533, 113 A.L.R. 421.

Question for jury as to liability for injury by stepping or falling into opening in sidewalk while doors were open or cover off, 70 A.L.R. 1364.

Credibility of interested witness as question of law or fact, 72 A.L.R. 32, 51.

Validity of chattel mortgage where mortgagor is given right to sell as question of fact, 73 A.L.R. 253.

Question for jury as to sufficiency of type of cattle guards at railroad crossing, 75 A.L.R. 948.

Question for jury as to stockbroker's notice to customer before sale of stock for failure to furnish additional margin, 76 A.L.R. 1531.

Question for jury as to waiver of right to rescind sale contract by use of article by buyer, 77 A.L.R. 1189, 41 A.L.R.2d 1173.

Question for jury as to duty of pedestrian crossing street or highway as regards looking for automobile, 79 A.L.R. 1081.

Question for jury as to existence of natural drainway for flow of surface water, 81 A.L.R. 273.

Question for jury as to negligence in case of injury by trailer attached to vehicle, 84 A.L.R. 281.

Due care of person killed at railroad crossing as question for jury, 84 A.L.R. 1239.

Insolvency of bank as question of fact, 85 A.L.R. 816.

Discretion of jury as to allowances of damages for conversion of commodities or chattels of fluctuating values after time of conversion, 87 A.L.R. 817.

Rebuttal of presumption of receipt of letter properly mailed and addressed as question for jury, 91 A.L.R. 164.

Question of law or fact as to reasonable time for presentation of check, 91 A.L.R. 1190.

Question for jury as to adverse possession in case of mistake as to boundary, 97 A.L.R. 100.

Question whether express contract was made as one for court or jury when not evidenced by formal instrument but in whole or part by informal writings, 100 A.L.R. 969, 977.

Value of corporate stock for purpose of income tax as a question of fact, 103 A.L.R. 958.

Negligence in maintaining slippery condition of floor as question for jury, 118 A.L.R. 425.

Question for jury as to whether negligence in repairing or servicing automobile was proximate cause of subsequent injury, 118 A.L.R. 1129.

Degree of inequality in sidewalk which makes question for jury or for court, as to municipality's liability, 119 A.L.R. 161, 37 A.L.R.2d 1187.

Question whether distraction of attention of driver of automobile constituted negligence or wantonness, 120 A.L.R. 1520.

Questions affecting privilege of statements and nature of comment upon judicial, legislative or administrative proceeding or decision therein as for court or jury, 155 A.L.R. 1350.

Nature and effect of jury's verdict in equity, 156 A.L.R. 1147.

Authority of agent who delivers commercial paper or other obligation to third person for collection to receive payment of proceeds from latter as question for jury, 163 A.L.R. 1209.

Reasonableness of time for exercise of option to terminate, cancel or rescind contract as question of law or fact, 164 A.L.R. 1026.

Weight in value of dying declaration as question for jury, 167 A.L.R. 147.

Binding effect of parties' own unfavorable testimony as question for court or jury, 169 A.L.R. 798.

Assault by truck driver or chauffeur within scope of employment as question for jury, 172 A.L.R. 542.

Question for jury as to proximate cause of injury by explosives left accessible to children, 10 A.L.R.2d 22.

Tenant's liability for damage to leased property due to his acts or neglect as question for jury, 10 A.L.R.2d 1012.

Negligence of building or construction contractor as ground of liability upon his part for injury or damage to third person occurring after completion and acceptance of the work, 13 A.L.R.2d 191.

Jury trial in action for declaratory relief, 13 A.L.R.2d 777, 33 A.L.R.4th 146.

Bad faith of real estate broker in stating to prospective purchaser that property may be bought for less than list price, in breach of duty to vendor as question for court or jury, 17 A.L.R.2d 904.

Master-servant relation where operator is furnished with grease machine or motor vehicle as question of fact or law, 17 A.L.R.2d 1388.

Question as to who are accomplices within rule requiring corroboration of their testimony as one of law and fact, 19 A.L.R.2d 1352.

Question, as one of law for court or of fact for jury, whether oral promise was an original one or was a collateral promise to answer for the debts, default or miscarriage of another, 20 A.L.R.2d 246.

Proof of identity of person or thing where object, specimen, or part is taken from a human body, as basis for admission of testimony or report of expert or officer based on such object, specimen or part, 21 A.L.R.2d 1216.

Uniform Judicial Notice of Foreign Law Act, 23 A.L.R.2d 1437.

Intention to abandon private easement by nonuser as question for court or jury, 25 A.L.R.2d 1265.

Qualified privilege in a defamation of one relative to another by person not related to either as question for court or jury, 25 A.L.R.2d 1388.

Injury to insured while assaulting another as due to accident or accidental means as question of fact, 26 A.L.R.2d 399.

Jury question as to reasonable time within which to demand autopsy under insurance policy, 30 A.L.R.2d 837.

Question for jury as to duty of driver of automobile whose view is obscured by dust, smoke or atmospheric conditions, 42 A.L.R.2d 13, 32 A.L.R.4th 933.

Dentist's negligence as question for jury, 83 A.L.R.2d 7, 11 A.L.R.4th 748.

Question of jury as to meaning of "poison," as used in insurance policy, 14 A.L.R.3d 783.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 A.L.R.3d 1373.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A.L.R.3d 1321.

Issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393.

Contributory negligence in failing to comply with statute regulating travel by pedestrian along highway as question for jury, 45 A.L.R.3d 658.

When jeopardy attaches in nonjury trial, 49 A.L.R.3d 1039.

Landlord's knowledge of defect in inside steps or stairways as jury question, 67 A.L.R.3d 587.

Jury question as to landlord's liability for injury or death due to defects in exterior stairs, passageways, areas or structures used in common by tenants, 68 A.L.R.3d 382.

Establishment of "family" relationship to raise presumption that services were rendered gratuitously, as between persons living in same household but not related by blood or affinity, 92 A.L.R.3d 726.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

88 C.J.S. Trial § 203; 89 C.J.S. Trial § 547.

1-040. Assignment of cases for trial and order of trial.

A. **Assignment for trial.** The district courts shall set cases for trial in accordance with the provisions of Rule 1-016. For purposes of these rules, a case is set for trial if the case is set on a trailing calendar, provided that no trailing calendar shall include any case the trial of which is unlikely to commence within two (2) weeks after the first case scheduled for trial on such calendar.

B. **Certificate of readiness.** Unless a pretrial scheduling order is entered, any party may submit a request for trial on the merits stating that the case is ready for trial and the amount of time needed for the trial of the case. Any party who does not agree that the case is ready for trial shall, within ten (10) days from the service of the request for trial, file a response setting forth why the case is not ready for trial and when such case will be ready for trial. The district court shall give reasonable notice of the dates, times and places of settings by mail to counsel of record and parties appearing pro se.

C. **Order of trial.** The order of proceeding in trials, unless otherwise directed by the court, shall be as follows:

(1) selection and qualification of a jury, if required;

(2) opening statements, subject to the right to defer as hereinafter set out. The first opening statement shall be made by the party having the burden of first proceeding with the introduction of evidence. The opening statement by any other party may be deferred until immediately before the party is to proceed with the introduction of that party's evidence and, unless so deferred, opening statements by other parties shall be made in such order as the court shall direct;

(3) introduction of evidence. The order of introduction of evidence on any issue normally shall be first, evidence in chief of the party having the burden of proceeding, second, evidence in response, and third, rebuttal evidence. The court may, in its discretion, permit any party to introduce additional evidence. With permission of the court witnesses may be called and evidence introduced out of order. Only one counsel on a side may examine or cross-examine the same witness unless otherwise ordered by the court;

(4) instructions to the jury in causes tried before a jury;

(5) argument;

(6) motions for directed verdict, mistrial and the like shall be made and argued in the absence of the jury.

[As amended, effective January 1, 1990.]

ANNOTATIONS

Cross references. — For docketing preference for appeals from municipal assessments, *see* Section 3-33-35 NMSA 1978.

For advancement on the calendar of cases for reinstatement in employment for veterans, *see* Section 28-15-3 NMSA 1978.

For preference given to review of decisions of the board of review of the Human Services Department, *see* Section 51-1-8 NMSA 1978.

For preference given to actions involving the Public Service Commission, *see* Section 62-12-3 NMSA 1978.

For appeal of decisions of the Oil Conservation Commission, *see* Section 70-2-25 NMSA 1978.

For hearing of objection to establishment of artesian conservancy district as an advanced cause, *see* Section 73-1-10 NMSA 1978.

For advancement of cases questioning appraisals of conservancy districts, *see* Section 73-15-7 NMSA 1978.

For advancement of cases questioning validity of organization on proceedings of water and sanitation districts, *see* Section 73-21-33 NMSA 1978.

Compiler's notes. — This rule, together with Rules 1-020, 1-041, and 1-045 NMRA is deemed to supersede 105-807, C.S. 1929, relating to order of docketing and trial, 105-819, C.S. 1929, relating to bringing cases to trial in the absence of a party and 105-820, C.S. 1929, relating to advancing causes for trial. Also, together with Rule 1-038, this rule is deemed to have superseded 105-814, C.S. 1929, relating to docket call. Also, together with Rule 1-006, this rule is deemed to have superseded 105-802, C.S. 1929, relating to time of hearing. Also, as to the order of proceedings in trials and matters relating to juries, opening statements, introduction of evidence, motions and arguments, this rule replaces Laws 1880, ch. 6, § 20, compiled as § 21-8-18 NMSA 1953, repealed by Laws 1973, ch. 183, § 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75 Am. Jur. 2d Trial § 76 et seq.

Propriety of trial court order limiting time for opening or closing argument in civil case - state cases, 71 A.L.R.4th 130.

Order of closing arguments in federal civil trials, 53 A.L.R. Fed. 900.

88 C.J.S. Trial §§ 18 to 35.

1-041. Dismissal of actions.

A. **Voluntary dismissal; effect thereof.**

(1) Subject to the provisions of Paragraph E of Rule 1-023 NMRA and of any statute, an action may be dismissed by the plaintiff without order of the court:

(a) by filing a notice of dismissal at any time before service by the adverse party of an answer or other responsive pleading; or

(b) by filing a stipulation of dismissal signed by all parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed an action based on or including the same claim.

(2) Except as provided in Subparagraph (1) of this paragraph, an action shall not be dismissed on motion of the plaintiff except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim, cross-claim or third-party claim has been filed by a party prior to the service upon such party of the plaintiff's

motion to dismiss, the action shall not be dismissed against the party's objection unless the counterclaim, cross-claim or third-party claim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

B. **Involuntary dismissal; effect thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 1-052 NMRA. Unless the court in its order for dismissal otherwise specifies, a dismissal under this paragraph and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 1-019 NMRA, operates as an adjudication upon the merits.

C. **Dismissal of counterclaim, cross-claim or third-party claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim or third-party claim. A voluntary dismissal by the claimant alone pursuant to Subparagraph (1) of Paragraph A of this rule shall be made before a responsive pleading is served, or if there is none, before the introduction of evidence at the trial or hearing.

D. **Costs of previously dismissed action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

E. **Dismissal of action with and without prejudice.**

(1) Any party may move to dismiss the action, or any counterclaim, cross-claim or third-party claim with prejudice if the party asserting the claim has failed to take any significant action to bring such claim to trial or other final disposition within two (2) years from the filing of such action or claim. An action or claim shall not be dismissed if the party opposing the motion is in compliance with an order entered pursuant to Rule 1-016 NMRA or with any written stipulation approved by the court.

(2) Unless a pretrial scheduling order has been entered pursuant to Rule 1-016 NMRA, the court on its own motion or upon the motion of a party may dismiss without prejudice the action or any counterclaim, cross-claim or third party claim if the party filing the action or asserting the claim has failed to take any significant action in connection with the action or claim within the previous one hundred and eighty (180)

days. A copy of the order of dismissal shall be forthwith mailed by the court to all parties of record in the case. Within thirty (30) days after service of the order of dismissal, any party may move for reinstatement of the case. Upon good cause shown, the court shall reinstate the case and shall enter a pretrial scheduling order pursuant to Rule 1-016 NMRA. At least twice during each calendar year, the court shall review all actions governed by this paragraph.

F. **Applicability.** This rule shall apply to all civil cases filed in the district court, including civil cases appealed from the metropolitan or magistrate courts. This rule shall not apply to:

(1) guardianship, receivership, trusteeship or conservatorship cases;

(2) proceedings commenced pursuant to the Mental Health and Developmental Disabilities Code [43-1-1 NMSA 1978];

(3) proceedings commenced pursuant to the provisions of the Probate Code [45-1-101 NMSA 1978]; or

(4) proceedings commenced pursuant to the Children's Code [32A-1-1 NMSA 1978].

[As amended, effective January 1, 1990; April 1, 2002.]

ANNOTATIONS

Cross references. — For dismissal of appeals in district court, *see* Section 39-3-14 NMSA 1978.

Compiler's notes. — Paragraph A is deemed to have superseded 105-1401 and 105-1403, C.S. 1929, respectively, relating to dismissal of action in vacation of the district court and dismissal prior to judgment.

Paragraph B, together with Rules 1-020 and 1-055 NMRA, is deemed to supersede 105-819, C.S. 1929, relating to trial in absence of a party and separate trials.

The 2002 amendment, effective April 1, 2002, deleted Paragraph E(3) which read "The filing of a motion for dismissal pursuant to this rule shall not be an entry of appearance in said action or proceeding."

I. GENERAL CONSIDERATION.

Allegations which state cause of action, taken as true. — Allegations of conspiracy, trespass, false arrest, conversion, unlawful coercion and interference in the use of property, all claimed to have been committed with malice outside of the scope of the defendants' authority, appear to have stated a cause of action, which, for the purpose of

a motion to dismiss, should be taken as true. Allen v. McClellan, 77 N.M. 801, 427 P.2d 677 (1967).

A party who does not appeal is presumed to be satisfied with the judgment rendered by the court, and plaintiff, not having taken advantage of the election afforded her when the trial judge in dismissing her complaint gave her 20 days to amend it, was bound by the judgment entered against her. Watkins v. Local School Bd., 88 N.M. 276, 540 P.2d 206 (1975).

Rule held inapplicable. — Where a district court dismisses an appeal from a magistrate court and five months later remands the case for execution of judgment to the original court, this rule shall not apply. Los Alamos County v. Beery, 101 N.M. 157, 679 P.2d 825 (1984).

II. VOLUNTARY DISMISSAL.

Voluntary dismissal of legal separation action following the death of one party. — Section 40-4-20 NMSA 1978 does not preclude voluntary dismissal of a legal separation action as a means of concluding the proceedings after the death of one of the parties. *Trinosky v. Johnstone*, 2011-NMCA-045, 149 N.M. 605, 252 P.3d 829.

Where petitioner filed a petition for legal separation, division of property and spousal support and while the action was pending and before entry of a final decree, respondent died; and petitioner filed a motion to voluntarily dismiss the action, Section 40-4-20 NMSA 1978 did not preclude the district court from granting the motion to dismiss the action. *Trinosky v. Johnstone*, 2011-NMCA-045, 149 N.M. 605, 252 P.3d 829.

Rule 1-041 NMRA does not apply to the voluntary dismissal of a declaration of water rights filed in an adjudication of water rights. State ex rel. State Engineer v. Commissioner of Public Lands, 2009-NMCA-004, 145 N.M. 433, 200 P.3d 86, cert. denied, 2008-NMCERT-011.

Rule 1-041 NMRA does not permit the voluntary dismissal of individual claims that make up an action. Gates v. N.M. Taxation & Revenue Dept., 2008-NMCA-023, 143 N.M. 446, 176 P.3d 1169.

Voluntary dismissal rule has consistently been interpreted as drawing a bright line that permits unilateral dismissal of a case by a plaintiff in the earliest stages of litigation thus extinguishing the action and leaving it as though no suit had ever been brought. Becenti v. Becenti, 2004-NMCA-091, 136 N.M. 124, 94 P.3d 867.

No absolute right in plaintiff to dismiss action. — Plaintiff has not an absolute right to dismiss an action, and dismissal will be denied where it creates an injustice to defendant by depriving him of affirmative relief. On dismissal, plaintiff must pay costs. Dalahoyde v. Lovelace, 39 N.M. 446, 49 P.2d 253 (1935); Andrews v. French, 17 N.M. 615, 131 P. 996 (1913) (decided under former law).

Voluntary dismissal leaves situation same as though suit had never been brought; all prior proceedings and orders in the case are vitiated and annulled, and jurisdiction of the court is immediately terminated. Board of Educ. v. Rodriguez, 79 N.M. 570, 446 P.2d 218 (1968).

Court without jurisdiction after voluntary dismissal. — After voluntary dismissal, the court is without further jurisdiction and has no right to render any judgment. The case is moot and the parties are out of court for every purpose. Board of Educ. v. Rodriguez, 79 N.M. 570, 446 P.2d 218 (1968).

Judgment final where no appeal taken from erroneous dismissal. — Where no appeal was taken from erroneous dismissal of a second amended complaint without prejudice, the judgment became final and it could not be questioned on later litigation. State ex rel. Bliss v. Casarez, 52 N.M. 406, 200 P.2d 369 (1948).

Implicit acknowledgement for conditions of dismissal. — Although the district court entered a form order dismissing the action, the order explicitly noted that petitioner had initiated the dismissal and that no responsive pleading had been filed in the case. Thus, the district court implicitly acknowledged that the conditions of a voluntary dismissal had been met. Becenti v. Becenti, 2004-NMCA-091, 136 N.M. 124, 94 P.3d 867.

Reinstatement. — Paragraph A of this rule makes no provision for the reinstatement of an action following a voluntary dismissal. Becenti v. Becenti, 2004-NMCA-091, 136 N.M. 124, 94 P.3d 867.

Filed stipulation renders court powerless to prevent dismissal. — Once the parties have agreed in their filed stipulation to dismiss the case, under this rule, it is dismissed and the district court is powerless to prevent it. Elwess v. Elwess, 73 N.M. 400, 389 P.2d 7 (1964).

And it brings court's jurisdiction to end. — Stipulation for dismissal, signed by both parties, leaves a situation the same as though the suit had never been brought and jurisdiction of the court is terminated. Halmon v. Pico Drilling Co., 78 N.M. 474, 432 P.2d 830 (1967).

Court cannot award attorneys' fees where stipulation is signed by both defendant and plaintiff; the action is effectively dismissed without further jurisdiction. McCuistion v. McCuistion, 73 N.M. 27, 385 P.2d 357 (1963).

Court permission is required for motion to dismiss after commencement of trial. State ex rel. State Hwy. Comm'n v. Weatherly, 67 N.M. 97, 352 P.2d 1010 (1960).

Upon voluntary dismissal, the answer of the defendant is vitiated and the counterclaim annulled. Telephonic, Inc. v. Montgomery Plaza Co., 87 N.M. 407, 534 P.2d 1119 (Ct. App. 1975).

Effect of absence of court order authorizing dismissal. — Because there was no court order authorizing a dismissal of the counterclaim, it could only have been dismissed by plaintiff's consent. Griego v. Roybal, 79 N.M. 273, 442 P.2d 585 (1968).

Counterclaim dismissed prior to judgment, without prejudice. — A defendant who has filed a counterclaim against plaintiff in a cause tried to the court has the right to dismiss his counterclaim without prejudice before judgment is rendered. Pershing v. Ward, 34 N.M. 298, 280 P. 254 (1929) (decided under former law).

Dismissal without prejudice entirely within court's discretion. — The right of a plaintiff to dismiss his cause of action without prejudice under Subdivision (a) (see now Paragraph A) is entirely within the discretion of the court, and unless there is a clear abuse of discretion, the judgment of the trial court in denying a plaintiff the right to dismiss without prejudice will not be disturbed on appeal. Emmco Ins. Co. v. Walker, 57 N.M. 525, 260 P.2d 712 (1953) (decided before 1979 amendment).

Duty to correct clerical mistake. — Where plaintiffs, pursuant to this rule, filed a motion to dismiss before the answer and counterclaim were filed, and the motion contained a clerical error in that the phrase "with prejudice" was substituted for "without prejudice" at some point between counsel's dictation of the notice and the final draft, and upon discovery of the error, the plaintiffs filed a motion pursuant to Rule 60(a) (see now Rule 1-060 NMRA) to correct the notice (also before defendant's answer and counterclaim), the lower court not only had the right but the duty to correct the clerical mistake in plaintiffs' original notice of dismissal with prejudice to read "without prejudice." Telephonic, Inc. v. Montgomery Plaza Co., 87 N.M. 407, 534 P.2d 1119 (Ct. App. 1975) (decided before 1979 amendment).

Effect of dismissal of coobligor on liability of remaining obligors. — A dismissal seasonably entered by leave of court as to one of a number of defendants severally liable does not charge from liability his coobligors and codefendants. Bank of Commerce v. Broyles, 16 N.M. 414, 120 P. 670 (1910), rev'd sub nom. Schmidt v. Bank of Commerce, 234 U.S. 64, 34 S. Ct. 730, 58 L. Ed. 1214 (1914) (decided under former law).

III. INVOLUNTARY DISMISSAL.

False conflict doctrine applied. — The trial court properly applied the false conflict doctrine and dismissed the plaintiff’s action for breach of contract and unjust enrichment because under the following circumstances the plaintiff was an independent contractor of the defendant notwithstanding the fact that the parties’ contract purported to create an employer-employee relationship between the parties, and the plaintiff did not substantially comply with contractor licensing requirements: the plaintiff performed construction work on a project in Arizona for the defendant; both parties were New Mexico citizens; Arizona law required the plaintiff to have an Arizona contractor’s license to perform the work on the project; the plaintiff did not have the required Arizona contractor’s license; the defendant had the required Arizona contractor’s license; and

under both New Mexico and Arizona law unlicensed contractors are barred from recovering for their work under any cause of action. Fowler Brothers, Inc. v. Bounds, 2008-NMCA-091, 144 N.M. 510, 188 P.3d 1261.

Notice and hearing required for res judicata effect. — While dismissal under Paragraph B of this rule may not require a notice and a hearing, for an order of dismissal to have res judicata effect, notice and a hearing must be provided, and the result is an adjudication on the merits. Cagan v. Village of Angel Fire, 2005-NMCA-059, 137 N.M. 570, 113 P.3d 393.

Prima facie case does not preclude dismissal. — Assuming, but not holding, that plaintiff had established a prima facie case, a prima facie case does not preclude dismissal by the trial court. Carrasco v. Calley, 79 N.M. 432, 444 P.2d 617 (Ct. App. 1968); White v. City of Lovingston, 78 N.M. 628, 435 P.2d 1010 (Ct. App. 1967).

Timeliness essential in making motion. — Where defendant did not make any motion to dismiss, either oral or written, before the trial setting was obtained by the plaintiff, and the oral motion was made at the outset of the trial, it was neither timely nor proper and its denial was correct. Beyer v. Montoya, 75 N.M. 228, 402 P.2d 960 (1965).

Rule 1-037 and Paragraph B distinguished. — Subdivision (b) (see now Paragraph B) deals with sanctions available for use during the trial, whereas Rule 37(d) (see now Rule 1-037 NMRA), spells out sanctions for failure to give a deposition or answer interrogatories. Rule 37(d) (see now Rule 1-037 NMRA) is adequate in itself to allow a dismissal with prejudice. Chalmers v. Hughes, 83 N.M. 314, 491 P.2d 531 (1971).

Rule 1-050(A) and Paragraph B distinguished. — The grant of a motion to dismiss under Paragraph B will be sustained even if the plaintiff has produced enough evidence to withstand a directed verdict under Rule 1-050(A), so long as the decision of the trial judge is rationally based on the evidence. Padilla v. RRA, Inc., 1997-NMCA-104, 124 N.M. 111, 946 P.2d 1122.

Waiver of venue by acquiescing to motion hearing in different county. — Plaintiff waived his right of having case brought to enjoin trespass to land tried in the county where the land is located by apparently acquiescing to holding of a hearing on a motion to dismiss the action in another county within the district. Heron v. Gaylor, 53 N.M. 44, 201 P.2d 366 (1948).

The special statutory eminent domain procedure is inconsistent with Subdivisions (b) and (e) (see now Paragraphs B and E), and these rules are therefore inapplicable to eminent domain proceedings brought under the special alternative procedure where, as here, a permanent order of entry has been made as to some part of the property being condemned. State ex rel. State Hwy. Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

For dismissal of action in quiet title action. — See Gilman v. Osborn, 78 N.M. 498, 433 P.2d 83 (1967).

When nonsuit not reversed on appeal in quiet title action. — In an action to quiet title, where the deeds forming the basis of plaintiff's title are void for insufficiency of description of the land they purport to convey, a nonsuit granted pursuant to this rule will not be reversed on appeal. Komadina v. Edmondson, 81 N.M. 467, 468 P.2d 632 (1970).

Presumption that case dismissed under court's inherent authority. — Where the trial court does not state by what authority it is dismissing the case, it will be assumed it was doing so pursuant to its inherent authority. Mora v. Hunick, 100 N.M. 466, 672 P.2d 295 (Ct. App. 1983).

Trial court, being the trier of the facts, has the power of applying its own judgment and may grant or deny a motion to dismiss. Gilon v. Franco, 77 N.M. 786, 427 P.2d 666 (1967).

A trial court, being the trier of the facts, has the power of applying its own judgment and may grant or deny a motion to dismiss under this rule. The case of Olivas v. Garcia, 64 N.M. 419, 329 P.2d 435 (1958), and other prior cases which are to the effect that a demurrer (now motion to dismiss) to the evidence raises only a question of law, are no longer applicable. Hickman v. Mylander, 68 N.M. 340, 362 P.2d 500 (1961).

Judgment entered under this rule constitutes a judgment on the merits, unless the trial court otherwise specifies. Herbert v. Sandia Sav. & Loan Ass'n, 82 N.M. 656, 486 P.2d 65 (1971).

Notice and hearing essential to decision upon merits. — The provision "any dismissal not provided for in this rule" does not require a holding that the dismissal of the original action was an adjudication upon the merit. The provision applies to a dismissal of which the party affected has notice. Notice and hearing, or an opportunity to be heard, is essential to a decision upon the merits. Otero v. Sandoval, 60 N.M. 444, 292 P.2d 319 (1956).

Dismissal either with or without prejudice. — The right of a defendant to move for dismissal for failure of the plaintiff to prosecute with diligence is provided by this rule, and a dismissal under this rule may be either with or without prejudice depending on the circumstances. Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965).

Deliberate failure to appear for inspection of records. — Dismissal with prejudice of suit to compel production of records was proper where the court gave the petitioner clear and specific notification of the time and place for the inspection of the records, but the petitioner deliberately chose not to appear. Newsome v. Farer, 103 N.M. 415, 708 P.2d 327 (1985).

Evidence submitted by plaintiff considered true. — When a motion to dismiss is interposed at close of plaintiff 's case, the evidence submitted by plaintiff is to be considered as being true and any fair and reasonable inferences that may be drawn therefrom should be resolved in his favor. Pilon v. Lobato, 54 N.M. 218, 219 P.2d 290 (1950).

Evidence given such weight as court believes it deserves. — Upon dismissal of a plaintiff's case under this rule, the trial court weighs the evidence and gives to it such weight as the court believes it deserves. Worthey v. Sedillo Title Guar., Inc., 85 N.M. 339, 512 P.2d 667 (1973).

This rule authorizes the court upon a motion to dismiss at the close of plaintiffs' case to weigh the evidence and give it such weight as the court believes it deserves. Komadina v. Edmondson, 81 N.M. 467, 468 P.2d 632 (1970).

Unimpeached and uncontradicted evidence needs consideration as well. — In ruling on a motion to dismiss made at the close of plaintiff's case, the trial court is not required to view evidence in its most favorable light, but rather to weigh all evidence and give it the weight it deserves. However, evidence which is unimpeached and uncontradicted may not be disregarded, and findings diametrically opposed thereto lack support. Lorenzo v. Lorenzo, 85 N.M. 305, 512 P.2d 65 (1973).

Court gives only such weight as plaintiff's testimony entitled to receive. — On motion to dismiss after presentation of plaintiff's case in a nonjury trial the court is not bound to give plaintiff's testimony the most favorable aspect but rather should give the testimony such weight as it is entitled to receive and, as trier of the facts, is to apply its own judgment in ruling on the motion. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

Under this rule, the trial court is not bound to give plaintiff's testimony the most favorable possible aspect. Rather, the trial court is to give the testimony such weight as it is entitled to receive. Carrasco v. Calley, 79 N.M. 432, 444 P.2d 617 (Ct. App. 1968).

The trial court is not bound to give plaintiff 's testimony the most favorable possible aspect. Rather, the trial court is to give the testimony such weight as it is entitled to receive. Thus, the trial court, as the trier of the facts, is to apply its own judgment in ruling on a motion to dismiss after plaintiff has completed the presentation of its evidence. White v. City of Lovingston, 78 N.M. 628, 435 P.2d 1010 (Ct. App. 1967).

Under this rule the trial court was not required to view plaintiff's testimony, together with all reasonable inferences therefrom in its most favorable aspect for plaintiff. Rather, the court could weigh the testimony and apply its judgment thereto. Blueher Lumber Co. v. Springer, 77 N.M. 449, 423 P.2d 878 (1967).

The trial court when ruling on a motion to dismiss made at the close of the plaintiff's case is not required to view the plaintiff 's testimony together with all reasonable

inference therefrom in its most favorable aspect for the plaintiff, but rather that the trial court weighs the testimony and applies its judgment thereto. Gilon v. Franco, 77 N.M. 786, 427 P.2d 666 (1967); Simmons v. International Minerals & Chem. Corp., 77 N.M. 100, 419 P.2d 756 (1966).

Under this rule on motion for dismissal by defendant at close of plaintiff 's case, the trial court may determine the facts and in so doing is not bound to give plaintiff 's testimony the most favorable aspect, together with all reasonable inferences therefrom, and to disregard all unfavorable testimony. Rather, it is the trial court's duty to weigh the evidence and give to it such weight as he believes it is entitled to receive. Giles v. Canal Ins. Co., 75 N.M. 25, 399 P.2d 924 (1965); Montano v. Saavedra, 70 N.M. 332, 373 P.2d 824 (1962).

Under this rule, a trial judge, when ruling on a motion to dismiss made at the close of plaintiff's case, is not required to view plaintiff's testimony together with all reasonable inferences therefrom in its most favorable aspect for plaintiff, but rather the court weighs the testimony and applies its judgment thereto. Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

When defendant moves for dismissal under this rule, the trial court may determine the facts and in so doing is not bound to give plaintiff's testimony the most favorable aspect, together with all reasonable inferences therefrom, and to disregard all unfavorable testimony. Rather, it is the trial court's duty to weigh the evidence and give to it such weight as it believes it is entitled to receive. Montano v. Saavedra, 70 N.M. 332, 373 P.2d 824 (1962).

Under this rule the trial court, as the trier of the facts without a jury, is not bound to give appellants' and counterclaimants' testimony the most favorable possible aspect, together with all reasonable inferences therefrom. Rather, it is the trial court's duty to give appellants' and counterclaimants' testimony such weight as it believes it is entitled to receive. Hickman v. Mylander, 68 N.M. 340, 362 P.2d 500 (1961).

Credibility of testimony is for the trial court, and it is not the function of the court of appeals to determine the weight to be given the evidence. Harlow v. Fibron Corp., 100 N.M. 379, 671 P.2d 40 (Ct. App. 1983).

Consideration and weight to be given the testimony of an adverse witness is the same whether the proceedings leading to a judgment on the merits fall within this rule or constitute a complete trial consisting of a full presentation of evidence by both sides and the resting of their respective cases. Herbert v. Sandia Sav. & Loan Ass'n, 82 N.M. 656, 486 P.2d 65 (1971).

Testimony of witness taken out of order disregarded. — In testing the sufficiency of the proof and in weighing the evidence, the testimony of defendants' witness taken out of order should be disregarded. Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

Matters in record which allow court to disregard testimony. — The rule in this jurisdiction is that the testimony of a witness, whether interested or disinterested, cannot arbitrarily be disregarded by the trier of the facts; but it cannot be said that the trier of facts has acted arbitrarily in disregarding such testimony, although not directly contradicted, whenever any of the following matters appear from the record: (a) that the witness is impeached by direct evidence of his lack of veracity or of his bad moral character, or by some other legal method of impeachment, (b) that the testimony is equivocal or contains inherent improbabilities, (c) that there are suspicious circumstances surrounding the transaction testified to, (d) that legitimate inferences may be drawn from the facts and circumstances of the case that contradict or cast reasonable doubt upon the truth or accuracy of the oral testimony. Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

An instruction covering an issue not presented to court cannot be first raised on appeal. State v. Rael, 81 N.M. 791, 474 P.2d 83 (Ct. App. 1970).

Abuse of discretion by trial court ground for appeal. — The district court has inherent power to dismiss a case for failure to prosecute, independent of statute, and unless there has been an abuse of discretion, the trial court's dismissal will not be disturbed upon appeal. Baker v. Sojka, 74 N.M. 587, 396 P.2d 195 (1964).

Two courses of action for defendant after denial of motion to dismiss. — Where a defendant makes a motion to dismiss under Subdivision (b) (see now Paragraph B) at the close of plaintiff 's case and it is denied, he has two courses of action: he may stand on his motion and appeal directly from the order of denial or proceed to offer evidence. Den-Gar Enters. v. Romero, 94 N.M. 425, 611 P.2d 1119 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

When defendant waives right to claim error in denial of motion. — Where defendant, after its motion to dismiss was denied, proceeded to present its own case, it waived any right to claim as error the denial of its motion to dismiss. Den-Gar Enters. v. Romero, 94 N.M. 425, 611 P.2d 1119 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Statute of limitations not suspended while suit pending. — A dismissal without prejudice operates to leave the parties as if no action had been brought at all. Following such dismissal, the statute of limitations is deemed not to have been suspended during the period in which the suit was pending. King v. Lujan, 98 N.M. 179, 646 P.2d 1243 (1982).

Motion for directed verdict in nonjury trial is, in effect, a motion to dismiss under Subdivision (b) (see now Paragraph B). Garcia v. American Furn. Co., 101 N.M. 785, 689 P.2d 934 (Ct. App. 1984).

Case remanded when motion erroneously granted. — When on appeal the court determines that the defendant's motion to dismiss should have been denied, the case

must be remanded for presentation of testimony by the plaintiff in the furtherance of her case. Bogle v. Potter, 68 N.M. 239, 360 P.2d 650 (1961).

Appellate court views evidence in light most favorable to defendant. — In disposing of an action on its merits under this rule a trial court is not bound to give the plaintiff's evidence the most favorable aspect, but only has the duty to weigh the evidence and give it such weight as the court believes it is entitled. Upon review, in determining whether the findings of the trial court are supported by substantial evidence, an appellate court will view the evidence in the light most favorable to support the findings. Blancett v. Homestake-Sapin Partners, 73 N.M. 47, 385 P.2d 568 (1963).

No review of facts on appeal where plaintiff initially waived findings. — Where plaintiff fails to request findings of fact, thereby in effect waiving findings, and trial court dismissed plaintiff's claim at the close of plaintiff's case, ruling on the merits, plaintiff may not, in order to determine whether the trial court correctly dismissed the claim against defendant for failure of proof, obtain a review of the facts on appeal. Wallace v. Wanek, 81 N.M. 478, 468 P.2d 879 (Ct. App. 1970).

Or when appellant made no request for specific findings. — Where the judgment contains a general finding of fact finding the issues for appellee, and no specific findings of fact were requested or tendered by appellant, the appellant cannot invoke a review of the evidence to ascertain whether it supports the general finding or judgment. Western Timber Prods. Co. v. W.S. Ranch Co., 69 N.M. 108, 364 P.2d 361 (1961).

Motion held proper where appellant's circumstantial proof inconclusive. — Where trial court weighed the evidence and found appellant's circumstantial proof to be inconclusive as to the fact of delivery of material by appellant to defendant, it properly sustained defendants' motion to dismiss under this rule. Panhandle Pipe & Steel, Inc. v. Jesko, 80 N.M. 457, 457 P.2d 705 (1969).

Reinstatement following dismissal for lack of prosecution. — A case that has been dismissed without prejudice for lack of prosecution may be reinstated upon a showing of good cause; a new complaint need not be filed in order to proceed and, thus, there is no problem with the running of the statute of limitations. Wershaw v. Dimas, 1996-NMCA-118, 122 N.M. 592, 929 P.2d 984.

IV. COSTS OF PREVIOUSLY DISMISSED ACTION.

Generally. — Since defendant suffers no damages other than those that accompany all suits of like kind, a mere possibility of future litigation is not such hardship as would prevent a dismissal by plaintiff, because the hardship is presumably compensated for by recovery of costs. Johnson v. Walker-Smith Co., 47 N.M. 310, 142 P.2d 546 (1943).

V. DISMISSAL OF ACTION WITH PREJUDICE.

A. IN GENERAL.

Arbitrary dismissal. — Where there exists no evidence of wrongful or wilful conduct on the part of a party in presenting a stipulated motion without the concurrence of another party, in failing to serve the other party with a copy of the stipulated motion, or in failing to obtain that party's approval of the order, the dismissal was arbitrary because it was too extreme a sanction under the circumstances. Gila Resources Information Project v. N.M. Water Quality Control Comm'n, 2005-NMCA-139, 138 N.M. 625, 124 P.3d 1164, cert. denied, 2005-NMCERT-009.

Effect of 1990 amendment — Paragraph E of this rule was essentially rewritten in 1990 and differs from the former rule in several ways. Cagan v. Village of Angel Fire, 2005-NMCA-059, 137 N.M. 570, 113 P.3d 393.

Not due process violation. — Plaintiff was not denied her right to due process by the court's dismissal of her action because the rule does not require notice and a hearing prior to dismissal and, in any event, she was provided with notice and a hearing after dismissal but before the court's determination of whether the dismissal would be with or without prejudice. Lowrey v. Atterbury, 113 N.M. 71, 823 P.2d 313 (1992).

Rights of litigants not to be completely disregarded in applying Paragraph E. — Subdivision (e) (see now Paragraph E) is intended to promote judicial efficiency and to conclude stale cases, but it should not be applied in complete disregard of the rights of litigants to have their day in court and their cases decided on the merits and not on trivial technicalities. Sewell v. Wilson, 97 N.M. 523, 641 P.2d 1070 (Ct. App. 1982).

Dismissal removes plaintiff's remedy, not his rights. — An order of dismissal under this rule only takes from a plaintiff a remedy, but it does not destroy his rights. Eager v. Belmore, 53 N.M. 299, 207 P.2d 519 (1949).

The effect of a dismissal merely deprives one of his remedy from again bringing suit on the same cause of action, but the rights are not destroyed. Otero v. Sandoval, 60 N.M. 444, 292 P.2d 319 (1956).

Mandamus is the proper proceeding to compel dismissal under this rule when the district judge has refused to do so. State ex rel. City of Las Cruces v. McManus, 75 N.M. 267, 404 P.2d 106 (1965).

The special statutory eminent domain procedure is inconsistent with Subdivisions (b) and (e) (see now Paragraphs B and E), and these rules are therefore inapplicable to eminent domain proceedings brought under the special alternative procedure where, as here, a permanent order of entry has been made as to some part of the property being condemned. State ex rel. State Hwy. Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

These rules are inapplicable to eminent domain proceedings in which an order of permanent entry and possession has been made. State ex rel. State Hwy. Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

Written motion required. — Before the court is empowered to dismiss under this rule for lack of diligence, the party must elect to invoke his right to compel a dismissal and must manifest such election by filing a written motion to dismiss. Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965).

A trial court does have the inherent power to dismiss a cause for failure of prosecution. Smith v. Walcott, 85 N.M. 351, 512 P.2d 679 (1973).

The right of a court to dismiss a suit for failure to prosecute with diligence exists independently of statute; it is inherent. The determination of what amounts to lack of diligence is within the discretion of the court. City of Rosewell v. Holmes, 44 N.M. 1, 96 P.2d 701 (1939) (decided under former law).

Paragraph E does not oust the trial court of jurisdiction to exercise its inherent power to dismiss under Local Rule 43 (1st Dist.). Gathman-Matotan Architects & Planners, Inc. v. State, Dep't of Fin. & Admin., 107 N.M. 113, 753 P.2d 892 (1988).

And order entered pursuant to such power, final. — The order or judgment entered pursuant to the inherent power to dismiss a cause is final and effectively terminates a case, unless and until it is properly reinstated. Smith v. Walcott, 85 N.M. 351, 512 P.2d 679 (1973).

Effect of omitting defendant from order. — Even if defendant was not included in the order of dismissal, the statute specifically provides that the dismissal shall be "with prejudice to the prosecution of any other or further action or proceeding based on the same cause of action set up in the complaint" so no new action may be tried against the defendant. Brown v. Davis, 74 N.M. 610, 396 P.2d 594 (1964).

Order entered sua sponte does not constitute adjudication upon merits. — The order of dismissal entered sua sponte by the trial court does not constitute an adjudication upon the merits. Hence, the doctrine of res judicata is not applicable to the issues presented in this case. Smith v. Walcott, 85 N.M. 351, 512 P.2d 679 (1973).

Power to dismiss both good and deficient complaints. — A trial court has the power to dismiss a perfectly good complaint for a failure to expeditiously move a case along, and it has the same power in regard to a complaint which is patently deficient. Birdo v. Rodriguez, 84 N.M. 207, 501 P.2d 195 (1972).

The rule contemplates a hearing upon a motion to dismiss at which the parties may present evidence on the issue of whether the plaintiff therein or any defendant filing a cross-complaint therein has failed to take any action to bring such action or proceeding to its final determination for a period of at least three years after the filing of said action or proceeding or of such cross-complaint. Dunham-Bush, Inc. v. Palkovic, 84 N.M. 547, 505 P.2d 1223 (1973); State ex rel. Reynolds v. Molybdenum Corp. of Am., 83 N.M. 690, 496 P.2d 1086 (1972).

Failure to give notice of motion not jurisdictional error. — Even if it is required that notice be given of a motion to dismiss under this rule, failure to give such notice is not a jurisdictional error. Midwest Royalties, Inc. v. Simmons, 61 N.M. 399, 301 P.2d 334 (1956).

Timeliness essential in making motion. — Where defendant did not make any motion to dismiss, either oral or written, before the trial setting was obtained by the plaintiff, and the oral motion was made at the outset of the trial, it was neither timely nor proper and its denial was correct. Beyer v. Montoya, 75 N.M. 228, 402 P.2d 960 (1965).

When motion to dismiss not timely filed. — Motions to dismiss made during the time court was actually hearing argument and evidence on petition for ejectment and the response thereto were not timely filed. Southern Pac. Co. v. Timberlake, 81 N.M. 250, 466 P.2d 96 (1970).

Where defendant acted more than two years after complaint filed (now three years) but before written motion to dismiss, the subsequent motion for dismissal was too late. Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965).

Motion must precede action by court and parties toward determination. — Where action was taken by the trial court and by both parties toward a final determination of the case, and such action was taken before the defendant filed his motion to dismiss, the motion to dismiss under this statute came too late. Dollison v. Fireman's Fund Ins. Co., 77 N.M. 392, 423 P.2d 426 (1966).

The application of Subdivision (e) (see now Paragraph E) must be preceded by defendant's motion and a hearing. Mora v. Hunick, 100 N.M. 466, 672 P.2d 295 (Ct. App. 1983).

Determination of motion to dismiss action with prejudice. — To resolve a motion to dismiss pursuant to Subdivision (e)(1) (see now Paragraph E(1)), the trial court should determine, upon the basis of the court record and the matters presented at the hearing, whether such action has been timely taken by the plaintiff, the cross-claimant or the counter-claimant against whom the motion is directed and, if not, whether he has been excusably prevented from taking such action. Albuquerque Prods. Credit Ass'n v. Martinez, 91 N.M. 317, 573 P.2d 672 (1978).

Factors to be considered by court. — A court must consider many factors in ruling on a motion to dismiss pursuant to Subdivision (e) (see now Paragraph E), including: (1) All written and oral communications between the court and counsel; (2) actual hearings by the court on motions; (3) negotiations and other actions between counsel looking toward the early conclusion of the case; (4) all discovery proceedings; and (5) any other matters which arise and the actions taken by counsel in concluding litigation. Jones v. Montgomery Ward & Co., 103 N.M. 45, 702 P.2d 990 (1985).

Prejudice to defendant is not discrete matter to be considered in deciding a motion under Subdivision (e) (see now Paragraph E). Howell v. Anaya, 102 N.M. 583, 698 P.2d 453 (Ct. App. 1985).

Timeliness of activities between filing and hearing of motion. — A court may, in its discretion, consider as timely, activities occurring between the filing of a motion to dismiss and the hearing on it. Sewell v. Wilson, 97 N.M. 523, 641 P.2d 1070 (Ct. App. 1982).

Right to dismissal depends whether plaintiff abandoned his claim. — The positive right of a defendant to procure a dismissal with prejudice after at least two years of nonaction on the part of the plaintiff is to be tested by a determination as to just what action the plaintiff could have taken, within the applicable rules of procedure, to bring his case to trial. The dismissal of an action merely because it is not tried within two years, three years or within any other fixed period after the filing of the complaint, amounts to an arbitrary denial of justice unless the plaintiff has failed to take some action, within the given period, which he could effectively take, and has thereby been guilty of a statutory abandonment of his claim. Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965).

Duty to act to bring case to trial. — Where appellant urged that his first attorney withdraw, his second attorney left the state, one judge was disqualified, the appointed judge's term expired and two months elapsed before a new judge was appointed; nevertheless, the appellant could have acted toward bringing his case to trial by obtaining a new attorney, and there was a presiding district judge designated to hear the case at all times except for three months; thus his contention was immaterial since more than two years had elapsed since the final designation. Pettine v. Rogers, 63 N.M. 457, 321 P.2d 638 (1958).

Error committed if motion dismissed without good reason. — If no good reason exists, the denial by the trial court of a motion to dismiss is error; but by proceeding to trial the court is within its jurisdiction. Baca v. Burks, 81 N.M. 376, 467 P.2d 392 (1970).

Initiation of discovery proceedings does not necessarily demonstrate the diligence required of a plaintiff under Subdivision (e) (see now Paragraph E), because such activity is routine and almost reflexive in modern litigation. Sewell v. Wilson, 97 N.M. 523, 641 P.2d 1070 (Ct. App. 1982).

Factors which cumulatively constitute excusable delay. — Undertaking discovery, the pursuit of or delay in finding an expert witness, the physical disability of a plaintiff, economic difficulty or the need to travel, in and of themselves if taken individually would not constitute sufficient action or excusable delay in bringing a case to final determination within the time constraints of Subdivision (e) (see now Paragraph E), but cumulatively they provide sufficient reason to permit the plaintiff to proceed with his claim. Sewell v. Wilson, 97 N.M. 523, 641 P.2d 1070 (Ct. App. 1982).

Good faith attempt to obtain setting bars dismissal. — Letter of March 29, 1963, filed July 26, 1963, which was on the record, and was placed there before the motion to dismiss was filed, while not a motion for a setting, disclosed that a good-faith attempt had been made to obtain a setting and met requirement that action had been taken to prevent dismissal. Foundation Reserve Ins. Co. v. Johnston Testers, Inc., 77 N.M. 207, 421 P.2d 123 (1966).

Good cause for inactivity shown. — Where plaintiffs filed a complaint in July 2002; one plaintiff filed for bankruptcy in federal court in June 2003 and claimed sole ownership of the claim against defendant; counsel for plaintiffs was uncertain whether counsel could represent both plaintiffs in the case without approval of the bankruptcy court; in May 2006, the district court entered an order "closing" the case and permitting plaintiffs to reopen the case within sixty days after the termination of the bankruptcy stay; plaintiffs reached a settlement in the bankruptcy proceeding in which they agreed to pursue their claims against defendant jointly; the bankruptcy proceeding concluded on May 16, 1007; and on May 25, 2007, plaintiffs filed a motion to reinstate the case together with a request for a trial setting, plaintiffs demonstrated good cause and the district court erred when it denying plaintiffs' motion to reinstate the case. *Summit Elec. Supply Co., Inc. v. Rhodes & Salmon, P.C.*, 2010-NMCA-086, 148 N.M. 590, 241 P.3d 188, cert. denied, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Setting case for trial defeats dismissal. — Plaintiffs' motion to set the case for trial, made prior to defendant's motion to dismiss, prevents a dismissal under this rule. Procter v. Fez Club, 76 N.M. 241, 414 P.2d 219 (1966).

Motion to set the cause for trial was not action to bring such action to its final determination and such a motion is proper action to satisfy this rule. Foster v. Schwartzman, 75 N.M. 632, 409 P.2d 267 (1965).

Procuring of a setting on the merits prevents mandatory dismissal under this rule. Jones v. Pringle, 78 N.M. 467, 432 P.2d 823 (1967).

Court's refusal to set particular trial date does not violate due process. — Failure or refusal of the court to set a case for trial at any particular time does not deny due process. At any time before the motion to dismiss was filed, and even after expiration of the two-year period, the plaintiff could have prevented dismissal by the mere filing in the case of a written motion requesting a trial setting. Briesmeister v. Medina, 76 N.M. 606, 417 P.2d 208 (1966).

Defendant's motion to dismiss does not inure to the benefit of the plaintiffs. Gilman v. Bates, 72 N.M. 288, 383 P.2d 253 (1963).

When dismissal erroneous although record of actions not in file. — The failures of the trial court to make a record of the pretrial conference and hearing and to decide the legal issues presented to the court by oral arguments and the briefs are not chargeable to either party, therefore, both parties had clearly taken actions to bring the suit to its

final conclusion long before May 25, 1971, and although a record of these actions did not appear in the court file, dismissal of the action pursuant to this rule was error. State ex rel. Reynolds v. Molybdenum Corp. of Am., 83 N.M. 690, 496 P.2d 1086 (1972).

Requests for conference sufficient to withstand motion. — Actions consisting of (1) the writing of a letter to the district judge requesting a pretrial conference and hearing on defendant's legal defenses; (2) the participation in this pretrial conference; (3) the subsequent preparation and furnishing to the court of "Plaintiff's Trial Brief on Legal Defenses"; and (4) conferences with defendant's counsel for the purpose of getting an early disposition of at least defendant's legal defenses, were sufficient to withstand motion for dismissal under this rule. State ex rel. Reynolds v. Molybdenum Corp. of Am., 83 N.M. 690, 496 P.2d 1086 (1972).

Failure to immediately file motion does not constitute waiver. — That the defendant did not file his motion immediately upon the expiration of the two years is certainly not a waiver. Featherstone v. Hanson, 65 N.M. 398, 338 P.2d 298 (1959).

Defendant's failure to move for dismissal of the case immediately upon the expiration of the two-year period, the filing of various motions, the initialing of the order by defendants' counsel assenting to a third amended complaint, etc., do not constitute a waiver of the statute. Brown v. Davis, 74 N.M. 610, 396 P.2d 594 (1964).

But defendant required to elect whether to invoke right. — While failure to file a motion for dismissal immediately upon the expiration of the two-year period does not constitute a waiver of the right to invoke dismissal, this rule requires that the defendant elect whether to invoke his right before the plaintiff has taken the requisite action to bring the case to its final determination. Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965).

Rule not bar to suit to enforce judgment lien against realty. — A suit on small claims court judgment was not a suit to enforce a judgment lien against real estate, and an order of dismissal under this rule, of a suit to enforce the judgment lien against real estate, was not a bar to such suit. Curtis Mfg. Co. v. Barela, 76 N.M. 392, 415 P.2d 361 (1966).

B. NECESSITY TO BRING ACTION TO FINAL DETERMINATION.

In order for res judicata to apply, the action asserted to have preclusive effect must have concluded with a final adjudication on the merits. Cagan v. Village of Angel Fire, 2005-NMCA-059, 137 N.M. 570, 113 P.3d 393.

Dismissal constitutes adjudication on merits. — Order of dismissal with prejudice for failure to prosecute pursuant to Paragraph E(1) of this rule constitutes an adjudication on the merits. Cagan v. Village of Angel Fire, 2005-NMCA-059, 137 N.M. 570, 113 P.3d 393.

When a dismissal with prejudice for lack of prosecution is entered pursuant to a written motion and after a hearing on the merits where the losing party has had notice and an opportunity to be heard, a dismissal under Paragraph E(1) of this rule constitutes an adjudication on the merits. Cagan v. Village of Angel Fire, 2005-NMCA-059, 137 N.M. 570, 113 P.3d 393.

Rule inapplicable where cause already brought to final determination. — Dismissal under this rule is mandatory after the passage of two years from the filing of the action, unless the time is tolled by certain well-defined exceptions, but this rule has no application to a situation where the cause had been brought to a final determination in the district court, an appeal prosecuted and a new trial ordered. Ballard v. Markey, 73 N.M. 437, 389 P.2d 205 (1964).

This rule has no application where the action has previously been brought to final determination, appeal has been taken, and a new trial has been ordered. Clark v. Carmody, 55 N.M. 5, 225 P.2d 696 (1950).

And method of reaching determination immaterial. — This rule, by its express language, has no application to an action once it has been brought to a final determination in the district court. Whether that final determination is reached after a trial on the merits or by way of summary judgment is unimportant. Ballard v. Markey, 73 N.M. 437, 389 P.2d 205 (1964).

Plaintiff's duty to bring case to trial. — Plaintiff should not be permitted to file a motion for trial setting and then, especially when it becomes obvious that such a request has not been effective in producing a trial setting, to sit and do nothing for a period of 11 years. The language of this rule is clear that the duty of bringing a case to trial is plaintiff's; plaintiff may not shift the burden of bringing a case to trial to the court if it becomes obvious that his request for a trial setting is unavailing. Stoll v. Dow, 105 N.M. 316, 731 P.2d 1360 (Ct. App. 1986).

What constitutes activity bringing a case to a final determination must be decided considering the facts of each case. Cottonwood Enters. v. McAlpin, 109 N.M. 78, 781 P.2d 1156 (1989).

What constitutes activity bringing a case to a final determination? — Where plaintiffs filed a complaint in July 2002; one plaintiff filed for bankruptcy in federal court in June 2003; the district court entered an order in May 2006 "closing" the case and permitting plaintiffs to reopen the case within sixty days after the termination of the bankruptcy stay; the bankruptcy proceeding concluded on May 16, 2007; plaintiffs filed a motion to reinstate the case on May 25, 2007 together with a request for a trial setting; and in response, defendant filed a motion to dismiss for failure to prosecute, plaintiffs acted to bring the case to a final determination and timely moved for reinstatement before defendant filed a motion to dismiss and the district court abused its discretion by dismissing the case. *Summit Elec. Supply Co., Inc. v. Rhodes & Salmon, P.C.*, 2010-

NMCA-086, 148 N.M. 590, 241 P.3d 188, cert. denied, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

No requirement to be equally active against all defendants. — Plaintiffs took sufficient action towards bringing the case to a final determination so as to avoid a dismissal with prejudice under this provision when they initiated settlement negotiations with one of the multiple defendants which culminated in a settlement agreement. There is no requirement under Paragraph E that a plaintiff be equally active in prosecuting a claim against all of the defendants. New Mexico Water Quality Control Comm'n v. Emerald Corp., 113 N.M. 144, 823 P.2d 944 (Ct. App. 1991).

Bona fide efforts on plaintiff's part required. — A notice that the case would be heard, filed just three months after the complaint was filed, without having arranged for a trial setting and with no jury being available although the case was a jury case, did not disclose "actual and bona fide efforts on the part of the plaintiff to have the case finally determined." Foster v. Schwartzman, 75 N.M. 632, 409 P.2d 267 (1965).

As well as showing of diligence. — A showing of diligence in the court filed by motion seeking action by the court to bring the case to its final determination satisfies the requirements of this rule and when the requisite action is taken to bring the case to its final determination, this rule is satisfied. Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965).

Duty rests upon the claimant at every stage of the proceeding to use diligence to expedite his case. Pettine v. Rogers, 63 N.M. 457, 321 P.2d 638 (1958).

Late filing not demonstrate diligence. — Letter not filed until day after motion to dismiss for failure to prosecute was not effective to establish diligence on the part of the plaintiff to bring the case to final disposition within two years after it was filed. Foundation Reserve Ins. Co. v. Johnston Testers, Inc., 77 N.M. 207, 421 P.2d 123 (1966).

Or correspondence not reflected in court file. — Correspondence between the court and counsel, not reflected in the court file prior to the filing of the motion to dismiss, is not to be considered in determining the question of diligence of plaintiff in bringing an action to its final determination. Dollison v. Fireman's Fund Ins. Co., 77 N.M. 392, 423 P.2d 426 (1966).

Correspondence between counsel and the court, and a verbal request for a trial setting, not reflected in the court file prior to the motion to dismiss, does not constitute the action to bring the case to its final determination contemplated by the rule. Briesmeister v. Medina, 76 N.M. 606, 417 P.2d 208 (1966).

This rule does not justify an automatic dismissal upon the expiration of two years after the filing of the complaint or cross-complaint, even though the party has done

nothing to bring the action to its final determination. Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965).

Four-year delay in setting trial. — Plaintiff's claim was properly dismissed with prejudice where he originally filed suit in 1969 and did not file motion to set trial until 1973, thus failing to meet any reasonable standard for bringing a case to its final determination in accordance with Paragraph E. Stoll v. Dow, 105 N.M. 316, 731 P.2d 1360 (Ct. App. 1986).

Trial setting filed. — Although plaintiff 's case lay fallow for over two years, and plaintiff 's failure to appear at a hearing could not be condoned, plaintiff 's irresponsibility did not warrant dismissal for inactivity where it had filed for a trial setting, thereby acting to bring the case to a conclusion and saving itself from a likely dismissal. Cottonwood Enters. v. McAlpin, 109 N.M. 78, 781 P.2d 1156 (1989).

Filing requests for discovery. — A party's filing of requests for discovery constitutes sufficient action to avoid dismissal under Paragraph E. Jimenez v. Walgreens Payless, 106 N.M. 256, 741 P.2d 1377 (1987).

Hearing prior to dismissal. — Where the trial court relied for its order of dismissal on Paragraph E, it erred by not allowing a hearing at which the parties could have presented evidence. Jimenez v. Walgreens Payless, 106 N.M. 256, 741 P.2d 1377 (1987).

C. STATUTE OF LIMITATIONS.

Effect of this rule is the same as that of a statute of limitations; i.e., a plaintiff who fails to act to bring his case to final determination may lose his remedy through a motion for a dismissal of the action. Eager v. Belmore, 53 N.M. 299, 207 P.2d 519 (1949).

This rule has the effect of a statute of limitations, and the order of dismissal does not destroy plaintiff's rights but only takes from him a remedy. Briesmeister v. Medina, 76 N.M. 606, 417 P.2d 208 (1966).

This rule, if not avoided, operates as a statute of limitations. Henriquez v. Schall, 68 N.M. 86, 358 P.2d 1001 (1961).

No requirement that action tried without statutory period. — This rule does not require that an action be tried without the two-year period, but only that the plaintiff take action to bring the case to its final determination within that time, or prior to a motion to dismiss filed thereafter. Briesmeister v. Medina, 76 N.M. 606, 417 P.2d 208 (1966).

Period commences on date of filing of complaint. — The date of filing the complaint is the date upon which the two-year period of the rule commences to run and the only exceptions this court has found are Vigil v. Johnson, 60 N.M. 273, 291 P.2d 312 (1955) and Chavez v. Angel, 77 N.M. 687, 427 P.2d 40 (1967), which are to the effect that the

statute commenced to run on the date of the filing of an amended complaint. Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967).

Or until complaint amended. — The two-year limitation period does not commence running until the complaint is amended in response to a motion for a more definite statement under Rule 12(e) (see now Rule 1-012 NMRA). A motion to dismiss under this rule is premature unless two years have passed since the filing of the amended complaint. Chavez v. Angel, 77 N.M. 687, 427 P.2d 40 (1967).

Period commences on date of amended complaint adding additional party against whom different cause of action is asserted. — The three-year statute of limitations begins to run against a party added in an amended complaint on the date of the filing of the amended complaint, rather than on the date of the filing of the original complaint, if the amended complaint includes a different cause of action against the party added. Fidelity Nat'l Bank v. Collier, 101 N.M. 273, 681 P.2d 58 (1984).

Statute tolled for bona fide reasons disclosed in record. — To avoid the running of the two-year statute for any reason not specifically provided for therein, the court record must disclose actual and bona fide efforts on the part of the plaintiff to have the case finally determined within the two-year period. Schall v. Burks, 74 N.M. 583, 396 P.2d 192 (1964).

And defendants entitled to dismissal when statute not tolled. Where no sufficient showing to excuse compliance or toll the statute requiring disposition of litigation within two years after the "filing" of an action has been made, defendants are entitled to dismissal for plaintiff 's failure to prosecute claim. State ex rel. City of Las Cruces v. McManus, 75 N.M. 267, 404 P.2d 106 (1965).

Motion to set case satisfies statute. — Filing of a motion for a setting of the case and bringing it to the attention of the court for consideration before expiration of the two-year limit satisfies the statute. McClenithan v. Lovato, 78 N.M. 480, 432 P.2d 836 (1967).

The filing of a motion seeking a trial setting and the taking of immediate steps to prepare for trial, even after more than two years had expired, when done before the motion to dismiss was filed, effectively met the requirement of taking action to bring the case to its final determination. Foundation Reserve Ins. Co. v. Johnston Testers, Inc., 77 N.M. 207, 421 P.2d 123 (1966).

Correspondence as to when trial may commence not avoid statute. — Letters from plaintiff to designated judges as to when trial might be had do not constitute sufficient effort to bring case on for trial and avoid the running of the statutory period of two years provided in the rule. More v. Shoemaker, 77 N.M. 689, 427 P.2d 41 (1967).

Preliminary motions not ruled upon will not prevent running of statute. — Preliminary motions filed but not ruled upon by the court will not prevent the running of the statute, at least where the record does not disclose that the court had been timely

advised of the urgency of a ruling on the pending motion with a request for a ruling and a setting for final disposition prior to a motion to dismiss under this rule. State ex rel. City of Las Cruces v. McManus, 75 N.M. 267, 404 P.2d 106 (1965).

Or interlocutory matters. — Notice of hearing on motion to dismiss for failure to serve process with reasonable diligence and the setting thereon are nothing more than proceedings leading to the disposition of interlocutory matters and not actions to bring the proceeding to its final determination so as to toll the statute. Jones v. Pringle, 78 N.M. 467, 432 P.2d 823 (1967).

Or pendency of motion to join indispensable parties. — The pendency of a motion to join parties claimed to be indispensable will not suspend the running of the statute of limitations in the rule. Briesmeister v. Medina, 76 N.M. 606, 417 P.2d 208 (1966).

Mere filing of a notice of hearing will not suffice to avoid the running of the statute. Schall v. Burks, 74 N.M. 583, 396 P.2d 192 (1964).

The mere filing of a notice of hearing, not considered to amount to an actual and bona fide effort to get the case finally determined, did not prevent the running of the statute. Although the effort should be made within the two-year period, it may be done subsequent to the passage of two years, if done in good faith before the motion was filed. Foundation Reserve Ins. Co. v. Johnston Testers, Inc., 77 N.M. 207, 421 P.2d 123 (1966).

Failure of service of process on nonresident tolls statute. — Statutory period during which plaintiff was required to commence action after filing of complaint was tolled during period in which service of process on nonresident defendant could not be accomplished. Yarbro v. Koury, 72 N.M. 295, 383 P.2d 258 (1963).

Or delays in getting on court calendar. — Delays caused by system of placing cases on jury trial calendar do not bring case within exception to limitation period due to causes beyond plaintiff's control. McClenithan v. Lovato, 78 N.M. 480, 432 P.2d 836 (1967).

Or difficulty in obtaining judge. — Difficulty in obtaining a judge to hear the case due to various designations of district judges does not excuse failure to bring suit within two years. More v. Shoemaker, 77 N.M. 689, 427 P.2d 41 (1967).

Or illness of judge. — Delays caused by illness of the judge do not bring the case within exception to the limitation period due to causes beyond plaintiff's control. McClenithan v. Lovato, 78 N.M. 480, 432 P.2d 836 (1967).

Or absence of benefit of counsel, disqualification of judge, etc. — The absence of benefit of counsel for some 14 months, various disqualifications and recusals of trial judges, the pretrial conference, and, particularly, the initialing by defendants' counsel of the order allowing the filing of a third amended complaint will not toll the statute of

limitations for bringing a case to trial. Brown v. Davis, 74 N.M. 610, 396 P.2d 594 (1964).

Or nonavailability of jury. — Running of the statute of limitations for dismissal for failure to take action is not tolled because of the nonavailability of a jury. Reger v. Preston, 77 N.M. 196, 420 P.2d 779 (1966).

The nonavailability of a jury, in itself, does not prevent dismissal under this rule. Escobar v. Montoya, 82 N.M. 640, 485 P.2d 974 (Ct. App. 1971).

The nonavailability of a jury is not good reason to toll the statute where plaintiff had agreed to furnish certain medical data to defendant, and that information was not made available to defendant until after the motion to dismiss. Because of plaintiff's failure to furnish the required material, the case could not have proceeded to trial and could not have been tried within the two-year period, even if a jury had been called. Trujillo v. Harris, 75 N.M. 683, 410 P.2d 401 (1966). But see State ex rel. Reynolds v. Molybdenum Corp. of Am., 83 N.M. 690, 496 P.2d 1086 (1972).

In many counties, jury sessions are infrequently held; but that in itself does not excuse a plaintiff from taking affirmative action showing diligence in bringing the case to trial within the two-year period. Schall v. Burks, 74 N.M. 583, 396 P.2d 192 (1964).

What is required to satisfy this rule that plaintiff bring case to final disposition within two years must be determined in each case. Baca v. Burks, 81 N.M. 376, 467 P.2d 392 (1970); Foundation Reserve Ins. Co. v. Johnston Testers, Inc., 77 N.M. 207, 421 P.2d 123 (1966).

D. MANDATORY DISMISSAL.

Purpose of Paragraph E(2). — Paragraph E(2) of this rule is designed to allow trial judges to clear deadwood from the docket, not to penalize plaintiffs who have lax attorneys. Penalties for laxness may be assessed in appropriate circumstances, including dismissal under Paragraph B of this rule or Rule 1-031E(1) NMRA. Vigil v. Thriftway Mktg. Corp., 117 N.M. 176, 870 P.2d 138 (Ct. App. 1994).

Statute mandatory, but not self-executing. — This rule requires mandatory dismissal except where tolled by statute or failure of process on account of absence of defendant from the state, or, unless for some other good reason, the plaintiff is unable, for causes beyond his control, to bring the case to trial. Although the statute is mandatory, it is not self-executing but requires the timely filing of a motion for its operation. Baca v. Burks, 81 N.M. 376, 467 P.2d 392 (1970).

If no action is taken for a period of at least two years, after filing the complaint, to bring the case to a final determination, the case must be dismissed upon motion of the opposite party unless dismissal is prevented by certain well-defined exceptions. Sarikey v. Sandoval, 75 N.M. 271, 404 P.2d 108 (1965).

Absence of material witnesses is not a reason beyond control of a party for taking no steps to bring a case to final determination and is sufficient ground for a dismissal with prejudice. Ringle Dev. Corp. v. Chavez, 51 N.M. 156, 180 P.2d 790 (1947).

Service of process is not the kind of action sufficient to toll the running of the mandatory dismissal rule, as service upon a defendant is merely one step in the process of litigation and does not constitute the required diligence to bring a case to its final determination. Escobar v. Montoya, 82 N.M. 640, 485 P.2d 974 (Ct. App. 1971); Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967).

Defendant's absence from state no defense to dismissal. — The exception stated in Ringle Dev. Corp. v. Chavez, 51 N.M. 156, 180 P.2d 790 (1947), is no longer applicable in cases in which the trial court is of the opinion that service could have been made, thus, that defendant is out of the state is not a defense to dismissal under this rule when the defendant could have been served under the "long-arm" statute. Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967). But see State ex rel. Reynolds v. Molybdenum Corp. of Am., 83 N.M. 690, 496 P.2d 1086 (1972).

Where evidence before the trial court shows the inability to locate or serve defendant at two specified addresses, however, the evidence of defendant's residence and whereabouts in the state is uncontradicted and there is no evidence indicating that defendant concealed himself within the state; therefore, the exception to this rule on account of the absence of the defendant from the state, or his concealment within the state, is not applicable. Escobar v. Montoya, 82 N.M. 640, 485 P.2d 974 (Ct. App. 1971).

Motion for reinstatement. — A trial judge should reinstate a claim previously dismissed sua sponte if a party can demonstrate to the court that he is ready, willing, and able to proceed with the prosecution of his claim and that the delay in the prosecution is not wholly without justification. Vigil v. Thriftway Mktg. Corp., 117 N.M. 176, 870 P.2d 138 (Ct. App. 1994).

Paragraph E(2) of this rule provides that: "Within thirty (30) days after service of the order of dismissal, any party may move for reinstatement of the case." Thus, the fact that the order of dismissal was not mailed to the worker until August means that the worker had until September to file his motion to reinstate the case, even though the case was actually dismissed sua sponte in May. Vigil v. Thriftway Mktg. Corp., 117 N.M. 176, 870 P.2d 138 (Ct. App. 1994).

Action cannot be reinstated. — When a notice of dismissal is requested or filed by a plaintiff before service of an answer or responsive pleading, the jurisdiction of the district court is immediately terminated, and the district court is without power to reinstate the action under Paragraph E(2) of this rule. Becenti v. Becenti, 2004-NMCA-091, 136 N.M. 124, 94 P.3d 867.

Reinstatement for good cause shown. — Paragraph E(2) directs the court to reinstate the case "upon good cause shown." The Judge should have determined whether the plaintiff had shown "good cause" for his lack of action; "compelling excuse" is not the correct standard. The standard adopted by the Judge indicates that he required a greater showing than "good cause". Vigil v. Thriftway Mktg. Corp., 117 N.M. 176, 870 P.2d 138 (Ct. App. 1994).

E. APPEAL.

Oral judgments not final. — Oral rulings are not final and therefore not a proper basis for an appeal. There was no final order denying reinstatement until the Judge issued a written order on November 23, 1992. Nor was the worker's motion for reinstatement deemed denied by operation of law under 39-1-1 NMSA 1978. The worker's motion for reinstatement was not filed pursuant to 39-1-1 NMSA 1978, it was filed pursuant to Paragraph E of this rule, which does not contain a provision saying that motions filed pursuant to it are deemed denied is not acted upon within a certain amount of time. Vigil v. Thriftway Mktg. Corp., 117 N.M. 176, 870 P.2d 138 (Ct. App. 1994).

Section not run with nunc pro tunc order. — Where during the course of three years the plaintiff's only action was an occasional interrogatory, where the defendant had the case dismissed under this section, and the plaintiff appealed and then got a nunc pro tunc order, that order was a hollow gesture since the trial court was divested of jurisdiction except for the appeal, and this section did not commence to run with the nunc pro tunc order. Carter Farms Co. v. Hoffman-LaRoche, Inc., 91 N.M. 132, 571 P.2d 124 (Ct. App. 1977).

Dismissal upheld except for abuse of discretion. — The district court has inherent power to dismiss a cause for failure to prosecute the same independent of any existing statute, and unless there has been an abuse of discretion the dismissal will not be disturbed on appeal even though the movant in the court below bases his motion primarily on this rule. Gilman v. Bates, 72 N.M. 288, 383 P.2d 253 (1963).

A district court may dismiss a cause under this rule and under its inherent power to dismiss a cause for failure to prosecute, independent of any statute, and unless there has been an abuse of discretion, a trial court's dismissal will not be disturbed on appeal. Henriquez v. Schall, 68 N.M. 86, 358 P.2d 1001 (1961).

The trial judge has inherent powers to dismiss a cause for failure to prosecute the same independent of any existing statute, and unless there has been an abuse of discretion the trial court's dismissal will not be disturbed on appeal. Pettine v. Rogers, 63 N.M. 457, 321 P.2d 638 (1958).

The discretion of the trial court, whether or not to dismiss the action, will be upheld on appeal except for a clear abuse thereof. Albuquerque Prods. Credit Ass'n v. Martinez, 91 N.M. 317, 573 P.2d 672 (1978).

What trial court should consider in making determination. — The trial court should determine, upon the basis of the court record, whether such action has been timely taken by the plaintiff, against whom the motion is directed, and, if not, whether he has been excusably prevented from taking such action. In making this final determination, the discretion of the trial court will be upheld on appeal except for a clear abuse thereof. Carter Farms Co. v. Hoffman-LaRoche, Inc., 91 N.M. 132, 571 P.2d 124 (Ct. App. 1977).

The trial court should determine, upon the basis of the court record and the matters presented at the hearing, whether such action has been timely taken by the plaintiff, the cross-claimant or the counter-claimant against whom the motion is directed, and, if not, whether he has been excusably prevented from taking such action. In making this determination, the discretion of the trial court will be upheld on appeal except for a clear abuse thereof. State ex rel. Reynolds v. Molybdenum Corp. of Am., 83 N.M. 690, 496 P.2d 1086 (1972); Howell v. Anaya, 102 N.M. 583, 698 P.2d 453 (Ct. App. 1985).

Trial court abused its discretion in ordering dismissal. — Trial court abused its discretion in ordering dismissal with prejudice because plaintiff's explanation that she was not prepared for trial due to extended settlement negotiations and a change in attorney representation was reasonable and could not be characterized as extreme. Even if plaintiff's conduct was extreme, the court erred in failing to consider alternative sanctions short of dismissal. Lowrey v. Atterbury, 113 N.M. 71, 823 P.2d 313 (1992).

Failure to take action warrants dismissal. — Since the appellant had at no time since the filing of his counterclaim done anything toward bringing his claim to trial, the lower court was warranted in dismissing it after the two-year lapse either under the inherent power of the courts to keep their dockets clear or under this section. Pettine v. Rogers, 63 N.M. 457, 321 P.2d 638 (1958).

The court of appeals holds that the trial court may dismiss plaintiffs' complaint with prejudice if the trial court finds that plaintiffs failed to take any action to end this litigation beyond all appeal after the filing of the complaint. Carter Farms Co. v. Hoffman-LaRoche, Inc., 91 N.M. 132, 571 P.2d 124 (Ct. App. 1977).

Insufficient evidence grounds for dismissal. — The trial court did not abuse its discretion in granting the motion to dismiss for failure to prosecute where the evidence produced by plaintiff was not sufficient to prove anything other than a failure to take any action to bring a case to determination. Dunham-Bush, Inc. v. Palkovic, 84 N.M. 547, 505 P.2d 1223 (1973).

And where only action submission of interrogatories, etc. — Where only action taken by plaintiffs was the submission of interrogatories and a hearing on defendant's motion to be relieved of filing any answers, and the trial court determined that plaintiffs' complaint should be dismissed with prejudice, there was no abuse of discretion. Carter Farms Co. v. Hoffman-LaRoche, Inc., 91 N.M. 132, 571 P.2d 124 (Ct. App. 1977).

When appellants' motion for judgment on pleadings properly denied. — Appellants' motion for judgment on the pleadings, or in the alternative, summary judgment on the ground that no action had been taken by appellees to bring the action or proceeding to a final determination within two years (now three years) after the action was filed, was denied where although two years had elapsed since appellees' last motion, two years (three years) had not elapsed since appellants' response thereto, thus it was beyond appellees' control to bring case to a close until the response was filed. Vigil v. Johnson, 60 N.M. 273, 291 P.2d 312 (1955).

Law reviews. — For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For comment on Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965), see 6 Nat. Resources J. 159 (1966).

For article, "Mandamus in New Mexico," see 4 N.M.L. Rev. 155 (1974).

For article, "The Writ of Prohibition in New Mexico" see 5 N.M.L. Rev. 91 (1974).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 98; 24 Am. Jur. 2d Dismissal, Discontinuance, and Nonsuit § 7 et seq.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348, 56 A.L.R.3d 1109, 27 A.L.R.4th 61, 32 A.L.R.4th 212, 3 A.L.R.5th 237.

Federal statutes providing for transfer of certain actions and proceedings to another district or division as affecting court's power to dismiss action, 10 A.L.R.2d 932.

Effect of nonsuit, dismissal or discontinuance of action on previous orders, 11 A.L.R.2d 1407.

Necessity of notice of application or intention to correct error in judgment entry, 14 A.L.R.2d 224.

Punishment of civil contempt in other than divorce cases by striking pleading or entering default judgment or dismissal against contemnor, 14 A.L.R.2d 580.

Appellate review at instance of plaintiff who has requested, induced or consented to dismissal or nonsuit, 23 A.L.R.2d 664.

Dismissal of plaintiff's case for want of prosecution as affecting defendant's counterclaim, setoff or recoupment, or intervenor's claim for affirmative relief, 48 A.L.R.2d 748.

Effect of judgment dismissing action, or otherwise denying relief, for lack of jurisdiction or venue, 49 A.L.R.2d 1036.

Dismissal of civil action for want of prosecution as res judicata, 54 A.L.R.2d 473.

Authority of attorney to dismiss or otherwise terminate action, 56 A.L.R.2d 1290.

What dismissals preclude a further suit, under federal and state rules regarding two dismissals, 65 A.L.R.2d 642.

Dismissal without prejudice of injunction action or bill as breach of injunction bond, 91 A.L.R.2d 1312.

Attack on personal service as having been obtained by fraud or trickery, 98 A.L.R.2d 551.

Time when voluntary nonsuit or dismissal may be taken as of right under statute so authorizing at any time before "trial," "commencement of trial," "trial of the facts," or the like, 1 A.L.R.3d 711.

Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question, 4 A.L.R.3d 545.

Dismissal, nonsuit, judgment or direction of verdict on opening statement of counsel in civil action, 5 A.L.R.3d 1405.

Dismissal of action because of perjury or suppression of evidence by party, 11 A.L.R.3d 1153.

Attorney's inaction as excuse for failure to timely prosecute action, 15 A.L.R.3d 674.

Right of one spouse, over objection, to voluntarily dismiss claim for divorce, annulment or similar marital relief, 16 A.L.R.3d 283.

Application to period of limitations fixed by contract, of statute permitting new action to be brought within specified time after failure of prior action for cause other than on the merits, 16 A.L.R.3d 452.

Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property, 24 A.L.R.3d 768.

What amounts to "final submission" or "retirement of jury" within statute permitting plaintiff to take voluntary dismissal or nonsuit without prejudice before submission or retirement of jury, 31 A.L.R.3d 449.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

Dismissal of plaintiff's action as entitling defendant to recover attorneys' fees or costs as "prevailing party" or "successful party," 66 A.L.R.3d 1087.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper, 34 A.L.R.4th 778.

Dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties, 3 A.L.R.5th 237.

Propriety of dismissal under Federal Civil Procedure Rule 41(a) of action against less than all of several defendants, 3 A.L.R. Fed. 569.

Propriety of dismissal for failure of prosecution under Rule 41(b) of Federal Rules of Civil Procedure, 20 A.L.R. Fed. 488.

Plaintiff's right to file notice of dismissal under Rule 41(a)(1)(i) of Federal Rules of Civil Procedure, 54 A.L.R. Fed. 214.

Appealability of order imposing conditions upon grant of plaintiff's motion for dismissal without prejudice, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, 75 A.L.R. Fed. 505.

20 C.J.S. Costs § 35; 27 C.J.S. Dismissal and Nonsuit §§ 7 to 39, 41 to 91.

1-042. Consolidation; separate trials.

A. **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

B. **Separate trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving the right of trial by jury given to any party as a constitutional right.

ANNOTATIONS

Cross references. — For joinder of claims and remedies, *see* Rule 1-018 NMRA.

For separate trial upon permissive joinder, *see* Rule 1-020 NMRA.

For separation of claims upon misjoinder, *see* Rule 1-021 NMRA.

For sanction against unnecessarily splitting actions, *see* Section 39-2-3 NMSA 1978.

For consolidation of actions on mechanics' liens, *see* Section 48-2-14 NMSA 1978.

For consolidation of actions on oil and gas well and pipeline liens, *see* Section 70-4-9 NMSA 1978.

Compiler's notes. — Paragraph A is deemed to have superseded 105-828, C.S. 1929, which was substantially the same.

Paragraph B together with Rule 1-015 NMRA, are deemed to have superseded 105-604, C.S. 1929, relating to amended pleadings and separation of misjoined causes.

It is improper to consolidate one suit that is in the early stages of litigation with another suit that is on appeal. Roark v. Farmers Group, Inc., 2007-NMCA-074, 142 N.M. 59, 162 P.3d 896, cert. denied, 2007-NMCERT-006.

Counterclaim or cross-claim to quiet title allowed in mortgage foreclosure action. Ortega, Snead, Dixon & Hanna v. Gennitti, 93 N.M. 135, 597 P.2d 745 (1979).

Consolidation is within the discretion of the trial court. Kassel v. Anderson, 84 N.M. 697, 507 P.2d 444 (Ct. App. 1973), overruled on other grounds Fidelity Nat'l Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 583 P.2d 470 (1978); Bloom v. Lewis, 97 N.M. 435, 640 P.2d 935 (Ct. App. 1980).

Exercise of such discretion not overturned absent abuse. — The consolidation of causes of action is a matter vested solely within the discretion of the trial court and the exercise of such discretion will not be disturbed on appeal absent a showing of abuse of discretion. Hanratty v. Middle Rio Grande Conservancy Dist., 82 N.M. 275, 480 P.2d 165 (1970), cert. denied, 404 U.S. 841, 92 S. Ct. 135, 30 L. Ed. 2d 75 (1971); Five Keys, Inc. v. Pizza Inn, Inc., 99 N.M. 39, 653 P.2d 870 (1982).

If there are questions common to two cases at the time consolidation is ordered, the order is reviewable only if the court abused its discretion in entering the order. Doe v. City of Albuquerque, 96 N.M. 433, 631 P.2d 728 (Ct. App. 1981).

District court did not have power to compel consolidated arbitration over party's objection. — While district court may have thought consolidation of arbitration proper in

interests of judicial economy, under Arbitration Act the court had power to compel only two separate arbitration proceedings according to terms of two contracts and did not have power to compel consolidated arbitration over objection of party. Pueblo of Laguna v. Cillessen & Son, 101 N.M. 341, 682 P.2d 197 (1984).

Consistent results in consolidated cases not required. — There is no legal requirement of consistency of result where separate cases are consolidated for trial. In the trial of consolidated cases, absent error in the pleading, proof or submission of the action, each case retains its distinctive characteristics and remains separate in respect of verdicts, findings, judgments and all other matters except the one of joint trial. Aragon v. Kasulka, 68 N.M. 310, 361 P.2d 719 (1961).

Successful prosecution of one claim dependent on outcome of another. — There was no error in bifurcating the trial and in subsequently denying the second trial where the bifurcation separated the civil rights claims against the city and the police chief from the claims against a police officer; the claims against the city and the police chief for inadequate training and supervision were secondary to, and dependent upon, successful prosecution of the complaint against the police officer, and the trial court determined that a successful defense by plaintiff in the first trial prevented a second trial. Baum v. Orosco, 106 N.M. 265, 742 P.2d 1 (Ct. App. 1987).

Single judgment from consolidated cases reviewed singly. — Where pleadings are filed as though but one case is pending, and the court enters a single judgment from which one appeal is prosecuted and one supersedeas bond executed, it is but fair to treat the case in the supreme court as presenting but a single appeal. Palmer v. Town of Farmington, 25 N.M. 145, 179 P. 227 (1919) (decided under former law).

Separate judgments from consolidated cases reviewed separately. — Where separate cases are consolidated for trial purposes only by order of the court, and separate judgments are rendered in each case, those several judgments cannot be reviewed in a single appeal or writ of error. Clark v. Queen Ins. Co., 22 N.M. 368, 163 P. 371 (1916) (decided under former law).

Applicability of Paragraph B. — Subdivision (b) (see now Paragraph B) applies where all parties are subject to trial by jury and one or more of the parties demand a separate trial by jury. El Paso Elec. v. Real Estate Mart, Inc., 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

Separation within discretion of trial court. — The granting of a motion for a separate trial on the issue of the validity of a release is a matter resting within the sound discretion of the trial court and will not be disturbed unless there is a clear abuse of such discretion shown. Mendenhall v. Vandeventer, 61 N.M. 277, 299 P.2d 457 (1956).

The bifurcation of a trial is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. McCrary v. Bill McCarty Constr. Co., 92 N.M. 552, 591 P.2d 683 (Ct. App. 1979).

Granting severance is discretionary with the trial judge. Speer v. Cimosz, 97 N.M. 602, 642 P.2d 205 (Ct. App. 1982).

The district court, for purposes of convenience, avoiding prejudice, or for the purpose of expediting the trial of the issues or in the interests of judicial economy, may direct that specific issues be tried separately. Bolton v. Board of County Comm'rs, 119 N.M. 355, 890 P.2d 808 (Ct. App. 1994).

Court order of separate trial reviewable only for abuse of discretion. — The court order of a separate trial of any claim or separate issue when separate trials will be conducive to expedition and economy is reviewable only for abuse of discretion. State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist., 99 N.M. 699, 663 P.2d 358 (1983).

Separability prerequisite to separate trial of issue. — Upon remand, the appellate court may order a separate trial of any separate issue where it appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. Vivian v. Atchison, T. & S.F. Ry., 69 N.M. 6, 363 P.2d 620 (1961).

Potential prejudice grounds for separation. — Where there is a danger that the evidence upon the defendant's negligence, or plaintiff's freedom from contributory negligence, may create an atmosphere which will produce an unconscious influence upon the triers of fact as to the entirely disconnected and distinct issue of the validity and sufficiency of a release acknowledging receipt of money in full settlement for all injuries and property damages resulting from the accident, the issue of the validity of the release should be tried separately. Mendenhall v. Vandeventer, 61 N.M. 277, 299 P.2d 457 (1956).

Denial of separate trial motion and use of jury in advisory capacity necessitating new trial. — Trial court's denial of a motion for separate trial and its submission of equitable issues to the jury in a shareholders' derivative suit, without entering the court's own findings of fact and conclusions of law, thereby using the jury in an advisory capacity, was the equivalent of an abuse of discretion necessitating a new trial. Scott v. Woods, 105 N.M. 177, 730 P.2d 480 (Ct. App. 1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Actions § 18 et seq.; 20 Am. Jur. 2d Counterclaim, Recoupment and Setoff §§ 56, 58; 75 Am. Jur. 2d Trial § 115 et seq.

Power of equity to enjoin prosecution of independent actions at law by different persons injured by the same tort, 75 A.L.R. 1444.

Consolidation of actions for personal injuries or property damage arising out of same accident as affected by fact that one action has been set down for trial without a jury, 104 A.L.R. 75, 68 A.L.R.2d 1372.

Right of defendant sued jointly with another or others in action for personal injury or death to separate trial, 174 A.L.R. 734.

Appellate review, on single appellate proceeding, of separate actions consolidated for trial together in lower court, right to, 36 A.L.R.2d 823.

Time for making application for consolidation of actions, 73 A.L.R.2d 739.

Separate trial of issues of liability and damages in tort, 85 A.L.R.2d 9.

Right of plaintiff suing jointly with others to separate trial or order of severance, 99 A.L.R.2d 670.

Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 A.L.R.3d 456.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving personal injury, death, or property damage, 78 A.L.R. Fed. 890.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in civil rights actions, 79 A.L.R. Fed. 220.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving patents and copyrights, 79 A.L.R. Fed. 532.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in contract actions, 79 A.L.R. Fed. 812.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in civil rights actions, 81 A.L.R. Fed. 732.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in actions involving patents, copyrights, or trademarks, 82 A.L.R. Fed. 719.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in actions involving securities, 83 A.L.R. Fed. 367.

1A C.J.S. Actions §§ 205, 220 to 228; 88 C.J.S. Trial §§ 6 to 10.

1-043. Evidence.

A. **Taking of testimony.** In all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided by these or other rules.

B. **When testimony at another trial can be used.** The testimony of any witness taken in any court, state or federal, in this state may be used in any subsequent trial or hearing of the same issued between the same parties in the following cases:

(1) when the witness is dead or insane;

(2) when the witness is a nonresident of this state;

(3) when after diligent effort the whereabouts of witnesses cannot be ascertained.

This rule is not intended to be exclusive and nothing herein contained shall be construed to require the courts to exclude evidence admissible under the New Mexico Rules of Evidence.

C. **Evidence on motions.** When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

ANNOTATIONS

Compiler's notes. — Paragraph B (formerly (a)(1)) was adopted as part of this rule, effective November 1, 1942; formerly this provision comprised Rule 26 (m) (see now Rule 1-026 NMRA). This subdivision is deemed to have superseded 45-407, C.S. 1929, which was substantially the same.

The major portion of the former provisions of Paragraph A has been superseded by Rule 11-402 NMRA; former Subdivision (b) has been superseded by Rules 11-607 and 11-611 NMRA; former Subdivision (c) by Rule 11-103; and former Subdivision (d) by Rule 11-603 NMRA.

Constitutional to impose sanctions without hearing where party warned and hearing not necessary. — Where a party has been warned that failure to comply with the court's discovery orders may result in the imposition of sanctions under Rule 37(B) (see now Rule 1-037 NMRA), and where the court, pursuant to this rule has determined that an evidentiary hearing under the circumstances is not necessary before ruling on a motion to impose sanctions, the imposition of such sanctions does not amount to a denial of due process. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Generally as to prior testimony. — Section 45-407, C.S. 1929, was not repealed by 35-4508, C.S. 1929 (relating to conduct of preliminary examinations), and while they overlapped to some extent, they were to be construed together. State v. Moore, 40 N.M. 344, 59 P.2d 902 (1936).

Oral testimony proper in hearing on motion for summary judgment. — Pleading seeking summary judgment is a motion, and Subdivision (e) (see now Paragraph C) permits court to hear oral testimony at a hearing on a motion. Summers v. American Reliable Ins. Co., 85 N.M. 224, 511 P.2d 550 (1973).

Procedure regarding telephone testimony. — Any permissible use of telephone testimony in court proceedings would depend on the specific facts and circumstances involved. Assuming that such testimony is appropriate in some circumstances, the conclusion that a deposition witness must take an oath and testify in the presence of an authorized officer also would apply to any testimony that a witness gives to the court over the telephone. 1988 Op. Att'y Gen. No. 88-81.

Because Rule 1-056 NMRA is silent concerning the use of oral testimony to support or oppose motions for summary judgment, the practice is to be used, if at all, only upon a proper showing that the party seeking to offer such testimony has first exercised due diligence in attempting to secure affidavits or deposition testimony for submission incident to such motion, and that for reasons beyond his control has been unable to obtain the affidavits or depositions. Marquez v. Gomez, 116 N.M. 626, 866 P.2d 354 (Ct. App. 1991).

Law reviews. — For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses § 713.

Validity of proceedings as affected by taking evidence out of court, 43 A.L.R. 1516, 47 A.L.R. 371, 48 A.L.R. 1269, 18 A.L.R.3d 572.

Manner or extent of trial judge's examination of witnesses in civil cases, 6 A.L.R.4th 951.

Admissibility of oral testimony at state summary judgment hearing, 53 A.L.R.4th 527.

98 C.J.S. Witnesses §§ 317, 322.

1-044. Judicial notice and determination of foreign law.

A. **Judicial notice.** The courts of New Mexico shall take judicial notice of the following facts:

(1) the true significance of all English words and phrases and of all legal expressions;

(2) whatever is established by law;

(3) public and private official acts of the legislative, executive and judicial departments of the United States, and the laws of the several states and territories of the United States, and the interpretation thereof by the highest courts of appellate jurisdiction of such states and territories;

(4) the seals of all the courts of this state, the United States and the courts of record of the various states of the United States and its territories;

(5) the accession to office, seals and the official signatures under seal of the officers of government in the legislative, executive and judicial departments of the United States and of the several states and territories thereof;

(6) the existing title, national flag and seal of every state or sovereign recognized by the executive power of the United States;

(7) the seals of notaries public;

(8) the laws of nature, the result of time and the geographic divisions and political history of the world.

In all cases the court may resort for its aid to appropriate books or documents of reference.

This rule is not intended to be exclusive and nothing herein contained shall be construed to limit or restrict the courts from taking judicial notice under the New Mexico Rules of Evidence or existing practice.

B. **Determination of foreign law.** A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the New Mexico Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

ANNOTATIONS

Compiler's notes. — Paragraph A is deemed to have superseded former Trial Court Rule 45-702, which was substantially the same, and 105-527, C.S. 1929, relating to judicial notice of private statutes.

The former provisions of Paragraph A have been superseded by Rules 11-902 and 11-1001 through 11-1005 NMRA. Former Subdivision (b) has been superseded by Rule 11-803 NMRA.

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Domestic Relations and Juvenile Law," see 11 N.M.L. Rev. 134 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29 Am. Jur. 2d Evidence § 318 et seq.; 29A Am. Jur. 2d Evidence § 1135; 61A Am. Jur. 2d Pleading §§ 16, 17, 19.

Proof of foreign official record under Rule 44(a)(2) of Federal Rules of Civil Procedure, 41 A.L.R. Fed. 784.

Raising and determining issue of foreign law under Rule 44.1 of Federal Rules of Civil Procedure, 62 A.L.R. Fed. 521.

32A C.J.S. Evidence § 1126; 71 C.J.S. Pleading § 86.

1-045. Subpoena.

A. **Form; issuance.**

(1) Every subpoena shall:

(a) state the name of the court from which it is issued;

(b) state the title of the action and its civil action number;

(c) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing or sampling of designated documents, electronically stored information or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(d) be substantially in the form approved by the Supreme Court.

A command to produce evidence or to permit inspection, copying, testing or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) All subpoenas shall issue from the court for the district in which the matter is pending.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court.

B. **Service; place of examination.**

(1) A subpoena may be served any place within the state.

(2) A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if that person's attendance is commanded:

(a) if the witness is to be paid from funds appropriated by the legislature to the administrative office of the courts for payment of state witnesses or for the payment of witnesses in indigency cases, by processing for payment to such witness the fee and mileage prescribed by regulation of the administrative office of the courts;

(b) for all persons not described in Subparagraph (2)(a) of this paragraph, by tendering to that person the full fee for one day's expenses provided by Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Subsection D of Section 10-8-4 NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises before trial, notice shall be served on each party in the manner prescribed by Rule 1-005 NMRA.

(3) A person may be required to attend a deposition within one hundred (100) miles of where that person resides, is employed or transacts business in person, or at such other place as is fixed by an order of the court.

(4) A person may be required to attend a hearing or trial at any place within the state.

(5) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

(6) A subpoena may be issued within this state in an action pending outside the state pursuant to Rule 1-045.1 NMRA upon the filing of a miscellaneous proceeding in the judicial district in which the subpoena is to be served. Upon the docketing of the miscellaneous proceeding, the subpoena may be issued and shall be served as provided by this rule.

(7) A subpoena may be served in an action pending in this state on a person in another state or country in the manner provided by law or rule of the other state or country.

C. **Protection of persons subject to subpoenas.**

(1) **In general.** A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or

expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) **Subpoena of materials or inspection of premises.**

(a) A person commanded to produce and permit inspection, copying, testing or sampling of designated electronically stored information, documents or tangible things, or inspection of premises:

(i) need not appear in person at the place of production, inspection, copying, testing or sampling unless commanded to appear for deposition, hearing or trial;

(ii) absent a court order, shall not respond to the subpoena prior to the expiration of fourteen (14) days after the date of service of the subpoena;

(iii) if a written objection is served or a motion to quash the subpoena is filed, shall not respond to the subpoena until ordered by the court;

(iv) may condition the preparation of any copies upon payment in advance of the reasonable cost of inspection and copying.

(b) Subject to Subparagraph (2) of Paragraph D of this rule:

(i) a person commanded to produce and permit inspection, copying, testing or sampling or a person who has a legal interest in or the legal right to possession of the designated material or premises may file a written objection or a motion to quash the subpoena;

(ii) any party may, within fourteen (14) days after service of the subpoena serve upon all parties written objection to or a motion to quash inspection, copying, testing or sampling of any or all of the designated materials or inspection of the premises.

(iii) If objection is served on the party serving the subpoena or a motion to quash is filed with the court and served on the parties, the party serving the subpoena shall not be entitled to inspect, copy, test or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. The court may award costs and attorney fees against a party or person for serving written objections or filing a motion to quash which lacks substantial merit.

(3)

(a) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance,

(ii) requires a person who is not a party or an officer of a party to travel to a place more than one hundred (100) miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of Subparagraph (3)(b)(iii) of this paragraph, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(b) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development or commercial information,

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

D. **Duties in responding to subpoena.**

(1)

(a) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(b) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the

information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(c) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(d) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of Subparagraph (3) of Paragraph B of Rule 1-026 NMRA. The court may specify the conditions for the discovery.

(2)

(a) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(b) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. By motion, a receiving party may promptly present the information to the court for in camera review and a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

E. **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided in Subparagraph (3)(a)(ii) of Paragraph C of this rule.

F. **Duties to make copies available.** A party receiving documents under subpoena shall make them available for copying by other parties.

[As amended, effective January 1, 1987; August 1, 1989; January 1, 1998; November 1, 2002, as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as amended by Supreme Court Order No. 09-8300-018, effective August 7, 2009.]

Committee Commentary for 2002 Amendment. —

Formerly, pre-trial production of documents or tangible items in the possession or control of a nonparty could only be obtained by a subpoena issued in conjunction with a notice of deposition of the person in possession of the documents.

In 1991, the federal rule was amended to allow pretrial subpoenas of documents or tangible items without the necessity of noticing and scheduling a simultaneous deposition. In 1997, the New Mexico Supreme Court similarly amended Rule 1-045 NMRA.

As amended in 1991, the federal rule required that "[p]rior notice" of any commanded production shall be served on each party, F.R. Civ. P. 45(b) (1). "The purpose of the notice provision is to afford other parties an opportunity to object to the production. . . " Fed. R. Civ. P. Rule 45 Committee Comment.

The 1997 amendment of Rule 1-045 NMRA provided for notice to all parties "[p]rior to or at the same time" as service of the subpoena. Rule 1-045(B)(2)(b) NMRA. As demonstrated in Wallis v. Smith, 2001-NMCA-017, 130 N.M. 214, 22 P.2d 682, cert. denied 23 P.3d 929, the New Mexico rule could be construed to permit a party to hand deliver a subpoena for documents and simultaneously mail notice to other parties with the possible result that the nonparty might comply with the subpoena before other parties received notice of its contents and had an opportunity to object to its contents pursuant to Rule 1-045(C)(2)(b) NMRA.

The 2002 amendment to Rule 1-045(C)(2) NMRA solves this problem by providing a fourteen (14) day period before responding to assure that "a person who has a legal interest in or the legal right to possession of the designated material or premises" or any party will have an opportunity to object to the subpoena before the witness responds.

The federal rule, requiring "[p]rior notice" is ambiguous, though it has been construed to require "reasonable notice" prior to service of the subpoena. Biocore Medical Technologies, Inc. v. Khosrowshahi, 181 F.R.D. 660, 667 (D. Kan. 1998). The committee considered but rejected this construction, preferring to set a specific time that will assure prior notice, while also recognizing the possibility that a court might reduce the time under appropriate circumstances.

1997 Amendment of Rule 1-045

1. Introduction

The New Mexico District Court Rules were based upon the Federal Rules of Civil Procedure. Although the New Mexico rules diverge from the Federal Rules when appropriate, the committee regularly reviews New Mexico's District Court Rules of Civil Procedure when the Federal Rules are modified. Federal Rule 45 - Subpoenas - underwent significant change as a result of amendments that went into effect in

December, 1991 and was further modified by amendments effective in December, 1995. The Rules Committee's reevaluation of Rule 1-045 in light of the changes in the federal rule prompted amendments to Rule 1-045 and the adoption of Rule 1-045 in its current form.

2. Overview

Rule 1-045 formerly contained different provisions for subpoenas for attendance at trial or hearing and for attendance at a deposition. The existing rule follows the model of the current federal rule which generally eliminates that distinction. Rule 1-045 formerly had the effect of barring parties from obtaining items such as documents or inspecting premises except in conjunction with a subpoena setting a deposition of a witness. The existing rule follows the current federal rule which allows subpoenas for production of items or inspection of premises from non-parties without the necessity of scheduling and conducting a deposition at the same time. The rule provides procedural protections to assure advance notice to parties that a party has issued a subpoena for production or inspection.

The rule provides for statewide service of both trial and hearing subpoenas and deposition and production subpoenas. Rule 1-045(B)(1).

Formerly, Rule 1-045 placed significant geographic limitations upon the place that depositions might be conducted in the absence of a court order. Some of those limitations depended upon the place of service of the subpoena. The rule eliminates the significance of the place of service of the subpoena as a factor in setting the place of deposition and modifies but does not eliminate other limitations in the former rule.

Rule 1-045 formerly authorized only the district court clerk to issue subpoenas. The existing rule follows the current federal rule which allows a party's attorney to issue subpoenas in the name of the court.

3. Who may issue subpoenas

Formerly, Rule 1-045 required that the clerk issue and sign all subpoenas. Following the model of the current federal rule, Rule 1-045 now authorizes an attorney for a party to issue and sign subpoenas in the attorney's capacity as an officer of the court. Any attorney authorized to practice law in New Mexico who is serving as attorney to a party may issue trial and hearing subpoenas as well as deposition and production and inspection subpoenas.

The clerk continues to have power to issue subpoenas. A clerk's subpoena will be of particular use to a party who is not represented by counsel. The clerk of the court for the district in which the matter is pending is the appropriate person to issue subpoenas for service anywhere in the state.

4. Form and content of subpoenas

A subpoena may: 1) command a person to attend at trial or attend a hearing; 2) command a person to appear for a deposition; 3) command a person to permit inspection of premises; 4) command a person to produce items at trial or a hearing; or 5) command a person to produce items for discovery or inspection prior to trial. A subpoena to produce items or permit inspection may, but need not, also command the person to attend a trial, hearing or deposition. Thus, Rule 1-045 now permits a party to subpoena items or obtain inspection without simultaneously scheduling a deposition.

Following the model of the current federal rule, subpoenas no longer need to contain the seal of the court. They must, however, now contain the civil action number of the case for which the subpoena is issued. Rule 1-045(A)(1)(d) now provides that subpoenas shall be substantially in the form approved by the Supreme Court and the Court has approved forms consistent with the requirements of Rule 1-045. *See* Civil Form 4-505 NMRA.

5. Service of subpoenas

Rule 1-045 now explicitly authorizes service of process anywhere in the state. When a person is beyond the subpoena power of the New Mexico District Court, Rule 1-045 provides that the party to the New Mexico proceeding who seeks to subpoena items, conduct inspection, or conduct a deposition in another state shall do so in the manner provided by law or rule of the other state. *See, e.g.*, Mass. Gen. Laws Ann. 123A Sec. 11 (West 1985) ("Discovery Within Commonwealth for Proceedings Outside Commonwealth").

As in former Rule 1-045, service of the subpoena normally must be accompanied by the tender of designated per diem expenses and mileage except in situations provided for in Rule 1-045(B)(2)(a) and when subpoenas are issued in behalf of the state, a state officer or a state agency. The rule now specifically requires that the full per diem be tendered even if the party believes that the required attendance will not take an entire day. Where attendance is required for more than one day, the full per diem for each additional day must be paid prior to the commencement of proceedings each day.

Rule 1-045(B)(2) formerly provided that the failure to tender required per diem expense and mileage fees did not invalidate the subpoena but merely justified the imposition of appropriate sanctions. That provision has been omitted from Rule 1-045. The committee intends that henceforth the failure to tender required expense and mileage fees shall invalidate the subpoena and justify non-compliance with the subpoena's command. The burden of compliance rests upon the person on whose behalf the subpoena is served.

Because Rule 1-045 already provided for service by any person not a party who is at least eighteen years old, specific references to the authority of sheriffs and deputies to serve subpoenas was superfluous and has been omitted in this rule. This modification follows the model of the current federal rule.

6. Notice of service of subpoena

Whenever a party schedules a deposition (whether or not a subpoena is issued compelling attendance at the deposition), Rule 1-030(B)(1) requires that notice of the deposition be sent to each party. When a subpoena for production or inspection is served in conjunction with the notice of deposition, the party seeking production at the deposition must also send notice of the issuance of the subpoena to each party along with the notice of the deposition. *Id*.

Because Rule 1-045 formerly required that subpoenas for pre-trial production or inspection could only be issued in conjunction with the taking of a deposition, the notice requirement of Rule 1-030(B)(1) effectively assured that all parties would receive notice of every pre-trial attempt by a party to compel production and inspection against a non-party. Rule 1-045 now authorizes issuance of a subpoena for pre-trial production without the necessity of a simultaneous deposition, Rule 1-045(A)(1)(d), with the result that the notice requirement in Rule 1-030(B)(1) no longer assures that all parties will receive notice of pre-trial production and subpoenas. To fill this notice gap, Rule 1-045(B)(2) now requires that prior to or simultaneously with the service of pre-trial inspection or production subpoenas the party on whose behalf the subpoena is served must give notice to all parties in the lawsuit in the manner required by Rule 1-005. This provision follows the model of the current federal rule.

7. Place of attendance or production

Service of a subpoena may be made anywhere in the state. Rule 1-045(B)(1). As was the case under former Rule 1-045, if the subpoena commands attendance at a trial or a hearing, the person served with the subpoena must appear as commanded anywhere in the state. Rule 1-045(B)(4).

Rule 1-045 modifies the former rule concerning the place in which a deposition of a subpoenaed witness may be scheduled. The rule formerly contained separate provisions for the place of depositions, depending upon whether the person subpoenaed was a resident of the judicial district in which the deposition was to be taken. In the case of nonresidents of the judicial district, the former rule focused on the place of service, and required that the deposition be held within forty miles of the place of service of the subpoena unless the court ordered otherwise.

Rule 1-045 eliminates the distinction between residents and nonresidents of the judicial district and does not take into account the place of service in setting the proper place for the deposition. Instead, Rule 1-045 provides that all persons may be required to attend a deposition only within 100 miles of the place of their residence, their place of employment or where they transact business unless another place is fixed by order of the court. Rule 1-045(B)(3).

If a person declines to honor a subpoena that is inconsistent with the geographical limitations of this rule, the person cannot be held in contempt for failure to attend the deposition unless the court entered an order compelling attendance at that place. Rule 1-045(E).

8. Proof of service of subpoena

The Supreme Court has approved a form for proof of service of a subpoena. See civil Form 4-505 NMRA. When proof of service of the subpoena must be filed pursuant to Rule 1-005(D) NMRA, Rule 1-045(B)(5) requires that the form of the proof of service be in substantial compliance with the approved form.

9. Duty to avoid misuse of subpoena authority

For the first time, Rule 1-045 imposes an explicit duty on parties and attorneys responsible for subpoenas to take reasonable steps to avoid undue burden or expense on persons subject to the subpoenas. Rule 1-045(C)(1). The court may sanction parties or attorneys who violate this rule with appropriate sanctions including imposition of an order to pay the witness lost earnings and attorney's fees. Id.

10. Subpoenas for production or inspection

Subpoenas for production of tangible items or inspection of premises now may issue without the necessity for setting a deposition at the same time. Rule 1-045(A)(1)(d). When such a subpoena is issued, the party responsible for the issuance of the subpoena must provide timely notice to all parties of the issuance of the subpoena. Rule 1-045(B)(2).

The rule formerly provided only that the subpoenaed person "produce" the items. The rule now requires that the person "produce and permit inspection and copying" of the books, documents or tangible items. Rule 1-045(A)(1)(d).

The rule formerly provided that the subpoena must identify the items subject to the subpoena with reasonable particularity. The committee has eliminated this explicit requirement in deference to its preference to model Rule 1-045 after the federal rule, but believes that the requirement that the items be "designated", Rule 1-045(A)(1)(c), incorporates the former requirement of reasonable particularity in the description of the items sought. The former rule also explicitly limited the scope of subpoenaed items to those within the scope of discovery permitted by Rule 1-026(B). The committee has eliminated this explicit limitation also in deference to its preference to model Rule 1-045 after the federal rule, but assumes that specific references to protection for trade secrets, expert opinions and the like, now found in Rule 1-045(C)(3)(b), which are rooted in Rule 1-026, suffice to indicate that the subpoena of items continues to be subject to the limitations of discovery in Rule 1-026.

The person who receives a subpoena to produce items or permit inspection of premises need not appear in person at the designated time and place unless that person is also commanded in the subpoena to appear for a deposition, trial or hearing. Rule 1-045(C)(2).

The person who receives a subpoena to produce items or permit inspection of premises must do so unless the person serves timely (See Rule 1-045(C)(2)(b)) objections on all parties. This modifies the federal rule by requiring service on all parties.

If no objections are served, the person responding shall produce the documents either as they are kept in the ordinary course of business or labeled and organized to correspond with the categories of the demand. Rule 1-045(D)(1).

If timely objections are served, the subpoenaed person need not comply with the subpoena unless and until the person seeking the subpoenaed items obtains a court order compelling the production. Rule 1-045(C)(2)(b). Alternatively, the person who opposes compliance with the subpoena and serves timely notice of objections may file a timely motion seeking to quash or modify the subpoena. Rule 1-045(C)(3)(a).

Rule 1-045 now lists grounds for seeking an order of protection from a subpoena, Rule 1-045(C)(3), and provides guidelines for the court to use in ruling on such motions. Id. These new provisions follow the current federal rule.

11. Taking a deposition in New Mexico for an action pending outside New Mexico

A New Mexico statute authorizes New Mexico courts to order the deposition of persons found in this state for use in conjunction with legal proceedings outside New Mexico. Sections 38-8-1 to 38-8-3 NMSA 1978. Rule 1-045(B)(6) makes reference to new Rule 1-045.1 NMRA, which authorizes the issuance of subpoenas for depositions and other discovery in New Mexico for an action pending outside of New Mexico.

Committee Commentary for 2007 Amendment. —

See the 2007 Committee Commentary to Rule 1-026 NMRA for additional information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as amended by Supreme Court Order No. 09-8300-018, effective August 7, 2009.]

Committee Commentary for 2009 Amendment. —

See the 2009 Committee Commentary to Rule 1-026 NMRA for additional information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

ANNOTATIONS

Cross references. — For witness fees, *see* Sections 10-8-1 to 10-8-8 and 38-6-4 NMSA 1978.

For the subpoena power of the director of the Financial Institutions Division of the Commerce and Industry Department, *see* Section 58-1-34 NMSA 1978.

For the subpoena power and enforcement thereof of the Oil Conservation Commission, *see* Sections 70-2-8 and 70-2-9 NMSA 1978.

For the application of this rule, insofar as subpoena witnesses, in criminal cases, *see* Paragraph A of Rule 5-613 NMRA.

The 1997 amendment, effective January 1, 1998, rewrote this rule to such an extent that a detailed comparison is impracticable.

The first 2009 amendment, approved by Supreme Court Order 09-8300-007, effective May 15, 2009, in Subparagraph (1)(c) of Paragraph A, after "produce and permit inspection", changed "and copying of designated books, document or tangible things" to "copying, testing or sampling of designated documents, electronically stored information or tangible things"; in Subparagraph (1)(d) of Paragraph A, in the second sentence, after "permit inspection", added "copying, testing or sampling" and added the last sentence; in Subparagraph (2)(a) of Paragraph C, after "permit inspection", changed "and copying of designated books, papers, documents or tangible things" to "copying, testing or sampling of designated electronically stored information, documents or tangible things"; in Subparagraph (2)(a)(i) of Paragraph C, after "inspection", added "copying, testing or sampling"; in Subparagraphs (2)(b)(i) and (2)(b)(ii) of Paragraph C, and after "copying", added "testing or sampling"; in Subparagraph (2)(b)(iii) of Paragraph C, after "copy", added "test or sample"; in Subparagraph (1) of Paragraph D, added Subparagraphs (b), (c) and (d); and in Paragraph D, added Subparagraph (2)(b).

The second 2009 amendment, approved by Supreme Court Order No. 09-8300-018, effective August 7, 2009, in the first sentence of Paragraph B(6), deleted "for taking of a deposition" and replaced "Section 38-8-1 NMSA 1978" with "Rule 1-045.1 NMRA". The amendment also deleted "the statute as a guide to practitioners" and added "new Rule 1-045.1 NMRA, which authorizes the issuance of subpoenas for depositions and other discovery in New Mexico for an action pending outside of New Mexico" in item 11 of the 1997 Amendment of Rule 1-045 of the committee commentary.

Compiler's notes. — Paragraph A may supersede 38-6-1, 38-6-2 NMSA 1978 insofar as they relate to subpoenas of witnesses before the district courts.

Paragraph D, together with Rules 1-028, 1-030, 1-031 and 1-032 NMRA, is deemed to have superseded 45-101 to 45-119, C.S. 1929 (36-5-21 to 36-5-39, 1953 Comp., now repealed), insofar as those provisions related to the taking of depositions for use in the district courts.

Court permission not required to subpoena witness. — Although the trial court refused to subpoena a psychologist as requested by defendant after trial had begun, the defendant himself could have the doctor subpoenaed without court permission, and had the trial court refused to allow him to testify, the defendant would in that case have to make an offer of proof to preserve error. State v. Melton, 90 N.M. 188, 561 P.2d 461 (1977).

District courts authorized to hear duces tecum subpoena application for commission records. — The district courts are authorized and directed, upon proper application for a subpoena duces tecum under this rule to hear and determine whether the records, reports and files of the governor's organized crime prevention commission may be subpoenaed, and if so, upon what conditions. If the district court orders that a subpoena duces tecum be issued, an in camera hearing shall be held to determine which records, reports and files of the commission shall be produced. In re Motion for a Subpoena Duces Tecum, 94 N.M. 1, 606 P.2d 539 (1980).

Redress of improper use of process. — The improper use of process of a court may be redressed by a motion to quash, inquiry into the matter under the supreme court disciplinary rules, a motion to set aside judgment under Rule 60(b)(6) (see now Rule 1-060 NMRA) or a determination of whether such an action amounts to facts giving rise to an action for abuse of process. Under proper circumstances, the matter may also constitute contempt of court. Poorbaugh v. Mullen, 99 N.M. 11, 653 P.2d 511 (Ct. App. 1982).

A party has an obligation to subpoena a witness if he wants to assure his presence. Gallegos v. Yeargin W. Constructors, 104 N.M. 623, 725 P.2d 599 (Ct. App. 1986).

Trial court properly quashed subpoena issued one day before trial. Udall ex rel. State v. Montoya, 1998-NMCA-149, 126 N.M. 273, 968 P.2d 784, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

An on-call subpoena commanding a police officer to appear at a criminal hearing was effective for attendance at the hearing on a later date than specified in the subpoena and an order holding the officer in criminal contempt of court for failure to appear was proper. State v. Klempt, 1996-NMCA-004, 121 N.M. 250, 910 P.2d 326.

Subpoena may not be used to sidestep discovery procedure. — All discovery, including discovery under this rule, is limited by Rule 1-026 NMRA to the acquisition of information "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action". Thus, once a privilege is asserted in response to interrogatories, counsel cannot unilaterally disregard the privilege and then issue subpoenas to sidestep the procedure outlined in Rule 1-033 NMRA for resolving the dispute. Wallis v. Smith, 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682, cert. denied, 130 N.M. 254, 23 P.3d 929 (2001).

Law reviews. — For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For article, "Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings," see 14 N.M.L. Rev. 275 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 17 Am. Jur. 2d Contempt §§ 12, 138; 20 Am. Jur. 2d Costs § 49; 23 Am. Jur. 2d Deposition and Discovery §§ 148 to 150; 81 Am. Jur. 2d Witnesses §§ 5 et seq., 68 et seq.

Validity of statute making concealment of or failure to produce books or papers presumptive evidence, 4 A.L.R. 471.

Inconvenience or expense as excuse for disobeying subpoena duces tecum, 9 A.L.R. 163.

Right to enforce production of papers or documents by subpoena duces tecum or other process, as affected by unlawful means by which the knowledge of their existence was acquired, 24 A.L.R. 1429.

Mandamus to compel court or judge to require witnesses to testify or produce documents, 41 A.L.R. 436.

Service of a subpoena as arrest within constitutional or statutory immunity of members of legislature or others from arrest, 79 A.L.R. 1214.

Privilege against self-incrimination as justification for refusal to comply with subpoena requiring production of books or documents of private corporation, 120 A.L.R. 1102.

Practice or procedure for testing validity or scope of the command of subpoena duces tecum, 130 A.L.R. 327.

Use of subpoena to compel production or use of as evidence of records or writings or objects in custody of court or officer thereof, 170 A.L.R. 334.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348, 56 A.L.R.3d 1109, 27 A.L.R.4th 61, 32 A.L.R.4th 212, 3 A.L.R.5th 237.

Form, particularity and manner of designation required in subpoena duces tecum for production of corporate books, records and documents, 23 A.L.R.2d 862.

Construction and effect of Rules 30(b), (d), 31(d), of the Federal Rules of Civil Procedure, and similar state statutes and rules, relating to preventing, limiting, or terminating the taking of depositions, 70 A.L.R.2d 685.

Compelling expert to testify, 77 A.L.R.2d 1182, 66 A.L.R.4th 213.

Subpoena duces tecum for production of items held by foreign custodian in another country, 82 A.L.R.2d 1403.

Limiting number of noncharacter witnesses in civil case, 5 A.L.R.3d 169.

Propriety and prejudicial effect of limiting number of character or reputation witnesses, 17 A.L.R.3d 327.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 A.L.R.3d 1373.

Who has possession, custody or control of corporate books or records for purposes of order to produce, 47 A.L.R.3d 676.

Right of independent expert to refuse to testify as to expert opinion, 50 A.L.R.4th 680.

Compelling testimony of opponent's expert in state court, 66 A.L.R.4th 213.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney - modern cases, 78 A.L.R.4th 571.

Adverse presumption or inference based on party's failure to produce or examine witness who was occupant of vehicle involved in accident - modern cases, 78 A.L.R.4th 616.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel - modern cases, 81 A.L.R.4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue - modern cases, 81 A.L.R.4th 939.

Requirements, under Rule 45(c) of Federal Rules of Civil Procedure and Rule 17(d) of Federal Rules of Criminal Procedure, relating to service of subpoena and tender of witness fees and mileage allowance, 77 A.L.R. Fed. 863.

Appealability by client of denial of motion to quash subpoena directed to attorney or order compelling attorney to testify or produce documents - federal criminal cases, 109 A.L.R. Fed. 564.

97 C.J.S. Witnesses §§ 19 to 34, 45.

1-045.1. Interstate subpoenas.

A. **Definitions.** As used in this rule:

(1) “foreign jurisdiction” means a state other than this state;

(2) “foreign subpoena” means a subpoena issued under authority of a court of record of a foreign jurisdiction;

(3) “person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity;

(4) “state” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States;

(5) “subpoena” means a document, however denominated, issued under authority of a court of record requiring a person to:

(a) attend and give testimony at a deposition;

(b) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person, or

(c) permit inspection of premises under the control of the person.

B. **Issuance of subpoena.**

(1) To request issuance of a subpoena under this paragraph, a party must submit a foreign subpoena to the clerk of the district court where the discovery is sought to be conducted in New Mexico. A request for issuance of a subpoena under this rule does not constitute an appearance in the courts of this state.

(2) When a party submits a foreign subpoena to a clerk of court in this state, the clerk shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(3) A subpoena under Subparagraph (2) must:

(a) incorporate the terms used in the foreign subpoena; and

(b) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

C. **Service of subpoena.** A subpoena issued by a clerk under Paragraph B of this rule must be served in compliance with Rule 1-045 NMRA.

D. **Deposition, production, and inspection.** Rule 1-045 NMRA applies to subpoenas issued under Paragraph B of this rule.

E. **Application to court.** An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under Paragraph B of this rule must comply with the rules and statutes of this state and be submitted to the court in the district in which discovery is to be conducted.

[Adopted by Supreme Court Order No. 09-8300-018, effective August 7, 2009.]

Committee commentary. — This rule was adapted from the Uniform Interstate Depositions and Discovery Act. See the comment to the uniform act for additional information.

[Adopted by Supreme Court Order No. 09-8300-018, effective August 7, 2009.]

1-046. Preserving questions for review.

Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and if a party has no opportunity to object to a ruling or order at the time it is made the absence of an objection does not thereafter prejudice him. It shall not be necessary to file a motion for a new trial in order to preserve for review errors called to the attention of the trial court under this rule.

This rule applies to all causes, whether tried before a jury or to the court without a jury.

ANNOTATIONS

Cross references. — For preserving errors in instructions, *see* Rule 1-051 NMRA.

For preserving errors in rulings on evidence, *see* Rule 11-103 NMRA.

For preserving scope of review, *see* Rule 12-216 NMRA.

Compiler's notes. — This rule is deemed to have superseded 105-830, C.S. 1929, which provided when exceptions were unnecessary.

Purpose of rule. — The principal purpose of the rule requiring a party to preserve error in the trial court of issues sought to be asserted on appeal is to alert the mind of the trial judge to the claimed error and to accord the trial court an opportunity to correct the matter. Madrid v. Roybal, 112 N.M. 354, 815 P.2d 650 (Ct. App. 1991).

Formal exceptions, but not objections, have been dispensed with. — Laws 1897, ch. 73, § 119 (105-830, C.S. 1929), dispensed with formal exception, but in no sense dispensed with objection in order to preserve the error complained of, and such objection had to be preserved according to the forms of law to be available in the

supreme court. Blacklock v. Fox, 25 N.M. 391, 183 P. 402 (1919); Neher v. Armijo, 11 N.M. 67, 66 P. 517 (1901).

The trial court must be clearly alerted to a claimed nonjurisdictional error to preserve it for appeal. Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968).

If plaintiffs felt they were being prejudiced by the conduct of the court in submitting the forms of verdicts to the jury, it was their duty to call such to the attention of the trial court so that the court might have corrected or avoided the claimed error. Scott v. Brown, 76 N.M. 501, 416 P.2d 516 (1966).

The purpose of any objection during the trial of a case is to alert the mind of the judge to the claimed error so that he may correct it. Lovato v. Hicks, 74 N.M. 733, 398 P.2d 59 (1965) (objection to interrogatories to jury held not sufficient).

Exceptions taken during the trial to rulings of the court should specify wherein counsel contend the court erred. Territory v. Guillen, 11 N.M. 194, 66 P. 527 (1901).

Nonjurisdictional questions not so presented cannot be raised on appeal. — The mind of the trial court must be clearly alerted to a claimed nonjurisdictional error in order to preserve it for appeal. Questions not so presented to the trial court cannot be raised for the first time on appeal. Shelley v. Norris, 73 N.M. 148, 386 P.2d 243 (1963).

While matters of fundamental error may be first raised on appeal, such matters as sufficiency of evidence to authorized submission of case to jury or to support the verdict are to be raised by appropriate objections at the trial. State v. Nuttal, 51 N.M. 196, 181 P.2d 808 (1947)See now Rule 11-103, R. Evid.

It is a fundamental rule of appellate practice and procedure that an appellate court will consider only such questions as were raised in the court below. Irick v. Elkins, 38 N.M. 113, 28 P.2d 657 (1933); State ex rel. Baca v. Board of Comm'rs, 22 N.M. 502, 165 P. 213 (1916).

An appellate court will not reverse on some ground not particularized at the trial. Lovato v. Hicks, 74 N.M. 733, 398 P.2d 59 (1965).

Where no objection to form of injunction was made at trial, the matter could not be raised on appeal. Holloway v. Evans, 55 N.M. 601, 238 P.2d 457 (1951).

Findings must be written and specific for appeal. — In order to obtain a review of a judgment rendered in a case tried by the court without a jury, and to question the conclusions of the court upon the facts and the law, there must be written specific findings, both of law and fact, and exceptions must be taken thereto. Harris & Maldonado v. Sperry, 35 N.M. 52, 290 P. 1022 (1930) (decided under former law).

Acceptance of fact-findings not required. — Fact-findings of a trial court in favor of plaintiff are not required to be accepted as facts on appeal, because of absence of exception or objection, where no opportunity to except has been given defendant, and he requested contrary findings in every essential particular covered by the findings, and challenged the sufficiency of the evidence. N.H. Ranch Co. v. Gann, 42 N.M. 530, 82 P.2d 632 (1938) (decided under former law).

No review if finding not requested. — Under Rule 52 (see now Rule 1-052 NMRA) the trial court, when sitting without a jury, is required to make findings of fact. This is true even though a motion is sustained at the close of plaintiff's case. Notwithstanding the fact that the rule is stated in mandatory language directed to the court, a party who has not requested the court to make findings on any given point is not in position to obtain a review of the evidence on such point in this court. DesGeorges v. Grainger, 76 N.M. 52, 412 P.2d 6 (1966). See also Duran v. Montoya, 56 N.M. 198, 242 P.2d 492 (1952).

Where supreme court has neither a bill of exceptions nor requested findings, it is in no position to overturn trial court's findings. Garcia v. Garcia, 81 N.M. 277, 466 P.2d 554 (1970). See also Alexander Hamilton Inst. v. Smith, 35 N.M. 30, 289 P. 596 (1930) (decided under former law).

Where issue was neither specifically requested nor passed upon by the trial court, it may not be urged for the first time on appeal. Thomas v. Barber's Super Mkts., Inc., 74 N.M. 720, 398 P.2d 51 (1964).

A party could not obtain a review of the evidence where he failed to make requested findings or file exceptions. Owensby v. Nesbitt, 61 N.M. 3, 293 P.2d 652 (1956).

Where workmen's compensation proceeding's findings were not objected to and no requested findings were timely made under Rule 52 (see now Rule 1-052 NMRA), the court's findings could not be attacked. Gillit v. Theatre Enters., Inc., 71 N.M. 31, 375 P.2d 580 (1962).

Or if court makes requested finding. — Plaintiff will not be permitted to complain on appeal because the trial court made the findings that he requested. Platero v. Jones, 83 N.M. 261, 490 P.2d 1234 (Ct. App. 1971).

Failure to except to findings and conclusions in moving for directed verdict. — In determining whether a trial court has erred in denying a motion for a directed verdict made at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announces the law to be in its findings and conclusions. An appellate court must ascertain for itself what the applicable law is, whether its findings and conclusions were excepted to or not. A proper motion for a directed verdict and its denial will always preserve for review the question whether under the law truly applicable to the case there was an adequate evidentiary basis for submission to the

jury. Sands v. American G.I. Forum of N.M., Inc., 97 N.M. 625, 642 P.2d 611 (Ct. App. 1982).

General exception limited in scope. — Reviewing court need not examine the evidence to decide whether it supports the findings when only a general exception has been taken to the findings. Clouser v. Clouser, 46 N.M. 220, 126 P.2d 289 (1942) (decided under former law).

General conclusion on mixed question of fact and law cannot be reviewed, in absence of specific exceptions. De Lost v. Phelps Dodge Corp., 33 N.M. 15, 261 P. 811 (1927) (decided under former law).

Objections should be made in time for trial court to rule. — Objections to arguments of counsel should be made in time for the trial court to rule on them and to correct them, where it is possible to correct them by a cautionary instruction before the jury retires. McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968).

Where no opportunity given to take exceptions. — Where the only exceptions sought to be taken are formal, and no exceptions were taken at the trial because no opportunity was given, the complaining party is not required to move to set aside the judgment for irregularities and then except, in view of Laws 1897, ch. 73, § 119 (105-830, 1929 Comp.). N.H. Ranch Co. v. Gann, 42 N.M. 530, 82 P.2d 632 (1938).

Question properly preserved. — Plaintiff's timely request to the court concerning "the action which he desired the court to take", in regard to a note submitted to the court by the jury, complied with the requirement of this rule. Madrid v. Roybal, 112 N.M. 354, 815 P.2d 650 (Ct. App. 1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Trial court's allowance of a general exception to adverse rulings as obviating necessity of specific exceptions, 102 A.L.R. 209.

Sufficiency of general objection or exception to evidence admitted without qualification, which was competent against one or more parties, but not all, 106 A.L.R. 467.

Necessity of renewal of objection to evidence admitted conditionally, 88 A.L.R.2d 12.

When will federal court of appeals review issue raised by party for first time on appeal where legal developments after trial effect issue, 76 A.L.R. Fed. 522.

Sufficiency in federal court of motion in limine to preserve for appeal objection to evidence absent contemporary objection at trial, 76 A.L.R. Fed. 619.

4 C.J.S. Appeal and Error §§ 95, 197.

1-047. Jurors.

A. **Examination of jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

B. **Alternate jurors.** In any civil case, the court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

ANNOTATIONS

Cross references. — For drawing and empaneling jurors, *see* Sections 38-5-1 to 38-5-19 NMSA 1978.

Compiler's notes. — Paragraph B is similar to Laws 1935, ch. 38, § 1 (41-10-4, 1953 Comp.), repealed by Laws 1969, ch. 222, § 17.

A juror's personal view as to the law or what it should be is not a proper subject of inquiry on voir dire examination; he is bound by the law received from the court. State v. Thompson, 68 N.M. 219, 360 P.2d 637 (1961).

Juror may be discharged for good cause and alternate substituted. — Under Subdivision (b) (see now Paragraph B) a juror may be discharged for other causes and an alternate substituted besides substitution in case of death. A juror may be discharged by the court for good cause, and an alternate substituted as provided by the rule. Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337 (1960) (decided prior to 1969 amendment).

The trial court's action may only be set aside if he acts arbitrarily or abuses discretion in discharging a juror and substituting an alternate. Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337 (1960).

Discharge without notice or hearing is not abuse of discretion. — Action of court in discharging a juror, when no notice was given counsel prior to the action taken by the court in discharging the juror and no hearing was given before the court to have a determination made and discover whether or not there was a legal reason for discharging the juror, was not an abuse of judicial discretion. Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337 (1960).

But, the better practice is for the court of its own motion to conduct a summary hearing to determine the inability of a juror to serve before he is discharged during the trial. Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337 (1960).

Use of additional challenges. — Where both defendants exercised all their peremptory challenges before the second panel of jurors was called and the trial court subsequently allowed two additional challenges to both the plaintiff and to each defendant, allowing all the challenges to be used against the regular panel and not requiring that the additional challenges be used only against the alternates was error. Carraro v. Wells Fargo Mtg. & Equity, 106 N.M. 442, 744 P.2d 915 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Scope and import of term "owner" in statutes relating to qualifications of juror, 2 A.L.R. 800, 95 A.L.R. 1085.

Betting on result as disqualifying juror, 2 A.L.R. 813.

Conferring right of suffrage upon women as qualifying them as jurors, 12 A.L.R. 525, 157 A.L.R. 461.

Membership in Ku-Klux-Klan as ground for challenge of juror, 31 A.L.R. 411, 158 A.L.R. 1361.

Unfamiliarity with English as affecting competency of juror, 34 A.L.R. 194.

Effect of exclusion of women from jury list, 52 A.L.R. 922.

Challenge to panel as remedy for exclusion of eligible class or classes of persons from jury list, 52 A.L.R. 923.

Questions to jury in personal injury or death action as to interest in, or connection with, indemnity insurance company, 56 A.L.R. 1454, 74 A.L.R. 849, 95 A.L.R. 388, 105 A.L.R. 1319, 4 A.L.R.2d 761.

Statutory grounds for challenge of jurors for cause as exclusive of common-law grounds, 64 A.L.R. 645.

Right to introduce extrinsic evidence in support of challenge to juror for cause, 65 A.L.R. 1056.

Statute or rule of court providing for summary judgment in absence of affidavit of merits as infringement of right to jury trial, 69 A.L.R. 1031, 120 A.L.R. 1400.

Women's suffrage amendment as affecting right of women to serve on juries, 71 A.L.R. 1336.

Challenge of proposed juror for implied bias or interest because of relationship to one who would be subject to challenge for that reason, 86 A.L.R. 118.

Prospective juror's connection with insurance company as ground for challenge for cause in action for personal injuries or damage to property, 103 A.L.R. 511.

Power of court to exclude all persons belonging to class membership which may be supposed to involve bias or prejudice from panel or venire for particular case, 105 A.L.R. 1527.

Validity and effect of plan or practice as to consulting preferences of persons eligible for jury service, as regards periods or times of service or character of actions, 112 A.L.R. 995.

Dissolution of marriage as affecting disqualifying relationship by affinity in case of juror, 117 A.L.R. 800.

Member of petit jury as officer within constitutional or statutory provision in relation to oath or affirmation, 118 A.L.R. 1098.

Intelligence, character, religious or loyalty tests of qualifications of juror, 126 A.L.R. 506.

Women as jurors, 157 A.L.R. 461.

Membership in secret order or organization for the suppression of crime as proper subject for examination of juror, 158 A.L.R. 1361.

Competency of juror as affected by his participation in a case of similar character, but not involving the party making the objection, 160 A.L.R. 753.

Governing law as to existence or character of offense for which one has been convicted in federal court or court of another state, as bearing upon disqualifications to sit on jury, 175 A.L.R. 805.

Peremptory challenge after acceptance of juror, 3 A.L.R.2d 499.

Waiver of peremptory challenge or challenges in civil case other than by acceptance of juror, 56 A.L.R.2d 742.

Right to peremptory challenge as prejudiced by appearance of additional counsel in civil case after impaneling of jury, 56 A.L.R.2d 971.

Prejudicial effect of reference on voir dire examination of jurors to settlement efforts, 67 A.L.R.2d 560.

Previous knowledge of facts of civil case by juror as disqualification, 73 A.L.R.2d 1312.

Disqualification, in absence of specific controlling statute, of residents or taxpayers of litigating political subdivision, 81 A.L.R.2d 708.

Propriety of inquiry on voir dire as to juror's attitude toward amount of damages asked, 82 A.L.R.2d 1420.

Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial, 84 A.L.R.2d 1288, 15 A.L.R.4th 1127, 88 A.L.R.4th 711.

Voir dire inquiry, in personal injury or death case, as to prospective jurors' acquaintance with literature dealing with amounts of verdicts, 89 A.L.R.2d 1177.

Effect of allowing excessive number of peremptory challenges, 95 A.L.R.2d 957.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case, 99 A.L.R.2d 7.

Proper procedure upon illness or other disability of juror, 99 A.L.R.2d 684.

Religious belief as ground for exemption or excuse from jury service, 2 A.L.R.3d 1392.

Social or business relationship between proposed juror and nonparty witness as affecting former's qualification as juror, 11 A.L.R.3d 859.

Claustrophobia or other neurosis of juror as subject of inquiry on voir dire or of disqualification of jury, 20 A.L.R.3d 1420.

Number of peremptory challenges allowable in civil case where there are more than two parties involved, 32 A.L.R.3d 747.

Use of peremptory challenge to exclude from jury persons belonging to a class or race, 79 A.L.R.3d 14, 20 A.L.R.5th 398.

Professional or business relations between proposed juror and attorney as ground for challenge for cause, 52 A.L.R.4th 964.

Effect of juror's false or erroneous answer on voir dire as to previous claims or actions against himself or his family, 66 A.L.R.4th 509.

Propriety of substituting juror in bifurcated state trial after end of first phase and before second phase is given to jury, 89 A.L.R.4th 423.

Prospective juror's connection with insurance company as ground for challenge for cause, 9 A.L.R.5th 102.

Use of preemptory challenges to exclude caucasian persons, as a racial group, from criminal jury-post-batson state cases, 47 A.L.R.5th 259.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability in negligence actions, 40 A.L.R. Fed. 541.

Examination and challenge of federal case jurors on basis of attitudes toward homosexuality, 85 A.L.R. Fed. 864.

50 C.J.S. Juries §§ 333, 462, 463, 465, 482.

1-048. Juries of fewer than twelve; stipulation.

Notwithstanding the provisions of Rule 1-038 NMRA, the parties may stipulate that the jury shall consist of any number fewer than twelve or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

[As amended, effective December 3, 2001.]

Committee commentary. — When a party makes a general demand for a jury trial, a six person jury normally will be assembled, five of whom must agree on a verdict. Rule 1-038(B)(2) NMRA; Rule 1-038(B) NMRA. If any party properly makes a request for a twelve person jury, a twelve person jury will be assembled, ten of whom must agree on a verdict. Rule 1-038(B)(2) and (B)(3); Rule 1-038(G) NMRA.

This rule allows the parties to agree to a jury of any number fewer than twelve as well as allowing them to agree that a binding verdict may be returned by any number of jurors above a majority. Normally parties will vary from six or twelve person juries only when these standard sized juries have been selected but the number of jurors and alternates is reduced below twelve or six during the course of the proceeding. When this happens, a question will arise concerning the number of jurors needed for a binding verdict. If the parties stipulate to an eleven person jury without also modifying the number of jurors who must agree on a verdict, the requirement of ten jurors will continue in effect. In like manner, if the parties stipulate to use a five person jury instead of a six person jury, all five jurors must agree on a verdict unless the parties also agreed to accept as binding the verdict of fewer than five jurors.

Parties who stipulate to a jury of fewer than eleven or fewer than five necessarily also have to stipulate to the number of jurors who must agree in order to render a binding verdict.

Often, alternate jurors are not needed to fill vacancies in the jury. Normally they are discharged from jury service when the jury retires to deliberate. Nothing in this rule prevents the parties from stipulating that alternate jurors may participate fully in the deliberations and the decision of the jury, so long as the parties also stipulate as to the number of jurors (including the alternates) required to return a valid verdict.

ANNOTATIONS

Cross references. — For right to trial by jury, and size of same, *see* Rule 1-038 NMRA.

For waiver of jury trial, *see* Rules 1-038 and 1-052 NMRA.

For constitutional right to trial by jury, *see* N.M. Const., art. II, § 12.

For verdict by 10 jurors, *see* Section 38-5-17 NMSA 1978.

The 2001 amendment, effective December 3, 2001, inserted "Notwithstanding the provisions of Rule 1-038 NMRA" at the beginning, substituted "fewer" for "less" preceding "than twelve or that" and deleted the former second sentence which read "In cases where a jury has been demanded but no party has demanded a jury of twelve and there is no express stipulation as to any number less than twelve, the parties shall be deemed to have stipulated to a jury of six as provided in Rule 1-038". See Rule 1-038 NMRA.

Verdict of 10 jurors. — Former version of this rule, providing that when at least 10 jurors agreed on a verdict, such verdict was valid, unless upon requested polling of the jury more than two jurors disagreed therewith, meant that at least 10 jurors, but not necessarily the same 10, had to agree to each material finding supporting the verdict, provided that none of the jurors upon whose votes the verdict depended was guilty of irreconcilable inconsistencies or material contradictions when his votes on all issues were considered. Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

Polling of jury. — Under former version of this rule, parties were entitled as a matter of right to have jury polled upon making a proper request therefor; error committed by refusal to poll the jury could not be cured by subsequent polling or filing of affidavits by jurors, but in itself this failure did not constitute reversible error. Levine v. Gallup Sand & Gravel Co., 82 N.M. 703, 487 P.2d 131 (1971).

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Jury §§ 190, 204.

Validity of agreement, by stipulation of waiver in state civil case, to accept verdict by number or proportion of jurors less than that constitutionally permitted, 15 A.L.R.4th 213.

50 C.J.S. Juries §§ 261 to 267, 510; 89 C.J.S. Trial §494.

1-049. Special verdicts and interrogatories.

A. **Special verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

B. **General verdict accompanied by answer to interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, appropriate judgment upon the verdict and answers shall be entered. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

ANNOTATIONS

Compiler's notes. — This rule is deemed to have superseded former Trial Court Rule 70-103, derived from 70-103, C.S. 1929, which were substantially the same.

All of the following pre-1982 case notes were taken from cases decided prior to the 1982 amendment.

Constitutionality. — Laws 1889, ch. 45, § 1 (70-103, C.S. 1929, now superseded by this rule), did not infringe seventh amendment of United States Constitution or any other constitutional provision; it was within power of territorial legislature to provide that on trial of a common-law action, court may in addition to the general verdict require specific answers to special interrogatories, and when a conflict is found between the two, render such judgment as the answers to the special questions compel. Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 17 S. Ct. 421, 41 L. Ed. 837 (1897).

General verdicts and special verdicts distinguished. — See Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Special verdict and special interrogatories with general verdict distinguished. — See Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Purpose of special findings is to test validity of general verdict by ascertaining whether or not it may have been the result of misapprehension of the law through actual findings in material conflict with findings which in their absence would be implied from general verdict. Bryant v. H.B. Lynn Drilling Corp., 65 N.M. 177, 334 P.2d 707 (1959).

Proper purpose of submitting interrogatories is to aid jury, not to cross-examine it. Landers v. Atchison, T. & S.F. Ry., 73 N.M. 131, 386 P.2d 46 (1963); Segura v. Molycorp, Inc., 97 N.M. 13, 636 P.2d 284 (1981).

Special findings upon any material matter in case are permitted. Upton v. Santa Rita Mining Co., 14 N.M. 96, 89 P. 275 (1907).

Submission of special interrogatories lies largely in discretion of trial judge. Landers v. Atchison, T. & S.F. Ry., 73 N.M. 131, 386 P.2d 46 (1963).

Giving of special interrogatories is discretionary with the trial court, subject to review for abuse. Bryan v. Phillips, 70 N.M. 1, 369 P.2d 37 (1962).

Trial court may exercise a reasonable discretion in matter of what questions should be submitted to the jury for special findings, and unless that discretion is abused, it will not be disturbed. Crocker v. Johnston, 43 N.M. 469, 95 P.2d 214 (1939).

It is within the sound discretion of the trial judge, based on the facts and circumstances involved in the particular case, to determine whether the matter shall be submitted to the jury on general verdicts or special interrogatories, or both. Segura v. Molycorp, Inc., 97 N.M. 13, 636 P.2d 284 (1981).

Despite word "shall". — Notwithstanding use of the word "shall," mandatory in form, counsel agree that trial court exercises a broad discretion in applying this rule. Madsen v. Read, 58 N.M. 567, 273 P.2d 845 (1954).

Section 70-103, C.S. 1929 (now superseded by this rule), though mandatory in form, did not change general rule giving trial court discretionary power in submission of special interrogatories. Larsen v. Bliss, 43 N.M. 265, 91 P.2d 811 (1939).

Court is not required to submit improper questions to jury because one of the parties to the cause requests it. Robinson v. Palatine Ins. Co., 11 N.M. 162, 66 P. 535 (1901).

Section 70-103, C.S. 1929 (now superseded by this rule) was to be construed to enable court in its discretion to refuse to submit questions not regarded as material, and to refuse to set aside a verdict if it was possible to reconcile special findings with it. Walker v. New Mexico & S.P.R.R., 7 N.M. 282, 34 P. 43 (1893), aff'd, 165 U.S. 593, 17 S. Ct. 421, 41 L. Ed. 837 (1897).

Court did not err in submitting special interrogatories to jury relating to route taken by plaintiff in crossing intersection, where whole issue of contributory negligence revolved around manner in which she crossed the intersection; the questions concerned the determination of ultimate facts. Bryan v. Phillips, 70 N.M. 1, 369 P.2d 37 (1962).

Refusal to submit interrogatories justified. — There was no abuse of discretion in trial court's refusal to submit certain special interrogatories to the jury where the only issues were whether the defendant was negligent and, if so, whether his negligence had proximately caused death of administrator's deceased, and special interrogatories could only tend to confuse. Madsen v. Read, 58 N.M. 567, 273 P.2d 845 (1954).

If court submits questions to jury, it can withdraw them from their consideration if it sees fit. Robinson v. Palatine Ins. Co., 11 N.M. 162, 66 P. 535 (1901).

Answers as findings of fact. — Answers to special interrogatories submitted under this rule constituted a finding of fact by the jury on such issues and final adjudication of such factual question between the parties, unless for some proper reason answers must be set aside by the court. Lovato v. Hicks, 74 N.M. 733, 398 P.2d 59 (1965).

Findings by a jury in answer to interrogatories stand in same posture on appeal as finding of fact by the trial court in case tried without a jury. Lovato v. Hicks, 74 N.M. 733, 398 P.2d 59 (1965).

Interrogatories to be accompanied by general verdict. — Only provision for submitting special interrogatories to a jury is when they are accompanied by a general verdict, unless the latter is waived or matter is so submitted by consent. Saavedra v. City of Albuquerque, 65 N.M. 379, 338 P.2d 110 (1959); Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

General verdict a matter of right. — Reversible error is committed when special interrogatories are submitted to jury without inclusion of a general verdict, over objection of the claimant, as he is entitled to a general verdict as a matter of right when he asks

for it. Saavedra v. City of Albuquerque, 65 N.M. 379, 338 P.2d 110 (1959); Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Where no general verdict, question whether special verdict deemed equivalent. — Where there is no traditional general verdict, the question, where the court submits the case to the jury on a special verdict, is whether the jury's answers are the equivalent of a general verdict. Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Jury's answer determinative of plaintiff's rights given effect as general verdict. — Where a jury's answer is determinative of the right of the plaintiff to recover damages from the defendant as an alleged tortfeasor, that answer is the equivalent of, and is to be given effect as, a general verdict. Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Every reasonable presumption favoring general verdict will be indulged in, while nothing will be presumed in favor of the special findings. Gallegos v. Sandoval, 15 N.M. 216, 106 P. 373 (1909).

No presumption will be indulged in favor of special findings as against the general verdict. Crocker v. Johnston, 43 N.M. 469, 95 P.2d 214 (1939).

Special findings override general verdict only when both cannot stand. Smith v. Atchison, T. & S.F. Ry., 19 N.M. 247, 142 P. 150 (1914).

When a special verdict contradicts the general verdict on a material issue, the former controls. Terry v. Biswell, 64 N.M. 153, 326 P.2d 89 (1958).

Special findings of jury will not justify setting aside of general verdict, unless such findings are in irreconcilable conflict with general verdict. Bass v. Dehner, 103 F.2d 28 (10th Cir.), cert. denied, 308 U.S. 580, 60 S. Ct. 100, 84 L. Ed. 486, rehearing denied, 308 U.S. 635, 60 S. Ct. 136, 84 L. Ed. 528 (1939); Thayer v. Denver & R.G.R.R., 25 N.M. 559, 185 P. 542 (1919).

Verdict should express clear intent of jury to award damages. — The verdict should leave no question as to the clear intent of the jury to render an award of damages and as to the amount of damages. Casarez v. Garcia, 99 N.M. 508, 660 P.2d 598 (Ct. App. 1983).

Finding on damages controlling. — Where jury was instructed on issue of special damages and on issue of general compensatory damages, jury's finding of no special damages controlled general verdict. Rockafellow v. New Mexico State Tribune Co., 74 N.M. 652, 397 P.2d 303 (1964).

Trial court erred in setting aside judgment in plaintiff's favor, on grounds of inconsistency with answer to special interrogatory finding that plaintiff failed to cross

street at crosswalk, absent inquiry as to whether such negligence contributed proximately to the accident. Terry v. Biswell, 64 N.M. 153, 326 P.2d 89 (1958).

Separate verdicts on joint trial of issues. — Where issue in suit upon promissory note and issue upon garnishment thereon, instituted at same time, were both submitted to jury, defendant in promissory note issue had no right to separate trials, nor to have garnishment tried before main issue, but the court, in its discretion, could direct separate verdicts to be returned and that issues be tried at same time. Traylor v. First Nat'l Bank, 26 N.M. 375, 193 P. 404 (1920).

Although the defendant, at least initially, had consented to a jury trial of a laches issue, her motion for dismissal at the close of the plaintiff's case in chief and her explicit casting of the laches issue as an equitable issue for decision by the court, without objection by the plaintiff, make it clear that the parties never expressly or impliedly consented to a jury trial of the issue. Therefore, Rule 39(B) was not applicable to the laches issue as it developed at trial, so that it was proper for the trial court to decide the issue when the defendant, following the court's declaration of a mistrial, renewed her motion to dismiss under Rule 41(B). Garcia v. Garcia, 111 N.M. 581, 808 P.2d 31 (1991).

Special findings supporting verdict. — Special findings, in order to support general verdict, must correspond to the proofs and be within the pleadings. Thompson v. Albuquerque Traction Co., 15 N.M. 407, 110 P. 552 (1910).

Verdict ignoring interrogatories. — If jury returns a general verdict ignoring questions submitted to it, and judge accepts verdict as returned and discharges jury, it is the same as though court had refused to submit them in the first instance. Robinson v. Palatine Ins. Co., 11 N.M. 162, 66 P. 535 (1901).

Form of questions. — Questions presented for special findings which assume as true material facts in issue which are not admitted, should not be submitted. Blake v. Cavins, 25 N.M. 574, 185 P. 374 (1919).

Error in form must be preserved. — Form of interrogatory submitted to the jury cannot be reviewed for error claimed for the first time on appeal. Lovato v. Hicks, 74 N.M. 733, 398 P.2d 59 (1965).

Objection insufficient. — Objection to submission of special interrogatories on grounds that they would tend to confuse the jury "by introducing collateral matters and by particularizing," was not sufficient to alert mind of the trial judge to the specific vice claimed. Lovato v. Hicks, 74 N.M. 733, 398 P.2d 59 (1965).

Scope of review. — Where only assignment of error is refusal of motion for judgment on special findings of the jury, supreme court is limited to determination of their consistency with the general verdict. Smith v. Atchison, T. & S.F. Ry., 19 N.M. 247, 142 P. 150 (1914).

Former law not repealed by implication. — Code of Civil Procedure of 1897 did not repeal Laws 1889, ch. 45, § 1 (Comp. Stat. 1929, § 70-103, now superseded by this rule), providing that juries when required shall make special findings. Schofield v. Territory ex rel. American Valley Co., 9 N.M. 526, 56 P. 306 (1899), appeal dismissed, 20 S. Ct. 1029, 44 L. Ed. 1222 (1900).

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1750, 1751, 1835, 1836, 1855, 1859.

Duty of jury to follow instructions as to amount of party's liability, if liable at all, 23 A.L.R. 305.

Power of court to reduce or increase verdict without giving party affected the option to submit to a new trial, 53 A.L.R. 779, 95 A.L.R. 1163.

Power of court to add interest to verdict returned by jury, 72 A.L.R. 1150.

Verdict as affected by agreement in advance among jurors to abide by less than unanimous vote, 73 A.L.R. 93.

Necessity of verdict against servant or agent as condition of verdict against master or principal for tort of servant or agent, 78 A.L.R. 365.

Finding for "defendants" as inuring to benefit of defaulting defendant, 78 A.L.R. 938.

Court's power to increase or reduce verdict without giving party affected option to submit to new trial, 95 A.L.R. 1163.

Absence of issue as to amount of recovery, as distinguished from right to recover, as justifying return of verdict which does not assess amount, 105 A.L.R. 1075.

Court's power to mold or amend verdict with respect to parties for or against whom it was rendered, 106 A.L.R. 418.

Curing error of jury in attempting to apportion damages as between joint tort-feasor by remittitur and all but one defendant, 108 A.L.R. 795, 46 A.L.R.3d 801.

Verdict which finds for party upon his cause of action or counterclaim for money judgment, but which does not state amount of recovery, or is indefinite in this regard, or which affirmatively states that he is entitled to no amount, 116 A.L.R. 828, 49 A.L.R.2d 1328.

Correction by trial judge of verdict which finds for party upon his cause of action but which does not state amount of recovery or is indefinite in this regard, or which affirmatively states that he is entitled to no amount, 116 A.L.R. 847, 49 A.L.R.2d 1328.

Pleading of estoppel by verdict, 120 A.L.R. 69.

Failure of one or more jurors to join in answer to special interrogatory or special verdict as affecting verdict, 155 A.L.R. 586.

Power of trial court to correct its misinterpretation of jury's verdict, 160 A.L.R. 457.

Propriety of court questioning jury as to meaning of the verdict or for the purpose of correcting it in matters of form, 164 A.L.R. 989.

Validity and effect of verdict in civil action finding defendant "not guilty," 7 A.L.R.2d 1341.

Reversible effect of informing jury of the effect that their answers to special interrogatories or special issues may have upon ultimate liability or judgment, 90 A.L.R.2d 1040.

Withdrawal of written special interrogatories or special questions submitted to jury, 91 A.L.R.2d 776.

Submission of special interrogatories in connection with general verdict under federal Rule 49 (B), and state counterparts, 6 A.L.R.3d 438.

Quotient verdicts, 8 A.L.R.3d 335.

Validity of verdict or verdicts by same jury in personal injury action awarding damages to injured spouse but denying recovery to other spouse seeking collateral damages, or vice versa, 66 A.L.R.3d 472.

Validity of verdict awarding plaintiff in personal injury action on amount of medical expenses but failing to award damages for pain and suffering, 55 A.L.R.4th 186.

Criminal law: propriety of reassembling jury to amend, correct, clarify, or otherwise change verdict after jury has been discharged, or has reached or sealed its verdict and separated, 14 A.L.R.5th 89.

89 C.J.S. Trial § 491.

1-050. Judgment as a matter of law in jury trials; alternative motion for new trial; conditional rulings.

A. **Judgment as a matter of law.**

(1) If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(a) resolve the issue against the party; and

(b) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

B. **Renewing the motion after trial; alternative motion for a new trial.** If the court does not grant a motion for judgment as a matter of law made under Paragraph A of this rule, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than ten (10) days after the entry of judgment or -- if the motion addresses a jury issue not decided by a verdict -- no later than ten (10) days after the jury was discharged. The movant may alternatively request a new trial or join a motion for a new trial under Rule 1-059 NMRA. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(a) allow the judgment to stand;

(b) order a new trial; or

(c) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(a) order a new trial; or

(b) direct entry of judgment as a matter of law.

C. **Granting renewed motion for judgment as a matter of law; conditional rulings; new trial motion.**

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 1-059 NMRA by a party against whom judgment as a matter of law is rendered shall be filed no later than ten (10) days after entry of the judgment.

D. **Denial of motion for judgment as a matter of law.** If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

[As amended, effective September 27, 1999; as amended by Supreme Court Order 07-8300-01, effective March 15, 2007.]

ANNOTATIONS

I. GENERAL CONSIDERATION.

The 1999 amendment, effective September 27, 1999, rewrote the rule which was formerly catchlined as "Motion for a directed verdict and for judgment notwithstanding the verdict" and added the provisions regarding judgments as a matter of law.

Purpose of 1999 amendment. — The Supreme Court amended this rule in 1999 in order to conform the rule with the Federal Rules of Civil Procedure, which had been amended primarily to change the familiar terminology of “directed verdict” and “judgment n.o.v.” to the single term “judgment as a matter of law.” Valley Bank of Commerce v. Hilburn, 2005-NMCA-004, 136 N.M. 741, 105 P.3d 294.

The 2007 amendment, approved by Supreme Court Order 07-8300-01, effective March 15, 2007, amended Paragraphs A and B to be consistent with the December 1, 2006 amendment of Rule 50 of the Federal Rules of Civil Procedure for the District Courts. Paragraph B has been amended to delete the requirement that a motion for judgment as a matter of law be made at the close of all of the evidence and to require a motion that addresses a jury issue not decided by a verdict to be made within ten (10) days after the jury is discharged.

There is no automatic denial of motions for judgment as a matter of law under this rule alone. Valley Bank of Commerce v. Hilburn, 2005-NMCA-004, 136 N.M. 741, 105 P.3d 294.

Time for filing notice of appeal. — In jury trial cases where one of the parties files a post-trail motion for judgment as a matter of law, the time for filing a notice of appeal does not begin to run until the district court enters an order ruling on the motion. Valley Bank of Commerce v. Hilburn, 2005-NMCA-004, 136 N.M. 741, 105 P.3d 294.

Purpose of rule is to allow the judge, not the jury, to resolve the factual issue. Strickland v. Roosevelt County Rural Elec. Coop., 94 N.M. 459, 612 P.2d 689 (Ct. App. 1980), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Standards for directed verdict and judgment notwithstanding verdict the same. — The standards required for the granting of a motion for directed verdict are the same as those for granting a motion for judgment notwithstanding the verdict. Garcia v. Barber's Super Mkts., Inc., 81 N.M. 92, 463 P.2d 516 (Ct. App. 1969).

Upon motion for judgment notwithstanding the verdict, the court is governed by the same rules which apply to a motion for directed verdict. Francis v. Johnson, 81 N.M. 648, 471 P.2d 682 (Ct. App. 1970).

II. MOTION FOR DIRECTED VERDICT: WHEN MADE; EFFECT.

A. IN GENERAL.

Directed verdicts are not favored and should be granted only when the jury could not reasonably and legally reach any other conclusion. Strickland v. Roosevelt County Rural Elec. Coop., 94 N.M. 459, 612 P.2d 689 (Ct. App. 1980), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

No presumption of validity where directed before all evidence presented. — Where the trial court had taken it upon itself to grant a directed verdict before the evidence had all been presented, the supreme court was not disposed to indulge any presumptions as to the correctness of its ruling. Home Fire & Marine Ins. Co. v. Pan Am. Petroleum Corp., 72 N.M. 163, 381 P.2d 675 (1963).

Trial court ruling not discretionary. — Decisions holding or suggesting that trial court's ruling on a motion for a directed verdict is discretionary are overruled. Archuleta v. Pina, 86 N.M. 94, 519 P.2d 1175 (Ct. App. 1974).

If reasonable minds cannot differ, then a directed verdict is not only proper but the court has a duty to direct a verdict. Owen v. Burn Constr. Co., 90 N.M. 297, 563 P.2d 91 (1977).

Objection as functional equivalent of directed verdict motion. — Objection to an instruction on duress on the grounds that no evidence had been introduced to support such a finding was the functional equivalent of a motion for directed verdict on the issue of duress and was sufficient to preserve for review the question of the legal sufficiency of the evidence on duress and to keep open the possibility of reversal and grant of a new trial in the event submission of the claim to the jury was in error. First Nat'l Bank v. Sanchez, 112 N.M. 317, 815 P.2d 613 (1991).

Involuntary dismissal distinguished. — The grant of a motion to dismiss under Rule 1-041(B) will be sustained even if the plaintiff has produced enough evidence to withstand a directed verdict under Paragraph A, so long as the decision of the trial judge is rationally based on the evidence. Padilla v. RRA, Inc., 1997-NMCA-104, 124 N.M. 111, 946 P.2d 1122.

Where error to direct verdict. — Where there was evidence supporting the state's case and there was no conflicting testimony, it would have been error to have directed a verdict for defendant. State v. Tapia, 81 N.M. 365, 467 P.2d 31 (Ct. App. 1970).

It would be error for a trial court to direct a verdict in favor of the movant unless the adverse party has presented no evidence which would support a judgment in his favor, and if reasonable minds may differ, it is a proper question to be submitted to the jury. Brown v. Hall, 80 N.M. 556, 458 P.2d 808 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969).

It is firmly established that it is error for the trial court to direct a verdict at the close of the evidence in favor of the movant unless the adverse party has presented no evidence which would support a judgment in his favor. Merchant v. Worley, 79 N.M. 771, 449 P.2d 787 (Ct. App. 1969).

Where it is clear from the record that if the testimony of the plaintiff and her husband is believed the defendant ran a red light and if defendant's testimony and that of the eyewitnesses is believed, the plaintiff's husband operating the vehicle in which she was riding ran a red light. An issue of fact is presented and such issue is not appropriate for resolution by a directed verdict. Vander Biesen v. Lewis, 80 N.M. 490, 458 P.2d 94 (Ct. App. 1969).

Denial of motion for directed verdict was proper where, although rechanneling of water onto neighbor's property was not intentional, the result of grading and paving parking lot

was the creation of an artificial channel which caused damage to neighbor's property. Groff v. Circle K Corp., 86 N.M. 531, 525 P.2d 891 (Ct. App. 1974).

If reasonable minds may differ as to the conclusion to be reached under the evidence or permissible inferences to be drawn therefrom, the question is one for the jury and it is error to direct a verdict. Smith v. Loos, 78 N.M. 339, 431 P.2d 72 (Ct. App.), cert. denied, 78 N.M. 337, 431 P.2d 70 (1967); Jones v. New Mexico School of Mines, 75 N.M. 326, 404 P.2d 289 (1965).

Where no issue of fact. — If the evidence and the reasonable inferences to be drawn therefrom are plain and not open to doubt by reasonable men, then there is no issue of fact to be presented to the jury. Williamson v. Piggly Wiggly Shop Rite Foods, Inc., 80 N.M. 591, 458 P.2d 843 (Ct. App. 1969).

A verdict should only be directed where there is no fact for the jury to pass upon or where the court, in the exercise of its sound discretion, would be required to set aside a verdict if favorable to one side rather than to the other. Edwards v. Ross, 72 N.M. 38, 380 P.2d 188 (1963).

Questions of negligence are generally to be determined by the fact finder, but when reasonable minds cannot differ, a question of law to be resolved by the trial judge is presented. Montoya v. Williamson, 79 N.M. 566, 446 P.2d 214 (1968).

Misconduct not basis for verdict. — A directed verdict in favor of a defendant is not to be granted on the basis of defendant's misconduct. State v. Paul, 83 N.M. 527, 494 P.2d 189 (Ct. App. 1972).

Insufficient evidence for armed robbery. — The defendant's motion for a directed verdict, questioning the sufficiency of the evidence for a conviction of armed robbery, should have been sustained, where witness only testified that he had been taken by surprise and not that by force or fear he had been induced to part with anything of value. State v. Baca, 83 N.M. 184, 489 P.2d 1182 (Ct. App. 1971).

Workmen's compensation. — In personal injury action, trial court properly refused to direct verdict for defendant employer on the theory that the parties were bound by the provisions for Workmen's Compensation where defendant had not complied with insurance requirements. Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957).

Trial court may properly remove case from consideration by jury only when no true issues of fact have been presented and the right of jury trial on any issue of fact presented by the pleadings is provisional, and if the evidence fails to form such issue of fact the right of jury trial disappears. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966).

Negligence, contributory negligence and last clear chance. — As is true of negligence and contributory negligence, last clear chance is generally a question to be

determined by the jury. However, if reasonable minds cannot differ that the facts do not give rise to liability, the court should decide the issue as a matter of law. Montoya v. Williamson, 79 N.M. 566, 446 P.2d 214 (1968).

Denial of motion for directed verdict preserves issue for review. — A motion for a directed verdict and its denial always preserves for review the question whether, under the law applicable to the case, there is an adequate evidentiary basis to warrant denial of the motion. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978).

B. WHEN MADE.

Generally. — A motion for directed verdict ordinarily cannot be made until movant's adversary has presented his case or rested. Hatch v. Strebeck, 58 N.M. 824, 277 P.2d 317 (1954).

Directing verdict at close of plaintiff's case. — It is error for trial court to direct a verdict in favor of a defendant at the close of plaintiff's case unless plaintiff has presented no facts which would support a judgment in his favor. Smith v. Loos, 78 N.M. 339, 431 P.2d 72 (Ct. App.), cert. denied, 78 N.M. 337, 431 P.2d 70 (1967); Jones v. New Mexico School of Mines, 75 N.M. 326, 404 P.2d 289 (1965).

Before adversary has rested. — While this rule, by its express terms, does not deny that a motion for a directed verdict may be made before an adversary has rested, such must be its general application if an orderly administration of justice is to be accomplished. Home Fire & Marine Ins. Co. v. Pan Am. Petroleum Corp., 72 N.M. 163, 381 P.2d 675 (1963).

Granting directed verdict for defendant was error where plaintiff was given no opportunity to overcome adverse effects of testimony of one of its witnesses on cross-examination. Home Fire & Marine Ins. Co. v. Pan Am. Petroleum Corp., 72 N.M. 163, 381 P.2d 675 (1963).

C. TREATMENT OF EVIDENCE AND INFERENCES.

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and has been defined as evidence of substance which establishes facts from which reasonable inferences may be drawn. McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968).

Trial court must review all of evidence with all reasonable inferences deducible therefrom most favorable to the party resisting the motion in ruling on a motion for a directed verdict. Strickland v. Roosevelt County Rural Elec. Coop., 94 N.M. 459, 612 P.2d 689 (Ct. App. 1980), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Reasonable inference is conclusion arrived at by a process of reasoning. This conclusion must be a rational and logical deduction from facts admitted or established by the evidence, when such facts are viewed in the light of common knowledge or common experience. Williamson v. Piggly Wiggly Shop Rite Foods, Inc., 80 N.M. 591, 458 P.2d 843 (Ct. App. 1969).

Generally. — In ruling upon a motion for a directed verdict, the court will consider the evidence and inferences therefrom most favorable to the party resisting the motion. Harmon v. Farmers Mkt. Food Store, 84 N.M. 80, 499 P.2d 1002 (Ct. App.), cert. denied, 84 N.M. 77, 499 P.2d 999 (1972).

Trial and appellate rule the same. — Decisions suggesting a difference between the rule governing trial courts in passing on a motion for a directed verdict and the rule governing appellate courts in reviewing the validity of a judgment entered pursuant to a directed verdict, are overruled. Archuleta v. Pina, 86 N.M. 94, 519 P.2d 1175 (Ct. App. 1974).

By trial court. — In ruling on a motion for a directed verdict, the trial court must view the evidence, together with all reasonable inferences deducible therefrom, in the light most favorable to the party resisting the motion, and must disregard all conflicts in the evidence unfavorable to the position of that party. Archuleta v. Pina, 86 N.M. 94, 519 P.2d 1175 (Ct. App. 1974); Sanchez v. Gattas, 54 N.M. 224, 219 P.2d 962 (1950); Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957); Tabet v. Sprouse-Reitz Co., 75 N.M. 645, 409 P.2d 497 (1966); Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966); Bank of N.M. v. Rice, 78 N.M. 170, 429 P.2d 368 (1967); Smith v. Loos, 78 N.M. 339, 431 P.2d 72 (Ct. App.), cert. denied, 78 N.M. 337, 431 P.2d 70 (1967); Simon v. Akin, 79 N.M. 689, 448 P.2d 795 (1968); Garcia v. Barber's Super Mkts., Inc., 81 N.M. 92, 463 P.2d 516 (Ct. App. 1969); Demers v. Gerety, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973), rev'd on other grounds, 86 N.M. 141, 520 P.2d 869 (1974).

By appellate court. — The appellate court, upon reviewing a judgment entered pursuant to a directed verdict, must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the party resisting the motion, and must disregard all conflicts in the evidence unfavorable to the position of that party. Archuleta v. Pina, 86 N.M. 94, 519 P.2d 1175 (Ct. App. 1974); Bryan v. Phillips, 70 N.M. 1, 369 P.2d 37 (1962); Burks v. Baumgartner, 72 N.M. 123, 381 P.2d 57 (1963); McGuire v. Pearson, 78 N.M. 357, 431 P.2d 735 (1967); Carter Farms Co. v. Hoffman-LaRoche, Inc., 83 N.M. 383, 492 P.2d 1000 (1971).

All evidence to be considered. — Upon motion for directed verdict, trial court has duty to consider all the evidence, not just that favorable to party opposing motion, and if any evidence conflicts, it is to be resolved in favor of party resisting motion. Skyhook Corp. v. Jasper, 90 N.M. 143, 560 P.2d 934 (1977), overruled on other grounds, Klopp v. Wackenhut Corp., 113 N.M. 153, 824 P.2d 293 (1992).

Question of substantial evidence. — In ruling on a defense motion for a directed verdict, the evidence must be viewed in the light most favorable to the state. The question presented by such a motion is whether there is substantial evidence to support the charge. In deciding this question on appeal, the court views the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all reasonable inferences therefrom in favor of the verdict of conviction. State v. McKay, 79 N.M. 797, 450 P.2d 435 (Ct. App. 1969).

D. CLAIM OF NEGLIGENCE OR CONTRIBUTORY NEGLIGENCE.

"Wrongful conception" is not a distinct tort in New Mexico. — Because a "wrongful conception" action is nothing more than a normal medical malpractice action with a unique type of damages for the costs of raising a child from birth to adulthood when a child is conceived as a result of a negligently performed, unsuccessful sterilization procedure, plaintiff, as in any medical malpractice action, has the burden of proving that defendant owed plaintiff a duty recognized by law, that defendant failed to conform to the recognized standard of medical practice in the community, and that the actions complained of were the proximate cause of plaintiff's injuries. Plaintiff does not have to prove that defendant failed to disclose that the sterilization procedure was unsuccessful, and if defendant informed plaintiff that the sterilization was unsuccessful, the disclosure does not automatically bar plaintiff's case from going to the jury. The effect of defendant's disclosure that the sterilization was unsuccessful should be considered by the jury in its assessment of causation and, if there is causation, the apportionment of the parties' relative fault. *Provencio v. Wenrich*, 2010-NMCA-047, 148 N.M. 799, 242 P.3d 366, *cert. granted*, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Where defendant performed a tubal ligation on plaintiff; the ligation was not successful and fertility tests revealed that plaintiff was still fertile; defendant informed plaintiff that plaintiff could get pregnant; plaintiff did not seek additional medical care from defendant or contraceptive care from any other health care provider; plaintiff understood that plaintiff could get pregnant and used condoms as the sole method of birth control; and after plaintiff received the results of the fertility tests, plaintiff conceived a child; plaintiff was merely required to show that there was a negligent failure to perform the tubal ligation procedure, defendant's disclosure that plaintiff was still fertile did not, as a matter of law, break the casual chain, and the district court erred in granting judgment to defendant as a matter of law on the grounds that a failure to inform plaintiff that the ligation was unsuccessful is an essential element of the tort of "wrongful conception" and that defendant had informed plaintiff that plaintiff continued to be fertile. *Provencio v. Wenrich*, 2010-NMCA-047, 148 N.M. 799, 242 P.3d 366, *cert. granted*, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Claim of negligence. — Motion for directed verdict was properly granted in favor of city in negligence suit against city for failure to specify procedures for contractor for construction of sewage lines, where there was no evidence of either contractor's incompetence or use of improper methods, and there was no question of fact to decide. Garcia v. Universal Constructors, Inc., 82 N.M. 70, 475 P.2d 464 (Ct. App. 1970).

In negligence action, in ruling on directed verdict motion, the first question to be resolved is whether the plaintiff has made out a prima facie case of negligence and in determining this issue, all evidence and all reasonable inferences arising therefrom which tend to prove the plaintiff's case of primary negligence must be accepted as true. Edwards v. Ross, 72 N.M. 38, 380 P.2d 188 (1963).

Negligence and causal connection are generally questions of fact for the jury, but where the evidence is undisputed and reasonable minds cannot differ, the question is one of law to be resolved by the judge. New Mexico State Hwy. Dep't v. Van Dyke, 90 N.M. 357, 563 P.2d 1150 (1977).

Motion denied despite negligence per se. — In automobile accident case, trial court cannot grant a directed verdict on the issue of liability even though defendant is negligent per se, because the fact finders still have to determine whether the negligence per se was the actual and proximate cause of the accident. Archibeque v. Homrich, 88 N.M. 527, 543 P.2d 820 (1975).

Claim of contributory negligence. — Verdict may be directed where there can be no disagreement among reasonable minds that plaintiff is guilty of contributory negligence. Home Fire & Marine Ins. Co. v. Pan Am. Petroleum Corp., 72 N.M. 163, 381 P.2d 675 (1963).

Directed verdict for defendant on ground plaintiff was contributorily negligent was error where there was no evidence plaintiff violated statute or ordinance. Question of contributory negligence was one of fact to be determined by trier of facts. McKeough v. Ryan, 79 N.M. 520, 445 P.2d 585 (1968).

Defendant's motion for a directed verdict because of plaintiff's contributory negligence as a matter of law admits his negligence for the purpose of the motion. McKeough v. Ryan, 79 N.M. 520, 445 P.2d 585 (1968).

The issue of contributory negligence should be determined as a matter of law only when reasonable minds cannot differ on the question and readily reach the conclusion that the plaintiff was contributorily negligent and that his negligence proximately contributed with that of the defendant in causing the injury. Canter v. Lowrey, 69 N.M. 81, 364 P.2d 140 (1961).

Failure to clean up fallen substance. — Denial of directed verdict for defendant was error where plaintiff slipped on substance in produce area of market, which was swept several times each day, and the employees were instructed to pick up fallen produce, and did so. Lewis v. Barber's Super Mkts., Inc., 72 N.M. 402, 384 P.2d 470 (1963).

The mere presence of a slippery spot on a floor is insufficient to establish negligence, as this condition may arise temporarily. Barakos v. Sponduris, 64 N.M. 125, 325 P.2d 712 (1958); Kitts v. Shop Rite Foods, Inc., 64 N.M. 24, 323 P.2d 282 (1958).

E. WAIVER.

Jury trial not waived. — Motion of both sides for a directed verdict no longer amounts to a waiver of jury trial. Goldenberg v. Village of Capitan, 55 N.M. 122, 227 P.2d 630 (1951).

Waiver of error. — When a defendant proceeds to put on his case after the denial of his motion for a directed verdict made at the end of the plaintiff's case, he waives error, if any, in the lower court's refusal to grant such motion if the motion is not renewed at the close of the entire case. Bondanza v. Matteucci, 59 N.M. 354, 284 P.2d 1024 (1955).

Where defendants moved to dismiss at close of plaintiff's case in chief on grounds that plaintiffs seeking right of ingress and egress to their land failed to establish that road in question was public, and thereby failed to establish a prima facie case, but where defendants did not elect to stand on their motion but proceeded with their case after the denial thereof, they thereby waived any error committed in denial of the motion, even where evidence unquestionably failed to establish a public road. Board of Trustees v. Montano, 82 N.M. 340, 481 P.2d 702 (1971).

Unless a motion for a directed verdict made at the close of plaintiff's case is renewed at the close of the entire case, appellant cannot, on appeal, raise any question concerning the legal sufficiency of the evidence to sustain the judgment. Nally v. Texas-Arizona Motor Freight, Inc., 69 N.M. 491, 368 P.2d 806 (1962).

F. STATEMENT OF SPECIFIC GROUNDS.

Generally. — Where the motion for a directed verdict fails to state any grounds in support thereof, it is defective and may be denied. Hatch v. Strebeck, 58 N.M. 824, 277 P.2d 317 (1954).

III. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

A. IN GENERAL.

Generally. — A judgment notwithstanding the verdict should not be granted except where it is most clear that the evidence or any inference therefrom does not present an issue for the jury. Romero v. Turnell, 68 N.M. 362, 362 P.2d 515 (1961).

Judgment notwithstanding the verdict is proper only when it can be said that there is neither evidence nor inference from which the jury could have arrived at the verdict. Bookout v. Griffin, 97 N.M. 336, 639 P.2d 1190 (1982).

Improper where substantial conflicting evidence exists. — Judgments notwithstanding the verdict are not proper where there is substantial conflicting evidence. Bookout v. Griffin, 97 N.M. 336, 639 P.2d 1190 (1982).

Prerequisite to motion. — A motion for a directed verdict at the close of all the evidence is a prerequisite to a motion for judgment notwithstanding verdict. Bondanza v. Matteucci, 59 N.M. 354, 284 P.2d 1024 (1955).

Where matter of law. — Where car of plaintiff's decedent collided with defendant's cow on highway, and there was insufficient evidence for the application of the doctrine of res ipsa loquitur or of negligence apart from the doctrine, defendant's motion for a directed verdict should have been granted. That not having been done, the motion for judgment notwithstanding the verdict should have been granted. Tapia v. McKenzie, 85 N.M. 567, 514 P.2d 618 (Ct. App. 1973).

Reasonable minds could not differ as to the liability of defendant for damaging plaintiff's building or as to the amount of damages, since there literally was no evidence disputing either of the factual issues. Therefore, the supreme court reversed the court of appeals and the trial court and directed that judgment be entered, notwithstanding the verdict, awarding plaintiff his damages plus his costs. Owen v. Burn Constr. Co., 90 N.M. 297, 563 P.2d 91 (1977).

When after reading the testimony in the light most advantageous to the plaintiff, and giving him the benefit of every inference of fact fairly deducible therefrom, the reviewing court determined that the plaintiffs and cross defendants were not entitled as a matter of law to a judgment against the defendant, the ruling of the trial court in granting judgment notwithstanding must be sustained. Marr v. Nagel, 59 N.M. 21, 278 P.2d 561 (1954).

Where question of fact. — Whether plaintiff would have seen defendant's car in ample time to have avoided the collision had the automobile been so parked as to expose the reflectors to oncoming traffic presented a fact question for determination by the jury, and not a question of law to be decided by judgment n.o.v. Chavira v. Carnahan, 77 N.M. 467, 423 P.2d 988 (1967).

Where the evidence of the location of a cave to a dedicated area is conflicting and there is substantial evidence which would support a determination that the cave was within the dedicated area, then under the rules for reviewing evidence where there has been a judgment notwithstanding the verdict, the trial court could not have properly entered the judgment notwithstanding the verdict on the basis of the location of the cave. Williams v. Town of Silver City, 84 N.M. 279, 502 P.2d 304 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

In a products liability case, defendants' award of judgment notwithstanding the verdict was overturned by the court of appeals, which held that defendants' arguments and evidence of inherent improbability could not overcome plaintiffs' experts' testimony that an axle did in fact break while the car was being driven, and was all met by contradictory evidence of the plaintiffs, so that the resulting conflict was properly one for the jury. Montoya v. GMC, 88 N.M. 583, 544 P.2d 723 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Where judgment notwithstanding verdict improper although evidence undisputed. — Even though evidence may be undisputed, a judgment notwithstanding verdict is improper if different inferences may reasonably be drawn therefrom. Chavira v. Carnahan, 77 N.M. 467, 423 P.2d 988 (1967).

Power to reserve ruling. — Subdivision (b) (see now Paragraph B) permits a trial judge to overrule or deny a motion for dismissal or for a directed verdict at the close of all of the evidence and reserve ruling thereon until after the jury is given an opportunity to pass on the identical situation from a factual standpoint. Marr v. Nagel, 59 N.M. 21, 278 P.2d 561 (1954).

Automatic denial of motion for reconsideration. — The parties were required to file their notice of appeal from an order of distribution of certain settlement proceeds within 30 days from the date their motion for reconsideration was deemed denied by operation of law. Beneficial Fin. Corp. v. Morris, 120 N.M. 228, 900 P.2d 977 (Ct. App. 1995).

B. WHEN MADE.

Raising issue on judgment notwithstanding verdict. — Where no question of the status of the four boys killed in collapse of cave was raised during the trial and this question was not presented to the trial court until defendant moved for judgment notwithstanding the verdict, the question was raised too late to be the subject of review. Williams v. Town of Silver City, 84 N.M. 279, 502 P.2d 304 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Motion to reconsider filed more than 10 days after the entry of order and accordingly was not timely. State v. Navas, 78 N.M. 365, 431 P.2d 743 (1967).

C. TREATMENT OF EVIDENCE AND INFERENCES.

Generally. — In considering a motion for judgment n.o.v. the motion is to be granted only when there is neither evidence nor inference from which the jury could have arrived at its verdict. Demers v. Gerety, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973), rev'd on other grounds, 86 N.M. 141, 520 P.2d 869 (1974); Michelson v. House, 54 N.M. 197, 218 P.2d 861 (1950); Romero v. Turnell, 68 N.M. 362, 362 P.2d 515 (1961); Chavira v. Carnahan, 77 N.M. 457, 423 P.2d 988 (1967); Flanary v. Transport Trucking Stop, 78 N.M. 797, 438 P.2d 637 (Ct. App. 1968); Tapia v. McKenzie, 85 N.M. 567, 514 P.2d 618 (Ct. App. 1973).

The standard for granting a judgment notwithstanding the verdict is the same as that for granting a directed verdict. The party who prevails in the jury's verdict is entitled to have the testimony considered in a light most favorable to him and is entitled to every inference of fact fairly deducible from the evidence. Montoya v. GMC, 88 N.M. 583, 544 P.2d 723 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

The trial court must view the evidence in the light most favorable to the party resisting the motion for judgment n.o.v. Bookout v. Griffin, 97 N.M. 336, 639 P.2d 1190 (1982).

Appeal from denial of motion. — On appeal from the denial of a motion under this rule, the verdict of the jury will not be disturbed unless unsupported by substantial evidence. An appellate court will not reverse, unless, after viewing the evidence in the light most favorable to support the verdict, it is convinced that such verdict cannot be sustained either by the evidence or permissible inferences therefrom. Perschbacher v. Moseley, 75 N.M. 252, 403 P.2d 693 (1965).

Evidence as existing at close of trial. — In considering a motion for judgment notwithstanding the verdict, the evidence must be taken as it existed at the close of the trial, and evidence admitted over objection cannot be excluded nor can evidence be included which was improperly rejected. Whether competent or incompetent, all evidence submitted to the jury must be considered by the court in ruling on a motion for judgment notwithstanding the verdict, and such a judgment cannot be entered on a diminished record after the elimination of incompetent evidence. Townsend v. United States Rubber Co., 74 N.M. 206, 392 P.2d 404 (1964), overruled in part on other grounds, Rhein v. ADT Auto, Inc., 1996-NMSC-066, 122 N.M. 646, 930 P.2d 783.

D. APPEAL.

Generally. — Whether motion for judgment n.o.v. is sustained or overruled, the ensuing judgment can be appealed and the correctness of the court's ruling on the motion can be appealed. Scott v. J.C. Penney Co., 67 N.M. 219, 354 P.2d 147 (1960).

Judgment n.o.v. coupled with motion for new trial. — Where judgment n.o.v. is coupled with a motion for a new trial, denial of the motion for a new trial leaves the judgment standing and can be appealed. Scott v. J.C. Penney Co., 67 N.M. 219, 354 P.2d 147 (1960).

Effect of new trial order where judgment rendered. — Where motions for judgment n.o.v. and new trial are made in the alternative, and a judgment has been rendered on the verdict, order granting new trial would be a final order and appealable. Scott v. J.C. Penney Co., 67 N.M. 219, 354 P.2d 147 (1960).

Where no judgment rendered. — Where motions for judgment n.o.v. and new trial are made in the alternative, and no judgment has been rendered on the verdict, order granting new trial renders verdict a nullity and is not appealable. Scott v. J.C. Penney Co., 67 N.M. 219, 354 P.2d 147 (1960).

E. PARTIAL JUDGMENT NOTWITHSTANDING THE VERDICT.

Claims not established with reasonable certainty. — Defendant's motion for judgment n.o.v. was properly granted as to certain claims for damages which had not been established with reasonable certainty, although other parts of the judgment

against defendant were not modified. Terrel v. Duke City Lumber Co., 86 N.M. 405, 524 P.2d 1021 (Ct. App. 1974), rev'd on other grounds, 88 N.M. 299, 540 P.2d 229 (1975).

F. LATER DETERMINATION OF LEGAL QUESTIONS.

Generally. — Where defendant unsuccessfully sought motions for directed verdict on each of plaintiff's three motions, appellate review as to all three issues was not extinguished by failure to object to jury instruction listing claims in alternative and his request of a similar instruction since on motion for judgment n.o.v. the movant is entitled to assert the legal question in accordance with his motion for a directed verdict. Gerety v. Demers, 86 N.M. 141, 520 P.2d 869 (1974).

Court may reexamine earlier ruling in subsequent motion. — Trial courts can rule on a motion for a directed verdict when the motion is made, and yet the court can, without express reservation, reexamine its ruling in a subsequent motion for a directed verdict or for a judgment non obstante veredicto. Kinetics, Inc. v. El Paso Prods. Co., 99 N.M. 22, 653 P.2d 522 (Ct. App. 1982).

IV. SAME; CONDITIONAL RULINGS ON GRANT OF MOTION.

Ruling not mandatory. — Claim that trial court erred in failing to rule on motion for new trial on the basis that it was mandatorily required by Subdivision (c) (see now Paragraph C) was without merit. Scott v. McWood Corp., 82 N.M. 776, 487 P.2d 478 (1971).

Failing to rule within limit. — Since trial court failed to rule on motion for new trial within 30 days, it was denied as a matter of law. Scott v. McWood Corp., 82 N.M. 776, 487 P.2d 478 (1971).

Law reviews. — For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial §§ 857, 858, 914.

Request by both parties for directed verdict as waiver of submission to jury, 18 A.L.R. 1433, 68 A.L.R.2d 300.

Constitutionality of statute forbidding direction of verdict or nonsuit, 29 A.L.R. 1287.

Right of insurer to direct verdict on issue of suicide, 37 A.L.R. 171.

Effect of explanatory or qualifying testimony to nullify prima facie case made by plaintiff, 66 A.L.R. 1532.

Right or duty of court to direct verdict where based upon testimony of party or interested witness, 72 A.L.R. 27.

May question as to qualification or competency of witness be raised by or upon motion for nonsuit or for directed verdict, absent objection on that ground when testimony was given, 93 A.L.R. 788.

Right to move for judgment notwithstanding verdict after entry of judgment, 95 A.L.R. 429.

Absence of issue as to amount of recovery, as distinguished from right to recover, as justifying return of verdict which does not assess amount, 105 A.L.R. 1075.

Objectionable evidence, admitted without objection, as entitled to consideration on demurrer to evidence or motion for nonsuit or directed verdict, 120 A.L.R. 205.

Evidence as to mutual decision, waiver, ratification or estoppel as regards insurer's attempt to rescind policy of insurance or particular provisions thereof as warranting direction of verdict, 152 A.L.R. 104.

Directed verdict in action involving question whether injury to or death of insured while assaulting another was due to accident or accidental means, 26 A.L.R.2d 399.

Direction of verdict in action against railroad for injury to an adult pedestrian attempting to pass over, under or between cars obstructing crossing, 27 A.L.R.2d 369.

Entry of final judgment after disagreement of jury, 31 A.L.R.2d 885.

Appealability of order overruling motion for directed verdict, or for judgment, or the like, where the jury has disagreed, 40 A.L.R.2d 1284.

Appealability of order denying motion for directed verdict or for judgment notwithstanding the verdict where movant has been granted a new trial, 57 A.L.R.2d 1198.

Direction of verdict based on uncontradicted testimony as affected by credibility of witness, 62 A.L.R.2d 1191.

Motion by each party for directed verdict as waiving submission of fact questions to jury, 68 A.L.R.2d 300.

Federal civil procedure rule, right to jury trial as invaded by Rule 50 (b) or like state provisions with respect to motion for judgment notwithstanding or in default of verdict, 69 A.L.R.2d 449.

Res ipsa loquitur as ground for direction of verdict in favor of plaintiff, 97 A.L.R.2d 522.

Dismissal, nonsuit, judgment or direction of verdict on opening statement of counsel in civil action, 5 A.L.R.3d 1405.

Propriety and prejudicial effect of counsel's argument or comment as to trial judge's refusal to direct verdict against him, 10 A.L.R.3d 1330.

Direction of verdict in action involving duty and liability of vehicle driver blinded by glare of lights, 64 A.L.R.3d 551.

Direction of verdict in action against landlord for personal injury or death due to defective inside steps or stairways for use of several tenants, 67 A.L.R.3d 587.

Propriety of direction of verdict in favor of fewer than all defendants at close of plaintiff's case, 82 A.L.R.3d 974.

Impeachment of verdict by juror's evidence that he was coerced or intimidated by fellow juror, 39 A.L.R.4th 800.

Eligibility of management's relatives to vote in NLRB election, 26 A.L.R. Fed. 427.

What standards govern appellate review of trial court's conditional ruling, pursuant to Rule 50(c)(1) of Federal Rules of Civil Procedure, on party's motion for new trial, 52 A.L.R. Fed. 494.

Substitution of judges under Rule 25 of Federal Rules of Criminal Procedure, 73 A.L.R. Fed. 833.

49 C.J.S. Judgments §§ 62 to 72; 88 C.J.S. Trial §§ 249 to 265.

1-051. Instructions to juries.

A. **Type of instruction.** The trial judge shall instruct the jury in the language of the Uniform Jury Instructions on the applicable rules of law and leave to counsel the application of such rules to the facts according to their respective contentions.

B. **Duty to instruct.** The court shall instruct the jury regarding the law applicable to the facts in the cause unless such instructions be waived by the parties.

C. **Admonitions to jury on conduct.** After a jury has been sworn to try a case, but before opening statements or the presentation of any testimony, the court must read the applicable portions of UJI 13-106 to the jury. The instruction or appropriate portions thereof may be repeated to the jury before any recess of the trial if in the discretion of the judge it is desirable to do so. At the close of the case when the jury is instructed UJI 13-106 shall not be reread to the jury but applicable portions thereof shall be included with other instructions sent to the jury room.

D. **Use.** Whenever New Mexico Uniform Jury Instructions Civil contains an instruction applicable in the case and the trial court determines that the jury should be instructed on the subject, the UJI Civil shall be used unless under the facts or

circumstances of the particular case the published UJI Civil is erroneous or otherwise improper, and the trial court so finds and states of record its reasons.

E. **Certain instructions not to be given.** When in UJI Civil it is stated that no instructions should be given on any particular subject matter, such direction shall be followed unless under the facts or circumstances of the particular case an instruction on the subject should be given, and the trial court so finds and states of record its reason.

F. **Instruction by the court.** Whenever the court determines that the jury should be instructed on a subject, the instruction given on that subject shall be brief, impartial and free from hypothesized facts. If there is a UJI Civil on that subject, it shall be given.

G. **Preparation and request for instructions.** Any party may move the court to give instructions on any point of law arising in the cause. At any time before or during the trial, the court may direct counsel to prepare designated instructions. The attorneys for the parties shall confer in good faith prior to the settling of instructions by the court and shall prepare a single set of instructions upon which the parties agree. Such instructions as well as instructions tendered by the parties shall be in writing and shall consist of an original to be used by the court in instructing the jury, adequate copies for the parties, and one (1) copy for filing in the case on which the judge shall note "given" or "refused" as to each instruction requested. Copies of instructions tendered by the parties shall indicate who tendered them. All copies of instructions shall also contain a notation "UJI Civil No. _____" or "Not in UJI Civil" as appropriate. (The instructions which go to the jury room shall contain no notations.)

H. **Instructions to be in writing; waiver; to be given before argument and to go to jury.** Unless waived, the instructions shall be in writing. Except where instructions, either written or oral, are waived, the judge in all cases shall charge the jury before the argument of counsel. Written instructions shall go to the jury room.

I. **Error in instructions; preservation.** For the preservation of any error in the charge, objection must be made to any instruction given, whether in UJI Civil or not; or, in case of a failure to instruct on any point of law, a correct instruction must be tendered, before retirement of the jury. Reasonable opportunity shall be afforded counsel so to object or tender instructions.

J. **Review.** All instructions given to the jury or refused, whether UJI Civil or otherwise, are subject to review by appeal or writ of error when the matter is properly preserved and presented.

[As amended, effective January 1, 1987; August 27, 1999.]

ANNOTATIONS

Cross references. — For preserving questions for review, and scope of review, *see* Rules 1-046 and 12-216 NMRA.

The 1999 amendment, effective August 27, 1999, in Paragraph G, added the third sentence in which a single set of instructions shall be prepared and agreed upon by both parties.

Compiler's notes. — This rule is deemed to have superseded Trial Court Rules 70-101, 70-102, 70-104 to 70-108, derived from 70-101, 70-102, 70-104 to 70-108, C.S. 1929, which were substantially the same.

I. GENERAL CONSIDERATION.

Jury presumed charged according to law. — Where error complained of was that the court gave its instructions orally, and the record on its face did not sustain the error, and there was no evidence aliunde, the legal presumption was that the charge of the court was delivered according to law. Kent v. Favor, 3 N.M. (Gild.) 347, 5 P. 470 (1885) (decided under former law).

Duty of jury. — The jury must judge the weight of the testimony and the credibility of the witnesses. Kirchner v. Laughlin, 4 N.M. (Gild.) 386, 17 P. 132 (1888) (decided under former law).

Generally. — Where no rights were sacrificed or prejudiced by failure to number instructions as required by Comp. Laws 1897, § 2998 (70-108, C.S. 1929, (now superseded by this rule)), it was not such error as would justify a reversal of the judgment. Territory v. Cordova, 11 N.M. 367, 68 P. 919 (1902); Miller v. Preston, 4 N.M. (Gild.) 396, 17 P. 565 (1888)(both cases decided under former law).

Where erasure or interlineation on instructions handed to jury cannot be considered to be prejudicial, it is not such an irregularity as to justify a reversal. Daly v. Bernstein, 6 N.M. 380, 28 P. 764 (1892); Denver & R.G. Ry. v. Harris, 3 N.M. (Gild.) 114, 2 P. 369 (1884), aff'd, 122 U.S. 597, 7 S. Ct. 1286, 30 L. Ed. 1146 (1887) (both cases decided under former law).

An instruction is properly refused which would in effect instruct the jury that plaintiff had established his claim, where evidence was conflicting. C.W. Kettering Mercantile Co. v. Sheppard, 19 N.M. 330, 142 P. 1128 (1914) (decided under former law).

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For note, "Undue Influence in Wills - Evidence - Testators' Position Changes After In re Will of Ferrill," see 13 N.M.L. Rev. 753 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 1077 et seq.

Instructions in civil action for assault upon female person, 6 A.L.R. 1030.

Necessity of repeating definition of legal or technical term in different parts of instructions in which it is employed, 7 A.L.R. 135.

Instructions in action based on employer's statutory duty as to timbering of mines, 15 A.L.R. 1491.

Use of emphatic words, like "great care," "utmost care" or "highest care" in instructing jury as to duty of carrier to passengers, 32 A.L.R. 1190.

Instruction as to what items of damage on account of personal injury to infant belongs to him and what to parent, 37 A.L.R. 78, 32 A.L.R.2d 1060.

Instructions in action on policy insuring against automobile conversion or embezzlement, 55 A.L.R. 848.

Duty to instruct, and effect of failure to instruct jury as to reduction to present worth of damages for future loss on account of death or personal injury, 77 A.L.R. 1439, 154 A.L.R. 796.

Statute in relation to subject-matter or form of instructions as impairing right to jury trial, 80 A.L.R. 906.

Duty to instruct as to what constitutes natural drainway for flow of surface water, 81 A.L.R. 273.

Court's communication with or instructions to jury in civil case in absence of counsel, 84 A.L.R. 220.

Instructions regarding measurement of damages for pain and suffering, 85 A.L.R. 1010.

Instructions regarding determination of life expectancy, 87 A.L.R. 910.

Instruction as to mental suffering as element of damages for libel and slander, 90 A.L.R. 1195.

Necessity of defining preponderance or weight of evidence, 93 A.L.R. 156.

Furnishing or reading instructions to jury, in jury room, after retirement, as error, 96 A.L.R. 899.

Instruction in action for injury or damage by automobile colliding with temporary obstruction in connection with alteration or repair of street, 100 A.L.R. 1389.

Sufficiency of instruction on contributory negligence as respects element of proximate cause, 102 A.L.R. 411.

Right or duty of court to instruct jury as to presumptions, 103 A.L.R. 126.

Instructions to jurors as to right to act upon their own knowledge in determining property values, 104 A.L.R. 1020.

Instructions in action for injury to trespasser or licensee struck by object projecting or thrown from passing train, 112 A.L.R. 864.

Necessity of expert testimony to justify instruction to jury as to permanency of injury or as to future pain and suffering, 115 A.L.R. 1149.

Failure to comply with statute, constitutional provision or court rule providing for giving instructions to jury in writing as prejudicial or reversible error, 115 A.L.R. 1332.

Propriety of instruction as to instinct of self-preservation where there is direct evidence as to what took place at time of accident, 116 A.L.R. 340.

Use of, or comment on use of, "and/or" in instruction, 118 A.L.R. 1376, 154 A.L.R. 866.

Instructions as to effect of good or bad character of witnesses in their credibility, 120 A.L.R. 1443.

Propriety in action for libel or slander where actual damages are not shown, of instructions on compensatory damages which do not embody jury's right to award small or nominal damages, 122 A.L.R. 853.

Duty of court in civil case to correct, and to give as corrected, a requested instruction which includes a clerical or inadvertent mistake, 125 A.L.R. 685.

Propriety of instruction, or requested instruction, in civil case, as to caution in considering testimony of oral admissions, or as to weight of such admissions as evidence, 126 A.L.R. 66.

Propriety and effect of instruction or requested instruction which either affirms or denies jury's right to draw unfavorable inference against a party because he invokes privilege against testimony of person offered as witness by the other party or because he fails to call such person as a witness, 131 A.L.R. 693.

Propriety of instructions on matters of common knowledge, 144 A.L.R. 932.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness in corroborating circumstances," rule included in charge to jury, 156 A.L.R. 499.

Instruction in ejection on rule that plaintiff must recover on strength of own title, 159 A.L.R. 646.

Instructions defining weight and value of dying declarations as evidence, 167 A.L.R. 158.

Duty of court instructing jury to explain and define offense charged, 169 A.L.R. 315.

Use of language of statute in explaining and defining of offense charged, 169 A.L.R. 331.

Necessity of request for instruction giving definition or explanation of crime, 169 A.L.R. 352.

Constitutional or statutory provision permitting comment on failure of defendant in criminal case to explain or deny by his testimony, evidence or facts against him, 171 A.L.R. 1267.

Right of plaintiff in res ipsa loquitur case to an instruction respecting inference by jury, 173 A.L.R. 880.

Propriety of instruction mentioning or suggesting specific sum as damages in personal injury action, 2 A.L.R.2d 454.

Modern view as to propriety and correctness of instructions referable to maxim "falsus in uno, falsus in omnibus," 4 A.L.R.2d 1077.

Propriety and effect of court's indication to jury that court would suspend sentence, 8 A.L.R.2d 1001.

Propriety of instructions in will contest defining natural objects of testator's bounty, 11 A.L.R.2d 731.

Instruction requiring or permitting consideration of changes in cost of living or in purchasing power of money in fixing damages, 12 A.L.R.2d 611, 21 A.L.R.4th 21.

Instructions to jury in action by patron of public amusement for accidental injury from cause other than assault, hazards of game or amusement, or condition of premises, 16 A.L.R.2d 912.

Driving motor vehicle without lights or with improper lights as affecting liability for collision, 21 A.L.R.2d 7, 62 A.L.R.3d 560, 62 A.L.R.3d 771, 62 A.L.R.3d 844.

Binding effect of court's order entered after pretrial conference, 22 A.L.R.2d 599.

Instructions as to intoxication of person injured or killed as affecting applicability of last clear chance doctrine, 26 A.L.R.2d 308.

Instructions in action for injury incident to touring automobile, 30 A.L.R.2d 1019.

Instruction as to application of "assured clear distance ahead" or "radius of lights" doctrine to accident involving pedestrian crossing street or highway, 31 A.L.R.2d 1424.

Right of defendant to complain, on appellate review, of instructions favoring codefendant, 60 A.L.R.2d 524.

Prejudicial effect of judge's disclosure to jury of motions or proceedings in chambers in civil case, 77 A.L.R.2d 1253.

Indoctrination by court of persons summoned for jury service, 89 A.L.R.2d 197.

Provision in Rule 51, Federal Rules of Civil Procedure, and similar state rules and statutes, requiring court to inform counsel, prior to argument to jury, of its proposed action upon requests for instructions, 91 A.L.R.2d 836.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect of instruction to the jury as to landowner's unwillingness to sell property in eminent domain proceedings, 20 A.L.R.3d 1081.

Admissibility and probative value of admissions of fault by agent on issue of principal's secondary liability, where both are sued, 27 A.L.R.3d 966.

Verdict-urging instructions in civil case stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Liability or recovery in automobile negligence action arising out of collision or upset as affected by operation of vehicle without front lights or with improper front lights, 62 A.L.R.3d 560.

Liability or recovery in automobile negligence action arising out of collision or upset as affected by operation of vehicle without or with improper taillights or rear reflectors, 62 A.L.R.3d 771.

Liability or recovery in automobile negligence action arising out of collision or upset as affected by operation of vehicle without, or with improper, clearance, load, or similar auxiliary lights, 62 A.L.R.3d 844.

Instructions as to duty to dim motor vehicle lights, 63 A.L.R.3d 824.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury - state cases, 41 A.L.R.5th 1.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

When will federal court of appeals review issue raised by party for first time on appeal where legal developments after trial effect issue, 76 A.L.R. Fed. 522.

88 C.J.S. Trial §§ 267, 330 to 333, 390, 413.

II. DUTY TO INSTRUCT.

A. IN GENERAL.

Instructions considered in entirety. — Considering the instructions as a whole, and in the absence of proper objection, and reading each in the light of all of the others, the court held that the trial court did not err in instructing the jury, as the instructions given adequately cover the law applicable in the instant case. Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55 (1971).

It is the duty of the jury to read and consider the instructions as a whole. AT & T Co. v. Walker, 77 N.M. 755, 427 P.2d 267 (1967).

A reviewing court also examines and considers the instructions as a whole. In considering instructions as a whole, particular expressions should be considered as

qualified by the context and other instructions. AT & T Co. v. Walker, 77 N.M. 755, 427 P.2d 267 (1967).

The instructions are to be considered as a whole and if they fairly present the law applicable to the issues, that is all that is required. Sturgeon v. Clark, 69 N.M. 132, 364 P.2d 757 (1961).

Instructions must be considered as a whole and, if the law is fairly presented by the whole, that is sufficient. Gerrard v. Harvey & Newman Drilling Co., 59 N.M. 262, 282 P.2d 1105 (1955).

If the entire charge of the court presents the law of the case fairly to the jury, it is sufficient. Kirchner v. Laughlin, 6 N.M. 300, 28 P. 505 (1892); Torlina v. Trorlicht, 5 N.M. 148, 21 P. 68 (1889), aff'd, 6 N.M. 54, 27 P. 794 (1891) (both cases decided under former law).

So each instruction need not stand alone. — Where instructions are read together, each need not, within its own limits, contain all elements of the case, if in the aggregate they fairly present the issues and the law applicable thereto. Demers v. Gerety, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973), rev'd on other grounds, 86 N.M. 141, 520 P.2d 869 (1974).

Refusal to give defendant's requested instruction was not error where the court otherwise correctly instructed on the point of law involved. Landers v. Atchison, T. & S.F. Ry., 73 N.M. 131, 386 P.2d 46 (1963).

And jury to be instructed clearly and simply on issues. — The court must determine from an examination of the pleadings what the issues are, and so state them to the jury as to be readily comprehended, and setting out the pleadings in lieu thereof will not be tolerated, unless manifestly without prejudice. We may add that such issues cannot be too clearly and explicitly stated, and that terseness and brevity will uniformly add emphasis. Haynes v. Hockenhull, 74 N.M. 329, 393 P.2d 444 (1964).

Where the allegations of the pleading as incorporated therein were not short and concise but long and ambiguous, not plain and simple but intricate and complicated, the trial court committed reversible error by embodying, practically verbatim into the first instruction, all of the pleadings hereinbefore set out, and the case should be reversed and remanded for a new trial. Haynes v. Hockenhull, 74 N.M. 329, 393 P.2d 444 (1964).

Trial courts need not give erroneous instructions. Kinney v. Luther, 97 N.M. 475, 641 P.2d 506 (1982).

B. ALLOWABLE INSTRUCTIONS.

When party entitled to instructions. — A party is entitled to an instruction on his theory of the case if such a theory is pleaded and supported by the evidence. Moreover,

if a theory is pleaded and supported by the evidence, a refusal to instruct the jury on that theory constitutes reversible error. Conversely, if there is no evidence to support the theory, it would be reversible error to instruct on that theory. Garcia v. Barber's Super Mkts., Inc., 81 N.M. 92, 463 P.2d 516 (Ct. App. 1969).

An instruction on a theory is properly given only if theory is pleaded or is tried by express or implied consent of the parties, and there is evidence supporting the theory. Davila v. Bodelson, 103 N.M. 243, 704 P.2d 1119 (Ct. App. 1985).

At least instructions on fundamental law of case. — Both Subdivisions 1(a) and 1(g) (see now Paragraphs B and I) should be read together and must be reconciled by a holding that it is the duty of the court at every trial to give to the jury the fundamental law applicable to the facts in the case and that, unless waived by the parties, instructions to that extent at least must be given whether requested or not; and further that if incidental questions arise in the case, as almost always occurs in the trial of a case, the court need not instruct on such incidental questions unless request be made, in writing, before the jury retires. Gerrard v. Harvey & Newman Drilling Co., 59 N.M. 262, 282 P.2d 1105 (1955).

Supported by evidence. — It is reversible error not to have the jury instructed upon all correct legal theories of a case which are supported by evidence. Romero v. Melbourne, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

A party is entitled to have the jury instructed on all correct legal theories of his case which are supported by substantial evidence. Crawford v. American Employers' Ins. Co., 86 N.M. 612, 526 P.2d 206 (Ct. App. 1974), rev'd on other grounds, 87 N.M. 375, 533 P.2d 1203 (1975).

It is the trial court's duty to instruct the jury on the law applicable to issues of fact raised by the proof. Hill v. Burnworth, 85 N.M. 615, 514 P.2d 1312 (Ct. App. 1973).

There should be a genuine basis for giving the instruction on unavoidable accident such as "unpreventable mechanical failure" and such must be coupled with circumstances which present a fair issue of whether this failure of the driver to anticipate or sooner guard against the danger or to avoid it, is consistent with a conclusion of the exercise of his due care. Goodman v. Venable, 82 N.M. 450, 483 P.2d 505 (Ct. App. 1971).

A party is entitled to an instruction on his theory of the case upon which there is evidence. Ward v. Ray, 78 N.M. 566, 434 P.2d 388 (1967).

Where there was proof as to speed and manner of driving, it was proper for the jury to consider this along with all other evidence in determining if party was negligent. Lujan v. Reed, 78 N.M. 556, 434 P.2d 378 (1967).

A party is entitled to instructions on its theory of the case when there is evidence to support it in the record. Failure to submit such instructions to the jury constitutes reversible error. Adams v. United Steelworkers, 97 N.M. 369, 640 P.2d 475 (1982).

Law stated by court must be applicable to facts in issue as shown by the evidence. Flanary v. Transport Trucking Stop, 78 N.M. 797, 438 P.2d 637 (Ct. App. 1968).

And pleaded. — The law in this jurisdiction supports the position that the jury must be instructed on defenses pleaded which are supported by evidence. Mills v. Southwest Bldrs., Inc., 70 N.M. 407, 374 P.2d 289 (1962).

It is prejudicial error to refuse to instruct specifically on a litigant's theory of the case, providing such theory is pleaded and there is evidence to support it. Hanks v. Walker, 60 N.M. 166, 288 P.2d 699 (1955).

In a jury trial a party is entitled to have his theory of the case submitted to the jury by specific instruction if that theory is both pleaded and supported by substantial evidence. Hanks v. Walker, 60 N.M. 166, 288 P.2d 699 (1955).

Each party is entitled to an instruction on his theory of the case if he has pled it and there is evidence upon which the theory might be supported. Mac Tyres, Inc. v. Vigil, 92 N.M. 446, 589 P.2d 1037 (1979).

Or tried by express or implied consent. — An instruction is proper only if plaintiff pleads the theory or it is tried by express or implied consent. Rice v. Gideon, 86 N.M. 560, 525 P.2d 920 (Ct. App.), cert. quashed, 87 N.M. 299, 532 P.2d 888 (1974).

C. LIMITATIONS ON INSTRUCTIONS.

No instructions on issues not pleaded. — An instruction on last clear chance was improper in a personal injury case where the doctrine was not pleaded. There was evidence in the record which would support certain elements thereof, but that evidence was also relevant to other issues and there was no evidence as to defendant's opportunity to avoid the accident once plaintiff was in a position of peril. Inferences from the evidence without affirmative evidence on the point were not enough to imply consent to try the issue, since the parties did not squarely recognize it as an issue in the case. Rice v. Gideon, 86 N.M. 560, 525 P.2d 920 (Ct. App.), cert. quashed, 87 N.M. 299, 532 P.2d 888 (1974).

Or not supported by evidence. — Since there was no evidence to the effect that the plaintiff was contributorily negligent, or to the effect that a sudden emergency arose, instructions on these theories should not have been given; it is error to instruct on issues which are unsupported by the evidence or which present a false issue. Archibeque v. Homrich, 88 N.M. 527, 543 P.2d 820 (1975).

Where there was no testimony, expert or otherwise, which tended to show the extent, if any, to which plaintiff's injuries would have been mitigated had she been wearing her seat belt, although there was testimony to the effect that her injuries resulted from the striking of her head on the windshield, an instruction precluding recovery for any injuries which a seat belt could have prevented was properly refused because there was no evidence on which to base it. Selgado v. Commercial Whse. Co., 86 N.M. 633, 526 P.2d 430 (Ct. App. 1974).

Where the evidence would not have supported a finding that defendant had a clear chance, by the exercise of ordinary care, to avoid striking decedent, the refusal of the instruction as to him was not only proper but necessary. Lopez v. Maes, 81 N.M. 693, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

In the absence of substantial evidence that driver's act in running over the body proximately caused the death, it was not error for the trial court to refuse the instruction on last clear chance as to this defendant. Lopez v. Maes, 81 N.M. 693, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

It is error to instruct on a proposition of law not supported by the evidence, or which presents a false issue. State ex rel. State Hwy. Comm'n v. Atchison, T. & S.F. Ry., 76 N.M. 587, 417 P.2d 68 (1966).

It is error to instruct on a legal proposition that is not within the issues in a case and on which there is present no competent evidence. Ryder v. Sandlin, 70 N.M. 377, 374 P.2d 133 (1962).

Where no question of notice to the defendant was raised in any way in the pleadings or the evidence, it was a mistake to give the jury any instruction about notice. Gerrard v. Harvey & Newman Drilling Co., 59 N.M. 262, 282 P.2d 1105 (1955).

An instruction on the issue of trespass is erroneous, where there is insufficient evidence to establish a trespass situation, where the victim of a dog bite had been invited to the defendant's premises. Aragon v. Brown, 93 N.M. 646, 603 P.2d 1103 (Ct. App. 1979).

In an action for personal injuries sustained from a dog bite, where there is no evidence that the victim's possession or consumption of beer at the defendant's residence, in violation of former 60-10-16 NMSA 1978 (now see 60-7B-1.1 NMSA 1978), was in any way the proximate cause of his injuries, an instruction on the unlawfulness of giving beer to a minor is properly refused. Aragon v. Brown, 93 N.M. 646, 603 P.2d 1103 (Ct. App. 1979).

Or based on speculation and conjecture. — Testimony of defendant's expert as to how a one-car accident in which both driver and passenger were killed might have occurred, (e.g., that an insect could have been in the car, that cigarette ashes could have blown into the eyes of the driver, that an animal could have run out in front of the driver, etc.) was speculation and conjecture, and to base a jury instruction on

speculation or conjecture was not proper; the interjection of a false issue and the giving of instructions not warranted by the evidence required a reversal. Archibeque v. Homrich, 88 N.M. 527, 543 P.2d 820 (1975).

And instructions to jury limited. — An instruction that plaintiff relied "in part" upon the doctrine of res ipsa loquitur was improper where the trial court only allowed one different theory to go to the jury. Archibeque v. Homrich, 88 N.M. 527, 543 P.2d 820 (1975).

Since false issue difficult to correct. — The jury having been misled by the submission of a false issue, the resulting prejudice may not be eliminated by giving of a general abstract instruction. Garcia v. Southern Pac. Co., 79 N.M. 269, 442 P.2d 581 (1968).

D. ERROR.

When incorrect instruction not reversible error. — A judgment will not be reversed by reason of an erroneous instruction, unless upon a consideration of the entire case, including the evidence, it shall appear that such error has resulted in a miscarriage of justice; usually there will be no cause for reversal unless the evidence indicates that without such error in the instructions the verdict probably would have been different from the verdict actually returned by the jury. Romero v. Melbourne, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Since there was a conflict in the evidence as to the degree of injury of the plaintiffs and since there was evidence that much of their chiropractor's treatment may have been unnecessary and that he had a personal interest in prolonging the treatment, the jury had ample ground for deciding that the plaintiffs had suffered no compensable injuries as a result of the collision, and therefore, the inclusion of an erroneous instruction as to the contributory negligence of a passenger was harmless and did not require reversal. Romero v. Melbourne, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Since the trial court correctly instructed the jury to deliberate the matter of liability before damages, and the jury did not find the necessary causal connection to establish any liability, any incorrect instructions on the question of damages did not constitute reversible error. Sandoval v. Cortez, 88 N.M. 170, 538 P.2d 1192 (Ct. App. 1975).

If the jury has resolved the question of liability in favor of defendant, the failure to have given correct instructions on the question of damages does not constitute reversible error. Britton v. Boulden, 87 N.M. 474, 535 P.2d 1325 (1975).

Nor lack of instruction. — Where jury was not instructed to confine its comparisons to individual features or specific traits, it was not reversible error for the court to fail to so instruct the jury where no such request was made by either side. Glascock v. Anderson, 83 N.M. 725, 497 P.2d 727, 55 A.L.R.3d 1079 (1972).

Where the court has instructed the jury in the degree of care which a driver is required to exercise, and these instructions had not been objected to, it is not error requiring a reversal for the court to refuse to give an instruction on sudden emergency, where no proper instruction was tendered, even though defendants would have been entitled to the same if they had tendered a correct statement of the law in this regard. Montoya v. Winchell, 69 N.M. 177, 364 P.2d 1041 (1961).

Nor abstract instruction. — While abstract statements of rules of law, in no way connected with the issues and proof in a case, are not to be given, reversible error does not result if there is no prejudice, or the jury is not misled. Mills v. Southwest Bldrs., Inc., 70 N.M. 407, 374 P.2d 289 (1962).

Granting of negative instruction is not in itself reversible error especially where the negative language is primarily cautionary and is not contrary to law. Clinard v. Southern Pac. Co., 82 N.M. 55, 475 P.2d 321 (1970).

But undue emphasis and repetition may cause reversible error in instructions. — Instructions, which unduly emphasize, by repetition or by singling out and making unduly prominent, any portion of the case or of the applicable law, should not be given, and if such instructions are given and the emphasis is of such nature that a party is prejudiced thereby, then such constitutes reversible error. Scott v. Brown, 76 N.M. 501, 416 P.2d 516 (1966).

Refusal to give a requested instruction in the form tendered is not error where another correct instruction on the same rule of law is in fact given. Apodaca v. Miller, 79 N.M. 160, 441 P.2d 200 (1968).

Instructions which are repetitious or which unduly emphasize certain portions of the case should not be given. State ex rel. State Hwy. Comm'n v. Atchison, T. & S.F. Ry., 76 N.M. 587, 417 P.2d 68 (1966).

As may erroneous and repetitious instruction. — Plaintiff cannot be heard to complain that the court failed to give her requested instruction, which was not only erroneous, but was repetitious of her prior requested instruction, which the court stated would be given and was given. Lopez v. Maes, 81 N.M. 693, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

It is not error to refuse instructions which are incomplete, erroneous or repetitious. Goodman v. Venable, 82 N.M. 450, 483 P.2d 505 (Ct. App. 1971).

III. ADMONITIONS TO JURY ON CONDUCT.

Elements of admonition. — Under UJI 13-102, juries are given instructions concerning their province as the sole judges of the facts, their duty to follow the law as given them by the court, and that they must not select or single out any particular instruction, or

portion thereof, but must consider all of the instructions, as a whole, in reaching their verdict. Scott v. Brown, 76 N.M. 501, 416 P.2d 516 (1966).

Showing of prejudice necessary for finding of reversible error. — Although Subdivision 1(b) (see now Paragraph C) is a mandatory direction to the trial court to give appropriate portions of UJI 13-102 near the outset of the trial, where no prejudice was shown as a result of failure to properly instruct the jury, or the complaining party did not reserve the omission for review, there was no reversible error. City of Albuquerque v. Ackerman, 82 N.M. 360, 482 P.2d 63 (1971).

And prejudice determined by facts of each case. — Whether an admonition by the court can cure possible prejudice arising out of an improper question is a matter that must be determined according to the facts and circumstances of each case; and asking defendant whether he had come to the city in order to take marijuana to another city when accompanied by proper admonitions, was held to be insufficiently prejudicial to give rise to a mistrial. State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968).

IV. USE OF UNIFORM JURY INSTRUCTIONS.

Uniform Jury Instructions must be used, unless the court finds it to be erroneous or otherwise improper, and states into the record the reasons for not using it. A failure to do so constitutes reversible error. Chapin v. Rogers, 80 N.M. 684, 459 P.2d 846 (Ct. App. 1969).

Reconciliation of former and current instructions. — Where a Uniform Jury Instruction is amended after the filing of a claim, the former version is applicable to the case to the extent it accurately reflects current New Mexico law; however, where there is conflict between the former UJI and current law, a trial court has the discretion to fashion a hybrid instruction that incorporates the former and current versions of the law. Brooks v. K-Mart Corp., 1998-NMSC-028, 125 N.M. 537, 964 P.2d 98.

UJI Civ. 3.6 (see now UJI 13-304) is properly given in district court cases arising under Probate Code. Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Giving general instruction is error where more specific instruction covers case. — It is error for the district court to give jury instructions on the issues of negligence and contributory negligence when the mandatory instruction states the entire law of liability and relief from liability in connection with dog-bite injuries. Aragon v. Brown, 93 N.M. 646, 603 P.2d 1103 (Ct. App. 1979).

Court seeks slightest evidence of prejudice in nonuse. — In determining whether the failure to give a Uniform Jury Instruction is reversible error, the court would accept the slightest evidence of prejudice, with all doubt resolved in favor of the party claiming prejudice. De La O v. Bimbo's Restaurant, Inc., 89 N.M. 800, 558 P.2d 69 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976); Davila v. Bodelson, 103 N.M. 243, 704 P.2d 1119 (Ct. App. 1985).

Submission of non-uniform instruction can result in reversible error. — Subdivision (D) (see now Paragraph D) alerts lawyers and district judges to the fact that the submission of non-uniform jury instructions to the jury can result in reversible error unless compliance therewith has occurred. Malczewski v. McReynolds Constr. Co., 96 N.M. 333, 630 P.2d 285 (Ct. App. 1981).

Under Paragraph D, published uniform jury instructions must be used unless under the facts or circumstances of the particular case they are erroneous or otherwise improper and the trial court states its reasons for refusing to use them. Deviation from required uniform jury instructions is reversible error if the appellant can show that he was prejudiced by the erroneous instruction. First Nat'l Bank v. Sanchez, 112 N.M. 317, 815 P.2d 613 (1991).

However, nonuse not necessarily reversible error. — The failure to give a Uniform Jury Instruction under Subdivision 1(c) (see now Paragraph D), if the sole error of the trial court, is not necessarily reversible error. Jewell v. Seidenberg, 82 N.M. 120, 477 P.2d 296 (1970).

Although the use of Uniform Jury Instructions is mandatory, supreme court did not intend to place form above substance in adopting the instructions. The standards there set forth will be of first consideration, and any deviation from them is held to be error. In determining whether it is reversible error, supreme court will accept the slightest evidence of prejudice, and all doubt will be resolved in favor of the party claiming prejudice. Thus, determination will be made by viewing the record in light of the standards the supreme court adopted for a fair trial, rather than indulging in a presumption of prejudice if the Uniform Jury Instructions are not followed. Jewell v. Seidenberg, 82 N.M. 120, 477 P.2d 296 (1970).

Failure to comply with Subdivision 1(c) (see now Paragraph D) is reversible error only if the complaining party is prejudiced by the noncompliance and substantial rights have been harmed, but the slightest evidence of prejudice is sufficient. McCrary v. Bill McCarty Constr. Co., 92 N.M. 552, 591 P.2d 683 (Ct. App. 1979).

And record to be made of reason for nonuse. — Both former 14.1 and 17.8, U.J.I. Civ., were to be given, purposely to cover the subject matter twice, unless, as provided by Subdivision 1(c) (see now Paragraph D), the court found and stated of record its reasons why the proposed instruction was erroneous or otherwise improper. Clinard v. Southern Pac. Co., 82 N.M. 55, 475 P.2d 321 (1970).

Party may not object where instruction modified to accommodate his evidence. — Having presented evidence of another land sale by the condemnor, the condemnee cannot then complain that the sale was an unfair measure of value, or that UJI Civ. 7.11 (1st Ed.) (now UJI 13-717) should not have been modified so as to explain to the jury how they should consider such evidence. El Paso Elec. Co. v. Real Estate Mart, Inc., 98 N.M. 570, 651 P.2d 105 (Ct. App. 1982).

Failure to record reasons for denying repetitious instructions did not violate Paragraph D. — It was not error for court to deny requested jury instructions when instructions given adequately covered law to be applied; trial court did not violate Subdivision (D) (see now Paragraph D) in not stating its reasons for refusing requested instructions. Kirk Co. v. Ashcraft, 101 N.M. 462, 684 P.2d 1127 (1984).

Uniform Jury Instructions are standard in determining if a fair trial had resulted. Jewell v. Seidenberg, 82 N.M. 120, 477 P.2d 296, 49 A.L.R.3d 121 (1970).

V. INSTRUCTION WHEN NO APPLICABLE UNIFORM INSTRUCTION.

Use of non-UJI instructions. — Attorneys may request non-Uniform Jury Instructions or modifications thereof where no applicable instruction on the subject is available. Mac Tyres, Inc. v. Vigil, 92 N.M. 446, 589 P.2d 1037 (1979).

The plain meaning of Paragraph D is that it applies when the trial court determines that a particular Uniform Jury Instruction is erroneous or improper. Thus the trial court did not err in failing to make a finding that UJI 13-1811 was erroneous or improper before giving a non-UJI instruction where the two instructions were complementary and both were given. Blacker v. U-Haul Co., 113 N.M. 542, 828 P.2d 975 (Ct. App. 1992).

Necessity of additional instructions. — The committee comments to the Uniform Jury Instructions are not the equivalents of the "directions for use"; thus, the giving of an instruction regarding a corporation's liability for actions committed while the corporation was under different ownership, although not found in Uniform Jury Instructions, met the requirements of Subdivision 1(e) (see now Paragraph F), and despite the fact that the committee comment to UJI 13-411 states that UJI 13-411 is sufficient for any issue of liability of a corporation, the "directions for use" suggests an additional instruction may be necessary, so that no error was committed in giving an additional instruction. O'Hare v. Valley Utils., Inc., 89 N.M. 105, 547 P.2d 1147 (Ct. App.), rev'd in part on other grounds, 89 N.M. 262, 550 P.2d 274 (1976).

VI. PREPARATION AND REQUEST FOR INSTRUCTIONS.

Generally. — The law requiring instructions to be in writing was mandatory; error is established where record shows charge was given orally, even though charge itself does not appear of record. Territory v. Perea, 1 N.M. 627 (1879) (decided under former law).

The court is under no obligation in civil cases to instruct the jury unless requested so to do, and the fact that an instruction is insufficient is not available error, unless a sufficient instruction was requested. King v. Tabor, 15 N.M. 488, 110 P. 601 (1910); Palatine Ins. Co. v. Santa Fe Mercantile Co., 13 N.M. 241, 82 P. 363 (1905) (both cases decided under former law).

A judge is not bound to charge the jury in the exact words proposed to him by counsel. The form of expression may be his own. If he instructs the jury correctly and in substance covers the relevant rules of law proposed to him by counsel, there is no error in refusing to adopt the exact words of the request. Cunningham v. Springer, 204 U.S. 647, 27 S. Ct. 301, 51 L. Ed. 662, 9 Ann. Cas. 897 (1907) (decided under former law).

In an action of assumpsit against husband and wife jointly for goods sold, it was error not to give an instruction requested by the wife that a married woman is not liable for the debts of her husband, and that before jury could find against her they must find that the goods were sold to her and not to her husband, especially where it was not alleged such goods were necessaries. Holmes v. Tyler, 8 N.M. 613, 45 P. 1129 (1896) (decided under former law).

Entitled to instructions on theories of case supported by evidence. — A party is entitled to have the jury instructed on all correct legal theories of his case which are supported by substantial evidence but in this case the court's refusal to give the involuntary manslaughter instruction was correct where to have given the requested instruction, which included acts for which there was no evidentiary support, would have introduced false issues and would have been misleading to the jury. LaBarge v. Stewart, 84 N.M. 222, 501 P.2d 666 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972).

When pleaded or tried with implied consent. — Before a party is entitled to an instruction upon his theory of the case, that theory must be pleaded or tried with implied consent. Ciesielski v. Waterman, 86 N.M. 184, 521 P.2d 649 (Ct. App.), rev'd on other grounds, 87 N.M. 25, 528 P.2d 884 (1974).

Or relied on at pretrial hearing. — A refusal to instruct on assumption of risk when it was not stated as a defense in the pleadings and was not relied on at the pretrial hearing is not error. Skeet v. Wilson, 76 N.M. 697, 417 P.2d 889 (1966).

And failure to submit instruction may limit scope of appeal. — When evidence is admitted over objection, with a statement by the court that its use would be limited by the instructions but the court fails to so instruct, an appellant cannot complain of this action if he does not submit a limiting instruction, or in some manner call the omission to the attention of the court. McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968).

If plaintiff did not tender an instruction concerning how they were to determine the price for or value of the services rendered, plaintiff is not in a position to complain of incomplete instructions. Panhandle Irrigation, Inc. v. Bates, 78 N.M. 706, 437 P.2d 705 (1968).

If plaintiff wished any instruction, it was her duty to submit it in writing, and not merely make a general statement on appeal that the Uniform Jury Instructions were not given. Lopez v. Maes, 81 N.M. 693, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

As may submission of improper verdicts. — Parties cannot participate in the submission of an improper verdict or other improper matters and then have the verdict set aside because it may turn out to be unfavorable. Scott v. Brown, 76 N.M. 501, 416 P.2d 516 (1966).

But no error if given instructions adequately cover issues of case. — Denial of requested instructions is not error when the court gives instructions adequately covering the issues. Nor is it material that one instruction did not contain all the elements of defendant's requested instruction if all instructions given fairly present the issues and the law applicable thereto. Garcia v. Barber's Super Mkts., Inc., 81 N.M. 92, 463 P.2d 516 (Ct. App. 1969).

If instructions considered on a whole fairly present all issues of law applicable to the facts, then they are sufficient and it is not error to refuse all others as surplusage. Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

If instructions, considered as a whole, fairly present the issues and the law applicable thereto, they are sufficient. Denial of a requested instruction is not error where the instructions given adequately cover the issue. Hudson v. Otero, 80 N.M. 668, 459 P.2d 830 (1969).

Denial of a requested instruction is not error where the instructions given adequately cover the issue. Flanary v. Transport Trucking Stop, 78 N.M. 797, 438 P.2d 637 (Ct. App. 1968).

And court may refuse instruction. — It is not error for the trial court to refuse an instruction which is incomplete, erroneous or repetitious. LaBarge v. Stewart, 84 N.M. 222, 501 P.2d 666 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972).

The trial court properly refused an oral request for an additional instruction because instructions tendered by the parties are to be in writing, and because the oral request was confusing, including a reference to proximate cause, which the requested written instruction on contributory negligence did not. De La O v. Bimbo's Restaurant, Inc., 89 N.M. 800, 558 P.2d 69 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

No prejudice when variety of paper qualities received by jury. — Plaintiffs were not prejudiced where six of the seven forms of verdicts submitted to the jury were on onionskin paper and in part carbon copies, but the form of verdict in favor of defendants was in ribbon copy on bond paper. Scott v. Brown, 76 N.M. 501, 416 P.2d 516 (1966).

VII. INSTRUCTIONS IN WRITING TO JURY; WAIVER.

Generally. — Any error in permitting instructions to go to jury room was waived, if not invited, where counsel participated in proceedings and objected to sending certain exhibits to jury room, but did not object to sending instructions to jury room until motion

for new trial. Dollarhide v. Gunstream, 55 N.M. 353, 233 P.2d 1042 (1951) (decided prior to 1966 amendments to this rule).

Where no objection is raised on account of the failure of the jury to take instructions with them, there is no ground for a new trial. Cunningham v. Springer, 13 N.M. 259, 82 P. 232 (1905), aff'd, 204 U.S. 647, 27 S. Ct. 301, 51 L. Ed. 662, 9 Ann. Cas. 897 (1907) (decided under former law).

Instructions must be submitted to the court in writing when the evidence is concluded, and before the cause is argued or submitted to the jury, and an oral request after jury had retired must be refused. Laws v. Pyeatt, 40 N.M. 7, 52 P.2d 127 (1935) (decided under former law).

Denial of requested instruction which is not in writing is not error. Lujan v. McCuistion, 55 N.M. 275, 232 P.2d 478 (1951).

Duty of court as to instructions. — Both Subdivisions 1(a) and 1(g) (see now Paragraphs B and I), should be read together and must be reconciled by a holding that it is the duty of the court at every trial to give to the jury the fundamental law applicable to the facts in the case and that, unless waived by the parties, instructions to that extent at least must be given whether requested or not; and further that if incidental questions arise in the case, as almost always occur in the trial of a case, the court need not instruct on such incidental questions unless request be made, in writing, before the jury retires. Gerrard v. Harvey & Newman Drilling Co., 59 N.M. 262, 282 P.2d 1105 (1955).

VIII. ERROR IN INSTRUCTIONS; PRESERVATION.

A. IN GENERAL.

Instruction not distinguishing between claims, nor between contribution and indemnity, incorrect. — Where a requested instruction fails to distinguish between the claims of the third-party plaintiffs and fails to distinguish between contribution and indemnity, it is incorrect and therefore should be refused. Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Notice and opportunity to correct errors needed. — Unless the trial court's attention is called in some manner to the fact that it is committing error, and given an opportunity to correct it, cases will not be reversed because of errors which could and would have been corrected in the trial court, if they had been called to its attention. City of Albuquerque v. Ackerman, 82 N.M. 360, 482 P.2d 63 (1971).

Attorneys are afforded a reasonable opportunity to object to instructions and such objections must be explicit. Objections in general terms are not sufficient as the trial court must be advised on the specific error so he may have an opportunity to correct it. Echols v. N.C. Ribble Co., 85 N.M. 240, 511 P.2d 566 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

It is not sufficient that the objection be in general terms. The court must be advised of the error therein so he may have an opportunity to correct it. Sturgeon v. Clark, 69 N.M. 132, 364 P.2d 757 (1961).

Objection cannot be made in general terms. Atler v. Murphy Enterprises, Inc., 2005-NMCA-006, 136 N.M. 701, 104 P.3d 1092, cert. granted, 2005-NMCERT-001.

In an action by a tenant against a landlord for violation of the Owner-Resident Relations Act, when the landlord did not tender correct or adequate instructions on his theory that the act did not apply because the tenant was an employee, and since the amendment making the act applicable to written agreements only was not brought to the attention of the court, unpreserved errors in the jury instructions that were given covering these matters were not reviewable since they were not fundamental and did not involve the public interest. Gracia v. Bittner, 120 N.M. 191, 900 P.2d 351 (Ct. App. 1995).

There is no issue concerning propriety of instruction where there is no objection. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Complaint as to nonacceptance of testimony by jury barred absent objection to instruction. — Not having objected to an expert testimony instruction, the plaintiff may not complain of the jury's failure to accept 100 percent of an expert's uncontradicted testimony. Strickland v. Roosevelt County Rural Elec. Coop., 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

So no appeal without proper objection. — Objections must be made to an instruction if error is to be preserved for appeal. Morris v. Dodge Country, Inc., 85 N.M. 491, 513 P.2d 1273 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

In order to preserve error in the giving of an instruction, objection must be made thereto, whether in the Uniform Jury Instructions or not. Jasper v. Lumpee, 81 N.M. 214, 465 P.2d 97 (Ct. App. 1970).

Plaintiff is required to call a claimed error in instructions to the attention of the trial court. Where he did not do so this contention will not be reviewed. Sanchez v. J. Barron Rice, Inc., 77 N.M. 717, 427 P.2d 240 (1967).

Where appellants argue that court erred in failing to instruct on circumstantial evidence, and it is a point raised on appeal for the first time, as no instruction was tendered by the appellants at the trial, even if such an omission were error, the error is not preserved. State v. Gutierrez, 75 N.M. 580, 408 P.2d 503 (1965).

Appellant's objection to a jury instruction was not considered as it failed to specifically object to the instruction in the trial court on any of the grounds urged on appeal, and the error was not preserved. Lanier v. Securities Acceptance Corp., 74 N.M. 755, 398 P.2d 980 (1965).

The form of the instruction to the jury on unavoidable accident is not subject to review since plaintiff failed, by proper objection, to preserve the error in the lower court. Zamora v. Smalley, 68 N.M. 45, 358 P.2d 362 (1961).

At trial appellant failed to specifically object to the instruction on unavoidable accident on the ground that it was an inaccurate statement of law, and, therefore, could not on appeal raise the issue since he had failed, by proper objection, to preserve the error, if any, of the lower court. Lucero v. Torres, 67 N.M. 10, 350 P.2d 1028 (1960).

A litigant may not sit by and see the trial court about to give an erroneous instruction and one that is contrary to his theory of the case without objecting and pointing out the vice thereof, and then claim error for failing to adopt his contrary instruction. This rule is the same in civil and criminal cases. State ex rel. State Hwy. Comm'n v. Weatherly, 67 N.M. 97, 352 P.2d 1010 (1960).

Where no objection was made and saved in trial court that court commented on weight of evidence, it is not available on appeal. Nelson v. Hill, 30 N.M. 288, 232 P. 526 (1924) (decided under former law).

Errors in giving or refusing instructions and in deciding matters of law arising on trial cannot be considered on appeal unless incorporated in bill of exceptions, for the mandatory terms of Laws 1880, ch. 6, § 26 (70-107, C.S. 1929) (now superseded by this rule) require exceptions to secure a review. Rogers v. Richards, 8 N.M. 658, 47 P. 719 (1896) (decided under former law).

And no corrections made. — Where neither party objected to the instruction, the appellate court will not consider the trial court's error in including the price claimed for the services as part of the alleged sale. Panhandle Irrigation, Inc. v. Bates, 78 N.M. 706, 437 P.2d 705 (1968).

Since instructions become law of case. — Where defendant did not tender any instructions nor object to the instructions given, those instructions became "the law of the case" on appeal and not vulnerable to attack. Sanford v. Stroll, 86 N.M. 6, 518 P.2d 1210 (Ct. App. 1974).

Where no objection was made to any of these instructions in the trial court, and no claim of error therein is asserted on appeal, the statements contained in the instructions are the law of the case. Adamson v. Highland Corp., 80 N.M. 4, 450 P.2d 442 (Ct. App. 1969).

Where the court's instruction as to the effect of a jury view of condemned land was in no way attacked in the trial court and is not attacked on appeal, it is the law of the case. AT & T Co. v. Walker, 77 N.M. 755, 427 P.2d 267 (1967).

And timeliness of objections. — Error in failure to give incidental instructions, even from the Uniform Jury Instructions, and even though mandatory, must be brought to the

attention of the court in timely fashion if it is to be preserved as error, at least as to instructions which do not cover the fundamental law applicable to the facts in the case. City of Albuquerque v. Ackerman, 82 N.M. 360, 482 P.2d 63 (1971).

Errors in respect to instructions are to be invited to the attention of the court before retirement of the jury. City of Albuquerque v. Ackerman, 82 N.M. 360, 482 P.2d 63 (1971).

Any claimed error on instructions given, whether Uniform Jury Instructions or not, whether mandatory or not, at least as to instructions which do not cover the fundamental law applicable to the facts, must be brought to the attention of the trial court for ruling before retirement of the jury. Otherwise, it is not subject to review. Valencia v. Beaman, 85 N.M. 82, 509 P.2d 274 (Ct. App. 1973).

B. PRESERVATION OF ERROR.

Generally. — Prior to the publication of this opinion (1953) it was possible to preserve error in the court's charge either by specifically pointing out the error in objection thereto, or by tendering a correct instruction. No distinction was recognized in the decisions between instances where the court did or did not instruct on the point. State v. Compton, 57 N.M. 227, 257 P.2d 915 (1953).

Preservation requirement of Paragraph I is not intended to be punitive. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Purpose of Paragraph I would be undermined by precluding district court judges from protecting unpreserved errors prior to appeal. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Paragraph I presents no barrier to district court's ability to reopen judgment under Rule 1-060 NMRA and grant a new trial on the basis of juror confusion, despite petitioner's failure to object to a jury instruction. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

To preserve error in instructions for review: (1) it is sufficient if a correct instruction has been tendered, if the court has not instructed on the subject matter; (2) if, however, the court has instructed erroneously on a subject, even where a correct instruction has been tendered, it must be clear in the record that the error has been called to the court's attention. Where the court has instructed erroneously, it is not a prerequisite to a right to complain of an instruction that a correct instruction be offered - rather the important question concerns the clarity with which the errors in the instruction given have been called to the attention of the trial court. Baros v. Kazmierczwk, 68 N.M. 421, 362 P.2d 798 (1961).

Correct interpretation of rule is that where the court has not instructed on the subject it is sufficient to preserve the error if a correct instruction is tendered. But, where the

court has instructed erroneously on the subject, although a correct instruction has been tendered on the point, if it leaves it doubtful whether the trial judge's mind was actually alerted thereby to the defect sought to be corrected by the requested instruction, the error is not preserved unless, in addition, the specific vice in the instruction given is pointed out to the trial court by proper objection thereto only. State v. Compton, 57 N.M. 227, 257 P.2d 915 (1953).

Need to point out specific vice of instruction. — Where the court has instructed erroneously on a subject, although a correct instruction has been tendered on the point, if it leaves it doubtful whether the trial judge's mind was actually alerted thereby to the defect sought to be corrected by the requested instruction, the error is not preserved unless, in addition, the specific vice in the instruction given is pointed out to the trial court by proper objection thereto. Bendorf v. Volkswagenwerk Aktiengesellschaft, 88 N.M. 355, 540 P.2d 835 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975), aff'd, 90 N.M. 414, 564 P.2d 619 (Ct. App. 1977).

Where the trial court fails to instruct on a certain subject, tendering of correct instruction is sufficient to preserve error, but to preserve error where the court has given erroneous instruction, specific vice must be pointed out to the trial court by proper objection thereto and correct instruction tendered. Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55 (1971).

To save a question for review, it must be presented to the court and a ruling invoked thereon. It follows, therefore, that instructions, right or wrong, cannot be reviewed for error where the objections failed to point out the vice in the instructions. Louderbough v. Heimbach, 68 N.M. 124, 359 P.2d 518 (1961).

To preserve error on appeal as to an instruction, the objection must specifically guide the mind of the trial court to the claimed vice. Objections in general terms are not sufficient to advise the court of the particular claim of error so that it may be corrected. Poorbaugh v. Mullen, 99 N.M. 11, 653 P.2d 511 (Ct. App. 1982).

Where a defendant claimed on appeal that an instruction was not supported by sufficient evidence, but at trial the objection made did not refer either to causation or to the sufficiency of the evidence to support the instruction, the objection made at trial was not specific enough to alert the district court to the contention made on appeal. Andrus v. Gas Co., 110 N.M. 593, 798 P.2d 194 (Ct. App. 1990).

An objection on appeal cannot change from that argued to the trial court and this is particularly true for challenges to jury instructions. Hinger v. Parker & Parsley Petro. Co., 120 N.M. 430, 902 P.2d 1033 (Ct. App. 1995).

And need to tender correct instruction. — Issue was not properly preserved for appeal when, although the failure to instruct was on a point of law, a correct instruction was not tendered. Terrel v. Duke City Lumber Co., 86 N.M. 405, 524 P.2d 1021 (Ct. App. 1974), aff'd in part, rev'd in part sub nom. 88 N.M. 299, 540 P.2d 229 (1975).

In a patient's medical malpractice case against a doctor where the trial court required the patient to refine his proffered jury instructions, the patient objected to neither the wording, nor the structure of the instruction ultimately given, and never suggested better or different wording or structure; thus, the patient failed to preserve error. Allen v. Tong, 2003-NMCA-056, 133 N.M. 594, 66 P.3d 963.

But when no need to tender correct instruction. — Where counsel pointed out the defect in the instruction and all that would have been required to correct it would have been to strike out and omit the second sentence, no purpose would have been served by requiring the attorneys in the midst of a trial to find a means to get the correct instruction in shape to tender in writing. Where defendant pointed out defect in instruction, he did all that was necessary to sufficiently preserve error. Baros v. Kazmierczwk, 68 N.M. 421, 362 P.2d 798 (1961).

Issue of erroneous instructions preserved. — The issue of erroneous instructions was preserved, notwithstanding the failure to record "extensive argument" regarding such instructions, where the trial judge was alerted to any error in the instructions and had the opportunity to correct any error prior to retirement of the jury by virtue of his participation in the argument. Nichols Corp. v. Bill Stuckman Constr., Inc., 105 N.M. 37, 728 P.2d 447 (1986).

IX. REVIEW.

Preservation of error for review. — Where the trial court fails to instruct on a certain subject, tendering of correct instruction is sufficient to preserve error, but to preserve error where the court has given erroneous instruction, specific vice must be pointed out to the trial court by proper objection thereto and correct instruction tendered. Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55 (1971).

To preserve error in instructions for review: (1) it is sufficient if a correct instruction has been tendered, if the court has not instructed on the subject matter; (2) if, however, the court has instructed erroneously on a subject, even where a correct instruction has been tendered, it must be clear in the record that the error has been called to the court's attention. Where the court has instructed erroneously, it is not a prerequisite to a right to complain of an instruction that a correct instruction to be offered - rather the important question concerns the clarity with which the errors in the instruction given have been called to the attention of the trial court. Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55 (1971).

Need to point out specific defects in instructions. — Objections which fail to point out specifically the vice or defect in an instruction, so as to clearly inform the trial court of the claimed error, are insufficient to preserve the error for review. Scott v. Brown, 76 N.M. 501, 416 P.2d 516 (1966).

A general exception or objection to an instruction is not sufficient to preserve claimed error. The specific vice in the instruction must be pointed out so as to leave no doubt

that the court's mind was actually altered. Castillo v. Juarez, 80 N.M. 196, 453 P.2d 217 (Ct. App. 1969).

And need evidence on which instruction founded. — Neither instructions given by the court, nor instructions requested by the parties, can ordinarily be reviewed by an appellate court in the absence of the evidence, for the reason that proper instructions are necessarily founded on the evidence. Scott v. Brown, 76 N.M. 501, 416 P.2d 516 (1966).

All instructions must be read and considered together, and if, when so considered together, they fairly present the issues and the law applicable thereto, they are sufficient. Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55 (1971).

1-052. Nonjury trials; findings and conclusions.

A. **Findings and conclusions; when required.** In a case tried by the court without a jury, or by the court with an advisory jury, the court shall enter findings of fact and conclusions of law when a party makes a timely request. Findings of fact and conclusions of law are unnecessary in decisions on motions under Rule 1-012, 1-050 or 1-056 NMRA or any other motion except as provided in Paragraph B of Rule 1-041 NMRA.

B. **Request to enter findings and conclusions.** Unless otherwise ordered by the court, no later than ten (10) days after the court announces its decision, a party may request the court to enter findings of fact and conclusions of law by filing the party's requested findings of fact and conclusions of law.

C. **Amended or supplemental findings and conclusions; withdrawal of request for findings.** A party who filed requested findings of fact and conclusions of law prior to the trial, may file amended or supplemental findings and conclusions or may withdraw the request for findings and conclusions within ten (10) days after the court announces its decision.

D. **Motion to amend.** Upon motion of a party made not later than ten (10) days after entry of judgment, the court may amend its findings or conclusions or make additional findings and conclusions and may amend the judgment accordingly.

[As amended, effective January 1, 1987; February 1, 2001; as amended by Supreme Court Order 06-8300-17, effective August 21, 2006.]

Committee commentary. —

1. In general.

Prior to the February 1, 2001 revisions, Rule 1-052 NMRA provided procedures which were cumbersome, unnecessarily detailed and confusing. The February 1, 2001

revision simplifies the process of rendering a decision in nonjury trials while preserving the portions of the existing rule which seek to assure that the court's decision will be clear and correct.

The February 1, 2001 revision eliminates the confusing distinction between evidentiary and ultimate facts. The court is no longer required to mark as "Refused" all proposed findings that are not included in the court's decision. It requires that the court enter findings and conclusions upon request of a party. Finally, former Paragraph A of Rule 1-052, relating to waiver of trial by jury, has been rewritten and is now found in Paragraph D of Rule 1-038 NMRA, jury trial in civil actions.

2. Findings and conclusions; when required.

The February 1, 2001 revision requires a party to tender findings and conclusions in timely manner in order to assure that the court will enter findings and conclusions. A party who complies with this requirement by tendering findings and conclusions at an early stage in the proceedings may subsequently waive findings and conclusions pursuant to Paragraph C of this rule.

3. Preservation of error on appeal.

Former Rule 1-052 lacked clarity as to the proper means for preserving error for appeal concerning the findings and conclusions. *Compare* former Rule 1-052(F) NMRA with former Rule 1-052(B)(2); *see* Cockrell v. Cockrell, 117 N.M. 321, 871 P.2d 977 (1994). The revision omits reference to "preservation of error" as this is a matter for the appellate rules. *See* Rules 12-208(E) NMRA, 12-213(A)(4) NMRA and 12-216 NMRA. *Compare dicta* in Martinez v. Martinez, 101 N.M. 88, 93, 678 P.2d 1163, 1168 (1984) and Blea v. Sandoval, 107 N.M. 554, 556, 761 P.2d 432, 434 (Ct. App. 1988).

ANNOTATIONS

The 2000 amendment, effective February 1, 2001, rewrote this rule, simplifying the process of rendering decisions in nonjury trials and requiring the entrance of finding and conclusions of law upon request of a party.

The 2006 amendment, approved by Supreme Court Order 06-8300-17, effective August 21, 2006, eliminated the provision in Paragraph D of Rule 1-052 that stated that if a timely motion to amend findings and conclusions for a judgment was not granted within thirty days after it was filed, the motion was automatically denied.

See the 2006 Committee Commentary to Rule 1-054.1 NMRA for additional information.

Compiler's notes. — This rule is deemed to have superseded former Trial Court Rule 105-813, derived from 105-813, C.S. 1929, which were substantially the same.

I. GENERAL CONSIDERATION.

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For comment, "Trial-Appeal and Error-Findings of Fact," see 3 Nat. Resources J. 331 (1963).

For opinion, "The Development of Modern Libel Law: A Philosophic Analysis," see 16 N.M.L. Rev. 183 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1956, 1967 to 1999.

Amendment of judgment as affecting time for taking or prosecuting appellate review proceedings, 21 A.L.R. 285, 131 A.L.R. 1146.

Conclusiveness of or weight attached to findings of fact of master in chancery, 33 A.L.R. 745.

Right of judge trying case without jury to base findings on result of personal observations, 97 A.L.R. 335.

Necessity, as condition of effectiveness of express finding on a matter in issue to prevent relitigation of question in later case, that judgment in former action shall have rested thereon, 133 A.L.R. 840.

Requiring successor judge to journalize findings or decision of predecessor, 4 A.L.R.2d 584.

Inclusion in domestic judgment or record, in action upon a judgment of a sister state, of findings respecting the cause of action, on which the judgment in the sister state was rendered, 10 A.L.R.2d 435.

Libel and slander, findings, report or like of judge or person acting in judicial capacity as privileged, 42 A.L.R.2d 825.

Withdrawal or disregard of waiver of jury trial in civil action, 64 A.L.R.2d 506, 9 A.L.R.4th 1041.

Sufficiency of waiver of full jury, 93 A.L.R.2d 410.

How to obtain jury trial in eminent domain; waiver, 12 A.L.R.3d 7.

Power of trial court, on remand for further proceedings, to change prior fact findings as to matter not passed upon by appellate court, without receiving further evidence, 19 A.L.R.3d 502.

Propriety and effect of trial court's adoption of findings prepared by prevailing party, 54 A.L.R.3d 868.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Contractual jury trial waivers in state civil cases, 42 A.L.R.5th 53.

Application of "clearly erroneous" test by Rule 52(a) of the Federal Rules of Civil Procedure to trial court's findings of fact based on documentary evidence, 11 A.L.R. Fed. 212.

49 C.J.S. Judgments § 279; 50A C.J.S. Juries § 182; 89 C.J.S. Trial §§ 609 to 657.

II. WAIVER OF TRIAL BY JURY.

When lack of objection deemed waiver of jury. — Where defendant was in court when case was set for trial with consent of the parties, and did not demand a jury, and afterwards the case was submitted on the day set for such trial, the defendant then making no objection to the proceedings, and not demanding a jury, was not in a position to complain that there was no submission to a jury. Porter v. Alamocitos Land & Live Stock Co., 32 N.M. 344, 256 P. 179 (1925) (decided under former law).

No application to criminal cases. — This rule sets forth various methods by which a jury trial may be waived in suits of a civil nature but is not applicable to defendant's criminal case. State v. Brill, 81 N.M. 785, 474 P.2d 77 (Ct. App.), cert. denied, 81 N.M. 784, 474 P.2d 76 (1970).

III. FINDINGS OF FACT.

A. IN GENERAL.

In a quiet title action, where the defendant, but not the plaintiff, filed timely requested findings of fact and conclusions of law and where the trial court’s oral ruling in favor of the plaintiff provided no indication of why or how the plaintiff established title and relied on the weakness of the defendant’s title, the trial court erred by entering judgment quieting title in the plaintiff without written findings of fact and conclusions of law. Montoya v. Medina, 2009-NMCA-029, 145 N.M. 690, 203 P.3d 905.

Purpose of rule. — Although this rule differs from the federal rule, the reasons for both rules are the same, i.e., as an aid to the appellate court by placing before it the basis of the decision of the trial court; to require care on the part of the trial judge in his consideration and adjudication of the facts and for the purposes of res judicata and estoppel by judgment. Mora v. Martinez, 80 N.M. 88, 451 P.2d 992 (1969). See also DesGeorges v. Grainger, 76 N.M. 52, 412 P.2d 6 (1966).

Application of rule. — A proceeding under former Rule 93 (now withdrawn) or 31-11-6 NMSA 1978 was an independent civil action, and, therefore, this rule requiring the making of findings of fact, applied to such proceedings. State v. Hardy, 78 N.M. 374, 431 P.2d 752 (1967).

Court approves making findings and conclusions whenever hearing on evidence. — While this rule does not literally require the court to make findings of fact and conclusions of law in connection with a hearing under Rule 60(b) (see now Rule 1-060 NMRA), many courts follow the commendable practice of making findings and conclusions where there has been a hearing on the evidence. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Requirements of rule. — The rules require the trial judge to make and file his decision consisting of findings of such ultimate facts and conclusions of law stated separately as are necessary to support his judgment, in a single document; and that he sign and file such decision in the cause as a part of the record proper. Lusk v. First Nat'l Bank, 46 N.M. 445, 130 P.2d 1032 (1942); McDaniel v. Vaughn, 42 N.M. 422, 80 P.2d 417 (1938) (both cases decided under former law).

Under this rule the trial court, when sitting without a jury, is required to make findings of fact. This is true even though a motion is sustained at the close of plaintiff's case. Guidry v. Petty Concrete Co., 77 N.M. 531, 424 P.2d 806 (1967).

Where jury is not solely advisory, this rule is inapplicable. — The trial court has great discretion in the matter of trial by jury; it ordered the jury; one was impaneled and its verdict received. There was no need to make findings of fact and conclusions of law. Keeth Gas Co. v. Jackson Creek Cattle Co., 91 N.M. 87, 570 P.2d 918 (1977).

Preserving error for review. — A request for findings is not the only means of preserving error based upon insufficiency of the evidence to support a judgment. The party may make requested findings or file exceptions. Cockrell v. Cockrell, 117 N.M. 321, 871 P.2d 977 (1994).

When findings of fact and conclusions of law not necessary. — Since a summary judgment presupposes that there are no triable issues of fact, findings of fact and conclusions of law are not required in rendering judgment. Failure to make and enter findings and conclusions is not error. Federal Bldg. Serv. v. Mountain States Tel. & Tel. Co., 76 N.M. 524, 417 P.2d 24 (1966).

Findings of fact and conclusions of law are not required by the rules except in involved cases where the reason for the summary judgment is not otherwise clearly apparent from the record. Williams v. Herrera, 83 N.M. 680, 496 P.2d 740 (Ct. App. 1972).

Since a summary judgment presupposes that there are no triable issues of fact, findings of fact and conclusions of law are not required in rendering judgment. Failure to make

and enter findings and conclusions is not error. Jacobson v. State Farm Mut. Auto. Ins. Co., 81 N.M. 600, 471 P.2d 170 (1970).

Findings of fact and conclusions of law are not required for a motion seeking relief from judgment. Fidelity Nat'l Bank v. Lobo Hijo Corp., 92 N.M. 737, 594 P.2d 1193 (Ct. App. 1979).

The requirement of written findings did not apply to the issue of attorneys' fees that was before the court in the context of a motion, not in a bench trial. Monsanto v. Monsanto, 119 N.M. 678, 894 P.2d 1034 (Ct. App. 1995).

Rulings on motions. — While findings of fact and conclusions of law are not required when ruling on a motion, where a ruling on a motion necessarily involves a determination of factual issues, express findings of fact are preferable. Begay v. Rael, 107 N.M. 810, 765 P.2d 1178 (Ct. App. 1988).

Purpose of a review of evidence in a nonjury case is to determine whether evidence supports the findings of trial court. Guidry v. Petty Concrete Co., 77 N.M. 531, 424 P.2d 806 (1967).

An appellate court, in the review of cases tried without a jury, may be able to traverse the same ground as the lower court, reaching not a conclusion of its own, but a determination as to whether that of the trial court is justified in fact and in law. Watson Land Co. v. Lucero, 85 N.M. 776, 517 P.2d 1302 (1974).

Appeal must be timely. — Although the taking by the court of proposed findings of fact and noting after each whether it was "refused" or "adopted" was irregular, writ of certiorari would not lie to compel the court to make its own findings and conclusions, after time for appeal had expired. Macabees v. Chavez, 43 N.M. 329, 93 P.2d 990 (1939) (decided under former law).

And findings supported by substantial evidence not disturbed. — It is not the function of the appellate court to weigh the evidence or its credibility, and it will not substitute its judgment for that of the trial court as to the facts established by the evidence, so long as the findings are supported by substantial evidence. Getz v. Equitable Life Assurance Soc'y, 90 N.M. 195, 561 P.2d 468, cert. denied, 434 U.S. 834, 98 S. Ct. 121, 54 L. Ed. 2d 95 (1977).

Findings of fact which are supported by substantial evidence will not be disturbed on appeal. If the evidence shows that the decision of the trial court is based on reasonable, substantial and probative evidence, so that it can be said that a reasonable person might have reached the same conclusion, the decision of the trial court should be affirmed. In re Valdez, 540 P.2d 818 (1975).

It is not error to refuse requested findings which are contrary to findings made, when those findings are supported by substantial evidence. Clem v. Bowman Lumber Co., 83 N.M. 659, 495 P.2d 1106 (Ct. App. 1972).

Where a jury is waived and the cause is tried by the court, the judgment of the court based on conclusions reached upon conflicting but substantial sustaining evidence will not be disturbed. Pecos Valley Immigration Co. v. Cecil, 15 N.M. 45, 99 P. 695 (1909); Gale & Farr v. Salas, 11 N.M. 211, 66 P. 520 (1901); Rush v. Fletcher, 11 N.M. 555, 70 P. 559 (1902) (all cases decided under former law).

Or if supported by competent evidence. — In cases where a jury is waived, the findings of fact by the court have the same force and effect as the verdict of a jury, and appellate court will not set aside the findings and order a new trial for the admission of incompetent evidence if there be other competent evidence to support the conclusion. Grayson v. Lynch, 163 U.S. 468, 16 S. Ct. 1064, 41 L. Ed. 230 (1896) (decided under former law).

While findings of fact must support judgment. — A judgment cannot be sustained on appeal unless the conclusion upon which it rests finds support in one or more findings of fact. Thompson v. H.B. Zachry Co., 75 N.M. 715, 410 P.2d 740 (1966).

Findings of fact are to be liberally construed in support of the judgment. The findings are sufficient if a fair construction of all of them, taken together, justify the trial court's judgment. H.T. Coker Constr. Co. v. Whitfield Transp., Inc., 85 N.M. 802, 518 P.2d 782 (Ct. App. 1974).

Where plaintiff 's inartful drafting of findings to carry out the rulings of the trial court gave rise to defendants' claim that the trial court applied incorrect legal standards, the appellate court would construe the findings liberally to support the judgment. Martinez v. Earth Resources Co., 87 N.M. 278, 532 P.2d 207 (Ct. App. 1975).

Findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all, taken together with the pleadings, we can see enough, upon a fair construction, to justify the judgment of the court notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law. Watson Land Co. v. Lucero, 85 N.M. 776, 517 P.2d 1302 (1974).

The refusal by the court to accept a requested finding is regarded on appeal as a finding against the party bearing the burden of proof on the issue at trial. Western Bank v. Franklin Dev. Corp., 111 N.M. 259, 804 P.2d 1078 (1991).

But findings and judgments not sustainable without substantial evidence. — A finding of fact, not supported by substantial evidence, will not be sustained on appeal, and a judgment based on such finding is itself without support. Therefore, where the district court in making its decision itself indicated concern about the lack of evidence regarding offsets on a construction contract, and the witnesses testifying in regard to

offsets gave only guesses or estimates, the case was remanded to the trial court to allow defendant to present evidence, if available, to substantiate its claims. Olivas v. Sibco, Inc., 87 N.M. 488, 535 P.2d 1339 (1975).

Although it is not proper for the appellate court to disagree with a finding supported by substantial evidence, it can and must determine whether the evidence presented substantially supports a finding which has been properly attacked: findings not supported by substantial evidence, and which have been properly attacked, cannot be sustained on appeal, and a judgment dependent thereon must be reversed. Getz v. Equitable Life Assurance Soc'y, 90 N.M. 195, 561 P.2d 468, cert. denied, 434 U.S. 834, 98 S. Ct. 121, 54 L. Ed. 2d 95 (1977).

A judgment cannot be sustained on appeal unless the conclusion upon which it is based finds support in the findings of fact. Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1976).

Conclusion by the court that appellee's community interest would not equal $200,000 if the tax ramifications were taken into account was an insufficient finding to enable an appellate court a meaningful opportunity for review. Michelson v. Michelson, 86 N.M. 107, 520 P.2d 263 (1974).

Where a case is tried to a court and the trial court makes findings of fact and conclusions of law, court of appeals cannot reverse unless convinced that the findings cannot be sustained by evidence or inferences therefrom. Barber's Super Mkts., Inc. v. Stryker, 84 N.M. 181, 500 P.2d 1304 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972).

Or without sufficient specificity. — Laws 1880, ch. 6, § 29, as amended (105-813, C.S. 1929) (now superseded) required the trial court in cases heard without a jury to make findings of fact and conclusions of law sufficiently specific to enable the higher court to review its action, and findings too general to enable the reviewing court to test the correctness of the judgment were not sufficient. Apodaca v. Lueras, 34 N.M. 121, 278 P. 197 (1929) (decided under former law).

Judgment entered prior to fact finding. — Where defendant filed his notice of appeal and thereafter the court entered its requested findings of fact and conclusions of law, the supreme court held that, although it was technical error to enter judgment without those findings, where the trial court's findings of fact and conclusions of law were part of the record, it would be a misuse of judicial resources to remand the case to the trial court. Hickey v. Griggs, 106 N.M. 27, 738 P.2d 899 (1987).

Finding of fact mislabeled as conclusion of law. — The trial court's failure to denominate as a finding of fact its determination as to the percentage of negligence between the parties and instead identifying it as a "conclusion of law" does not constitute reversible error where the trial court's decision on the matter is clear. Sheraden v. Black, 107 N.M. 76, 752 P.2d 791 (Ct. App. 1988).

When remand proper. — When findings wholly fail to resolve in any meaningful way the basic issues of fact in dispute, they become clearly insufficient to permit the reviewing court to decide the case at all, except to remand it for proper findings by the trial court. Michelson v. Michelson, 89 N.M. 282, 551 P.2d 638 (1976).

Where there are no findings of fact at all at the trial level the appellate court shall not take to supply the findings, but remand to the trial court so that it can make them. DesGeorges v. Grainger, 76 N.M. 52, 412 P.2d 6 (1966).

Where justice requires supreme court may remand a case to district court for the making of proper findings and conclusions as contemplated by this rule. Prater v. Holloway, 49 N.M. 353, 164 P.2d 378 (1945).

Trial court was directed to make defendant's requested findings on counterclaim alleging negligent repair where erroneous award of interest and attorney fees in suit to recover for repairs to defendant's building required remand of case. Tabet Lumber Co. v. Chalamidas, 83 N.M. 172, 489 P.2d 885 (Ct. App. 1971).

Where doubt or ambiguity exists as to whether the trial court considered relevant evidence, or where other findings are required, the ends of justice require that the cause be remanded to the district court for the entry of additional findings and conclusions of law. State ex rel. Human Servs. Dep't v. Coleman, 104 N.M. 500, 723 P.2d 971 (Ct. App. 1986).

Findings of fact solely by district courts. — The supreme court is not authorized to make findings which the district court should have made, nor to draw inferences therefrom, and must depend upon the district court for findings of fact. Where the district court used the language of the wrong insurance policy (mistakenly filed with defendant's pleadings and later substituted by the proper policy, by stipulation of the parties) in reaching its decision, it was not in a position to make findings of fact and conclusions of law based upon proper factual evidence, and the case was remanded to the district court to reach a decision based upon findings of fact and conclusions of law consistent with the proper insurance policy. Safeco Ins. Co. of Am. v. McKenna, 87 N.M. 481, 535 P.2d 1332 (1975).

With a dispute as to the facts, and with no findings by the trial court, the appellate court has no facts before it. Guidry v. Petty Concrete Co., 77 N.M. 531, 424 P.2d 806 (1967).

Findings of fact which are not directly attacked become the facts in an appellate court. Latta v. Harvey, 67 N.M. 72, 352 P.2d 649 (1960).

But when remand not necessary. — Even though no specific finding as to the testator's intent to revoke was made by the trial court, a remand is unnecessary if the missing fact required to support a judgment is documentary or appears undisputed in the record. Boddy v. Boddy, 77 N.M. 149, 420 P.2d 301 (1966).

Under this rule the trial court is required, in a case tried without a jury, to find the facts necessary to support a judgment, and the rule further provides for a remand for the making of findings when proper findings are not made. But an exception, born of common sense and presently germane, is made to the application of the rule. A remand is unnecessary if the missing fact required to support the judgment is documentary or appears undisputed in the record. Under such circumstances it may be supplied by the court without remand. DesGeorges v. Grainger, 76 N.M. 52, 412 P.2d 6 (1966).

Where an order allowing appeal is granted six days prior to the filing of the trial court's findings of fact and conclusions of law which were generally in accord with those erroneously contained in the judgment, the supreme court will not strike those findings and remand the case to the trial court for the making of the same over again. Brown v. Hayes, 69 N.M. 24, 363 P.2d 632 (1961).

Trial court loses jurisdiction of case upon filing of notice of appeal, except for the purposes of perfecting such appeal or passing upon a motion directed to the judgment which is pending at the time, therefore, the trial court lacked authority to enter findings and conclusions 19 days after the filing of the notice of appeal and over a month and a half after the entry of the judgment, the case was reversed and remanded to the district court for the purpose of entering a proper decision prior to the entry of judgment, so that either party may then take an appropriate appeal therefrom, if aggrieved thereby. University of Albuquerque v. Barrett, 86 N.M. 794, 528 P.2d 207 (1974).

After trial court has entered its order allowing an appeal and supersedeas bond has been set it loses jurisdiction over the case, except for perfecting the appeal, and any requested findings of fact or conclusions of law which may be filed thereafter cannot be considered. Veale v. Eavenson, 52 N.M. 102, 192 P.2d 312 (1948).

Although subject matter jurisdiction raised at any time. — Although the father-appellant did not precisely raise a defect in the judgment of the lower court for lack of proper findings as to domicile of his child, it is appropriate, where there is a question of subject matter jurisdiction, that the appellate court do so on its own motion. Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1976).

Failure to tender specific findings waives review of the findings on appeal. — See Fenner v. Fenner, 106 N.M. 36, 738 P.2d 908 (Ct. App. 1987).

B. DECISION BY COURT.

Oral opinions or oral statements do not constitute "decision," within the meaning of this rule and error may not be predicated thereon. Getz v. Equitable Life Assurance Soc'y, 90 N.M. 195, 561 P.2d 468, cert. denied, 434 U.S. 834, 98 S. Ct. 121, 54 L. Ed. 2d 95 (1977); Mosley v. Magnolia Petroleum Co., 45 N.M. 230, 114 P.2d 740 (1941); Specter v. Specter, 85 N.M. 112, 509 P.2d 879 (1973).

The oral remarks of the trial court at the completion of the evidence do not constitute a decision by the court as contemplated by this rule. Peace Found., Inc. v. City of Albuquerque, 76 N.M. 757, 418 P.2d 535 (1966).

Plaintiffs' assertion of error based upon the trial court's remarks at the conclusion of the testimony which they claim indicate that the decision was based partly or wholly upon erroneous conclusions and speculation unsupported by evidence is clearly without merit for the reason that an oral opinion is not a "decision" as contemplated by this rule, and error cannot be predicated thereon. Pack v. Read, 77 N.M. 76, 419 P.2d 453 (1966).

Oral statements of a judge in articulating his ruling at the close of trial do not constitute a "decision" within the meaning of Subdivision (B)(1)(a) (see now Paragraph B(1)(a)) and error may not be predicated thereon. Balboa Constr. Co. v. Golden, 97 N.M. 299, 639 P.2d 586 (Ct. App. 1981).

Nor remarks from bench. — This section provides for a written decision of the court. Remarks from the bench were not such a decision and error could not be predicated on inconsistencies between the trial court's remarks and the findings. Fox v. Doak, 78 N.M. 743, 438 P.2d 153 (1968).

In no event may court comments from the bench be substituted for material facts appearing as findings in the decision. Such comments may be utilized only as an aid in understanding a decision of the court which is ambiguous. Ulibarri v. Gee, 106 N.M. 637, 748 P.2d 10 (1987).

Word "decision" used in this rule does not mean "judgment." It means "findings of fact and conclusions of law." Trujillo v. Tanuz, 85 N.M. 35, 508 P.2d 1332 (Ct. App. 1973).

The trial court's formal findings represent the court's official decision. Western Bank v. Fluid Assets Dev. Corp., 111 N.M. 458, 806 P.2d 1048 (1991).

And decision entered before judgment. — Under New Mexico law the decision of the trial court constitutes the factual and legal basis for the judgment, and the parties' requests for findings and conclusions and the court's decision, consisting of its findings and conclusions, should be entered before the entry of the judgment. University of Albuquerque v. Barrett, 86 N.M. 794, 528 P.2d 207 (1974).

Duty of court. — In those cases tried without a jury it is the duty of the trial court to make findings of fact and conclusions of law. State ex rel. Reynolds v. Board of County Comm'rs, 71 N.M. 194, 376 P.2d 976 (1962).

Trial court is charged with a duty to make findings of fact and conclusions of law when the case is tried to the court without a jury. Goldenberg v. Village of Capitan, 53 N.M. 137, 203 P.2d 370 (1948).

The fact that the demurrer to the evidence was sustained did not relieve the trial court of its duty of making its findings of fact and conclusions of law based thereon as required by 105-813, C.S. 1929 (now superseded), and in doing so the court is required to make every essential finding of fact necessary to sustain the plaintiff's case that had substantial support in any of the evidence or in any reasonable inference that could be deduced therefrom. Pankey v. Hot Springs Nat'l Bank, 46 N.M. 10, 119 P.2d 636 (1941).

A trial court may not abdicate its judicial responsibility and must exercise its independent judgment in entering findings of fact and conclusions of law. Coulter v. Stewart, 97 N.M. 616, 642 P.2d 602 (1982).

By selectively refusing and adopting by number reference both the plaintiff's and the defendant's requested findings of fact, without actually drafting its own, the trial court failed to make findings sufficient for review. Green v. General Accident Ins. Co. of Am., 106 N.M. 523, 746 P.2d 152 (1987).

When findings and conclusions requested after final decree modified. — Under this rule, the trial court was obligated to make and file findings of fact and conclusions of law, because factual determinations were necessary to a proper decision of the case, even though defendant's requested findings and conclusions were filed six days after entry of the order modifying the final divorce decree. Merrill v. Merrill, 82 N.M. 458, 483 P.2d 932 (1971).

Judgment lacking decretal language not final, appealable order. — Court "order" that made numerous findings of fact and rulings of law, including a finding that mother was entitled to child support payments and costs from father, but which failed to specifically order that judgment be entered for mother, and did not contain the signatures or initials of the parties' attorneys, was not a final, appealable order because of its lack of decretal language. Khalsa v. Levinson, 1998-NMCA-110, 125 N.M. 680, 964 P.2d 844.

Procedure on appeal where decision not timely entered but transcript contains findings. — Subdivision (B) (see now Paragraph B) contemplates that a written decision containing findings of fact and conclusions of law be entered prior to entry of judgment. Where such a decision was not timely entered, but the findings are part of the transcript on appeal, it would be a useless thing to strike the findings and remand the case to the trial court for the making of the same over again. Peterson v. Peterson, 98 N.M. 744, 652 P.2d 1195 (1982).

Trial court must, when requested, find one way or another upon a material issue. Curbello v. Vaughn, 78 N.M. 489, 432 P.2d 845 (1967); State ex rel. Reynolds v. Board of County Comm'rs, 71 N.M. 194, 376 P.2d 976 (1962); Weldon v. Heron, 78 N.M. 427, 432 P.2d 392 (1967).

And error to refuse performance of duty. — The trial court must, when requested, find one way or the other upon a material fact issue, and failure to do so constitutes error. Aguayo v. Village of Chama, 79 N.M. 729, 449 P.2d 331 (1969); Thompson v. H.B. Zachry Co., 75 N.M. 715, 410 P.2d 740 (1966).

Where a duty is imposed upon the court, which affects a right of a litigant, it is error to refuse to perform such duty. Lopez v. Townsend, 37 N.M. 574, 25 P.2d 809, 96 A.L.R. 342 (1933) (decided under former law).

Unless apparent that trial judge read and considered requested findings. — Where trial court failed to make, sign and file a decision as required by this rule, normally supreme court would remand the cause to the trial court to make, sign and file a proper decision as required by the rule, but where it was apparent the trial judge read and considered the requested findings, he rejected one of the requests, but adopted all of the others, and the fact that he has retired as a district judge, and the further fact that appellants made no effort to file requests or to call the now claimed error to the attention of the trial court, supreme court was not inclined to remand the case for the entry of a proper decision by some other judge unfamiliar with the case, or disregard the findings actually adopted and made by the trial judge. Sears v. Board of Trustees, 83 N.M. 372, 492 P.2d 643 (1971).

Or not sufficient evidence to justify findings. — Trial court had a clear right to refuse to make a finding of fact concerning the amount of one alleged item of damages if, in fact, there was not sufficient evidence to justify such a finding. The court made a finding on the ultimate fact of appellants' damages in a specified amount. The failure to find as to evidentiary facts concerning particular items of alleged damage must be deemed a refusal of such items and not an erroneous failure to find an ultimate fact. Industrial Supply Co. v. Goen, 58 N.M. 738, 276 P.2d 509 (1954).

As independent judgment of trial judge required. — This state requires adequate findings and insists on the exercise of an independent judgment on the part of the trial judge in making his own findings of fact rather than adopting those of one of the parties. The fact that the trial court made its findings in the language submitted by the parties did not show an absence of independent judgment by the trial court; moreover, in choosing from various requested findings the trial court showed the exercise of an independent judgment. Jesko v. Stauffer Chem. Co., 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976).

It is necessary that adequate findings be made and there be an exercise of an independent judgment on the part of the trial judge in making his own findings of fact rather than adopting those of one of the parties. Mora v. Martinez, 80 N.M. 88, 451 P.2d 992 (1969).

Section 105-813, C.S. 1929 (now superseded), contemplated that the decision on ultimate facts and appropriate conclusions of law should be that of the trial court and not

of counsel. McDaniel v. Vaughn, 42 N.M. 422, 80 P.2d 417 (1938) (decided under former law).

But no reversible error if adopted findings supported by record. — The practice of adopting findings and conclusions entirely as submitted by one of the parties is not reversible error so long as the findings adopted are supported by the record. United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 597 P.2d 290, cert. denied, 444 U.S. 911, 100 S. Ct. 222, 62 L. Ed. 2d 145 (1979).

Court may adopt findings and conclusions submitted by a party. — A trial court does not abdicate its judicial responsibilities by adopting findings of fact and conclusions of law submitted by one of the parties, so long as the findings adopted are supported by the record. Coulter v. Stewart, 97 N.M. 616, 642 P.2d 602 (1982).

But separate findings not required if not requested. — If neither party requests it, the trial court does not commit error in failing to make separate findings of fact and conclusions of law. Carlisle v. Walker, 47 N.M. 83, 136 P.2d 479 (1943).

Successor judge may not sign decision of initial judge. — Even though the initial trial judge prepared the findings of fact and conclusions of law, the successor judge had no power to sign and enter a decision in the case, where there was no decision, written, signed or entered before the initial trial judge left the position. Pritchard v. Halliburton Servs., 104 N.M. 102, 717 P.2d 78 (Ct. App. 1986).

When refused request deemed finding against party. — Where a party has the burden of proof on an issue and requests findings on that issue, which are refused, the legal effect of the refusal of the requested findings is a finding against that party. H.T. Coker Constr. Co. v. Whitfield Transp., Inc., 85 N.M. 802, 518 P.2d 782 (Ct. App. 1974).

The failure to make specific findings of fact is regarded as a finding against the party having the burden of establishing that fact. Foremost Foods Co. v. Slade, 80 N.M. 658, 459 P.2d 457 (1969); Steinbaugh v. Payless Drug Store, Inc., 75 N.M. 118, 401 P.2d 104 (1965).

The denial of the requested findings and a failure to find specifically on the issue is to be regarded as finding such material fact against the party having the burden of proof. Herrera v. C & R Paving Co., 73 N.M. 237, 387 P.2d 339 (1963).

Trial court is sole judge of credibility of witnesses and the weight to be given to their testimony, in a case tried without a jury. Crumpacker v. Adams, 77 N.M. 633, 426 P.2d 781 (1967).

And evidence of expert admissible. — Where there is no jury trial, evidence of expert is admissible within the sound discretion of the judge. State ex rel. State Hwy. Comm'n v. Pelletier, 76 N.M. 555, 417 P.2d 46 (1966).

C. ULTIMATE FACTS.

Trial court is required to make findings of ultimate facts as are necessary to determine the issues in the case. Sanchez v. Sanchez, 84 N.M. 498, 505 P.2d 443 (1973); State ex rel. State Hwy. Comm'n v. Pelletier, 76 N.M. 555, 417 P.2d 46 (1966); Alvillar v. Hatfield, 82 N.M. 565, 484 P.2d 1275 (Ct. App. 1971).

Under this provision, a trial court, when properly requested, is required to find the ultimate facts and it has been held that a failure to so find constitutes reversible error. Tabet Lumber Co. v. Chalamidas, 83 N.M. 172, 489 P.2d 885 (Ct. App. 1971).

A court sitting without a jury is required to find those ultimate facts necessary to determine the issues, i.e., the controlling facts without which the law cannot be correctly applied in rendering judgment. Thompson v. H.B. Zachry Co., 75 N.M. 715, 410 P.2d 740 (1966).

It was not error for trial court to refuse factually correct findings which were not ultimate facts necessary to support the judgment. Gregory v. Eastern N.M. Univ., 81 N.M. 236, 465 P.2d 515 (Ct. App. 1970).

The trial court must make findings only with regard to ultimate facts - those necessary to determine the issues of the case. Empire West Cos. v. Albuquerque Testing Labs, Inc., 110 N.M. 790, 800 P.2d 725 (1990).

The trial court is only required to make ultimate findings of fact and conclusions of law necessary to support its decision. Jeantete v. Jeantete, 111 N.M. 417, 806 P.2d 66 (Ct. App. 1990).

Trial court is to find only ultimate facts as opposed to evidentiary facts. State ex rel. Martinez v. Lewis, 116 N.M. 194, 861 P.2d 235 (Ct. App. 1993).

Findings of fact are not required to cover every material fact, only the ultimate facts. McCleskey v. N.C. Ribble Co., 80 N.M. 345, 455 P.2d 849 (Ct. App.), cert. denied, 80 N.M. 317, 454 P.2d 974 (1969).

Where the findings requested were neither ultimate facts nor material to the decision, it was not error for the court to refuse to make them even though they may have been correct. State ex rel. State Hwy. Comm'n v. Pelletier, 76 N.M. 555, 417 P.2d 46 (1966).

Findings by a trial court judge need not cover every material fact but only ultimate facts. Griego v. Bag 'N Save Food Emporium, 109 N.M. 287, 784 P.2d 1030 (Ct. App. 1989).

The rules of procedure do not require that findings of fact include more than an ultimate finding of fact. Apodaca v. Payroll Express, Inc., 116 N.M. 816, 867 P.2d 1198 (Ct. App. 1993).

Nor all relevant facts. — There is no obligation on the part of the court to find all of the relevant facts but only such ultimate facts as are necessary to determine the issues in the case. Goodwin v. Travis, 58 N.M. 465, 272 P.2d 672 (1954).

Nor every evidentiary fact. — Only such ultimate facts as are necessary to determine the issues in the case, as distinguished from evidentiary facts supporting them, are required by this rule. Thomas v. Barber's Super Mkts., Inc., 74 N.M. 720, 398 P.2d 51 (1964); Hoskins v. Albuquerque Bus Co., 72 N.M. 217, 382 P.2d 700 (1963). See also Nelson v. Nelson, 82 N.M. 324, 481 P.2d 403 (1971).

The trial court must make ultimate findings of fact. Evidentiary findings are not required. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968).

Requested findings which go to evidentiary matters rather than ultimate facts may be properly refused on that ground. Clem v. Bowman Lumber Co., 83 N.M. 659, 495 P.2d 1106 (Ct. App. 1972).

That the court's finding correctly describes the nature of the injuries sustained, but does so in general terms and does not go into the minute details requested by plaintiff, is not a ground for error as the findings of fact shall consist only of such ultimate facts as are necessary to determine the issues in the case, as distinguished from evidentiary facts supporting them. Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379 (Ct. App.), cert. denied, 78 N.M. 198, 429 P.2d 657 (1967).

The trial court must make findings only with regard to ultimate facts - those necessary to determine the issues of the case. Western Bank v. Franklin Dev. Corp., 111 N.M. 259, 804 P.2d 1078 (1991).

Although some evidentiary facts allowable. — Though findings of ultimate facts could have been more conveniently set out with omission of many findings of evidentiary nature, where suit involves intricate accounting, but for which findings would have been more briefly stated, the findings and conclusions are in sufficient compliance with this rule. Stroope v. Potter, 48 N.M. 404, 151 P.2d 748 (1944).

When not proper to refuse finding of ultimate fact. — It is not proper for the trial court to refuse a proposed specific finding of an ultimate fact within the issues supported by substantial evidence, believed by the court and necessary to determine the issues in the case. State Nat'l Bank v. Cantrell, 46 N.M. 268, 127 P.2d 246 (1942).

But when refusal of finding deemed proper. — Where the findings made were supported by substantial evidence the refusal to make contrary findings was not error. Moreover, the findings requested were findings of evidential facts, not ultimate facts as required. Asbury v. Yellow-Checker Cab Co., 64 N.M. 372, 328 P.2d 941 (1958).

Where the complaint and evidence all supported the court's findings, the court was under no obligation to make a finding foreign to the case as developed. Luna v. Flores, 64 N.M. 312, 328 P.2d 82 (1958).

And refusal deemed finding against party with burden of proof. — Failure to find facts on a material point in issue will be regarded on appeal as a finding against the party having the burden of proof. Begay v. First Nat'l Bank, 84 N.M. 83, 499 P.2d 1005 (Ct. App.), cert. denied, 84 N.M. 77, 499 P.2d 999 (1972).

The refusal by the court to accept a requested finding is regarded on appeal as finding against the party bearing the burden of proof on the issue at trial. Empire West Cos. v. Albuquerque Testing Labs, Inc., 110 N.M. 790, 800 P.2d 725 (1990).

Ultimate facts are essential and determining facts upon which the court's conclusion rests and without which finding the judgment would lack support in an essential particular or, in other words, factual conclusions deduced by a trial court from the evidentiary facts; ultimate facts should not be a mere enumeration or recapitulation of the evidentiary facts. Scott Graphics, Inc. v. Mahaney, 89 N.M. 208, 549 P.2d 623 (Ct. App.), cert. denied, 89 N.M. 322, 551 P.2d 1369 (1976).

Ultimate facts are the essential and determinative facts on which a conclusion is reached. A judgment cannot be sustained on appeal unless the conclusion upon which it is based finds support in the findings of fact. First W. Sav. & Loan Ass'n v. Home Sav. & Loan Ass'n, 84 N.M. 72, 499 P.2d 694 (Ct. App. 1972).

Ultimate facts are the facts which are necessary to determine the issues in the case, as distinguished from the evidentiary facts supporting them. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968).

A finding that a workman, to a stated percentage extent, is partially and permanently disabled is a finding of an ultimate fact. McCleskey v. N.C. Ribble Co., 80 N.M. 345, 455 P.2d 849 (Ct. App.), cert. denied, 80 N.M. 317, 454 P.2d 974 (1969).

Actual value or represented value of stock, or the difference between these values, are ultimate facts necessary to determine damages in suit based on fraudulent misrepresentations concerning sale of stock, and such findings are necessary to support conclusion as to damages. Goldie v. Yaker, 78 N.M. 485, 432 P.2d 841 (1967).

The existence or nonexistence of fraud or undue influence is an ultimate fact and one which a court without a jury may properly find. Goodwin v. Travis, 58 N.M. 465, 272 P.2d 672 (1954).

Failure of trial court to find concerning plaintiff's ability to perform the usual tasks of the work performed when injured was not a failure to find an ultimate fact. McCleskey v. N.C. Ribble Co., 80 N.M. 345, 455 P.2d 849 (Ct. App.), cert. denied, 80 N.M. 317, 454 P.2d 974 (1969).

In negligence suit against motel operator, failure of trial court to include the element of constructive notice in its finding that defendant did not know of hazardous condition which caused plaintiff's accident did not amount to failure to find ultimate facts necessary for determination of issues in the case where it appeared that when all findings were considered together with the conclusions flowing therefrom, the trial court was fully cognizant that the element of constructive notice was present, but that it did not deem it necessary to state the obvious. Husband v. Milosevich, 79 N.M. 4, 438 P.2d 888 (1968).

In finding that an account was stated between the parties, the court need not find the date of the last item of the account, or to find various exact balances show by monthly statements. Brown v. Cory, 77 N.M. 295, 422 P.2d 33 (1967).

In view of the findings by the trial court on an express contract, the question of fraud was not a material issue necessary for the determination of the case and that it was not error for the court to refuse such finding. Luna v. Flores, 64 N.M. 312, 328 P.2d 82 (1958).

And findings of fact and conclusions of law may intermix. — Contention that some of the trial court's findings of fact were conclusions of law and not findings of ultimate facts, and the judgment based thereon cannot stand is not correct because occasional intermixture of matters of fact and conclusions of law do not constitute error where court can see enough, upon a fair construction, to justify the judgment of the court. Gough v. Famariss Oil & Ref. Co., 83 N.M. 710, 496 P.2d 1106 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972).

In workmen's compensation case, where there was no specific finding by trial court under the "finding of fact" concerning notice of a compensable injury, but where one of the conclusions of law read in part that plaintiff did not give the defendant notice of a compensable injury within the time and manner provided by law, that portion of the conclusion was a finding of ultimate fact although intermingled with the conclusion of law. Clark v. Duval Corp., 82 N.M. 720, 487 P.2d 148 (Ct. App. 1971).

In many instances the ultimate facts to be properly found by a trial court are indistinguishable from and identical to conclusions of law which are also found by the court. Goodwin v. Travis, 58 N.M. 465, 272 P.2d 672 (1954).

Although only findings of ultimate fact binding in review. — A finding by the trial court which is a "conclusion of fact," or of "fact and law," and not a "finding of ultimate fact," from which such conclusion might be drawn, is not binding on the supreme court. Porter v. Mesilla Valley Cotton Prods. Co., 42 N.M. 217, 76 P.2d 937 (1937) (decided under former law).

Where not necessary to state finding of fact separately. — Where finding was not separately stated and numbered as a finding of fact as required by this section but where the finding was clear, and the only fault with the finding was that it was

mislabeled, plaintiff was not prejudiced, and court of appeals declined to remand the case to require the trial court to remove the finding from its conclusions and include it under the findings of fact. Clark v. Duval Corp., 82 N.M. 720, 487 P.2d 148 (Ct. App. 1971).

D. CONCLUSIONS OF LAW.

Conclusions of law must be predicated upon, and supported by, findings of fact; and where there is a conflict between an opinion and a finding of fact supported by substantial evidence, the finding prevails. Beavers v. Luther, 87 N.M. 43, 529 P.2d 269 (1974).

In a workers' compensation case, while the trial court concluded that the employer was 20% liable and the subsequent injury fund 80% liable, no finding supported this conclusion. In contrast to this conclusion, the judgment ordered the fund to reimburse the employer for 90% of all amounts it paid the worker. Because of the conflict between the judgment and the trial court's findings and conclusions, the cause was remanded for adoption of additional findings and conclusions so as to clearly delineate the percentage of liability to be properly apportioned between the employer and the fund based upon the worker's disability. Mares v. Valencia County Sheriff's Dep't, 106 N.M. 744, 749 P.2d 1123 (Ct. App. 1988).

Where findings of fact fail to resolve all of the issues presented by the evidence and do not support the conclusions reached, a judgment will be remanded for further proceedings consistent with this opinion. Foutz v. Foutz, 110 N.M. 642, 798 P.2d 592 (Ct. App. 1990).

Conclusions of law treated as findings of fact. — The appellate court may treat a conclusion of law as a finding of fact under certain circumstances. Apodaca v. Payroll Express, Inc., 116 N.M. 816, 867 P.2d 1198 (Ct. App. 1993).

Whether or not master-servant relationship existed is a legal conclusion, and it would have been improper to have found it as a fact. Latta v. Harvey, 67 N.M. 72, 352 P.2d 649 (1960).

E. SIGNED AND FILED IN RECORD.

Findings and conclusions entered into record before judgment. — Rules contemplate that a written decision containing findings of fact and conclusions of law be entered prior to entry of judgment. Kipp v. McBee, 78 N.M. 411, 432 P.2d 255 (1967).

As proper part of record. — Findings of fact and conclusions of law made by the trial court are a part of the record proper. Martin v. Village of Hot Springs, 33 N.M. 396, 268 P. 568 (1928) (decided under former law).

And where review allowed although findings not in record. — Though findings were not incorporated into a written decision filed in the cause, as required by the rules, the impropriety was not that of appellant, and it will not interfere with appellate review. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967).

F. REFUSED FINDINGS.

Court may refuse findings as part of decision. — Where trial court's decision stated that, "The Court has considered such requests and they are all hereby denied except such as are included in this Decision," this statement was sufficient compliance with this rule. Chalmers v. Hughes, 83 N.M. 314, 491 P.2d 531 (1971).

Trial court's conclusion of law in record stating "All requested findings of fact and conclusions of law inconsistent herewith are hereby refused" held sufficient for purpose of this rule. Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n, 67 N.M. 108, 353 P.2d 62 (1960).

In a quiet title action the court need not separately mark each finding "refused," but may enter an order as a part of the decision refusing all requested findings and conclusions submitted by the parties in conflict with those made by the court. Stull v. Board of Trustees, 61 N.M. 135, 296 P.2d 474 (1956).

Where the record shows that portions of some of the findings and conclusions submitted by both parties were refused while other portions were adopted, and that the wording of all of the findings and conclusions is different, the trial court, instead of marking each requested finding and conclusion not included in his findings and conclusions "Refused," could have stated in his conclusions of law that, "All requested Findings of Fact and Conclusions of Law submitted by the parties at variance with this Decision are hereby denied." Edwards v. Peterson, 61 N.M. 104, 295 P.2d 858 (1956).

Or by not including in decision. — Where the court filed his decision without including any findings of fact requested by plaintiff, the effect is a refusal to make the requested findings. Sandoval County Bd. of Educ. v. Young, 43 N.M. 397, 94 P.2d 508 (1939) (decided under former law).

And refusal deemed finding against party with burden of proof. — The refusal or failure to make a requested finding on a material issue is held by the court to be in effect a finding against the party having the burden of proof. Gallegos v. Wilkerson, 79 N.M. 549, 445 P.2d 970 (1968); Wynne v. Pino, 78 N.M. 520, 433 P.2d 499 (1967).

Although not deemed finding to contrary. — The trial court's specific refusal of a proposed finding is not equivalent to a direct finding to the contrary. State Nat'l Bank v. Cantrell, 46 N.M. 268, 127 P.2d 246 (1942) (decided under former law).

G. WAIVER.

Purpose of subdivision. — Addition of Subdivision B(a)(6) (see now Paragraph B(1)(f)) was but a recognition of established case law that a party could not take advantage of court's failure to make specific findings unless he has requested them. State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952).

Effect of subdivision. — The effect of Subdivision (B)(a)(6) (see now Paragraph B(1)(f)) is to limit the scope of attack on appeal, and thus to define the area of review by the supreme court. This provision caused the New Mexico rule to differ from Federal Rule of Civil Procedure 52(a), which provides that requests are unnecessary for a review. State v. Hardy, 78 N.M. 374, 431 P.2d 752 (1967).

Compliance with Paragraph B(1)(f). — A written communication, sufficient to apprise the trial court of a desire to submit requested findings and conclusions, is a "general request" satisfying the requirements of Subdivision (B)(1)(f) (see now Paragraph B(1)(f)) and a formal written request is unnecessary. McCaffery v. Steward Constr. Co., 101 N.M. 51, 678 P.2d 226 (Ct. App. 1984).

Trial court did not err in rejecting plaintiffs' requested findings of fact which were either findings of evidentiary, not ultimate, facts, or were not supported by substantial evidence. Whorton v. Mr. C's, 101 N.M. 651, 687 P.2d 86 (1984).

When party waives specific findings and conclusions. — A party will waive specific findings of fact and conclusions of law if he fails to make a general request therefor in writing, or if he fails to tender specific findings and conclusions. Wagner Land & Inv. Co. v. Halderman, 83 N.M. 628, 495 P.2d 1075 (1972).

A party who has failed to request a finding of ultimate fact has waived such a finding. C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria, 110 N.M. 291, 795 P.2d 502 (1990).

By failing to request findings concerning stock's value, plaintiffs waived findings as to this ultimate fact. Goldie v. Yaker, 78 N.M. 485, 432 P.2d 841 (1967).

When, in a suit by a real estate broker for his commission, the defendants made no requested findings as to the plaintiff having failed to produce a qualified purchaser, the defendants relying entirely in the trial court on the lack of good faith, such claim is waived. Hinkle v. Schmider, 70 N.M. 349, 373 P.2d 918 (1962).

And so cannot obtain review of evidence. — Subdivision B(a)(6) (see now Paragraph B(1)(f)) provides that a party waives specific findings if he fails to make a request therefor in writing, or if he fails to tender specific findings, and a party who does not request findings of fact and conclusions of law cannot on appeal obtain a review of the evidence. McNabb v. Warren, 83 N.M. 247, 490 P.2d 964 (1971).

Plaintiffs' failure to timely request findings of fact and conclusions of law constitutes a waiver of same, and they cannot obtain a review of the evidence on appeal. Wagner Land & Inv. Co. v. Halderman, 83 N.M. 628, 495 P.2d 1075 (1972).

The claimed errors, if any, were not preserved by any request for findings contrary to those which were entered by the court. Appellant made no request for findings at any time, nor in any way excepted to the express findings of the court, and, in such a situation, both the rules and decisions are to the effect that the error has not been preserved; thus failure to make any request is dispositive of this appeal. Davis v. Davis, 77 N.M. 135, 419 P.2d 974 (1966).

The supreme court, on appeal, will not consider whether the trial court erred in failing to make separate findings and conclusions where, as here, the complaining party neither tendered specific requests nor made a general request in writing. Edington v. Alba, 74 N.M. 263, 392 P.2d 675 (1964).

Where there was no requested finding that counsel was asked to appeal judge's decision and the only requested finding was that defendant was not adequately represented by counsel at the hearing before the judge, finding that defendant was adequately represented was supported by substantial evidence and no review was allowed of claim that counsel was asked to appeal judge's decision. Maimona v. State, 82 N.M. 281, 480 P.2d 171 (Ct. App. 1971).

Where court, in single document entitled "judgment," found that the proof sustained only one item of damages and judgment was rendered accordingly, without exception by the appellants to the form of the judgment nor with the request of findings of their own, the supreme court cannot review the evidence to see whether or not it supported general findings and judgment. Scuderi v. Moore, 59 N.M. 352, 284 P.2d 672 (1955).

The failure of a party to file a timely request for findings of fact and conclusions of law precludes evidentiary review by the court of appeals. Pennington v. Chino Mines, 109 N.M. 676, 789 P.2d 624 (Ct. App. 1990).

"Ends of justice" exception to waiver. — In this case the appellant initially waived error in the trial court's failure to make additional or specific findings by his failure to request or submit findings. The appellate court will not remand for findings absent a timely request unless the "ends of justice" so require. Only when there are exceptional circumstances does an "ends of justice" argument prevail over waiver. These exceptional circumstances include those cases in which: (1) jurisdictional questions exist; (2) there are questions of a general public nature affecting the interest of the state at large; (3) it is necessary to do so to protect the fundamental rights of the party; or (4) facts or circumstances occurred, arose, or first became known after the trial court lost jurisdiction. Cockrell v. Cockrell, 117 N.M. 321, 871 P.2d 977 (1994).

Specific findings waived. — See Lukoski v. Sandia Indian Mgt. Co., 106 N.M. 664, 748 P.2d 507 (1988).

No review of evidence on appeal absent request for findings. — Once a party has failed to request specific findings he cannot, on appeal, obtain a review of the evidence. Pedigo v. Valley Mobile Homes, Inc., 97 N.M. 795, 643 P.2d 1247 (Ct. App. 1982).

Nor argue findings or conclusions for first time on appeal. — No findings or conclusions were requested on this issue, nor were any made by the trial court. The claimed error was not preserved for review and cannot be urged for the first time on appeal. Schreiber v. Armstrong, 70 N.M. 419, 374 P.2d 297 (1962).

Where no findings or conclusions touching the issue of independent contractor during the trial are requested, or made, it is too late to attempt to inject the issue for review on appeal. Selby v. Tolbert, 56 N.M. 718, 249 P.2d 498 (1952).

On appeal from trial court's decision allowing certain expenditures from principal, it would be unfair to opposing party and trial court to enlarge upon the items which, after a hearing, appellant then asked to be held illegal. National Agrl. College v. Lavenson, 55 N.M. 583, 237 P.2d 925 (1951).

In case a party makes no request in trial court for additional or other findings and raises no objection to findings made, except through a motion to vacate, and fails to make the trial court aware of the error claimed in some other manner, failure to make the additional or substitute finding cannot be made the basis of complaint on appeal. Chavez v. Chavez, 54 N.M. 73, 213 P.2d 438 (1950).

Where the plaintiff failed to request a finding that the defendant insurance company impermissibly changed its theory of the case, the plaintiff could not raise the issue for the first time on appeal. Crownover v. National Farmers Union Property & Cas. Co., 100 N.M. 568, 673 P.2d 1301 (1983).

Review of legal conclusions. — While the failure to submit findings of fact and conclusions of law precludes a review of the evidence on appeal, this merely prevents the appellate court from reviewing the factual basis of any findings the trial court may have made. The appellate court may still review the trial court's decision to determine whether it is legally correct. Blea v. Sandoval, 107 N.M. 554, 761 P.2d 432 (Ct. App. 1988).

Review not provided by designating, on appeal, certain findings as "challenged". — Designating certain findings as "challenged," then restating portions of the evidence, does not automatically provide entitlement to appellate review when the challenge is, in reality, to the sufficiency of the evidence. There can be no review of the evidence on appeal when the party seeking review has failed to submit requested findings of fact and conclusions of law to the trial court. Smith v. Maldonado, 103 N.M. 570, 711 P.2d 15 (1985).

Specific findings not required unless requested. — The trial court was not required by Laws 1880, ch. 64, § 29, as amended (105-813, C.S. 1929) (now superseded), to

make specific findings of fact and conclusions of law in the absence of a request to so do. Alexander Hamilton Inst. v. Smith, 35 N.M. 30, 289 P. 596 (1930); Bank of Commerce v. Baird Mining Co., 13 N.M. 424, 85 P. 970 (1906); Radcliffe v. Chavez, 15 N.M. 258, 110 P. 699 (1910); Springer Ditch Co. v. Wright, 31 N.M. 457, 247 P. 270 (1925) (all cases decided under former law).

Requests must be timely. — If requested findings of fact and conclusions of law are untimely requested, they are considered waived. Fidelity Nat'l Bank v. Lobo Hijo Corp., 92 N.M. 737, 594 P.2d 1193 (Ct. App. 1979).

No request for findings of fact and conclusions of law having been made until after judgment had been entered and appeal allowed, trial court's failure to make findings and conclusions did not constitute error. Veale v. Eavenson, 52 N.M. 102, 192 P.2d 312 (1948).

The omission of the trial court to make findings will not be considered on appeal in the absence of a request therefor in the trial court, and findings of fact submitted after judgment cannot be made the basis of appeal. In re Caffo, 69 N.M. 320, 366 P.2d 848 (1961).

But not applicable in summary judgment proceedings. — Since a summary judgment presupposes that there are no triable issues of fact, findings of fact and conclusions of law are not required in rendering judgment. Failure to make and failure to request findings and conclusions is not error barring review. Jacobson v. State Farm Mut. Auto. Ins. Co., 81 N.M. 600, 471 P.2d 170 (1970).

Although rule applicable in other proceedings. — Because the rules of procedure followed by the state corporation commission (now public regulation commission) are, as far as applicable, the same as the rules of procedure generally followed by district courts, the assimilation of Subdivision B(a)(1) (see now Paragraph B(1)(a)) calling upon the court for findings of fact and conclusions of law, at the same time would bring in Subdivision B(a)(6) (see now Paragraph B(1)(F)) providing that a party will waive specific findings and conclusions if he fails to tender specific findings and conclusions. Ferguson-Steere Motor Co. v. SCC, 60 N.M. 114, 288 P.2d 440 (1955).

This rule applies to findings made by the court in a workmen's compensation case. Rone v. Calvary Baptist Church, Inc., 70 N.M. 465, 374 P.2d 847 (1962).

In workmen's compensation, where the exceptional circumstances identified in DesGeorges v. Grainger, 76 N.M. 52, 412 P.2d 6 (1966), exist, the "ends of justice" provision of Subdivision B(a)(7) (see now Paragraph B(1)(g)) is not applicable. Subdivision B(a)(6) (see now Paragraph B(1)(f)) is applicable. Having failed to make a general request for findings or tender specific findings, plaintiff has waived findings by the court. Having waived findings, the case will not be remanded for findings by the court. Guidry v. Petty Concrete Co., 77 N.M. 531, 424 P.2d 806 (1967).

Failure to make findings. — Alleging error for failure to make requested findings of fact and conclusions of law is not equivalent to alleging error for failure to find facts and conclusions of law, especially in view of lack of request therefor. Board of Trustees v. Garcia, 32 N.M. 124, 252 P. 478 (1925) (decided under former law).

Findings not waived. — Although the buyer waived requested findings and conclusions following trial, it preserved its claims on appeal in its motion to amend the judgment. Credit Institute v. Veterinary Nutrition Corp., 2003-NMCA-010, 133 N.M. 248, 62 P.3d 339.

H. SINGLE DOCUMENT; REMAND.

Single document required. — The rule is plain, and requires the trial judge to file his decision in a single document consisting of the findings of ultimate facts and conclusions of law, stated separately. Moore v. Moore, 68 N.M. 207, 360 P.2d 394 (1961).

The trial judge in an action for partition is required to file his decision in a single document consisting of the findings of ultimate fact and conclusions of law, stated separately. This is true even though the complaining parties never tendered any requested findings of fact and conclusions of law. Moore v. Sussman, 92 N.M. 70, 582 P.2d 1283 (1978).

Order refusing findings not included in single document. — Subdivision B(a)(7) (see now Paragraph B(1)(g)) contains no requirement that an order refusing proposed findings be included in the same document as the court's decision. United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 597 P.2d 290, cert. denied, 444 U.S. 911, 100 S. Ct. 222, 62 L. Ed. 2d 145 (1979).

Where there is doubt as to the findings adopted by the trial court, the cause will be remanded for additional findings and conclusions. Carter v. Mountain Bell, 105 N.M. 17, 727 P.2d 956 (Ct. App. 1986).

Where remand required by ends of justice. — Where trial judge did not file his decision in a single document, although sympathies are with the parties who are faced with delay caused by something which is not their responsibility, the ends of justice require a remand of the case to the district court for the making and filing of proper findings of fact and conclusions of law. Moore v. Moore, 68 N.M. 207, 360 P.2d 394 (1961).

But where not required. — Where the trial court did, by supplemental written decision, make a general finding of fact which is sufficient to support the judgment, the ends of justice do not require a remand for further findings of fact. Edington v. Alba, 74 N.M. 263, 392 P.2d 675 (1964).

Wrongful death action for vehicle pedestrian accident did not present a question of a general public nature affecting the interest of the state at large and did not call for remand of cause to district court for the making and filing of proper findings of fact and conclusions of law. Hamilton v. Woodward, 78 N.M. 633, 436 P.2d 106 (1968).

In workmen's compensation, where the exceptional circumstances identified in DesGeorges v. Grainger, 76 N.M. 52, 412 P.2d 6 (1966), exist, the "ends of justice" provision of Subdivision B(a)(7) (see now Paragraph B(1)(g)) is not applicable. Subdivision B(a)(6) (see now Paragraph B(1)(f)) is applicable. Having failed to make a general request for findings or tender specific findings, plaintiff has waived findings by the court. Having waived findings, the case will not be remanded for findings by the court. Guidry v. Petty Concrete Co., 77 N.M. 531, 424 P.2d 806 (1967).

Where judgment contains findings remand for separate statement unnecessary. — Where, in the judgment, there are findings which the trial court entered, and there is substantial evidence to support these findings, little would be accomplished in remanding the case for the purpose only of separately stating these same findings of fact. Coulter v. Stewart, 97 N.M. 616, 642 P.2d 602 (1982).

I. OPPORTUNITY TO SUBMIT FINDINGS.

Must be timely filed and served upon opposing counsel. — Where defendant's requested findings of fact and conclusions of law were not timely filed and copies thereof were not served upon opposing counsel, as required by Subdivisions B(a)(6), B(a)(7), B(a)(8) and B(b) (see now Paragraphs B(1)(f), (g), (h) and (2)), they were never submitted to or considered by the trial court. Supreme court could not consider them and defendant could not contend at that point that the judgment was not supported by the evidence. Macnair v. Stueber, 84 N.M. 93, 500 P.2d 178 (1972).

Proposed findings following notice of appeal. — A pending appeal does not divest the trial court of jurisdiction to take further action when the action will not affect the judgment on appeal and when, instead, the further action enables the trial court to carry out or enforce the judgment. The notice of appeal in this case did not deprive the judge of jurisdiction to permit the party to file its supplemental proposed findings, which had been submitted to the judge well before filing of the notice. Barela v. ABF Freight Sys., 116 N.M. 574, 865 P.2d 1218 (Ct. App. 1993).

J. AMENDMENT.

Applicability. — Subdivision B(b) (see now Paragraph B(2)) contemplates the existence of findings and applies only to findings made after judgment. Absent such findings, this rule is not applicable. Guidry v. Petty Concrete Co., 77 N.M. 531, 424 P.2d 806 (1967).

The third sentence of Subdivision B(b) (see now Paragraph B(2)) should only be applied where findings were made after judgment. Duran v. Montoya, 56 N.M. 198, 242 P.2d 492 (1952).

But where rule not applicable. — Subdivision B(b) (see now Paragraph B(2)) is not applicable to a case where no findings of fact were made by the court. Gilmore v. Baldwin, 59 N.M. 51, 278 P.2d 790 (1955).

Cases in which the court has made no findings of fact would come under 39-1-1 NMSA 1978 which limits the time for modification of judgment to not more than 30 days after the date of its entry, that being the time during which the court retains jurisdiction. Gilmore v. Baldwin, 59 N.M. 51, 278 P.2d 790 (1955).

Motion must be timely. — This rule allows only 10 days after entry of judgment for the filing of a motion to have the court amend its findings, or make additional findings, and to amend the judgment accordingly. Wagner Land & Inv. Co. v. Halderman, 83 N.M. 628, 495 P.2d 1075 (1972).

Motion to reconsider filed more than 10 days after the entry of order and accordingly was not timely. State v. Navas, 78 N.M. 365, 431 P.2d 743 (1967).

And court cannot extend or enlarge time for motions. — Under the terms of Rule 6(b) (see now Rule 1-006 NMRA), the court cannot extend or enlarge the time for taking any action under Subdivision B(b) (see now Paragraph B(2)) except under the conditions stated in such rule. Wagner Land & Inv. Co. v. Halderman, 83 N.M. 628, 495 P.2d 1075 (1972).

Need timely request for findings. — While Subdivision B(b) (see now Paragraph B(2)) allows review of the evidence, that provision applies only when the party asking for a review had timely requested findings and conclusions in compliance with Subdivision B(a)(6) (see now Paragraph B(1)(f)). Kipp v. McBee, 78 N.M. 411, 432 P.2d 255 (1967).

But exceptions or motions to amend not necessary. — Where party submitted requested findings, the party consequently may obtain a review of the evidence without having filed exceptions or a motion to amend findings. Van Orman v. Nelson, 78 N.M. 11, 427 P.2d 896 (1967).

And when error not to amend. — Under Subdivision B(a)(1) (see now Paragraph B(1)(a)), the trial court was obligated to make and file findings of fact and conclusions of law, because factual determinations were necessary to a proper decision of the case even though defendant's requested findings and conclusions were filed six days after entry of the order modifying the final divorce decree. Merrill v. Merrill, 82 N.M. 458, 483 P.2d 932 (1971).

Provisions not considered as waiver. — The provisions of Subdivision B(b) (see now Paragraph B(2)) relating to amendments should not be considered as a waiver on the

part of the defendant when court failed to comply with Subdivision A(a)(7) (see now Paragraph B(1)(g)) for the simple reason that there were no findings of the court to be amended. Moore v. Moore, 68 N.M. 207, 360 P.2d 394 (1961).

And doctrine of fundamental error not applicable. — Doctrine of fundamental error has for its purpose the protection of an accused who has been convicted of a crime where there was no evidence to support the verdict and it was not intended to be applied in a case where a decision was made in the main on conflicting evidence after three separate hearings and an independent survey. Duran v. Montoya, 56 N.M. 198, 242 P.2d 492 (1952).

1-053. Masters.

A. **Appointment and compensation.** The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

B. **Reference.** A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

C. **Powers.** The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 1-043 NMRA for a court sitting without a jury.

D. **Proceedings.**

(1) When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within twenty (20) days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 1-045 NMRA. If without adequate excuse a witness fails to appear or give evidence, he may be punished by the district judge as for a contempt and be subjected to the consequences, penalties and remedies provided in Rules 1-037 and 1-045.

(3) When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

E. **Report.**

(1) The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and unless waived by the parties he shall file with it a transcript or other authorized recording of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within ten (10) days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Paragraph C of Rule 1-006 NMRA. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In an action to be tried by a jury the master shall make his report as in nonjury actions. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury; provided that either party

may attack such findings in the same manner and upon the same grounds as in nonjury cases, and also subject to the ruling of the court upon any objections in point of law which may be made to the report. If no objections are made to the findings of the master, then they may be introduced in evidence without submission to the trial court for approval.

(4) The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

F. **Special masters, commissioners and referees; substitution.** Upon application of an interested party, and after notice if directed by the court, showing that a special master, commissioner or referee theretofore appointed is unable for any reason to continue in the performance of his prescribed duties, the court may appoint another as successor. Unless the court shall otherwise order, such successor shall take the proceedings as he finds them, and carry the same on to completion, with all powers of the original master. Without further or other notice, such successor may conduct any sale, notice of which may have been published in the name of such original master.

ANNOTATIONS

Cross references. — For nonjury trial, *see* Rule 1-052 NMRA.

For references in corporate receiverships, *see* Sections 53-16-17 and 53-16-18 NMSA 1978.

For reference upon discharge of assignee for benefit of creditors, *see* Section 56-9-49 NMSA 1978.

For reference in suits to determine water rights, *see* Section 72-4-17 NMSA 1978.

Compiler's notes. — Paragraph A is deemed to have superseded 105-904, 105-905, C.S. 1929, relating to appointment of and hearings by referees.

Paragraph B is deemed to have superseded 105-901, 105-902, C.S. 1929, relating to references by and without consent.

Paragraph C is deemed to have superseded 105-911, C.S. 1929, relating to use of depositions before referee, 105-914, C.S. 1929, relating to referee's power to compel production of materials and examine parties on oath, 105-916, C.S. 1929, relating to referee's power to rule an objection and to submit findings, and 105-921, C.S. 1929, relating to notices and subpoenas of referees.

Paragraph D(1) is deemed to have superseded 105-909, C.S. 1929, which was substantially the same. It is also deemed to have superseded 105-912, C.S. 1929, relating to joint meetings of referees, and 105-913, C.S. 1929, relating to the court's power to order the referee to make decisions and reports.

Paragraphs D(2) and (3) are deemed to have superseded 105-910 and 105-915, C.S. 1929, relating to compelling attendance of witnesses and methods for submitting accounts.

Paragraphs E(1) and (5) are deemed to have superseded 105-917 and 105-918, C.S. 1929, which were substantially the same.

Paragraph E(2) is deemed to have superseded 105-919, C.S. 1929, relating to the effect to be given to referee's findings.

Paragraph E(4) is deemed to have superseded 105-920, C.S. 1929, which was substantially the same.

Paragraph F is deemed to have superseded 105-907, C.S. 1929, and former Trial Court Rule 46-106a which were substantially the same.

Duty to disclose underlying evidence for report. — In a divorce proceeding, where the court appointed a special master to review and resolve issues concerning the liquidation of the parties' family businesses and subsequently ordered the special master to complete the liquidation of the estate, the case was remanded to the district court to determine whether husband was entitled to receive the financial information and documentation that the special master obtained and used as support for the information, conclusions, and recommendations contained in the special master's reports. Muse v. Muse, 2009-NMCA-003, 145 N.M. 451, 200 P.3d 104.

Rule is applicable to juvenile court (now children's court) proceedings. 1963-64 Op. Att'y Gen. No. 63-14 (opinion rendered under former law).

But Rule 11, R. Child. Ct. (see now Rule 10-111), limits inherent power of district judge to appoint a special master in children's court. State v. Doe, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979).

Construction given corresponding federal rule is persuasive. Lopez v. Singh, 53 N.M. 245, 205 P.2d 492 (1949).

Appointment of special masters has been left entirely to discretion of district judge in civil cases. Schwartzman v. Schwartzman Packing Co., 99 N.M. 436, 659 P.2d 888 (1983).

Special masters are to be appointed when issues are complicated. State ex rel. Reynolds v. Niccum, 102 N.M. 330, 695 P.2d 480 (1985).

Special masters' findings are presumed to be correct; and when there is any testimony consistent with the findings, they must be treated as unassailable. State ex rel. Reynolds v. Niccum, 102 N.M. 330, 695 P.2d 480 (1985).

Party challenging validity of master's support award had duty to request record of testimony and evidence. State ex rel. Alleman v. Shoats, 101 N.M. 512, 684 P.2d 1177 (1984).

Appellate court reviews sufficiency of evidence supporting master's findings. — When an attack is made upon a trial court's findings, when that court has approved and adopted all of the findings and conclusions of a special master, an appellate court must first review the sufficiency of the evidence to support those findings made by the master. State ex rel. Reynolds v. Lewis, 74 N.M. 442, 394 P.2d 593 (1964).

Motion to vacate reference must be timely. — Where, after order of reference, the issue changes by reason of a stipulated decree so that only an issue of law is involved, the order of reference could have been vacated and a jury trial had, but where no ruling of the court is sought on such question until the evidence is taken and the report of the referee filed, the request is too late. E.M. Biggs Tie & Store Co. v. Arlington Land Co., 25 N.M. 613, 186 P. 449 (1919) (decided under former law).

Master subject to direction of trial court. — Special master is not obliged to follow all procedures authorized by this rule, but could properly be limited by trial court's directions. Gonzales v. Gonzales, 85 N.M. 67, 509 P.2d 259 (1973).

Parties to present testimony, evidence and viewpoints at first meeting. — Where court order refers parties to a master for determination of quiet title action, meeting between parties' lawyers and master held two months before court order is entered cannot be considered a first meeting within the ambit of Subdivision (d)(1) (see now Paragraph D(1)). Purpose of this requirement is to allow parties to present master with their testimony, evidence and viewpoints so that master can give his report to the court, and where no meeting is held within specified time limit, such opportunity is denied, regardless of what has preceded at other times between master and attorneys. Nolasco v. Nolasco, 86 N.M. 725, 527 P.2d 320 (1974).

Court authorized to order master to speed proceedings. — The court has the power to require the referee to proceed promptly with the hearings and make a report. E.M. Biggs Tie & Store Co. v. Arlington Land Co., 25 N.M. 613, 186 P. 449 (1919) (decided under former law).

Ensuring accurate vote count in corporate proxy fight. — The court did not abuse its discretion by determining that special master proceedings were necessary to ensure a well-regulated vote count in a corporate proxy fight and that the corporation should bear the costs of those proceedings. Pena v. Westland Dev. Co., 107 N.M. 560, 761 P.2d 438 (Ct. App. 1988).

Errors in report waived absent objections to trial court. — Errors complained of in a referee's report must be called to the attention of the trial court or they will be deemed waived. Neher v. Armijo, 11 N.M. 67, 66 P. 517 (1901) (decided under former law).

Referee's findings not unassailable. — A district court is well within its powers when it overturns the findings of a referee which are not unassailable. Bradford v. Armijo, 28 N.M. 288, 210 P. 1070 (1922) (decided under former law).

De novo review by district court. — The interpretation and construction that federal courts give Federal Rule of Civil Procedure 53(E)(2), as it relates to the special master's conclusions of law, is persuasive authority for New Mexico courts applying this rule: under federal law, a special master's conclusions of law carry no weight with the district court; rather, the court reviews a special master's conclusions of law de novo. Lozano v. GTE Lenkurt, Inc., 1996-NMCA-074, 122 N.M. 103, 920 P.2d 1057.

Findings supported by substantial evidence not erroneous. — As used in Subdivision (e)(2) (see now Paragraph E(2)), clearly erroneous means findings not supported by substantial evidence, and findings are not erroneous where they are supported, if not by a preponderance, by substantial evidence. Lopez v. Singh, 53 N.M. 245, 205 P.2d 492 (1949).

Findings conclusive. — When supported by substantial evidence, the findings of a master are conclusive upon the trial court. Lopez v. Singh, 53 N.M. 245, 205 P.2d 492 (1949).

Absent clear error. — The findings of the special master should be accepted when they are supported by substantial evidence and are not clearly erroneous. Witt v. Skelly Oil Co., 71 N.M. 411, 379 P.2d 61 (1963).

Findings unassailable if based on any consistent testimony. — The master's findings are presumed to be correct and so far as they depend upon conflicting evidence, or upon the credibility of witnesses, or so far as there is any testimony consistent with the findings, they must be treated as unassailable. Witt v. Skelly Oil Co., 71 N.M. 411, 379 P.2d 61 (1963).

Conflicting evidence. — The findings of fact by a master, depending upon the weight of conflicting testimony, are presumptively correct, and are not to be disturbed, unless it clearly appears that there has been error or mistake on his part. De Cordova v. Korte, 7 N.M. 678, 41 P. 526 (1895), aff'd, 171 U.S. 638, 19 S. Ct. 35, 43 L. Ed. 315 (1898) (decided under former law).

Veracity of witness. — A master who has heard the witnesses testify and observed their demeanor is in a better position than the trial court to pass upon their veracity. Lopez v. Singh, 53 N.M. 245, 205 P.2d 492 (1949).

"Clearly erroneous" is defined as finding unsupported by substantial evidence. Witt v. Skelly Oil Co., 71 N.M. 411, 379 P.2d 61 (1963).

"Clearly erroneous" standard requires. — The trial court may set aside findings when clearly erroneous. In considering the question the word "clearly" must not be overlooked, and findings will not be set aside merely because the record tends to show that they are not supported by the weight of the evidence, for it is only where there is a total lack of substantial evidence to support the findings that the court is warranted in rejecting the report of the referee. Witt v. Skelly Oil Co., 71 N.M. 411, 379 P.2d 61 (1963).

Total absence of supporting substantial evidence to reject findings. — Only where there is a total lack of substantial evidence to support findings is the court warranted in rejecting the report of a referee. Lopez v. Singh, 53 N.M. 245, 205 P.2d 492 (1949).

A finding of fact by referee on evidence is equivalent to the special verdict of a jury and cannot be disturbed unless such evidence is manifestly insufficient to sustain it. Pueblo of Nambe v. Romero, 10 N.M. 58, 61 P. 122 (1900) (decided under former law).

Application of improper standard by master deemed clear error. — Findings are clearly erroneous if the reviewing court on the entire evidence has the definite and firm conviction that a mistake has been committed as to the application of the proper standard by the master. When a master's findings are clearly erroneous they are reversible. Martin v. Foster, 81 N.M. 583, 470 P.2d 304 (1970).

Notice and opportunity to object required before adoption of findings. — Where special master's report and final judgment are entered the same day, the trial court commits error by not giving opposing counsel notice and allowing him time to submit proposed findings and conclusion. Barelas Community Ditch Corp. v. City of Albuquerque, 63 N.M. 25, 312 P.2d 549 (1957).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27A Am. Jur. 2d Equity §§ 226 to 229, 231 to 233; 66 Am. Jur. 2d References §§ 3 to 14, 17 to 37.

Power of referee to punish for contempt, 8 A.L.R. 1575, 54 A.L.R. 326, 73 A.L.R. 1185.

What amounts to nonsuit within contemplation of statute extending time for new action in case of nonsuit, 86 A.L.R. 1048.

Voluntary dismissal or nonsuit, right of plaintiff to take, after submission of case to referee, 89 A.L.R. 99, 126 A.L.R. 284.

Counterclaim or defense setting up facts involving examination of long account as ground for compulsory reference where complaint alleges nonreferable cause of action, 102 A.L.R. 1062.

Voluntary dismissal where case has been submitted to referee, 126 A.L.R. 302.

Statute providing for reference without consent of the parties in classes of cases enumerated as excluding reference in other cases, 126 A.L.R. 314.

Relief from stipulations, 161 A.L.R. 1161.

Appealability of order with respect to reference, 75 A.L.R.2d 1007.

Availability of mandamus or prohibition to review order of reference to master or auditor, 76 A.L.R.2d 1120.

Propriety of reference in connection with fixing amount of alimony, 85 A.L.R.2d 801.

Amount of master's fee in divorce proceedings, 89 A.L.R.2d 377.

Bankruptcy, right of creditor who has not filed timely petition for review of referee's order to participate in appeal secured by another creditor, 22 A.L.R.3d 914.

Submission to referee as "final submission," within statute permitting plaintiff to take voluntary dismissal without prejudice before final submission, 31 A.L.R.3d 449.

Power of successor or substituted master or referee to render decision or enter judgment on testimony heard by predecessor, 70 A.L.R.3d 1079.

Criminal record as affecting applicant's moral character for purposes of admission to the bar, 88 A.L.R.3d 192.

Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 A.L.R.4th 889.

What are "exceptional conditions" justifying reference under Rule of Civil Procedure 53(b), 1 A.L.R. Fed. 922.

76 C.J.S. References § 2 et seq.

1-053.1. Domestic violence special commissioners; duties.

A. **Appointment.** Domestic violence special commissioners shall be at-will positions subject to the New Mexico Judicial Branch Policies for At-will Employees. Consistent with the authority set forth in this rule, domestic violence special commissioners may perform such duties as assigned by the chief judge of the district in domestic violence proceedings.

B. **Qualifications.** Any person appointed to serve as a special commissioner pursuant to this rule shall:

(1) be a lawyer licensed to practice law in New Mexico and who has at least three (3) years of experience in the practice of law; and

(2) be knowledgeable in the area of domestic relations and domestic violence matters.

C. **Duties.** A domestic violence special commissioner shall perform the following duties in carrying out the provisions of the Family Violence Protection Act:

(1) review petitions for orders of protection and motions to enforce, modify or terminate orders of protection;

(2) if deemed necessary, interview petitioners, provided that any interview shall be on the record;

(3) conduct hearings on the merits of petitions for orders of protection and motions to enforce, modify or terminate orders of protection; and

(4) prepare recommendations, in the form, if any, approved by the Supreme Court, for review and final approval by the court regarding petitions for orders of protection and motions to enforce, modify or terminate orders of protection.

D. **Removal.** Upon motion of any party for good cause shown, or on the court's own motion, the court may remove the domestic violence special commissioner from acting in a proceeding.

E. **Authority.** The domestic violence special commissioner's recommendations shall not become effective until reviewed and adopted as an order of the court.

F. **Recommendations.**

(1) **Recommendations concerning *ex parte* orders.** After conducting the necessary review, the domestic violence special commissioner shall promptly submit to the court recommendations concerning the entry of an *ex parte* temporary order of protection. The court shall review the recommendations and shall determine whether to enter an order consistent with the recommendations, to enter a different order, to request the commissioner to conduct further proceedings or to request the commissioner to make additional findings and conclusions. Unless otherwise ordered by the court, an *ex parte* order of protection signed by the court shall remain in effect, in accordance with the provisions of Section 40-13-4 NMSA 1978, until the court enters a final order ruling on the petition for an order of protection.

(2) **Recommendations.** At the conclusion of the proceedings, the domestic violence special commissioner shall submit to the court for review and approval the commissioner's recommendations, including proposed findings and conclusions, and

shall serve each of the parties with a copy together with a notice that specific objections may be filed within ten (10) days after service of the recommendations.

G. **Objections.** Any party may file timely objections to the domestic violence special commissioner's recommendations. Objections must identify the specific portions of the commissioner's recommendations to which the party objects. The party filing objections shall promptly serve them on other parties.

H. **District Court Proceedings.** After receipt of the recommendations of the domestic violence special commissioner:

(1) **Review of Recommendations.**

(a) The court shall review the recommendations of the domestic violence special commissioner and determine whether to adopt the recommendations.

(b) If the party files timely, specific objections to the recommendations, the court shall conduct a hearing appropriate and sufficient to resolve the objections. The hearing shall consist of a review of the record unless the court determines that additional evidence will aid in the resolution of the objections.

(c) The court shall make an independent determination of the objections.

(d) The court may adopt the recommendations, modify them, reject them in whole or in part, receive further evidence, or may recommit them to the domestic violence special commissioner with instructions.

(2) **Findings and conclusions; entry of final order.** After the hearing, the court shall enter a final order. When required by Rule 1-052 NMRA, the court also shall enter findings and conclusions.

I. **Limitations on private practice.** Full-time domestic violence special commissioners shall devote full time to their duties under the Family Violence Protection Act and shall not engage in the private practice of law or in any employment, occupation or business interfering with or inconsistent with the discharge of their duties. Part-time domestic violence special commissioners may engage in the private practice of law so long as in the discretion of the appointing judge it does not interfere with nor is inconsistent with the discharge of their duties as a domestic violence special commissioner and subject to the Code of Judicial Conduct rules enumerated in Paragraph J of this rule.

J. **Code of Judicial Conduct.** A domestic violence special commissioner is required to conform to Rules 21-100 through 21-500 NMRA and 21-700 NMRA of the Code of Judicial Conduct.

[Adopted, effective October 18, 1996; as amended by Supreme Court Order 06-8300-19, effective October 16, 2006.]

Committee Commentary for 2006 Amendment. —

Authority

Former Paragraph C of Rule 1-053.1 NMRA has been amended to make clear the permissible scope of the domestic violence special commissioner's duties include not only the review of petitions and the conducting of hearings for requests for all orders of protection, *see, e.g.*, Form 4-961 NMRA (Petition for order of protection from domestic abuse), Form 4-962A NMRA (Counter-petition for order of protection), Form 4-972 NMRA (Petition for emergency order of protection) and related proceedings, *see, e.g.*, Form 4-961B NMRA (Request for order to omit address and phone number of petitioner), but also for motions to enforce, modify or terminate orders of protection. *See* Form 4-968 NMRA (Application to modify, terminate or renew the order of protection).

The requirement in Paragraph C of Rule 1-053.1 NMRA that interviews with the petitioner be conducted on the record is taken from Subsection A, Paragraph (2) of Section 40-13-10 NMSA 1978.

Form of recommendations

Subparagraph (4) of Paragraph C of Rule 1-053.1 NMRA reflects current practice by providing that where court-approved forms are available, the domestic violence special commissioner will use the forms in preparing recommendations for the court. *See* Forms 4-961 to 4-974 NMRA.

See relevant committee comments to Rule 1-053.2 NMRA for discussion of other provisions in the 2006 amendments to Rule 1-053.1 NMRA.

ANNOTATIONS

Cross references. — For child support hearing officers, *see* Section 40-4B-4 NMSA 1978.

1-053.2. Domestic relations hearing officers; duties.

A. **Appointment.** Domestic relations hearing officers shall be at-will positions subject to the New Mexico Judicial Branch Policies for At-will Employees. Consistent with the authority set forth in this rule, domestic relations hearing officers may perform such duties as assigned by the judges of the district in domestic relations proceedings.

B. **Qualifications.** Any person appointed to serve as a domestic relations hearing officer shall have the same qualifications as provided in Section 40-4B-4 NMSA 1978 for a child support hearing officer.

C. **Duties.** A domestic relations hearing officer may perform the following duties in domestic relations proceedings:

(1) review petitions for indigency;

(2) conduct hearings on all petitions and motions, both before and after entry of the decree;

(3) in a child support enforcement division case, carry out the statutory duties of a child support hearing officer;

(4) carry out the statutory duties of a domestic violence special commissioner and utilize the procedures as set forth in Rule 1-053.1 NMRA;

(5) assist the court in carrying out the purposes of the Domestic Relations Mediation Act; and

(6) prepare recommendations for review and final approval by the court.

D. **Removal.** Upon motion of any party for good cause shown, or on the court's own motion, the court may remove the domestic relations hearing officer from acting in a proceeding.

E. **Authority.** The domestic relations hearing officer's recommendations shall not become effective until reviewed and adopted as an order of the court.

F. **Recommendations.** Within thirty (30) days after the conclusion of the proceedings, the domestic relations hearing officer shall file and submit to the court for review and approval the hearing officer's recommendations, including proposed findings and conclusions, and shall serve each of the parties with a copy together with a notice that specific objections may be filed within ten (10) days after service of the recommendations.

G. **Objections.** Any party may file timely objections to the domestic relations hearing officer's recommendations. Objections must identify the specific portions of the hearing officer's recommendations to which the party objects. The party filing objections shall promptly serve them on other parties.

H. **District court proceedings.** After receipt of the recommendations of the domestic relations hearing officer:

(1) **Review of recommendations**.

(a) The court shall review the recommendations of the domestic relations hearing officer and determine whether to adopt the recommendations.

(b) If a party files timely, specific objections to the recommendations, the court shall conduct a hearing appropriate and sufficient to resolve the objections. The hearing shall consist of a review of the record unless the court determines that additional evidence will aid in the resolution of the objections.

(c) The court shall make an independent determination of the objections.

(d) The court may adopt the recommendations, modify them, reject them in whole or in part, receive further evidence, or may recommit them to the domestic relations hearing officer with instructions.

(2) **Findings and conclusions; entry of final order.** After the hearing, the court shall enter a final order. When required by Rule 1-052 NMRA, the court also shall enter findings and conclusions.

I. **Child Support Hearing Officer Act.** The court and child support hearing officers acting pursuant to the Child Support Hearing Officer Act (Sections 40-4B-1 through 40-4B-10 NMSA 1978) and domestic relations hearing officers acting pursuant to Subparagraph (3) of Paragraph C of Rule 1-053.2 NMRA shall comply with this rule notwithstanding any contrary provision of the Child Support Hearing Officer Act.

J. **Limitations on private practice.** Full-time domestic relations hearing officers shall devote full time to domestic relations matters and shall not engage in the private practice of law or in any employment, occupation or business interfering with or inconsistent with the discharge of their duties. Part-time domestic relations hearing officers may engage in the private practice of law so long as in the discretion of the appointing judge it does not interfere with nor is inconsistent with the discharge of their duties as a domestic relations hearing officer and subject to the Code of Judicial Conduct rules enumerated in Paragraph K of this rule.

K. **Code of Judicial Conduct.** A domestic relations hearing officer is required to conform to Rules 21-100 through 21-500 NMRA and 21-700 NMRA of the Code of Judicial Conduct.

[Adopted, effective January 1, 1998; as amended by Supreme Court Order 06-8300-19, effective October 16, 2006.]

Committee Commentary for 2006 Amendment. —

Introduction

Child support hearing officers acting pursuant to the Child Support Hearing Officer Act, Sections 40-4B-1 to 40-4B-10 NMSA 1978, domestic relations hearing officers acting pursuant to Rule 1-053.2 NMRA, and domestic violence special commissioners acting pursuant to the Family Violence Protection Act, Sections 40-13-1 to 40-13-8 NMSA 1978, and Rule 1-053.1 NMRA, assist the court in carrying out its functions in certain

domestic relations matters. In *Lujan v. Casados-Lujan*, 2004-NMCA-036, 135 N.M. 285, 87 P.3d 1067, the Court of Appeals considered the appropriate division of responsibility between domestic violence special commissioners and the court. In *Buffington v. McGorty*, 2004-NMCA-092, 136 N.M. 226, 96 P.3d 787, the Court of Appeals addressed comparable issues concerning the constitutional requirements and appropriate procedures that should govern the relationship of the court to child support hearing officers and domestic relations hearing officers.

These amendments and the 2006 amendments to Rule 1-053.1 NMRA respond to the concerns addressed in *Lujan* and *Buffington* and address additional, related matters. To the extent appropriate, given the different but sometimes overlapping tasks assigned to the three different judicial officers, the committee sought to have the same provisions apply to child support hearing officers, domestic relations hearing officers and domestic violence special commissioners. For this reason, many of the committee comments contained here are equally applicable to the 2006 amendments to Rule 1-053.1 NMRA and will not be repeated as committee comments to that rule.

Child support hearing officers

The Legislature created the position of child support hearing officer. Section 40-4B-2 NMSA 1978. The statute provides that the hearing officers follow certain procedures in the course of their duties. *E.g.*, Section 40-4B-7 NMSA 1978. For two reasons, the committee recommended that child support hearing officers comply with Rule 1-053.2 NMRA rather than the Child Support Hearing Officer Act when the two conflict. First, Rule 1-053.2 NMRA domestic relations hearing officers sometimes perform a dual role in the same proceeding, acting both in their regular capacity and as child support hearing officers. *See* Rule 1-053.2(C)(3) NMRA. To assure consistency and efficiency, the officer should not have to follow different procedures in the same proceeding. Second, some of the procedural provisions of the Child Support Hearing Officer Act are of doubtful validity. *See Buffington v. McGorty*, 2004-NMCA-092, 136 N.M. 226, 96 P.3d 787. Paragraph I of Rule 1-053.2 NMRA therefore provides that when a hearing officer acts as a child support hearing officer, whether under authority granted by Section 40-4B-4 NMSA 1978 or by Rule 1-053.2(C)(3) NMRA, the hearing officer shall comply with the procedures set forth in Rule 1-053.2 NMRA where the rule and the Child Support Hearing Officer Act are inconsistent. *See Albuquerque Rape Crisis Center v. Blackmer*, 2005-NMSC-032, ¶ 5, 138 N.M. 398, 120 P.3d 820 (recognizing that the Supreme Court may exercise power of superintending control to revoke or amend statutory provisions that conflict with the court's procedural rules); *see also* Rule 1-091 NMRA; Section 38-1-1(A) NMSA 1978.

Removal of hearing officer

Each party may exercise a peremptory excusal of the district court judge assigned to a case. Rule 1-088.1 NMRA. There is no equivalent provision for peremptory excusal of a domestic relations hearing officer. In some judicial districts there is only one hearing officer and the use of peremptory challenges would cause undue administrative

difficulties. Peremptory challenges also might lead to severely unbalanced workloads where a judicial district has more than one hearing officer. For these reasons, the committee recommended that peremptory challenges not be available to remove hearing officers. Instead, Paragraph D of Rule 1-053.2 NMRA provides the court with broad discretion to remove a hearing officer from a case for good cause shown by a party, or on the court's own motion.

Authority of hearing officer

Although the hearing officer performs a critical function within the judiciary, hearing officers are not judges, do not wear robes and are not addressed as judge or your honor. Nonetheless, hearing officers are required to conform to the Code of Judicial Conduct and are entitled to the respect due all officers of the court as they assist the court in performing its core judicial function. It is a bedrock principle that "[t]he hearing officer assists the district court in determining the factual and legal issues, and the core judicial function is independently performed by the district judge." *Buffington v. McGorty*, 2004-NMCA-092, ¶ 31, 136 N.M. 226, 96 P.3d 787.

This principle was built into former Rule 1-053.2 NMRA, which provided that "all orders be signed by a district judge before the recommendations of a domestic relations hearing officer become effective." Paragraph C of Rule 1-053.2 NMRA (now superseded). The 2006 amendment carries forward the rule that hearing officer recommendations are not effective until "adopted as an order of the court," Paragraph E of Rule 1-053.2 NMRA, and makes explicit what was implicit in the superseded rule: The court must review the recommendations before entering an order. Paragraph E of Rule 1-053.2 NMRA. This provision is inconsistent with Subsection C of Section 40-4B-8 NMSA 1978, which provides that if the court fails to act upon the hearing officer's recommendation within fifteen days, the recommendations have the force of a court order even if not considered or signed by the court. Because child support hearing officers, those acting as child support hearing officers and the court now must comply with Rule 1-053.2 NMRA where inconsistent with the Child Support Hearing Officer Act, *see* Paragraph I of Rule 1-053.2 NMRA, that statutory provision is no longer valid.

Opportunity to object to recommendations of hearing officer

The former version of Rule 1-053.2 NMRA did not provide a means for a party who disagreed with the recommendations of the hearing officer to voice those objections to the judge who was to consider whether to adopt the recommendations. In *Buffington v. McGorty*, 2004-NMCA-092, ¶ 30, 136 N.M. 226, 96 P.3d 787, the Court of Appeals held that due process requires that a party have a meaningful opportunity to present objections to the court before the court enters an order based on the recommendations. The rule now provides that opportunity.

When the hearing officer presents the recommendations to the judge, the hearing officer must serve the parties with a copy of the recommendations and with a notice informing the parties that they may file objections with the court within ten (10) days of service of

the recommendations. Paragraph F of Rule 1-053.2 NMRA; *see Buffington v. McGorty*, 2004-NMCA-092, ¶ 30, 136 N.M. 226, 96 P.3d 787 (suggesting that ten days is an adequate time for filing objections).

Objections must be specific

The purpose of the objections is to focus the court's attention on areas of dispute concerning the recommendations. Objections should be sufficiently detailed to accomplish this purpose. General objections to the recommendations as a whole or objections that do not point out the nature of the party's disagreement with the recommendation will not suffice.

Review of recommendations

Unobjected-to recommendations

The court will review the recommendations and make an independent determination whether to adopt them even when no party presents specific objections. If the court agrees with the recommendations it shall enter an order consistent with them. If the court chooses not to adopt the recommendations, the court should consider returning the matter to the hearing officer for further proceedings. The court may instead modify or reject the recommendation and enter a different or contrary order from that recommended. When this is done, the court should consider whether it would be appropriate to give notice to the parties of the court's proposed action and order, thus allowing the parties an opportunity to present objections to the court's proposed order, even though the parties had no objection to the hearing officer's different recommendations. *Compare Buffington v. McGorty*, 2004-NMCA-092, ¶ 30, 136 N.M. 226, 96 P.3d 787 (due process requires a right to object to hearing officer's recommendations before adopted by court). If the court does not afford the parties the opportunity to view and object in advance of the entry of the court's modified or contrary order, a party may file a motion for reconsideration after the order is entered. Section 39-1-1 NMSA 1978; *see In re Keeney*, 121 N.M. 58, 60, 908 P.2d 751, 753 (1995).

Objected-to recommendations

When the court receives timely, specific objections, "[t]he district court must then hold a hearing on the merits of the issues before the court, including the hearing officer's recommendations and the parties' objections thereto." *Buffington v. McGorty*, 2004-NMCA-092, ¶ 31, 136 N.M. 226, 96 P.3d 787. Subparagraph (1)(b) of Paragraph H of Rule 1-053.2 NMRA mandates a hearing to consider the recommendations and the objections. The *Buffington* court noted that "[t]he nature of the hearing and review to be conducted by the district court will depend upon the nature of the objections being raised." *Id.* Subparagraph (1)(b) of Paragraph H of Rule 1-053 NMRA provides this flexibility but creates a presumption that the hearing will consist of a review of the record rather than a de novo proceeding. However, the court has discretion in all cases to determine that a different form of hearing take place, including a de novo proceeding at

which evidence is presented anew before the court, or a hearing partly on the record before the hearing officer and partly based on the presentation of new evidence not before the hearing officer. *See id.* The required hearing need not always consist of oral presentations before the court. When appropriate and sufficient to resolve the objections, the court may rely upon written presentations of the parties. *See National Excess Insurance Co. v. Bingham*, 106 N.M. 325, 327, 742 P.2d 537, 539 (Ct. App. 1987) (noting that summary judgment motions may be resolved without oral argument "when the opposing party has had an adequate opportunity to respond to movant's arguments through the briefing process.").

Entry of findings of fact and conclusions of law

As in any case tried without a jury, the court must enter findings of fact and conclusions of law when required to do so under the terms of Rule 1-052 NMRA.

Opportunity to submit objections to report required. — While this rule contains no express provision, due process requires that the parties be given a right to object to the report and recommendations of the hearing officer. Buffington v. McGorty, 2004-NMCA-092, 136 N.M. 226, 97 P.3d 787.

Hearing officers distinguished. — This rule and the Child Support Hearing Officer Act describe both material similarities and material differences between a domestic relations hearing officer and a child support hearing officer. Buffington v. McGorty, 2004-NMCA-092, 136 N.M. 226, 97 P.3d 787.

1-053.3. Guardians ad litem; contested custody appointments.

A. **Appointment.** In any proceeding when custody of a minor child is contested under Chapter 40, NMSA 1978 the court may appoint a guardian ad litem on the court's motion or upon the motion of any party, as set forth in this rule. The guardian ad litem serves as an arm of the court and assists the court in discharging its duty to adjudicate the child's best interests.

B. **Order.** The appointment order shall be written in substantial conformity with the form, if any, approved by the Supreme Court. The order shall specify the guardian ad litem's role, tasks, duties, any limitations, the reasons for the appointment and the duration of the appointment.

C. **Designation.** The guardian ad litem appointed under this rule is a "best interests attorney" who shall provide independent services to protect the child's best interests without being bound by the child's or either party's directive or objectives and who shall make findings and recommendations. This rule shall not limit the court's ability to appoint an expert pursuant to Rule 11-706 NMRA or a special master pursuant to Rule 1-053 NMRA.

D. **Prohibited delegation.** In no event shall the court delegate the ultimate determination of the child's best interests, unless the parties have agreed to arbitrate such issues under Section 40-4-7.2 NMSA 1978.

E. **Factors.** In determining whether an appointment will be made, the court may consider relevant factors, including:

(1) the wishes of the parents or other parties;

(2) the age of the child;

(3) the contentiousness of the parties or other dynamics affecting the child, including past or present mental health issues of a party or a household member;

(4) the extent to which the appointment will assist the court by providing factual information useful to the court in determining the child's best interest;

(5) the ability of the parties to pay;

(6) the views or concerns expressed by the child;

(7) the requests for extraordinary remedies, including supervised visitation;

(8) a proposed relocation;

(9) the likelihood that the child will be called as a witness or be examined by the court in chambers;

(10) past or present substance abuse, sexual abuse, emotional abuse or domestic abuse by, or to, a party, the child or a household member;

(11) disputes as to paternity;

(12) interference, or threatened interference, with custody or parenting time, including abduction;

(13) special physical, educational or mental health needs of the child;

(14) inappropriate adult influence on, or manipulation of, the child;

(15) the extent to which the litigation process is harmful to the child;

(16) whether the child's needs can be protected through the limitation of the appointment to a specific issue; and

(17) any other relevant factors.

F. **Duties.** The guardian ad litem shall have the following duties, in addition to other duties stated in the order:

(1) if the child is age six (6) or older, interviewing the child face-to-face outside the presence of both parents and counsel; interviewing both parents in conformity with Rule 16-402 NMRA; interviewing any therapist for the child after obtaining the necessary authorization for the release of information; interviewing other persons at the guardian ad litem's or court's discretion after obtaining any necessary authorizations for the release of information and reviewing relevant records;

(2) determining the child's wishes, if appropriate;

(3) serving a written report of investigation and separate written recommendations to all parties and counsel at least ten (10) days before the recommendations are filed with the court, except in the case of emergency; and

(4) filing the recommendations with the court.

G. **Guardian ad litem recommendations.**

(1) If the parties agree to adopt the guardian ad litem recommendations, they shall submit a stipulated order adopting the recommendations within ten (10) days after the recommendations are filed.

(2) If one or both of the parties does not agree to adopt the recommendations, such party may file objections to the recommendations and a request for hearing on the objections within ten (10) days after the recommendations are filed. Objections must identify the specific portions of the guardian ad litem's recommendations to which the party objects. The court will set a hearing on the objections.

(3) If no party files timely objections, the court shall enter an appropriate order.

H. **Duties to the child.** A guardian ad litem, in a manner appropriate to the child's developmental level, shall:

(1) explain the role of the guardian ad litem to the child;

(2) inform the child that, in providing assistance to the court, the guardian ad litem may use information that the child gives to the guardian ad litem;

(3) keep the child informed of the nature and status of the proceeding;

(4) review and accept or decline to accept any proposed stipulation for an order affecting the child and explain to the court the basis for any opposition; and

(5) consider the child's objectives in determining what to recommend.

I. **Confidential communications.** A guardian ad litem shall not disclose a child's confidential communications with the guardian ad litem except as permitted by the Rules of Professional Conduct for attorneys as if the child were in an attorney-client relationship with the guardian ad litem, but the guardian ad litem may use the child's communications for the purpose of performing the duties of a guardian ad litem without disclosing the communications.

J. **Witnesses.** The guardian ad litem may call and examine witnesses.

K. **Fees and costs.** The order shall state the guardian ad litem's authorized retainer and hourly rate, provide for itemized monthly statements to the parties, and designate the manner in which the parties bear the fees and costs. Either party or the guardian ad litem may request a hearing on the guardian ad litem fees and costs.

[Provisionally approved by Supreme Court Order 06-8300-18, effective August 21, 2006; as amended by Supreme Court Order 07-8300-21, effective August 21, 2007.]

ANNOTATIONS

The 2007 amendment, approved by Supreme Court Order 07-8300-21, effective August 21, 2007, amended Subparagraph (2) of Paragraph G to provide that objections to recommendations must be filed within ten (10) days after the recommendations are filed.

ARTICLE 7
Judgment

1-054. Judgments; costs.

A. **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master or the record of prior proceedings.

B. **Judgment upon multiple claims or involving multiple parties.**

(1) Except as provided in Subparagraph (2) of this paragraph, when more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims shall not terminate the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

(2) When multiple parties are involved, judgment may be entered adjudicating all issues as to one or more, but fewer than all parties. Such judgment shall be a final one unless the court, in its discretion, expressly provides otherwise and a provision to that effect is contained in the judgment. If such provision is made, then the judgment shall not terminate the action as to such party and shall be subject to revision at any time before the entry of judgment adjudicating all claims and the rights and liabilities of all the parties.

C. **Demand for judgment.** A judgment by default shall not be different in kind from or exceed the amount prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

D. **Costs.**

(1) **Costs other than attorney fees.** Except when express provision therefor is made either in a statute or in these rules, costs, other than attorney fees, shall be allowed to the prevailing party unless the court otherwise directs; but costs against the state, its officers and agencies shall be imposed only to the extent permitted by law.

(2) **Recoverable costs.** Costs generally are recoverable only as allowed by statute, Supreme Court rule and case law. The following costs generally are recoverable:

(a) filing fees;

(b) fees for service of summonses, subpoenas, writs and other service of process;

(c) jury fees as provided in Rule 1-038 NMRA;

(d) transcript fees including those for daily transcripts and transcripts of hearings prior or subsequent to trial, when requested or approved by the court;

(e) the cost of a deposition:

(i) if any part is used at trial; [or]

(ii) in successful support or defense of a motion for summary judgment pursuant to Rule 1-056 NMRA; or

(iii) when the court determines the deposition was reasonably necessary to the litigation;

(f) witness mileage or travel fare and per diem expenses, when the witness testifies at trial or at a deposition which is deemed reasonable and necessary, and as limited by Sections 38-6-4(A), 39-2-8, 39-2-9 and 39-2-10 NMSA 1978;

(g) expert witness fees for services as [limited] provided by Section 38-6-4(B) NMSA 1978 or when the court determines that the expert witness was reasonably necessary to the litigation;

(h) translator fees, when the translated document is admitted into evidence;

(i) reasonable expenses involved in the production of exhibits which are admitted into evidence;

(j) official certification fees for documents admitted into evidence; and

(k) interpreter fees for judicial proceedings and depositions.

(3) **Non-recoverable costs.** Unless specifically authorized by statute, Supreme Court rule or case law, the following costs generally are not recoverable:

(a) except as provided in Paragraph D(2)(i) of this rule, photocopying and other reproduction expenses;

(b) telephone expenses;

(c) facsimile expenses;

(d) courier service expenses;

(e) attorney mileage, travel fare and per diem expenses;

(f) paralegal and other support staff expenses;

(g) general office expenses; and

(h) legal research, including computer-assisted research.

(4) **Procedure for recovery of costs.** Within fifteen (15) days after filing of the final judgment, the party recovering costs shall file with the clerk of the district court an itemized cost bill, with proof of service of a copy on opposing counsel. Any party failing to file a cost bill within fifteen (15) days after the filing of the final judgment shall be deemed to have waived costs. If no objections are filed within ten (10) days after service of the cost bill, the clerk of the district court shall tax the claimed costs which are allowable by law. The judge shall settle any objections filed.

E. **Attorney fees.**

(1) Claims for attorney fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(2) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than fifteen (15) days after entry of judgment; must specify the judgment and the statute or other grounds entitling the moving party to the award; and must state the amount sought and the basis for the amount claimed.

(3) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. A judgment shall be prepared and entered as provided in Rule 1-058 NMRA.

F. **Applicability.** The provisions of this rule do not apply to claims for fees and expenses as sanctions.

[As amended, effective October 1, 1996; December 15, 1999; February 1, 2001; as amended by Supreme Court Order 08-8300-011, effective May 23, 2008.]

Committee commentary. — After the filing of the final judgment, upon request of the prevailing party, the clerk shall issue a transcript of judgment. Section 39-1-6 NMSA 1978.

ANNOTATIONS

Cross references. — For computation of time for periods ten (10) days or less and periods eleven (11) days or more, *see* Rule 1-006(A) NMRA.

For costs, *see* Sections 39-2-1 to 39-2-14 NMSA 1978.

The 1996 amendment, effective October 1, 1996, inserted "submissions" in the rule heading; in Paragraph A, added the language beginning "or, for the purposes of Paragraph B" at the end of the first sentence and added the last sentence; and rewrote Paragraph B and Subparagraphs B(1) and B(2).

The 1999 amendment, effective December 15, 1999, in Paragraph A, deleted "or, for the purpose of Paragraph B of this rule, any order that in effect stays proceedings or any part thereof until entered" in the first sentence; deleted the third sentence pertaining to " 'submission' as used in Paragraph B"; deleted Paragraph B, relating to the issuance of a judgment or order within 60 days of submission, renumbered Paragraphs C through E as present Paragraphs B through D; in Paragraph D, inserted the "(1)" designation, added the bold line "Costs other than attorney's fees" at the beginning, and deleted the last two sentences; and added Paragraphs D(2) through F.

The 2000 amendment, effective February 1, 2001, in Paragraph D(1), substituted "other than" for "but not" preceding "attorneys' fees" and deleted "as a matter of course" preceding "to the prevailing party"; rewrote Paragraph D(2) by adding in the costs that are generally recoverable; renumbered Paragraph D(3) as D(4); and added present Paragraph D(3), pertaining to non-recoverable costs.

The 2008 amendment, approved by Supreme Court Order 08-8300-011, effective May 23, 2008, added Item (iii) of Subparagraph (e) of Paragraph (2) of Subsection D and added the provision in Subparagraph (g) of Paragraph (2) of Subsection D that expert witness fees are recoverable when the court determines that the expert witness was reasonably necessary to the litigation.

Compiler's notes. — Paragraph D and Rule 1-027 are deemed to have superseded 105-1301, C.S. 1929, as amended by Laws 1933, ch. 16, § 1, which was substantially the same.

I. GENERAL CONSIDERATION.

Setoff was not precluded. — Where plaintiff, who purchased a commercial greenhouse operation to hydrophonically grow tomatoes, contracted with defendant for electrical power; the greenhouse was destroyed in a fire before plaintiff was able to plant its first crop; before the fire and without notifying plaintiff, defendant disconnected electrical power to the greenhouse for nonpayment of bills which prevented plaintiff from pumping water from its wells to quench the fire; plaintiff sued defendant for negligence; plaintiff's casualty insurer paid plaintiff for property damage and was made a party plaintiff in the case based on the insurer's subrogation rights; defendant settled with the insurer and the insurer released its claims against defendant and assigned its subrogation rights to defendant; and the district court allowed defendant a setoff of plaintiff's judgment against defendant in the amount of the insurer's payment to plaintiff, the collateral source rule did not apply to preclude the setoff. *Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc.*, 2011-NMCA-049, 149 N.M. 746, 255 P.3d 324, *cert. granted*, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

Express contract. — An express contract is to be enforced as written in regard to contractual obligations of the parties unless the court has determined that equity should override the express contract because of fraud, real hardship, oppression, mistake, unconscionable results, and the other grounds of righteousness, justice and morality. *Arena Res., Inc. v. OBO, Inc.*, 2010-NMCA-061, 148 N.M. 483, 238 P.3d 357.

Judgment granting equitable relief in action based on express contract. — Where plaintiff, who was the operating-interest owner, redeveloped an oilfield unit and sought reimbursement from defendant, who was a working-interest owner; plaintiff unilaterally redeveloped the unit without obtaining the consent of defendant as was required by the operating agreement of the parties; the redevelopment project increased oil and gas production, enhanced the unit, and netted favorable revenue consequences for defendant; although the district court concluded that plaintiff had breached the operating

agreement, the court granted judgment for plaintiff based on unjust enrichment; plaintiff's action was for breach of contract and to enforce a contractual lien; plaintiff never asserted a claim for unjust enrichment, the case was not tried on the theory of unjust enrichment, and plaintiff did not request findings of fact and conclusions of law on unjust enrichment; and the court never mentioned the existence of any evidence or entered any findings of fact that supported its conclusion of unjust enrichment or otherwise provided any basis for invoking the unjust enrichment theory in the face of the parties' express contract, the court was not permitted to exercise its equitable powers to grant plaintiff relief under the equitable unjust enrichment theory of recovery. *Arena Res., Inc. v. OBO, Inc.*, 2010-NMCA-061, 148 N.M. 483, 238 P.3d 357.

Jury award was not excessive. — Where plaintiff, who was employed as a drilling rig floorhand, was injured when a tool owned and operated by defendant blew apart and fractured plaintiff's femur; surgery was required to set the fracture; plaintiff also had muscle and soft tissue damage; plaintiff was in the hospital for eight days and suffered pain; a functional capacity evaluation showed that plaintiff was physically capable of returning to very heavy work, but would have difficulty performing the work of a floorhand, derrickman or operator due to pain and weakness; as a result of the accident, plaintiff postponed plaintiff's wedding for two years; plaintiff had difficulty engaging in activities plaintiff enjoyed with plaintiff's fiancé, friends and family and was no longer able to engage in outdoor activities; because of the injuries, plaintiff had to accept a lower-paying job and plaintiff's income declined by about $30,000 annually; the jury found defendant to be solely at fault and awarded plaintiff damages of $2.2 million; plaintiff's special damages related to plaintiff's medical bills and lost wages totaling approximately $100,000; plaintiff did not sustain permanent muscle damage or bone deformation to plaintiff's leg; plaintiff's future pain and suffering would be limited to a dull ache during wet and cold weather, treatable with little or no medication; and the highest estimate of plaintiff's future earnings was $600,000, the evidence justified the amount awarded and was not grossly out of proportion to the evidence. *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, 146 N.M. 853, 215 P.3d 791.

Extension of deadline. — Where plaintiff filed its bill of costs after the time limit of Rule 1-054 NMRA, but within the time limit of the applicable local district court rule, the time limits of Rule 1-054 NMRA control but the district court had discretion to extend the time for filing the bill of costs for excusable neglect. H-B-S Partnership v. Aircoa Hospitality Services, Inc., 2008-NMCA-013, 143 N.M. 404, 176 P.3d 1136.

Definition of "party". — These rules, as well as common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of a lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

Trial court is given large measure of discretion under this rule. Davis v. Severson, 71 N.M. 480, 379 P.2d 774 (1963).

Delay in entering judgment. — In an action for divorce the trial court's failure to enter judgment prior to the death of husband over four months after the case was heard

violated former Paragraph B(1) of this rule. State ex rel. Rivera v. Conway, 106 N.M. 260, 741 P.2d 1381 (1987).

Right to collateral attack. — Normal method of correcting trial errors, even as to constitutional questions, is by appeal, and collateral attack cannot serve as a substitute for the regular judicial process of appeal in the absence of circumstances indicating that a right to attack collaterally is needed to provide an effective means of preserving constitutional rights. State v. Garcia, 80 N.M. 21, 450 P.2d 621 (1969).

Appeal of jury verdict. — Where there is nothing in record indicating jury's verdict was result of mistake, passion, prejudice, sympathy or partiality, award will not be disturbed on appeal. Williams v. Yellow Checker Cab Co., 77 N.M. 747, 427 P.2d 261 (1967).

In awarding damages for pain and suffering or permanent injury to health, amount of awards necessarily rests with good sense and deliberate judgment of tribunal assigned by law to ascertain what is just compensation, and, in the final analysis, each case must be decided on its own facts and circumstances. Powers v. Campbell, 79 N.M. 302, 442 P.2d 792 (1968).

Excessive verdict. — Proof that there has been no present or future loss of earnings does not in itself make verdict excessive. Williams v. Yellow Checker Cab Co., 77 N.M. 747, 427 P.2d 261 (1967).

II. FINAL JUDGMENT.

A. IN GENERAL.

Motion to dismiss for lack of necessary, indispensable party. – Where the only order certified by the district court as a final order was the district court's order granting defendant's motion for summary judgment, the defendant's motion to dismiss the plaintiff's complaint for failure to name a necessary, indispensable party was not before the appellate court for review. Wood v. Cunningham, 2006-NMCA-139, 140 N.M. 699, 147 P.3d 1132, cert. denied, 2006-NMCERT-011.

Purpose of rule. — This rule was adopted, not to prevent piecemeal appeals, but to permit them under certain circumstances even though a judgment technically lacked finality. Central-Southwest Dairy Coop. v. American Bank of Commerce, 78 N.M. 464, 432 P.2d 820 (1967); Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

Where issues remained outstanding in case involving arbitration clause, court order was not final. Systems Technology, Inc v. Hall, 2004-NMCA-130, 136 N.M. 548, 102 P.3d 107.

Implementation of 40-4-7 A NMSA 1978. — Paragraph E of this rule and Rule 1-127 NMRA appear to implement 40-4-7 A NMSA 1978. Bursum v. Bursum, 2004-NMCA-133, 136 N.M. 584, 102 P.3d 651.

Decision to make judgment final and appealable is for trial court. Central-Southwest Dairy Coop. v. American Bank of Commerce, 78 N.M. 464, 432 P.2d 820 (1967).

Judgment lacking decretal language not final, appealable order. — Court "order" that made numerous findings of fact and rulings of law, including a finding that mother was entitled to child support payments and costs from father, but which failed to specifically order that judgment be entered for mother, and did not contain the signatures or initials of the parties' attorneys, was not a final, appealable order because of its lack of decretal language. Khalsa v. Levinson, 1998-NMCA-110, 125 N.M. 680, 964 P.2d 844.

Nondecretal order held to be incurable. — While lack of decretal language can sometimes be cured by remand to make an order final, it was impossible to do so where the trial judge was no longer serving on the bench and numerous unresolved issues relating to each claim of relief were intertwined with the court's findings. Khalsa v. Levinson, 1998-NMCA-110, 125 N.M. 680, 964 P.2d 844.

Court letter describing marital property not appealable order. — Trial court's letter informing the parties that the husband's certified public accountant business would be characterized as a community asset was not a final order from which the husband could appeal. Mitchell v. Mitchell, 104 N.M. 205, 719 P.2d 432 (Ct. App. 1986).

Dismissal without prejudice is not final order and is not appealable. Ortega v. Transamerica Ins. Co., 91 N.M. 31, 569 P.2d 957 (Ct. App. 1977); Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

As the effect of a dismissal without prejudice implies further proceedings. Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

Appealability of summary judgments. — Where one plaintiff and one defendant are involved, summary judgment is a final judgment and appealable. Mabrey v. Mobil Oil Corp., 84 N.M. 272, 502 P.2d 297 (Ct. App.), cert. denied, 83 N.M. 740, 497 P.2d 742 (1972).

Summary judgment was not an appealable order when rendered because there was not express determination making it a final judgment; however, it became an appealable final judgment upon the entry of the judgment. Mabrey v. Mobil Oil Corp., 84 N.M. 272, 502 P.2d 297 (Ct. App.), cert. denied, 83 N.M. 740, 497 P.2d 742 (1972).

Where a summary judgment adjudicates all of plaintiffs' claims against the defendant and does not provide that it is not final, then the summary judgment is an appealable

final judgment under this rule. Stotlar v. Hester, 92 N.M. 26, 582 P.2d 403 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Judgment on directed verdict. — Where, in entering judgment on directed verdict, trial court does not make an express determination and does not give an express direction, it retains jurisdiction to revise the judgment at any time before entry of judgment adjudicating all the claims, and because power to alter judgment is reserved, judgment is not one that practically disposes of the merits of the action, and judgment is not appealable. Nichols v. Texico Conference Ass'n of Seventh Day Adventists, 78 N.M. 310, 430 P.2d 881 (Ct. App. 1967).

Dismissal of a third cause of action, where the trial court found for the intervenors, was partial but final judgment under this rule. State ex rel. Overton v. State Tax Comm'rs, 80 N.M. 780, 461 P.2d 913 (1969).

Judgment directed on order to dismiss counterclaim was final and appealable under Subdivision (b), where order recited no reason to delay entry of order and directed that judgment should be entered. Mutual Bldg. & Loan Ass'n v. Fidel, 78 N.M. 673, 437 P.2d 134 (1968).

Judgment final even though cost determination pending. — The pendency of a proceeding solely to determine the amount of costs does not render an otherwise final judgment nonfinal. Schleft v. Board of Educ., 107 N.M. 56, 752 P.2d 248 (Ct. App. 1988).

Interlocutory judgment. — Where further action of trial court is necessary to complete relief contemplated, judgment is interlocutory only and in such cases, supreme court lacks jurisdiction to consider the appeal. Carpenter v. Merrett, 82 N.M. 185, 477 P.2d 819 (1970).

Default judgment entered against one of two defendants under former version of this rule, where no express determination was made that there was no just cause for delay (as was required prior to 1973 amendment in cases involving multiple parties), was interlocutory, and could be set aside or affirmed in the judicial discretion of the trial court, since the issue of a meritorious defense was only applicable where defendant sought to set aside final judgment under Rules 55(c) and 60(b) (see now Rules 1-055 and 1-060). Brown v. Lufkin Foundry & Mach. Co., 83 N.M. 34, 487 P.2d 1104 (Ct. App. 1971).

When final distribution has not been made of funds adjudged to be paid, the judgment recites that it is a "partial" judgment, and there is a total absence of an "express direction" that the judgment should be filed, the judgment is not final and appealable. Central-Southwest Dairy Coop. v. American Bank of Commerce, 78 N.M. 464, 432 P.2d 820 (1967).

Order setting aside and holding for naught a default judgment is a "final judgment" and appealable, as is an order overruling defendant's motion to set aside a default judgment. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Subfile orders are final. — A subfile order, which is an adjudication of water rights as between the state and the applicant only, of all water rights issues between the state and the applicant may be given the presumption of finality accorded adjudications involving "multiple parties" under Paragraph B(2). State ex rel. State Eng'r v. Parker Townsend Ranch Co., 118 N.M. 780, 887 P.2d 1247 (1994).

The state is precluded from challenging the provisions of a subfile order it agreed to and requested the court to enter unless the state moves to amend such order under Rule 1-060B NMRA. State ex rel. Martinez v. Parker Townsend Ranch Co., 118 N.M. 787, 887 P.2d 1254 (Ct. App. 1992).

Decree followed by supplemental final order not appealable. — In absence of express determination that there was no just reason for delay, court's final decree in quiet title suit involving multiple claims was not appealable, where it was followed by supplemental final order awarding certain tracts, excluding certain property awarded in prior decree, and finalizing determination of overlap. Leal v. Leal, 82 N.M. 263, 479 P.2d 767 (1970).

Judgment entered in a quiet title action was a final appealable order where it settled claims between plaintiff and two defendants and where a determination of lien rights of other defendants involving the subject property would not affect the respective claims between plaintiff and the former defendants. Tres Ladrones, Inc. v. Fitch, 1999-NMCA-076, 127 N.M. 437, 982 P.2d 488, cert. denied, 127 N.M. 391, 981 P.2d 1209 (1999).

Order of judicial sale not appealable. — An order granting defendant's Rule 60(b) (see now Rule 1-060 NMRA) motion and ordering a judicial sale was not a final, appealable order, where further action was contemplated by the trial court, i.e., the foreclosure and sale of a vehicle and a determination of the method of distributing the proceeds of the sale. Waisner v. Jones, 103 N.M. 749, 713 P.2d 565 (Ct. App. 1986), rev'd on other grounds, 107 N.M. 260, 755 P.2d 598 (1988).

Appellate court may dismiss defective appeal on own motion. — Even in the absence of a challenge to the sufficiency of an interlocutory appeal, an appellate court will on its own motion dismiss a defective appeal on jurisdiction grounds. Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

And court looks to substance of judgment in making determination. — In determining whether there is a final judgment or order, the appellate court looks to the substance, and not to the form, of the judgment or order. Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

Right to appeal lost by acquiescing in judgment. — When defendant consented to the entry of summary judgment against him, he thereby acquiesced in the judgment and lost his right to appeal. It follows that, since the purpose of this rule is to give notice to a party that a judgment or order is "final," so as to allow immediate appeal, its provisions never became applicable, and defendant could not be heard to complain that requirements of the rule were not satisfied. Gallup Trading Co. v. Michaels, 86 N.M. 304, 523 P.2d 548 (1974).

B. MULTIPLE CLAIMS.

Discretion of court. — The determination of whether there is no just reason for delay lies in the sound discretion of the trial court, and the trial court's determination will not be disturbed absent an abuse of discretion. Navajo Ref. Co. v. Southern Union Ref. Co., 105 N.M. 616, 735 P.2d 533 (1987); Roselli v. Rio Communities Serv. Station, Inc., 109 N.M. 509, 787 P.2d 428 (1990).

The trial court should not certify judgments for immediate appeals merely to put off further work on a case or to accommodate counsel's wishes; in a close case, the trial court should decide against certifying a judgment for immediate appeal. Sundial Press v. City of Albuquerque, 114 N.M. 236, 836 P.2d 1257 (Ct. App. 1992).

Discretion abused where conflicting claims unresolved. — Trial court abused its discretion in finding that there was no just reason for delay of entry of judgment, where although the claims and counterclaims asserted by the parties were intertwined in many respects, several conflicting claims remained unresolved. Banquest/First Nat'l Bank v. LMT, Inc., 105 N.M. 583, 734 P.2d 1266 (1987).

Adjudication of less than all claims. — Under the rule, where action involves multiple claims, an order or decision is not final if it adjudicates less than all of the claims in the action, unless the trial court makes (1) an express determination that there is no reason for delay, and (2) an express direction for entry of judgment. Absent such express determination and order, a multiple claims action is treated in its entirety as a single judicial unit, and the adjudication of one or more of such multiple claims, but less than all of them, is not a final judgment or order, and therefore, is not appealable. Aetna Cas. & Sur. Co. v. Miles, 80 N.M. 237, 453 P.2d 757 (1969).

Where there were multiple claims and no determination by the court making summary judgment final as to two defendants, court retained jurisdiction and had authority to revise it at any time before entry of judgment adjudicating the last of the multiple claims. Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968).

This rule scrupulously recognizes statutory requirement of a final decision before appellate court can exercise its jurisdiction. Judgment or order entered on fewer than all claims asserted against a party, absent express determination by the court that there is no just reason for delay, is not a final order and hence not appealable. Ortega v. Transamerica Ins. Co., 91 N.M. 31, 569 P.2d 957 (Ct. App. 1977).

Where judgment was entered in favor of lien-claimants, but plaintiff 's claim was undetermined, judgment appeared to be one entered upon fewer than all of the claims and not upon the express determination that there was no just reason for delay, it was not a final judgment from which an appeal will lie to supreme court. Mock Homes, Inc. v. Wakely, 82 N.M. 179, 477 P.2d 813 (1970).

Trial Court properly denied plaintiff's motion to reopen judgment on theory that previous court's order dismissing plaintiff's claim with prejudice affected fewer than all claims presented and adjudicated issues pertaining to fewer than all parties, since previous court's order covered all claims of all parties. Marquez v. Tome Land & Imp. Co., 86 N.M. 317, 523 P.2d 815 (Ct. App. 1974).

Final property judgment in petition for dissolution of marriage was not final so as to allow appellate review where court failed to determine parties' rights to custody, support and visitation of minor children, as requested by pleading, and failed to determine that there was no just reason for delay before its decision would be final enough to allow appellate review. Thornton v. Gamble, 101 N.M. 764, 688 P.2d 1268 (Ct. App. 1984).

An order that adjudicates fewer than all the claims between the parties is not final. High Ridge Hinkle Joint Venture v. City of Albuquerque, 119 N.M. 29, 888 P.2d 475 (Ct. App. 1994), aff'd, 123 N.M. 394, 940 P.2d 1189 (1997).

Although a court may enter a final appealable judgment as to fewer than all of the counts in a petition, it can do so only upon an express determination that there is no just reason for delay. High Ridge Hinkle Joint Venture v. City of Albuquerque, 119 N.M. 29, 888 P.2d 475 (Ct. App. 1994), aff'd, 123 N.M. 394, 940 P.2d 1189 (1997).

An order that sends some of the claims to arbitration and retains other claims for resolution by the district court without finally resolving any of the claims between the parties is not final unless the district court certifies it under Subparagraph (1) of Paragraph B of this rule by determining that there is no just reason for delay and directing that judgment be entered. Collier v. Pennington, 2003-NMCA-064, 133 N.M. 728, 69 P.3d 238.

What constitutes separate claim. — To determine the existence of separate claims, the trial court should use a modified transaction oriented analysis. The Court should take into account whether the claims seek the same result, arise out of a common factual nucleus, and whether the claims are so inextricably intertwined that difficulties would result if appealed separately. Sundial Press v. City of Albuquerque, 114 N.M. 236, 836 P.2d 1257 (Ct. App. 1992).

An order disposing of the issues contained in the complaint but not the counterclaim is not a final judgment. Watson v. Blakely, 106 N.M. 687, 748 P.2d 984 (Ct. App. 1987), overruled on other grounds, Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 824 P.2d 1033 (1992).

Term “claim” as used in Paragraph B of this rule has a technical meaning that is determined by a modified transaction-oriented analysis and thus cannot be treated as synonymous with “cause of action.” Collier v. Pennington, 2003-NMCA-064, 133 N.M. 728, 69 P.3d 238.

Claim must be disposed of by judgment. — Findings and conclusions which dispose of a claim, but which are not carried forward and incorporated in the judgment, generally have no effect. Watson v. Blakely, 106 N.M. 687, 748 P.2d 984 (Ct. App. 1987), overruled on other grounds, Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 824 P.2d 1033 (1992).

Dismissal of issue affecting claims. — The court's denial of a motion to dismiss was not a final appealable judgment as to any of plaintiffs' or defendant's claims. The order did not dismiss any of those claims, but merely disposed of an issue affecting those claims. Accordingly, the defendant's later appeal from the denial of the motion was neither waived nor untimely. Blea v. Sandoval, 107 N.M. 554, 761 P.2d 432 (Ct. App. 1988).

Paragraph B(1) cannot be used to sanction the appeal of a partial adjudication of a single claim or claims. Graham v. Cocherell, 105 N.M. 401, 733 P.2d 370 (Ct. App. 1987).

Decision that is "final" within Paragraph B(1) does not necessarily mean last order possible in a case; whether a decision is final may be at times a close question, since it is difficult to devise a formula to resolve all marginal issues coming within the scope of finality. Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

Judgment not "final" unless all necessary issues determined. — A judgment or order is not "final" unless all the issues of law and of fact necessary to be determined have been determined, and the case has been completely disposed of so far as the court has the power to dispose of it. Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

Where court's order granting summary judgment dismissed all claims directed by plaintiffs, it was a final order. Sam v. Estate of Sam, 2004-NMCA-018, 135 N.M. 101, 84 P.3d 1066.

Order is fatally defective as a final order where: (1) it was entered "without prejudice"; and (2) it failed to contain a determination by the trial court that there is no just reason for delay in the prosecution of the appeal. Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

Final judgment order held erroneous. — Trial court abused its discretion in making a determination that there was no just reason to delay entering final judgment, where the issues determined by a summary judgment and some of unadjudicated issues were

interrelated and, because of the numerous claims and counterclaims, the amounts which might ultimately be owned after setoff were uncertain. Navajo Ref. Co. v. Southern Union Ref. Co., 105 N.M. 616, 735 P.2d 533 (1987).

This rule was held inapplicable where trial court, in rendering default judgment for plaintiff, held in abeyance the matter of any other damages to which plaintiffs were entitled against the defendant until trial of the issues between plaintiffs and the other defendant. Chronister v. State Farm Mut. Auto. Ins. Co., 67 N.M. 170, 353 P.2d 1059 (1960).

Summary judgment order, authorizing amendment to counterclaim, not final. — Although summary judgment disposed of all issues in connection with original complaint and counterclaim, where the same order authorized defendant to amend the counterclaim, "all" claims were not disposed of so that it was not a final judgment. City of Albuquerque v. Jackson, 101 N.M. 457, 684 P.2d 543 (Ct. App. 1984).

Appellate review of certification for immediate appeal. — Appellate review of the trial court's discretion in certifying an immediate appeal is to assure that the trial court considers appropriate factors in certifying that there is no just reason to delay finality of a claim; the question is whether the trial court's consideration of the appropriate factors was reasonable in light of the policies of the applicable rule. Sundial Press v. City of Albuquerque, 114 N.M. 236, 836 P.2d 1257 (Ct. App. 1992).

C. MULTIPLE PARTIES.

Final order as to one plaintiff. — Where both plaintiffs were parties to counts I through III of the complaint; plaintiff Bigbyte was not a party to count IV; the parties dismissed count III; the district court granted summary judgment against plaintiffs on counts I and II; count IV remained pending before the district court; and the district court's summary judgment provided that the summary judgment did not practically dispose of the merits of the case, but did finally dispose of the claims raised in counts I and II; that the summary judgment involved a controlling question of law as to which there was a substantial ground for differences of opinion, and that "an immediate appeal from the summary judgment may materially advance the ultimate termination of litigation and there is no just cause for delay"; the summary judgment was a final judgment as to Bigbyte because all of Bigbyte's claims had been disposed of, and the summary judgment did not contain express language stating that the summary judgment was not a final order as to Bigbyte. *Santa Fe Pac. Trust, Inc. v. City of Albuquerque,* 2012-NMSC-028, 285 P.3d 595.

Final order. — Where the court adjudicated all issues regarding one of the defendants when it entered its order to dismiss on December 10, 2003, as that defendant had not filed a counterclaim against plaintiff, and the court's dismissal of plaintiff's amended complaint resolved all the claims involving the defendant, pursuant to Paragraph B(2) of this rule, the December 10 order was final as to that defendant. Healthsource, Inc. v. X-

Ray Associates, 2005-NMCA-097, 138 N.M. 70, 116 P.3d 861, cert. denied, 2005-NMCERT-007.

In personal injury suit against two defendants, if determination of the issues relating to one defendant will or may affect the determination of the issues relating to another defendant, the judgment in favor of the first is not appealable under Rule 3, N.M.R. App. P. (Civ.) (see now Rules 12-201 and 12-203 NMRA), and if such interrelationship exists, there is but one claim against both defendants and if there is but one claim, the judgment in favor of the first defendant is neither a final judgment on that claim nor an interlocutory order which practically disposes of the merits of the action. Nichols v. Texico Conference Ass'n of Seventh Day Adventists, 78 N.M. 310, 430 P.2d 881 (Ct. App. 1967).

Default judgment awarding damages on negligence complaint invalid. — Where a complaint alleges that two employees and, vicariously, their employer were negligent and the employees fail to answer the complaint, a default judgment is valid as to the issue of the employees' liability, but invalid insofar as it awards damages. United Salt Corp. v. McKee, 96 N.M. 65, 628 P.2d 310 (1981).

And default judgment absent notice and hearing not final adjudication. — A default judgment, absent notice and hearing or an opportunity to be heard, is not an adjudication of all issues as intended by Paragraph B(2). United Salt Corp. v. McKee, 96 N.M. 65, 628 P.2d 310 (1981).

Uninjured defendant cannot appeal default judgment against other defendants. — Where there is no substantial reason for believing that a defendant will be prejudiced or injured by a final default judgment entered in error against other defendants, the defendant has no standing to appeal that judgment. McKee v. United Salt Corp., 96 N.M. 382, 630 P.2d 1237 (Ct. App. 1980), aff'd in part, rev'd on other grounds, 96 N.M. 65, 628 P.2d 310 (1981).

And even where judgment may affect remaining defendants' liability, decision not reversed. — Where the trial court has entered a final default judgment against some but not all of the defendants, the determination is technically erroneous where it will or may affect the liability of the remaining defendants. A reviewing court will not reverse the trial court's decision, however, in the absence of an abuse of discretion, when there are sound judicial reasons for the decision. McKee v. United Salt Corp., 96 N.M. 382, 630 P.2d 1237 (Ct. App. 1980), aff'd in part, rev'd on other grounds, 96 N.M. 65, 628 P.2d 310 (1981).

Judgment dismissing all claims of one party is final at that time, and such party cannot wait until the remaining claims are concluded before appealing. Seaboard Fire & Marine Ins. Co. v. Kurth, 96 N.M. 631, 633 P.2d 1229 (Ct. App. 1980).

Order holding parties jointly and severally liable. — Order entered in show cause hearing, because of attorney's and client's failure to obey court order in main action,

which held attorney and client jointly and severally liable for attorney's fees, was final judgment appealable under Rule 3 (a)(1), N.M.R. App. P. (Civ.) (see now Rules 12-201 and 12-203 NMRA) as to attorney since proceeding against him was independent of main action. Although order, as to client, was not viewed as having been entered in proceeding independent of main action, since no final judgment has been entered against client nor have all issues been decided against client in main action, since it was joint and several, it was held appealable on same basis as order against attorney. Miller v. City of Albuquerque, 88 N.M. 324, 540 P.2d 254 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Interlocutory nature of order dismissing third party defendants. — Trial court's order granting dismissal of third party defendants which defendants sought to implead was interlocutory in nature if not in form, since the trial court had implicitly ruled that defendant's answer raised an adequate defense. Wilson v. Gillis, 105 N.M. 259, 731 P.2d 955 (Ct. App. 1986).

Supplemental order as to third-party plaintiffs, defendants. — Before 1973 amendment to this rule, which changed procedure involving multiple parties, supplemental order and judgment granted third-party plaintiff against third-party defendant, reducing previous judgment, was not appealable as final judgment absent express determination that there was no just reason for delay and direction for entry of final judgment. Voison v. Kantor, 81 N.M. 560, 469 P.2d 709 (1970).

Order setting aside default judgment as to one of two defendants is final and appealable under this rule. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

"No just reason for delay". — Paragraph B(2), unlike Paragraph B(1), does not require that the trial court expressly find there is "no just reason for delay". Rivera v. King, 108 N.M. 5, 765 P.2d 1187 (Ct. App. 1988).

III. DEMAND FOR JUDGMENT.

Relationship between prayer for relief and cause of action. — While a prayer for relief may be helpful in specifying the contentions of the parties, it forms no part of the pleader's cause of action, and the prevailing party should be given whatever relief he is entitled to under the facts pleaded and proved at trial. Lett v. Westland Dev. Co., 112 N.M. 327, 815 P.2d 623 (1991).

Relationship between pleadings and recovery. — Judgment may not grant relief which is neither requested by the pleadings nor within the theory on which the case was tried. Holmes v. Faycus, 85 N.M. 740, 516 P.2d 1123 (Ct. App. 1973).

Judgment may not grant relief which is neither requested by the pleadings nor within the theory on which the case was tried. Federal Nat'l Mtg. Ass'n v. Rose Realty, Inc., 79 N.M. 281, 442 P.2d 593 (1968).

Divorce decree granting wife as alimony the difference between value of the community property which she received and the value of the community property which the husband received was affirmed, despite the fact that alimony was not demanded in the wife's petition as required by Paragraph C in judgment by default, since essential nature of decree was an equitable division of the community property of the parties, for which the wife had petitioned. Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1976).

Recovery should be allowed on quantum meruit even though suit was originally framed on express contract; amendment to pleadings should be freely allowed to accomplish that purpose at any stage of the proceeding, including considering the pleadings amended to conform to the proof. State ex rel. Gary v. Fireman's Fund Indem. Co., 67 N.M. 360, 355 P.2d 291 (1960).

Although a plaintiff did not request a deficiency judgment in her pleadings, the district court did not exceed the scope of the pleadings when it awarded a deficiency judgment against the defendants should the sale of the corporate assets in issue not fully satisfy the judgment. Wilburn v. Stewart, 110 N.M. 268, 794 P.2d 1197 (1990).

The pleadings are not dispositive of the issues, and recovery may be found on other grounds not specifically stated in the complaint. Farmers, Inc. v. Dal Mach. & Fabricating, Inc., 111 N.M. 6, 800 P.2d 1063 (1990).

Amendment of plaintiff's pleadings after default. — This rule is derived from Rule 54(c), Federal Rules of Civil Procedure, and refers to problems of amending pleadings in a default judgment. The statute applies to the situation in which an action is commenced, default occurs and the plaintiff subsequently amends his pleadings. Under these circumstances, no default judgment can be entered unless the defendant is notified of the amended pleading. Richins v. Mayfield, 85 N.M. 578, 514 P.2d 854 (1973).

Notice of amendment of pleadings. — Neither this rule nor Rule 5 (a) (see now Rule 1-005 NMRA), pertaining to service of pleadings, entitles defendant to notice that pleadings have been amended to allege gross negligence rather than negligence against defendant where there was no showing that the damages rested upon this charge and no relief was sought from the damages. Gurule v. Larson, 78 N.M. 496, 433 P.2d 81 (1967).

Possession of land preceding default judgment. — Where default judgment was not changed in kind or exceeded by the trial court's later action, nor did plaintiff attempt to substantially amend his pleadings, and as trial court did not grant plaintiff-appellee possession of the partnership land since possession already had occurred, this rule does not apply. Richins v. Mayfield, 85 N.M. 578, 514 P.2d 854 (1973).

Award of prejudgment interest. — The district court may grant an award of prejudgment interest even if the party entitled to recover has not included a demand for

such relief in his pleadings. Foster v. Luce, 115 N.M. 331, 850 P.2d 1034 (Ct. App. 1993).

An award of prejudgment interest will not be precluded merely because a party fails to request specifically such an award. Taylor v. Allegretto, 118 N.M. 85, 879 P.2d 86 (1994).

IV. COSTS.

Summary judgment. — Where defendants obtained summary judgment in a toxic tort action, defendants were entitled to recover expert witness fees for witnesses whose affidavits and testimony were material to the award of summary judgment for defendants and to the exclusion of the testimony of plaintiff's expert witnesses and whose testimony was not cumulative. *Andrews v. U.S. Steel Corp.*, 2011-NMCA-032, 149 N.M. 461, 250 P.3d 887.

Attorney fees. — Where plaintiff was successful on certain claims brought against defendant, but was not successful on an Unfair Trade Practices Act claim; the court ruled that defendant was only entitled to attorney fees incurred in defending the Unfair Trade Practices Act claim; and defendant did not identify what portion of defendants' attorney fees were attributable to defending the Unfair Trade Practices Act or demonstrate that it was difficult or impossible to segregate the work of defending the Unfair Trade Practices Act claim from plaintiff's other claims, the court did not abuse its discretion in ruling that defendant was not entitled to any attorney fees. *Dean v. Brizuela*, 2010-NMCA-076, 148 N.M. 548, 238 P.3d 917.

Not applicable in administrative hearings. — Rule 1-054 NMRA does not govern the award of costs in an administrative disciplinary action under the Uniform Licensing Act. N.M. Bd. of Veterinary Medicine v. Riegger, 2006-NMCA-069, 139 N.M. 679, 137 P.3d 619, cert. granted, 2006-NMCERT-006.

1999 amendment inapplicable. — Where an amendment to the Rules of Civil Procedure, approved by the Supreme Court on October 27, 1999, was effective for cases filed on or after December 15, 1999, because plaintiffs filed an action in November, 1998, amended Paragraph D(2)(g) of this rule would not apply. Fernandez v. Espanola Public School Dist., 2004-NMCA-068, 135 N.M. 677, 92 P.3d 689, cert. granted, 2004-NMCERT-006.

Paragraph D and Rule 1-068 NMRA. — A plaintiff who recovers a judgment is the prevailing party and entitled to recover his or her costs, at least as incurred before the defendant makes a Rule 1-068 NMRA offer of judgment. Dunleavy v. Miller, 116 N.M. 353, 862 P.2d 1212 (1993).

Paragraph D does not apply when statute expressly provides for award of costs. — The trial court did not err in making an award of costs without notice to defendants pursuant to Paragraph D, since that paragraph, by its own terms, does not apply when a

statute expressly provides for an award of costs. Paternoster v. La Cuesta Cabinets, Inc., 101 N.M. 773, 689 P.2d 289 (Ct. App. 1984).

Paragraph D(2) correctly sets out the law relating to recoverable costs of expert witnesses. Fernandez v. Espanola Pub. Sch. Dist., 2005-NMSC-026, 138 N.M. 283, 119 P.3d 163.

Costs are defined as "statutory allowance to a party for his expenses incurred in an action." Mills v. Southwest Bldrs., Inc., 70 N.M. 407, 374 P.2d 289 (1962).

"To the prevailing party" defined. — The phrase "to the prevailing party" in Paragraph D means the party who wins the lawsuit. South v. Lucero, 92 N.M. 798, 595 P.2d 768 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

The threshold question in determining if a party is entitled to an award of costs under Paragraph D is whether the party requesting costs is the prevailing party; the prevailing party is the party who wins the lawsuit; that is, a plaintiff who recovers a judgment or a defendant who avoids an adverse judgment. Marchman v. NCNB Tex. Nat'l. Bank, 120 N.M. 74, 898 P.2d 709 (1995).

Plaintiff who won judgment less than that proffered by defendant was nonetheless the "prevailing party" and entitled to costs from defendant. Gilmore v. Duderstadt, 1998-NMCA-086, 125 N.M. 330, 961 P.2d 175.

One recovering judgment, but reduced in amount by damages awarded in recoupment, was the prevailing party and should recover costs under former law. State Trust & Sav. Bank v. Hermosa Land & Cattle Co., 30 N.M. 566, 240 P. 469 (1925).

Costs awarded to party supporting valuation determined by court. — Where central issue is valuation of plaintiff's interest in an LLC and where trial court entered judgment for plaintiff on the amount defendant agreed was the value of plaintiff's interest, rather than on higher amount claimed by plaintiff, defendant was the prevailing party for purpose of awarding costs to defendant. Mayeux v. Winder, 2006-NMCA-028, 139 N.M. 235, 131 P.3d 85.

Costs against state allowed under 39-3-30 NMSA 1978. — The legislature, in 39-3-30 NMSA 1978, gives express authority, without exception, to the recovery of costs against any losing party, including the state. Kirby v. New Mexico State Hwy. Dep't, 97 N.M. 692, 643 P.2d 256 (Ct. App. 1982).

Application to supreme court. — Section 105-1301, C.S. 1929, regarding costs, applied to supreme court as well as to the district court, at least insofar as actions at law were concerned. King v. Tabor, 15 N.M. 488, 110 P. 601 (1910).

Mediation costs not recoverable. — Where mediation is conducted pursuant to agreement of the parties, not by order of the court, the expense of the mediator's fee

should not be a recoverable cost, absent an enforceable agreement permitting such award. Smith v. Village of Ruidoso, 1999-NMCA-151, 128 N.M. 470, 994 P.2d 50.

Matter of costs was in discretion of the court under former law. State ex rel. Stanley v. Lujan, 43 N.M. 348, 93 P.2d 1002 (1939).

Supreme court had discretion in assessing costs under former law but, in law actions at least, district court was required to award costs in favor of the prevailing party. Frank A. Hubbell Co. v. Curtis, 40 N.M. 234, 58 P.2d 1163 (1936).

Under this rule, trial court is given large measure of discretion in allowing costs and this includes cost of depositions, if the taking of the deposition was reasonably necessary, even though it was not used at the trial. Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972).

Matter of assessing costs lies within discretion of trial court, and appellate court will not interfere with trial court's exercise of this discretion in this regard. Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379 (Ct. App.), cert. denied, 78 N.M. 198, 429 P.2d 657 (1967); South v. Lucero, 92 N.M. 798, 595 P.2d 768 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

The trial court has discretion in assessing costs, and its ruling will not be disturbed on appeal unless it was an abuse of discretion. Pioneer Sav. & Trust v. Rue, 109 N.M. 228, 784 P.2d 415 (1989).

Costs for depositions, filing fees, lis pendens, service of process and a receiver's fee are costs which are reasonably necessary and so within the discretion of the court. Pioneer Sav. & Trust v. Rue, 109 N.M. 228, 784 P.2d 415 (1989).

This rule allows costs to be awarded to the prevailing party as a matter of course. The trial court has discretion in assessing costs, and its ruling will not be disturbed on appeal unless it was an abuse of discretion. Mascarenas v. Jaramillo, 111 N.M. 410, 806 P.2d 59 (1991).

The assessment of costs is entrusted to the sound discretion of the court, and absent a showing of an abuse of discretion, a reviewing court will not interfere with such discretion. In re Stailey, 117 N.M. 199, 870 P.2d 161 (Ct. App. 1994).

Even though the defendant was the prevailing party against certain plaintiffs, based on the granting of a motion for summary judgment, since those plaintiffs' claims were intertwined with those of another plaintiff dismissed on the grounds of forum non conveniens, the trial court did not err in ordering the parties to bear their own costs pending final adjudication of the action. Marchman v. NCNB Tex. Nat'l. Bank, 120 N.M. 74, 898 P.2d 709 (1995).

When dismissal of a complaint was made after a full trial on the merits, it was treated as a judgment on the merits, and the defendant was entitled to costs as the prevailing party. Daddow v. Carlsbad Mun. Sch. Dist., 120 N.M. 97, 898 P.2d 1235 (1995).

Even though plaintiff won a majority of its claims, trial court's decision that each party should bear its own costs was not an abuse of discretion based on its consideration of the complexity of the case, issues involved, legitimacy of some of the disputes, and the fact that plaintiff had requested more damages than it ultimately received. Cafeteria Operators v. Coronado - Santa Fe Assocs., 1998-NMCA-005, 124 N.M. 440, 952 P.2d 435.

It is within the informed discretion of the trial court to assess costs against an insurer who intervenes in the worker's suit against an alleged tortfeasor. Eskew v. National Farmers Union Ins. Co., 2000-NMCA-093, 129 N.M. 667, 11 P.3d 1229.

Costs awarded for fraudulent claim. — In an action to quiet title to property, where a claim was based upon a document expressly found to have been forged by defendant, the trial court's order denying an award of costs for plaintiff's expert witness and imposition of sanctions against defendant was reversed and remanded for reconsideration. Martinez v. Martinez, 1997-NMCA-096, 123 N.M. 816, 945 P.2d 1034.

Award of partial costs not abuse of trial court's discretion. — Where a party does not prevail in all respects at trial, the trial court does not abuse its discretion in awarding him partial costs. Poppe v. Taute, 94 N.M. 656, 615 P.2d 271 (Ct. App. 1980).

Ability to pay is a factor. — Trial courts may properly consider plaintiff's and her parents' ability to pay as one factor to be considered in determining whether to award defendants their costs. Gallegos ex rel. Gallegos v. Southwest Community Health Servs., 117 N.M. 481, 872 P.2d 899 (Ct. App. 1994).

Where the trial court did not limit its consideration to the parties' disparity in wealth but rather properly considered evidence relevant to the parties' ability to pay, the court's decision to deny the defendant costs was reasonable and not an abuse of discretion. Apodaca v. AAA Gas Co., 2003-NMCA-085, 134 N.M. 77, 73 P.3d 215.

Where plaintiff and plaintiff's fiancé have approximately $7,000 in disposal income every year, the district court did not abuse its discretion in awarding deposition costs to defendant in the amount of $2,800.36. *May v. DCP Midstream*, L.P., 2010-NMCA-087, 148 N.M. 595, 241 P.3d 193, cert. granted, 2010-NMCERT-009, 149 N.M. 49, 243 P.3d 753.

Reducing award of costs based on financial disparity between parties. — The district court abused its discretion when, without evidence, it reduced a cost award to defendant because of the financial disparity between the parties, plaintiff's perceived inability to pay all of defendant's costs, and the chilling effect that a large cost award

would have on future litigation. Key v. Chrysler Motors Corp., 2000-NMSC-010, 128 N.M. 739, 998 P.2d 575.

Costs divided between parties. — Where plaintiff's recovery was $703.52, which was reduced by $50.00 on appeal, costs of appeal were taxed equally between parties under former law. Roberson v. Bondurant, 41 N.M. 638, 73 P.2d 321 (1937).

Under former law where both parties appealed, but one did not perfect a cross-appeal, but joined in appellants' appeal, and both parties in fact prevailed in their demands, costs should be divided equally between them. Field v. Hudson, 20 N.M. 178, 147 P. 283 (1915).

Award against prevailing party. — The court cannot order a prevailing party to share, or shoulder, all or part of the costs of an unsuccessful litigant, unless the costs are intended to serve as a sanction and the court clearly expresses its reasons for imposing such sanction. Absent a finding of bad faith or misconduct by a prevailing party during litigation, neither Paragraph D of this rule nor 39-3-30 NMSA 1978 authorizes a court to award costs against a prevailing party. In re Stailey, 117 N.M. 199, 870 P.2d 161 (Ct. App. 1994).

Dismissal of action for discovery violations. — Where the district court imposed the sanction of dismissal against plaintiff for discovery violations, it did not abuse its discretion in viewing the assessment of costs as an additional sanction and relying upon this articulated reasoning as the good cause for refusing to award defendant its costs. Reed v. Furr's Supermarkets, Inc., 2000-NMCA-091, 129 N.M. 639, 11 P.3d 603, cert. denied, 129 N.M. 599, 11 P.3d 563 (2000).

Award in proportion to percentages of negligence. — There need be no direct relation between percentage of fault and costs, but it is within the trial court's discretion to award costs in such a manner. Thus, a trial court did not err or abuse its discretion by awarding costs in proportion to the percentages of negligence found by the jury in a medical malpractice case. Baca v. Marquez, 105 N.M. 762, 737 P.2d 543 (Ct. App. 1987).

Costs unevenly divided between defendants. — Trial court did not abuse its discretion in assessing 30 percent of costs against one codefendant and 70 percent of costs against other codefendant. Robison v. Campbell, 101 N.M. 393, 683 P.2d 510 (Ct. App.), cert. denied, 101 N.M. 362, 683 P.2d 44 (1984).

Costs cannot be taxed against the regents under this rule unless permitted by law. Hillis v. Meister, 82 N.M. 474, 483 P.2d 1314 (Ct. App. 1971).

Deposition and witness costs improper. — The trial court abused its discretion in allowing defendant to recover for the costs of a taxi and parking associated with a deposition, and for the witness fee since the witness was not identified in the cost bill.

Dunleavy v. Miller, 116 N.M. 365, 862 P.2d 1224 (Ct. App. 1992), rev'd on other grounds, 116 N.M. 353, 862 P.2d 1212 (1993).

Costs of deposition. — No abuse of discretion is apparent or demonstrated in allowance of cost of taking deposition of man employed by plaintiff to make certain tests designed to demonstrate speed of death car in action for death of minor resulting from overturning of automobile. Davis v. Severson, 71 N.M. 480, 379 P.2d 774 (1963).

Traveling expenses. — In equity cases, under former law traveling expenses for attorneys usually could not be recovered. State ex rel. Stanley v. Lujan, 43 N.M. 348, 93 P.2d 1002 (1939).

Travel expenses for attorneys ordinarily should not be taxed as costs; thus, when the district court awarded travel expenses, it was required to state a reason for such action. Lopez v. American Airlines, 1996-NMCA-088, 122 N.M. 302, 923 P.2d 1187.

Section 38-6-4 NMSA 1978 does not condition the travel allowance upon being subpoenaed to appear. The allowance of costs for witness fees and mileage is discretionary with the court under this section. Prudential Ins. Co. of Am. v. Anaya, 78 N.M. 101, 428 P.2d 640 (1967).

Because a party is not entitled to per diem or mileage expenses for appearing as a witness in his own case, where defendants argue that the general rule in inapplicable since they received a subpoena too close to trial for their motion for protective order to be filed, but cite no authority for an exception to the rule that parties are not entitled to be treated as ordinary witnesses, trial court’s award of transportation and per diem for travel was error. Robertson v. Carmel Builders Real Estate, 2004-NMCA-056, 135 N.M. 641, 92 P.3d 653, cert. denied, 2004-NMCERT-004.

Costs not authorized. — Expenses for photocopies, telephone, facsimile, courier, mileage, travel, and per diem, and a large expense paid for obtaining plaintiff's own medical records, were not properly recoverable as costs. Gillingham v. Reliable Chevrolet, 1998-NMCA-143, 126 N.M. 30, 966 P.2d 197.

Computer-assisted legal research. — Computer-assisted legal research expenses are not allowable as costs. Key v. Chrysler Motors Corp., 2000-NMSC-010, 128 N.M. 739, 998 P.2d 575.

Pre-trial survey expense allowed as costs. — The expense of a survey made preparatory for trial, and upon which the surveyor testified, is properly allowed as costs. Ulibarri Landscaping Material, Inc. v. Colony Materials, Inc., 97 N.M. 266, 639 P.2d 75 (Ct. App. 1981); Gurule v. Ault, 103 N.M. 17, 702 P.2d 7 (Ct. App. 1985).

Expenses of adjuster and engineer in action for damages caused by fire. — Where, as a result of the failure of a manufacturer to properly manufacture and inspect a fireplace, and a seller to inspect a fireplace, a fire occurs and the expenses of an

adjuster and an engineer are incurred to investigate its cause, the cost of the adjuster and the engineer are properly assessed against the defendants where plaintiff prevails in action for damages caused by the fire. Pedigo v. Valley Mobile Homes, Inc., 97 N.M. 795, 643 P.2d 1247 (Ct. App. 1982).

Expenses of judge and court reporter. — Costs are creature of statutes and may not be imposed in absence of clear legislative authorization, and since no statute or rule of court imposes upon litigants in a civil case the burden of paying per diem and travel expenses incurred by district judge and his court reporter, such expenses could not be properly taxed as costs when plaintiff requested continuance pending appeal of one defendant's summary judgment. Read v. Western Farm Bureau Mut. Ins. Co., 90 N.M. 369, 563 P.2d 1162 (Ct. App. 1977).

Physicians appearing as expert witnesses. — Fees paid to physicians who testified as expert witnesses at trial or served as consulting experts to plaintiff were properly awarded as costs against defendant. Gillingham v. Reliable Chevrolet, 1998-NMCA-143, 126 N.M. 30, 966 P.2d 197.

Expense of transcript as cost. — Even if expense of transcript of hearing was a cost, trial court had discretion as to who should bear it, which discretion is not to be tampered with, absent an abuse thereof. Dunne v. Dunne, 83 N.M. 377, 492 P.2d 994 (1972).

No provision is made for costs of compensating jury panel in attendance at court for their time in travel and attendance, and since taxation of costs must await final determination of the case, costs of jury attendance in court were not properly taxed against plaintiff when he requested a continuance to appeal the award of summary judgment to the defendant. Read v. Western Farm Bureau Mut. Ins. Co., 90 N.M. 369, 563 P.2d 1162 (Ct. App. 1977).

Levy of execution in unlawful detainer. — In a judgment awarding possession of premises to plaintiffs which was not contemplated by lease stipulation, the plaintiffs are entitled to their costs incurred in connection with levy of execution in unlawful detainer. Putelli v. Hardy, 84 N.M. 66, 499 P.2d 688 (1972).

Costs of appeal after remand. — Where decision of the trial court, directing verdict for defendant, is reversed, and case remanded with instructions that it be reset for trial by jury, costs of appeal will be assessed against defendant pursuant to whose motion for a directed verdict the error in the proceedings has arisen. Sanchez v. Gomez, 57 N.M. 383, 259 P.2d 346 (1953).

Dismissal of writ of error. — Under former law, writ of error would be dismissed as to consideration of a question which had become moot, and the court could make an order concerning costs. First Nat'l Bank v. Noce, 31 N.M. 591, 249 P. 107 (1926).

Child abuse and neglect proceedings. — A specific Children's Code provision for costs controlled, in a child abuse and neglect proceedings, over the general statute (39-

3-30 NMSA 1978) governing costs in civil actions. State ex rel. Human Servs. Dep't v. Judy H., 105 N.M. 678, 735 P.2d 1184 (Ct. App. 1987).

Disbarment proceedings. — Section 105-1301, C.S. 1929 did not authorize taxation of cost in disbarment proceedings and, in absence of statute providing therefor, none could be taxed. In re Marron & Wood, 22 N.M. 501, 165 P. 216 (1917).

Divorce proceedings. — Section 105-1301, C.S. 1929 applied to divorce cases. Fullen v. Fullen, 159 P. 952 (1916).

Habeas corpus proceedings. — Section 105-1301, C.S. 1929, did not apply to habeas corpus proceedings. In re Fullen, 17 N.M. 405, 132 P. 1137 (1913).

Mandamus proceeding costs. — Where an officer refused to perform mere ministerial duty, such as signing voucher for salary earned, he was liable under former law to relator for costs incurred in compelling the performance of such duty by mandamus proceeding. State ex rel. Stephens v. SCC, 25 N.M. 32, 176 P. 866 (1918).

In action in quo warranto, taxation of costs, other than the receivership costs, is governed by 44-3-11 NMSA 1978 (costs in quo warranto proceedings) rather than by this section. White v. Clevenger, 71 N.M. 80, 376 P.2d 31 (1962).

Action dismissed based on forum non conveniens. — In granting a motion to dismiss the plaintiff's claims on the grounds of forum non conveniens, the trial court did not reach the merits of the plaintiff's underlying action and, thus, could not determine who was the prevailing party for purposes of awarding costs. Marchman v. NCNB Tex. Nat'l. Bank, 120 N.M. 74, 898 P.2d 709 (1995).

Special master to regulate corporate proxy fight. — The court did not abuse its discretion by determining that special master proceedings were necessary to ensure a well-regulated vote count in a corporate proxy fight and that the corporation should bear the costs of those proceedings. Pena v. Westland Dev. Co., 107 N.M. 560, 761 P.2d 438 (Ct. App. 1988).

Specific order for recovery of costs. — Appellants, having prevailed in the supreme court, were entitled under former law to recover their costs and to have execution issue against appellees, without specific order. Gallup Elec. Light Co. v. Pacific Imp. Co., 16 N.M. 279, 117 P. 845 (1911).

Conditioning continuance on payment of costs and expenses. — While granting or denying of continuances is matter within the sound discretion of trial court, and will be reviewed only where palpable abuse of discretion is demonstrated, there was palpable abuse of discretion in conditioning continuance on plaintiff 's payment of costs and expenses where plaintiff was ready for trial and did not seek a continuance merely for vexation or delay, but was caught by surprise the morning of trial, when summary

judgment was granted to the defendant principal. Read v. Western Farm Bureau Mut. Ins. Co., 90 N.M. 369, 563 P.2d 1162 (Ct. App. 1977).

Remission of amount recovered. — Where on appeal or error, under former law, appellee or defendant in error remitted a portion of amount recovered, he would be required to pay costs of appeal or writ of error. King v. Tabor, 15 N.M. 488, 110 P. 601 (1910).

If action was not timely for relief sought, it must be dismissed in toto, including costs and attorney fees, and the costs reassessed pursuant to this rule. Brito v. Carpenter, 81 N.M. 716, 472 P.2d 979 (1970).

Supreme court had discretion in assessing costs under former law but, in law actions at least, district court was required to award costs in favor of the prevailing party. Frank A. Hubbell Co. v. Curtis, 40 N.M. 234, 58 P.2d 1163 (1936).

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Service of process fee. — State highway commission [State transportation commission] does not have to pay the $3.00 service of process fee provided for in 38-1-5 NMSA 1978. 1964 Op. Att'y Gen. No. 64-11.

Law reviews. — For article, "The `New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 1 et seq.; 46 Am. Jur. 2d Judgments § 1 et seq.

Correcting clerical errors in judgments, 10 A.L.R. 526, 67 A.L.R. 828, 126 A.L.R. 956, 14 A.L.R.2d 224.

Form of judgment against garnishee respecting obligation payable in installments, 7 A.L.R.2d 680.

Jurisdiction, upon constructive or extraterritorial service upon nonresident, of suit for establishment or enforcement of trust in respect of real property within the state, 15 A.L.R.2d 610.

Unsuccessful litigant's payment of costs as barring his right to appeal from judgment on merits, 39 A.L.R.2d 194.

Effect of verdict for plaintiff in action against multiple defendants, 47 A.L.R.2d 803.

Appealability of order or judgment awarding or denying costs but making no other adjudication, 54 A.L.R.2d 927.

Court's power to increase amount of judgment, over either party's refusal or failure to consent to addition, 56 A.L.R.2d 213.

Appealability of void judgment or of one granting or denying motion for vacation thereof, 81 A.L.R.2d 537.

Validity of court's judgment rendered on Sunday or holiday, 85 A.L.R.2d 595.

Contempt for violation of compromise and settlement, the terms of which were approved by court but not incorporated in court order, decree or judgment, 84 A.L.R.3d 1047.

Attorney's personal liability for expenses incurred in relation to service for client, 66 A.L.R.4th 256.

Propriety under 28 USCS § 1920 and Rule 54(d) of the Federal Rules of Civil Procedure of allowing prevailing party costs for copies of depositions, 50 A.L.R. Fed. 472.

Compensation of expert witness as costs recoverable in federal civil action by prevailing party against party other than United States, 71 A.L.R. Fed. 875.

Recoverability of cost of computerized legal research under 28 USCS § 1920 or Rule 54(d), Federal Rules of Civil Procedure, 80 A.L.R. Fed. 168.

Modern status of Federal Civil Procedure Rule 54(b) governing entry of judgment on multiple claims, 89 A.L.R. Fed. 514.

Propriety under 28 USCA § 1920 and Rule 54(d) of Federal Rules of Civil Procedure of allowing prevailing party costs for copies of depositions, 155 A.L.R. Fed. 445.

4 C.J.S. Appeal and Error §§ 33 to 35, 121, 127, 142, 198; 20 C.J.S. Costs §§ 36 to 38, 134 et seq.; 49 C.J.S. Judgments §§ 2 to 21, 73 to 94, 195 to 233, 235 to 242, 538.

1-054.1. Judgments and orders; time limit.

Notwithstanding Section 39-1-1 NMSA 1978, the court shall enter a judgment or order within sixty (60) days after submission. As used in this rule, "submission" is the time when the court takes the matter under advisement.

[Approved, effective December 15, 1999; as amended by Supreme Court Order 06-8300-17, effective August 21, 2006.]

Committee commentary. — The chief judge of a judicial district has the power and responsibility to monitor performance of the judges of the judicial district, including compliance with the sixty (60) day time limit for entry of judgments and orders. *See* Rule 23-109(B)(17) NMRA. A separate procedure for monitoring compliance, as found in former Rule 1-054(B), is unnecessary.

Committee Commentary for 2006 Amendment. — The 2006 amendment, approved by Supreme Court Order 06-8300-17, effective August 21, 2006, supersedes the portion of Section 39-1-1 NMSA 1978 providing that many post-judgment motions are deemed automatically denied if not granted within thirty (30) days of filing. As a result of this change, and changes made to Paragraph D of Rule 1-052 and Paragraph D of Rule 1-059, post-judgment motions are subject to the rule that the court shall enter judgments or orders within sixty (60) days of submission. Rule 1-054.1 NMRA. Because there no longer is an automatic denial of post-judgment motions, the time for filing notices of appeal will run "from the entry of an order expressly disposing of the motion". Rule 12-201(D) NMRA (time for filing of notice of appeal runs from date of entry of order expressly disposing of the motion when there is no provision of automatic denial of motion under applicable statute or rule of court).

In 1917, the Legislature provided that the trial court shall have control over its judgments for thirty (30) days after entry. Laws 1917, ch. 15. The statute also provided that if the court did not rule upon timely post-judgment motions within thirty (30) days after filing, the motions were deemed to be denied by operation of law. *Id.* That provision, now contained in Section 39-1-1 NMSA 1978, is superseded by the 2006 amendment.

The scope of Section 39-1-1 NMSA 1978 has never been clear. The statute applies only to non-jury trials, *Valley Bank of Commerce v. Hilburn*, 2005-NMCA-004, ¶ 18, 136 N.M. 741, 105 P.3d 294, and the automatic denial portion has been construed to not apply to post-judgment motions made pursuant to Rule 1-060 NMRA. *Wooley v. Wooley*, 75 N.M. 241, 245, 403 P.2d 685, 687-688 (1965). The automatic denial provision has caused confusion, *e.g.*, *Archuleta v. New Mexico State Police*, 108 N.M. 543, 775 P.2d 745 (1989) and, on occasion, possible injustice. *E.g.*, *Beneficial Finance Corp. v. Bradley*, 120 N.M. 228, 900 P.2d 977 (1995) (though Rule 1-059(E) NMRA is silent as to automatic denial while Paragraph D of Rule 1-059 NMRA explicitly provides for automatic denial, Rule 1-059(E) motions for reconsideration are automatically denied after thirty (30) days. As a result, appeal was untimely when notice of appeal was filed shortly after court's order denying motion but more than thirty days from date of automatic denial of motion).

Perhaps to alert litigants to the perils of the automatic denial statutory provision, the Supreme Court incorporated a thirty-day automatic denial provision in Rules 1-052(D) (motion to amend findings and conclusions), Paragraph D of Rule 1-059 NMRA (motion for new trial) and a former version of Rule 1-050 NMRA (motion for directed verdict), but omitted the provision in the Court's 1999 amendment to Rule 1-050. *Valley Bank of Commerce v. Hilburn*, 2005-NMCA-004, ¶ 15, 136 N.M. 741, 105 P.3d 294. The

presence of the automatic denial provision in Paragraph D of Rule 1-059 but not in Paragraph C of Rule 1-050 NMRA has created an apparent anomaly in that a Rule 1-059 motion for new trial is deemed denied after thirty (30) days while the often simultaneously-filed Rule 1-050 motion for a judgment as a matter of law is not. *Id.* at ¶ 16.

The 2006 amendment to Rule 1-054.1 NMRA and the corresponding amendments to Paragraph D of Rule 1-052 and Paragraph D of Rule 1-059 NMRA eliminate the confusion by providing that the automatic denial provision in Section 39-1-1 NMSA 1978 has no application in cases to which the Rules of Civil Procedure for the District Courts apply.

The Supreme Court can supersede the automatic denial provision in Section 39-1-1 NMSA 1978 by promulgating a rule of procedure to the contrary. *Albuquerque Rape Crisis Center v. Blackmer*, 2005-NMSC-032, ¶ 5, 138 N.M. 398, 120 P.3d 820 ("We have exercised our superintending control under Article VI, Section 3, to revoke or amend a statutory provision when the statutory provision conflicts with an existing court rule . . . or if the provision impairs the essential function of the court."). This superseding power may not extend to legislative provisions properly limiting a court's jurisdiction. *See Lovelace Medical Center v. Mendez*, 111 N.M. 336, 339, 805 P.2d 603, 606 (1991) ("If the statutory provision were *intended* by the legislature to have jurisdictional effect, then presumably we would accord it that effect -- unless we were to hold it unconstitutional...."). The automatic denial portion of Section 39-1-1 NMSA 1978, however, does not purport to affect the jurisdiction of the district court. It is similar to another statute providing for automatic denial of certain orders based on the passage of time, about which the Supreme Court declared "there are good reasons for construing it simply as the legislative adoption of a housekeeping rule to assist the courts with the management of their cases, to have effect unless and until waived by a court in a particular case or modified by a rule of this Court on the same subject." *Id.* at 339, 111 N.M. at 339. Even if Section 39-1-1 NMSA 1978 did purport to limit the jurisdiction of the district court, the statute probably would be unconstitutional. *See In re Arnall*, 94 N.M. 306, 610 P.2d 193 (1980) (constitutional provision granting district courts general jurisdiction precludes legislative attempts to limit jurisdiction of district courts).

These amendments to Rules 1-052, 1-059 and 1-054.1 affect only the Rules of Civil Procedure for the District Courts. Rules applicable to other courts that provide for automatic denial of motions by the passage of time are unaffected by this amendment. *See*, *e.g.*, Paragraph C of Rule 5-614 NMRA (motion for new trial, 30 days); Paragraph B of Rule 5-801 NMRA (motion to modify sentence, 90 days); Paragraph H of Rule 5-802 NMRA (habeas corpus, petition for certiorari, 30 days); Paragraph B of Rule 7-611 NMRA (motion for new trial, 20 days); Paragraph A of Rule 10-120 NMRA (relief from judgment or order, 10 or 30 days); Rule 10-230.1 NMRA (modification of judgment, 90 days); Paragraph C of Rule 12-404 NMRA (motions for rehearing, 20 days unless the court orders otherwise); Paragraph E of Rule 12-501 NMRA (petition for certiorari after habeas corpus petition, 30 days unless otherwise ordered by court). The appropriate

rules committees may consider whether to review whether similar amendments should be made to these rules.

1-055. Default.

A. **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

B. **Judgment.** Judgment by default may be entered as follows: in all cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application; provided, however, that the filing of an appearance and disclaimer of interest shall not be construed as requiring the service of written notice of application for judgment under the terms of this rule. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties entitled thereto.

C. **Setting aside default.** For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 1-060 NMRA.

D. **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Paragraph C of Rule 1-054 NMRA.

E. **Limitations.** No judgment by default shall be entered against the state or an officer or agency thereof or against a party in any case based upon a negotiable instrument, unless the original negotiable instrument is filed with the court and merged with the judgment, or where the damages claimed are unliquidated unless the claimant establishes the claimant's claim or right to relief by evidence satisfactory to the court.

[As amended, effective August 27, 1999.]

ANNOTATIONS

Cross references. — For default judgment in garnishment, *see* Section 35-12-4 NMSA 1978.

For statutes relating to judgments, *see* Sections 39-1-1 to 39-1-20 NMSA 1978.

For default in quiet title suit, *see* Section 42-6-7 NMSA 1978.

The 1999 amendment, effective August 27, 1999, in Paragraph B, inserted "committee" in the first sentence; in Paragraph E, substituted "Limitations" for "Judgments against the state; exceptions" in the bold heading and substituted "unless the original negotiable instrument is filed with the court and merged with the judgment" for "or where the party was only constructively served with the process"; and substituted "the party's" for "his" throughout the rule.

Compiler's notes. — This rule is deemed to have superseded 105-421, C.S. 1929, as to failure to respond to an answer containing new matter, and 105-804, C.S. 1929, relating to default judgments.

This rule, together with Rules 1-020, 1-040 and 1-041 NMRA, is deemed to have superseded 105-819, C.S. 1929, relating to trial in absence of a party and separate trials.

I. GENERAL CONSIDERATION.

Applicability. — Where judgment was on the merits after due notice, this rule had no application. State Collection Bureau v. Roybal, 64 N.M. 275, 327 P.2d 337 (1958).

Not to be used in dispute over forum non conveniens. — A default judgment is not a tool to be used in a dispute over forum non conveniens or the propriety of another court's actions. Franco v. Federal Bldg. Serv., Inc., 98 N.M. 333, 648 P.2d 791 (1982).

Federal decisions persuasive. — Since New Mexico adopted federal rule as its own, federal cases, while not controlling, are quite persuasive. State Collection Bureau v. Roybal, 64 N.M. 275, 327 P.2d 337 (1958).

Law reviews. — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Judgments § 783 et seq.

Successful defense by one codefendant, or a finding for "defendants," as inuring to benefit of defaulting defendant, 78 A.L.R. 938.

Duty of court upon opening default to defer vacation of judgment or order until result of trial on merits, 98 A.L.R. 1380.

Abandonment of or withdrawal from case by attorney as ground for opening or setting aside judgment by default, 114 A.L.R. 279.

Actual knowledge of pendency of action, or evasion of personal service, as affecting right to relief from judgment by default on constructive or substituted service of process, 122 A.L.R. 624.

Waiver by plaintiff of right to enter default judgment against defendant, or of the default itself after entry, what amounts to, 124 A.L.R. 155.

Disobedience of order, summons or of documents, constitutionality, construction and application of statutes or rules of court which permit setting aside of a plea and giving judgment by default, because of, 144 A.L.R. 372.

Mistaken belief or contention that defendant had not been served, or had not been legally served, with summons, as ground for setting aside default judgment, 153 A.L.R. 449.

Validity, construction and application of statutes providing for entry of default judgment by clerk without intervention of court or judge, 158 A.L.R. 1091.

Failure of complaint to state cause of action for unliquidated damages as ground for dismissal of action at hearing to determine amount of damages following defendant's default, 163 A.L.R. 496.

Punishment of civil contempt in other than divorce cases by striking pleading or entering default judgment or dismissal against contemner, 14 A.L.R.2d 580.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 A.L.R.2d 1179.

Conditioning setting aside of judgment or grant of new trial on payment of opposing attorney's fees, 21 A.L.R.2d 863.

Divorce action, power of court, in absence of express authority, to grant relief from judgment by default in, 22 A.L.R.2d 1312.

Effect, under Rule 55 (b) (2) of the Federal Rules of Civil Procedure and similar state statutes and rules, of failure, prior to taking default judgment against party who has appeared, to serve three-day written notice of application for judgment, 51 A.L.R.2d 837.

Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Amount of damages, defaulting defendant's right to notice and hearing as to determination of, 15 A.L.R.3d 586.

Attorney's mistake as to time or place of appearance, trial or filing of necessary papers, opening default or default judgment claimed to have been obtained because of, 21 A.L.R.3d 1255.

What amounts to "appearance" under statute or rule requiring notice to party who has "appeared," of intention to take default judgment, 73 A.L.R.3d 1250.

Authority of court, upon entering default judgment, to make orders for child custody or support which were not specifically requested in pleadings of prevailing party, 5 A.L.R.5th 863.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

49 C.J.S. Judgments §§ 195 to 233, 235 to 242, 376 to 433.

II. ENTRY OF DEFAULT.

"Default". — "Default" to be entered by the clerk under Subdivision (a) (see now Paragraph A) is a statement in appropriate form as to the state of the record, which serves to invite attention of the court to party's omission to plead or otherwise defend, and to fact that case is ripe for entry of judgment by default. Schmider v. Sapir, 82 N.M. 355, 482 P.2d 58 (1971).

Certain elements must be present for entry of default by clerk under Subdivision (a) (see now Paragraph A); there must be claim for affirmative relief and a failure to plead or otherwise defend on the part of the opposing party. Schmider v. Sapir, 82 N.M. 355, 482 P.2d 58 (1971).

Simultaneous entry of default and judgment. — Since entry of default is only a formal matter, entry of default and default judgment may be simultaneous, and by a single instrument. Rogers v. Lyle Adjustment Co., 70 N.M. 209, 372 P.2d 797 (1962).

III. JUDGMENT BY DEFAULT.

A. IN GENERAL.

Entry of default and default judgment may be simultaneous, and by a single instrument, since entry of default is only a formal matter. Rogers v. Lyle Adjustment Co., 70 N.M. 209, 372 P.2d 797 (1962).

Judgment by default does not involve merits of case; it is based solely upon fact that, whatever case the party had, he did not appear at the proper time to present it. Schmider v. Sapir, 82 N.M. 355, 482 P.2d 58 (1971).

Default as protection from unresponsive party. — Default judgment must normally be viewed as available only when adversary process has been halted because of an essentially unresponsive party, in which instance diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights; furthermore, possibility of default is a deterrent to those parties who choose delay as part of their litigative strategy. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Judgment goes by default whenever between commencement of suit and its anticipated decision in court either of the parties omits or refuses to pursue, in the regular method, ordinary measures of prosecution or defense. Schmider v. Sapir, 82 N.M. 355, 482 P.2d 58 (1971).

Court had authority to enter default judgment on the basis of defendant's failure to attend the pretrial conference and his failure to obtain counsel as ordered by the court, as these were failures to "otherwise defend." Kutz v. Independent Publishing Co., 101 N.M. 587, 686 P.2d 277 (Ct. App. 1984).

Judgment not "by default". — Where appellants defaulted by failure to appear in court at time appointed for trial of issues, appellee was entitled to proceed with the hearing and offer evidence to sustain pleadings; the resultant judgment was not in a strict sense judgment by default within the meaning of this rule, but rather final judgment on the merits. Ranchers Exploration & Dev. Co. v. Benedict, 63 N.M. 163, 315 P.2d 228 (1957).

An ex parte order modifying an award of custody and child support was not a default judgment but a decision on the merits where, following a hearing, husband failed to file findings of fact and conclusions of law in time. Skelton v. Gray, 101 N.M. 158, 679 P.2d 826 (1984).

Generally, default judgment precludes trial of facts, except as to damages, as the allegations of the complaint, in effect, become findings of fact. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Admission of allegations in complaint. — By virtue of default judgment defendants are taken to have admitted the allegations of the complaint; for those matters which require examination of details, plaintiff must furnish proof. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Default judgments are not favored, and, generally, cases should be decided on their merits. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976); Farms v. Carlsbad Riverside Terrace Apts., Inc., 84 N.M. 624, 506 P.2d 781 (1973).

This rule should not be used to punish technical violations of the Rules of Civil Procedure. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Discretion of trial court. — Whether default judgment should be granted rests within sound discretion of the trial court, and the same is true of motion to set aside the default judgment. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976); Hubbard v. Howell, 94 N.M. 36, 607 P.2d 123 (1980).

It lies within sound discretion of trial court to refuse entry of default judgment. Farms v. Carlsbad Riverside Terrace Apts., Inc., 84 N.M. 624, 506 P.2d 781 (1973).

Doubts resolved in favor of defaulting defendant. — Any doubts about whether relief should be granted are resolved in favor of the defaulting defendant because default judgments are not favored in the law; in the absence of a showing of prejudice to the plaintiff, cases should be tried upon the merits. Dyer v. Pacheco, 98 N.M. 670, 651 P.2d 1314 (Ct. App. 1982).

Default judgments against state. — It is apparent that the exception at the end of Paragraph E applies to the prohibition of a default judgment against the state. A default judgment, therefore, is available against the state if the claimant establishes his right to relief. Caristo v. Sullivan, 112 N.M. 623, 818 P.2d 401 (1991).

Default judgment was properly entered where, for 10 months defendants failed to comply with the Rules of Civil Procedure, filed consent to withdrawal of their attorneys and failed to obtain other attorneys and failed to appear at the hearing on motion for default judgment or to show any cause, oral or written, why default judgment should not be entered. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Failure to seek extension. — Default judgment was properly entered notwithstanding fact that after notice and before entry of judgment, appellant filed a general denial, where defendant did not apply for enlargement of time to plead pursuant to Rule 6(b) (see now Rule 1-006 NMRA). Rogers v. Lyle Adjustment Co., 70 N.M. 209, 372 P.2d 797 (1962).

Inadequate answer. — After answer to verified complaint was stricken out as "sham and unverified," and defendant had elected to stand on his answer, it was not error to adjudge him in default and to render judgment without first acting on his motion for security for costs filed with his answer. Pilant v. S. Hirsch & Co., 14 N.M. 11, 88 P. 1129 (1907).

Failure to appear. — Subsequent withdrawal of appeal by attorney, without leave of court, left record in condition where judgment by default for want of appearance could be entered, and the supreme court of the territory did not err in affirming trial court's denial of defendant's motion to vacate default judgment. Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 174 U.S. 603, 19 S. Ct. 761, 43 L. Ed. 1103 (1899).

A "constructive appearance" may be found when the defaulted party's overt actions show an intent to submit to the jurisdiction of the court. State ex rel. N.M. State Police

Dep't v. One 1984 Pontiac 6000, 111 N.M. 85, 801 P.2d 667 (Ct. App. 1990), aff'd, 111 N.M. 746, 809 P.2d 1274 (1991).

Default judgment properly denied. — Trial court did not err in denying defendant's motion for default judgment where plaintiff's allegedly late reply to defendant's counterclaim reply was filed prior to defendant's motion, and notice requirements of Subdivision (b) (see now Paragraph B) were not complied with. The case had been set for trial and was proceeding to trial on the merits and no claim was made that late filing of the reply in any way prejudiced defendant. Farms v. Carlsbad Riverside Terrace Apts., Inc., 84 N.M. 624, 506 P.2d 781 (1973).

In city's suit against hotel operator to recover license tax, with answer of illegality of tax, and tender of payment of amount defendant thought to be due, to which there was no reply, defendant, waiving all defense except tender, was not entitled to judgment by default for failure to reply to new matter in answer, without proof as to correct amount of tax. City of Raton v. Seaberg, 41 N.M. 459, 70 P.2d 906 (1937).

Where answer setting up new matter was filed on June 30, and, no reply having been filed, defendant on July 23 filed motion asking that new matter set up in answer be taken as confessed, trial court's overruling of motion was sustained on appeal for failure of record to show that answer had been served on counsel for plaintiff twenty days prior to filing of motion. Armstrong v. Concklin, 27 N.M. 550, 202 P. 985 (1921).

Insured defendant who immediately gives process and complaint to his insurance agent, is not grossly negligent or ordinarily careless in not making inquiry as to the progress of the action. Dyer v. Pacheco, 98 N.M. 670, 651 P.2d 1314 (Ct. App. 1982).

Default by administrator. — Where administrator is sued as such, without allegation of assets in his hands, and he defaults, he is not personally liable, and judgment should authorize only a levy against goods of deceased in hands of administrator, and, if not sufficient to satisfy judgment, then costs only to be levied de bonis propriis, but where there is an allegation of assets in hands of administrator, his default is an admission of assets to extent charged in proceedings against him. Senescal v. Bolton, 7 N.M. 351, 34 P. 446 (1893).

Waiver by going to trial. — By going to trial on the merits and not objecting to evidence, defendant waived any rights he may have had consequent upon the cross-complainant's failure to reply to his answer. Lohman v. Reymond, 18 N.M. 225, 137 P. 375 (1913).

Place of judgment. — Under 105-801, C.S. 1929 (39-1-1 NMSA 1978), a default judgment may be rendered by a judge of district court at any place where he may be in state. Singleton v. Sanabrea, 35 N.M. 491, 2 P.2d 119 (1931).

B. NOTICE.

Notice constitutionally required. — Failure to give notice pursuant to Subdivision (b) (see now Paragraph B) coupled with giving of default judgment without hearing or notice of hearing, when matters stood at issue, constituted a violation of the due process clause of the New Mexico Constitution. Adams & McGahey v. Neill, 58 N.M. 782, 276 P.2d 913 (1954), distinguished, Houston Fire & Cas. Ins. Co. v. Falls, 67 N.M. 189, 354 P.2d 127 (1960); Midwest Royalties, Inc. v. Simmons, 61 N.M. 399, 301 P.2d 334 (1956).

Purpose of notice. — Notice requirement is device intended to protect those parties who have indicated to the moving party clear intent to defend the suit. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Purpose of three-day notice is not to give party time within which to plead defensively, but to seek to set aside default as provided by Subdivision (c) (see now Paragraph C) and for enlargement of time within which to plead in accordance with Rule 6(b) (see now Rule 1-006 NMRA). Rogers v. Lyle Adjustment Co., 70 N.M. 209, 372 P.2d 797 (1962).

Notice is required only when party has appeared in action; since the defendant did not appear, the plaintiff was entitled to a default judgment without contacting the defendant's counsel. Rummel v. Edgemont Realty Partners, Ltd., 116 N.M. 23, 859 P.2d 491 (Ct. App. 1993).

Because defendant never filed any documents with the court prior to entry of default, plaintiff had no duty to provide any notice to defendant before seeking default judgment. Adams v. Para-Chem Southern, 1998-NMCA-161, 126 N.M. 189, 967 P.2d 864.

"Appearance". — An "appearance" is a coming into court as party to suit, whether as plaintiff or defendant, or the formal proceeding by which defendant submits to jurisdiction of the court. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Defendant's attendance at a deposition nearly eight months before he was served with a summons and a copy of the amended complaint cannot be considered an "appearance" under Paragraph B because it could not possibly have indicated either knowledge of the suit against him or an intention to meet his obligation as a party. Therefore, defendant was not entitled to notice of the applications for default judgments against him. Rodriguez v. Conant, 105 N.M. 746, 737 P.2d 527 (1987).

Letters and telephone calls between lawyers indicating no more than an awareness of a lawsuit is not enough; the defaulted party must take some affirmative action to signify to the court an intention to submit to its jurisdiction in order to consider that he has made an "appearance". Merrill v. Tabachin, Inc., 107 N.M. 802, 765 P.2d 1170 (1988).

Effect of appearance. — Appearance alone, where there has been no pleading, does not prevent party from becoming in default, but if such appearance is entered prior to

default, such party is entitled to three days' notice of application to court for default judgment. Rogers v. Lyle Adjustment Co., 70 N.M. 209, 372 P.2d 797 (1962).

Affirmative act showing intent to appear. — All that is necessary to constitute an "appearance" to avoid default judgment without notice, is an affirmative act by the party showing knowledge of the suit and intention to appear; this affirmative act can be shown by contacts between attorneys, by letter from one attorney to the other or where plaintiff's attorney has acquiesced in defendant's request for more time to answer. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Where party's intention to appear is clearly manifested in acts of its agent, such acts constitute an appearance within scope of this rule. Mayfield v. Sparton S.W., Inc., 81 N.M. 681, 472 P.2d 646 (1970).

Garnishee's attempt to answer interrogatories in a letter to clerk, copy of which he sent to appellee's counsel, and payment into court of what he thought was owing, clearly indicated intention to meet obligations of party to law suit and to submit to court's jurisdiction. Mayfield v. Sparton S.W., Inc., 81 N.M. 681, 472 P.2d 646 (1970).

Determination of necessity for notice. — Before default judgment is entered, trial court should determine by record whether three-day notice is required, inquiring of party seeking default judgment whether any contacts occurred between opposing attorneys so as to determine whether defaulting party knew of the pending action intended to appear and defend and did something affirmatively to show this intention. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Notice of damages hearing. — Although Paragraph B does not by its terms require written notice of such a hearing to the party against whom default judgment is sought, the damages hearing must be regarded as a hearing on the application for default judgment and written notice must be given if the party "has appeared in the action", but where defendant has failed to make an appearance in the case he is not entitled to notice of the damages hearing in accordance with the requirements of Paragraph B. Rodriguez v. Conant, 105 N.M. 746, 737 P.2d 527 (1987).

Notice in eminent domain proceedings. — Subdivision (b) (see now Paragraph B) is applicable to entry of default in eminent domain proceedings filed under "special alternative procedure," and failure to give required notice requires reversal of default judgment. Board of County Comm'rs v. Boyd, 70 N.M. 254, 372 P.2d 828 (1962).

Where defendant failed to appear after service. — A district court is not required by Paragraph B of this rule or by due process of law to set aside for lack of notice default judgments entered against a defendant who failed to appear in the action after being personally served with process. Rodriguez v. Conant, 105 N.M. 746, 737 P.2d 527 (1987).

Vacation of default entered without requisite notice. — Where notice of motion for a default judgment is required, but not given, judgment entered must be vacated as a matter of law. Mayfield v. Sparton S.W., Inc., 81 N.M. 681, 472 P.2d 646 (1970).

Judgment vacated where notice requirement not complied with. — Where neither the party against whom a default judgment was being granted nor his attorney were given written notice of an application for the judgment and the court granted an oral motion for default judgment, the judgment must be vacated for failure to comply with Subdivision (b) (see now Paragraph B). Jordan v. Daniels Ins. Agency, Inc., 102 N.M. 162, 692 P.2d 1311 (1984).

Notice of requirement not applicable. — Three-day notice requirement has no application where judgment is entered on the merits after due notice. Coastal Plains Oil Co. v. Douglas, 69 N.M. 68, 364 P.2d 131 (1961).

Denial of motion made on day of trial discretionary. — Where the plaintiff had failed to respond to the counterclaim at the time of trial, but the defendants did not comply with this rule, which requires an affidavit, a written application for default, and service upon the defaulting party no less than three days before the hearing, the court properly denied the motion and tried the matter on its merits, when it was confronted with a motion for default on the day of trial. Landavazo v. Sanchez, 111 N.M. 137, 802 P.2d 1283 (1990).

C. DAMAGES.

Default not necessarily admission of damages pleaded. — Liability and damages are different and separate concepts. Thus, a default judgment is not necessarily an admission of the amount of damages pleaded by the plaintiff. Armijo v. Armijo, 98 N.M. 518, 650 P.2d 40 (Ct. App. 1982).

Default judgment not considered admission of unliquidated damages. — The entry of a default judgment against a defendant is not considered an admission by the defendant of the amount of unliquidated damages claimed by the plaintiff. United Salt Corp. v. McKee, 96 N.M. 65, 628 P.2d 310 (1981).

Claims for large sums of money should not be determined by default judgments if they can reasonably be avoided. United Salt Corp. v. McKee, 96 N.M. 65, 628 P.2d 310 (1981).

Punitive damage claim is not admitted by default, and neither are punitive damages provided for in Subdivision (b) (see now Paragraph B). Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Hearing is necessary to determine compensatory or punitive damages. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Trial court had authority to enter default judgment only on issue of liability, not on damages; that part of the default judgment on damages should have been set aside before evidence on damages was heard, and failure to do so prejudiced time of defendants' right of appeal on default judgment. Defendants had no duty to reopen the matter or to produce testimony on damage issue, since this burden was on trial court and plaintiff. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Failure to hold hearing on unliquidated damages. — Where the claim for damages is unliquidated, it is an abuse of discretion not to have a hearing and to put the plaintiff to the test of presenting evidence to support his claim for damages. Armijo v. Armijo, 98 N.M. 518, 650 P.2d 40 (Ct. App. 1982).

Right to cross-examine and introduce evidence on damage issue. — Upon assessment of damages following entry of default, defaulting defendant has the right to cross-examine plaintiff's witnesses and to introduce affirmative testimony on his own behalf in mitigation of damages. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

IV. SETTING ASIDE DEFAULT.

Construction. — This rule provides that, for good cause shown, court may set aside entry of default and, if judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (see now Rule 1-060 NMRA). Weisberg v. Garcia, 75 N.M. 367, 404 P.2d 565 (1965).

Entry of default is procedurally distinct from entry of judgment by default. Entry of default is a formal matter that serves to invite the court's attention to a party's omission to plead or otherwise defend and to the fact that the case is ripe for entry of judgment by default. By its terms, Paragraph (C) of this rule requires requests for relief from entries of default to be considered under a "good cause shown" standard. On the other hand, default judgments are to be deemed final judgments. As final judgments they are subject to the trial court's control for a period of thirty days, pursuant to Section 39-1-1 NMSA 1978. Thereafter, default judgments must be set aside in accordance with Rule 1-060(B) NMRA. DeFillippo v. Neil, 2002-NMCA-085, 132 N.M. 529, 51 P.3d 1183.

Applicability of Rule 1-060 NMRA. — With the exception of judgments still under the court's control pursuant to 39-1-1 NMSA 1978, judgments by default must be set aside in accordance with Rule 1-060 NMRA. Marinchek v. Paige, 108 N.M. 349, 772 P.2d 879 (1989).

Compliance with rule jurisdictional. — Court acts in excess of its jurisdiction in vacating default judgment without a showing of compliance with this rule and Rule 60(b) (see now Rule 1-060 NMRA). Starnes v. Starnes, 72 N.M. 142, 381 P.2d 423 (1963).

Relief from default before pleading. — Party in default for failure to plead or otherwise defend action must apply to court for relief under this rule before he can plead in the cause. Rogers v. Lyle Adjustment Co., 70 N.M. 209, 372 P.2d 797 (1962).

Motion addressed to court's discretion. — Motion to set aside default judgment was addressed to sound discretion of trial judge, whose ruling would not be reversed except for abuse of discretion. Springer Corp. v. Herrera, 85 N.M. 201, 510 P.2d 1072 (1973), overruled on other grounds Sunwest Bank v. Roderiguez, 108 N.M. 211, 770 P.2d 533 (1989); Conejos County Lumber Co. v. Citizens Sav. & Loan Ass'n, 80 N.M. 612, 459 P.2d 138 (1969); Dyer v. Pacheco, 98 N.M. 670, 651 P.2d 1314 (Ct. App. 1982).

Whether motion to set aside default judgment should be granted rests within sound discretion of trial court. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Decision of trial court as to setting aside default judgment is discretionary and will be reversed only for abuse of that discretion. Otis Eng'r Corp. v. Grace, 86 N.M. 727, 527 P.2d 322 (1974), overruled on other grounds Sunwest Bank v. Roderiguez, 108 N.M. 211, 770 P.2d 533 (1989).

Motion to set aside default or judgment by default is addressed to discretion of court, and adequate basis must be shown; in exercising this discretion court will be guided by the fact that default judgments are not favored in the law. Wakely v. Tyler, 78 N.M. 168, 429 P.2d 366 (1967).

Motion to set aside or vacate default judgment is addressed to sound discretion of trial court; district court did not abuse its discretion where there was evidence of a meritorious defense and no intervening equities. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Nature of discretion. — Discretion is not the power to act pursuant to one's own judgment without other restraint or control, but is a legal discretion to be exercised in conformity to law; though wide and not lightly to be interfered with, it is not limitless. Springer Corp. v. Herrera, 85 N.M. 201, 510 P.2d 1072 (1973), overruled on other grounds Sunwest Bank v. Roderiguez, 108 N.M. 211, 770 P.2d 533 (1989).

Trial on merits preferred. — It is the policy of the law to prefer that cases be decided on merits, and this policy looks with disfavor upon default judgments and litigant who attempts to take advantage of mistake, surprise, inadvertence or neglect of adversary. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

In exercising discretion to set aside a default judgment, courts should bear in mind that default judgments are not favored, and that generally causes should be tried upon their merits. Springer Corp. v. Herrera, 85 N.M. 201, 510 P.2d 1072 (1973), overruled on other grounds Sunwest Bank v. Roderiguez, 108 N.M. 211, 770 P.2d 533 (1989).

In determining whether to set aside default judgment, courts should bear in mind that default judgments are not favored and that, generally, causes should be tried upon their merits, but should also recognize that rules of procedure are intended to provide orderly procedure and to expedite disposal of causes. Rogers v. Lyle Adjustment Co., 70 N.M. 209, 372 P.2d 797 (1962).

Although the granting of a default judgment lies within the second discretion of the trial judge, defaults are not favored and cases should be decided on their merits. Franco v. Federal Bldg. Serv., Inc., 98 N.M. 333, 648 P.2d 791 (1982).

A grant of default judgment or of a motion to set aside a default judgment rests within the sound discretion of a trial court; however, because default judgments are generally disfavored, any doubts about whether relief should be granted are resolved in favor of the defaulting defendant and, in the absence of a showing of prejudice to the plaintiff, causes should be tried upon the merits. Gandara v. Gandara, 2003-NMCA-036, 133 N.M. 329, 62 P.3d 1211.

Court should be more liberal than under Rule 60(b). — In determining whether the entry of a default should be set aside under Subdivision (c) (see now Paragraph C) of this rule, the trial court should be more liberal than under Rule 60(b) (see now Rule 1-060 NMRA) and resolve all doubts in favor of the party declared to be in default. Franco v. Federal Bldg. Serv., Inc., 98 N.M. 333, 648 P.2d 791 (1982).

While the strict criteria of Rule 1-060(B) NMRA are used when setting aside an entry of default judgment by a trial court, this rule merely requires the use of a "good cause" standard when setting aside the entry of a default by a district court clerk. Gandara v. Gandara, 2003-NMCA-036, 133 N.M. 329, 62 P.3d 1211.

Doubts resolved in movant's favor. — When there are no intervening equities, any doubt should, as a general proposition, be resolved in favor of the movant to the end of securing a trial upon the merits. Springer Corp. v. Herrera, 85 N.M. 201, 510 P.2d 1072 (1973), overruled on other grounds Sunwest Bank v. Roderiguez, 108 N.M. 211, 770 P.2d 533 (1989).

Where timely relief is sought from default judgment and movant has a meritorious defense, doubt, if any, should be resolved in favor of motion to set aside the judgment so that case may be decided on merits. Wakely v. Tyler, 78 N.M. 168, 429 P.2d 366 (1967).

Where there are no intervening equities, any doubt should, as a general proposition, be resolved in favor of the movant, the trial court liberally determining what is a good excuse, to the end of securing trial upon the merits. Weisberg v. Garcia, 75 N.M. 367, 404 P.2d 565 (1965).

Reversal for slight abuse of discretion. — Slight abuse of discretion in refusing to set aside a default judgment will often be sufficient to justify reversal of order. Springer

Corp. v. Herrera, 85 N.M. 201, 510 P.2d 1072 (1973), overruled on other grounds Sunwest Bank v. Roderiguez, 108 N.M. 211, 770 P.2d 533 (1989).

Good excuse and meritorious defense. — Court should not reopen default judgment merely because party in default requests it, but should require him to show both that there was good reason for default and that he has a meritorious defense to the action. Wakely v. Tyler, 78 N.M. 168, 429 P.2d 366 (1967).

To have default judgment set aside movant must demonstrate that he has a meritorious defense. Otis Eng'r Corp. v. Grace, 86 N.M. 727, 527 P.2d 322 (1974).

Under Laws 1880, ch. 6, § 31 (now repealed), default could be set aside on motion on such terms as court deemed just if reasonable excuse was shown for having made such default, and it was matter largely in discretion of trial court whether excuse presented was reasonable. Lasswell v. Kitt, 11 N.M. 459, 70 P. 561 (1902).

Generally, before the trial court will set aside an entry of default, the defendant must demonstrate both that he had good cause for failing to answer and that he had a meritorious defense. Franco v. Federal Bldg. Serv., Inc., 98 N.M. 333, 648 P.2d 791 (1982).

"For good cause shown" construed. — The defendant must show "good cause" to be relieved from the onerous burdens and consequences of defaults and default judgments. "For good cause shown" means that the district court must be satisfied that the facts or questions of law involved, or both, make it a part of wisdom to set aside the default judgment. Dyer v. Pacheco, 98 N.M. 670, 651 P.2d 1314 (Ct. App. 1982).

Defendant showed good cause for relief from default: (1) there was no evidence that she had intended to delay the suit or that her filing her answer one day late was the result of anything other than human error; (2) her claim she had no notice of any defect in the property (which was supported by a copy of an inspection report) was a meritorious defense to the premises liability suit; and (3) plaintiffs did not argue that any intervening equities weighed against setting aside the default. DeFillippo v. Neil, 2002-NMCA-085, 132 N.M. 529, 51 P.3d 1183.

Court abuses discretion in not setting aside excusable default where defenses meritorious. — Where an employer involved in a workmen's compensation case presents uncontroverted evidence that its failure to file a timely answer resulted from excusable neglect, mistake and inadvertence, and where it specified meritorious defenses involving statutes of limitation and no accidental injury, the trial court abused its discretion in denying the motion to set aside the default judgment. Lopez v. Sears, Roebuck & Co., 96 N.M. 143, 628 P.2d 1139 (Ct. App. 1981).

When tardiness excusable neglect setting aside default. — Out-of-town attorney's 40-minute tardiness in appearing in court as a result of receiving no motel wake-up call

constituted excusable neglect. Chase v. Contractors' Equip. & Supply Co., 100 N.M. 39, 665 P.2d 301 (Ct. App. 1983).

Lack of jurisdiction. — Argument that defendant could not be excused from proceeding promptly to move to set aside judgment because of asserted negligence of his lawyer in mistakenly informing him of dismissal of case, had no application where court had no jurisdiction because of lack of service. Eaton v. Cooke, 74 N.M. 301, 393 P.2d 329 (1964).

Notice requirements not complied with. — Default judgments entered without the required three-day notice must be set aside. State ex rel. N.M. State Police Dep't v. One 1984 Pontiac 6000, 111 N.M. 85, 801 P.2d 667 (Ct. App. 1990), aff'd, 111 N.M. 746, 809 P.2d 1274 (1991).

Improper service. — Trial court did not err in vacating default judgment under Rule 60(b) (4) (see now Rule 1-060 NMRA), where motion for default judgment filed by plaintiff was not consistent with return of service and affidavit of deputy sheriff that service of process was made on member of professional corporation, not an officer or as otherwise provided in Rule 4(o) (see now Rule 1-004 NMRA), since court could have found judgment void although it did not make this ruling explicit. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Appearance and answer after learning of default. — Court properly exercised discretion in setting aside default judgment, where 19 days after learning of same, defendant made calls to attorneys, entered an appearance, filed an answer and then moved to set default judgment aside. Brown v. Lufkin Foundry & Mach. Co., 83 N.M. 34, 487 P.2d 1104 (Ct. App. 1971).

Discovery of release. — Trial court did not abuse its discretion by setting aside as unjust a deficiency judgment entered after certain mortgaged properties subject to default judgment were sold, when six years after judgment, defendant located letter purporting to be from plaintiff which ostensibly released her from liability for the mortgages on basis of which she had refrained from contesting original foreclosure suit; defendant was permitted to file her answer and proceed to trial. Home Sav. & Loan Ass'n v. Esquire Homes, Inc., 87 N.M. 1, 528 P.2d 645 (1974).

Filing of late answer. — Answer filed by defendant after time therefor had expired was not a nullity, and so long as it remained on file and undisposed of, rendition of default judgment constituted an irregularity for which judgment could be set aside upon motion filed within one year from date of rendition of such judgment. Ortega v. Vigil, 22 N.M. 18, 158 P. 487 (1916).

Failure to attend hearing on motion for default. — Trial court did not abuse its discretion in denying motion to vacate default judgment where defendant inexcusably failed to attend hearing set for considering motion for default, of which he had been notified, even though defendant had relied on previous local custom that entry of

appearance followed by late pleading would protect against entry of default judgment. Rogers v. Lyle Adjustment Co., 70 N.M. 209, 372 P.2d 797 (1962).

Defendant not misled. — Judgment of affirmance on default will not be vacated where appellee has not misled appellant or in any way prevented him from obtaining a continuance. Dwyer v. Springfield Fire & Marine Ins. Co., 32 N.M. 250, 255 P. 391 (1927).

Default judgment reinstated. — Trial court did not abuse its discretion in reinstating default judgment upon defendant's failure to comply with conditions imposed by court in setting aside the default judgment. Kutz v. Independent Publishing Co., 101 N.M. 587, 686 P.2d 277 (Ct. App. 1984).

Only "final judgments" intended. — Subdivision (c) (see now Paragraph C), along with Rule 60(b) (see now Rule 1-060 NMRA), deals only with "final judgments." Brown v. Lufkin Foundry & Mach. Co., 83 N.M. 34, 487 P.2d 1104 (Ct. App. 1971).

Interlocutory default judgment. — Interlocutory default judgments may be set aside or affirmed in the judicial discretion of the trial court. Brown v. Lufkin Foundry & Mach. Co., 83 N.M. 34, 487 P.2d 1104 (Ct. App. 1971).

Failure to prove a meritorious defense did not constitute error upon which to reinstate interlocutory default judgment. Brown v. Lufkin Foundry & Mach. Co., 83 N.M. 34, 487 P.2d 1104 (Ct. App. 1971).

Default judgment in action involving multiple parties was an interlocutory and not a final judgment where no determination was made that there was no just reason for delay under Rule 54 (b) (see now Rule 1-054 NMRA), and hence fact that trial court did not rule on motion to set aside within 30 days was inconsequential. Brown v. Lufkin Foundry & Mach. Co., 83 N.M. 34, 487 P.2d 1104 (Ct. App. 1971).

Where default judgment was only for compensatory damages, and issues of punitive damages and costs were left open or pending, default judgment was interlocutory, and consequently, 30-day limitation of 39-1-1 NMSA 1978 was not applicable. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Judgment not by default. — Where defendant had appeared and answered and his counsel had participated fully in trial and other proceedings, although court had refused to grant a week's delay in which to appear and produce evidence, judgment was not by default, and this rule regarding setting aside default judgments had no application. Schmider v. Sapir, 82 N.M. 355, 482 P.2d 58 (1971).

Failure to appeal denial of motion to vacate. — Where defendants on appeal attacked both entry of default judgment and order denying motions to vacate same, but failed to appeal denial of latter motion, evidence taken at hearings pursuant to that motion had no bearing on validity of the default judgment and would not be noticed, the

only issue before the appellate court being whether the default judgment had been properly entered. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Review. — Where plaintiff failed to include facts and testimony in the record to support contention of insufficient evidence to support court's order vacating default judgment, and did not request transcript of proceedings, appellate court would follow rule that upon a doubtful or deficient record, every presumption is indulged in favor of correctness and regularity of decision of trial court. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

V. PARTIES; LIMITATIONS.

Amendment of pleadings after default. — Under Rule 54(c) (see now Rule 1-054 NMRA), where an action is commenced and default occurs, and subsequently plaintiff amends his pleadings, no default judgment can be entered unless the defendant is notified of the amended pleading. Richins v. Mayfield, 85 N.M. 578, 514 P.2d 854 (1973).

Limitations of Rule 54(c) (see now Rule 1-054 NMRA) did not apply where trial court in May, 1972, approved stipulation by the terms of which bankrupt codefendant and wife were released from June 1971 default judgment, as said default judgment was not charged in kind or exceeded by trial court's action, plaintiff did not attempt to substantially amend his pleadings and trial court did not grant possession of partnership land to plaintiff since possession had already occurred. Richins v. Mayfield, 85 N.M. 578, 514 P.2d 854 (1973).

VI. EXCEPTIONS.

No showing of service on defendant. — Absent showing of service upon defendant, court was without jurisdiction to enter default judgment against defendant and it was void. Barela v. Lopez, 76 N.M. 632, 417 P.2d 441 (1966); Eaton v. Cooke, 74 N.M. 301, 393 P.2d 329 (1964).

Service of motorist by publication. — Trial court lacked jurisdiction to enter a default judgment against motorist who had been served solely by order of publication. Chapman v. Farmers Ins. Group, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Proof of unliquidated damages. — Entry of default judgment against defendant is not considered an admission by defendant of the amount of unliquidated damages claimed by plaintiff, and where damages are unliquidated and uncertain, plaintiff must prove extent of injuries established by default. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Garnishee's debt not unliquidated. — Garnishee's argument that default judgment was void because amount was unliquidated and was granted without proof failed, where amount had been fixed by operation of law when judgment against principal debtor was entered prior to issuance of writ of garnishment. Conejos County Lumber Co. v. Citizens Sav. & Loan Ass'n, 80 N.M. 612, 459 P.2d 138 (1969).

No evidence on which to base judgment. — Where damages were unliquidated, as affidavit merely set out a general description of various acts allegedly performed by plaintiff, followed by total amount of attorney's fee, together with offsets and credits thereto, and there was no evidence upon which to base default judgment, complaint would be dismissed. Wagner v. Hunton, 76 N.M. 194, 413 P.2d 474 (1966).

1-056. Summary judgment.

A. **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

B. **For defending party.** A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment as to all or any part thereof.

C. **Grounds for motion.** The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

If alternative grounds for summary judgment have been presented to the court, the order granting or denying the motion for summary judgment shall specify the grounds upon which the order is based.

D. **Time; procedure.**

(1) Motions for summary judgment will not be considered unless filed within a reasonable time prior to the date of trial to allow sufficient time for the opposing party to file a response and affidavits, depositions or other documentary evidence and to permit the court reasonable time to dispose of the motion.

(2) The moving party shall submit to the court a written memorandum containing a short, concise statement of the reasons in support of the motion with a list of authorities relied upon. A party opposing the motion shall, within fifteen (15) days after service of the motion, submit to the court a written memorandum containing a short, concise statement of the reasons in opposition to the motion with authorities. The

moving party may, within fifteen (15) days after the service of such memorandum, submit a written reply memorandum.

The memorandum in support of the motion shall set out a concise statement of all of the material facts as to which the moving party contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which the moving party relies.

A memorandum in opposition to the motion shall contain a concise statement of the material facts as to which the party contends a genuine issue does exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and shall state the number of the moving party's fact that is disputed. All material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted.

E. **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

F. **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his position, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

G. **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[As amended, effective August 1, 1989.]

ANNOTATIONS

Cross references. — For statutes on confession of judgments, *see* Sections 39-1-9 to 39-1-18 NMSA 1978.

Compiler's notes. — This rule is deemed to have superseded 105-822, C.S. 1929, relating to summary judgment for plaintiffs in contract actions.

I. GENERAL CONSIDERATION.

Summary judgment evidence. — For purposes of summary judgment, while a court must consider evidence even if the form of evidence, such as a deposition, would be inadmissible at trial, the court cannot consider evidence if the substance of the evidence is inadmissible at trial. *Wilde v. Westland Dev. Co., Inc.*, 2010-NMCA-085, 148 N.M. 627, 241 P.3d 628.

Standard for summary judgment. — Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment. All reasonable inferences are construed in favor of the non-moving party. New Mexico courts view summary judgment with disfavor, preferring a trial on the merits. Summary judgment may be proper when the movant has met its initial burden of establishing a prima facie case for summary judgment. The evidence adduced must result in reasonable inferences. When disputed facts do not support reasonable inferences, they cannot serve as a basis for denying summary judgment. Only when the inferences are reasonable is summary judgment appropriate. In addition to requiring reasonable inferences, New Mexico law requires that the alleged facts at issue be material to survive summary judgment. To determine which facts are material, the court must look to the substantive law governing the dispute. The inquiry's focus should be on whether, under substantive law, the fact is necessary to give rise to a claim. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, 148 N.M. 713, 242 P.3d 280, reversing 2009-NMCA-022, 145 N.M. 658, 203 P.3d 873.

Extrinsic evidence of ambiguity in document prevents summary judgment. — If a written document, construed in light of circumstances surrounding its making, is reasonably and fairly susceptible of different constructions, an ambiguity exists, and summary judgment is not proper and even if the language of a document appears to be clear and unambiguous, the court should consider extrinsic evidence of the circumstances surrounding the making of the document to decide whether the document is ambiguous. *City of Rio Rancho v. Amrep Southwest, Inc.*, 2010-NMCA-075, 148 N.M. 542, 238 P.3d 911, *cert. granted*, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Where defendant's final subdivision plat labeled a ten-acre parcel of land as a drainage easement; plaintiff claimed that the parties intended that the parcel be set aside as open space in perpetuity; defendant claimed that the parties intended that the parcel be encumbered by a drainage easement and that defendant retain ownership of the parcel; plaintiff presented extrinsic evidence that defendant's preliminary subdivision plat and

drainage management plan designated the parcel as open space, defendant's agent had stated that the parcel would be part of a park site, defendant represented to purchasers of lots that the parcel was open space, the parcel is an elevated area that had no drainage control function, defendant knew that plaintiff carried the parcel on plaintiff's inventory of open space, and the designation of the parcel as a drainage easement was a surrogate means of dedication so that the parcel would not be confused with defendant's obligation to donate open space under a 1979 settlement agreement; defendant contended that the dedication statement on the final plat did not dedicate the parcel to plaintiff, because plaintiff had requested that the parcel not be dedicated, plaintiff required defendant to maintain the parcel, and plaintiff approved the platting of other parcels that were designated as drainage easements; and the district court granted summary judgment for defendant based on the language of the final plat, the extrinsic evidence of the parties presented a genuine issue of material fact as to the parties' intent in designating the parcel as a drainage easement and the district court erred in granting summary judgment for defendant. *City of Rio Rancho v. Amrep Southwest, Inc.*, 2010-NMCA-075, 148 N.M. 542, 238 P.3d 911, *cert. granted*, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Summary judgment based on admissions of a codefendant. — A summary judgment against one defendant cannot bind a codefendant where the summary judgment is based on the deemed admissions of the defendant. *Alba v. Hayden*, 2010-NMCA-037, 148 N.M. 465, 237 P.3d 767.

Where plaintiff signed a real estate contract to sell property to defendant Hayden; defendant Hayden signed the contract and began making payments; plaintiff claimed that plaintiff orally withdrew plaintiff's offer to sell the property before defendant Hayden signed the contract; plaintiff refused to accept further payments from defendant Hayden; defendant Hayden transferred the property to defendant White by quitclaim deed; because defendant Hayden failed to answer requests for admissions, defendant Hayden was deemed to have admitted that defendant Hayden signed the contract after plaintiff rescinded the offer to sell the property and that defendant had not given any written assignment of any rights defendant Hayden claimed to possess to defendant White; the trial court entered summary judgment against defendant Hayden; and following a trial on the merits, the district court held that the contract between plaintiff and defendant Hayden was valid and that defendant White obtained a valid title from defendant Hayden, defendant White was not bound by the summary judgment entered against defendant Hayden. *Alba v. Hayden*, 2010-NMCA-037, 148 N.M. 465, 237 P.3d 767.

Investigation by plaintiff's medical peers was reasonable as a matter of law. — Where defendant suspended plaintiff's medical privileges based on plaintiff's use of inappropriate sexually explicit language with patients; defendant claimed immunity from suit under 42 U.S.C. §11112 of the Health Care Quality Act of 1986; the suspension was based primarily on a consideration by an ad hoc review committee of notes taken by a case manager during a telephone interview of the complaining patient after the patient had been discharged from the hospital; neither the case manager nor the

complaining patient were ever contacted or questioned by defendant regarding the incident; and plaintiff's privileges were suspended after two investigations by separate ad hoc committees that included a review of the records of plaintiff's other patients, reviews of the ad hoc committee reports by defendant's medical executive committee, an appeal to a professional review committee at which plaintiff presented evidence and cross-examined witnesses, a final review by defendant's appellate review committee, and a review by defendant's board of trustees of the entire record, plaintiff's allegations of bad faith and failure of the ad hoc committee to interview the case manager and the complaining patient were not sufficient to meet the required burden on summary judgment of showing that the review process was unreasonable as a whole. *Summers v. Ardent Health Servs., LLC*, 2011-NMSC-017, 150 N.M. 123, 257 P.3d 943, *rev'g* 2010-NMCA-026, 147 N.M. 506, 226 P.3d 20.

Genuine issue of material fact regarding medical professional review process. — Where defendant suspended plaintiff's medical privileges based on defendant's finding that plaintiff used inappropriate sexually explicit language with patients; defendant filed a motion for summary judgment on the grounds that because defendant had suspended plaintiff's medical privileges after defendant had taken reasonable efforts to obtain the facts of the matter, defendant was immune from suit under 42 U.S.C. § 11112 of the Health Care Quality Act of 1986; the suspension was based primarily on a consideration of the notes taken by a case manager during a telephone interview of the complaining patient after the patient had been discharged from the hospital; neither the case manager nor the complaining patient were ever contacted or questioned by defendant regarding the incident; and plaintiff disputed the allegations throughout the professional review process, a genuine issue of material fact existed regarding the reasonableness of defendant's efforts to obtain the facts of the matter during the professional review process and the court properly denied defendant's motion for summary judgment. *Summers v. Ardent Health Services, LLC*, 2010-NMCA-026, 147 N.M. 506, 226 P.3d 20, *cert. granted*, 2010-NMCERT-003, 148 N.M. 559, 240 P.3d 14.

Effective grant of summary judgment. — Where decedent died in a nursing home; plaintiff, as the personal representative of decedent's estate, sued defendant for wrongful death; in its answer to plaintiff's complaint for wrongful death, defendant noted that its subsidiary was the owner and operator of the nursing home, denied that defendant owned and operated the nursing home, and denied that it was the employer of the staff of the nursing home; defendant filed a motion for summary judgment on plaintiff's punitive damages claim arguing that there was no evidence that either defendant or the nursing staff had any malicious intent; and in response to plaintiff's oral motion for a ruling at the hearing on defendant's motion for summary judgment, the district court found that defendant was the employer of the nursing staff, the district court's finding constituted partial summary judgment for plaintiff because the finding resolved a disputed question of fact concerning whether defendant employed the staff of the nursing home. *Keith v. ManorCare, Inc.*, 2009-NMCA-119, 147 N.M. 209, 218 P.3d 1257, *cert. granted*, 2009-NMCERT-010.

Estoppel to plead inconsistent claims. — Where decedent was employed in the gift shop of a tribal casino; the manager of the gift shop, decedent and another employee consumed a quart of rum at work; at the end of decedent's shift, decedent clocked out and returned to the gift shop to talk to the manager about a promotion; and decedent left the casino and was killed in an automobile accident; plaintiffs, who were decedents personal representatives, initially filed a complaint for workers' compensation benefits with the Workers' Compensation Administration; in the workers' compensation proceeding, defendants argued that plaintiffs had no remedy through workers' compensation because decedent's death did not occur within the course and scope of decedent's employment; plaintiffs acquiesced in defendants' argument and did not reject the workers' compensation mediator's recommendation that the claim be denied; and plaintiffs filed a wrongful death action in district court, summary judgment for defendants on the ground that workers' compensation provided the exclusive remedy was improper because defendants were estopped from arguing in district court, contrary to defendants' position in the workers' compensation proceeding, that because defendants were negligent in their actions preceding decedent's death, workers' compensation provided the exclusive remedy. *Guzman v. Laguna Development Corp.*, 2009-NMCA-116, 147 N.M. 244, 219 P.3d 12.

Court not bound by the parties' assertions of conclusions of law. — In ruling on a motion for summary judgment, a court is not bound by the petitioner's assertions of conclusions of law whether in a petition, complaint or motion for summary judgment, even if the conclusions are admitted by the opposing party. Vives v. Verzino, 2009-NMCA-083, 146 N.M. 673, 213 P.3d 823.

The parties' assertions of conclusions of law are not binding on the court. – Where petitioner filed a declaratory judgment action to be removed from the sex offender registry; respondents filed motions to dismiss the action for lack of jurisdiction; the court denied the motions to dismiss; the parties agreed to resolve the case by summary judgment; and respondents never answered the petition or otherwise denied petitioner's averments that petitioner was not required by law to register as a sex offender, the district court was not bound by petitioner's uncontroverted conclusions of law. Vives v. Verzino, 2009-NMCA-083, 146 N.M. 673, 213 P.3d 823.

Standing. — Family members are third-party beneficiaries of burial contracts and may sue for breach of a burial contract. Eisert v. Archdiocese of Santa Fe, 2009-NMCA-042, 146 N.M. 179, 207 P.3d 1156.

Release of claims. — Where the owner, contractor and subcontractor were aware of the subcontractor's unliquidated claims for subballast when the subcontractor applied for payment of completed work under the contract and signed releases of all claims; the subballast was supplied at the request of the owner to address a soil problem that made it difficult to prospectively measure the exact amount of subballast required to correct the problem; the subcontractor's evidence showed that the understanding of the parties was that the subcontractor would supply additional subballast necessary to address the problem; the written communications concerning the understanding of the parties did

not mention that the subcontractor had made an estimating error or that the subcontractor had assumed the risk of solving the problem; and the contractor had ignored the releases and issued a change order for separate field ticket work, the coverage of the releases was ambiguous and the district court improperly granted summary judgment on the subcontractor's claim for the additional subballast. J.R. Hale Contracting Co., Inc. v. Union Pacific Railroad, 2008-NMCA-037, 143 N.M. 574, 179 P.3d 579.

Generally as to summary judgment. — Summary judgment provides a method whereby it is possible to determine whether a genuine claim for relief or defense exists and whether there is a genuine issue of fact warranting the submission of the case to the jury. Meeker v. Walker, 80 N.M. 280, 454 P.2d 762 (1969); Agnew v. Libby, 53 N.M. 56, 201 P.2d 775 (1949); Pederson v. Lothman, 63 N.M. 364, 320 P.2d 378 (1958).

Trial courts are to bring litigation to an end at an early stage when it clearly appears that one of the parties is entitled to a judgment in the case as made out by the pleadings and the admissions of the parties. The courts are not intended to substitute a new method of trial when an issue of fact exists. Buffington v. Continental Cas. Co., 69 N.M. 365, 367 P.2d 539 (1961).

A summary judgment will be granted only when the moving party is entitled to a judgment as a matter of law upon clear and undisputed facts. The purpose of the hearing on the motion for such a judgment is not to resolve factual issues but to determine whether there is any genuine issue of material fact in dispute and, if not, to render judgment in accordance with the law as applied to the established facts or, if there be a genuine factual issue, to deny the motion for summary judgment and allow the action to proceed to a trial of the disputed facts. Great W. Constr. Co. v. N.C. Ribble Co., 77 N.M. 725, 427 P.2d 246 (1967).

The ordinary summary judgment procedures can be used to penetrate the allegations of the pleadings to determine whether plaintiff has standing to sue; that is, whether injury in fact actually exists. The procedures provided by this rule serve a worthwhile purpose in disposing of groundless claims or claims which cannot be proved without putting the parties and the courts through the trouble and expense of full-blown trials on these claims. De Vargas Sav. & Loan Ass'n v. Campbell, 87 N.M. 469, 535 P.2d 1320 (1975).

Purpose of summary judgment proceeding is to expedite litigation by determining whether a party possesses competent evidence to support his pleadings so as to raise genuine issues of material fact and, if he has not, then to dispose of the matters at that state of the proceeding. Goffe v. Pharmaseal Labs., Inc., 90 N.M. 764, 568 P.2d 600 (Ct. App. 1976), rev'd in part on other grounds, 90 N.M. 753, 568 P.2d 589 (1977).

The purpose of summary judgment is to search out the evidentiary facts and determine the existence of a material issue from them. Stake v. Woman's Div. of Christian Serv. of Bd. of Missions, 73 N.M. 303, 387 P.2d 871 (1963).

The purpose of this rule is to eliminate a trial in cases where there is no genuine issue of fact although such an issue is raised by the formal pleadings. Aktiengesellschaft Der Harlander, etc. v. Lawrence Walker Cotton Co., 60 N.M. 154, 288 P.2d 691 (1955); Jelso v. World Balloon Corp., 97 N.M. 164, 637 P.2d 846 (Ct. App. 1981).

This rule is obviously designed to expedite litigation by eliminating needless trials and by avoiding frivolous defenses delaying determination of the legitimate issues. Agnew v. Libby, 53 N.M. 56, 201 P.2d 775 (1949).

One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. Goradia v. Hahn Co., 111 N.M. 779, 810 P.2d 798 (1991).

Summary proceeding determines whether issue of fact exists. — A summary proceeding is not used to decide an issue of fact but rather to determine whether one exists. Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 568 P.2d 589 (1977); First Nat'l Bank v. Nor-Am Agrl. Prods., Inc., 88 N.M. 74, 537 P.2d 682 (Ct. App.), cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975); Withers v. Board of County Comm'rs, 96 N.M. 71, 628 P.2d 316 (Ct. App. 1981).

The sole purpose of a summary judgment proceeding is to determine whether a genuine issue of material fact exists. It is not to be used to decide an issue of fact. Cebolleta Land Grant ex rel. Board of Trustees v. Romero, 98 N.M. 1, 644 P.2d 515 (1982).

A summary judgment motion is not an opportunity to resolve factual issues, but should be employed to determine whether a factual dispute exists. Gardner-Zemke Co. v. State, 109 N.M. 729, 790 P.2d 1010 (1990).

Summary judgment may be proper even though disputed issues remain, if those issues are not material. Tapia v. Springer Transf. Co., 106 N.M. 461, 744 P.2d 1264 (Ct. App. 1987).

Not necessary to decide nonconstitutional issues before constitutional questions. — This rule does not postpone a summary judgment on constitutional issues until all nonconstitutional issues have been decided. Deer Mesa Corp. v. Los Tres Valles Special Zoning Dist. Comm'n, 103 N.M. 675, 712 P.2d 21 (Ct. App. 1985).

Method of summary judgment is necessarily inquisitorial. State ex rel. State Hwy. Dep't v. Intertribal Indian Ceremonial Ass'n, 82 N.M. 797, 487 P.2d 906 (1971).

Summary judgment statute is drastic, and its purpose is not to substitute for existing methods in the trial of issues of fact. Holcomb v. Power, 83 N.M. 496, 493 P.2d 981 (Ct. App. 1971), cert. denied, 83 N.M. 473, 493 P.2d 958 (1972); McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978); McFarland v. Helquist, 92 N.M. 557, 591 P.2d 688 (Ct. App. 1979);

Garcia v. Presbyterian Hosp. Center, 92 N.M. 652, 593 P.2d 487 (Ct. App. 1979); C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 597 P.2d 1190 (Ct. App. 1979). See also Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 568 P.2d 589 (1977).

Summary judgment is drastic and its use strictly limited. North v. Public Serv. Co., 97 N.M. 406, 640 P.2d 512 (Ct. App. 1982).

Summary judgment is a drastic remedy which should be used with extreme caution. Cebolleta Land Grant ex rel. Board of Trustees v. Romero, 98 N.M. 1, 644 P.2d 515 (1982).

And its use strictly limited. — Although the trial court may be of the opinion that eventually it must decide the issues in favor of the party moving for summary judgment, if there be a genuine issue on an essential fact, evidence thereon should be heard at a trial, and no attempt should be made to try the case in advance in the summary proceedings. Johnson v. J.S. & H. Constr. Co., 81 N.M. 42, 462 P.2d 627 (Ct. App. 1969).

Even where judgment given by court sua sponte. — The rule that summary judgment is not proper where there are material issues of fact involved applies where the summary judgment is given sua sponte by the court. Boggs v. Anderson, 72 N.M. 136, 381 P.2d 419 (1963).

Summary proceeding no substitute for trial. — A motion for summary judgment is not to be used as a substitute for a trial on the merits. Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 568 P.2d 589 (1977); Sooner Pipe & Supply Corp. v. Doerrie, 69 N.M. 78, 364 P.2d 138 (1961); Hewitt-Robins, Inc. v. Lea County Sand & Gravel, Inc., 70 N.M. 144, 371 P.2d 795 (1962); Federal Bldg. Serv. v. Mountain States Tel. & Tel. Co., 76 N.M. 524, 417 P.2d 24 (1966); Southern Pac. Co. v. Timberlake, 81 N.M. 250, 466 P.2d 96 (1970); Summers v. American Reliable Ins. Co., 85 N.M. 224, 511 P.2d 550 (1973); First Nat'l Bank v. Nor-Am Agrl. Prods., Inc., 88 N.M. 74, 537 P.2d 682 (Ct. App. 1975); Fidelity Nat'l Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 583 P.2d 470 (1978); Garcia v. Presbyterian Hosp. Center, 92 N.M. 652, 593 P.2d 487 (Ct. App. 1979); Fischer v. Mascarenas, 93 N.M. 199, 598 P.2d 1159 (1979); Jemez Properties, Inc. v. Lucero, 94 N.M. 181, 608 P.2d 157 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

But parties may waive objection to said treatment. — If the parties turn the summary judgment proceedings into a trial, they will not be heard to object to that procedure. Summers v. American Reliable Ins. Co., 85 N.M. 224, 511 P.2d 550 (1973); Huerta v. New Jersey Zinc Co., 84 N.M. 713, 507 P.2d 460 (Ct. App.), cert. denied, 84 N.M. 696, 507 P.2d 443 (1973).

Summary judgment distinguished from motion to dismiss. — A summary judgment amounts to more than a motion to dismiss for failure to state a claim upon which relief may be granted; it is by its own terms a final judgment. The court goes beyond the

allegations of the complaint and determines whether a claim can in reality be supported on the grounds alleged and whether a controversy as to an issue of fact exists as to the statements of the complaint. Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970).

And from pretrial conference. — It is the purpose of the pretrial conference to simplify the issues, shape up the testimonial and documentary evidence and generally clear the decks for the trial, while the function of the summary judgment motion is to sift the proofs pro and con as submitted in the various affidavits and exhibits attached thereto so that a determination may be made without the expense and delay of a trial that there are or are not real, as distinct from mere fictitious or paper, issues which must be disposed of in the traditional manner by trial to the court or jury. Becker v. Hidalgo, 89 N.M. 627, 556 P.2d 35 (1976).

Unlike directed verdict, defendant does not admit negligence in arguing for summary judgment. — Unlike a motion for directed verdict, defendant does not admit negligence when he presents facts outside the pleading and argues for summary judgment on the theory that plaintiff was contributorily negligent as a matter of law. Silva v. City of Albuquerque, 94 N.M. 332, 610 P.2d 219 (Ct. App. 1980).

Granting of summary judgment in absence of motion. — Even if a plaintiff fails to move for summary judgment, the court would not be barred from granting summary judgment in his favor if there is no material factual issues in dispute. Martinez v. Logsdon, 104 N.M. 479, 723 P.2d 248 (1986).

Summary judgment by its own terms is a final judgment. Satterwhite v. Stolz, 79 N.M. 320, 442 P.2d 810 (Ct. App. 1968); Pederson v. Lothman, 63 N.M. 364, 320 P.2d 378 (1958); Morris v. Miller & Smith Mfg. Co., 69 N.M. 238, 365 P.2d 664 (1961).

Summary judgment is a final order and final orders are appealable. Ortega v. Shube, 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979), overruled on other grounds Bracken v. Yates Petroleum Corp., 107 N.M. 463, 760 P.2d 155 (1988).

Summary judgment is an interlocutory order. — The grant or denial of a motion for summary judgment is an interlocutory order, and, therefore, the district court could properly reconsider its previous ruling notwithstanding the fact that a different judge had issued the ruling. Tabet Lumber Co. v. Romero, 117 N.M. 429, 872 P.2d 847 (1994).

Partial summary judgment not final. — Because the trial court entered a partial summary judgment, the court order is not a final judgment and therefore is not appealable. Aetna Life Ins. Co. v. Nix, 85 N.M. 415, 512 P.2d 1251 (1973).

Generally as to trial court stating findings and conclusions. — Findings of fact and conclusions of law are not required by the rules except in involved cases where the reason for the summary judgment is not otherwise clearly apparent from the record. Williams v. Herrera, 83 N.M. 680, 496 P.2d 740 (Ct. App. 1972).

Statement of reasons necessary only as this rule requires. — Trial court is not required to state reasons for granting a summary judgment in greater detail than as provided in Subdivision (c) (see now Paragraph C). Garrett v. Nissen Corp., 84 N.M. 16, 498 P.2d 1359 (1972), overruled on other grounds, Klopp v. Wackenhut Corp., 113 N.M. 153, 824 P.2d 293 (1992); George v. Caton, 93 N.M. 370, 93 N.M. 172, 600 P.2d 822, 598 P.2d 215 (1979).

The trial court is not required to adopt a separate opinion or enter a recital in the record as to the exact grounds for the granting of a summary judgment beyond that required by this rule. Skarda v. Skarda, 87 N.M. 497, 536 P.2d 257 (1975).

A statement of the trial court's reasons for summary judgment is not required. Huerta v. New Jersey Zinc Co., 84 N.M. 713, 507 P.2d 460 (Ct. App.), cert. denied, 84 N.M. 696, 507 P.2d 443 (1973).

Findings of fact are not required in a summary judgment proceeding. Shumate v. Hillis, 80 N.M. 308, 454 P.2d 965 (1969); Burden v. Colonial Homes, Inc., 79 N.M. 170, 441 P.2d 210 (1968).

The trial court is not required to adopt a separate opinion or to enter a recital in the record as to the exact grounds for granting summary judgment beyond the requirements of this rule. Akre v. Washburn, 92 N.M. 487, 590 P.2d 635 (1979).

Summary judgment presupposes no fact issues. — Since a summary judgment presupposes that there are no triable issues of fact, findings of fact and conclusions of law are not required in rendering judgment. Failure to make and enter findings and conclusions is not error. Jacobson v. State Farm Mut. Auto. Ins. Co., 81 N.M. 600, 471 P.2d 170 (1970); Federal Bldg. Serv. v. Mountain States Tel. & Tel. Co., 76 N.M. 524, 417 P.2d 24 (1966); Cromer v. J.W. Jones Constr. Co., 79 N.M. 179, 441 P.2d 219 (Ct. App. 1968), overruled on other grounds Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975).

Points nonetheless preserved for review. — Summary judgment is neither a trial nor a substitute for trial. A tender or request for findings and conclusions is not required in summary judgment to preserve points for review. DeArman v. Popps, 75 N.M. 39, 400 P.2d 215 (1965).

Applicability to Workers' Compensation Administration proceedings. — The requirements of this rule are applicable to motions for summary judgment made in proceedings before the Workers' Compensation Administration. Junge v. John D. Morgan Constr. Co., 118 N.M. 457, 882 P.2d 48 (Ct. App. 1994).

Where summary judgment motion is made solely on pleadings without supporting affidavits, it serves the same function as a motion for judgment on the pleadings. Matkins v. Zero Refrigerated Lines, 93 N.M. 511, 602 P.2d 195 (Ct. App. 1979).

Consideration of matter outside pleadings involves summary judgment proceeding. — Where the court considered the proceedings in a prior divorce action between defendant and her former husband in addition to the pleadings of the present action, the case was dismissed under this rule, not Rule 12(c) (see now Rule 1-012 NMRA) (relating to judgment on the pleadings). Richardson Ford Sales v. Cummins, 74 N.M. 271, 393 P.2d 11 (1964).

Insufficiency of complaint properly raised under two rules. — Insufficiency of complaint could have been raised by motion for judgment on the pleadings under Rule 12(c) (see now Rule 1-012 NMRA), and if this had been done the motion would have been sustained. The fact that the motion is one made under this rule does not alter the situation, however, and such defect was properly raised under this rule. Valdez v. City of Las Vegas, 68 N.M. 304, 361 P.2d 613 (1961).

Pretrial order does not preclude summary judgment. — Since the trial court has some discretion at trial to modify the issues delimited in a pretrial order, his discretion exists at earlier stages as well so that if issues of fact at pretrial conference later dissolve into issues of law before trial, summary judgment is appropriate upon proper motion and hearing. The mere listing of contested issues in a pretrial order does not preclude summary judgment on defendant's motion after a hearing. Becker v. Hidalgo, 89 N.M. 627, 556 P.2d 35 (1976).

Rule 1-006 NMRA requirements not rigid in summary judgment proceedings. — Assuming but not deciding that Rule 6(d) (see now Rule 1-006 NMRA) applies to motions for summary judgment and requires any supporting affidavits to be filed simultaneously with them, nevertheless there is room for judicial discretion; Subdivision (b) (see now Paragraph B) shows that a rigid application of Rule 6(d) (see now Rule 1-006 NMRA) is not contemplated. Since it is permissible to renew motions for summary judgment previously denied to avoid circuity, the motions are treated as if they were refiled at the time the affidavits were filed, an approach which accords with the flexible approach contemplated by Subdivision (e) (see now Paragraph E). Cordova v. City of Albuquerque, 86 N.M. 697, 526 P.2d 1290 (Ct. App. 1974).

Motion for summary judgment is not a responsive pleading within the meaning of Rule 15(a) (see now Rule 1-015 NMRA), providing for the timing of amendments to pleadings. Jacobson v. State Farm Mut. Auto. Ins. Co., 81 N.M. 600, 471 P.2d 170 (1970).

Denial of motion not reviewable after final judgment on merits. — A denial of a motion for summary judgment is not reviewable after final judgment on the merits. If a summary judgment motion is improperly denied, the error is not reversible, for the result becomes merged in the subsequent trial. Green v. General Accident Ins. Co. of Am., 106 N.M. 523, 746 P.2d 152 (1987).

Appellate review of untimely motion. — Even if the motion was untimely, where the trial court addresses an untimely motion on the merits, appellate court may review the

question presented. Deaton v. Guiterrez, 2004-NMCA-043, 135 N.M. 423, 89 P.3d 672, cert. denied, 2004-NMCERT-004.

Reviewing court looks to whole record. — In deciding whether the summary judgment was proper, reviewing court must look to the whole record and take note of any evidence therein which puts a material fact in issue. Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 568 P.2d 589 (1977); C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 597 P.2d 1190 (Ct. App. 1979).

Of undisputed facts. — In reviewing the summary judgment, the court considers only undisputed facts and determines whether under those facts summary judgment was proper as a matter of law. Fleming v. Phelps-Dodge Corp., 496 P.2d 1111 (Ct. App. 1972).

Reviewing court to take admitted facts as undisputed. — When a party admits, for purposes of a summary judgment motion, the veracity of the allegations in the complaint, a reviewing court should consider the facts pleaded as undisputed and determine if a basis is present to decide the issues as a matter of law. GCM, Inc. v. Kentucky Cent. Life Ins. Co., 1997-NMSC-052, 124 N.M. 186, 947 P.2d 143.

Reviewing court is not bound by grounds used by trial court as the basis for the granting of summary judgment. C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 597 P.2d 1190 (Ct. App. 1979).

Review cannot be based on evidence not before trial court. — An affidavit which was not before the trial court at the summary judgment hearing could not be considered by the court of appeals in reviewing the trial court's determination that summary judgment was appropriate. Schmidt v. St. Joseph's Hosp., 105 N.M. 681, 736 P.2d 135 (Ct. App. 1987).

Burden on party who won summary judgment. — In order to sustain a summary judgment defendants have the burden of showing an absence of a genuine issue of material fact as a matter of law. Reinhart v. Rauscher Pierce Sec. Corp., 83 N.M. 194, 490 P.2d 240 (Ct. App. 1971).

Appellate court views matters in most favorable aspect supporting trial. — On summary judgment the appellate court must view the matters presented in the most favorable aspect they will bear in support of the right to trial on the issues. Read v. Western Farm Bureau Mut. Ins. Co., 90 N.M. 369, 563 P.2d 1162 (Ct. App. 1977); Ginn v. MacAluso, 62 N.M. 375, 310 P.2d 1034 (1957); Coca v. Arceo, 71 N.M. 186, 376 P.2d 970 (1962); Cortez v. Martinez, 79 N.M. 506, 445 P.2d 383 (1968); Nix v. Times Enters., Inc., 83 N.M. 796, 498 P.2d 683 (Ct. App. 1972); C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 597 P.2d 1190 (Ct. App. 1979).

A reviewing court looks to the whole record and views matters in the light most favorable to support a trial on the merits. North v. Public Serv. Co., 97 N.M. 406, 640 P.2d 512 (Ct. App. 1982).

Unless appellant fails to present record showing judgment wrong. — The summary judgment is entitled to all presumptions in its favor where appellants fail to present a record showing it to be wrong. Shumate v. Hillis, 80 N.M. 308, 454 P.2d 965 (1969).

Plaintiff has the burden of clearly pointing out the asserted error of the trial court, and where even though the propriety of the summary judgment in favor of defendant is assumed to have been presented as a point relied on for reversal, if the point is neither argued nor supported by authority, it is considered as abandoned. Novak v. Dow, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970).

Genuine issues deemed present where trial court's finding not challenged. — Where the insurance company did not challenge by cross-appeal the trial court's finding that genuine issues of material fact existed with respect to its agent's negligence and fraud and did not establish that its agent was not acting within the scope and authority of that agency, genuine issues of material fact were present on the liability of the company for the agent's claimed misdeeds. Read v. Western Farm Bureau Mut. Ins. Co., 90 N.M. 369, 563 P.2d 1162 (Ct. App. 1977).

Defenses cannot be invoked for first time on appeal. — In determining whether it was error to grant summary judgment, appellate court is limited to matters presented in the pleadings, affidavits and pretrial depositions, and defenses cannot be invoked for the first time on appeal. Western Farm Bureau Mut. Ins. Co. v. Barela, 79 N.M. 149, 441 P.2d 47 (1968).

Appellate court reversing summary judgment need not consider other issues. — Where on an appeal from an order granting defendant's motion for summary judgment in a malpractice action there are factual issues concerning negligence as a proximate cause of plaintiff 's condition, the court in reversing need not consider plaintiff 's other contentions concerning proximate cause. Binns v. Schoenbrun, 81 N.M. 489, 468 P.2d 890 (Ct. App. 1970).

Proceedings upon reversal of summary judgment. — Since the trial court erred in granting summary judgment against one defendant (principal of the other), plaintiff must go to trial against it, prove a case for compensatory damages (to which plaintiff was no longer entitled, a judgment against the other tortfeasor having been discharged) and then prove culpable conduct in order to obtain judgment on the punitive element of damages, because punitive damages may only be awarded as an adjunct to compensatory or actual damages. Sierra Blanca Sales Co. v. Newco Indus., Inc., 88 N.M. 472, 542 P.2d 52 (Ct. App. 1975), rev'd on other grounds, 89 N.M. 187, 548 P.2d 865 (1976).

II. SUMMARY JUDGMENT FOR CLAIMANT.

Ownership of bank account. — Where defendant opened a bank account in defendant's name as primary joint owner and in the names of defendant's children as secondary joint owners; defendant wanted defendant's children to be able to assist defendant with payment of bills and financial matters; plaintiffs obtained a judgment against one of defendant's children and served a writ of garnishment on the bank; the bank seized all funds in the account; defendant intervened and filed for summary judgment claiming that defendant was the sole owner of the account; and defendant supported the motion with an affidavit in which the child who was the judgment debtor stated that the child had never deposited or withdrawn money from the account, disclaimed any ownership in the account, and that the child was a joint owner merely to assist defendant, there was a genuine issue of material fact with respect to the ownership of the funds because the account documents indicated that the account was jointly owned by defendant and defendant's children. *Alcantar v. Sanchez*, 2011-NMCA-073, 150 N.M. 146, 257 P.3d 966.

Implied contract with municipality. — Where a municipality enacted an ordinance that adopted a comprehensive personnel policy manual that required the municipality to offer to its retiring employees the option of continuing their health care coverage under the municipality's group plan at the active employee premium reimbursement rate; the petitioners, who retired from municipal service, accepted the municipality's offer at the time they retired and before the municipal council enacted an ordinance deleting the retirement insurance provision from the manual, municipal employees were required to be provided with a copy of and acknowledge receipt of the manual; employees were bound by the terms of the manual; the municipality felt bound to comply with the manual; municipal officials made admissions by their statements and conduct that the municipality was obligated to continue paying health insurance premiums for retirees who had accepted the municipality's offer to do so after the retirees had met the requirements of the ordinance existing at the time of retirement; and municipal officials made admissions that provisions of the manual became terms of an employment contract and the retirees had a vested interest in continued health insurance benefits, there was sufficient evidence to show the existence of genuine issues of material fact regarding whether an implied contract was formed and the scope of its terms. Beggs v. City of Portales, 2009-NMSC-023, 146 N.M. 372, 210 P.3d 798.

Insufficient evidence. — Where decedent died in a nursing home; plaintiff, as the personal representative of decedent's estate, sued defendant for wrongful death; in its answer to plaintiff's complaint for wrongful death, defendant noted that its subsidiary was the owner and operator of the nursing home, denied that defendant owned and operated the nursing home, and denied that it was the employer of the staff of the nursing home; plaintiff's evidence dealt with the fact that both defendant and the nursing home used a common trade name and defendant's acknowledgment that the nursing home was one of defendant's subsidiaries; plaintiff's evidence was contradicted by defendant's evidence which indicated that the nursing home was owned and operated by a subsidiary and that the staff of the nursing home were employed by the subsidiary,

plaintiff's evidence was insufficient to support a ruling as a matter of law that defendant was the employer of the staff of the nursing home. *Keith v. ManorCare, Inc.*, 2009-NMCA-119, 147 N.M. 209, 218 P.3d 1257, *cert. granted*, 2009-NMCERT-010.

Enforcement of restrictive covenants. — Where concerned residents and the developer of commercial property entered into a settlement agreement that contained restrictive covenants on the commercial property that ran with the land; the agreement did not give the residents a personal covenant in gross or a right to enforce the covenants; and the residents did not own any property that was benefited by the covenants, the residents did not have a right to enforce the covenants and the district court properly granted summary judgment in favor of the developer. Santa Fe Estates, Inc. v. Concerned Residents of S.F. North, Inc., 2009-NMCA-033, 146 N.M. 166, 207 P.3d 1143.

Partial summary judgment not final. — See same catchline in notes under analysis line I, "General Consideration."

Partial summary judgment upheld. — Trial court did not err in granting partial summary judgment against a party before completion of discovery, where such party did not file a motion to compel production of requested documents, did not seek a continuance of the summary judgment hearing, and had approximately two and a half months to discover the critical information after the filing of the summary judgment motions until the court's grant of summary judgment against it. Sun Country Sav. Bank v. McDowell, 108 N.M. 528, 775 P.2d 730 (1989).

Summary judgment upheld. — Where defendants' motion for summary judgment relied on the fact that plaintiffs at an early stage in the proceedings admitted that they lacked an expert witness, such a showing was sufficient to support a motion for summary judgment on the basis that the nonmoving party's evidence was insufficient to establish an essential element of the nonmoving party's claim. Blauwkamp v. University of N.M. Hosp., 114 N.M. 228, 836 P.2d 1249 (Ct. App. 1992).

Summary judgment erroneous in wage claim. — Employer's affidavit that employee was salaried, and thus not entitled to overtime, and had not accrued vacation time under her employment contract and employer's vacation policy, combined with a copy of the employment contract and other documentation, was sufficient to establish that there were disputed issues of fact concerning employer's liability for overtime and vacation pay which precluded summary judgment. Southworth v. Santa Fe Servs., 1998-NMCA-109, 125 N.M. 489, 963 P.2d 566.

III. SUMMARY JUDGMENT FOR DEFENDING PARTY.

Bank's duty in garnishment actions. — Where defendant opened a bank account in defendant's name as primary joint owner and in the names of defendant's children as secondary joint owners; defendant wanted defendant's children to be able to assist defendant with payment of bills and financial matters; plaintiffs obtained a judgment

against one of defendant's children and served a writ of garnishment on the bank; the bank seized all funds in defendant's account; defendant filed suit against the bank for conversion; the bank filed for summary judgment claiming that the bank had complied with the writ of garnishment and other applicable laws; the writ of garnishment authorized the bank to seize only funds owned by the judgment debtor; and the bank violated Section 45-6-211 NMSA 1978 by seizing the funds without any acknowledgment of or concession to the interests of the non-debtor co-owners of the account and to the extent the writ of garnishment was notice of an adverse claim, the bank violated Section 58-1-7 NMSA 1978 by failing to require indemnity from plaintiffs or an order reflecting that all of the owners of the account had been joined as parties to the lawsuit which violations supported defendant's claim of conversion, the bank was not entitled to summary judgment. *Alcantar v. Sanchez*, 2011-NMCA-073, 150 N.M. 146, 257 P.3d 966.

Bank account agreement was insufficient to authorize seizure of funds in garnishment action. — Where defendant opened a bank account in defendant's name as primary joint owner and in the names of defendant's children as secondary joint owners; defendant wanted defendant's children to be able to assist defendant with payment of bills and financial matters; defendant signed an account application in which defendant acknowledged that defendant had received a copy of an account agreement and agreed to be bound by the agreement; the agreement provided that in garnishment actions affecting any co-owner, the bank could treat all funds in the account as belonging to the judgment debtor; plaintiffs obtained a judgment against one of defendant's children and served a writ of garnishment on the bank; the bank seized all funds in defendant's account; defendant filed suit against the bank for conversion; the bank moved for summary judgment on the ground that the bank was authorized to seize the funds pursuant to the account agreement; and defendant filed an affidavit in which defendant denied ever receiving a copy of the account agreement; a genuine issue of material fact existed with respect to the applicability of the account agreement and the bank was not entitled to summary judgment. *Alcantar v. Sanchez*, 2011-NMCA-073, 150 N.M. 146, 257 P.3d 966.

Failure to notify co-owner of funds seized by bank in garnishment action. — Where defendant opened a bank account in defendant's name as primary joint owner and in the names of defendant's children as secondary joint owners; defendant wanted defendant's children to be able to assist defendant with payment of bills and financial matters; plaintiffs obtained a judgment against one of defendant's children and served a writ of garnishment on the bank; the bank seized all funds in defendant's account but did not give defendant notice of the seizure; defendant filed suit against the bank for negligence; the bank moved for summary judgment, there are no statutory or common law rules that established a duty of the bank to notify non-debtor owners of a garnishment, and although the bank was entitled to summary judgment as to negligence, the claims for negligence were improperly dismissed because the bank had direct information concerning the plaintiffs' claim against the funds and a statutory duty to ensure that a garnishment not proceed against innocent depositors which, if

established by the facts, may create a duty to notify non-debtor holders of the account about the claim. *Alcantar v. Sanchez*, 2011-NMCA-073, 150 N.M. 146, 257 P.3d 966.

Claim of breach of covenant running with the land. — Where plaintiffs sued defendant for breach of deed restrictions that prohibited defendant from subdividing defendant's land; the land was subject to a recorded declaration of covenants prohibiting the subdivision of the land into less than one acre lots; at the time defendant purchased the land, the surrounding property did not have any improvements that would give defendant notice that there was a general plan of development other than the recorded restrictions; defendant's real estate agent told defendant that the land could be subdivided into one acre lots; the deed that was given to defendant contained a restriction that prohibited all subdivision of the land; the deed restriction placed a burden on defendant's land and a benefit on plaintiffs' property; identical restrictions were placed on property surrounding defendant's land; purchasers of property in the subdivision whose deeds did not contain the deed restriction were told that they were prohibited from subdividing; and the original owner of the subdivision wanted to restrict subdivision because of the unique layout of the property and a desire to limit density, defendant was not entitled to summary judgment on the ground that the deed restriction was not an enforceable covenant running with the land because defendant failed to show that the deed restriction did not touch and concern the land and that defendant did not have actual knowledge of the deed restriction and because there was a question of fact as to whether the original owner of the subdivision intended to create a covenant running with the land. *Dunning v. Buending*, 2011-NMCA-010, 149 N.M. 260, 247 P.3d 1145, *cert. denied*, 2011-NMCERT-001, 150 N.M. 558, 263 900.

Compliance with federal substantive law as it relates to oligopolies. — To ensure uniform application of federal and state laws in antitrust actions under the Antitrust Act, §§ 57-1-1 to 57-1-15 NMSA 1978, involving oligopolies, such as the tobacco industry, which are by nature interdependent such that it is likely that when one company acts in a certain manner, the other firms will determine whether it is in their best interest to follow the leader's action, plaintiffs must meet the standard of federal substantive antitrust law which requires that to show that there was an unlawful agreement, plaintiffs must present evidence that tends to exclude the possibility that defendants acted independently or plaintiffs cannot meet their burden of establishing a genuine issue of material fact to withstand summary judgment for defendants. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, 148 N.M. 713, 242 P.3d 280, *rev'g* 2009-NMCA-022, 145 N.M. 658, 203 P.3d 873.

Evidence of "plus factors" did not exclude the possibility of independent action. — Where plaintiffs alleged that defendants engaged in an agreement to fix the price of cigarettes; defendants were large manufacturers of cigarettes; defendant Philip Morris reduced wholesale prices on all brands; the other defendants followed the price reductions; defendants then began to increase wholesale prices in near lock-step fashion; and plaintiffs offered evidence of parallel pricing behavior, the economies of the market place, motivation to conspire, condensation of price tiers, actions contrary to self-interest, conspiratorial meetings in foreign markets, a smoking and health

conspiracy, defendants monitoring the market through a business data service, opportunities to conspire, and pricing decisions made at high levels, the district court properly granted summary judgment for defendants, because plaintiff's evidence was just as consistent with lawful, independent actions as it was with price fixing and did not exclude independent conduct which was required to raise a genuine issue of material fact that there was an agreement among defendants to fix the price of cigarettes, and because defendants offered evidence of fierce retail competition that undermined the plausibility of a price-fixing agreement, that wholesale prices did not exceed the wholesale price levels that existed at the time defendants began to lower prices until almost five years later, and that plaintiffs' expert acknowledged that it was just as likely that defendants would have behaved in the same manner if they were acting independently and not under a price-fixing agreement. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, 148 N.M. 713, 242 P.3d 280, *rev'g* 2009-NMCA-022, 145 N.M. 658, 203 P.3d 873.

Surface lessee of land had no standing to sue for trespass and unjust enrichment. — Where plaintiff leased land for purposes of ranching and defendants pumped salt water from beyond the boundaries of the land into a disposal well on the land without the knowledge or consent of plaintiff, plaintiff did not have standing to sue defendants for trespass or unjust enrichment. *McNeill v. Rice Eng'g & Operating, Inc.*, 2010-NMSC-015, 148 N.M. 16, 229 P.3d 489.

Owner of land had no standing to sue for trespass for use of land prior to owner's acquisition of the land. — Where defendants pumped salt water from beyond the boundaries of plaintiff's land into a disposal well on plaintiff's land without the knowledge or consent of plaintiff or plaintiff's predecessor in interest, plaintiff did not have standing to sue defendants for trespass for acts that occurred prior to the time plaintiff owned the land. *McNeill v. Rice Eng'g & Operating, Inc.*, 2010-NMSC-015, 148 N.M. 16, 229 P.3d 489.

Police officer had qualified immunity in Section 1983 action. — Where a municipal police officer stopped plaintiff for a traffic violation; the officer noticed a handgun in plaintiff's vehicle; dispatch informed the officer that plaintiff was a convicted felon; plaintiff produced an order from Texas that stated that plaintiff had a deferred conviction; the Texas order did not indicate the charge to which the order pertained, whether the charge was for a felony, or whether the order pertained to the same charge as the felony identified by dispatch; the officer did not find anything that indicated that the conviction about which dispatch had informed the officer was deferred or that the Texas order was authentic; and the officer arrested plaintiff on a charge of felon in possession of a firearm, because plaintiff's felony status at the time of arrest was uncertain and the officer reasonably believed that the officer had probable cause to arrest plaintiff, the district court did not err in granting the officer qualified immunity and summary judgment as a matter of law. *Dickson v. City of Clovis*, 2010-NMCA-058, 148 N.M. 831, 242 P.3d 398, *cert. denied*, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Municipality did not have supervisory liability under Section 1983 where municipal police officer had qualified immunity. — Where a municipal police officer stopped plaintiff for a traffic violation; the officer noticed a handgun in plaintiff's vehicle; dispatch informed the officer that plaintiff was a convicted felon; plaintiff produced an order from Texas that stated that plaintiff had a deferred conviction; the Texas order did not indicate the charge to which the order pertained, whether the charge was for a felony, or whether the order pertained to the same charge as the felony identified by dispatch; there was no evidence that the municipality that employed the officer had any policy or custom regarding arrest that violated civil rights; and the officer had qualified immunity, the municipality that employed the officer did not have supervisory liability under Section 1983. *Dickson v. City of Clovis*, 2010-NMCA-058, 148 N.M. 831, 242 P.3d 398, *cert. denied*, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Sales managers and salespersons were not employees. — Where, in a personal injury case, defendant's sales managers and salespersons sued defendant when an automobile in which they were riding was involved in an accident in which the occupants were killed or injured; the undisputed material facts showed that defendant operated a processing center for direct sales of magazine subscriptions; defendant entered into independent contractor agreements with sales managers to solicit magazine and book subscriptions; sales managers entered into independent contractor agreements with salespersons to sell magazine subscriptions to consumers; all of the agreements provided that the parties intended to create an independent contractor relationship not an employer-employee relationship; sales managers operated their sales crews as separate companies, were free to hire and fire their salespersons and determine where and when to solicit subscriptions, had no production quotas, were not required to sell only for defendant, and were paid through a credit/debit system that kept track of commissions due and money owed by the sales managers; defendant did not withhold taxes from sales managers; salespersons were hired and fired by sales managers; defendant did not determine the work hours or areas for salespersons; and sales managers determined the procedures for processing subscriptions and provided their salespersons with forms, price lists and other printed material, the sales managers and salespersons were not employees of defendant but independent contractors and summary judgment for defendant was proper. *Korba v. Atlantic Circulation, Inc.*, 2010-NMCA-029, 148 N.M. 137, 231 P.3d 118.

No common law duty of medical professionals to third party. — Where the decedent was struck and killed by an automobile driven by the perpetrator during a high-speed chase with police officers; the perpetrator had an extensive history of psychiatric illness; the same month the decedent was killed the perpetrator had been transported to the hospital pursuant to a district court order that the perpetrator be evaluated for civil commitment; the doctor who performed the evaluation discharged the perpetrator after five days because the perpetrator did not meet the criteria for continued commitment; the decedent was killed twelve days after the perpetrator was discharged from the hospital; and the perpetrator did not have an ongoing patient-provider relationship with the hospital and the doctor at the time of the accident, and further contacts between the perpetrator and the hospital and the doctor were not

scheduled or planned, the hospital and the doctor did not have a common law duty to the decedent regarding the treatment and discharge of the perpetrator because the likelihood of injury to the decedent based on the hospital or doctor's actions was not foreseeable to the extent necessary to create a duty on the part of the hospital or the doctor, because the hospital and doctor did not have a "special relationship" with the perpetrator or the right or ability to control the perpetrator's conduct at the time of the accident, and because New Mexico public policy does not support such a duty. *Ross v. City of Las Cruces*, 2010-NMCA-015, 148 N.M. 81, 229 P.3d 1253.

No statutory duty of medical professionals to third party. — Where the decedent was struck and killed by an automobile driven by the perpetrator during a high-speed chase with police officers; the perpetrator had an extensive history of psychiatric illness; approximately three months before the decedent was killed, the perpetrator had been charged with a misdemeanor assault in municipal court; at a competency hearing in district court the same month decedent was killed, the parties stipulated that the perpetrator was not competent to stand trial and the misdemeanor assault charge was remanded to municipal court for dismissal; at the competency hearing, the state intervened to seek an evaluation of the perpetrator for a civil commitment; the district court ordered that the perpetrator be transported to the hospital for evaluation; the doctor who performed the evaluation discharged the perpetrator after five days because the perpetrator did not meet the criteria for continued commitment; the transport order did not require that the perpetrator be returned to the facilities of the district court after discharge from the hospital; the perpetrator was not transported to the hospital in connection with a criminal matter; there was no finding by the district court that the perpetrator was a danger to himself or others; and the decedent was killed twelve days after the perpetrator was discharged from the hospital, the hospital and the doctor did not have a statutory duty to the decedent under Section 43-1-1(A) NMSA 1978 either to detain the perpetrator beyond the time required for the evaluation or to return the perpetrator to the district court facilities. *Ross v. City of Las Cruces*, 2010-NMCA-015, 148 N.M. 81, 229 P.3d 1253.

Contract term was clear and unambiguous regarding termination. — Where plaintiff sued defendant, who was an optometrist, for breach of a non-compete provision in a sublease between the parties; the sublease provided that the sublease could be renewed if defendant gave plaintiff written notice at least 120 days prior to the end of the term of defendant's intent to renew, that defendant's notice of intent to renew would be superseded if plaintiff notified defendant in writing at least 120 days prior to the end of the term of plaintiff's intention to terminate the sublease at the end of the term, in which case the sublease would terminate at the end of the term, that the renewal would be on plaintiff's current form of sublease agreement, which defendant had to sign not less than 60 days prior to the end of the term, and that if defendant failed to sign the renewal sublease, defendant would be deemed to have elected not to renew the sublease; more than 120 days prior to end of the sublease, plaintiff sent defendant a letter explicitly stating that the letter was notice of non-renewal of the sublease, instructed defendant to sign a provision at the bottom of the letter acknowledging termination of the sublease, and enclosed a new sublease if defendant wished to

continue subleasing space from plaintiff; defendant did not sign the acknowledgment of termination or accept the new sublease agreement; defendant sent a letter to plaintiff stating that defendant was not renewing the sublease; and defendant opened an optometry practice at a time and location that violated the non-compete provision in the sublease, the district court properly dismissed plaintiff's breach of contract claim on summary judgment because plaintiff had terminated the sublease and the non-compete provision as a matter of law so that the non-compete provision was not in effect when defendant established a new optometry practice. *Lenscrafters, Inc. v. Kehoe*, 2012-NMSC-020, 282 P.3d 758.

Ambiguous contract. — Where five individuals, including plaintiff, personally guaranteed a $500,000 bank loan to a third party; the five guarantors entered into a memorandum agreement to pay equal shares of any unpaid amounts; the guarantors also entered into a compensation agreement with the third party in which the third party agreed to pay each guarantor a premium of $1.00 for each dollar guaranteed as compensation for the risk the guarantors had taken in guaranteeing the loan; when the third party defaulted on the loan, plaintiff refused to pay a pro-rata share of the amount due; three of the guarantors paid $500,000 due on the loan; the third party subsequently paid the three guarantors a premium of $500,000 pursuant to the compensation agreement; and plaintiff sued the three guarantors to recover $100,000 of the premium, the district court erred in granting summary judgment to the three guarantors because the compensation agreement was ambiguous as to what event triggered payment of the premium and as to whether the parties intended the memorandum agreement and the compensation agreement to be construed together. *Randles v. Hanson*, 2011-NMCA-059, 150 N.M. 362, 258 P.3d 1154.

Rescission of contract denied. — Where plaintiff and defendant entered into an agreement for the development of commercial property; the business relationship between the parties was subsequently terminated when the parties entered into a settlement agreement in which plaintiff released all claims against defendant; plaintiff sought to rescind the settlement agreement in order to pursue claims against defendant under the property development agreement; and plaintiff failed to tender back the monetary payment plaintiff had received under the settlement agreement, plaintiff was barred from rescinding the settlement agreement and the court properly granted summary judgment against plaintiff. *Branch v. Chamisa Development Corporation, Ltd.*, 2009-NMCA-131, 147 N.M. 397, 223 P.3d 942.

Claims for fraud in the inducement of a settlement agreement denied. — Where plaintiff and defendant entered into an agreement for the development of commercial property; the business relationship between plaintiff and defendant was subsequently terminated when the parties entered into a settlement agreement in which plaintiff released all claims against defendant; plaintiff alleged that plaintiff was induced to enter into the settlement agreement by defendant's fraudulent misrepresentations and concealment; and the record showed that during the negotiations for the settlement agreement, plaintiff suspected that defendant was misrepresenting information, plaintiff knew that plaintiff had not received full disclosure from defendant, and plaintiff

nevertheless went ahead with the settlement, plaintiff knew that plaintiff was releasing any fraud claims against defendant and the court properly granted summary judgment against plaintiff. *Branch v. Chamisa Development Corporation, Ltd.*, 2009-NMCA-131, 147 N.M. 397, 223 P.3d 942.

Claim for breach of a fiduciary duty denied. — Where plaintiff and defendant entered into an agreement for the development of commercial property; the property development agreement specifically disclaimed any partnership or joint venture between the parties; the business relationship between plaintiff and defendant was subsequently terminated when the parties entered into a settlement agreement in which plaintiff released all claims against defendant as of the date of the settlement agreement; and plaintiff claimed that defendant breached its fiduciary duty to plaintiff because defendant had not disclosed to plaintiff information concerning a purchase offer for the property that defendant had received during the negotiations for the settlement agreement, the parties were parties to an arm's-length commercial transaction when they entered into the settlement agreement and the court properly granted summary judgment against plaintiff. *Branch v. Chamisa Development Corporation, Ltd.*, 2009-NMCA-131, 147 N.M. 397, 223 P.3d 942.

Duty of care to baseball spectators. — An owner/occupant of a commercial baseball stadium owns a duty that is symmetrical to the duty of the spectator. Spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play and the owner/occupant must exercise ordinary care not to increase that inherent risk. *Edward C. v. City of Albuquerque*, 2010-NMSC-043, 148 N.M. 646, 241 P.3d 1086, *rev'g Crespin v. Albuquerque Baseball Club, LLC*, 2009-NMCA-105, 147 N.M. 62, 216 P.3d 827.

Defendant followed the rules of baseball. — Where a child was seated at picnic tables located in the left outfield stands at a baseball stadium; without warning or notice pre-game batting practice began, and defendant hit a ball directly into the left field picnic tables; the ball struck the child in the head; and defendant was attempting to do what the official rules and defendant's team expected defendant to do, defendant made a prima facie case that defendant's actions satisfied defendant's duty to exercise reasonable care under the circumstances. *Crespin v. Albuquerque Baseball Club, LLC*, 2009-NMCA-105, 147 N.M. 62, 216 P.3d 827, *reversed by Edward C. v. City of Albuquerque*, 2010-NMSC-043, 148 N.M. 646, 241 P.3d 1086.

No duty of the operator of a business to prevent the sudden, deliberate targeted assassination of customers on its premises. — In a premises liability case for alleged wrongful death and personal injury against the defendant who was the owner and operator of a convenience store and gas station, where the occupants of a car were suddenly and deliberately shot by a person whom the driver of the car had previously threatened with a gun; at the time of the shooting, the car was parked in the parking lot of the defendant's convenience store; and prior to the shooting, there were police reports of theft of gasoline and alcohol, physical altercations involving loiterers, domestic violence, harassment, traffic accidents, vandalism, and trespassing at the

convenience store, the owner of the convenience store did not owe the occupants of the car a duty to prevent the shooting because the shooting was not foreseeable and summary judgment for the owner was proper. *Romero v. Giant Stop-N-Go of N.M., Inc.*, 2009-NMCA-059, 146 N.M. 520, 212 P.3d 408, *cert. denied*, 2009-NMCERT-005.

Intentional interference with a contractual relationship. — In an action for intentional interference with a contractual relationship based on the termination of the defendant from the defendant's employment, the sole-intent-to-harm standard does not apply to the improper-means ground of an intentional interference with contractual relationship claim and the plaintiff is not require to show that the defendant used improper means solely to harm the plaintiff. *Zarr v. Washington Tru Solutions, LLC*, 2009-NMCA-050, 146 N.M. 274, 208 P.3d 919, *overruling, Los Alamos Nat'l Bank v. Martinez Surveying*, 2006-NMCA-081, 140 N.M. 41, 139 P.3d 201.

In an action for intentional interference with a contractual relationship based on the termination of the defendant from the defendant's employment, the sole-intent-to-harm standard applies to the improper-motive ground of an intentional-interference-with-contractual-relations claim and requires the plaintiff to show that the defendant had an improper motive solely to harm the plaintiff. *Zarr v. Washington Tru Solutions, LLC*, 2009-NMCA-050, 146 N.M. 274, 208 P.3d 919, *overruling, Los Alamos Nat'l Bank v. Martinez Surveying*, 2006-NMCA-081, 140 N.M. 41, 139 P.3d 201.

Where an employee's employment was at-will, the sole-motive test is the correct standard to apply to the improper-motive ground of an intentional interference with a contractual relationship claim. *Zarr v. Washington Tru Solutions, LLC*, 2009-NMCA-050, 146 N.M. 274, 208 P.3d 919, *overruling, Los Alamos Nat'l Bank v. Martinez Surveying*, 2006-NMCA-081, 140 N.M. 41, 139 P.3d 201.

Where the employee, who was responsible for oversight and forecasting of the employer's budget, experienced difficulties with the employee's supervisor that were related to the employee's budget responsibilities and to personal friction between the employee and the employee's supervisor and where the employee was discharged from employment because the employee did not follow the proper channels when the employee by-passed the employee's supervisor with the employee's concerns about proposed budget proposals, the employee failed to show that the sole motive of the employer for discharging the employee was to harm the employee because the employer acted in part for legitimate business reasons and no material issue of fact existed to defeat the employer's motion for summary judgment. *Zarr v. Washington Tru Solutions, LLC*, 2009-NMCA-050, 146 N.M. 274, 208 P.3d 919, *overruling, Los Alamos Nat'l Bank v. Martinez Surveying*, 2006-NMCA-081, 140 N.M. 41, 139 P.3d 201.

Tortious interference with a contractual relationship. — Where plaintiff, which was an eyeglass-dispensing store, sued defendant, who was an optometrist, to enforce a non-compete provision in a sublease agreement between the parties; after plaintiff terminated the sublease; defendant established an optometry practice in subleased space from a different eyeglass-dispensing store at a time and location that violated the

restrictions of the non-compete provision; defendant counter-claimed for intentional interference with a contractual relationship and alleged that plaintiff interfered with defendant's existing contract with the second eyeglass-dispensing store, with defendant's prospective contracts with the second eyeglass-dispensing store, and with defendant's patients at plaintiff's store and the second eyeglass-dispensing store; defendant's sublease with the second eyeglass-dispensing store expired and defendant rejected a renewal offer; and defendant offered no evidence to establish that defendant was unable to fulfill defendant's contractual obligations with the second eyeglass-dispensing store, that plaintiff caused defendant to lose the benefits of the contract with the second eyeglass-dispensing store, that plaintiff's primary motive for filing its lawsuit was personal vengeance or spite for the purpose of harming defendant's relationship with the second eyeglass-dispensing store, that plaintiff's request that defendant steer patients to plaintiff's store and provide defendant's patient list to plaintiff was beyond the profit motive, for personal vengeance or spite, or that plaintiff provided false and misleading information to patients who tried to contact defendant, the district court properly dismissed defendant's tortious interference with a contractual relationship claim on summary judgment. *Lenscrafters, Inc. v. Kehoe*, 2012-NMSC-020, 282 P.3d 758.

Malicious abuse of process. — Summary judgment for the defendants in a malicious abuse of process action was proper where the undisputed material facts showed that the defendants filed their action against the plaintiff after they had performed a reasonable pre-filing investigation of their claims against the plaintiff and that the knowledge arising from their pre-filing investigation supported a reasonable belief that the defendants had probable cause to bring their claims against the plaintiff. Guest v. Berardinelli, 2008-NMCA-144, 145 N.M. 186, 195 P.3d 353.

Where plaintiff sued defendant to enforce a non-compete provision in a sublease agreement; defendant counter-claimed for malicious abuse of process based solely on plaintiff's filing its lawsuit; and the undisputed facts were that the sublease contained a non-compete provision, there were inconsistencies in letters between the parties regarding the termination of the sublease; defendant violated the time and location restrictions of the non-compete provision, the district court correctly ruled that plaintiff's lawsuit was not filed without lawful probable cause and dismissed defendant's malicious abuse of process claim on summary judgment. *Lenscrafters, Inc. v. Kehoe*, 2012-NMSC-020, 282 P.3d 758.

In a malicious abuse of process action, evidence that the defendant refused to dismiss the plaintiff from the defendant's action against the plaintiff without a settlement agreement, without evidence of extortion or other fraudulent behavior, cannot give rise to a procedural impropriety sufficient to support an action for malicious abuse of process and to defeat a motion for summary judgment for the defendant. Guest v. Berardinelli, 2008-NMCA-144, 145 N.M. 186, 195 P.3d 353.

No outrageous conduct. — Where plaintiff alleged that his employer wrongfully discriminated against him, disciplined him and discharged him, but did not allege facts to show that his employer's actions constituted outrageous behavior, plaintiff's state

claim for intentional infliction of emotional distress was preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000) would have nevertheless failed under state law. Weise v. Washington Tru Solutions, LLC, 2008-NMCA-121, 144 N.M. 867, 192 P.3d 1244.

Where plaintiff failed to allege that defamatory statements by his employer were circulated with malice and that the statements caused harm beyond the defamation itself, plaintiff's state claim for defamation was preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000). Weise v. Washington Tru Solutions, LLC, 2008-NMCA-121, 144 N.M. 867, 192 P.3d 1244.

Respondeat superior. — An employer who consented to the use of the vehicle driven by its employee and who had a right to control the employee's operation of the vehicle was not liable as a matter of law for injuries to plaintiff in an automobile accident that occurred when the employee was driving home after work. Lessard v. Coronado Paint & Decorating Center, Inc., 2007-NMCA-122, 142 N.M. 583, 168 P.3d 155, cert. granted, 2007-NMCERT-009.

Negligent hiring and retention. — An employer has a duty to the motoring public to use due care to hire and retain employees who will drive vehicles in the scope of their employment and whether that duty includes a duty to investigate the employee's driving record and how that duty may be satisfied is a question of breach of the employer's duty which is a question of fact for the jury. Lessard v. Coronado Paint & Decorating Center, Inc., 2007-NMCA-122, 142 N.M. 583, 168 P.3d 155, cert. granted, 2007-NMCERT-009.

Partial summary judgment not final. — See same catchline in notes under analysis line I, "General Consideration."

IV. MOTION AND PROCEEDINGS THEREON.

A. IN GENERAL.

Genuine issue of material fact raised by the failure of plaintiffs' union to consider the merits of plaintiffs' grievances. — Where plaintiffs were terminated as full-time teachers; the union filed a grievance on behalf of plaintiffs; instead of pursuing plaintiffs' grievances in arbitration, the union settled the grievances; and the union failed to pursue, obtain and evaluate the reasons for the termination of plaintiffs, to discuss the reasons for termination with plaintiffs, and to evaluate the merits of plaintiffs' grievances, a genuine issue of material fact existed as to whether the union breached the duty of fair representation. *Callahan v. New Mexico Federation of Teachers-TVI*, 2010-NMCA-004, 147 N.M. 453, 224 P.3d 1258, *cert. denied*, 2009-NMCERT-012.

Genuine issues of fact as to an implied employment contract. — Where the employer promulgated a comprehensive and specific set of procedures for handling almost all types of work-related problems; the employer made statements in the procedures which suggested that the procedures were put into place in order to create a

sense of fairness and that managers and employees were required to use the procedures; in managers' training sessions, the employer represented that termination was for cause and only after progressive discipline; and the employer had a practice of only terminating for cause, a genuine issue of material fact existed as to whether the employer's words and conduct would lead a reasonable employee to believe that the employer was bound by an implied contract that the employee would only be fired for cause and after the application of progressive disciplinary procedures. *West v. Washington Tru Solutions, LLC*, 2010-NMCA-001, 147 N.M. 424, 224 P.3d 651, cert. denied, 2009-NMCERT-011.

Improper procedure. — Where decedent died in a nursing home; plaintiff, as the personal representative of decedent's estate, sued defendant for wrongful death; in its answer to plaintiff's complaint for wrongful death, defendant noted that its subsidiary was the owner and operator of the nursing home, denied that defendant owned and operated the nursing home, and denied that it was the employer of the staff of the nursing home; plaintiff did not file a motion for summary judgment on the employment relationship between defendant and the staff of the nursing home; at the hearing on defendant's motion for summary judgment on plaintiff's punitive damages claim, plaintiff orally asked the court for a ruling on the employment issue; and the court allowed defendant to respond orally at the hearing, accepted one exhibit from defendant showing the corporate structure of defendant and its subsidiaries, and refused to consider other exhibits offered by defendant, the court failed to follow the proper procedure for resolving an issue of fact before trial through summary judgment because the court denied defendant notice that summary judgment could be entered against it and a meaningful opportunity to respond to plaintiff's request for a ruling on the employment issue. *Keith v. ManorCare, Inc.*, 2009-NMCA-119, 147 N.M. 209, 218 P.3d 1257, *cert. granted*, 2009-NMCERT-010.

Duty of care to baseball spectators. — An owner/occupant of a commercial baseball stadium owns a duty that is symmetrical to the duty of the spectator. Spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play and the owner/occupant must exercise ordinary care not to increase that inherent risk. *Edward C. v. City of Albuquerque*, 2010-NMSC-043, 148 N.M. 646, 241 P.3d 1086, *rev'g Crespin v. Albuquerque Baseball Club, LLC*, 2009-NMCA-105, 147 N.M. 62, 216 P.3d 827.

The court declined to adopt the "baseball rule", which provides that in the exercise of reasonable care, the proprietor of a ballpark need only provide screening for the area of the field behind home plate, where the danger of being struck by a ball is greatest. Such screening must be of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game, because comparative negligence principles allow the fact finder to take into account the risks that spectators voluntarily accept when they attend baseball games, as well as the ability of stadium owners to guard against unreasonable risks that are not essential to the game itself. *Crespin v. Albuquerque Baseball Club, LLC*, 2009-

NMCA-105, 147 N.M. 62, 216 P.3d 827, *reversed by Edward C. v. City of Albuquerque*, 2010-NMSC-043, 148 N.M. 646, 241 P.3d 1086.

Where a child was seated at picnic tables located in the left outfield stands at a baseball stadium; without warning or notice pre-game batting practice began, and a player hit a ball directly into the left field picnic tables; the ball struck the child in the head; plaintiffs alleged that by providing picnic-style seating, which invites spectators to turn their attention away from the field, the owner and operator of the baseball stadium had a duty to screen the picnic area in addition to the area behind home plate, and that because spectators were not necessarily aware that balls might fly into the picnic area during pre-game batting practice, the owner and operator had a duty to provide a warning that batting practice was about to begin and that spectators should be alert for foul or home run balls; and the owner and operator did not present any evidence that they took any action to protect spectators beyond screening the stands behind home plate, plaintiff's allegations raised issues of fact regarding the actions the owner and operator might reasonably be expected to take in order to protect spectators in the picnic area. *Crespin v. Albuquerque Baseball Club, LLC*, 2009-NMCA-105, 147 N.M. 62, 216 P.3d 827, *reversed by Edward C. v. City of Albuquerque*, 2010-NMSC-043, 148 N.M. 646, 241 P.3d 1086.

Foreseeability of modifications to manufactured product. — Where a rock crusher was manufactured with a solid metal protective shield covering a flywheel; rock jams were common and maintenance of the crusher was required; the feed box of the crusher was difficult to access to clear jams and to maintain the crusher; the purchaser of the rock crusher modified the crusher by removing the protective shield covering the flywheel and adding a step next to the flywheel to make it easier to clear jams and to perform maintenance; and the decedent was injured by the flywheel as the decedent knelt on the step to clear a jam, there was a genuine issue of material fact as to foreseeability. Chairez v James Hamilton Const. Co., 2009-NMCA-093, 146 N.M. 794, 215 P.3d 732.

Evidence to rule out conscious parallelism in antitrust conspiracy case. — Where the plaintiff alleged that cigarette manufacturers conspired during a seven year period to fix the prices of cigarettes in New Mexico and where the plaintiff's evidence showed that during the seven year period, the tobacco industry exhibited an unprecedented degree of parallelism; what had previously been ten price tiers had been consolidated into two price tiers; twelve in-tandum increases occurred in the prices of both premium and discount cigarettes; the multi-variable, multi-price-tier parallelism went well beyond the price leadership within a single-tier market demonstrated by the cigarette industry prior to the introduction of generic cigarettes; and the parallelism involved parallelism among market tiers that formerly had been in vigorous competition, the evidence allowed a reasonable fact finder to reject conscious parallelism as a plausible explanation for the parallelism in the cigarette industry, thereby leaving the competing inference of conspiracy as the most likely explanation for the parallelism and created a genuine issue of material fact. Romero v. Philip Morris, Inc., 2009-NMCA-022, 145 N.M. 658, 203 P.3d 873, cert. granted, 2009-NMCERT-002.

Where the plaintiff asked her union to submit a grievance addressing her salary step assignment; the union representatives never told the plaintiff that the union would not follow through with her grievance; the initially required written grievance was never filed; the union representatives never told the plaintiff that they would not or could not pursue her grievance because they had never filed the initially required written grievance; the union never told the plaintiff that her claim was not valid; and the union failed to point to any admissible evidence that explained its reasons for not filing the initially required written grievance, an issue of fact existed concerning the reasons the union failed to file a written grievance. Howse v. Roswell Indep. School Dist., 2008-NMCA-095, 144 N.M. 502, 188 P.3d 1253, cert. denied, 2008-NMCERT-006, 144 N.M. 380, 188 P.3d 104.

Genuine issues of fact raised by reasonableness of union settlement of prohibited practices complaint. — Plaintiffs' claim that the union breached its duty of fair representation by settling a prohibited practices complaint filed on behalf of some union members concerning the loss of promotional opportunity due to a flawed promotion process, but failing to include the plaintiffs in the settlement, presented genuine issues of material fact as to whether the union arbitrarily excluded the plaintiffs from the resolution of the prohibited practices complaint. Granberry v. Albuquerque Police Officers Association, 2008-NMCA-094, 144 N.M. 595, 189 P.3d 1217.

Genuine issues of fact raised by preclusive effect of union bylaws. — In an action against a union for breach of the duty of fair representation, in which the union settled a prohibited practices complaint that it filed on behalf of some union members concerning the loss of promotional opportunity due to a flawed promotion process, but failed to include the plaintiffs in the settlement and in which the union bylaws required members involved in an unfair labor practice to notify the union and lend the members' names to any action filed by the union to resolve the unfair labor practice and the plaintiffs offered facts to show that the union typically filed prohibited practices complaints on behalf of all of its affected members without naming individuals and that the plaintiffs and other members had benefited from such complaints in the past without requesting union assistance, the plaintiffs' claim presented genuine issues of material fact as to the viability of the bylaw. Granberry v. Albuquerque Police Officers Association, 2008-NMCA-094, 144 N.M. 595, 189 P.3d 1217.

Non-moving party's due process rights violated. — Where the trial court granted partial summary judgment to multiple plaintiffs as to liability on several different claims, even though only one plaintiff moved for summary judgment on one claim, the trial court violated the defendant's due process rights by adjudicating claims against it and striking its affirmative defenses without giving it notice and a reasonable opportunity to respond or present evidence to establish a genuine issue of material fact as to each of the claims adjudicated against it. Azar v. Prudential Ins. Co. of America, 2003-NMCA-062, 133 N.M. 669, 68 P.3d 909, cert. denied, 133 N.M. 539, 65 P.3d 1094 (2003).

Effect of failure to timely respond to motion. — Dismissal with prejudice was too severe a sanction against a party who failed to respond to opponent's motion for

summary judgment, failing a satisfactory explanation by the district court for ordering dismissal with prejudice. Lujan v. City of Albuquerque, 2003-NMCA-104, 134 N.M. 207, 75 P.3d 423.

The proper manner in which to request entry of an order granting a motion for summary judgment and to request entry of judgment of dismissal with prejudice, when the order and judgment are sought based on failure to timely respond to a motion for summary judgment, is through a written motion as provided under Rule 1-007(A) and (B)(1) NMRA, providing fifteen days to respond after service of the motion pursuant to Rule 1-007.1(D) NMRA. Lujan v. City of Albuquerque, 2003-NMCA-104, 134 N.M. 207, 75 P.3d 423.

Party not prejudiced by short notice where aware movant previously sought summary judgment. — A party cannot be heard to complain that it was prejudiced by short notice of a bankruptcy court hearing on a motion for emergency relief and summary judgment where the party was on notice that the movant had sought summary judgment in prior state proceedings, especially where the order granting summary judgment was subject to a motion to vacate. GECC v. Montgomery Mall Ltd. Partnership, 704 F.2d 1173 (10th Cir.), cert. denied, 464 U.S. 830, 104 S. Ct. 108, 78 L. Ed. 2d 110 (1983).

Motion for continuance. — This rule does not require the court to grant a continuance, but rather gives the court discretion to do so if appropriate. Griffin v. Thomas, 2004-NMCA-088, 136 N.M. 129, 95 P.3d 1044.

No abuse of discretion in refusing continuance. — Where the appellate court is unable to perceive any benefit that plaintiff could have received had the district court granted his motion for a continuance, any prejudice to plaintiff occurring as a result of the denial, or any legitimate motive for further delaying the proceedings, the district court did not abuse its discretion in refusing to grant plaintiff's motion for a continuance. Griffin v. Thomas, 2004-NMCA-088, 136 N.M. 129, 95 P.3d 1044.

Summary judgment appropriate following motion to dismiss. — The trial court's authority to grant summary judgment under this rule is not limited by a motion to dismiss pursuant to Rule 1-012 NMRA when the opposing party had reasonable notice of the issues underlying the summary judgment, together with the opportunity to be heard, and failed to make a specific allegation of prejudice at the appropriate time. Aldridge ex rel. Aldridge v. Mims, 118 N.M. 661, 884 P.2d 817 (Ct. App. 1994).

Dismissal motion treated as summary judgment motion when outside matters considered. — When matters outside the pleadings are considered on a motion to dismiss, the motion will be treated as one for summary judgment. Transamerica Ins. Co. v. Sydow, 97 N.M. 51, 636 P.2d 322 (Ct. App. 1981).

Motion to dismiss treated as motion for summary judgment. — See Emery v. University of N.M. Medical Center, 96 N.M. 144, 628 P.2d 1140 (Ct. App. 1981).

Basis for granting summary judgment. — Summary judgment is proper when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. Matkins v. Zero Refrigerated Lines, 93 N.M. 511, 602 P.2d 195 (Ct. App. 1979); Ortega v. Shube, 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979), overruled on other grounds Bracken v. Yates Petroleum Corp., 107 N.M. 463, 760 P.2d 155 (1988); Phillips v. Allstate Ins. Co., 93 N.M. 648, 603 P.2d 1105 (Ct. App. 1979); Hertz Corp. v. Paloni, 95 N.M. 212, 619 P.2d 1256 (Ct. App. 1980); Richards v. Upjohn Co., 95 N.M. 675, 625 P.2d 1192 (Ct. App.), cert. denied, 94 N.M. 675, 615 P.2d 992 (1980); Powers v. Riccobene Masonry Constr., Inc., 97 N.M. 20, 636 P.2d 291 (Ct. App. 1980); Frontier Leasing, Inc. v. C.F.B., Inc., 96 N.M. 491, 632 P.2d 726 (1981); Savinsky v. Bromley Group, Ltd., 106 N.M. 175, 740 P.2d 1159 (Ct. App. 1987); Garcia v. Smith Pipe & Steel Co., 107 N.M. 808, 765 P.2d 1176 (Ct. App. 1988).

Summary judgment should only be granted where there is no genuine issue as to any material fact and where the moving party is entitled to a judgment as a matter of law. Sweenhart v. Co-Con, Inc., 95 N.M. 773, 626 P.2d 310 (Ct. App. 1981).

Summary judgment is proper when the pleadings and the evidence in form of depositions, answers to interrogatories, admissions, affidavits and stipulations, if any, show that there is no genuine issue of material fact, and that the moving party is entitled to summary judgment as a matter of law. Vaughn v. State, Taxation & Revenue Dep't, 98 N.M. 362, 648 P.2d 820 (Ct. App. 1982).

If the facts are not in dispute, but only the legal effect of the facts is presented for determination, then summary judgment may properly be granted; and it is well established that whether a duty exists under the circumstances of a given case is a pure question of law for the court to determine. Koenig v. Perez, 104 N.M. 664, 726 P.2d 341 (1986).

Summary judgment should be granted when no genuine issue of material fact exists that requires a jury trial. FDIC v. Alto Constr. Co., 109 N.M. 165, 783 P.2d 475 (1989).

Summary judgment is improper so long as one issue of material fact remains. Fidelity Nat'l Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 583 P.2d 470 (1978); Frontier Leasing, Inc. v. C.F.B., Inc., 96 N.M. 491, 632 P.2d 726 (1981); Security Bank & Trust v. Parmer, 97 N.M. 108, 637 P.2d 539 (1981).

Substantial dispute as to material fact forecloses summary judgment. McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

Propriety of summary judgment must be independently determined by trial court. — Where both parties moved for summary judgment alleging the absence of a material fact issue, it was nevertheless the duty of the trial court to independently determine whether a genuine issue of fact was actually present. Giese v. Mountain States Tel. &

Tel. Co., 71 N.M. 70, 376 P.2d 24 (1962); Harp v. Gourley, 68 N.M. 162, 359 P.2d 942 (1961).

Facts must be clear and undisputed. — A summary judgment proceeding is not to decide the issue of fact but rather to determine whether one exists and is proper only where the moving party is entitled to the judgment as a matter of law upon clear and undisputed facts. De La Torre v. Kennecott Copper Corp., 89 N.M. 683, 556 P.2d 839 (Ct. App. 1976).

Where defendants admitted execution of a note, no denial under oath of the genuineness of the note attached as an exhibit was made as required by Rule 9(j) (see now Rule 1-009 NMRA), the terms of the note are self-explanatory and no material issue remained to be determined except the unpaid balance, the court properly entered summary judgment against defendants. General Acceptance Corp. v. Hollis, 75 N.M. 553, 408 P.2d 53 (1965) (decided prior to 1986 amendment of Rule 1-009 NMRA).

Issues of fact are not to be decided on motions for summary judgment, which should be denied unless the court is convinced from all the pleadings, depositions, admissions and affidavits before it that party moving is entitled thereto as a matter of law. Wieneke v. Chalmers, 73 N.M. 8, 385 P.2d 65 (1963).

Where there have been shown to be factual conflicts in opposing affidavits and where legal defenses do not clearly appear as a matter of law, summary judgment is not proper. Skarda v. Skarda, 87 N.M. 497, 536 P.2d 257 (1975).

Genuine issue as to reasonableness of plaintiff's conduct. — Since the word "NIL" did not communicate to plaintiff (a 19-year-old with a high school education) that medical expense coverage, which he had been assured would be included, was omitted from the policy, and the term was of doubtful meaning and ambiguous to him, a genuine issue of material fact existed as to whether the insured's conduct was that of a reasonable person, such as an ordinary lay person, such that reformation would be in order. Read v. Western Farm Bureau Mut. Ins. Co., 90 N.M. 369, 563 P.2d 1162 (Ct. App. 1977).

Proper amendment of summary judgment motions. — Since motions must be directed to specific parties, a movant has the option to amend the summary judgment motion to add additional parties or to change parties, if necessary, with the motion relating back to the date of the original motion if the party has received such notice so he will not be prejudiced. By failing to amend his motion, defendant failed to make a summary judgment motion against this plaintiff. Thus, the summary judgment motion granted must be reversed. Perea v. Snyder, 117 N.M. 774, 877 P.2d 580 (Ct. App. 1994).

Collision avoidance is factual issue. — In a wrongful death action, the question of whether a motorist could have avoided a collision with a pedestrian by keeping a proper

lookout and maintaining proper control of his vehicle is normally a factual issue for the trier of fact. Trujillo v. Treat, 107 N.M. 58, 752 P.2d 250 (Ct. App. 1988).

Doctors' opinions create factual issue as to malpractice. — Because of the opinion of several doctors as to fundamental techniques applicable no matter where the doctor practices medicine, there was a factual issue under the locality rule. Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977).

Genuine issue as to condition of electric lines. — Where plaintiff in a personal injury case claimed that he was told by defendant that all electric lines were dead, and defendant disputed this statement, a genuine issue of fact was raised regardless of whether it was reasonable for plaintiff to rely on the statement. New Mexico Elec. Serv. Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976).

Foreseeability and gun safety are jury issues. — Trial court erred in granting summary judgment in favor of gun maker and gun seller in an action arising from an accidental shooting because whether the misuse of the gun was foreseeable and whether the gun was safe were jury issues. Smith v. Bryco Arms, 2001-NMCA-090, 131 N.M. 87, 33 P.3d 638, cert. denied, 131 N.M. 221, 34 P.3d 610 (2002).

Absence of apparent injury is sufficient excuse for delay in giving notice to insurer where there is no reasonable ground for believing at the time that bodily injury would result from the accident, even where the insured knows of the accident upon which a later claim for damages is based; therefore questions of fact existed concerning the nature of defendant's injury, and the trial court's order granting summary judgment was error. Ohio Cas. Ins. Co. v. Lamy Columbus Club, 80 N.M. 740, 461 P.2d 155 (1969).

Denial of sufficient service of process raises material issue. — Where the judgment sued on recited sufficient service of process but the defendant denied such service, this certainly raised an issue of material fact which could not be resolved by taking evidence at a hearing on summary judgment without proof by uncontradicted affidavit or deposition. Shumate v. Hillis, 80 N.M. 308, 454 P.2d 965 (1969).

Substantial fact issue raised by contradictory evidence. — Where trial court had before it evidence which was in some respects directly contradictory such that, eliminating opinion and hearsay statements, a substantial issue of material fact was raised, the motion for summary judgment should have been denied. Sandoval v. Board of Regents, 75 N.M. 261, 403 P.2d 699 (1965).

Material issues of fact preventing summary judgment. — Trial court's ruling in favor of plaintiff's motion for summary judgment was erroneous, where defendant's affidavit contained numerous specific allegations in support of its counterclaim, and where substantial evidence weighed in favor of both parties' assertions. Lotspeich v. Golden Oil Co., 1998-NMCA-101, 125 N.M. 365, 961 P.2d 790.

Expert's opinion raises fact issue on general bodily impairment. — Where medical expert testified that as a result of the severance of the leg the claimant suffered no other organic bodily impairment but did suffer a psychic trauma greater than the average person under the circumstances and that such psychic trauma was directly traceable to the said severance and rendered claimant totally unable to perform any gainful employment, there was presented an issuable fact as to whether there was general bodily impairment other than that naturally flowing from the loss of the member, and defendant was not entitled to summary judgment. Gonzales v. Gackle Drilling Co., 70 N.M. 131, 371 P.2d 605 (1962).

Material issue raised by testimony explaining ambiguity in contract. — When testimony was admissible to explain the ambiguity present in a written contract, an issue of material fact not determinable on motion for summary judgment was present. Harp v. Gourley, 68 N.M. 162, 359 P.2d 942 (1961).

Genuine issue as to fraud in connection with probate of will. — District court erred in finding that there was no genuine issue as to one or more of the material facts necessary to give rise to a claim for fraud in connection with the informal probate of a will, where questions raised by the papers filed with the probate court constituted issues of fact and affidavits in support of a motion for summary judgment did not negate them. Eoff v. Forrest, 109 N.M. 695, 789 P.2d 1262 (1990).

Summary judgment for defendant in legal malpractice action. — Summary judgment in favor of defendant in legal malpractice action was proper where plaintiff failed to controvert defendants' factual allegation that they were unaware of original defendant's oral promises to plaintiff. Selby v. Roggow, 1999-NMCA-044, 126 N.M. 766, 975 P.2d 379.

Summary judgment for the defendant in a legal malpractice action was improper where there were genuine issues of material fact as to whether the plaintiff could have prevailed on the underlying fraud claim. Meiboom v. Carmody, 2003-NMCA-145, 134 N.M. 699, 82 P.3d 66, cert. denied, 2003-NMCERT-003.

Granting summary judgment in ejectment despite substantial evidence otherwise is error. — A court errs in granting summary judgment in ejectment where there is substantial evidence to the effect that defendants are the true owners of the property, and the plaintiffs do not meet their burden of establishing that they, rather than the defendants, are entitled to possession of the property. Jemez Properties, Inc. v. Lucero, 94 N.M. 181, 608 P.2d 157 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Action against school board members wherein summary judgment improper. — In an action brought against members of a school board and its superintendent, where issues of material fact existed: (1) as to whether the plaintiff had been dismissed without prior determination of the board, and (2) whether he was either an "employee" or a "certified school personnel of the school district," a summary judgment is improper.

Gallegos v. Los Lunas Consol. Schools Bd. of Educ., 95 N.M. 160, 619 P.2d 836 (Ct. App. 1980).

Whether consent not necessary before surgery issue of fact precluding summary judgment. — A physician must obtain an adult patient's consent before performing surgery. Consent is not necessary, however, in an emergency situation or when disclosure of the risk of surgery would be harmful to the patient. Whether a particular patient falls within either of these exceptions is an issue of fact precluding judgment. Eis v. Chesnut, 96 N.M. 45, 627 P.2d 1244 (Ct. App. 1981).

Genuine issue concerning prior decree's implementation precludes summary judgment. — Summary judgment is not proper where there remain in the cause genuine issues of material fact concerning the proper implementation of a prior decree. Marquez v. Juan Tafoya Land Corp., 96 N.M. 503, 632 P.2d 738 (1981).

No genuine issue as to duty to care for parking lot. — Where the provisions of a lease agreement do not require that a tenant care for a parking lot, and there is no showing that the tenant exercised control over the parking lot nor had the responsibility of maintaining the premises in a safe condition, no genuine issue of fact exists as to the tenant's duty, and therefore, the trial court may correctly grant the defendant's summary judgment motion. Torres v. Piggly Wiggly Shop Rite Foods, Inc., 93 N.M. 408, 600 P.2d 1198 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Where there is no evidence of estoppel, summary judgment is proper, as there is no genuine issue of material fact on that ground. Garcia v. Albuquerque Pub. Schools, 99 N.M. 741, 663 P.2d 1198 (Ct. App. 1983).

Summary judgment not granted if court finds evidence sufficient to create reasonable doubt as to the existence of a genuine issue. Hertz Corp. v. Paloni, 95 N.M. 212, 619 P.2d 1256 (Ct. App. 1980).

If the evidence is sufficient to create a reasonable doubt as to the existence of a genuine issue, summary judgment cannot be granted. Poorbaugh v. Mullen, 96 N.M. 598, 633 P.2d 706 (Ct. App. 1981).

If reasonable minds differ on issues matter is for the jury. Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563 (Ct. App. 1970).

Where certain showings raised material issues of fact as to whether the safe operation of the crane which killed plaintiff's decedent was its lessor's work and as to whether the lessor had a right to control safety matters, summary judgment on these matters was improper, and whether crane operator was or was not a special employee of lessee in connection with safety matters in the operation of the crane was a factual question for the jury. Fresquez v. Southwestern Indus. Contractors & Riggers, 89 N.M. 525, 554 P.2d 986 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Where the court was unwilling to rule on whether agent had actual authority based upon his title as a matter of law, and where questions existed as to the nature and extent of that authority, a genuine issue of material fact existed requiring reversal of the summary judgment. Pribble v. Aetna Life Ins. Co., 84 N.M. 211, 501 P.2d 255 (1972).

Where there existed an issue of fact as to whether the defendant should have anticipated that physical harm would be caused to its business invitees if the roof were permitted to remain in its snowy and icy condition, in spite of the fact that the danger was known and obvious the granting of summary judgment was improper. Proctor v. Waxler, 84 N.M. 361, 503 P.2d 644 (1972).

The court's determination that an easement offered to plaintiffs by the defendants did afford reasonable access to and from the property of plaintiffs is a factual determination, which at a summary judgment hearing was improper. Coe v. City of Albuquerque, 81 N.M. 361, 467 P.2d 27 (1970).

It was a question of fact whether appellee's letter constituted an unconditional offer to supply the specified product requested by the appellant, and therefore disposition by summary judgment was improper. Cillessen Bros. Constr. Co. v. Frank Paxton Lumber Co., 79 N.M. 95, 440 P.2d 133 (1968).

Where review of the record convinces court that the record is not such that plaintiff's conduct can be said as a matter of law to have constituted contributory negligence barring her recovery, the entry of a summary judgment dismissing plaintiff's action was error requiring reversal. Behymer v. Kimbell-Diamond Co., 78 N.M. 570, 434 P.2d 392 (1967).

Where permission as to use of automobile involved in accident was in dispute, there was an unresolved issue of material fact and granting of summary judgment was improper. Barela v. Lopez, 73 N.M. 121, 385 P.2d 975 (1963).

Where construction of contract depends on extrinsic facts, summary judgment precluded. — Whether an ambiguity exists in an agreement is a matter of law. But once this determination has been made, the construction of the agreement depends on extrinsic facts and circumstances, and then the terms of the agreement become questions of fact for the jury. Young v. Thomas, 93 N.M. 677, 604 P.2d 370 (1979).

Summary judgment proper where only legal effect of facts presented for determination. — Where the facts are not in dispute but only the legal effect of the facts is presented for determination, summary judgment may be properly granted. Sanders v. Smith, 83 N.M. 706, 496 P.2d 1102 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972); Pederson v. Lothman, 63 N.M. 364, 320 P.2d 378 (1958); Meeker v. Walker, 80 N.M. 280, 454 P.2d 762 (1969); Jelso v. World Balloon Corp., 97 N.M. 164, 637 P.2d 846 (Ct. App. 1981); Westgate Families v. County Clerk, 100 N.M. 146, 667 P.2d 453 (1983).

Where the facts are not in dispute and all that remains is the legal effect of the facts, summary judgment is proper. Lovato v. Duke City Lumber Co., 97 N.M. 545, 641 P.2d 1092 (Ct. App. 1982).

And improper where proximate cause issue remains. — Even though a prima facie showing of the plaintiff 's negligence has been made, summary judgment is improper if the issue of proximate cause remains. Ruiz v. Southern Pac. Transp. Co., 97 N.M. 194, 638 P.2d 406 (Ct. App. 1981).

If after considering all matters presented in the light most favorable to the party opposing the motion for summary judgment there is no genuine issue of material fact and a basis is therefore present to decide the issues as a matter of law, then the summary judgment should be granted. Montoya v. City of Albuquerque, 82 N.M. 90, 476 P.2d 60 (1970).

When the evidence on an issue of fact tendered by the pleadings is undisputed and the inferences to be drawn therefrom are not open to doubt by reasonable men, the issue is no longer one of fact to be submitted to the jury but becomes a question of law. Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972).

Where it was undisputed that the display rack over which or upon which plaintiff fell was in plain view and could have been seen by her had she looked, there was no material issue which would warrant a trial, and summary judgment was proper. Perry v. Color Title, 81 N.M. 143, 464 P.2d 562 (Ct. App. 1970).

The fact that appellant tripped and fell over a curb on what appeared to be a portion of the public sidewalk does not of itself raise a presumption of negligence on the part of the person who built or maintained the curb. There were no facts or inferences to be drawn therefrom which would have justified the submission to a jury of any issue of negligence on the part of appellee; therefore summary judgment was proper for disposition of this case. Giese v. Mountain States Tel. & Tel. Co., 71 N.M. 70, 376 P.2d 24 (1962).

Bar of statute of limitations question of law. — Where the facts are not disputed the question whether the case is within the bar of the statute of limitations is one of law for the court. Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972).

Likewise whether accord and satisfaction. — Where there is only the question of law as to whether there was an accord and satisfaction, based upon the pleadings and the admissions on file, there is no genuine issue of material fact, and the defendants are entitled to judgment as a matter of law. Such a case appears to be particularly well-suited for the use of the summary judgment procedure. Electric Supply Co. v. United States Fid. & Guar. Co., 79 N.M. 722, 449 P.2d 324 (1969).

And whether option contract or right of first refusal. — The undisputed facts of the case are that plaintiff wrote a letter to defendant offering to buy certain land and that

defendant answered in a letter that it would take "no action at this time" but that "if the present position of our committee changes you will be so informed immediately." As a matter of law, there was neither an option contract nor a right of first refusal arising from any construction which can reasonably be placed upon the disputed facts; thus there is no genuine issue of any material fact, and summary judgment is proper. Shriners Hosps. for Shriners Hosps. for Crippled Children v. Kirby Cattle Co., 89 N.M. 169, 548 P.2d 449 (1976).

Summary judgment proper where basis present for decision as matter of law. — If upon consideration of all material undisputed facts a basis is present to decide the issues as a matter of law, summary judgment is proper. Worley v. United States Borax & Chem. Corp., 78 N.M. 112, 428 P.2d 651 (1967).

If the undisputed facts as a matter of law will support a judgment in favor of the moving party, then the summary judgment should be granted. GECC v. Tidenberg, 78 N.M. 59, 428 P.2d 33 (1967).

Where a completed arbitration had occurred with all parties having participated and submitted their proofs and allegations to the arbitrator and an award was made, summary judgment was properly rendered for defendant insurer in subsequent suit alleging insurer's bad faith in resorting to arbitration. Chacon v. Mountain States Mut. Cas. Co., 82 N.M. 602, 485 P.2d 358 (Ct. App. 1971).

Unless rocky, barren, unplatted and unsettled land located within an area sought to be annexed could not be considered, where owners of acreage in excess of the required percentage had signed an annexation petition, the defendant's motion for summary judgment was correctly sustained in an action brought to enjoin the annexation. Hughes v. City of Carlsbad, 53 N.M. 150, 203 P.2d 995 (1949).

Actual knowledge of defect not shown by plaintiff. — A public electric utility cannot be held liable for an allegedly defective installation which it did not build or control unless it is shown that the utility furnished electricity with actual knowledge of a defect, and since it was shown that the utility had no actual knowledge in this case, summary judgment in its favor was properly granted. New Mexico Elec. Serv. Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976).

Nor deviation from standard medical practice. — In a malpractice case testimony of a medical doctor (a professor at the University of New Mexico medical school and a highly qualified surgeon) that he would have inserted a cantor tube in a different fashion failed to raise a genuine issue as to negligence on the part of the defendant doctor, an osteopathic surgeon, since there was no evidence that he knew or should have known about the procedure used by the witness and the record was completely void of any testimony that the technique was taught in osteopathic schools or seminars, was the subject of any medical literature or texts, or was in general use by osteopathic surgeons in the area or at any other place. There was literally no evidence of deviation from a recognized standard of osteopathic practice and no showing at all that the defendant's

action or failure to act was the proximate cause of any injury to the deceased. Becker v. Hidalgo, 89 N.M. 627, 556 P.2d 35 (1976).

Summary judgment may be proper even though disputed issue remains. — If the undisputed facts as a matter of law will support a judgment in favor of the moving party, then the summary judgment should be granted even though there may be a dispute in the facts on other immaterial issues. Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co., 77 N.M. 730, 427 P.2d 249 (1967).

Since certain affirmative defenses are often susceptible of categorical proof, a summary adjudication of a claim based on negligence may appropriately be rendered for the defendant when such is the case and the defense is legally sufficient; thus even if an issue of material fact remains as to the negligence of the defendant, summary judgment is proper because the contributory negligence of plaintiff barred her recovery. Catalano v. Lewis, 90 N.M. 215, 561 P.2d 488 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Summary judgment may be proper though some disputed issues remain, if there are sufficient undisputed facts to support a judgment and the disputed facts relate to immaterial issues. Oschwald v. Christie, 95 N.M. 251, 620 P.2d 1276 (1980).

Test in determining right to summary judgment is whether, if the case had been tried, a motion for new trial would have been inevitable. Southern Union Gas Co. v. Briner Rust Proofing Co., 65 N.M. 32, 331 P.2d 531 (1958).

Subsequent directed verdict preferable to summary judgment. — A case of negligence need not have been made out by the plaintiff in order that she be entitled to present the merits of her case to the factfinder. Even in cases where the judge is of the opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment. Sandoval v. Board of Regents, 75 N.M. 261, 403 P.2d 699 (1965).

In cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented. Coca v. Arceo, 71 N.M. 186, 376 P.2d 970 (1962).

Summary judgment inappropriate where insufficient details. — Where there are insufficient details for a confident application of legal principles the granting of summary judgment is inappropriate, and a determination of the case should await the taking of testimony and completion of the record. Toulouse v. Armendariz, 74 N.M. 507, 395 P.2d 231 (1964).

Facts insufficiently developed or further resolution necessary. — Summary judgment is not appropriate when the facts before the court are insufficiently developed or where further factual resolution is essential for determination of the central legal issues involved. National Excess Ins. Co. v. Bingham, 106 N.M. 325, 742 P.2d 537 (Ct. App. 1987).

Facts subject to equally logical, conflicting inferences. — Summary judgment is not proper if equally logical but conflicting inferences can be drawn from the facts before the court. National Excess Ins. Co. v. Bingham, 106 N.M. 325, 742 P.2d 537 (Ct. App. 1987).

Admissions did not determine all issues. — In action to recover balance of rent due, the admissions that an agreement had been entered into for a rental of $300 and that $100 had been paid thereon did not determine all the issues of fact and thus entitle the appellants, as a matter of law, to a summary judgment or a judgment on the pleadings. Ellis v. Parmer, 76 N.M. 626, 417 P.2d 436 (1966).

Summary judgment improper where evidence shows nonmoving party has enforceable right. — Since an independent contractor who installed the electric lines which injured plaintiff had a duty of care to anyone who might be foreseeably endangered by the allegedly defective construction, including plaintiff as an employee of another independent electrical contractor, summary judgment for the contractor was an improper action by the trial court. Whether the defendant breached his duty of reasonable care or proximately caused the injuries in question remain for the jury to decide. The conflicting evidence must be evaluated by the factfinder. New Mexico Elec. Serv. Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976).

Where defendant has a duty to exercise reasonable care to keep premises free of ice and snow, a genuine issue of fact exists as to defendant's negligence, and summary judgment is not properly granted. Proctor v. Waxler, 83 N.M. 58, 488 P.2d 108 (Ct. App. 1971), aff'd, 84 N.M. 361, 503 P.2d 644 (1972).

Where plat showed open areas labelled "golf course," "clubhouse" and "tennis courts," and though plat was not recorded it was used to induce sales of lots with these areas designated for common use, but no such course, courts or clubhouse had been built, then the lot owners had an enforceable right, and granting summary judgment was error. Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co., 77 N.M. 730, 427 P.2d 249 (1967).

Trial court erred in granting appellee's motion for summary judgment in personal injury suit on grounds that appellant (a welder sent to appellee's premises by his regular employer) was a special employee and thus was barred from further recovery by the Workmen's Compensation Act, where testimony of appellant disclosed that the work he was engaged in at the time of the accident was in the usual performance of his duties and that if any of appellee's agents had given him instructions contrary to those of his regular employer he would not have followed them. Such evidence, if not contradicted

by other evidence to be offered in the trial thereafter ordered, would have required the conclusion that appellant was employed solely by his regular employer and thus was not prevented from recovery from appellee. Davison v. Tom Brown Drilling Co., 76 N.M. 412, 415 P.2d 541 (1966).

Where there is a deed to one of the parties conveying a specific property, payment of taxes, possession by one of the parties, the presence of a common predecessor in the chain of title of both parties and other circumstances supporting a party's claim of ownership of the land, there is an issue of material fact, thereby making summary judgment impermissible. Fischer v. Mascarenas, 93 N.M. 199, 598 P.2d 1159 (1979).

Where, with knowledge of a false representation of an employee's physical condition to obtain employment, together with knowledge that the employee was an experienced electronics assembler, the defendant continued the plaintiff in her employment, this is sufficient to show that the defendant intentionally relinquished its right to terminate the plaintiff's employment, and therefore, a genuine issue of material fact exists whether the defendant waived its defense under the falsification concept. Chavez v. Lectrosonics, Inc., 93 N.M. 495, 601 P.2d 728 (Ct. App. 1979).

Lack of specificity in motion. — Where a party has timely alerted the trial court to the lack of specificity and difficulty in responding to a general motion, such as one for summary judgment, the trial court should carefully evaluate the prejudice which may result if the motion is heard or ruled upon without ordering further clarification of the grounds upon which the motion is premised. National Excess Ins. Co. v. Bingham, 106 N.M. 325, 742 P.2d 537 (Ct. App. 1987).

Lack of record. — Lack of a record did not preclude summary judgment where the party opposing summary judgment limited his opposition to only one issue that did not require a determination of facts, only their legal effect, and so advised the trial court. Carter v. Thurber, 106 N.M. 429, 744 P.2d 557 (Ct. App. 1987).

Opportunity to respond to merits of motion. — Where the court relies upon oral argument as the means for responding to the motion for summary judgment, due process requirements compel that each party be permitted a reasonable opportunity to be heard, and where defendant's motion for summary judgment lacked supporting affidavits or any factual explanation for its basis and defendant did not file any brief accompanying its motion, plaintiff was denied an opportunity to respond to the merits of the motion. National Excess Ins. Co. v. Bingham, 106 N.M. 325, 742 P.2d 537 (Ct. App. 1987).

Summary judgment generally inappropriate in negligence cases. — Where an issue of negligence is involved, ordinarily the trial court should allow a jury to determine whether "reasonable minds" can differ. Tapia v. McKenzie, 83 N.M. 116, 489 P.2d 181 (1971).

Especially in negligence cases, the weight of authority is to deny summary judgment for the obvious reason that there are ordinarily material fact issues to be determined. Cortez v. Martinez, 79 N.M. 506, 445 P.2d 383 (1968), overruled on other grounds McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975), criticized in Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972).

It is the general proposition that issues of negligence, including such related issues as contributory negligence, are ordinarily not susceptible of summary adjudication either for or against the claimant but should be resolved by trial in the ordinary manner. Coca v. Arceo, 71 N.M. 186, 376 P.2d 970 (1962).

In a negligence action for failure of a retail store to control crowds, causing plaintiff to fall down an escalator, summary judgment for defendants, the store and its operations manager, was inappropriate since the jury should have been permitted to consider whether a prudent person would have been led to believe that the operations manager possessed apparent authority to bind the store to pay plaintiff's medical expenses. Romero v. Mervyn's, 106 N.M. 389, 744 P.2d 164 (1987).

As well as in other tort cases. — A claim of defamation, like other tort claims, raises questions of fact which generally preclude summary judgment adjudication. Phillips v. Allstate Ins. Co., 93 N.M. 648, 603 P.2d 1105 (Ct. App. 1979).

Where a genuine issue of material fact exists as to whether an employer committed a tort against a person by blacklisting him, summary judgment may not be granted. Andrews v. Stearns-Roger, Inc., 93 N.M. 527, 602 P.2d 624 (1979).

Unless evidence undisputed and reasonable minds cannot differ. — Negligence and causal connection are generally questions of fact for the jury, but where the evidence is undisputed and reasonable minds cannot differ, the question is one of law to be resolved by the judge. New Mexico State Hwy. Dep't v. Van Dyke, 90 N.M. 357, 563 P.2d 1150 (1977).

Ordinarily negligence is a question for the jury, but when reasonable minds cannot differ as to facts and the inferences to be drawn therefrom the question is one of law to be summarily determined by the court. Where plaintiff failed to show any facts in support of her claim that the defendants knew of the patient's foregoing alleged propensities and knew that the patient's condition was such that an assault might be expected to follow, which must be established before liability may be imposed, grant of a summary judgment for defendant was proper. Stake v. Woman's Div. of Christian Serv. of Bd. of Missions, 73 N.M. 303, 387 P.2d 871 (1963), criticized in Tapia v. McKenzie, 83 N.M. 116, 489 P.2d 181 (1971).

Summary judgment proper where failure to perform required act. — Questions of negligence should generally not be decided by summary judgment, but that general rule does not apply when the alleged negligence is a failure to perform an act which one has

no duty to perform. Devlin v. Bowden, 97 N.M. 547, 641 P.2d 1094 (Ct. App. 1982), overruled on other grounds, Ruiz v. Garcia, 115 N.M. 269, 850 P.2d 972 (1993).

When proper in product liability action. — In a product liability action, the trial court acts properly in granting a motion for summary judgment where the testimony presented suffices to establish a prima facie showing that the product was not defective when sold, and where the opposing parties have failed to present any contrary evidence sufficient to establish a genuine issue of fact for trial. Livingston v. Begay, 98 N.M. 712, 652 P.2d 734 (1982).

Defamation actions. — The finding of summary judgment is premature where it is rendered before the thoughts, editorial processes and other information in the exclusive control of an alleged defamer can be examined. Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982).

When affirmative defenses alleged. — Where assumption of risk is raised as an affirmative defense by defendant, an issue in the defense is whether plaintiff voluntarily assumed the risk. This involves determining whether or not there was a reasonable alternative course of conduct available to plaintiff, which is a factual question that cannot be decided as a matter of law, so that summary judgment is not proper. Proctor v. Waxler, 83 N.M. 58, 488 P.2d 108 (Ct. App. 1971), aff'd, 84 N.M. 361, 503 P.2d 644 (1972).

Plaintiff's conduct in walking from her car up to the time of her fall creates a genuine issue of fact on the matter of contributory negligence and does not constitute negligence as a matter of law; summary judgment is therefore not proper. Proctor v. Waxler, 83 N.M. 58, 488 P.2d 108 (Ct. App. 1971), aff'd, 84 N.M. 361, 503 P.2d 644 (1972).

Summary judgment in a negligence case is proper when an affirmative defense such as contributory negligence is proved as a matter of law. Catalano v. Lewis, 90 N.M. 215, 561 P.2d 488 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Contributory negligence is ordinarily a fact question to be determined by the jury. Where, however, reasonable minds cannot differ on the question and readily reach the conclusion that plaintiff was negligent and that his negligence contributed proximately with that of defendant to cause the injury complained of, contributory negligence should be declared as a matter of law. Allen v. Papas, 80 N.M. 159, 452 P.2d 493 (Ct. App. 1969).

The plaintiff, when moving for summary judgment, has the burden to rebut the defendant's affirmative defenses but when a defense, such as accord and satisfaction, is totally without merit, plaintiff is not obligated to put on proof beyond all reasonable doubt to make a prima facie case for summary judgment. Transamerica Ins. Co. v. Sydow, 107 N.M. 104, 753 P.2d 350 (1988).

Case held ripe for summary adjudication. — Where the nonmoving party's defenses are limited to one or more affirmative defenses and there is no triable issue of fact as to any of the affirmative defenses or they are all legally insufficient, then the case is ripe for summary adjudication. Fidelity Nat'l Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 583 P.2d 470 (1978).

When proximate cause element of case. — Proximate cause is an ultimate fact, usually an inference to be drawn from facts proved. It becomes a question of law only when facts regarding causation are undisputed and all reasonable inferences therefrom are plain, consistent and uncontradictory. Unless as a matter of law there was an independent intervening cause, there is a factual issue on proximate cause. Harless v. Ewing, 80 N.M. 149, 452 P.2d 483 (Ct. App. 1969).

Where the facts are not in dispute and the reasonable inferences from those facts are plain and consistent, proximate cause becomes an issue of law. Galvan v. City of Albuquerque, 85 N.M. 42, 508 P.2d 1339 (Ct. App. 1973).

Summary judgment not warranted by mere showing of negligent motor vehicle operation. — A mere showing that the decedent operated a motor vehicle negligently in violation of 66-7-104 and 66-8-102 NMSA 1978 is not sufficient to warrant summary judgment, as it does not conclusively establish that the decedent's negligence was a contributing proximate cause of the accident. Sweenhart v. Co-Con, Inc., 95 N.M. 773, 626 P.2d 310 (Ct. App. 1981).

Intent usually jury question. — Intent may be inferred from the circumstances, and as intent is usually a question for the jury because its determination often depends on credibility of the witnesses, the granting of summary judgment was improper. Maxey v. Quintana, 84 N.M. 38, 499 P.2d 356 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

Good faith is usually a question of fact. McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

As is prior knowledge or notice. — Whether the purchasers of real estate are innocent purchasers for value or whether they had prior knowledge or notice of an unrecorded deed from the sellers of the realty is a genuine issue of fact. Jeffers v. Martinez, 93 N.M. 508, 601 P.2d 1204 (1979).

Likewise waiver. — Waiver is the intentional abandonment or relinquishment of a known right, and an intention to waive a right is ordinarily a question of fact. Reinhart v. Rauscher Pierce Sec. Corp., 83 N.M. 194, 490 P.2d 240 (Ct. App. 1971); C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 597 P.2d 1190 (Ct. App. 1979).

Insufficient time between service and judgment renders judgment erroneous. — Where service of the motion for summary judgment was by mail, and the judgment was entered prior to the time plaintiff could have been required to interpose counter-

affidavits or other opposing evidence in accordance with Rule 6(e) (see now Rule 1-006 NMRA), the entry of summary judgment was error. Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968).

But not absence of original depositions where copies available. — Where the record shows that copies of the depositions were in fact available, there is no merit to the contention that summary judgment was erroneous because the originals of the four depositions were not on file at the time of the hearing. Smith v. Klebanoff, 84 N.M. 50, 499 P.2d 368 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

Summary judgment properly based on independent judgment pending on appeal. — The trial court could base its summary judgment on the declaratory judgment in an independent proceeding, thus giving effect to a decision that was pending on appeal, because there was no showing that the declaratory judgment had been superseded or stayed; the judgment was in effect and could be enforced. Chavez v. Mountainair School Bd., 80 N.M. 450, 457 P.2d 382 (Ct. App. 1969).

And on defense argued but not alleged in pleadings. — Where motions for summary judgment were fully controverted and there was no surprise or prejudice, the trial court properly considered the defense of accord and satisfaction despite the fact that the pleadings did not allege that defense. Electric Supply Co. v. United States Fid. & Guar. Co., 79 N.M. 722, 449 P.2d 324 (1969).

Situation when challenged complaint taken as true. — Where no answer has been filed and the summary judgment motion is not supported by affidavits, every allegation of the complaint must be taken as true. Jacobson v. State Farm Mut. Auto. Ins. Co., 81 N.M. 600, 471 P.2d 170 (1970).

Court must consider the effect of the pleadings where the complaint specifically alleges two items of negligence which are only reached by inference in the depositions and affidavits; if these allegations raise a factual issue proximate cause may be inferred from these facts and not by an inference from an inference. The pleadings must also be considered where the complaint specifically alleges proximate cause as a fact; if the complaint raises a factual issue as to proximate cause summary judgment is improper. Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970).

Court will consider nature of defense. — The purpose of a summary judgment proceeding is to determine whether a defense exists. Since summary judgment may only be granted where no genuine issue of material fact is presented by the pleadings, affidavits and depositions, this court will consider the nature of the defense submitted by a defendant. Western Farm Bureau Mut. Ins. Co. v. Barela, 79 N.M. 149, 441 P.2d 47 (1968).

Magistrate's findings not material. — Where there was nothing to show that district court on trial de novo failed to consider the matters required to be considered by Subdivision (c) (see now Paragraph C), grant of summary judgment was not rendered

erroneous by magistrate's earlier findings. Southern Union Gas Co. v. Taylor, 82 N.M. 670, 486 P.2d 606 (1971).

Oral testimony proper at hearing on motion. — A pleading seeking summary judgment is a motion, and Rule 43(e) (see now Rule 1-043 NMRA) permits the court to hear oral testimony at a hearing on a motion. Summers v. American Reliable Ins. Co., 85 N.M. 224, 511 P.2d 550 (1973).

Sanctions for failure to file timely motion. — Sanctions for violating this rule were proper based on a party's failure to file its memorandum in opposition to the motion for summary judgment until the afternoon before the matter was set to be heard. Avlin Inc. v. Manis, 1998-NMCA-011, 124 N.M. 544, 953 P.2d 309.

B. BURDEN OF PROOF.

Unrebutted prima facie case for summary judgment. — When plaintiffs alleged their former attorney incorrectly advised them of the statute of limitation on their claim against a third party but failed to offer any evidence of a genuine issue of material fact that supported their claim against the third party, summary judgment for the attorney was proper. Bassett v. Sheehan, Sheehan & Stelzner, P.A., 2008-NMCA-072, 144 N.M. 178, 184 P.3d 1072.

Statutory burden of proof held inapplicable in summary judgment proceedings. — The burden of proof set out in 55-1-208 NMSA 1978 (relating to options to accelerate at will) applies to the quantum of evidence and sufficiency of proof as to the lack of good faith after all the evidence is before the court; that burden does not apply to a motion for summary judgment where the sole question is whether a genuine issue of material fact exists. At all times on a motion for summary judgment, the burden of proof is on the movant to show the absence of a genuine issue of fact. McKay v. Farmers & Stockmens Bank, 91 N.M. 181, 585 P.2d 325 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

Burden on moving party to show summary judgment appropriate. — Burden rests on the party moving for summary judgment to establish that no genuine issue of material fact exists for trial and that the movant is entitled to judgment as a matter of law, and if the movant fails to meet this burden summary judgment is erroneous. Brock v. Goodman, 83 N.M. 580, 494 P.2d 1397 (Ct. App.), rev'd on other grounds, 83 N.M. 789, 498 P.2d 676 (1972); Tapia v. McKenzie, 83 N.M. 116, 489 P.2d 181 (Ct. App. 1971); Sanchez v. Public Serv. Co., 82 N.M. 752, 487 P.2d 180 (Ct. App.), rev'd on other grounds, 83 N.M. 245, 490 P.2d 962 (1971); Sanchez v. Shop Rite Foods, 82 N.M. 369, 482 P.2d 72 (Ct. App. 1971); Fidelity Nat'l Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 583 P.2d 470 (1978); C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 597 P.2d 1190 (Ct. App. 1979); Phillips v. Allstate Ins. Co., 93 N.M. 648, 603 P.2d 1105 (Ct. App. 1979).

In justifying their termination of plaintiff's employment, defendant regents in seeking summary judgment had the burden of showing prima facie that plaintiff was an officer, and they did not meet that burden. Feldman v. Regents of Univ. of N.M., 88 N.M. 392, 540 P.2d 872 (Ct. App. 1975).

Where defendants failed to show that plaintiffs were not entitled to rely on agent's alleged misrepresentations, they did not make a showing entitling them to summary judgment on this issue. Steadman v. Turner, 84 N.M. 738, 507 P.2d 799 (Ct. App. 1973).

Where the facts before the trial court made a prima facie showing as to the means by which cow got out of the pasture but did not make a prima facie showing of no negligence on the part of defendant because they showed nothing as to action, inaction or foreseeability on the part of defendant in connection with the means of escape, summary judgment was improperly granted because defendant did not make a prima facie showing that he was entitled thereto. Tapia v. McKenzie, 83 N.M. 116, 489 P.2d 181 (Ct. App. 1971).

Estoppel is the preclusion by acts or conduct from asserting a right which might otherwise have existed to the detriment and prejudice of another who in reliance on such acts and conduct has acted thereon; in the absence of proof of the acts or conduct relied upon, a claim of estoppel will not constitute a defense sufficient for granting of summary judgment. Reinhart v. Rauscher Pierce Sec. Corp., 83 N.M. 194, 490 P.2d 240 (Ct. App. 1971); C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 597 P.2d 1190 (Ct. App. 1979).

In summary judgment proceedings, the burden rests upon the movant to show there is no genuine issue or material fact to submit to a fact finder, be it a court or jury. Nevertheless, an opposing party may not remain silent in the face of a meritorious showing by movant. Air Eng'r Co. v. Corporacion de la Fonda, 91 N.M. 135, 571 P.2d 402 (1977).

The moving party need only make a prima facie showing that he is entitled to summary judgment, and is not required to show beyond all possibility that a genuine issue of fact does not exist. Holguin v. Smith's Food King Properties, Inc., 105 N.M. 737, 737 P.2d 96 (Ct. App. 1987).

Where the meaning of a material contract term is in dispute, in order to establish that no genuine issue of material fact exists, a party seeking affirmative relief based on its interpretation of the contract necessarily bears the burden of establishing that its interpretation controls. Farmington Police Officers' Assn. v. City of Farmington, 2006-NMCA-077, 139 N.M. 750, 137 P.3d 1204.

By establishing prima facie case therefor. — Where defendant moves for summary judgment under this rule, the burden is on defendant to establish a prima facie case

showing there is no genuine issue of material fact. Lackey v. Mesa Petroleum Co., 90 N.M. 65, 559 P.2d 1192 (Ct. App. 1976).

Prima facie showing necessary. — The movant need only make a prima facie showing that he is entitled to summary judgment, and is not required to show beyond all possibility that a genuine issue of fact does not exist. Savinsky v. Bromley Group, Ltd., 106 N.M. 175, 740 P.2d 1159 (Ct. App. 1987).

Prima facie showing means such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. Kelly v. Board of Trustees, 87 N.M. 112, 529 P.2d 1233 (Ct. App.), cert. denied, 87 N.M. 111, 529 P.2d 1232 (1974).

No burden on nonmoving party until movant makes prima facie showing. — Movant for summary judgment has the burden of establishing the absence of a material issue of fact and that it is entitled to summary judgment as a matter of law. Until movant makes a prima facie showing that it is entitled to summary judgment, there is no requirement upon nonmovant to make any showing as to factual issues. Steadman v. Turner, 84 N.M. 738, 507 P.2d 799 (Ct. App. 1973).

A party moving for summary judgment has the burden of establishing that there is no material issue of fact to be determined by the factfinder and that he is entitled to judgment as a matter of law; the burden is not on the opposing party to prove a prima facie case. Yeary v. Aztec Discts., Inc., 83 N.M. 319, 491 P.2d 536 (Ct. App. 1971); Coca v. Arceo, 71 N.M. 186, 376 P.2d 970 (1962); Barber's Super Mkts., Inc. v. Stryker, 81 N.M. 227, 465 P.2d 284 (1970); Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563 (Ct. App. 1970).

In initially opposing defendant's motion for summary judgment, plaintiffs did not have the burden of establishing a prima facie case. Until defendant made a prima facie showing that it was entitled to summary judgment there was no requirement upon plaintiffs to show that a factual issue existed. Sanchez v. Shop Rite Foods, 82 N.M. 369, 482 P.2d 72 (Ct. App. 1971).

But prima facie showing is sufficient to support proceeding. — The burden on the movant does not require him to show or demonstrate beyond all possibility that no genuine issue of fact exists. To place this burden upon him would be contrary to the express provisions of Subdivision (e) (see now Paragraph E) and would make this rule almost, if not entirely, useless. Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972); Fidelity Nat'l Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 583 P.2d 470 (1978).

A movant for summary judgment is not required to show or demonstrate beyond all possibility that no genuine issue of fact exists but rather must make a prima facie showing for summary judgment. The burden is then on the nonmoving party to show the existence of questions of fact requiring a trial. Cordova v. City of Albuquerque, 86 N.M. 697, 526 P.2d 1290 (Ct. App. 1974); McFarland v. Helquist, 92 N.M. 557, 591 P.2d 688

(Ct. App. 1979); Peoples State Bank v. Ohio Cas. Ins. Co., 96 N.M. 751, 635 P.2d 306 (1981).

To prevail in a summary judgment proceeding, a defendant need only make a prima facie showing of entitlement to summary judgment. Once a defendant has made such a prima facie case, the burden then shifts to the plaintiff to show at least a reasonable doubt as to whether a genuine issue of fact exists. Quintana v. University of Cal., 111 N.M. 679, 808 P.2d 964 (Ct. App. 1991).

Burden of proof shifts once prima facie case shown. — Once the defendant has made a prima facie showing that he is entitled to summary judgment, the burden is on the plaintiff to show that there is a genuine factual issue and that the defendant is not entitled as a matter of law to summary judgment. Knippel v. Northern Communications, Inc., 97 N.M. 401, 640 P.2d 507 (Ct. App. 1982).

Upon making a prima facie showing, the burden then shifts to the opponent who must show at least a reasonable doubt, rather than a slight doubt, as to the existence of a genuine issue of fact. Savinsky v. Bromley Group, Ltd., 106 N.M. 175, 740 P.2d 1159 (Ct. App. 1987).

Once a prima facie showing is made by the moving party, the burden is then shifted to the party resisting the motion, who must show at least a reasonable doubt as to the existence of a genuine issue of fact. Holguin v. Smith's Food King Properties, Inc., 105 N.M. 737, 737 P.2d 96 (Ct. App. 1987).

And once showing made, resisting party must demonstrate reasonable doubt on genuine issue. — Once a prima facie showing has been made, the moving party is entitled to summary judgment unless the party resisting the motion demonstrates at least a reasonable doubt as to whether a genuine issue exists. Cargill v. Sherrod, 96 N.M. 431, 631 P.2d 726 (1981).

Facts deemed admitted where not disputed. — Where plaintiff did not dispute the facts set out in defendant's statement of material facts, pursuant to Paragraph D of this rule, those facts are deemed admitted. Cordova v. New Mexico Taxation & Revenue Dep't., 2005-NMCA-009, 136 N.M. 713, 104 P.3d 1104.

Facts deemed admitted pursuant to Paragraph D of this rule were sufficient to establish a prima facie case of entitlement to summary judgment. Bank of New York v. Regional Housing Authority, 2005-NMCA-116, 138 N.M. 389, 120 P.3d 471.

Movant must counter affirmative defenses. — A party moving for summary judgment on the basis of his complaint must demonstrate that no genuine issue of material fact exists as to affirmative defenses stated in the opposing party's pleadings. Fidelity Nat'l Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 583 P.2d 470 (1978).

But prima facie showing sufficient. — It is the movant's obligation to produce the necessary affidavits or other material to expose the nonmovant's affirmative defenses as unmerited, but that obligation is no different from the original obligation on the movant; he is not required to show or demonstrate beyond all possibility that no genuine issue of fact exists, but rather it is enough if he submits some material in order to shift the burden to the nonmoving party. Fidelity Nat'l Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 583 P.2d 470 (1978).

Burden as to tolling of statute of limitation. — In a motion for summary judgment, the party claiming that a statute of limitation should be tolled has the burden of alleging sufficient facts that if proven would toll the statute. Stringer v. Dudoich, 92 N.M. 98, 583 P.2d 462 (1978).

Burden establishing status of land satisfied. — Plaintiff's submission of the 1990 patent as evidence that the land was public land until 1990, coupled with submission of the deed evidencing that title to the property lay in plaintiff, satisfied plaintiff's burden of making a prima facie showing of entitlement to summary judgment against defendants. Deaton v. Guiterrez, 2004-NMCA-043, 135 N.M. 423, 89 P.3d 672, cert. denied, 2004-NMCERT-004.

Conversion of motion to dismiss to one for summary judgment. — When a Rule 1-012B NMRA motion to dismiss is converted into a summary judgment motion and the movant has satisfied its burden under this rule establishing a prima facie case for summary judgment, the opposing party must come forward and show the existence of a genuine issue of material fact rendering summary judgment inappropriate. Hern v. Crist, 105 N.M. 645, 735 P.2d 1151 (Ct. App. 1987).

C. MANNER OF DECISION.

Criterion used to determine whether an issue of fact exists in a summary judgment proceeding. — See Akre v. Washburn, 92 N.M. 487, 590 P.2d 635 (1979).

Generally as to manner of ruling on summary judgment. — In resolving the question as to whether summary judgment should be granted the trial court does not weigh the evidence, nor does the appellate court. The pleadings, affidavits, interrogatories and admissions, if any, must be viewed in the most favorable aspect they will bear in support of the rights of the party opposing the motion to a trial of the issues, and the party against whom a motion for summary judgment is directed is entitled to have all reasonable inferences construed in his favor. Wheeler v. Board of County Comm'rs, 74 N.M. 165, 391 P.2d 664 (1964).

In determining whether the plaintiff's evidence would support a judgment for him, the court will accept as true all evidence in the record favorable to plaintiff's claim, giving him the benefit of all fair and reasonable inferences deducible therefrom and disregarding all evidence and inferences to the contrary. Cook v. O'Connell, 65 N.M. 170, 334 P.2d 551 (1959).

Neither trial court nor appellate court should weigh the evidence in determining whether summary judgment should be granted. Gonzales v. Gackle Drilling Co., 70 N.M. 131, 371 P.2d 605 (1962); Sooner Pipe & Supply Corp. v. Doerrie, 69 N.M. 78, 364 P.2d 138 (1961); Hinojosa v. Nielson, 83 N.M. 267, 490 P.2d 1240 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971); Williams v. Herrera, 83 N.M. 680, 496 P.2d 740 (Ct. App. 1972); Huerta v. New Jersey Zinc Co., 84 N.M. 713, 507 P.2d 460 (Ct. App.), cert. denied, 84 N.M. 696, 507 P.2d 443 (1973); Fresquez v. Southwestern Indus. Contractors & Riggers, 89 N.M. 525, 554 P.2d 986 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976); C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 597 P.2d 1190 (Ct. App. 1979).

Neither the trial court nor the appellate court is to weigh the evidence in considering a motion for summary judgment. Metzgar v. Martinez, 97 N.M. 180, 637 P.2d 1235 (Ct. App.), rev'd on other grounds, 97 N.M. 173, 637 P.2d 1228 (1981).

Factual conflicts in opposing testimony must be resolved at trial. — In summary judgment proceeding the trial court could not weigh the factual conflicts in the opposing affidavits and thus could not resolve issues of credibility. Steadman v. Turner, 84 N.M. 738, 507 P.2d 799 (Ct. App. 1973); Security Bank & Trust v. Parmer, 97 N.M. 108, 637 P.2d 539 (1981).

Suggested inconsistencies are not to be resolved in a summary proceeding by equating affiant's statement with truth and plaintiff's testimony with falsity. The resolution of the apparent conflict, the credibility of the witnesses and the weight to be given their testimony are questions for the trier of the facts. Wisehart v. Mountain States Tel. & Tel. Co., 80 N.M. 251, 453 P.2d 771 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969).

No matter how well prepared the parties, how fully developed the issues to be tried, and how complete the discovery, summary judgment is no substitute for trial. When material facts are in dispute, their resolution may not be determined by the trial judge summarily, but must be resolved after a trial on those factual issues. Hutcherson v. Dawn Trucking Co., 107 N.M. 358, 758 P.2d 308 (Ct. App. 1988).

Likewise conflicts in testimony of single witness. — Where a conflict arises in statements on a material fact made by a witness in an affidavit and a deposition, summary judgment is improper. Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977).

Where the testimony of a single witness conflicts on a material fact, summary judgment is improper; the question is for the jury. Although movants for summary judgment in a personal injury suit contended that it was useless to go to trial since one of their employees, a crucial witness, was going to testify according to his affidavit in support of the motion and to distinguish his conflicting deposition testimony, nevertheless summary judgment was improper since the jury might choose to believe that the prior statement, made before the case arose, was accurate and that the subsequent affidavit

was colored by employee loyalty. Rodriguez v. State, 86 N.M. 535, 525 P.2d 895 (Ct. App. 1974).

Where plaintiff gave conflicting testimony in his deposition, the conflict is to be resolved by the trier of fact, and granting defendants summary judgment was improper. Hinojosa v. Nielson, 83 N.M. 267, 490 P.2d 1240 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971); Security Bank & Trust v. Parmer, 97 N.M. 108, 637 P.2d 539 (1981).

Or of allied parties. — Where a factual conflict exists in plaintiffs' testimony summary judgment is improper because appellate courts do not weigh the evidence; summary judgment may be granted only where the facts are clear and undisputed. Sanders v. Smith, 83 N.M. 706, 496 P.2d 1102 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972).

Discovery not completed. — As a general rule, a court should not grant summary judgment before a party has completed discovery, particularly when further factual resolution is essential to determine the central legal issues involved or the facts before the court are insufficiently developed. Sun Country Sav. Bank v. McDowell, 108 N.M. 528, 775 P.2d 730 (1989).

Fact that contradictory inferences exist shows that evidence is not undisputed, and the conflict in the testimony of a single witness is to be resolved by the trier of fact. The trial court could not properly resolve such conflict on a motion for summary judgment, for by doing so it would be weighing the evidence. Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563 (Ct. App. 1970).

Credibility generally not proper issue for summary judgment. — Courts should not resolve a genuine issue of credibility at a hearing on the motion for summary judgment, at least in the absence of a showing that the witnesses whose credibility is in question cannot be produced at the trial. Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964).

Credibility of defendant's testimony, as sole witness, not applied to summary judgment procedures. — The rule that where a defendant leads a plaintiff into danger which results in plaintiff's death, and defendant is the sole eyewitness of decedent's conduct, defendant's testimony, though uncontradicted and undisputed, is not conclusive on the issue of decedent's contributory negligence, and the credibility of defendant's testimony, no matter how plausible, is a question of fact for the jury, cannot be applied to summary judgment procedures. Silva v. City of Albuquerque, 94 N.M. 332, 610 P.2d 219 (Ct. App. 1980).

Physical facts and conditions may point unerringly to the truth so as to leave no room for a contrary conclusion based on reason or common sense, and under such circumstances the physical facts are not affected by sworn testimony which in mere words conflicts with them; however the physical facts must be such that conflicting oral testimony is inherently improbable. Sanchez v. Public Serv. Co., 83 N.M. 245, 490 P.2d 962 (1971).

Matters should be construed in support of right to trial. — The pleadings, depositions and other matters presented and considered by the court must be viewed in the most favorable aspect they will bear in support of the right to a trial of the issues. Gonzales v. Gackle Drilling Co., 70 N.M. 131, 371 P.2d 605 (1962); Wisehart v. Mountain States Tel. & Tel. Co., 80 N.M. 251, 453 P.2d 771 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969); Perry v. Color Tile, 81 N.M. 143, 464 P.2d 562 (Ct. App. 1970); Sanchez v. Public Serv. Co., 83 N.M. 245, 490 P.2d 962 (1971); Sparks v. Melmar Corp., 93 N.M. 201, 598 P.2d 1161 (1979).

In determining whether summary judgment is proper, the evidence must be viewed in the light most favorable to support the right to a trial on the merits. Holliday v. Talk of Town, Inc., 98 N.M. 354, 648 P.2d 812 (Ct. App. 1982).

And in light most favorable to nonmoving party. — Motions for summary judgments must be viewed in the light most favorable to the party opposing them. Wilson v. Albuquerque Bd. of Realtors, 81 N.M. 657, 472 P.2d 371 (1970), overruled on other grounds Garrett v. Nissen Corp., 84 N.M. 16, 498 P.2d 1359 (1972); Garcia v. Presbyterian Hosp. Center, 92 N.M. 652, 593 P.2d 487 (Ct. App. 1979); C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 597 P.2d 1190 (Ct. App. 1979).

The trial court has the duty of viewing the pleadings and all the testimony and evidence submitted in support of the motion for summary judgment in the most favorable manner possible in support of a denial of the motion. Brazell v. Save-On Drug, Inc., 79 N.M. 716, 449 P.2d 86 (Ct. App. 1968); Hubbard v. Mathis, 72 N.M. 270, 383 P.2d 240 (1963); Institute for Essential Hous., Inc. v. Keith, 76 N.M. 492, 416 P.2d 157 (1966); Las Cruces Country Club, Inc. v. City of Las Cruces, 81 N.M. 387, 467 P.2d 403 (1970).

The trial court is obliged to view the pleadings, affidavits and depositions in the light most favorable to the party opposing the motion. State v. Integon Indem. Corp., 105 N.M. 611, 735 P.2d 528 (1987).

All reasonable inferences are to be resolved in favor of trial and against summary judgment. Shumate v. Hillis, 80 N.M. 308, 454 P.2d 965 (1969); Smith v. State, 79 N.M. 25, 439 P.2d 242 (Ct. App. 1968).

And in light most favorable to nonmoving party. — A party opposing a motion for summary judgment is entitled to have all reasonable inferences construed in a light most favorable to him. Barber's Super Mkts., Inc. v. Stryker, 81 N.M. 227, 465 P.2d 284 (1970); Hewitt-Robins, Inc. v. Lea County Sand & Gravel, Inc., 70 N.M. 144, 371 P.2d 795 (1962); Jacobson v. State Farm Mut. Auto. Ins. Co., 81 N.M. 600, 471 P.2d 170 (1970); Montoya v. City of Albuquerque, 82 N.M. 90, 476 P.2d 60 (1970); Yeary v. Aztec Discts., Inc., 83 N.M. 319, 491 P.2d 536 (Ct. App. 1971).

On motion for summary judgment the opposing party must be given the benefit of all reasonable inferences to be drawn from the pleadings, affidavits and depositions. Baca v. Britt, 73 N.M. 1, 385 P.2d 61 (1963).

Conflicting inferences drawn from basic facts. — Even where the basic facts are undisputed, if equally logical but conflicting inferences can be drawn from the facts, summary judgment should be denied. Yeary v. Aztec Discts., Inc., 83 N.M. 319, 491 P.2d 536 (Ct. App. 1971); Fischer v. Mascarenas, 93 N.M. 199, 598 P.2d 1159 (1979); Jemez Properties, Inc. v. Lucero, 94 N.M. 181, 608 P.2d 157 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

If equally logical but conflicting inferences may be drawn from the facts and if any of these inferences would preclude granting of a judgment as a matter of law, then the motion for a summary judgment must be denied. Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co., 77 N.M. 730, 427 P.2d 249 (1967).

Even in a case where the basic facts are undisputed, it is frequently possible that equally logical but conflicting inferences may be drawn from the facts, which would preclude the granting of summary judgment. Hewitt-Robins, Inc. v. Lea County Sand & Gravel, Inc., 70 N.M. 144, 371 P.2d 795 (1962).

Inferences must be reasonable. — The inferences which the party opposing the motion for summary judgment is entitled to have drawn from all the matters properly before and considered by the trial court must be reasonable inferences. Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972).

For reasonable men to fairly differ upon whether there is a triable issue of fact, there must be reasonable inferences arising from the facts on which to base the differences. Martinez v. City of Albuquerque, 84 N.M. 189, 500 P.2d 1312 (Ct. App. 1972).

And permissible. — All permissible inferences from the facts established favorable to the party opposing the entry of summary judgment must be considered in determining whether an issue of fact requiring trial exists. Mahona-Jojanto, Inc. v. Bank of N.M., 79 N.M. 293, 442 P.2d 783 (1968).

Inference of negligence arising from pain following operation not overcome by expert opinion. — Where a patient alleges that a physician was negligent in failing to diagnose the cause of pain and has made out a prima facie case of negligence, the opinion of medical experts that the physician's treatment was not negligent is not sufficient to overcome the reasonable inference arising from the absence of pain before and after the first operation and continuous pain following the second operation. Under these circumstances summary judgment is not proper. Eis v. Chesnut, 96 N.M. 45, 627 P.2d 1244 (Ct. App. 1981).

Nonmoving party given benefit of all reasonable doubts. — On a motion for summary judgment the trial court must give the party opposing the motion the benefit of all reasonable doubts in determining whether a genuine issue exists. New Mexico Elec. Serv. Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976); Zamora v. Foster, 84 N.M. 177, 500 P.2d 1001 (Ct. App. 1972); First Nat'l Bank v. Nor-Am Agrl. Prods., Inc., 88 N.M. 74, 537 P.2d 682 (Ct. App.), cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975);

Rainbo Baking Co. v. Apodaca, 88 N.M. 501, 542 P.2d 1191 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975); Torres v. Piggly Wiggly Shop Rite Foods, Inc., 93 N.M. 408, 600 P.2d 1198 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979); Santistevan v. Centinel Bank, 96 N.M. 734, 634 P.2d 1286 (Ct. App. 1980), aff'd in part, rev'd on other grounds, 96 N.M. 730, 634 P.2d 1282 (1981).

All reasonable inferences are to be made in favor of the party opposing a summary judgment motion. Poorbaugh v. Mullen, 96 N.M. 598, 633 P.2d 706 (Ct. App. 1981); Koenig v. Perez, 104 N.M. 664, 726 P.2d 341 (1986).

Party opposing motion is to be given benefit of all reasonable doubts in determining whether a genuine issue exists, and if there are such reasonable doubts summary judgment should be denied. McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

Of all doubts. — It is the function of the trial court to resolve all doubts as to the existence of material issues of fact against the moving party and to deny the motion for summary judgment, unless the court is convinced from a consideration of the pleadings, depositions, admissions and affidavits that such party is entitled to summary judgment as a matter of law. Morris v. Miller & Smith Mfg. Co., 69 N.M. 238, 365 P.2d 664 (1961); Pederson v. Lothman, 63 N.M. 364, 320 P.2d 378 (1958); C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 597 P.2d 1190 (Ct. App. 1979).

In any case where doubt exists upon examining the pleadings, affidavits and depositions as to the existence of a genuine issue as to a material fact, the doubt is to be resolved against the moving side. Agnew v. Libby, 53 N.M. 56, 201 P.2d 775 (1949); McLain v. Haley, 53 N.M. 327, 207 P.2d 1013 (1949).

Of the slightest doubt. — When there is the slightest doubt as to the facts it is not proper to grant a motion for summary judgment because under such circumstances the litigants are entitled to a trial of the issues presented. Michelson v. House, 54 N.M. 197, 218 P.2d 861 (1950); Binns v. Schoenbrun, 81 N.M. 489, 468 P.2d 890 (Ct. App. 1970).

Summary judgment should not be employed where there is the slightest doubt as to the existence of an issue of material fact. Frontier Leasing, Inc. v. C.F.B., Inc., 96 N.M. 491, 632 P.2d 726 (1981).

Reasonable doubt does not mean slightest doubt. — Equating a "genuine issue as to any material fact" with a slight doubt or the slightest doubt has resulted in a disregard of the clear language of this rule and a departure from its meaning and purpose; such statements, if taken literally, would mean that there could hardly ever be a summary judgment, for at least a slight doubt can be developed as to practically all things human. A better formulation would be that the party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists. If there are such reasonable doubts, summary judgment should be denied. Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972).

Summary judgments are no longer to be reversed on the basis of slight issues of fact. Galvan v. City of Albuquerque, 85 N.M. 42, 508 P.2d 1339 (Ct. App. 1973).

A party against whom summary judgment is asserted is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists as to any material fact in the case. This does not mean that summary judgment should not be granted if there is the slightest doubt as to the facts, but rather that summary judgment should be denied if there are reasonable doubts or a substantial dispute as to a material fact. Skarda v. Skarda, 87 N.M. 497, 536 P.2d 257 (1975).

A substantial dispute as to a material fact forecloses summary judgment. Chevron Oil Co. v. Sutton, 85 N.M. 679, 515 P.2d 1283 (1973); Torres v. Piggly Wiggly Shop Rite Foods, Inc., 93 N.M. 408, 600 P.2d 1198 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

While summary judgment is not properly granted if there is an "issue of material fact," it will not be reversed on appeal on the basis of slight issues of fact. Oschwald v. Christie, 95 N.M. 251, 620 P.2d 1276 (1980).

V. FORM OF AFFIDAVITS, FURTHER TESTIMONY AND DEFENSE BY NONMOVING PARTY.

A. IN GENERAL.

Discovery documents. — The court was entitled to rely on the documents provided as part of discovery in granting summary judgment for the defendants where the plaintiff did not object to their use in the motion for summary judgment and did not argue the factual validity of the documents. Alliance Health of Santa Teresa, Inc. v. Natl. Presto Industries, Inc., 2007-NMCA-157, 143 N.M. 133, 173 P.3d 55.

This rule does not require movant to attach affidavits. Deaton v. Guiterrez, 2004-NMCA-043, 135 N.M. 423, 89 P.3d 672, cert. denied, 2004-NMCERT-004.

Language of Subdivision (e) (see now Paragraph E) is mandatory in nature, but does not provide that inadequate or defective affidavits shall not be considered by the trial court. Chavez v. Ronquillo, 94 N.M. 442, 612 P.2d 234 (Ct. App. 1980).

When affidavit properly before court. — An affidavit presented on the day of a summary judgment hearing is properly before the district court and, when subsequently made a part of the corrected record on appeal, is properly before the appellate court. Hunick v. Orona, 99 N.M. 306, 657 P.2d 633 (1983).

Court properly considered affidavits submitted by defendants in support of motions for summary judgment. See Zamora v. Creamland Dairies, Inc., 106 N.M. 628, 747 P.2d 923 (Ct. App. 1987).

Oral testimony at hearing. — Because this rule is silent concerning the use of oral testimony to support or oppose motions for summary judgment, such practice is to be used, if at all, only upon a proper showing that the party seeking to offer such testimony has first exercised due diligence in attempting to secure affidavits or deposition testimony for submission incident to such motion, and that for reasons beyond his control has been unable to obtain the affidavits or depositions. Marquez v. Gomez, 116 N.M. 626, 866 P.2d 354 (Ct. App. 1991).

B. FORM OF AFFIDAVITS.

Party must move to strike affidavit that violates this rule. Chavez v. Ronquillo, 94 N.M. 442, 612 P.2d 234 (Ct. App. 1980).

Affidavits need not contain any affirmative showing of admissibility. Chavez v. Ronquillo, 94 N.M. 442, 612 P.2d 234 (Ct. App. 1980).

Mere assertions made by movant seeking summary judgment are meaningless unless supported by affidavits pursuant to Subdivision (e) (see now Paragraph E) or by other admissible evidence. C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 597 P.2d 1190 (Ct. App. 1979).

Affidavits containing belief or opinion testimony alone cannot create genuine issue of fact which would preclude a summary judgment, because they are not based on "personal knowledge," as required by Subdivision (e) (see now Paragraph E). Martinez v. Metzgar, 97 N.M. 173, 637 P.2d 1228 (1981).

Affidavit form required. — The trial court properly refused to admit an investigative report proffered by plaintiff in challenging defendant's motion for summary judgment because it was not in a form to be considered; that is, it was not an affidavit. Cordova v. City of Albuquerque, 86 N.M. 697, 526 P.2d 1290 (Ct. App. 1974).

Affidavit form required. — District court did not abuse its discretion by refusing to admit a police accident report for summary judgment purposes because it was not an affidavit and was not presented with other sworn testimony based on personal knowledge. Rivera v. Trujillo, 1999-NMCA-129, 128 N.M. 106, 990 P.2d 219, cert. denied, 128 N.M. 148, 990 P.2d 822 (1999).

Verified pleading may constitute equivalent of affidavit. — A verified pleading made on personal knowledge, setting forth such facts as would be admissible in evidence and showing affirmatively that affiant is competent to testify to the matters stated therein, may properly be considered as equivalent to a supporting or opposing affidavit, as the case may be. Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970).

Where a verified pleading does not meet the affidavit requirements of Subdivision (e) (see now Paragraph E), it has no greater effect than an unverified pleading. Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970).

Common-sense interpretation of language should be applied. — In ruling on motions for summary judgment, a trial court should apply a common-sense interpretation of the language used by the affiant or deponent to determine whether the requirements of Paragraph E have been satisfied. Western Bank v. Biava, 109 N.M. 550, 787 P.2d 830 (1990).

Affidavit not considered because contents neither explanatory nor admissible. — When the affidavit neither identifies the tests performed nor explains how the tests were performed nor satisfactorily explains the conclusion as to speed, and as the affidavit did not set forth facts admissible in evidence, it was not entitled to consideration. Galvan v. City of Albuquerque, 85 N.M. 42, 508 P.2d 1339 (Ct. App. 1973).

Contents of business records admissible. — The contents of a noncontroverted affidavit which contained copies of business records were not hearsay and consequently were admissible in support of a motion for summary judgment. Federal Bldg. Serv. v. Mountain States Tel. & Tel. Co., 76 N.M. 524, 417 P.2d 24 (1966).

Testimony of nonqualified expert incompetent. — Meteorologist's failure to show he was qualified to speak on stress of glass rendered his testimony incompetent under Subdivision (e) (see now Paragraph E). Lay v. Vip's Big Boy Restaurant, Inc., 89 N.M. 155, 548 P.2d 117 (Ct. App. 1976).

Substance of affidavit not in compliance with rule. — Plaintiff's attempt to establish an issue of fact on defendant's last clear chance to avoid the accident through the affidavit of an expert witness failed, both because the affidavit opinion evidence was not competent evidence and because the affidavit, even if admissible, did not show that defendant had time for appreciation, thought and effective action. Catalano v. Lewis, 90 N.M. 215, 561 P.2d 488 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

An affidavit by plaintiff's counsel in opposition to defendant's motion for summary judgment, concerning information the deponent gathered from speaking with several witnesses was properly stricken by the trial court for failure to comply with personal knowledge, admissibility and competency requirements of Subdivision (e) (see now Paragraph E). Carter v. Burn Constr. Co., 85 N.M. 27, 508 P.2d 1324 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Affidavits held sufficient. — Document concerning informal proceedings which occurred at hospital, during which defendant's attorney questioned nondefendant doctors about postoperative procedures after admission of alleged malpractice victim into the hospital, did not fall within the category necessary to show whether there was a genuine issue as to any material fact in medical malpractice suit where document did not disclose that the witnesses were duly sworn nor that they had read the document

and where they neither signed it nor waived signature. Gandara v. Wilson, 85 N.M. 161, 509 P.2d 1356 (Ct. App. 1973).

Where at time of summary judgment hearing plaintiff sought to dispute the amount of runoff and the propriety of the culvert's design by offering two unsworn and uncertified reports of other engineers and where no affidavits or depositions were offered in connection with these reports and they were not admissible in the form in which they were offered, there was no evidence before the court at the time of the consideration of the motion for summary judgment to present a genuine issue of material fact. Martin v. Board of Educ., 79 N.M. 636, 447 P.2d 516 (1968), criticized on another point Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972).

The affidavit of the state penitentiary's medical records director, stating that attached exhibits represented an accurate summary of the medical records maintained by the penitentiary, sufficiently demonstrated personal knowledge and that the records were what they purported to be, and were properly considered by the court in ruling upon the defendant's motion for summary judgment in an inmate's civil rights action. Archuleta v. Goldman, 107 N.M. 547, 761 P.2d 425 (Ct. App 1987).

In a case involving a will contest, an affidavit representing opinion testimony of an expert, which testimony would be admissible at trial, was proper for summary judgment consideration even though it was not based on the affiant's personal knowledge. In re Estate of Keeney, 121 N.M. 58, 908 P.2d 751 (Ct. App. 1995).

Affidavits held insufficient. — Although affidavits attached to complaint seeking recovery on two open account debts might have supported a judgment under verified accounts statute, those affidavits were not sufficient to meet provisions of summary judgment rule under Subdivision (e) (see now Paragraph E). New Mexico Tire & Battery Co. v. Ole Tires, Inc., 101 N.M. 357, 683 P.2d 39 (1984).

Effect of affidavit's insufficiency. — Where the affidavit on which summary judgment had to rely was insufficient as a matter of law, defendant did not make a prima facie case entitling it to summary judgment, and the summary judgment was reversible. Sanchez v. Shop Rite Foods, 82 N.M. 369, 482 P.2d 72 (Ct. App. 1971).

C. BURDEN ON NONMOVING PARTY.

Nonmoving party must counter movant's prima facie case for summary judgment. — Movant for summary judgment has the burden of establishing a prima facie showing that no genuine factual issue exists. Once this burden is satisfied the nonmoving party then has the obligation of showing that there is such a genuine factual issue requiring a trial and that movant is not entitled as a matter of law to summary judgment. Smith Constr. Co. v. Knights of Columbus, Council No. 1226, 86 N.M. 50, 519 P.2d 286 (1974); Feldman v. Regents of Univ. of N.M., 88 N.M. 392, 540 P.2d 872 (Ct. App. 1975).

Plaintiff has a duty, when faced by a motion for summary judgment, to show the court that a material or genuine issue of fact is present. Spears v. Canon de Carnue Land Grant, 80 N.M. 766, 461 P.2d 415 (1969); Taylor v. Alston, 79 N.M. 643, 447 P.2d 523 (Ct. App. 1968).

Where defendant on the basis of depositions and an affidavit makes a prima facie showing that neither of plaintiff's two claims was the proximate cause of the accident, it is for plaintiff to show there was a factual issue concerning proximate cause in order to defeat a motion for summary judgment. Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970).

Paragraph E contemplates that the movant need only make a prima facie showing of entitlement to summary judgment. Once a prima facie showing is made, the burden shifts to the party opposing the motion to show at least a reasonable doubt as to whether a genuine issue for trial exists. Koenig v. Perez, 104 N.M. 664, 726 P.2d 341 (1986); Requarth v. Brophy, 111 N.M. 51, 801 P.2d 121 (Ct. App. 1990).

When a party makes a prima facie showing of no genuine issue of material fact, the nonmovant has the burden to come forward with affidavits or other documentation sufficient to raise a reasonable doubt that such an issue exists. FDIC v. Alto Constr. Co., 109 N.M. 165, 783 P.2d 475 (1989).

Plaintiff failed in her burden to oppose the motion for summary judgment where plaintiff's response to the motion and her supporting memorandum did not controvert any facts in the manner mandated by Paragraph (D)(2). Richardson v. Glass, 114 N.M. 119, 835 P.2d 835 (1992).

Prima facie showing means such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972).

Summary judgment proper where nonmoving party's burden not met. — After defendant established a prima facie showing that no genuine issue of material fact existed, it became the duty of plaintiff to show there was a factual issue present, and where plaintiff failed to do this summary judgment in favor of defendant was proper. Williams v. Herrera, 83 N.M. 680, 496 P.2d 740 (Ct. App. 1972); Mora-San Miguel Elec. Coop. v. Hicks & Ragland Consulting & Eng'r Co., 93 N.M. 175, 598 P.2d 218 (Ct. App. 1979).

Affidavit failed to create a genuine factual dispute. — An apparent contradiction between a nonmovant's testimony at deposition and subsequent affidavit is not sufficient to create a genuine dispute of material fact. Rivera v. Trujillo, 1999-NMCA-129, 128 N.M. 106, 990 P.2d 219, cert. denied, 128 N.M. 148, 990 P.2d 822 (1999).

Because no evidence present. — Where plaintiff failed to sustain its burden of showing the presence of a material fact issue, no evidence was present which, when

considered in a light most favorable to plaintiff's position, would support an inference of negligence on the part of defendant, no facts were in disagreement but only the law applicable under the circumstances and the action of the trial court in granting summary judgment was correct. Dillard v. Southwestern Pub. Serv. Co., 73 N.M. 40, 385 P.2d 564 (1963).

Defendant's affidavit supporting its motion for summary judgment stated that it had no knowledge or notice that the publication in question contained any article which invaded plaintiff's privacy, the plaintiff did not controvert the affidavit. Consequently, there was no genuine issue of a material fact insofar as this point is concerned, and summary judgment was properly granted in favor of defendant. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

Summary judgment improper where nonmoving party's burden met. — Where with knowledge of the false representation of an employee's physical condition to obtain employment, together with knowledge that the employee was an experienced electronics assembler, the defendant continued the plaintiff in her employment, this is sufficient to show that the defendant intentionally relinquished its right to terminate the plaintiff's employment, and therefore, genuine issue of material fact exists whether the defendant waived its defense under the falsification concept. Chavez v. Lectrosonics, Inc., 93 N.M. 495, 601 P.2d 728 (Ct. App. 1979).

After the defendant attorney sustained his burden to establish the absence of a fact issued by expert testimony, the plaintiffs could not remain silent as they must apprise the court of available expert proof to the contrary and then produce it; in the absence of expert proof defendant's summary judgment on the issue of legal malpractice was properly granted. Sanders v. Smith, 83 N.M. 706, 496 P.2d 1102 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972).

Paragraph F provides relief in proper cases. — The burden was on defendants to show an absence of a genuine issue of fact or that they were entitled as a matter of law for some other reason to a summary judgment in their favor. However once defendants had made a prima facie showing that they were entitled to summary judgment, the burden was on plaintiff to show that there was a genuine factual issue and that defendants were not entitled as a matter of law to summary judgment. This burden is contemplated and required by Subdivision (e) (see now Paragraph E), and relief from this burden may be granted, at least temporarily, under Subdivision (f) (see now Paragraph F). Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972).

Opposing party may not remain silent in the face of a meritorious showing by a movant. Cessna Fin. Corp. v. Mesilla Valley Flying Serv., Inc., 81 N.M. 10, 462 P.2d 144 (1969), cert. denied, 397 U.S. 1076, 90 S. Ct. 1521, 25 L. Ed. 2d 811 (1970); Southern Union Gas Co. v. Briner Rust Proofing Co., 65 N.M. 32, 331 P.2d 531 (1958); Mercury Gas & Oil Corp. v. Rincon Oil & Gas Corp., 79 N.M. 537, 445 P.2d 958 (1968); Akre v. Washburn, 92 N.M. 487, 590 P.2d 635 (1979).

Although favored procedurally, party opposing summary judgment cannot stand idly by and rely solely on the allegations contained in its complaint or upon mere argument or contention to defeat the motion if a prima facie showing has been made. Oschwald v. Christie, 95 N.M. 251, 620 P.2d 1276 (1980).

Deposition not silence. — Although a party opposing a motion for summary judgment may not remain silent in the face of a meritorious showing by movant, the deposition of plaintiff can hardly be considered as silence. Wisehart v. Mountain States Tel. & Tel. Co., 80 N.M. 251, 453 P.2d 771 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969).

Bare contention that factual issue exists not enough. — Mere argument or contention of existence of a material issue of fact does not make it so. The party opposing a motion for summary judgment cannot defeat the motion and require a trial by the bare contention that an issue of fact exists but must show that evidence is available which would justify a trial of the issue. Spears v. Canon de Carnue Land Grant, 80 N.M. 766, 461 P.2d 415 (1969); Aktiengesellschaft Der Harlander, etc. v. Lawrence Walker Cotton Co., 60 N.M. 154, 288 P.2d 691 (1955).

When the moving party demonstrates that no genuine issue as to a material fact exists as a matter of law, the moving party is entitled to summary judgment and the opposing party cannot defeat the motion by a bare contention that an issue of fact exists. Air Eng'r Co. v. Corporation de la Fonda, 91 N.M. 135, 571 P.2d 402 (1977).

In a summary judgment proceeding if defendants-movants made a prima facie showing of no genuine issue of fact, it would have been plaintiff's burden to show a factual issue existed. Plaintiff cannot defeat a prima facie showing for summary judgment by contending that a factual issue exists. Feldman v. Regents of Univ. of N.M., 88 N.M. 392, 540 P.2d 872 (Ct. App. 1975).

Once the opposing party denies the moving party's claim in his deposition, it is incumbent upon the moving party to show that evidence is available to justify a trial on that issue: he cannot simply rely upon his complaint, general allegations or arguments of counsel. State Farm Mut. Auto. Ins. Co. v. Sutherland, 94 N.M. 653, 615 P.2d 268 (1980).

There may be no genuine issue even though there is formal issue; neither a purely formal denial nor general allegations necessarily defeat summary judgment. In re Environmental Planning Comm'n, 87 N.M. 215, 531 P.2d 949 (1974).

Summary judgment should be rendered, even though an issue may be raised formally by the pleadings, where the supporting affidavits and other extraneous materials, if any (such as depositions, admissions and the opposing affidavit), show that there is no genuine issue of material fact. Stubborn reliance upon allegations and denials in the pleadings will not alone suffice when faced with affidavits or other materials showing the

absence of triable issues of material fact. Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970).

Uncontroverted facts in affidavits taken as true. — The mere argument or contention of the existence of a material issue of fact does not make it so, and uncontroverted facts contained in affidavits must be taken as true; however where the material portions of the affidavits are controverted, then there exist issues which must be resolved by trial. Wisehart v. Mountain States Tel. & Tel. Co., 80 N.M. 251, 453 P.2d 771 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969).

Where the facts set forth in affidavits and supporting documents are uncontroverted, the facts must be taken as true in support of a motion for summary judgment. State ex rel. Bardacke v. New Mexico Fed. Sav. & Loan Ass'n, 102 N.M. 673, 699 P.2d 604 (1985).

Likewise facts supporting motion not controverted by affidavits or depositions. — Where there are no opposing affidavits or depositions which controvert any of the facts set forth in support of motion for summary judgment, said facts must be taken as true. Carrillo v. Hoyl, 85 N.M. 751, 517 P.2d 73 (Ct. App. 1973).

Nonmoving party must set forth specific facts. — The opposing party cannot defeat a motion for summary judgment and require a trial by a mere contention that an issue of fact exists. He must show that evidence is available which would justify a trial of the issue. Cessna Fin. Corp. v. Mesilla Valley Flying Serv., Inc., 81 N.M. 10, 462 P.2d 144 (1969), cert. denied, 397 U.S. 1076, 90 S. Ct. 1521, 25 L. Ed. 2d 811 (1970); Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970).

In considering a motion for summary judgment the court goes beyond the allegations of the complaint and determines whether a claim can in reality be supported on the ground alleged. The adverse party may not rest upon the mere allegations of his pleading, but his response must set forth specific facts showing there is a genuine issue for trial. Green v. Manpower, Inc., 81 N.M. 788, 474 P.2d 80 (Ct. App. 1970), criticized on another point Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972).

Defendant met the burden of showing that there was a genuine issue of fact as to plaintiffs' claim of embezzlement, conversion, fraud and forgery where in his affidavit opposing the motion for summary judgment defendant contended that he did not voluntarily sign the statement of admission and note for the amount allegedly embezzled prepared by plaintiffs' security officer, that he was confused and in shock and did not understand the contents of the statement or the amount of the note and that he was threatened with prosecution if he refused to sign, which note and statement were the sole items of evidence offered by plaintiffs in support of their motion for summary judgment. Rainbo Baking Co. v. Apodaca, 88 N.M. 501, 542 P.2d 1191 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Where defendant insurer made a prima facie showing in its affidavits of no waiver or estoppel to rely on an "other insurance clause" in plaintiff's policy, based on an alleged

meeting with plaintiff four days subsequent to the applications for insurance and prior to the time the applications were mailed to the company, but plaintiff's affidavit stated that no such meeting occurred, there was an issue of fact as to whether the meeting occurred, and defendant's summary judgment on the issues of waiver and estoppel was reversed. Bell v. Weinacker, 88 N.M. 557, 543 P.2d 1185 (Ct. App. 1975).

Plaintiff had a duty, when faced by the motion for summary judgment, to show the court that a fact issue was present. If the opposite party had sustained his burden to establish the absence of a fact issue but there was available additional proof to the contrary, it was the duty of the party moved against to so apprise the court. Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964).

Where appellee in support of his motion for summary judgment introduced affidavits controverting the allegations of appellant's petition, it was incumbent upon appellant to show specific facts controverting appellee's motion. Failing to do so, appellant could no longer rely on the allegations of his complaint as presenting an issue of material fact. Snyder v. Snyder, 81 N.M. 231, 465 P.2d 288 (1970).

Where defendant has made a showing that there is no genuine issue as to proximate cause, plaintiff is required to show that evidence is available to justify a trial on that issue. The "bare contentions" of the complaint are not a showing of evidence available and thus do not raise a factual issue as to proximate cause. Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970).

In a suit by one doctor against another for defamation where defendant and plaintiff both testified in their depositions that the letter in question was written to initiate peer review, their testimony was sufficient to invoke the applicability of the absolute privilege of statements made to initiate a hearing before a grievance committee of the medical profession, thereby making a prima facie showing that no material issue of fact existed. The burden was then on the plaintiff as the party resisting the motion for summary judgment to come forward and demonstrate that a genuine issue of fact requiring a trial did exist; this burden not being met, defendant was entitled to judgment as a matter of law. Franklin v. Blank, 86 N.M. 585, 525 P.2d 945 (Ct. App. 1974).

Once defendants made a prima facie showing of entitlement to summary judgment, the burden of proving the existence of genuine material factual issues shifted to plaintiffs, requiring them to come forward and show by affidavits or other means, admissible evidence indicating material facts tending to establish each required element of their claims. Blauwkamp v. University of N.M. Hosp., 114 N.M. 228, 836 P.2d 1249 (Ct. App. 1992).

And demonstrate their significance. — In challenging defendant's motion for summary judgment on plaintiff's wrongful death claim, the burden was upon plaintiff to demonstrate the significance of the gunpowder residue test result, and since she did not do so the test result raised no issue as to the sufficiency of the showing by the

defendants. Cordova v. City of Albuquerque, 86 N.M. 697, 526 P.2d 1290 (Ct. App. 1974).

Where an acting manager's alleged statements are admissible as evidence of liability such testimony does not raise an issue of fact as against defendant if plaintiff makes no showing that the acting manager had authority to make the statements attributed to him. Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970).

Speculation and opinion insufficient to defeat motion. — Where an affidavit is no more than self-serving speculation and is factually-unsupported opinion testimony, and where the affiant has no personal knowledge, the affidavit is not sufficient to defeat a motion for summary judgment. Pedigo v. Valley Mobile Homes, Inc., 97 N.M. 795, 643 P.2d 1247 (Ct. App. 1982).

Reasonable inferences construed in favor of nonmoving party. — In determining whether plaintiffs met their burden of showing that an issue of fact exists, this court will construe all reasonable inferences in favor of plaintiffs. Smith v. Klebanoff, 84 N.M. 50, 499 P.2d 368 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

Quantum of proof necessary to preclude summary judgment is not the same as that required to set aside a release at trial because in summary judgment the court merely determines whether there is a truly controverted issue of fact, not whether the proof is sufficient to prove the particular fact. It is sufficient to raise a factual issue to avoid summary judgment. Linton v. Mauer-Neuer Meat Packers, 71 N.M. 305, 378 P.2d 126 (1963).

Nonmoving party entitled to reasonable opportunity to present pertinent material. — When the trial court improperly granted protective orders to a witness and to defendants which prevented plaintiff from taking their depositions as he had a right to do, plaintiff was denied a reasonable opportunity to present all material pertinent to the action to establish a genuine issue of material fact, and the trial court erred in granting summary judgment for defendants. Kirby Cattle Co. v. Shriners Hosps. for Crippled Children, 88 N.M. 605, 544 P.2d 1170 (Ct. App. 1975), rev'd on other grounds, 89 N.M. 169, 548 P.2d 449 (1976).

Discovery issues not directly relevant in summary judgment proceedings. — The defendant had a duty to resist plaintiffs' motion for summary judgment with whatever evidentiary material he could produce. The trial court was bound to consider such evidentiary material in arriving at its decision to grant or deny the motion, and it mistakenly struck defendant's response affidavit on grounds that he had allegedly refused to furnish certain information contained therein to plaintiffs during discovery proceedings. Rainbo Baking Co. v. Apodaca, 88 N.M. 501, 542 P.2d 1191 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

So long as interrogatories and answers thereto do not constitute a demonstration of the invalidity of the plaintiff's claim, the mere inadequacy of the answers to the

interrogatories to establish the claim has no persuasiveness in ruling on a motion for summary judgment since there is no burden on the plaintiff to establish his case in a pretrial interrogatory or deposition. Wheeler v. Board of County Comm'rs, 74 N.M. 165, 391 P.2d 664 (1964).

VI. WHEN AFFIDAVITS ARE UNAVAILABLE.

Information was available before summary judgment hearing. — Where registered shareholders sold and transferred their certificates of shares in the defendant corporation; the certificates were subsequently transferred to plaintiff in 1989; the intervening certificate holders did not register the certificates in their names; the registered shareholders obtained replacement certificates in 1987; when plaintiff attempted to register the original certificates in plaintiff's name in 1990 and in 2007, the corporation refused to register the original certificates; when plaintiff discovered in 2007 that the corporation had issued replacement certificates to the registered shareholders, plaintiff filed suit for fraud; in plaintiff's verified complaint, plaintiff alleged that the chief executive officer of the corporation had informed plaintiff that plaintiff's certificates would be noted in the corporation's records; plaintiff died during the course of the litigation; in response to defendants' motion for summary judgment on the grounds that plaintiff's action was barred by the statute of limitations, plaintiff's estate contended that the statute of limitations had been tolled and that the verified statements in plaintiff's complaint were sworn statements that supported plaintiff's argument; after the trial court granted the motion for summary judgment, the estate filed a motion for reconsideration and attached the affidavit of the shareholder relations director of the corporation which tended to confirm plaintiff's verified statements; the estate claimed that the shareholder relations director was unavailable to sign an affidavit until after plaintiff filed a response to the motion for summary judgment; and although plaintiff knew that the shareholder relations director had knowledge of issues relating to plaintiff and the certificates before the hearing summary judgment proceeding, plaintiff did not mention the potential testimony during the summary judgment proceeding, the trial court did not abuse its discretion in denying the motion for reconsideration and in refusing to consider the affidavit. *Wilde v. Westland Dev. Co., Inc.*, 2010-NMCA-085, 148 N.M. 627, 241 P.3d 628.

Purpose of rule. — There is a duty imposed upon one opposing a motion for summary judgment to resist it by whatever type of evidentiary material that is at hand. If, however, due to fortuitous circumstances or for other good reasons a party finds himself presently unable to controvert the motion, a procedure is available under this rule to prevent injustice; he may request time to obtain material to justify his position. Hamilton v. Hughes, 64 N.M. 1, 322 P.2d 335 (1958).

Law reviews. — For comment, "Attractive Nuisance - Liability of the United States for Accidental Drowning of Infant Trespassers in Middle Rio Grande Project Irrigation Ditches," see 10 Nat. Resources J. 137 (1970).

For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M.L. Rev. 367 (1976).

For survey, "Administrative Law," see 6 N.M.L. Rev. 401 (1976).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For article, "The Impact of Non-Mutual Collateral Estoppel on Tort Litigation Involving Several Liability," see 18 N.M.L. Rev. 559 (1988).

For article, "Summary Judgment in New Mexico Following *Bartlett v. Mirabal*", see 33 N.M.L. Rev. 503 (2003).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments §§ 225, 226; 73 Am. Jur. 2d Summary Judgment §§ 4, 12 to 14, 16 to 22, 26 to 36, 41 to 44.

Binding effect of court's order entered after pretrial conference, 22 A.L.R.2d 599.

Procedure and course of action by trial court, where both parties move for summary judgment, 36 A.L.R.2d 881.

Court's power, on motion for summary judgment, to enter judgment against movant, 48 A.L.R.2d 1188.

Gross or wanton negligence, propriety of granting summary judgment in case involving issue of, 50 A.L.R.2d 1309.

Statute of limitations raised by motion for summary judgment, 61 A.L.R.2d 341.

Less than all parties against whom relief is sought, power of court to grant summary judgment against, 67 A.L.R.2d 1456.

Interrogatories, propriety of considering answers to, in determining motion for summary judgment, 74 A.L.R.2d 984.

Multiple claims, propriety of summary judgment on part of single claim of, 75 A.L.R.2d 1201.

Constitutionality of legislation raised by motion for summary judgment, 83 A.L.R.2d 838.

Answer to complaint or petition, propriety of entering summary judgment for plaintiff before defendant files or serves, 85 A.L.R.2d 825.

Res judicata raised by motion for summary judgment under Federal Rule 56 and similar state statutes or rules, 95 A.L.R.2d 648.

Mandamus or prohibition cases, 3 A.L.R.3d 675.

Counterclaim, proceeding for summary judgment as affected by presentation of, 8 A.L.R.3d 1361.

Reviewability of order denying motion for summary judgment, 15 A.L.R.3d 899.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Admissibility of oral testimony at state summary judgment hearing, 53 A.L.R.4th 527.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings, 53 A.L.R.4th 561.

Sufficiency of showing, under Rule 56(f) of Federal Rules of Civil Procedure, of inability to present by affidavit facts justifying opposition to motion for summary judgment, 47 A.L.R. Fed. 206.

Propriety, under Rule 56(c) of the Federal Rules of Civil Procedure, of granting oral motion for summary judgment, 52 A.L.R. Fed. 567.

Necessity of oral argument on motion for summary judgment or judgment on pleadings in federal court, 105 A.L.R. Fed. 755.

Propriety, under rule 56 of the Federal Rules of Civil Procedure, of granting summary judgment when deponent contradicts in affidavit earlier admission of fact in deposition, 131 A.L.R. Fed. 403.

49 C.J.S. Judgments §§ 127 to 132.

1-057. Declaratory judgments.

A. **Procedure.** The procedure for obtaining a declaratory judgment shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 1-038 and 1-039 NMRA. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

B. **Procedure when state a party.** In all actions where the State of New Mexico is a party, the summons to be issued, together with a copy of the complaint or petition thereto attached, shall be personally served upon the governor and the attorney general

of the State of New Mexico. The state shall thereupon be required to answer or plead to the complaint or petition and serve copy thereof within twenty (20) days after service upon the last served of the two officials above named.

ANNOTATIONS

Cross references. — For Declaratory Judgment Act, *see* Sections 44-6-1 to 44-6-15 NMSA 1978.

Compiler's notes. — Paragraph A is deemed to have superseded the first sentence of former Trial Court Rule 1935-143-1, which was similar to the first sentence of the subdivision.

Paragraph B is deemed to have superseded the second and third sentences of former Trial Court Rule 1935-143-1, which were similar.

The principal characteristic of the declaratory judgment which distinguishes it from other judgments is that it declares preexisting rights of the parties without a coercive decree. Execution or performance by the opposing parties does not follow as a matter of course. Pan Am. Petroleum Corp. v. El Paso Natural Gas Co., 77 N.M. 481, 424 P.2d 397 (1966).

Court has discretion as to accepting jurisdiction of declaratory action. — Whether to accept jurisdiction over a declaratory judgment action to determine whether an insurance company has liability is within the sound discretion of the court. Therefore, it was not error for the district court of Dona Ana county to entertain jurisdiction of this declaratory judgment action when a common-law action for damages against employer was pending in Bernalillo county. Western Farm Bureau Mut. Ins. Co. v. Barela, 79 N.M. 149, 441 P.2d 47 (1968).

But it is error to dismiss count raising issues actually litigated. — Where, in a declaratory judgment action, count I of the complaint sought a declaratory judgment declaring defendants had no right to use certain irrigation water and count II asked that they be enjoined permanently from using such water, the dismissal of count I was error, since the issues actually litigated and decided were the ones raised by that count. State ex rel. Reynolds v. Mears, 86 N.M. 510, 525 P.2d 870 (1974).

State court has jurisdiction to determine if there is contractual basis for natural gas price increase. — A determination in declaratory judgment of only the threshold question of whether, under a proper construction of the New Mexico tax statutes, there is a contractual basis for the increased price asserted by Pan American in its notice filed with the federal power commission is within the jurisdiction of the New Mexico court. Pan Am. Petroleum Corp. v. El Paso Natural Gas Co., 77 N.M. 481, 424 P.2d 397 (1966).

Jurisdiction is not barred by failure to exhaust administrative remedies. — That the state court lacks jurisdiction to determine a question in declaratory judgment where plaintiff has failed to exhaust its administrative remedies is without merit. Pan Am. Petroleum Corp. v. El Paso Natural Gas Co., 77 N.M. 481, 424 P.2d 397 (1966).

If question is one of law, not fact. — The exhaustion doctrine applies where an administrative agency alone has authority to pass on every question raised by the one resorting to judicial relief, but does not apply in relation to a question which, even if properly determinable by an administrative tribunal, involves a question of law, rather than one of fact. Pan Am. Petroleum Corp. v. El Paso Natural Gas Co., 77 N.M. 481, 424 P.2d 397 (1966).

Complete relief may be granted. — Former 22-6-2 1953 Comp. (repealed Laws 1975, ch. 340, §16), authorized the court, when necessary or proper, to grant complete relief and to enter a coercive decree to carry the declaratory judgment into effect. Pan Am. Petroleum Corp. v. El Paso Natural Gas Co., 77 N.M. 481, 424 P.2d 397 (1966).

But there must be order to show cause for coercive decree. — A coercive decree may only be entered after an order to show cause, and then upon a determination that it should be granted to complete the relief declared. Pan Am. Petroleum Corp. v. El Paso Natural Gas Co., 77 N.M. 481, 424 P.2d 397 (1966).

Order may not be deemed injunction not to violate statute. — In a declaratory judgment action, insofar as the order by the trial court may be considered to be in the nature of an injunction not to violate a statute, it is improper and without foundation in law or equity. Raton Pub. Serv. Co. v. Hobbes, 76 N.M. 535, 417 P.2d 32 (1966).

Declaratory judgment is enforceable although appeal is pending. — The trial court could base its summary judgment on the declaratory judgment in an independent proceeding, thus giving effect to a decision that was pending on appeal, because there was no showing that the declaratory judgment had been superseded or stayed. The judgment was in effect and could be enforced. Chavez v. Mountainair School Bd., 80 N.M. 450, 457 P.2d 382 (Ct. App. 1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments § 1 et seq.

Declaration of rights or declaratory judgments, 12 A.L.R. 52, 19 A.L.R. 1124, 50 A.L.R. 42, 68 A.L.R. 110, 87 A.L.R. 1205, 114 A.L.R. 1361, 142 A.L.R. 8

Application of Declaratory Judgment Acts to questions in respect of insurance policies, 14 A.L.R. 8

Decree or order which merely declares rights of parties without an express command or prohibition as basis of contempt proceeding, 29 A.L.R. 134.

Form of declaratory judgment, 87 A.L.R. 1248.

Remedy or procedure to make effective rights established by declaratory judgment, 101 A.L.R. 689.

Joinder of causes of action and parties in suit under Declaratory Judgment Act, 110 A.L.R. 817.

Determining constitutionality of statute or ordinance, or proposed statute or ordinance, as proper subject of judicial decision under Declaratory Judgment Acts, 114 A.L.R. 1361.

Jurisdictional amount in its relation to suit for declaratory judgment, 115 A.L.R. 1489.

Action under Declaratory Judgment Act to test validity or effect of divorce decree, 124 A.L.R. 1336.

Original availability to wrongdoer of remedy under Declaratory Judgment Act as affecting defense of laches, mitigation of damages or other equitable defenses in subsequent suit against him, 131 A.L.R. 791.

Tax questions as proper subject of action for declaratory judgment, 132 A.L.R. 1108, 11 A.L.R.2d 359.

Jurisdiction of declaratory action as affected by pendency of another action or proceeding, 135 A.L.R. 934.

Pari delicto doctrine as applicable to suits for declaratory relief, 141 A.L.R. 1427.

Justiciable controversy within Declaratory Judgment Act as predicable upon advice, opinion or ruling of public administrative officer, 149 A.L.R. 349.

Declaratory Judgment Act actions as subject to limitations or conditions of jurisdiction imposed by other statutes, 149 A.L.R. 1103.

Statute of limitations or doctrine of laches in relation to declaratory actions, 151 A.L.R. 1076.

Declaratory and coercive or executory relief combined in action under Declaratory Judgment Act, 155 A.L.R. 501.

Cross-bill or counterclaim seeking coercive or executory relief in action for declaratory judgment, 155 A.L.R. 501.

Application of Declaratory Judgment Acts to questions in respect of contracts or alleged contracts, 162 A.L.R. 756.

Release as proper subject of action for declaratory judgment, 167 A.L.R. 433.

Labor dispute as the proper subject of declaratory action, 170 A.L.R. 421.

Custody of child as proper subject of declaratory action, 170 A.L.R. 521.

Right to declaratory relief as affected by existence of other remedy, 172 A.L.R. 847.

Seniority rights of employee as proper subject of declaratory suit, 172 A.L.R. 1247.

Interest necessary to maintenance of declaratory determination of validity of statute or ordinance, 174 A.L.R. 549.

Actual controversy under Declaratory Judgment Act in zoning and building restriction cases, 174 A.L.R. 853.

Discretion of court as to declaratory relief respecting future interest, 174 A.L.R. 880.

Relief against covenant restricting right to engage in business or profession as subject of declaratory judgment, 10 A.L.R.2d 743.

Extent to which res judicata principles are applicable to actions for declaratory relief, 10 A.L.R.2d 782.

Jury trial, 13 A.L.R.2d 777, 33 A.L.R.4th 146.

Unemployment compensation, 14 A.L.R.2d 826.

Remedy for refusal of corporation or its agent to register or effectuate transfer of stocks, 22 A.L.R.2d 12.

Burden of proof, 23 A.L.R.2d 1243.

Negligence issue as a proper subject, 28 A.L.R.2d 957.

Partnership or joint-venture matters, 32 A.L.R.2d 970.

Validity of lease of real property, 60 A.L.R.2d 400.

Construction, application and effect of § 11 of the Uniform Declaratory Judgments Act, that all persons who have or claim any interest which would be affected by the declaration shall be made parties, 71 A.L.R.2d 723.

Declaratory judgment, during lifetime of spouses, as to construction of antenuptial agreement dealing with property rights of survivor, 80 A.L.R.2d 941.

Validity or existence of common-law marriage, 92 A.L.R.2d 1102.

Availability and scope of declaratory judgment actions in determining rights of parties to arbitration agreements, or powers and exercise thereof by arbitrators, 12 A.L.R.3d 854.

Modern status of the Massachusetts or business trust, 88 A.L.R.3d 704.

26 C.J.S. Declaratory Judgments § 1 et seq.

1-058. Orders and judgments; preparation and entry.

A. **Preparation of orders and judgments.** Upon announcement of the court's decision in any matter the court shall:

(1) allow counsel a reasonable time, fixed by the court, within which to submit the requested form of order or judgment;

(2) designate the counsel who shall be responsible for preparation of the order or judgment and fix the time within which it is to be submitted; or

(3) prepare its own form of order or judgment.

B. **Time limit.** If no satisfactory form of order or judgment has been submitted within the time fixed by the court, the court shall take such steps as it may deem proper to have an appropriate form of order or judgment entered promptly.

C. **Examination by counsel.** In all events, before the court signs any order or judgment, counsel shall be afforded a reasonable opportunity to examine the same and make suggestions or objections.

D. **Filing.** Upon the signing of any order or judgment it shall be filed promptly in the clerk's office and such filing constitutes entry thereof.

ANNOTATIONS

Cross references. — For time and place of rendition of judgment, *see* Section 39-1-1 NMSA 1978.

For control of court over final judgment after entry, *see* Section 39-1-1 NMSA 1978 and Rules 1-059, 1-060 and 1-062 NMRA.

For notice before entry of judgment in cases taken under advisement after hearing, *see* Section 39-1-2 NMSA 1978.

For entry of judgment when either party dies after verdict, *see* Section 39-1-3 NMSA 1978.

For entry and enforcement of judgment, *see* Section 39-1-4 NMSA 1978.

For recording judgments authorizing transfer, etc., of property held as community property or in joint tenancy or tenancy in common, *see* Section 40-3-17 NMSA 1978.

For form of judgment in workmen's compensation case, *see* Section 52-1-38 NMSA 1978.

For form of judgment in suit to collect irrigation district assessments, *see* Section 73-11-48 NMSA 1978.

For filing copy with state engineer of judgment on appeal transferring water rights in irrigation district, *see* Section 73-13-5 NMSA 1978.

Construed in pari materia. — Section 37-1-2 and this rule shall be read in pari materia. Navajo Dev. Corp. v. Ruidoso Land Sales Co., 91 N.M. 142, 571 P.2d 409 (1977).

Judgment's validity not affected by delay or omission. — The entry of judgment is a ministerial act, and the validity of the judgment is not affected by a delay or omission in entering judgment. De Lao v. Garcia, 96 N.M. 639, 633 P.2d 1237 (Ct. App. 1981).

Unless great time lapse, intervening right or no jurisdiction. — Judgment may be entered on a verdict or decision at anytime thereafter, and a party is entitled to have a judgment so entered unless the lapse of time is unreasonably great, some independent right has intervened or the court has lost jurisdiction. De Lao v. Garcia, 96 N.M. 639, 633 P.2d 1237 (Ct. App. 1981).

Commission of act after announcement but before entry of judgment is contempt. — After trial court has declared in open court that injunction will be issued and become immediately effective, the commission of any act enjoined after that time before formal judgment has been entered constitutes contempt. State ex rel. Bliss v. Casarez, 52 N.M. 406, 200 P.2d 369 (1948).

The rules to be followed in arriving at the meaning of judgments and decrees are not dissimilar to those relating to other written documents. Where the decree is clear and unambiguous, neither pleadings, findings nor matters dehors the record may be used to change or even to construe its meaning. Owen v. Burn Constr. Co., 90 N.M. 297, 563 P.2d 91 (1977).

It was error to admit evidence dehors the record of the condemnation suit to vary the terms of the judgment in the owner's suit for negligence of a certain contractor who had damaged the building that had been located on the land, and, as a necessary corollary, it was error for the court to refuse the owner's instruction that he had not received compensation for his building in the first suit. Owen v. Burn Constr. Co., 90 N.M. 297, 563 P.2d 91 (1977).

Stipulated judgment is contract. — A stipulated judgment is not considered to be a judicial determination, but rather a contract between the parties. Owen v. Burn Constr. Co., 90 N.M. 297, 563 P.2d 91 (1977).

The district court has authority to vacate a final judgment during the period of 30 days after its entry. Laffoon v. Galles Motor Co., 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969). See 39-1-1 NMSA 1978.

Law reviews. — For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments § 121 et seq.

Entering judgment as collateral security, 3 A.L.R. 851.

Formality in authentication of judicial acts, 30 A.L.R. 700.

Rendition of judgment against one not a formal party but who has assumed the defense, 65 A.L.R. 1134.

Power to enter judgment nunc pro tunc after death of party, 68 A.L.R. 261.

Power to extend time for appeal by entering order nunc pro tunc, 89 A.L.R. 944, 149 A.L.R. 740.

Divorce decree entered after death of spouse against whom it purports to be rendered, 94 A.L.R. 922.

Construction and application of statute providing for entry of default judgment by clerk without intervention of court or judge, 158 A.L.R. 1091.

Entry of nunc pro tunc judgment in divorce suit on death of party before final decree, 158 A.L.R. 1209.

Date of verdict or date of entry of judgment thereon as beginning of interest period on judgment, 1 A.L.R.2d 479.

Necessity of notice of application or intention to correct error in judgment entry, 14 A.L.R.2d 224.

Entry of final judgment after disagreement of jury, 31 A.L.R.2d 885.

Mere rendition, or formal entry or docketing, of judgment as prerequisite to issuance of valid execution thereon, 65 A.L.R.2d 1162.

What constitutes "entry of judgment" within meaning of Rule 58 of Federal Rules of Civil Procedure, 10 A.L.R. Fed. 709.

Requirement of Rule 58, Federal Rules of Civil Procedure, that every judgment shall be set forth on a separate document, 53 A.L.R. Fed. 595.

49 C.J.S. Judgments §§ 112 to 137, 153.

1-059. New trials.

A. **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

B. **Time for motion.** A motion for a new trial shall be served not later than ten (10) days after the entry of the judgment.

C. **Time for serving affidavits.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has fifteen (15) days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty (20) days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

D. **On initiative of court.** Not later than ten (10) days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

E. **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than ten (10) days after entry of the judgment.

[As amended, effective January 1, 1987 and effective August 1, 1989; as amended by Supreme Court Order 06-8300-17, effective August 21, 2006.]

Committee commentary. — *See* the Committee Commentary for 2006 Amendment to Rule 1-054.1 NMRA for additional information.

ANNOTATIONS

Cross references. — For the computation of time for motions, *see* Rule 1-006 NMRA.

For judgment notwithstanding the verdict, *see* Rule 1-050 NMRA.

For judgment in nonjury trial, *see* Rule 1-052 NMRA.

For relief from final judgment, *see* Rule 1-060 NMRA.

For stay of enforcement of judgment upon motion for new trial, *see* Rule 1-062 NMRA.

The 2006 amendment, approved by Supreme Court Order 06-8300-17, effective August 21, 2006, eliminated the provision in Paragraph D of Rule 1-059 NMRA that stated that if a motion for new trial were not granted within thirty (30) days after it was filed, the motion was automatically denied.

Compiler's notes. — Paragraph A is deemed to have superseded 34-341, C.S. 1929, relating to motions for new trials and in arrest of judgment.

Paragraphs B and C together with Rule 20(3) of the former "Supreme Court Rules" are deemed to have superseded 105-842, C.S. 1929, relating to new trial motions and appeals in jury cases. Rule 20(3) of the former "Supreme Court Rules" mentioned above is deemed to have been superseded by Rule 12-216 NMRA.

Pending post-judgment motion tolls time for appeal. — Where plaintiff filed a Rule 1-059(E) motion to amend the district court's judgment; plaintiff did not file a reply to the responses to the motion; plaintiff did nothing to have the motion addressed by the district court; plaintiff did not claim on appeal that the district court erred by failing to rule on the motion; and the district court had not ruled on the motion before plaintiff filed the notice of appeal, the judgment entered by the district court was not final for purposes of appeal. *Dickens v. Laurel Healthcare, LLC*, 2009-NMCA-122, 147 N.M. 303, 222 P.3d 675.

Motion to modify an order to permit an interlocutory appeal was a motion to reconsider. — Were the defendant filed a motion to modify the district court's order, which denied the defendant's motion to extend the redemption period in a foreclosure action, to include language permitting an interlocutory appeal more than ten days, but less than thirty days, after the entry of the order, the motion asked the district court to reconsider its order and determine if an appeal was necessary and the motion should be deemed to be a motion for reconsideration, not a motion to alter or amend a judgment under Rule 1-059 NMRA. Chapel v. Nevitt, 2009-NMCA-017, 145 N.M. 674, 202 P.3d 889.

A motion to amend or alter a judgment is not subject to automatic denial after thirty days. Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co., 2007-NMSC-051, 142 N.M. 527, 168 P.3d 99.

A motion challenging a judgment, filed within ten days of the judgment, should be considered a Rule 1-059(E) motion to alter or amend a judgment. Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co., 2007-NMSC-051, 142 N.M. 527, 168 P.3d 99.

This rule is substantially the same as its federal counterpart with one notable exception. Federal Rule of Civil Procedure 59 does not impose a time limit on the trial court in granting new trial motions. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Automatic denial provision of Paragraph D was intended, at least in part, to assist district courts in managing their dockets by disposing of motions for new trial that are not acted upon within a specified time. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Rule not only authority for new trial. — This rule is not the only authority upon which the district court may order a new trial. A new trial may also be an available remedy under Rule 1-060 NMRA. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Ruling on new trial motion within trial court's discretion. — The granting or denial of a motion for a new trial rests within the sound discretion of the trial court and its ruling will not be disturbed in the absence of a clear abuse of that discretion. Martinez v. Schmick, 90 N.M. 529, 565 P.2d 1046 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977); Cienfuegos v. Pacheco, 56 N.M. 667, 248 P.2d 664 (1952); Scott v. Brown, 76 N.M. 501, 416 P.2d 516 (1966); State ex rel. State Hwy. Dep't v. Robinson, 84 N.M. 628, 506 P.2d 785 (1973); Murphy v. Frinkman, 92 N.M. 428, 589 P.2d 212 (Ct. App. 1978).

A motion for new trial is addressed to the sound discretion of the court, and the decision of the court in granting or refusing it alone is not the proper subject of a bill of exceptions. Buntz v. Lucero, 7 N.M. 219, 34 P. 50 (1983) (decided under former law).

The grant or denial of a new trial is a matter resting within the sound discretion of the trial court, and the reviewing court will not reverse absent a manifest abuse of that discretion. Martinez v. Ponderosa Prods., Inc., 108 N.M. 385, 772 P.2d 1308 (Ct. App. 1988).

Abuse of discretion determined from entire record. — The granting or denying of a motion for new trial is within the sound discretion of the trial court. The claim of abuse of discretion will not be considered when it is based only upon that portion of the evidence favorable to claimant; it must appear from the entire record, insofar as it concerns the issue involved. Minor v. Homestake-Sapin Partners Mine, 69 N.M. 72, 364 P.2d 134 (1961).

In determining whether the trial court abused its discretion in ruling on a motion for a new trial, the appellate court examines the entire record, not just the portions favorable

to plaintiff. Martinez v. Ponderosa Prods., Inc., 108 N.M. 385, 772 P.2d 1308 (Ct. App. 1988).

Denial by operation of law. — Where the trial court failed to rule on plaintiff's motion for a new trial within the thirty-day period prescribed by Paragraph D of this rule, the motion was denied by operation of law and the trial court's jurisdiction to grant a new trial terminated. The trial court's order granting a new trial was void for want of jurisdiction, as were any proceedings conducted pursuant to that order. Martinez v. Friede, 2003-NMCA-081, 133 N.M. 834, 70 P.3d 1273, cert. granted, 133 N.M. 727, 69 P.3d 237 (2003).

Relief is disfavored under Rule 1-060 NMRA if the grounds for the relief were known to the movant in time to bring a motion under this rule. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Request for relief based on previously known facts cannot be characterized as a motion under Rule 1-060. — Where the fact of a modification of a jury instruction on damages for pain and suffering was known to the plaintiff and the possible role of the modification in the jury's failure to award damages for past pain and suffering was known or should have been known to the plaintiff when she filed her motion for a new trial, plaintiff's motion for a new trial could not be characterized as motion under Rule 1-060(B) NMRA and plaintiff was relegated to the remedy provided by this rule. Martinez v. Friede, 2003-NMCA-081, 133 N.M. 834, 70 P.3d 1273, cert. granted, 133 N.M. 727, 69 P.3d 237 (2003).

Applicability to motions under Rule 1-060B. — The 30-day time limit of Paragraph D of Rule 1-059 NMRA does not apply to motions for a new trial authorized by Paragraph B of Rule 1-060 NMRA. Archuleta v. New Mexico State Police, 108 N.M. 543, 775 P.2d 745 (Ct. App. 1989).

When the grounds for a Rule 1-060B NMRA motion are or should have been known within the ten-day time limit for a motion pursuant to Paragraph B of this rule for a new trial, it is inappropriate to try to circumvent that time limit by resorting to the longer time limit afforded by Rule 1-060B NMRA. This rationale is equally appropriate in the context of a motion pursuant to Paragraph E of this rule to amend the judgment. Dozier v. Dozier, 118 N.M. 69, 878 P.2d 1018 (Ct. App. 1994).

A motion for new trial may be made in a nonjury cause. Romero v. McIntosh, 19 N.M. 612, 145 P. 254 (1914) (decided under former law).

Court has wide discretion to grant new trial in nonjury trials. — Since in the New Mexico rule the words found in the federal rule at the end of the first sentence: "in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States," are omitted, it would appear that the framers of the New Mexico rule desired to grant the court broader discretion where it hears the

case itself, without a jury, than is allowed under the federal rule. Cienfuegos v. Pacheco, 56 N.M. 667, 248 P.2d 664 (1952).

Motion for new trial must state grounds. — Unless the assignment of error in the motion for a new trial clearly specifies the legal ground of objection, the objection will not be considered. State v. Williams, 22 N.M. 337, 161 P. 334 (1916) (decided under former law).

Excessive verdicts ground for new trial. — Trial judges have a heavy responsibility in federal employer liability cases to see the damages are kept within reasonable bounds. They have considerable discretion in passing on motions for a new trial based on claimed excessive verdicts. Padilla v. Atchison, T. & S.F. Ry., 61 N.M. 115, 295 P.2d 1023 (1956).

Where motivated by passion or prejudice. — The fact that a verdict appears to be excessive is not a ground for a motion for a new trial. It is only when the excessive damages appear to have been given under the influence of passion or prejudice that a new trial may be granted for that reason. There is no standard fixed by law for measuring the value of human pain and suffering. In every case of personal injury a wide latitude is allowed for the exercise of the judgment of the jury, and, unless it appears that the amount awarded is so grossly out of proportion to the injury received as to shock the conscience, the court cannot substitute its judgment for that of the jury. Lujan v. Reed, 78 N.M. 556, 434 P.2d 378 (1967).

Where damage award excessive, remittitur or new trial required. — Where the trial court determines that a jury award of damages is manifestly excessive, thereby necessitating remittitur, it should require the party which recovered damages to either remit a specific amount or submit to a new trial. Chavez-Rey v. Miller, 99 N.M. 377, 658 P.2d 452 (Ct. App. 1982).

New trial proper for refusal to instruct. — Where motion for new trial is based on the refusal of the requested instruction, and where such refusal prevents a fair presentation of the case, the motion should have been granted. Flanary v. Transport Trucking Stop, 78 N.M. 797, 438 P.2d 637 (Ct. App. 1968).

Ambiguous verdict. — When it is impossible to ascertain from the verdict whether the jury intended to find for the plaintiff or for the defendants, it was the duty of the trial court to point out this defect to the jury and send it back with directions either to assess the damages or else return a verdict for defendants, but where the trial court failed to perform that duty and the jury has been discharged, the judgment must be reversed and new trial granted. Marr v. Nagel, 59 N.M. 21, 278 P.2d 561 (1954).

Improper admission of evidence. — The proper remedy for disposing of evidence erroneously admitted during the course of the trial is a new trial where motion therefor has been made. Townsend v. United States Rubber Co., 74 N.M. 206, 392 P.2d 404

(1964), overruled in part on other grounds, Rhein v. ADT Auto, Inc., 1996-NMSC-066, 122 N.M. 646, 930 P.2d 783.

Violation of collateral source rule. — The declaration of a mistrial is a ruling which in effect states, as a matter of law, that the trial cannot stand because of the disregard of some fundamental prerequisite, and the admission of evidence in violation of the collateral source rule constitutes such reversible error. Martinez v. Knowlton, 88 N.M. 42, 536 P.2d 1098 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975).

Communications with jurors. — Trial court may, without abusing his or her discretion, justifiably grant a new trial on the basis of communications with jurors or prospective jurors. Martinez v. Ponderosa Prods., Inc., 108 N.M. 385, 772 P.2d 1308 (Ct. App. 1988).

Unauthorized amendment of decree. — Replacement judge did not abuse his discretion in granting defendant's motion for a new trial where original judge, without stating cognizable grounds for doing so, amended final divorce decree to provide for temporary alimony for plaintiff. Gruber v. Gruber, 86 N.M. 327, 523 P.2d 1353 (1974).

Limited new trial available. — Where great conflict and inconsistency were present in the evidence and at conclusion of first trial, the trial judge remarked that he was dissatisfied with the testimony and showed reluctance in ruling for either side, he was granted wide discretion under this rule in permitting a limited new trial and abandoning an original finding for plaintiff and rendering judgment for defendants. Cienfuegos v. Pacheco, 56 N.M. 667, 248 P.2d 664 (1952).

Where issues separable. — Where the issue of damages is separable and distinct from the issues of negligence and proximate cause, and reversal is required because of errors in the amount of damages awarded, and where no error appears as to other issues, a new trial may be limited to the issue in which the error is present. Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 417 P.2d 25 (1966).

And not all in dispute. — With respect to the reversal for prejudicial error by trial court, where there was no claim of error as to the damages, the awarding of a new trial, limited to the issue of liability alone, conforms to the spirit of this rule. Cherry v. Stockton, 75 N.M. 488, 406 P.2d 358 (1965).

Improper influence on juror. — A district court may order a new trial under this rule because of improper influence on a juror. Archuleta v. New Mexico State Police, 108 N.M. 543, 775 P.2d 745 (Ct. App. 1989).

New trial proper because of bailiff's conduct. — Trial court properly ordered a new trial, where the subjective and subtle nature of the bailiff's conduct in demonstrating to the jurors his relationship to several defendants in a wrongful death action may have adversely affected the jury. Prudencio v. Gonzales, 104 N.M. 788, 727 P.2d 553 (Ct. App. 1986).

New trial improper when based solely on juror's affidavits. — New Mexico courts will deny the right to a new trial based alone on affidavits or statements of jurors presented after the jury has been discharged. Skeet v. Wilson, 76 N.M. 697, 417 P.2d 889 (1966).

Counsel's conduct must prevent just verdict to justify new trial. — Conduct of counsel in characterizing the cause of action as a money-making scheme in which their chiropractor and lawyer were also implicated was not such as would necessarily prevent the jury from rendering a just verdict. The issue of whether counsel misconduct in statements to the jury should result in a new trial is left to the discretion of the trial court. Romero v. Melbourne, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Denial of new trial based on credibility of witness strongly presumed correct. — Where the weight to be given testimony rests primarily on its credibility, the trial court's action in denying a motion for new trial, after seeing and observing the witnesses as they testified, is not to be lightly ignored or brushed aside. Reck v. Robert E. McKee Gen. Contractors, 59 N.M. 492, 287 P.2d 61 (1955).

Post-decision change in note value. — Where, in a divorce action, the change in value of a note occurred after its value was set at trial and the trial court was apprised of the change after it had rendered its decision changing ownership of the note from tenancy in common to wife's separate property, this is a post-trial and post-decision matter, and is governed by this rule and Rule 1-060 NMRA. Lewis v. Lewis, 106 N.M. 105, 739 P.2d 974 (Ct. App. 1987).

Contention not previously raised not considered in new trial motion. — It is not the function of a motion for a new trial to raise propositions not raised in the progress of the cause. Kelly v. La Cueva Ranch Co., 25 N.M. 674, 187 P. 547 (1920) (decided under former law).

The trial court was correct in denying plaintiff's motion for a new trial because there was no timely objection to defense counsel's allegedly improper arguments. Romero v. Melbourne, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Motion for new trial must be filed within 10 days of entry of judgment. — A motion filed more than 10 days after the rendition of the verdict is not well taken. Ojo Del Espiritu Santo Co. v. Baca, 28 N.M. 516, 214 P. 771 (1923) (decided under former law).

Subdivision (b) (see now Paragraph B) is a mandatory provision. El Paso Elec. v. Real Estate Mart, Inc., 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

Untimely motion not considered. — Motions for new trials must be filed within the specified time after rendition of the verdict, and in event such motion was not so made

in court below, the supreme court will not review the action. Schofield v. Slaughter, 9 N.M. 422, 54 P. 757 (1898) (decided under former law).

Motion to reconsider, treated as a motion for a new trial, filed more than 10 days after the entry of order, is not timely. State v. Navas, 78 N.M. 365, 431 P.2d 743 (1967).

Motion 13 days after the order denying the motion for error coram nobis is the equivalent of a motion for new trial, and was not timely under this rule as it was not served within 10 days after entry of judgment. State v. Ragin, 78 N.M. 542, 434 P.2d 67 (1967).

Hearing on motion did not toll limitation period. — Plaintiff's appeal from an order denying her motion for a new trial was untimely since it was filed over three and one-half months after the motion for a new trial was filed, and over 60 days from the date the motion was denied by operation of law, and no extensions of time within which to file an appeal were sought or granted; the fact that the trial court held a hearing on the motion for a new trial within 30 days after it was filed did not have the effect of tolling the period within which to file the notice of appeal. Feynn v. St. Martin's Hospitality Ctr., 1997-NMCA-122, 124 N.M. 317, 950 P.2d 290.

Rule change affecting time for filing inapplicable in pending case. — Where the effect of the rule change relating to time computation, as applied to this case, extends the time for filing a motion for new trial from 10 to 12 days contrary to Subdivision (b) (see now Paragraph B) of this rule, it is clearly a change in procedure and as such the change is inapplicable to pending cases. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967).

Untimely motion to vacate new trial denial. — Denial of new trial motion, timely filed, and granting of remittitur reestablished the earlier judgment as final, and a motion to vacate the order denying a new trial, filed after the time in which the original motion could have been filed, will not be considered. Salinas v. John Deere Co., 103 N.M. 336, 707 P.2d 27 (Ct. App. 1984).

Timely motion for new trial tolls time for filing appeal. — A motion for new trial, unless made within 10 days after judgment as provided by Subdivision (b) (see now Paragraph B) does not extend the time for appeal. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967); Associates Disct. Corp. v. DeVilliers, 74 N.M. 528, 395 P.2d 453 (1964).

Because judgment not final until denial of motion. — Motions under Rule 60(b) (see now Rule 1-060 NMRA) do not affect the finality of a judgment, but a motion under this rule made within 10 days, does affect finality of judgment and the running of the time for appeal. Perez v. Perez, 75 N.M. 656, 409 P.2d 804 (1966).

Merely formal amendment of judgment does not toll appeal time. — To terminate the running of the time for appeal, a timely motion for a new trial is required. Mere

amendment of judgment which makes no material change does not toll appeal time, which runs from the date of the original judgment. Rice v. Gonzales, 79 N.M. 377, 444 P.2d 288 (1968).

Denial of new trial motion of record prerequisite to appellate review of same. — Claim that the trial court erred in refusing to grant the relief sought in motion for a new trial or in the alternative for remittitur was not subject to review, since no refusal appeared of record. Selgado v. Commercial Whse. Co., 88 N.M. 579, 544 P.2d 719 (Ct. App. 1975).

Failure to rule on new trial motion deemed denial. — A motion for a new trial is deemed overruled by operation of law if no ruling is entered within 30 days of filing the motion. Since the trial court's ruling prior to the expiration of the 30-day appeal period would be reviewable, the court holds that failure to rule cannot avoid review. A timely motion for a new trial denied by operation of law had the same effect for appeal purposes as a motion denied by the trial court. Montgomery Ward v. Larragoite, 81 N.M. 383, 467 P.2d 399 (1970).

The failure to rule within 30 days of the filing of the motion for new trial constitutes a denial of the motion by operation of law. Chavez-Rey v. Miller, 99 N.M. 377, 658 P.2d 452 (Ct. App. 1982).

Motion subject to 39-1-1 NMSA 1978. — A motion brought under Paragraph D was subject to the limitations 39-1-1 NMSA 1978, providing that a court's failure to rule on a motion within 30 days of its filing is deemed a denial thereof. Beneficial Fin. Corp. v. Morris, 120 N.M. 228, 900 P.2d 977 (Ct. App. 1995).

Hearing on a motion for a new trial is generally not required except under the circumstances specified in Subdivision (d) (see now Paragraph D). New Mexico Feeding Co. v. Keck, 95 N.M. 615, 624 P.2d 1012 (1981).

Order granting new trial is not appealable. Scott v. J.C. Penney Co., 67 N.M. 219, 354 P.2d 147 (1960).

Denial of motion is ordinarily not an appealable order. El Paso Elec. v. Real Estate Mart, Inc., 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

Error at first trial not reviewable upon grant of new trial. — If the motion for a new trial is granted, the case stands as never tried, and until retried and a judgment entered, there is no final judgment. Scott v. J.C. Penney Co., 67 N.M. 219, 354 P.2d 147 (1960).

Because grant of new trial renders verdict nullity. — Where motions for judgment n.o.v. and new trial are made in the alternative, and no judgment has been rendered on the verdict, order granting new trial renders verdict a nullity and is not appealable. Scott v. J.C. Penney Co., 67 N.M. 219, 354 P.2d 147 (1960).

Order granting new trial not interlocutory order disposing of merits. — An order granting a new trial is not generally such an interlocutory order as practically disposes of the merits of the action because the order granting a new trial contemplates another trial at which the issues will be determined and in itself does not dispose of the merits of the action. Warren v. Zimmerman, 82 N.M. 583, 484 P.2d 1293 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971).

Trial court loses jurisdiction of judgment upon filing notice of appeal. — From and after the filing of the notice of appeal from a judgment, the trial court was without jurisdiction to take any further step in regard to the motion to alter or amend judgment. Meeker v. Walker, 80 N.M. 280, 454 P.2d 762 (1969).

Filing notice of appeal waives motion for new trial. — By serving their notice of appeal, the defendants abandoned the motion for a new trial or in the alternative for remittitur by depriving the trial court of jurisdiction; their notice of appeal amounted to an election to waive the motion and proceed with the appeal as though the motion had not been made. Selgado v. Commercial Whse. Co., 88 N.M. 579, 544 P.2d 719 (Ct. App. 1975).

Jurisdiction on remand limited by mandate. — The district court loses jurisdiction of the case when it is appealed, and on remand regains only such jurisdiction as the supreme court's opinion and the mandate confers. Wilson v. Employment Sec. Comm'n, 76 N.M. 652, 417 P.2d 455 (1966).

District court has jurisdiction to pass upon motions pending when the appeal is taken. City of Roswell v. Berry, 80 N.M. 110, 452 P.2d 179 (1969).

Longer time allowed for new trial based on new evidence. — A motion for a new trial on grounds of newly discovered evidence presents a somewhat different question than a motion for a new trial based on alleged erroneous instructions and rulings on matters presented to the trial court in the first instance, in that the former situation is covered by Rule 60(b) (see now Rule 1-060B) as to the time for filing. Public Serv. Co. v. First Judicial Dist. Court, 65 N.M. 185, 334 P.2d 713 (1959).

Consideration of new material. — The trial court had discretion to consider new material as a part of a motion for reconsideration as long as the delay in presenting the new material was not just for strategic reasons, and its relevance outweighed any prejudice; further, if the trial court considered the new material, the appellate court could review the materials de novo. In re Estate of Keeney, 121 N.M. 58, 908 P.2d 751 (Ct. App. 1995).

Parties on same side of suit remain one party. — The New Mexico Rules of Civil Procedure, as well as the common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of a lawsuit are but one party. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

Post-decision change in note value. — Where, in a divorce action, the change in value of a note occurred after its value was set at trial and the trial court was apprised of the change after it had rendered its decision changing ownership of the note from tenancy in common to wife's separate property, this is a post-trial and post-decision matter, and is governed by this rule and Rule 1-060. Lewis v. Lewis, 106 N.M. 105, 739 P.2d 974 (Ct. App. 1987).

Law reviews. — For comment, "Judgments: New Mexico and the Additur," see 2 N.M.L. Rev. 101 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d New Trial § 1 et seq.

Abuse of witness by counsel as ground for new trial, 4 A.L.R. 414.

Lis pendens, protection during time allowed for appeal, writ of error, or motion for new trial, 10 A.L.R. 415.

Inattention of juror from sleepiness or other cause as ground for new trial, 12 A.L.R. 663, 88 A.L.R.2d 1275.

Inability to perfect record for appeal as ground for new trial, 13 A.L.R. 102, 16 A.L.R. 1158, 107 A.L.R. 603.

Violation of court rule by trial court as ground for new trial, 23 A.L.R. 52.

Right of court, under its inherent power to grant a new trial, to disregard statute limiting time for filing or determining motion for new trial, 48 A.L.R. 362.

Contact between juror and party or attorney during trial of civil case as ground for new trial, 55 A.L.R. 750, 62 A.L.R.2d 298.

Conduct of party in courtroom tending improperly to influence jury as ground for new trial, 57 A.L.R. 62.

Premature motion for new trial and its effect, 78 A.L.R. 1108.

Running of limitations against proceeding to renew or revive judgment as affected by appeal or right of appeal from judgment, or by motion or right to move for new trial, 123 A.L.R. 565.

Lower court's consideration, on the merits, of unreasonable application for new trial, rehearing, or other reexamination, as affecting time in which to apply for appellate review, 148 A.L.R. 795.

Res judicata as affected by newly discovered evidence after judgment, 149 A.L.R. 1195.

Expression of opinion by juror based upon or influenced by his own observation and experience in connection with his trade, business or profession as grounds for new trial, 156 A.L.R. 1033.

Equity, new trial after jury's verdict in, on ground of error in rulings at trial, 156 A.L.R. 1165.

Newly discovered evidence, corroborating testimony given only by a party or other interested witness, as ground for new trial, 158 A.L.R. 1253.

Misinformation by judge or clerk of court as to status of case or time of trial or hearing as ground for new trial, 164 A.L.R. 537.

Effect of exclusion of eligible class of persons from jury list in civil case, 166 A.L.R. 1422.

Disregard of court's instructions in rendering an adequate verdict as ground of complaint by party against whom it is rendered, 174 A.L.R. 765.

Allowance of, or refusal to allow, peremptory challenge after acceptance of juror, 3 A.L.R.2d 499.

Voluntary statements damaging to accused, not proper subject for testimony, uttered by a testifying police or peace officer as ground for granting new trial, 8 A.L.R.2d 1013.

Judgment as res judicata pending motion for a new trial or during the time allowed therefor, 9 A.L.R.2d 984.

Statements of witness in civil action secured after trial inconsistent with his testimony as basis for new trial on ground of newly discovered evidence, 10 A.L.R.2d 381.

Constitutional or statutory provision forbidding re-examination of facts tried by jury as affecting power to reduce or set aside verdict because of inadequacy, 11 A.L.R.2d 1217.

Raising defense of statute of frauds by motion for new trial after failure to object to parol evidence, 15 A.L.R.2d 1330.

Court's power to grant new trial as to both defendants, over their objection, because of verdict for the employer in absolving employee for latter's negligence, 16 A.L.R.2d 969.

Coercive effect of verdict urging by judge in civil case, 19 A.L.R.2d 1257, 38 A.L.R.3d 1281, 41 A.L.R.3d 845, 41 A.L.R.3d 1154.

Conditioning the setting aside of judgment or grant of new trial on payment of opposing attorney's fees, 21 A.L.R.2d 863.

Necessity that trial court give parties notice and opportunity to be heard before ordering a new trial on its own motion, 23 A.L.R.2d 852.

Prejudicial effect of argument that adversary was attempting to suppress facts, 29 A.L.R.2d 996.

Prejudicial effect of admission of evidence as to communist or other subversive affiliation or association of accused, 30 A.L.R.2d 589.

Evidence as to physical condition after trial as affecting right to new trial, 31 A.L.R.2d 1236.

What constitutes final judgment within provision or rule limiting application for new trial to specified period thereafter, 34 A.L.R.2d 1181.

Right to have reporter's notes read to jury, 50 A.L.R.2d 176.

Facts or evidence forgotten at trial as newly discovered evidence which will warrant grant of new trial, 50 A.L.R.2d 994.

Manifestation of emotion by party during civil trial as ground for new trial, 69 A.L.R.2d 954.

Coaching of witness by spectator at trial as prejudicial error requiring new trial, 81 A.L.R.2d 1142.

Time for filing motion for new trial based on jury conduct occurring before, but discovered after, verdict, 97 A.L.R.2d 788.

Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Propriety and prejudicial effect of suggestions or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Necessity and propriety of counteraffidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Recantation by prosecuting witness in sex crime as ground for new trial, 51 A.L.R.3d 907.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Amendment, after expiration of time for filing motion for new trial in criminal case, of motion made in due time, 69 A.L.R.3d 933.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering, 55 A.L.R.4th 186.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 A.L.R.5th 422.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages - modern cases, 5 A.L.R.5th 875.

Excessiveness or adequacy of damages awarded for injuries causing metal or psychological damage, 52 A.L.R. 5th 1.

Time limitations under Rule 59(b) of Federal Rules of Civil Procedure, 45 A.L.R. Fed. 104.

Request for attorney fees as motion to alter or amend judgment within Federal Rule of Civil Procedure 59(e), 74 A.L.R. Fed. 797.

49 C.J.S. Judgments §§ 279 to 304; 66 C.J.S. New Trials §§ 2, 3.

1-060. Relief from judgment or order.

A. **Clerical mistakes.** Clerical mistakes in judgments, orders or parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so

corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

B. **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 1-059 NMRA;

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one-year after the judgment, order or proceeding was entered or taken. A motion under this paragraph does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review, are abolished, and the proceeding for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

ANNOTATIONS

Compiler's notes. — Paragraph A, together with Rules 1-015, 1-021 and 1-061 NMRA, is deemed to have superseded 105-605, 105-606, 105-610, 105-611 and 105-617 to 105-621, C.S. 1929, which were substantially the same.

Paragraph B is deemed to have superseded former Trial Court Rule 105-840 derived from 105-840, C.S. 1929, relating to setting aside interlocutory or default judgments. It is also deemed to be a substitute for 105-843 and 105-846, C.S. 1929, relating to setting aside default judgments and setting aside judgments for irregularities, respectively.

I. GENERAL CONSIDERATION.

Rule was created to provide simplified method for correcting errors in final judgments. Phelps Dodge Corp. v. Guerra, 92 N.M. 47, 582 P.2d 819 (1978); Barker v. Barker, 94 N.M. 162, 608 P.2d 138 (1980).

Piecemeal trial of lawsuit. — This rule does not permit a party to try a lawsuit in bits and pieces, saving some evidence and withholding some legal theories for later submission in the event of an unfavorable outcome. Armstrong v. Csurilla, 112 N.M. 579, 817 P.2d 1221 (1991).

Applicability to default judgments. — With the exception of judgments still under the court's control pursuant to Section 39-1-1 NMSA 1978, judgments by default must be set aside in accordance with this rule. Marinchek v. Paige, 108 N.M. 349, 772 P.2d 879 (1989).

Entry of default is procedurally distinct from entry of judgment by default. Entry of default is a formal matter that serves to invite the court's attention to a party's omission to plead or otherwise defend and to the fact that the case is ripe for entry of judgment by default. By its terms, Rule 1-055(C) NMRA requires requests for relief from entries of default to be considered under a "good cause shown" standard. On the other hand, default judgments are to be deemed final judgments. As final judgments they are subject to the trial court's control for a period of thirty days, pursuant to Section 39-1-1 NMSA 1978. Thereafter, default judgments must be set aside in accordance with Paragraph (B) of this rule. DeFillippo v. Neil, 2002-NMCA-085, 132 N.M. 529, 51 P.3d 1183.

Default resulting from attorney's or insurer's actions. — Under New Mexico law, a party will generally be bound by his or her attorney's actions, and to escape a default judgment resulting from his or her attorney's gross acts and failures, the client must demonstrate personal diligence which was thwarted by the attorney; moreover, the same rule applies to default arising out of actions by insurer defending case pursuant to an insurance policy with original defendant. Adams v. Para-Chem Southern, 1998-NMCA-161, 126 N.M. 189, 967 P.2d 864.

Timeliness of motion authorized by 39-1-1 NMSA 1978 and this rule. — When, after paying a judgment to avoid a foreclosure sale, a party decided he had paid more than the judgment required and sought relief by a motion filed in the same proceeding, if the motion was of a type authorized by both 39-1-1 NMSA 1978 and this rule, the court could consider the motion if it was timely filed under the rule, even if it was not timely under the statute. Century Bank v. Hymans, 120 N.M. 684, 905 P.2d 722 (Ct. App. 1995).

Court has full control of its judgment, jurisdiction and authority even upon its own motion to make any change, modification, or correction thereof which it deems proper under the circumstances. Desjardin v. Albuquerque Nat'l Bank, 93 N.M. 89, 596 P.2d 858 (1979).

Relief under rule is discretionary with trial judge and will be reviewed only for an abuse of that discretion. Click v. Litho Supply Co., 95 N.M. 419, 622 P.2d 1039 (1981).

Court's discretion to vacate judgment. — It is within the trial court's discretion to vacate a judgment when justice will be better served by its doing so. Parsons v. Keil, 106 N.M. 91, 739 P.2d 505 (1987), overruled on other grounds, Resolution Trust Corp. v. Ferri, 120 N.M. 320, 901 P.2d 738 (1995).

Property division modification still possible though precluded by this rule. — Although a party seeking a modification of a property division portion of a divorce decree fails to make timely showing of facts entitling him to relief under this rule, he may seek such modification through a new action under 40-4-20 NMSA 1978, relating to failure to divide property on dissolution of marriage. Mendoza v. Mendoza, 103 N.M. 327, 706 P.2d 869 (Ct. App. 1985).

Modification of marital settlement agreement. — Where parties to a divorce action entered into a marital settlement agreement in which they placed an annuity, money purchase plan, profit sharing plan, and individual retirement accounts under the control of a receiver to pay personal taxes and community debts; the district court approved the agreement and merged it into the divorce decree; creditors of the parties subsequently intervened in the action seeking payment of their bills from the assets; and the district court entered an order which provided that the assets could not be used to pay the creditors' claims, the district court abused its discretion to the extent the district court concluded that the divorce decree could be modified under Sections 42-10-2 and 42-10-3 NMSA 1978. *Gordon v. Gordon*, 2011-NMCA-044, 149 N.M. 783, 255 P.3d 361.

Retroactive modification of prior medical benefits award. — A motion seeking to retroactively modify a prior award of medical benefits must also satisfy the requirements of this rule. St. Clair v. County of Grant, 110 N.M. 543, 797 P.2d 993 (Ct. App. 1990).

Post-decision change in note value. — Where, in a divorce action, the change in value of a note occurred after its value was set at trial and the trial court was apprised of the change after it had rendered its decision changing ownership of the note from tenancy in common to wife's separate property, this is a post-trial and post-decision matter, and is governed by Rule 1-059 NMRA and this rule. Lewis v. Lewis, 106 N.M. 105, 739 P.2d 974 (Ct. App. 1987).

Findings of fact and conclusions of law are not required for a motion seeking relief from judgment. Fidelity Nat'l Bank v. Lobo Hijo Corp., 92 N.M. 737, 594 P.2d 1193 (Ct. App. 1979).

Applicability of 30-day time limit under Rule 1-059D NMRA. — The 30-day time limit of Rule 1-059D NMRA does not apply to motions for a new trial authorized by Rule 1-060B NMRA. Archuleta v. New Mexico State Police, 108 N.M. 543, 775 P.2d 745 (Ct. App. 1989).

Appellate court had jurisdiction over second supplemental judgment. English v. English, 118 N.M. 170, 879 P.2d 802 (Ct. App. 1994).

II. CLERICAL MISTAKES.

Courts under duty to correct clerical errors in orders. — Under this rule, courts have the power and the duty to correct clerical errors in orders which are issued due to inadvertence or mistake. Telephonic, Inc. v. Montgomery Plaza Co., 87 N.M. 407, 534 P.2d 1119 (Ct. App. 1975).

Court may modify judgment so as to correct purely clerical error. De Baca v. Sais, 44 N.M. 105, 99 P.2d 106 (1940); United States v. Rio Grande Dam & Irrigation Co., 13 N.M. 386, 85 P. 393 (1906), aff'd, 215 U.S. 266, 30 S. Ct. 97, 54 L. Ed. 190 (1909) (decided under former law).

And amend their judgments. — Courts may amend their judgments to correct clerical error in name of party. Zintgraff v. Sisney, 31 N.M. 564, 249 P. 108 (1926) (decided under former law).

Amended order does not vacate original order. — Amended order issued under Subsection A to correct clerical errors in the original probate order did not vacate the original order; as a result, the twelve-month time limit for challenging the court's heirship findings was triggered at the time of the original order, not the amended order. In re Estates of Hayes, 1998-NMCA-136, 126 N.M. 23, 965 P.2d 939.

Supreme court's primary function is to correct erroneous result rather than to approve or disapprove the grounds on which it is based. Armijo v. Shambaugh, 64 N.M. 459, 330 P.2d 546 (1958).

Scrivener's error in property description. — Where an error in the description of the property in the contract sued upon was a clerical error of the scrivener, wholly inadvertent and unintentional, action of the court in sustaining motion to amend the pleadings and decree affirmed the contract. Pugh v. Phelps, 37 N.M. 126, 19 P.2d 315 (1932) (decided under former law).

Correction of clerical mistakes in motion to dismiss. — Where plaintiffs, pursuant to Rule 41(a)(2) (see now Rule 1-041 NMRA), filed a motion to dismiss before the answer and counterclaim were filed, and the motion contained a clerical error in that the phrase "with prejudice" was substituted for "without prejudice" at some point between counsel's dictation of the notice and the final draft, and upon discovery of the error, the plaintiffs filed a motion pursuant to Rule 60(a) (see now Rule 1-060) to correct the notice (also before defendant's answer and counterclaim) the lower court not only had the right but the duty to correct the clerical mistake in plaintiffs' original notice of dismissal with prejudice to read "without prejudice." Telephonic, Inc. v. Montgomery Plaza Co., 87 N.M. 407, 534 P.2d 1119 (Ct. App. 1975).

And in decree in date of congressional act. — Where a clerical mistake was made in a decree in the date of an act of congress correctly alleged in the pleadings, the court could correct such mistake at the next regular term. United States v. Rio Grande Dam & Irrigation Co., 13 N.M. 386, 85 P. 393 (1906), aff'd, 215 U.S. 266, 30 S. Ct. 97, 54 L. Ed. 190 (1909) (decided under former law).

Omission of phrase in decree. — The omission of the phrase "per month" in a child support decree is clearly a clerical mistake apparent on the face of the record. Britton v. Britton, 100 N.M. 424, 671 P.2d 1135 (1983).

When order inadvertently entered. — Trial court did not err in setting aside its previous dismissal without prejudice and reinstating the case on the docket where no such contention was ever presented to the trial court, and, accordingly, could not be asserted for the first time on appeal without having afforded the trial court an opportunity to rule on it. Secondly, the dismissal order was entered pursuant to the trial court's inherent powers, and reinstatement less than 90 days later, for the stated reason that the order had been inadvertently entered, would be within the court's discretionary power to correct mistakes "arising from oversight or omission" at any time on the court's "own initiative" as provided in Rule 60(a) (see now Rule 1-060A). Beyer v. Montoya, 75 N.M. 228, 402 P.2d 960 (1965).

Effect of differences between complaint and contract regarding incorporating state. — Where the complaint alleges that defendant corporation was organized under the laws of a given state, and the contract alleges its incorporation in another state, and process is served upon its statutory agent with full notice to defendant, the erroneous allegation will not justify an attack upon a default judgment. Riverside Irrigation Co. v. Cadwell, 21 N.M. 666, 158 P. 644 (1916) (decided under former law).

Amendment on appeal. — Defective allegation of venue being one of form, without possibility of prejudice to anyone, could be amended on appeal. Friday v. Santa Fe Cent. Ry., 16 N.M. 434, 120 P. 316 (1910), aff'd, 232 U.S. 694, 34 S. Ct. 468, 58 L. Ed. 802 (1914) (decided under former law).

Amendment of pleading to cure technical defects permitted. — Supreme court may amend pleadings to cure technical defects not being against right and justice or altering the issue. Cannon v. First Nat'l Bank, 35 N.M. 193, 291 P. 924 (1930) (decided under former law).

And supplying missing names in judgment permitted. — Where action was brought by certain persons as a copartnership, and judgment was rendered against the copartnership and not against the individuals comprising it, the supreme court supplied the omission of the individual names by ordering them inserted in the judgment as provided in Comp. Laws 1897, § 2685 (94) (105-619, C.S. 1929). Wirt v. George W. Kutz & Co., 15 N.M. 500, 110 P. 575 (1910) (decided under former law).

As well as amending writ of error. — Under Comp. Laws 1897, § 2685 (94) (105-619, C.S. 1929), it was within the power of the supreme court to permit an amendment of a writ of error by striking out the parties defendant in error. Neher v. Armijo, 9 N.M. 325, 54 P. 236 (1898) (decided under former law).

When mistake in name of party not considered on appeal. — A mistake in the name of a corporation party plaintiff which might have been corrected by the trial judge, either before or after judgment, and where there can be no question as to the identity of the corporation suing, will not be considered on appeal. Board of Educ. v. Astler, 21 N.M. 1, 151 P. 462 (1914) (decided under former law).

Typographical error in a finding of fact can be corrected with leave of the appellate court. Cochrell v. Hiatt, 97 N.M. 256, 638 P.2d 1101 (1981).

Twice including single property item in calculation. — The request of parties to a divorce action to decrease the award of personal property was granted, where the parties stated that they had erroneously included the value of a coin collection twice in calculating the division of personal property. Mattox v. Mattox, 105 N.M. 479, 734 P.2d 259 (Ct. App. 1987).

Submission of additional statement on appeal where transcript already filed. — Rule 7(c), N.M.R. Civ. App. (see now Rule 12-209 NMRA), permits the appellant to prepare a statement of an unreported proceeding and submit it, along with objections, to the district court for settlement, approval and inclusion in the record on appeal. The fact that the transcript on appeal has already been filed in the supreme court would not prevent him from preparing such a statement; this correction of the record is not the type requiring leave of the appellate court under Subdivision (a) (see now Paragraph A) of this rule. Nichols v. Nichols, 98 N.M. 322, 648 P.2d 780 (1982).

Correction of errors in computation of interest. — When, after paying a judgment to avoid a foreclosure sale, a party decided he had paid more than the judgment required and sought relief by a motion filed in the same proceeding, the motion regarding errors in the computation of interest on the judgment was authorized under Paragraph A. Century Bank v. Hymans, 120 N.M. 684, 905 P.2d 722 (Ct. App. 1995).

III. MISTAKES; INADVERTENCE; ETC.

A. IN GENERAL.

Allegations of spouse's affair on settlement agreement. — Where the trial court was considering whether a marital settlement agreement should be set aside under Paragraph B of this rule, the allegations of an affair by one spouse was irrelevant to that determination. Edens v. Edens, 2005-NMCA-033, 137 N.M. 207, 109 P.3d 295, cert. denied, 2005-NMCERT-003.

Scope of rule. — The rule concerns itself only with relief from final judgments, orders or proceedings. Foundation Reserve Ins. Co. v. Martin, 79 N.M. 737, 449 P.2d 339 (Ct. App. 1968).

Similarity with Federal Rules of Civil Procedure. This rule is identical with Rule 60(b), Federal Rules of Civil Procedure. In the adoption of both rules, it was the intent to retain all the substantive rights protected by the old common-law writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review, but to eliminate the niceties of form of these writs. State v. Romero, 76 N.M. 449, 415 P.2d 837 (1966).

Paragraph B of this rule is identical to its federal counterpart, except that it omits the passage concerning the United State Code. Cordova v. Larsen, 2004-NMCA-087, 136 N.M. 87, 94 P.3d 830.

Generally as to intent and application of Paragraph B. — The intendment of Subdivision (b) (see now Paragraph B) is to carefully balance the competing principles of finality and relief from unjust judgments. The rule should be liberally construed, but the courts must also consider whether there are any intervening equities that make it inequitable to grant relief. Phelps Dodge Corp. v. Guerra, 92 N.M. 47, 582 P.2d 819 (1978).

A person who is represented by counsel and participated in proceedings is estopped, as a matter of law, from seeking relief under Paragraph B based on lack of knowledge of the details of the litigation. In re Gaines, 113 N.M. 652, 830 P.2d 569 (Ct. App. 1992).

Court should be more liberal in setting aside default. — In determining whether the entry of a default should be set aside under Rule 55(c) (see now Rule 1-055 NMRA), the trial court should be more liberal than under Subdivision (b) (see now Paragraph B) of this rule and resolve all doubts in favor of the party declared to be in default. Franco v. Federal Bldg. Serv., Inc., 98 N.M. 333, 648 P.2d 791 (1982).

Because default judgments are disfavored and causes generally should be tried upon their merits, trial courts should be liberal in determining the existence of grounds that satisfy Paragraph B. Sunwest Bank v. Roderiguez, 108 N.M. 211, 770 P.2d 533 (1989).

While the strict criteria of this rule are used when setting aside an entry of default judgment by a trial court, Rule 1-055(C) NMRA merely requires the use of a "good cause" standard when setting aside the entry of a default by a district court clerk. Gandara v. Gandara, 2003-NMCA-036, 133 N.M. 329, 62 P.3d 1211.

Judicial errors of law. — Although Paragraph B(1) applies to judicial errors of law, any motion pursuant thereto must be filed before the expiration of the time for appeal. Deerman v. Board of County Comm'rs, 116 N.M. 501, 864 P.2d 317 (Ct. App. 1993); Resolution Trust Corp. v. Ferri, 120 N.M. 320, 901 P.2d 738 (1995).

Limits on modification of final divorce decree incorporating property settlement agreement. — A final decree of dissolution of marriage which incorporates a property settlement agreement entered into by the parties may not be modified after the expiration of the statutory time for doing so. Wehrle v. Robison, 92 N.M. 485, 590 P.2d 633 (1979).

Apart from the exceptions to the general rule contained in 40-4-7 NMSA 1978 and Subdivision (b) (see now Paragraph B), once the time has lapsed within which an appeal may be taken from a divorce decree, a court cannot change the original division of the property as an exercise of its continuing jurisdiction. Higginbotham v. Higginbotham, 92 N.M. 412, 589 P.2d 196 (1979).

Party could not claim relief under Subdivisions (b)(1) and (b)(3) (see now Paragraphs B(1) and B(3)) and also under Subdivision (b)(6) (see now Paragraph B(6)). Wehrle v. Robison, 92 N.M. 485, 590 P.2d 633 (1979).

Meaning of "party" in in rem proceeding. — A supervised administration to secure complete settlement of a decedent's estate under the continuing authority of a district court is an in rem proceeding, and in such a proceeding the court may properly hear anyone who claims an interest and who seems in a position to throw light upon the questions under consideration, as such a person is a party in the proceeding. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

"Party" in Subdivision (b) (see now Paragraph B) is not limited to technical sense of opposing litigants. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Party affected by decree may bring bill. — A bill in the nature of a bill of review may be brought by one technically not a party to the original action, but whose interests were affected by the court's decree. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Failure to specifically mention rule not significant. — Where request for relief did not specifically mention this rule but simply stated that the claim for a second injury under the workmen's compensation statute had been settled and paid, the manner in which the relief was requested and the nomenclature used was not significant. Phelps Dodge Corp. v. Guerra, 92 N.M. 47, 582 P.2d 819 (1978).

Court approved practice of making findings and conclusions. — While Rule 52 (see now Rule 1-052 NMRA) does not literally require the court to make findings of fact and conclusions of law in connection with a hearing under Subdivision (b) (see now Paragraph B), many courts follow the commendable practice of making findings and conclusions whenever there has been a hearing on the evidence. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Action of trial court, under Subdivision (b) (see now Paragraph B) is discretionary. Adams & McGahey v. Neill, 58 N.M. 782, 276 P.2d 913 (1954).

Setting aside judgment matter within trial court's discretion. — Whether a judgment will be set aside under Subdivision (b) (see now Paragraph B) is ordinarily a matter within the trial court's discretion. Furthermore, the trial court's determination will ordinarily not be reversed except for an abuse of discretion. Home Sav. & Loan Ass'n v. Esquire Homes, Inc., 87 N.M. 1, 528 P.2d 645 (1974); Freedman v. Perea, 85 N.M. 745, 517 P.2d 67 (1973); Marberry Sales, Inc. v. Falls, 92 N.M. 578, 592 P.2d 178 (1979); Desjardin v. Albuquerque Nat'l Bank, 93 N.M. 89, 596 P.2d 858 (1979).

Setting aside a judgment under Subdivision (b) (see now Paragraph B) is discretionary with the trial court, and appellate courts will not interfere with the action of the trial court except upon a showing of an abuse of discretion. United Salt Corp. v. McKee, 96 N.M. 65, 628 P.2d 310 (1981).

Court should be liberal in determining whether excuse or defense is good. — Under Subdivision (b) (see now Paragraph B), a trial court should be liberal in determining what is a good excuse and what is a meritorious defense. The court must balance the policy in favor of trials on the merits with the conflicting policy in favor of the finality of judgments. Franco v. Federal Bldg. Serv., Inc., 98 N.M. 333, 648 P.2d 791 (1982).

Meritorious defense.— Parties seeking to set aside a default judgment must assert a valid legal theory and allege, with some particularity, facts that would support that legal theory. Such facts are to be taken as true, but in order to reopen the judgment and proceed to trial, the factual issues presented must be genuine. Magnolia Mountain Limited, Partners, Ltd. v. Ski Rio Partners, LTD., 2006-NMCA-027, 139 N.M. 288, 131 P.3d 675.

Meritorious defense analysis. — Factual disputes in the context of the meritorious defense analysis must be genuine and attempts to create sham issues of fact will not be sufficient to support a reopening of a default judgment. Magnolia Mountain Limited, Partners, LTD. v. Ski Rio Partners, Ltd., 2006-NMCA-027, 139 N.M. 288, 131 P.3d 675.

Defendant failed to establish a meritorious defense. — Where plaintiff obtained a default judgment against defendant in a mortgage foreclosure action; after a special master sold the property at public auction, defendant moved to set aside the default judgment and to vacate the foreclosure sale; after the district court entered the default judgment, plaintiff placed defendant’s loan under the federal Making Homes Affordable Program pursuant to a servicer participation agreement with Fannie Mae; although defendant alleged that plaintiff failed to comply with HAMP, defendant was not a third-party beneficiary of the HAMP servicer participation agreement and could not enforce compliance with HAMP; and although defendant alleged that plaintiff was equitably estopped from proceeding with the foreclosure based on plaintiff’s alleged representations regarding approval of a loan modification, defendant’s evidence failed

to establish that plaintiff made false representations or concealed material facts regarding the loan modification, defendant's defenses of failure to comply with HAMP and estoppel were not meritorious defenses to the default judgment for foreclosure. *Charter Bank v. Francoeur*, 2012-NMCA-078, ____ P.3d ____, cert. granted, 2012-NMCERT-008.

Discretion in setting aside judgment is abused when judge acts arbitrarily or unreasonably under the particular circumstances. McKee v. United Salt Corp., 96 N.M. 382, 630 P.2d 1237 (Ct. App. 1980), aff'd in part, rev'd on other grounds, 96 N.M. 65, 628 P.2d 310 (1981).

Relief not available. — Unsuccessful plaintiff, who had opposed defendant's motion for transfer of venue on grounds of forum non conveniens, was not entitled to relief under this rule based on a case decided subsequent to the ruling on the venue motion. Stein v. Alpine Sports, 1998-NMSC-040, 126 N.M. 258, 968 P.2d 769.

Negligent failure to perform settlement agreement does not constitute a basis in equity to set aside a stipulated judgment that was filed in accordance with the settlement agreement itself. Builders Contract Interiors, Inc. v. Hi-Lo Industries, Inc., 2006-NMCA-053, 139 N.M. 288, 131 P.3d 675.

Relief is disfavored under this rule if the grounds for the relief were known to the movant in time to bring a motion under Rule 1-059. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Remedy of new trial. — Rule 1-059 is not the only authority upon which the district court may order a new trial. A new trial may also be an available remedy under Paragraph B of this rule. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Nothing in the text of the rules bars the district court from sua sponte reopening judgment and granting a new trial based on Paragraph B of this rule, even though motion for new trial has been automatically denied. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

No relief for party choosing unfortunate course of action. — Subdivision (b) (see now Paragraph B) is not to be invoked to give relief to a party who has chosen a course of action which in retrospect appears unfortunate. Benavidez v. Benavidez, 99 N.M. 535, 660 P.2d 1017 (1983).

Failures by attorneys. — Defendants' claim that they were entitled to relief, predicated on the contention that they should not be bound by the failures of their attorneys, was contrary to settled law. Padilla v. Estate of Griego, 113 N.M. 660, 830 P.2d 1348 (Ct. App. 1992).

Motion denied where merely reasserts contention previously found against party. — Where a party does not appeal a judgment against him and finds himself in contempt of court for refusing to obey court orders, a motion under this rule which raises nothing new but merely reasserts a contention which was previously found against him will be denied. Gedeon v. Gedeon, 96 N.M. 315, 630 P.2d 267 (1981).

Subdivision (b) (see now Paragraph B) is particularly well-designed to cover situation where, in a final order that a foreign judgment is entitled to full faith and credit, there is a failure to reduce the foreign judgment to domestic judgment; it provides an appropriate procedure for correcting the omission. Barker v. Barker, 94 N.M. 162, 608 P.2d 138 (1980).

Section 39-1-1 NMSA 1978 does not conflict with Subdivision (b) (see now Paragraph B). Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Since statute restores to courts absolute control over their judgments. — Section 39-1-1 NMSA 1978 does not conflict with the right to grant relief from judgments under Subdivision (b) (see now Paragraph B), that statute only restored to district courts the absolute control they had over their judgments during the term at which they were entered. Laffoon v. Galles Motor Co., 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969); Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965).

Paragraph B applies to criminal judgments claimed void. — Although Subdivision (b) (see now Paragraph B) is a civil rule, where a prisoner had served his sentence and had been released, this civil rule could be utilized to seek relief from a criminal judgment claimed to be void, because of the intent to retain all substantive rights protected by the old writ of coram nobis. State v. Lucero, 90 N.M. 342, 563 P.2d 605 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Rule authorizes court to grant relief. — Courts are authorized by this rule to relieve a party from any final judgment for good cause shown. Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965); Desjardin v. Albuquerque Nat'l Bank, 93 N.M. 89, 596 P.2d 858 (1979).

Relief initiated on judge's motion. — Subdivision (b) (see now Paragraph B) provides that the relief therein provided may be granted "on motion . . ." and in the present case, no motion was filed; the judge can initiate relief from a judgment or order under this rule on his own motion. Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965); Desjardin v. Albuquerque Nat'l Bank, 93 N.M. 89, 596 P.2d 858 (1979).

Under Subdivision (b) (see now Paragraph B), the trial court has authority to vacate final judgment and to grant relief therefrom sua sponte. Barker v. Barker, 94 N.M. 162, 608 P.2d 138 (1980).

Purpose of judge initiating relief from a judgment or order under this rule on his own motion is to direct the court's attention to the necessity for relief; the rule does not

deprive the court of the power to act in the interest of justice when attention has been called to the need by means other than a motion. Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965).

Meaning of collateral attack on judgment. — A collateral attack is an attempt to impeach the judgment by matters dehors the record, in an action other than that in which it was rendered; an attempt to avoid, defeat or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it. Barela v. Lopez, 76 N.M. 632, 417 P.2d 441 (1966).

Jurisdictional error may be raised in collateral attack after the judgment has been entered. Wisdom v. Kopel, 95 N.M. 513, 623 P.2d 1027 (Ct. App. 1981).

Motions under Paragraph B filed in original action. — When proceeding by motion under the specific subparagraphs of Paragraph B, the presumption is that the motion must be filed in the district court and in the action in which the judgment was rendered; thus, a wife's motion to set aside a property settlement was an improper collateral attack since it was made in a different action in a different court. Sanders v. Estate of Sanders, 1996-NMCA-102, 122 N.M. 468, 927 P.2d 23.

Equity action attacking validity of judgment and seeking injunction. — Under the next to last sentence of Subdivision (b) (see now Paragraph B), a party can bring an action in equity attacking the validity of a judgment and seeking to enjoin its enforcement, and this action may be brought in the court that rendered the original judgment, in another court, or by collateral attack in any proceeding in which the validity of the judgment is in issue. Hort v. General Elec. Co., 92 N.M. 359, 588 P.2d 560 (Ct. App. 1978), cert. denied, 92 N.M. 353, 588 P.2d 554 (1979).

Meaning of direct attack on judgment. — A direct attack on a judgment is an attempt to avoid or correct it in some manner provided by law and in a proceeding instituted for that very purpose, in the same action and in the same court. Barela v. Lopez, 76 N.M. 632, 417 P.2d 441 (1966).

Judgments of district courts are presumptively correct. State ex rel. Dar Tile Co. v. Glens Falls Ins. Co., 78 N.M. 435, 432 P.2d 400 (1967); Phelps Dodge Corp. v. Guerra, 92 N.M. 47, 582 P.2d 819 (1978).

Motions under Subdivision (b) (see now Paragraph B), do not affect finality of judgment, but a motion under Rule 59 (see now Rule 1-059 NMRA), made within 10 days, does affect finality and the running of the time for appeal. Perez v. Perez, 75 N.M. 656, 409 P.2d 804 (1966).

Applicability of Rule 1-059 NMRA. — When the grounds for a Paragraph B motion are or should have been known within the ten-day time limit for a 1-059B NMRA motion for a new trial, it is inappropriate to try to circumvent that time limit by resorting to the longer time limit afforded by Paragraph B of this rule. This rationale is equally appropriate in

the context of a 1-059E NMRA motion to amend the judgment. Dozier v. Dozier, 118 N.M. 69, 878 P.2d 1018 (Ct. App. 1994).

But final judgment should not be lightly disturbed; to allow a party to correct alleged errors of law at any time by means of this rule would significantly weaken the policy of finality embodied in the rules. Phelps Dodge Corp. v. Guerra, 92 N.M. 47, 582 P.2d 819 (1978).

Subdivision (b) (see now Paragraph B) may be invoked only upon showing of exceptional circumstances. Parks v. Parks, 91 N.M. 369, 574 P.2d 588 (1978).

Paragraph B applies to arbitration awards. — District court retained jurisdiction over arbitration award even though buyers' notice of appeal from arbitration was untimely. The arbitration award is merely a nonenforceable order until the district court adopts the award as the court's final judgment following the time to file an appeal. After the district court has adopted the award as its final judgment, Paragraph B applies to set aside the judgment just as Paragraph B would apply to set aside any final judgment of the district court. Aragon v. Westside Jeep/Eagle, 117 N.M. 720, 876 P.2d 235 (1994).

Judgment rendered without jury final, when it passes from court's control. — In this jurisdiction there are no terms of court except for jury trials and no statute extending control of a court over its judgments, except in case of defaults (105-843, C.S. 1929, now superseded), and in cases of irregularly entered judgments (105-846, C.S. 1929, now superseded), and it necessarily follows that final judgments rendered by the district courts in cases tried without a jury become final when rendered and pass from the control of the court. State ex rel. Baca v. Board of Comm'rs, 22 N.M. 502, 165 P. 213 (1916); Fullen v. Fullen, 21 N.M. 212, 153 P. 294 (1915); Coulter v. Board of Comm'rs, 22 N.M. 24, 158 P. 1086 (1916)(decided under former law).

Applicability to motion for discovery sanctions. — This rule is not implicated when an award for sanctions concerns a collateral matter, such as an abuse of the discovery process. Gonzales v. Surgidev Corp., 120 N.M. 151, 899 P.2d 594 (1995).

Rule not substitute for appeal. — Although this rule provides a reservoir of equitable power to do justice, it is not to be used as a substitute for appeal. Phelps Dodge Corp. v. Guerra, 92 N.M. 47, 582 P.2d 819 (1978); Resolution Trust Corp. v. Ferri, 120 N.M. 320, 901 P.2d 738 (1995).

Nor means of recovering additional separate benefits. — In a workmen's compensation case, this rule does not provide a procedural method to recover additional benefits for vocational rehabilitation independent of a judgment already entered. Ruiz v. City of Albuquerque, 91 N.M. 526, 577 P.2d 424 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Rule not intended to prolong time to appeal. — This rule was not intended to extend the time allowed for taking an appeal and it cannot be employed for that purpose. Pettet v. Reynolds, 68 N.M. 33, 357 P.2d 849 (1960).

Subdivision (b) (see now Paragraph B) may not be used to toll the time for taking an appeal from a final divorce decree and property settlement. Barker v. Barker, 93 N.M. 198, 598 P.2d 1158 (1979).

A motion for relief from a judgment or order under this rule is not intended to extend the time for taking an appeal and cannot be used as a substitute for an appeal. The grant or denial of the motion is discretionary with the trial court. Gedeon v. Gedeon, 96 N.M. 315, 630 P.2d 267 (1981).

No relief during pendency of appeal. — A trial court cannot grant relief pursuant to Paragraph B of this rule during the pendency of an appeal. Hall v. Hall, 114 N.M. 378, 838 P.2d 995 (Ct. App. 1992).

Reasonable time provision only limitation on making motion. — The only time limit on a motion seeking relief under this rule is that it be made within a reasonable time. It was never intended that this rule be used to toll the time for an appeal, and in the face of the many decisions that the taking of an appeal within the time provided is jurisdictional, it may not be so used. Chavez v. Village of Cimarron, 65 N.M. 141, 333 P.2d 882 (1958).

Circumstances of case govern "reasonable time" provision. — What constitutes "reasonable time" under the rules depends upon the circumstances of the particular case. Eaton v. Cooke, 74 N.M. 301, 393 P.2d 329 (1964).

Where court of appeals lacked jurisdiction to review granting of summary judgment because of failure to file a timely appeal, the trial court's decision not to reopen the judgment was a final and appealable judgment which the court of appeals could review. James v. Brumlop, 94 N.M. 291, 609 P.2d 1247 (Ct. App. 1980).

Timely allowance of appeal is jurisdictional to place a case on the docket of the supreme court for review. Chavez v. Village of Cimarron, 65 N.M. 141, 333 P.2d 882 (1958).

Delay in asserting invalidity of divorce decree due to the trial court's lack of jurisdiction is not a basis for applying laches. Heckathorn v. Heckathorn, 77 N.M. 369, 423 P.2d 410 (1967).

During pendency of appeal court is without power to vacate, alter or amend the judgment under this rule, whether the motion is made prior to or after the appeal is taken, except with permission of the appellate court. A party seeking such relief must file a motion in the appropriate appellate court requesting that the case be remanded to

the trial court for consideration of the motion. State ex rel. Bell v. Hansen Lumber Co., 86 N.M. 312, 523 P.2d 810 (1974).

From and after the filing of the notice of appeal from a judgment, the trial court was without jurisdiction to take any further step in regard to the motion to alter or amend judgment. Meeker v. Walker, 80 N.M. 280, 454 P.2d 762 (1969).

When filing of notice of appeal from order nullity. — Where order granting a rehearing on dismissal order was filed before the notice of appeal, the filing of the notice of appeal from the order was a nullity. Gray v. Flint, 81 N.M. 222, 465 P.2d 279 (1970).

Waiver of objection to late filing. — Trial court's dismissal of plaintiff's original complaint and grant of leave to file amended complaint within 10 days relieved plaintiffs of their obligation of filing an amended complaint within 10 days by treating a late filed amended complaint as properly and timely filed, and defendant who took no action to have an order of judgment dismissal entered and who did not move to have amended complaint stricken waived any right to object to late filing. Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

Appeal from denial of motion under Subdivision (b) (see now Paragraph B) cannot review propriety of judgment sought reopened; the trial court can be reversed only if it is found to have abused its discretion in refusing to grant the motion. James v. Brumlop, 94 N.M. 291, 609 P.2d 1247 (Ct. App. 1980).

When remand permissible. — A case will be remanded only where the showing reasonably indicates that, if leave is given, the trial court might properly grant the motion. A denial of the relief sought will not necessitate the protection of a new appeal. State ex rel. Bell v. Hansen Lumber Co., 86 N.M. 312, 523 P.2d 810 (1974).

Reference to pleadings and record when judgment obscure. — If the entry of a judgment is so obscure as not to express the final determination with sufficient accuracy, reference may be had to the pleadings and to the entire record, and in a case of doubt regarding the signification of a judgment, or any part thereof, the whole record may be examined for the purpose of removing the doubt. State ex rel. Reynolds v. Lewis, 84 N.M. 768, 508 P.2d 577 (1973).

When doubtful record exists, presumption of correctness of lower court's decision. — Where plaintiff failed to include facts and testimony in the record to support his contention that there were insufficient facts or evidence to support the court's order vacating a default judgment and did not request a transcript of the proceedings, the appellate court followed the rule that upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the decision of the trial court. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Order not appealable. — Orders granting relief pursuant to Paragraph B of this rule ordinarily are not appealable. Hall v. Hall, 115 N.M. 506, 851 P.2d 506 (Ct. App. 1993),

holding that Albuquerque Prods. Credit Ass'n v. Martinez, 91 N.M. 317, 573 P.2d 672 (1978) implicitly overrruled the line of cases that includes Starnes v. Starnes, 72 N.M. 142, 381 P.2d 423 (1963), Hoover v. City of Albuquerque, 56 N.M. 525, 245 P.2d 1038 (1952), and Singleton v. Sanabrea, 35 N.M. 205, 292 P. 6 (1930).

Decision may be reviewed on appeal taken from judgment in reopened case. — Since the decision to set aside a judgment under Subdivision (b) (see now Paragraph B) is not immediately appealable, it may be reviewed in an appeal which is properly taken from the judgment entered in the reopened case. Jemez Properties, Inc. v. Lucero, 94 N.M. 181, 608 P.2d 157 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Sham issue of fact. — District court did not abuse discretion in reinstating a default judgment in a foreclosure action where defendant changed its factual allegations significantly over the course of the proceedings to set aside the default judgment, which could have led the court to believe that defendant was attempting to create a sham issue of fact. Magnolia Mountain Limited, Partners, LTD v. Ski Rio Partners, Ltd., 2006-NMCA-027, 139 N.M. 288, 131 P.3d 675.

B. MISTAKES, INADVERTENCE, SURPRISE OR EXCUSABLE NEGLECT.

Excusable neglect standard. — The standard for relief for excusable neglect is an equitable standard which requires the court to take into consideration all relevant circumstances related to a party's neglect, including the danger of prejudice to the non-moving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. Kinder Morgan CO2 Company, L.P. v. State of New Mexico Taxation and Revenue Department, 2009-NMCA-019, 145 N.M. 579, 203 P.3d 110, cert. denied, 2009-NMCERT-001.

Where the district court granted summary judgment to taxpayer on the issue of liability and left the amount of the refund due to the taxpayer to be determined at trial; the parties entered into settlement negotiations to resolve the amount of the refund; the court dismissed the case without prejudice for lack of prosecution; the taxpayer's counsel received notice that the case had been dismissed for lack of prosecution and the it would be reinstated if good cause were shown in a motion filed within thirty days; the taxpayer's counsel failed to enter a reminder of the deadline for filing a motion in counsel's calendaring system; the taxpayer delayed two months to file a motion for relief; there was no evidence that the taxpayer acted in bad faith; and there was no evidence that the state was prejudiced by the delay, the court did not abuse its discretion in finding excusable neglect. Kinder Morgan CO2 Company, L.P. v. State of New Mexico Taxation and Revenue Department, 2009-NMCA-019, 145 N.M. 579, 203 P.3d 110, cert. denied, 2009-NMCERT-001.

Subdivision (b)(1) (see now Paragraph B(1)) is not inconsistent with grounds for relief stated in 45-3-412 NMSA 1978 regarding formal testacy orders. Mathieson v.

Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Setting aside offer of judgment. — Paragraph B of this rule applies to a trial court's consideration of whether to set aside an offer of judgment made under Rule 1-068 NMRA. Fuller v. Bachen, 1999-NMCA-130, 128 N.M. 151, 990 P.2d 825.

"Excusable neglect". — A party, served with an initial summons and thus having actual notice of the litigation, may not claim "excusable neglect" under Paragraph B for not being aware of subsequent proceedings in the matter. In re Gaines, 113 N.M. 652, 830 P.2d 569 (Ct. App. 1992).

The neglect by defense counsel was not excusable, where counsel of record filed no response to requests for admission and no response to the motion for summary judgment, they did not appear at the pretrial conference, at which the motion for summary judgment was heard, they did not respond to the notice of presentment of the order for summary judgment, nor did they appear at court at the time that the judgment was presented. Padilla v. Estate of Griego, 113 N.M. 660, 830 P.2d 1348 (Ct. App. 1992).

Where there is excusable neglect and defendants have meritorious defense, in accordance with this rule, and there are no intervening equities, a default judgment should be set aside and the case decided on its merits. Dean Witter Reynolds, Inc. v. Roven, 94 N.M. 273, 609 P.2d 720 (1980).

Where an employer involved in a workmen's compensation case presents uncontroverted evidence that its failure to file a timely answer resulted from excusable neglect, mistake and inadvertence, and specified meritorious defenses involving statutes of limitation and no accidental injury, the trial court abused its discretion in denying the motion to set aside the default judgment. Lopez v. Sears, Roebuck & Co., 96 N.M. 143, 628 P.2d 1139 (Ct. App. 1981).

Neglect held not excusable. — Where defendant's insurer failed to take proper action to avoid default judgment, and where defendant showed a total lack of diligence by neglecting to inquire into the case for twenty-two months, and failed to provide an explanation for insurer's conduct, there was no basis for vacating the default judgment. Adams v. Para-Chem Southern, 1998-NMCA-161, 126 N.M. 189, 967 P.2d 864.

No "mistake" where court properly acts upon information before it. — Where the court properly acts upon the information before it at the time of judgment, there is no judicial error at that time, and thus no "mistake" which can be corrected under Subdivision (b)(1) (see now Paragraph B(1)). Benavidez v. Benavidez, 99 N.M. 535, 660 P.2d 1017 (1983).

Mistake in conception of divorce decree falls under Paragraph B(1). — A mistake in a wife's conception of the nature of her husband's pension plan as treated in her

divorce decree is a substantive flaw rather than a technical one. Where the decree was prepared by the wife's attorney and adopted by the trial court without any appearances by the husband and there is nothing in the record to suggest that the husband misrepresented the nature of the pension plan to his wife, the mistake is chargeable to the wife and falls within Subdivision (b)(1) (see now Paragraph B(1)), specifying a one-year period of limitation within which a mistake may be asserted to modify a decree. Parker v. Parker, 92 N.M. 710, 594 P.2d 1166 (1979).

Amendment of foreclosure judgment. — Trial courts at all times have jurisdiction over their final judgments to amend them, in material matters, to speak the truth. Thus where judgment of foreclosure, through error or mistake, ordered only a part of the property described in the mortgage to be sold to satisfy the judgment, trial court had jurisdiction five months after entry of the judgment to correct and amend it to speak the truth. De Baca v. Sais, 44 N.M. 105, 99 P.2d 106 (1940)(decided under former law).

Party may be relieved of judgment entered through surprise in a proper case. Battersby v. Bell Aircraft Corp., 65 N.M. 114, 332 P.2d 1028 (1958).

This rule may not be used to aid counsel who neglect to prosecute an appeal. Parks v. Parks, 91 N.M. 369, 574 P.2d 588 (1978); Hort v. General Elec. Co., 92 N.M. 359, 588 P.2d 560 (Ct. App. 1978), cert. denied, 92 N.M. 353, 588 P.2d 554 (1979).

C. NEWLY DISCOVERED EVIDENCE.

New evidence of paternity. — Where both a default judgment and a subsequent stipulated judgment determined that respondent was the child's parent and was obligated to pay child support; respondent had requested a paternity test when respondent was served with the petition to determine the child's parentage; respondent signed the stipulated judgment to obtain a driver's license; a paternity test that was administered several years after the stipulated judgment showed that respondent was not the child's biological parent; the child's biological parent had falsely represented to HSD that respondent was the child's biological parent, but at a hearing several years later, the biological parent named another person as the child's biological parent; the child's biological parents had been deported to Mexico; the child lived with the child's grandparent; and respondent had no personal relationship with the child, under the circumstances, the determination that respondent was not the child's biological parent after respondent's admission that respondent was the child's parent qualified as an extraordinary circumstance under Rule 1-060 NMRA sufficient to permit relief from respondent's obligations to pay accrued and prospective child support. *State ex rel. HSD v. Rawls,* 2012-NMCA-052, 279 P.3d 766.

Prerequisites for granting new trial on grounds of newly discovered evidence. — A motion for a new trial on the grounds of newly discovered evidence is addressed to the discretion of the trial court, and the prerequisites for granting of a new trial are: (1) it must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered

before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be merely cumulative to the former evidence; (6) it must not be merely impeaching or contradictory to the former evidence. If the movant fails to establish any of the six grounds the motion is properly denied. Hill v. Burnworth, 85 N.M. 615, 514 P.2d 1312 (Ct. App. 1973).

A new trial should not be granted solely on the ground that a post-trial event undercuts a prediction which formed the basis for the assessment of damages. Fowler-Propst v. Dattilo, 111 N.M. 573, 807 P.2d 757 (Ct. App. 1991).

Evidence discoverable by due diligence precludes new trial. — Where the trial court found that the evidence was not such as could not have been discovered by the exercise of due diligence prior to trial and that the evidence was not of a character as would with any reasonable probability compel a different result in the event of a new trial, then it was not error to refuse a new trial as both of these findings, the "due diligence" and "probably change the result," necessarily involve the trial court's evaluation of the evidence. Hill v. Burnworth, 85 N.M. 615, 514 P.2d 1312 (Ct. App. 1973).

Contradictory inferences as to whether evidence would have been discovered before trial by the exercise of due diligence meant that the appellate court could not say the trial court abused its discretion in denying the motion on this ground. Hill v. Burnworth, 85 N.M. 615, 514 P.2d 1312 (Ct. App. 1973).

Evaluation of new testimony. — Although testimony may be new, it must be evaluated in the light of the evidence testified to at trial and the physical facts of the occurrence. Hill v. Burnworth, 85 N.M. 615, 514 P.2d 1312 (Ct. App. 1973).

Grounds for motion for new trial distinguished. — A motion for a new trial on grounds of newly discovered evidence presents a somewhat different question than a motion for a new trial based on alleged erroneous instructions and rulings on matters presented to the trial court in the first instance. Public Serv. Co. v. First Judicial Dist. Court, 65 N.M. 185, 334 P.2d 713 (1959).

Where the fact of a modification of a jury instruction on damages for pain and suffering was known to the plaintiff and the possible role of the modification in the jury's failure to award damages for past pain and suffering was known or should have been known to the plaintiff when she filed her motion for a new trial, plaintiff's motion for a new trial could not be characterized as motion under Paragraph B of this rule and plaintiff was relegated to the remedy provided by Rule 1-059 NMRA. Martinez v. Friede, 2003-NMCA-081, 133 N.M. 834, 70 P.3d 1273, cert. granted, 133 N.M. 727, 69 P.3d 237 (2003).

D. FRAUD.

Predictions of spouses' future incomes. — Where the evidence establishes that each party trusted the other during mediation to predict future earning potential, and, as it turned out, wife may have underestimated her future income, while husband overestimated his, these inaccurate predictions do not amount to fraud or misrepresentation in that there was no showing that wife knowingly misrepresented what her income would be and therefore husband was not entitled to relief under Paragraph B(3) of this rule. Edens v. Edens, 2005-NMCA-033, 137 N.M. 207, 109 P.3d 295, cert. denied, 2005-NMCERT-003.

Motions under this rule are addressed to sound discretion of the court. Citty v. Citty, 86 N.M. 345, 524 P.2d 517 (1974); Kilcrease v. Campbell, 94 N.M. 764, 617 P.2d 153 (1980).

No special definition of fraud when under rule. — Fraud and misrepresentation under this rule require the same elements as fraud in the ordinary sense. An actionable fraud is a misrepresentation of a fact, known to be untrue by the maker, and made with an intent to deceive and to induce the other party to act upon it with the other party relying upon it to his injury or detriment. Unser v. Unser, 86 N.M. 648, 526 P.2d 790 (1974).

Time limitation. — Final judgments may be reopened because of fraud only if the motion to do so is made within a year after entry of the judgment. However, specific provision is made for courts to entertain independent actions for relief from judgments because of fraud upon the court. State ex rel. Speer v. District Court, 79 N.M. 216, 441 P.2d 745 (1968).

Time limit applies despite proof of misrepresentation or misconduct. — Even if he is able to prove misrepresentation or misconduct, a party may still be barred by the time limit applicable to this rule. Wehrle v. Robison, 92 N.M. 485, 590 P.2d 633 (1979).

Prima facie basis for relief. — Where the motion alleged that the biological mother misrepresented her intention to abide by the settlement agreement once the case was dismissed with prejudice, this allegation amounted to a prima facie basis for relief under this rule. A.C. v. C.B., 113 N.M. 581, 829 P.2d 660 (Ct. App. 1992).

Motion properly denied in absence of fraud. — Defendant-appellant's motion pursuant to this rule to set aside a paragraph of a certain stipulation which she had entered into with plaintiff-appellee denied, as it was determined that the husband was not guilty of any fraud, misrepresentation or misconduct and that there was no mistake of fact or law as to the stipulations. Oberman v. Oberman, 82 N.M. 472, 483 P.2d 1312 (1971).

Where property stipulation and agreement are entered into without fraud or imposition and are approved by the trial court, the stipulation and agreement may not be set aside. Barker v. Barker, 93 N.M. 198, 598 P.2d 1158 (1979).

Setting aside probate decree for fraud. — In order to have a final decree in probate set aside for fraud, a recognized ground for equitable intervention, the complainant must show there existed at the time the facts became known no adequate remedy at law either in the probate court or on appeal therefrom. Rubalcava v. Garst, 61 N.M. 10, 293 P.2d 656 (1956).

No presumption that separation agreements necessarily fraudulent. — While it is true that if a fiduciary relationship is shown and that as a result of confidence reposed by the one, dominion and influence resulting from such confidence can be exercised by the other, fraud and undue influence may be presumed to exist when an advantage is gained by the dominant party at the expense of the confiding party; nevertheless, the modern trend holds that when a husband and wife have separated or are about to separate and seek by agreement to settle their respective rights and obligations, they deal at arm's length. There is no presumption that separation agreements are fraudulent, and that one who asserts the invalidity of such agreement has the burden of proving that it is tainted by fraud, duress or overreaching. Unser v. Unser, 86 N.M. 648, 526 P.2d 790 (1974).

E. VOID JUDGMENT.

Where judgment void, no time limitation. — Where the judgment is void, this rule does not purport to place any limitation of time. Eaton v. Cooke, 74 N.M. 301, 393 P.2d 329 (1964).

There is no limitation of time within which a motion must be filed under the provisions of this rule. State v. Romero, 76 N.M. 449, 415 P.2d 837 (1966).

Attack on subject-matter jurisdiction may be made at any time in the proceedings. It may be made for the first time upon appeal, or it may be made by a collateral attack in the same or other proceedings long after the judgment has been entered. Chavez v. County of Valencia, 86 N.M. 205, 521 P.2d 1154 (1974).

Writ of coram nobis treated as motion. — A petition for a writ of coram nobis attacking the validity of a prior judgment is properly a motion under this rule. State v. Raburn, 76 N.M. 681, 417 P.2d 813 (1966).

Determination of improper service. — The husband's motion for relief from a default decree, brought almost two years after issuance and based on the wife's misrepresentation that she was unaware of his whereabouts and could not personally serve him when she filed the petition for dissolution of the marriage, was not based on fraud but, rather, on the ground that the judgment was void; thus, it was timely filed and an evidentiary hearing was required to determine whether service had been proper. Classen v. Classen, 119 N.M. 582, 893 P.2d 478 (Ct. App. 1995).

No discretion on part of trial court under Paragraph B(4). — Although the granting of relief under other portions of this rule has been held to be discretionary, and it has

been held that this discretion may be invoked only upon the showing of exceptional circumstances, there is no discretion on the part of the trial court under Subdivision (b)(4) (see now Paragraph B(4)), as a motion under this part of the rule differs markedly from motions under the other clauses of Subdivision (b) (see now Paragraph B). Chavez v. County of Valencia, 86 N.M. 205, 521 P.2d 1154 (1974).

There is no discretion on the part of a district court to set aside a void judgment. Such a judgment may be attacked at any time in a direct or collateral action. Nesbit v. City of Albuquerque, 91 N.M. 455, 575 P.2d 1340 (1977).

Order granting relief is tested by usual principles of finality. Thus, where the court, in addition to determining that there is a valid ground for relief under this rule, at the time makes a redetermination of the merits, its order is final, since it leaves nothing more to be adjudged. Albuquerque Prods. Credit Ass'n v. Martinez, 91 N.M. 317, 573 P.2d 672 (1978).

Where an order granting relief merely vacates the judgment and leaves the case pending for further determination, the order is akin to an order granting a new trial and is interlocutory and nonappealable. Albuquerque Prods. Credit Ass'n v. Martinez, 91 N.M. 317, 573 P.2d 672 (1978); Jemez Properties, Inc. v. Lucero, 94 N.M. 181, 608 P.2d 157 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Rights not cumulative but alternative. — If relief is denied under Subdivision (b)(4) (see now Paragraph B(4)) then a party has a right to appeal, but the two approaches of direct appeal and collateral attack followed by appeal are alternative rights, not cumulative rights. Hort v. General Elec. Co., 92 N.M. 359, 588 P.2d 560 (Ct. App. 1978), cert. denied, 92 N.M. 353, 588 P.2d 554 (1979).

Issue of voidness moot where order expired. — Issue of whether an order transferring child custody under the Family Violence Protection Act should have been declared void under Paragraph B(4) was moot since the order had expired. Lucero v. Pino, 1997-NMCA-089, 124 N.M. 28, 946 P.2d 232.

F. OTHER REASON JUSTIFYING RELIEF.

Additur not warranted. — Where defendant, who was an art appraiser, purchased two paintings from plaintiff for $4,500; defendant thought that the paintings had a value of $35,000 and would have paid as much as $16,000 for the paintings; plaintiff understood that art dealers, like defendant, generally offered one-half of the amount they expected to get for an item upon resale; defendant sold the paintings for $35,000 to an art dealer; the paintings were later sold to an art collector who sold the paintings at auction for $600,000; plaintiff sued defendant for negligent misrepresentation; the jury awarded plaintiff $20,000 in damages; and plaintiff filed a motion for additur of $380,500 based on plaintiff's expert's opinion that the fair market value of the paintings was $405,000, the court did not err in denying plaintiff's motion for additur. *Hicks v. Eller,* 2012-NMCA-061, 280 P.3d 304, cert. denied, 2012-NMCERT-005.

Application to criminal cases. — Coram nobis type of relief under Paragraph B of Rule 1-060 NMRA is not available unless the petitioner demonstrates that relief through habeas corpus proceeding under Rule 5-802 NMRA is unavailable or otherwise inadequate. *State v. Barraza*, 2011-NMCA-111, 267 P.3d 815.

Where defendant entered a plea of no contest to aggravated assault and was placed on probation; while defendant was on probation, defendant filed a petition pursuant to Rule 1-060 NMRA for coram nobis type relief on the ground that defendant's counsel had not advised defendant of the specific immigration consequences of defendant's conviction and the almost certain deportation that would result from the conviction; and defendant failed to demonstrate that defendant was precluded from filing a petition for habeas corpus or that habeas corpus was otherwise inadequate, the district court could not exercise its jurisdiction to review defendant's petition for coram nobis type of relief pursuant to Rule 1-060 NMRA, because such relief could only be granted pursuant to habeas corpus proceedings under Rule 5-802 NMRA while defendant was within the custody or restrictions imposed by defendant's sentence. *State v. Barraza*, 2011-NMCA-111, 267 P.3d 815.

Effect of husband's miscalculation of future income on settlement agreement. — Where husband argues that the alimony provision in the settlement agreement should be set aside under Paragraph B(5) of this rule because, in light of the parties' changed circumstances, it is no longer equitable that the provision be given prospective application, husband's miscalculation of his future income is not a basis to set aside the alimony provision under Paragraph B(5) of this rule. Edens v. Edens, 2005-NMCA-033, 137 N.M. 207, 109 P.3d 295, cert. denied, 2005-NMCERT-003.

Nonmodifiable lump sum alimony provision in settlement agreement. — Where the marital settlement agreement was not unconscionable because husband and wife mutually agreed on the terms of the agreement and it was husband who suggested the nonmodifiable lump sum alimony provision after consultation with an attorney and an accountant, and enforcement of the voluntary agreement does not amount to involuntary servitude that violates the 13th Amendment to the United States Constitution because husband freely entered into the terms of the agreement, alimony provisions of decree should not be set aside under Paragraph B(6) of this rule. Edens v. Edens, 2005-NMCA-033, 137 N.M. 207, 109 P.3d 295, cert. denied, 2005-NMCERT-003.

Scope of paragraph. — In simple English, the language of the "other reason" clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. Foundation Reserve Ins. Co. v. Martin, 79 N.M. 737, 449 P.2d 339 (Ct. App. 1968); Perez v. Perez, 75 N.M. 656, 409 P.2d 804 (1966); Barker v. Barker, 94 N.M. 162, 608 P.2d 138 (1980).

Power of trial court generally. — The trial court is invested with a reservoir of equitable power to vacate a final order where justice clearly dictates in exceptional

circumstances, such as where the court initially lacked jurisdiction. Smith v. Bradfield, 97 N.M. 611, 642 P.2d 214 (Ct. App. 1982).

Paragraph B(6) applied liberally. — Like this rule generally, Subdivision (b)(6) (see now Paragraph B(6)) should be liberally applied to situations not covered by the preceding five clauses so that, giving due regard to the sound interest underlying the finality of judgments, the district court nevertheless has power to grant relief from a judgment whenever, under all the surrounding circumstances, such action is appropriate in the furtherance of justice. Foundation Reserve Ins. Co. v. Martin, 79 N.M. 737, 449 P.2d 339 (Ct. App. 1968).

Under Subdivision (b)(6) (see now Paragraph B(6)) the district court, within a reasonable time, can grant relief or vacate for any other reason justifying relief from the operation of the judgment, and this is to be applied liberally. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Paragraph B(6) limited to where showing of exceptional circumstances exist. — Subdivision (b)(6) (see now Paragraph B(6)) provides a reservoir of equitable power to do justice in a given case, but it is limited to instances where there is a showing of exceptional circumstances. Perez v. Perez, 75 N.M. 656, 409 P.2d 804 (1966); Wehrle v. Robison, 92 N.M. 48, 590 P.2d 633 (1979); Marberry Sales, Inc. v. Falls, 92 N.M. 578, 592 P.2d 178 (1979); Jemez Properties, Inc. v. Lucero, 94 N.M. 181, 608 P.2d 157 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980); Kilcrease v. Campbell, 94 N.M. 764, 617 P.2d 153 (1980); Resolution Trust Corp. v. Ferri, 120 N.M. 320, 901 P.2d 738 (1995).

This rule provides a reservoir of equitable power to do justice in a given case, but it is limited in its application. The rule may be invoked only upon a showing of exceptional circumstances. Battersby v. Bell Aircraft Corp., 65 N.M. 114, 332 P.2d 1028 (1958).

In order to obtain relief under Subdivision (b)(6)(see now Paragraph B(6)), the movant must show exceptional circumstances, other than those advanced under Subdivisions (b)(1) to (b)(5) (see now Paragraphs B(1) to B(5)). Thompson v. Thompson, 99 N.M. 473, 660 P.2d 115 (1983).

Paragraph B(6) cannot serve as an escape hatch when new evidence does not satisfy the requirements for being "newly discovered evidence." It is limited in scope to reasons not addressed in the five preceding clauses. Fowler-Propst v. Dattilo, 111 N.M. 573, 807 P.2d 757 (Ct. App. 1991).

Exceptional circumstances must be shown. — To obtain relief under Subdivision (b)(6) (see now Paragraph B(6)), the party must establish the existence of exceptional circumstances. Dyer v. Pacheco, 98 N.M. 670, 651 P.2d 1314 (Ct. App. 1982).

The district court may in exceptional circumstances reopen judgment and order a new trial sua sponte. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Exceptional circumstances shown. — Exceptional circumstances sufficient to permit reopening the judgment under Paragraph B(6) existed, where, at the time a dismissal with prejudice order was entered, plaintiff had already furnished required discovery, although the trial court was unaware of it, and, when dismissal was entered, plaintiff was not represented by counsel. Lopez v. Wal-Mart Stores, Inc., 108 N.M. 259, 771 P.2d 192 (Ct. App. 1989).

Exceptional circumstances not shown. — Father was not entitled to relief from a lump-sum child support obligation, which he claimed had been discharged through prepayment on promissory note; under the circumstances of the case, he could not prove discharge of the obligation, newly discovered evidence or the "exceptional circumstances" required to establish "other reason justifying relief" under this section. Rochester v. Rochester, 1998-NMCA-100, 125 N.M. 369, 961 P.2d 794.

Paragraph B(6) not applicable to claims of judicial error. — The trial court abused its discretion in setting aside a default judgment for judicial error under Paragraph B(6) after 19 months had passed. Resolution Trust Corp. v. Ferri, 120 N.M. 320, 901 P.2d 738 (1995).

Paragraph B(6) may not be used as substitute for appeal and does not toll the time for appeal. Parks v. Parks, 91 N.M. 369, 574 P.2d 588 (1978); Hort v. General Elec. Co., 92 N.M. 359, 588 P.2d 560 (Ct. App. 1978), cert. denied, 92 N.M. 353, 588 P.2d 554 (1979).

It may not be used to circumvent time limit set out in Subdivisions (b)(1), (b)(2) and (b)(3) (see now Paragraphs B(1), (2) and (3)) and may be used only for reasons other than the ones therein set out. Parks v. Parks, 91 N.M. 369, 574 P.2d 588 (1978); Jemez Properties, Inc. v. Lucero, 94 N.M. 181, 608 P.2d 157 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

A party seeking to set aside a judgment cannot rely upon Paragraph B(6) to circumvent the one-year limit in which to advance reasons enumerated in Paragraph B(1), B(2), or B(3). Marinchek v. Paige, 108 N.M. 349, 772 P.2d 879 (1989).

Pendency of another suit, etc., considered exceptional circumstances. — Where the sole reasons given by defendants in their motions to abate the present suit were the pendency of another suit in Bernalillo county involving the same factual and legal questions and plaintiff's status as an indispensable party to that suit, where the court sustained these motions and plaintiff then sought to intervene in that suit but the present defendants had settled their differences and had that suit dismissed with prejudice without giving any notice thereof to plaintiff or its attorney, these were such exceptional circumstances as would have justified the trial court in the exercise of its sound discretion in vacating the order of abatement. If the trial court did not deny plaintiff's motion as an exercise of sound judicial discretion but rather did so upon a mistaken belief as to the legal effect on plaintiff's claim of the settlement and dismissal of the

Bernalillo county suit, then the court committed reversible error. Foundation Reserve Ins. Co. v. Martin, 79 N.M. 737, 449 P.2d 339 (Ct. App. 1968).

Tampering with evidence constitutes exceptional circumstances. — Tampering with physical evidence in the case and with public records in the county clerk's office went beyond the common fraud contemplated by Subdivision (b)(3) (see now Paragraph B(3)) of this rule, and constituted exceptional circumstances to allow the reopening of judgment more than a year after its entry, under Subdivision (b)(6) (see now Paragraph B(6)) of this rule. Jemez Properties, Inc. v. Lucero, 94 N.M. 181, 608 P.2d 157 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Arbitration proceedings. — The time limit contained in 44-7-12B NMSA 1978 for filing a motion to vacate an award applies in arbitration proceedings, not the one-year limitation period set forth in Paragraph (B)(6) of this rule. Medina v. Foundation Reserve Ins. Co., 1997-NMSC-027, 123 N.M. 380, 940 P.2d 1175.

Best interests of adopted child can be exceptional circumstance. — Where the best interests of the child demand it, the exceptional circumstance provision of Paragraph B(6) should be used to override the one-year statute of limitations on reopening an adoption decree. Drummond v. Drummond, 1997-NMCA-094, 123 N.M. 727, 945 P.2d 457.

Foreclosure of family home resulting from husband's failure to make mortgage payments constituted exceptional circumstances so as to justify relief under paragraph (B)(6) by allowing the court to identify any support obligation within the original divorce decree. Hopkins v. Hopkins, 109 N.M. 233, 784 P.2d 420 (1989).

Attorney negligence. — Attorney neglect absent additional facts demonstrating exceptional circumstances is not sufficient to invoke Paragraph B(6). Resolution Trust Corp. v. Ferri, 120 N.M. 320, 901 P.2d 738 (1995); Meiboom v. Watson, 2000-NMSC-004, 128 N.M. 536, 994 P.2d 1154.

Gross negligence by an attorney may constitute extraordinary circumstances allowing application of Paragraph B(6) when coupled with a showing of client diligence. Resolution Trust Corp. v. Ferri, 120 N.M. 320, 901 P.2d 738 (1995).

Redress of improper use of process. — The improper use of process of a court may be redressed by a motion to quash, inquiry into the matter under the supreme court disciplinary rules, a motion to set aside judgment under Subdivision (b)(6) (see now Paragraph B(6)) or a determination of whether such an action amounts to facts giving rise to an action for abuse of process. Under proper circumstances, the matter may also constitute contempt of court. Poorbaugh v. Mullen, 99 N.M. 11, 653 P.2d 511 (Ct. App. 1982).

Prior judicial precedent overruled. — Where an appellate opinion which ruled that a law should not be applied retroactively was expressly overruled a year later, wife's

motion to set aside decree of final separation and to allow assertion of a claim against husband's military retirement benefits was allowed under Subdivision (b)(6) (see now Paragraph B(6)). Koppenhaver v. Koppenhaver, 101 N.M. 105, 678 P.2d 1180 (Ct. App. 1984).

Notice is required only when party has appeared in action; since the defendant did not appear, the plaintiff was entitled to a default judgment without contacting the defendant's counsel. Rummel v. Edgemont Realty Partners, Ltd., 116 N.M. 23, 859 P.2d 491 (Ct. App. 1993).

Setting aside default judgment. — When there exist grounds for relief under Paragraph B and a meritorious defense, and when there are no intervening equities, the default judgment should be set aside and the case tried on its merits. Rodriguez v. Conant, 105 N.M. 746, 737 P.2d 527 (1987).

Where defendant's motion pointed out that he was at all times accessible to plaintiff and cross-plaintiff and, in fact, had communicated with them at some time during plaintiff's lawsuit and demonstrated the existence of a meritorious defense, because defendant had demonstrated both a meritorious defense and grounds for relief under Subparagraph B(6), the district court did not abuse its discretion by setting aside the default judgments. Rodriguez v. Conant, 105 N.M. 746, 737 P.2d 527 (1987).

Default judgment reinstated. — Trial court did not abuse its discretion in reinstating default judgment upon defendant's failure to comply with conditions imposed by court in setting aside the default judgment. Kutz v. Independent Publishing Co., 101 N.M. 587, 686 P.2d 277 (Ct. App. 1984).

Motion to set aside divorce decree denied where property division not inequitable. — Where divorce decree was entered after United States Supreme Court decision that military pay was community property but before federal enactment providing that the state law should determine whether military pay was community property, trial court did not abuse its discretion in refusing to grant ex-wife's motion to set aside stipulated divorce decree with respect to military retirement and alimony where she failed to show that prospective application of that portion of decree ordering alimony in lieu of military retirement was inequitable under the circumstances. Harkins v. Harkins, 101 N.M. 296, 681 P.2d 722 (1984).

Reasonable time limits imposed. — The only time limit on a motion seeking relief under this rule is that it be made within a reasonable time. Home Sav. & Loan Ass'n v. Esquire Homes, Inc., 87 N.M. 1, 528 P.2d 645 (1974); Freedman v. Perea, 85 N.M. 745, 517 P.2d 67 (1973).

The only time limit on a motion seeking relief under this rule is that it be made within a reasonable time, but what constitutes a reasonable time depends on the circumstances of each case. Home Sav. & Loan Ass'n v. Esquire Homes, Inc., 87 N.M. 1, 528 P.2d 645 (1974).

Plaintiffs did not file their motion under Paragraph B(6) within a reasonable time where it was filed several months after the statute of limitations had expired, more than one year after the stipulated dismissal, and approximately three months after plaintiffs stated they learned their case had been voluntarily dismissed. Meiboom v. Watson, 2000-NMSC-004, 128 N.M. 536, 994 P.2d 1154.

Where more than year has elapsed between entry of challenged order and Subdivision (b) (see now Paragraph B) motion to vacate, Subdivision (b)(6) (see now Paragraph B(6)) is the only provision under which the judgment may be set aside. Jemez Properties, Inc. v. Lucero, 94 N.M. 181, 608 P.2d 157 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Delay over 16 months not reasonable. — A delay in excess of 16 months, from the time the original decree was entered until the motion to vacate was filed, was held a delay beyond the time that was reasonable for setting aside the judgment in the case. State ex rel. Property Appraisal Dep't v. Sierra Life Ins. Co., 90 N.M. 268, 562 P.2d 829 (1977).

Effect of motion to vacate judgment not in its entirety. — Defendant's motion to set aside the judgment not in its entirety but only to the extent that it contains language not included in the original complaint is not a ground for relief under Subdivision (b)(6) (see now Paragraph B(6)), as the court is not asked to grant relief from the "operation" of the judgment. Gurule v. Larson, 78 N.M. 496, 433 P.2d 81 (1967).

Trial court loses jurisdiction when appeal taken. — Although this rule applies to the district courts, the court of appeals correctly entertained this motion as the trial court could not have considered it, having lost jurisdiction by reason of the appeal. Terrel v. Duke City Lumber Co., 86 N.M. 405, 524 P.2d 1021 (Ct. App. 1974), aff'd in part and rev'd in part, 88 N.M. 299, 540 P.2d 229 (1975).

Abuse of discretion reverses lower court's determination. — Whether a judgment will be set aside under Subdivision (b)(6) (see now Paragraph B(6)) is ordinarily a matter within the trial court's discretion, and the trial court's determination will ordinarily not be reversed except for an abuse of discretion. Freedman v. Perea, 85 N.M. 745, 517 P.2d 67 (1973).

Setting aside deficiency judgment. — The trial court did not abuse its discretion by setting aside as unjust a deficiency judgment entered after certain mortgaged properties subject to a default judgment were sold, when six years after judgment, defendant located a letter purporting to be from plaintiff which had ostensibly released her from liability for the mortgages on the basis of which she had refrained from contesting the original foreclosure suit; defendant was permitted to file her answer and proceed to trial. Home Sav. & Loan Ass'n v. Esquire Homes, Inc., 87 N.M. 1, 528 P.2d 645 (1974).

Failure to rule on B(6) motion not automatic denial. — A Paragraph B(6) motion is not automatically deemed denied if not ruled upon within 30 days. Archuleta v. New Mexico State Police, 108 N.M. 543, 775 P.2d 745 (Ct. App. 1989).

Juror confusion. — A district court is not precluded from acting under Paragraph B(6) of this rule to set aside a judgment and grant a new trial on the basis of juror confusion. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Rule 1-051 NMRA presents no barrier to the district court's ability to reopen judgment under Paragraph B of this rule and grant a new trial on the basis of juror confusion, despite petitioner's failure to object to a jury instruction. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Where in its order filed, the district court clearly granted a new trial on the basis of juror confusion, and since the appellate court has held this to be an appropriate action under Paragraph B(6) of this rule, the district court's failure to cite the rule does not render its order without force. Martinez v. Friede, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Juror bias not found. — Where, following trial, a plaintiff alleged juror bias and prejudice and juror incompetency based on another juror's letter to the judge and affidavit, the trial court erred in granting the plaintiff's Rule 1-060B NMRA motion because there was no competent evidence to support the plaintiff's allegations of bias or prejudice or that the juror in question had responded untruthfully to questions on voir dire; Rule 11-606 NMRA specifically precludes impeachment of a verdict by the testimony or affidavit of a juror concerning statements made by a juror during jury deliberations. Rios v. Danuser Mach. Co., 110 N.M. 87, 792 P.2d 419 (Ct. App. 1990).

Motion held appropriate and timely. — Employer's Paragraph B motion for relief from judgment on ground that circumstances warranted it was appropriate and timely where the employer sought set off for benefits paid to injured employee, employer produced evidence of payment to employee, and employer's motion was filed two months after judgment. Washington v. Atchison, T. & S.F. Ry., 114 N.M. 56, 834 P.2d 433 (Ct. App. 1992).

Divorce decree support order unmodifiable unless original calculation errors unforeseeable. — When under Paragraph B(5) the sole ground urged for the modification of a monthly payment award under a divorce decree is that the original award was based on an erroneous projection of the value of retirement benefits, such a modification is improper unless the reason for the error in the projection is a circumstance that the party seeking relief had no opportunity to foresee or control. This limitation on the prospective modification of a judgment does not affect cases in which the court has retained jurisdiction under the decree over a judgment ordering periodic payments, so that the amount of the payments can be adjusted as circumstances change. Barnes v. Shoemaker, 117 N.M. 59, 868 P.2d 1284 (Ct. App. 1993).

G. VACATING JUDGMENTS.

When the court considers a motion for relief from judgment and enters a new order and judgment, the court has vacated the earlier order. Ullrich v. Blanchard, 2007-NMCA-145, 142 N.M. 835, 171 P.3d 774, cert. granted, 2007-NMCERT-011.

Two issues arise on every application to open or vacate a judgment: the existence of grounds for opening or vacating the judgment and the existence of a meritorious defense or cause of action. Since there is no universally accepted standard as to what satisfies the requirement that a party show a meritorious defense, the matter is best left to the discretion of the trial judge, as is the decision whether a good excuse has been shown. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

In order for a court to set aside a default judgment under Subdivision (b) (see now Paragraph B), the moving party must show a meritorious defense or cause of action and the existence of grounds for opening or vacating the judgment. Marberry Sales, Inc. v. Falls, 92 N.M. 578, 592 P.2d 178 (1979).

Motion to vacate judgment need not be verified. Sheppard v. Sandfer, 44 N.M. 357, 102 P.2d 668 (1940) (decided under former law).

Court's power over judgments made during term, unlimited. — The power of the court over its judgments during the entire term at which they are rendered is unlimited, and the court may, during such term and without notice to the parties vacate, modify or set aside its judgments. Henderson v. Dreyfus, 26 N.M. 262, 191 P. 455 (1920) (decided under former law).

Jurisdiction lapses for vacation of void judgment, after one year. — A district court is without jurisdiction to set aside or vacate a voidable but not void judgment rendered by it after one year from the rendition of the judgment has elapsed. Weaver v. Weaver, 16 N.M. 98, 113 P. 599 (1911) (decided under former law).

Trial court reversed for abuse of discretion. — Whether a judgment will be set aside under this rule is ordinarily a matter within the trial court's discretion. The trial court's determination will ordinarily not be reversed except for an abuse of discretion. Home Sav. & Loan Ass'n v. Esquire Homes, Inc., 87 N.M. 1, 528 P.2d 645 (1974).

Action on motion to vacate judgment is discretionary and reviewable only for abuse. Grant v. Booker, 31 N.M. 639, 249 P. 1013 (1926) (decided under former law).

A motion to vacate or set aside a judgment is addressed to the sound legal discretion of the trial court on the particular facts of the case, and the determination of the trial court will not be disturbed on appeal unless an abuse of such discretion is shown. Stafford v. Clouthier, 22 N.M. 157, 159 P. 524 (1916) (decided under former law).

Notice of defect, prerequisite. — A judgment will not be vacated so as to affect a purchaser of the property without notice of a defect. Archuleta v. Landers, 67 N.M. 422, 356 P.2d 443 (1960).

Effect of subsequent events on setting aside judgment. — When attorney who represented claimant in workmen's compensation case was selected and paid for by the employer's insurance carrier and this attorney was found by the trial court to be experienced and competent, with the record disclosing no evidence of misconduct by anyone, the judgment will not be set aside for fraud, misconduct or mutual mistake, even if, in the light of subsequent events, an agreement of settlement of a workmen's compensation award proves to have been unwise or unfortunate. Herrera v. C & R Paving Co., 73 N.M. 237, 387 P.2d 339 (1963).

Court may vacate final judgments under 39-1-1 NMSA 1978 as well. — Where final judgment was vacated four days after its entry because of mistakes, inadvertence, excusable neglect, surprise and for other named reasons, whether correctly grounded on this provision or not, the court had discretion of doing so under this rule under the circumstances of the case, and in any event could so so under 39-1-1 NMSA 1978 giving district courts jurisdiction over judgments and decrees for 30 days after entry thereof. Hoover v. City of Albuquerque, 56 N.M. 525, 245 P.2d 1038 (1952), overruled on other grounds, Albuquerque Prods. Credit Ass'n v. Martinez, 91 N.M. 317, 573 P.2d 672 (1978).

Statutes limiting time for vacating final judgments inapplicable in extrinsic fraud or collusion cases. Kerr v. Southwest Fluorite Co., 35 N.M. 232, 294 P. 324 (1930).

In workmen's compensation case, court abused its discretion in vacating a judgment for the employee on grounds of surprise, where after hearing the doctor testify, the employer and insurer rested their case without challenging his evidence, no continuance or postponement was sought as a result of his evidence, he was not interrogated as to his report to the company nor as to the statements made to the employer and insurer's attorney; and their motion for a new trial was based on the sufficiency of the evidence to support the findings. Thus, the employer and insurer were given every opportunity to fully develop their defense, and in accordance with their legal duty are presumed to have exhausted their proof. Battersby v. Bell Aircraft Corp., 65 N.M. 114, 332 P.2d 1028 (1958).

Failure to include description, etc., in appraisal does not warrant vacation. — Although commissioners appointed to appraise land in condemnation proceedings failed to include description of property involved, date of view and other details, such failure was not an irregularity which would allow vacation of judgment awarding owner of land the amount of damages which had been assessed by said commissioners. Board of County Comm'rs v. Wasson, 37 N.M. 503, 24 P.2d 1098 (1933) (decided under former law).

Nor where decrees of foreclosure of mechanic's lien. — Where a contractor secures personal judgment against the owner of improved real property for labor and materials furnished and a decree of foreclosure of mechanic's lien, agreed to as to form by attorneys for the parties, there is no apparent irregularity warranting a vacation of the judgment. Mozley v. Potteiger, 37 N.M. 91, 18 P.2d 1021 (1933) (decided under former law).

Jurisdiction exceeded when lack of compliance with Paragraph B. — A court acts in excess of its jurisdiction in vacating a default judgment without a showing of compliance with Subdivision (b) (see now Paragraph B). Starnes v. Starnes, 72 N.M. 142, 381 P.2d 423 (1963), overruled on other grounds, Albuquerque Prods. Credit Ass'n v. Martinez, 91 N.M. 317, 573 P.2d 672 (1978).

Default judgment entered without required notice. — Default judgments entered without the required three-day notice under Paragraph B of Rule 1-055 NMRA must be set aside. State ex rel. N.M. State Police Dep't v. One 1984 Pontiac 6000, 111 N.M. 85, 801 P.2d 667 (Ct. App. 1990), aff'd, 111 N.M. 746, 809 P.2d 1274 (1991).

Motion to vacate default judgment rests upon court's discretion. — A motion to set aside a default or a judgment by default is addressed to the discretion of the court, and an adequate basis for the motion must be shown. In exercising this discretion the court will be guided by the fact that default judgments are not favored in the law. The court should not reopen a default judgment merely because the party in default requests it, but should require the party to show both that there was good reason for the default and that he has a meritorious defense to the action. Wakely v. Tyler, 78 N.M. 168, 429 P.2d 366 (1967).

The motion to set aside or vacate a default judgment is addressed to the sound discretion of the trial court. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

It is settled that the action of the trial court, in setting aside a default judgment, is discretionary under this rule. Weisberg v. Garcia, 75 N.M. 367, 404 P.2d 565 (1965).

And ruling not reversed save for abuse of discretion. — A motion to set aside a default judgment is addressed to the sound discretion of the trial judge, whose ruling will not be reversed except for abuse of that discretion. Springer Corp. v. Herrera, 85 N.M. 201, 510 P.2d 1072 (1973), overruled on other grounds Sunwest Bank v. Roderiguez, 108 N.M. 211, 770 P.2d 533 (1989); Gilmore v. Griffith, 73 N.M. 15, 385 P.2d 70 (1963); Wooley v. Wicker, 75 N.M. 241, 403 P.2d 685 (1965); Conejos County Lumber Co. v. Citizens Sav. & Loan Ass'n, 80 N.M. 612, 459 P.2d 138 (1969).

The action of the trial court in setting aside a default judgment under this rule is discretionary. Where good cause is shown, the order of the district court in setting aside a default judgment will only be disturbed for an abuse of discretion. Gilmore v. Griffith, 73 N.M. 15, 385 P.2d 70 (1963).

Setting aside judgment under Subdivision (b) (see now Paragraph B) is discretionary with trial court; an appellate court will not interfere with the action of a trial court in vacating a judgment except upon a showing of abuse of discretion. Phelps Dodge Corp. v. Guerra, 92 N.M. 47, 582 P.2d 819 (1978); McKee v. United Salt Corp., 96 N.M. 382, 630 P.2d 1237 (Ct. App. 1980), aff'd in part, rev'd on other grounds, 96 N.M. 65, 628 P.2d 310 (1981); Sun Country Sav. Bank v. McDowell, 108 N.M. 528, 775 P.2d 730 (1989).

Abuse of discretion means judge acted arbitrarily or unreasonably. — The vacating of a default judgment for good cause is a matter within the sound discretion of the trial court. The trial court's ruling will not be reversed unless an abuse of discretion is present which is defined as when the judge has acted arbitrarily or unreasonably under the particular circumstances. Richins v. Mayfield, 85 N.M. 578, 514 P.2d 854 (1973); United Salt Corp. v. McKee, 96 N.M. 65, 628 P.2d 310 (1981).

Motion to set aside a default judgment was a matter addressed to the sound discretion of the trial judge, whose ruling would not be reversed except for abuse of that discretion. Discretion, in this sense, was abused only when the trial judge has acted arbitrarily or unreasonably. Conejos County Lumber Co. v. Citizens Sav. & Loan Ass'n, 80 N.M. 612, 459 P.2d 138 (1969).

Default judgments not favored. — In exercising discretion to set aside a default judgment, courts should bear in mind that default judgments are not favored and that, generally, causes should be tried upon their merits. Springer Corp. v. Herrera, 85 N.M. 201, 510 P.2d 1072 (1973); Marberry Sales, Inc. v. Falls, 92 N.M. 578, 592 P.2d 178 (1979).

Motion to set aside default judgment on grounds of "mistake, inadvertence, surprise or excusable neglect," is addressed to the sound discretion of the trial judge. In the exercise of such discretion, the trial court should bear in mind that default judgments are not favored and that, generally, causes should be tried on their merits. Wooley v. Wicker, 75 N.M. 241, 403 P.2d 685 (1965).

In exercising the discretion whether to set aside a default judgment, courts should bear in mind that default judgments are not favored and that, generally, causes should be tried upon their merits, but should also recognize that the rules of procedure are intended to provide an orderly procedure and to expedite the disposal of causes. Rogers v. Lyle Adjustment Co., 70 N.M. 209, 372 P.2d 797 (1962).

Basis for setting aside default judgment. — If a court finds (1) mistake, inadvertence, surprise or excusable neglect, and (2) a meritorious defense, and there are no intervening equities in favor of the other party, a court should set aside a default judgment. New Mexico Educators Fed. Credit Union v. Woods, 102 N.M. 16, 690 P.2d 1010 (1984).

To establish the existence of a meritorious defense sufficient to warrant setting aside a default judgment the movant must proffer some statement of underlying facts to support the allegation. Sunwest Bank v. Roderiguez, 108 N.M. 211, 770 P.2d 533 (1989).

Policy of law to decide cases on merits. — It is the policy of the law to prefer that cases be decided on the merits, and this policy looks with disfavor upon default judgments and the litigant who attempts to take advantage of the mistake, surprise, inadvertence or neglect of an adversary. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

And doubts resolved in favor of motion to vacate. — Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits. Wakely v. Tyler, 78 N.M. 168, 429 P.2d 366 (1967).

Time limit of 39-1-1 NMSA 1978 inapplicable to default judgment. — Provision in 39-1-1 NMSA 1978 that failure by the court to rule on a motion within 30 days shall be deemed a denial thereof had no application as to the timeliness of an appeal from an order denying motion to set aside default judgment on grounds of mistake, inadvertence or excusable neglect. Such appeal is governed by this rule, which provides that motions thereunder may be made within a reasonable time, with a one-year limitation as to some of the grounds therein specified. Wooley v. Wirker, 75 N.M. 241, 403 P.2d 685 (1965).

Court was not precluded from ruling on a motion to vacate a default judgment after 30 days had passed since filing of the motion because 39-1-1 NMSA 1978 stipulating that court's failure to rule within 30 days constituted a denial was held to be inapplicable. McLachlan v. Hill, 77 N.M. 473, 423 P.2d 992 (1967).

Motion to vacate properly denied where defendant failed to appear. — Trial court did not abuse its discretion in denying motion to vacate a default judgment where defendant inexcusably failed to attend the hearing set for considering the motion for default, of which he had been notified, even though defendant had relied on previous local custom that an entry of appearance followed by late pleading would protect against the entry of default judgment. Rogers v. Lyle Adjustment Co., 70 N.M. 209, 372 P.2d 797 (1962).

Negligent failure to appear does not necessarily bar the right to have a default set aside upon application filed timely. Dyne v. McCullough, 36 N.M. 122, 9 P.2d 385 (1932)(decided under former law).

Court did not err in vacating default judgment under this rule, where the motion for default judgment filed by plaintiff was not consistent with the return of service and the affidavit of the deputy sheriff that service of process was made on a member, not an officer or as otherwise provided in Rule 4(o) (see now Rule 1-004 NMRA), since the

court could have found the judgment void although it did not make this ruling explicit. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

When refusal to vacate not interfered with by supreme court. — Where on the record, supreme court cannot say that the trial court acted arbitrarily or unreasonably or was unaware of the general policy that disputes should be tried on their merits rather than settled by default judgment, supreme court found no basis for interfering with the trial court's discretion in refusing to set aside the default judgment. Guthrie v. U.S. Lime & Mining Corp., 82 N.M. 183, 477 P.2d 817 (1970).

When res judicata applies to default decree. — A default decree in a suit to quiet title, in which the plaintiff's right and title were based upon a tax deed which was invalid because the taxes for which it was issued had been paid, cannot in the absence of fraud be set aside by a subsequent suit for that purpose, the doctrine of res judicata being applicable. Bowers v. Brazell, 27 N.M. 685, 205 P. 715 (1922)(decided under former law).

Law reviews. — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For note, "Post-Conviction Relief After Release From Custody: A Federal Message and a New Mexico Remedy," see 9 Nat. Resources J. 85 (1969).

For comment, "Statutory Notice in Zoning Actions: Nesbit v. City of Albuquerque," see 10 N.M.L. Rev. 177 (1979-80).

For note, "Family Law - A Limitation on Grandparental Rights in New Mexico: Christian Placement Service v. Gordon," see 17 N.M.L. Rev. 207 (1987).

For note, "Professional Responsibility - Attorneys Are Not Liable to Their Clients' Adversaries: Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.," see 20 N.M.L. Rev. 737 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3B Am. Jur. 2d Aliens and Citizens §§ 1693, 1694; 7 Am. Jur. 2d Audita Querela § 2; 46 Am. Jur. 2d Judgments § 127 et seq.; 58 Am. Jur. 2d New Trial § 8.

Clerical errors, correction of, 14 A.L.R.2d 224.

Notice of application or intention to correct error in judgment entry, necessity of, 14 A.L.R.2d 224.

Power of court, in absence of express authority, to grant relief from judgment by default in divorce action, 22 A.L.R.2d 1312.

Lack of certainty, judgment ambiguous or silent as to amount of recovery as defective for, 55 A.L.R.2d 723.

Formal requirements of judgment or order as regards appealability, 73 A.L.R.2d 250.

Vacating or setting aside divorce decree after remarriage of party, 17 A.L.R.4th 1153.

Incompetence of counsel as ground for relief from state court civil judgment, 64 A.L.R.4th 323.

Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 A.L.R.5th 422.

Amendment of record of judgment in state civil case to correct judicial errors and omissions, 50 A.L.R.5th 653.

Vacating or opening judgment by confession on ground of fraud, illegality, or mistake, 91 A.L.R.5th 485.

Relief from judicial error by motion under F.R.C.P. Rule 60(b)(1), 1 A.L.R. Fed. 771.

Propriety of conditions imposed in granting relief from judgment under Rule of Civil Procedure 60(b), 3 A.L.R. Fed. 956.

Independent actions to obtain relief from judgment, order or proceeding under Rule 60(b) of the Federal Rules of Civil Procedure, 53 A.L.R. Fed. 558.

Application of civil or criminal procedural rules in federal court proceeding on motion in nature of writ of error coram nobis, 53 A.L.R. Fed. 762.

Lack of jurisdiction, or jurisdictional error, as rendering federal district court judgment "void" for purposes of relief under Rule 60(b)(4) of Federal Rules of Civil Procedure, 59 A.L.R. Fed. 831.

Effect of filing of notice of appeal on motion to vacate judgment under Rule 60(b) of Federal Rules of Civil Procedure, 62 A.L.R. Fed. 165.

Who has burden of proof in proceeding under Rule 60(b)(4) of Federal Rules of Civil Procedure to have default judgment set aside on ground that it is void for lack of jurisdiction, 102 A.L.R. Fed. 811.

Construction and application of Rule 60(b)(5) of Federal Rules of Civil Procedure, authorizing relief from final judgment where its prospective application is inequitable, 117 A.L.R. Fed. 419.

49 C.J.S. Judgments §§ 275 to 325, 327 to 359.

1-061. Harmless error.

No error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

ANNOTATIONS

Compiler's notes. — For derivation of this rule, *see* notes to Rule 1-060 NMRA.

This rule, to the extent it relates to evidentiary matters, is deemed superseded by Rule 11-103 NMRA.

On account of the relevancy of this rule to nearly all appeals, the cases annotated below should not be considered an all-inclusive listing of the applications of the rule.

Rule applicable to appellate courts. — This rule applies not only to the district courts, but also to appellate courts. El Paso Elec. Co. v. Real Estate Mart, Inc., 98 N.M. 570, 651 P.2d 105 (Ct. App. 1982); Gallegos v. Citizens Ins. Agency, 108 N.M. 722, 779 P.2d 99 (1989).

This rule necessarily confers discretion upon trial court in its application to Rule 60 (see now Rule 1-060 NMRA). Adams & McGahey v. Neill, 58 N.M. 782, 276 P.2d 913 (1954).

But as to polling jury, slightest evidence of prejudice acceptable. — Mere failure of trial court to poll jury upon proper request does not in itself constitute reversible error, but reviewing court will accept the slightest evidence of prejudice, and all doubt will be resolved in favor of the party claiming prejudice. Levine v. Gallup Sand & Gravel Co., 82 N.M. 703, 487 P.2d 131 (1971).

Error to warrant a reversal must be prejudicial. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

A party must show prejudice before reversal is warranted. El Paso Elec. Co. v. Real Estate Mart, Inc., 98 N.M. 570, 651 P.2d 105 (Ct. App. 1982).

To complaining party. — Plaintiffs are not entitled to a reversal based upon error which does not affect them and which is harmless to them. Poulos v. Cock 'N Bull Beverage, Inc., 83 N.M. 45, 487 P.2d 1350 (Ct. App. 1971).

Unless errors committed by lower court are shown to be prejudicial to a substantial right of the party complaining, they will be disregarded. Johnson v. Nickels, 66 N.M. 181, 344 P.2d 697 (1959).

Appeals are ordinarily not allowed for the purpose of settling abstract questions, however interesting or important to the public generally, but only to correct error injuriously affecting appellant. Ruidoso State Bank v. Brumlow, 81 N.M. 379, 467 P.2d 395 (1970), overruled on other grounds De Vargas Sav. & Loan Ass'n v. Campbell, 87 N.M. 469, 535 P.2d 1320 (1975).

Who should reserve error for review. — Although Rule 51(1)(b) (see now Rule 1-051 NMRA) is a mandatory direction to the trial court to give appropriate portions of uniform jury instruction near outset of the trial, where no prejudice was shown as a result of failure to properly instruct the jury, or the complaining party did not reserve the omission for review, there was no reversible error. City of Albuquerque v. Ackerman, 82 N.M. 360, 482 P.2d 63 (1971).

Technical error harmless. — Use of word "statute" instead of the word "law" in instruction on common-law duty of drivers to keep proper lookout and maintain proper control of vehicles was technical and harmless error and should be disregarded. Porter v. Ferguson-Steere Motor Co., 63 N.M. 466, 321 P.2d 1112 (1958).

Particular form of judgment, order or decision is of no consequence so long as it can be ascertained therefrom what rights, if any, of the respective parties have been determined thereby. Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

Proper to restrict examination by counsel. — Restriction of examination by counsel was strictly within the trial judge's discretion and was done to avoid repetition of questions and answers. Whereas trial judge has a duty to guide a trial expeditiously to its conclusion, and rulings were not inconsistent with justice nor were substantial rights of any party affected, then the error, if any, was harmless. Csanyi v. Csanyi, 82 N.M. 411, 483 P.2d 292 (1971).

Order limiting issues not prejudicial. — Trial court order limiting the issues in the case to assertions that employment contract was without consideration and signed under duress was not prejudicial to plaintiff. Taylor v. Lovelace Clinic, 78 N.M. 460, 432 P.2d 816 (1967).

Allowing trial amendment to complaint harmless error. — Where the original complaint contained no allegation of gross negligence, but a trial amendment to the complaint was allowed to insert one in absence of notice to the defendant, who had appeared and answered but was not present in person or by counsel at the trial, allowance of amendment was harmless error. Gurule v. Larson, 78 N.M. 496, 433 P.2d 81 (1967).

Likewise omission of instruction on proximate cause. — In an automotive collision case, while something might have been added by way of understandability if the instruction had included an admonition that there would be no liability unless the negligence as defined proximately contributed to the accident, it cannot be said that omission of such language constitutes reversible error. Sturgeon v. Clark, 69 N.M. 132, 364 P.2d 757 (1961).

But refusal to instruct on negligence per se prejudicial error. — It was prejudicial error for trial court to refuse to instruct the jury that violation of the ordinance involved is negligence as a matter of law where it is proximate cause of injury. Sanchez v. J. Barron Rice, Inc., 77 N.M. 717, 427 P.2d 240 (1967).

Remittitur or new trial properly refused. — Where the court found ample evidence of a substantial nature to support the verdict, where amounts awarded by the jury were all between the highest and lowest values testified to by the various witnesses and where nothing in the record indicated that the verdict of the jury was wrong or that it was made through mistake or prejudice or that it was excessive as a matter of law, court properly refused to grant remittitur or a new trial. El Paso Elec. Co. v. Landers, 82 N.M. 265, 479 P.2d 769 (1970).

Findings of court should be considered in their entirety; appellant cannot rely on one erroneous conclusion to justify reversal of the entire case. Stolworthy v. Morrison-Kaiser F & S, 72 N.M. 1, 380 P.2d 13 (1963).

Appellate court cannot limit its review to only a portion of the record but must review the entire record presented to the trial court. Coe v. City of Albuquerque, 79 N.M. 92, 440 P.2d 130 (1968).

It was not material that jury instruction did not contain all aspects of damages to be considered by the jury where the instructions read as a whole fairly presented the damage issue; trial court did not commit error in giving said instruction. Lujan v. Gonzales, 84 N.M. 229, 501 P.2d 673 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972).

A reviewing court examines and considers the instructions as a whole. In considering instructions as a whole, particular expressions should be considered as qualified by the context and other instructions. AT & T Co. v. Walker, 77 N.M. 755, 427 P.2d 267 (1967).

If trial court stated a reason upon which it could properly disallow the amendment to the complaint, its ruling is not to be reversed because it also stated another allegedly erroneous reason. Cantrell v. Dendahl, 83 N.M. 583, 494 P.2d 1400 (Ct. App. 1972).

Error was harmless where trial court's conclusion of law was that plaintiff's claim of title was barred solely upon a claim of adverse possession when actually it rested on other grounds as well. Heron v. Conder, 77 N.M. 462, 423 P.2d 985 (1967).

Erroneous finding of fact immaterial to decision in case is harmless error and cannot be basis for reversal. Board of County Comm'rs v. Little, 74 N.M. 605, 396 P.2d 591 (1964).

Error must necessarily have affected ultimate disposition of case. — Trial court's failure to adopt requested findings was not reversible error where had findings between adopted, they would not necessarily have affected the ultimate disposition of the case. Grants State Bank v. Pouges, 84 N.M. 340, 503 P.2d 320 (1972).

Judgment will not be reversed by reason of erroneous instruction unless upon consideration of the entire case, including the evidence, it shall appear that such error has resulted in a miscarriage of justice; usually there will be no cause for reversal unless evidence indicates that without such error in the instructions the verdict probably would have been different from the verdict actually returned by the jury. Since there was a conflict in the evidence as to degree of injury of plaintiffs and there was evidence that much of chiropractor's treatment may have been unnecessary and that he had a personal interest in prolonging treatment, jury had ample ground for deciding that plaintiffs had suffered no compensable injuries as a result of the collision, and therefore inclusion of an erroneous instruction as to contributory negligence of passenger was harmless and did not require reversal. Romero v. Melbourne, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Erroneous findings of fact unnecessary to support judgment of the court are not grounds for reversal. Specter v. Specter, 85 N.M. 112, 509 P.2d 879 (1973).

There was no prejudice to appellant nor any error that would affect the ultimate result or substantial rights of the parties as a result of trial court's quieting title to the stock in defendant as against plaintiff where there was technically no pleading warranting granting of such relief, but the complaint sought an adjudication of ownership in the stock and the answer not only denied plaintiff's ownership but asserted ownership in defendant. Hyde v. Anderson, 68 N.M. 50, 358 P.2d 619 (1916).

Failure to instruct on a theory supported by substantial evidence is generally reversible error, but if jury has resolved question of liability in favor of defendant, failure to have given correct instructions on question of damages does not constitute reversible error. Britton v. Boulden, 87 N.M. 474, 535 P.2d 1325 (1975).

Exclusion of evidence deemed harmless error. — See Kleinberg v. Board of Educ., 107 N.M. 38, 751 P.2d 722 (Ct. App. 1988).

Court must state error did not affect jury to affirm erroneous ruling. — If the court is to affirm an erroneous ruling, it must say with a high degree of assurance that the error did not affect the jury and was therefore harmless. Mallard v. Zink, 94 N.M. 94, 607 P.2d 632 (Ct. App.), cert. denied, 94 N.M. 629, 614 P.2d 546 (1979).

Speculative effect not considered on appeal. — Even if trial court erred in denying plaintiffs' motions for summary judgment and for an instructed verdict on liability, plaintiffs were not harmed since jury found for plaintiffs on liability; assertion that an unnecessary battle by the jury on the question of liability led it to compromise on the award is pure speculation. Phillips v. Smith, 87 N.M. 19, 528 P.2d 663 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974), overruled on other grounds, Baxter v. Gannaway, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991).

No reversible error where substantial evidence on both sides. — Where evidence is conflicting, refusal to make findings and conclusions favorable to unsuccessful party cannot be sustained as error. Thus where requested findings would have been supported by substantial evidence, but trial court adopted contrary findings also supportable by substantial evidence, there was no reversible error. Grants State Bank v. Pouges, 84 N.M. 340, 503 P.2d 320 (1972).

Where reasons in record, failure to specify not reversible error. — Although trial court did not state of record reasons for modification of a uniform jury instruction on damages as is required by Rule 51(c) (see now Rule 1-051 NMRA), nonetheless there was evidence in the record to support modification, and defendant failed to show any prejudice resulting therefrom; thus modification was not reversible error. O'Hare v. Valley Utils., Inc., 89 N.M. 105, 547 P.2d 1147 (Ct. App.), rev'd in part on other grounds, 89 N.M. 262, 550 P.2d 274 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 562 et seq.; 58 Am. Jur. 2d New Trial §§ 83 to 86.

Counsel's argument or comment stating or implying that defendant is not insured and will have to pay verdict himself as prejudicial error, 68 A.L.R.4th 954.

5 C.J.S. Appeal and Error § 470 et seq.; 66 C.J.S. New Trial § 17.

1-062. Stay of proceeding to enforce a judgment.

A. **Stay; in general.** Except as provided in these rules, execution may issue upon a judgment and proceedings may be taken for its enforcement upon the entry thereof unless otherwise ordered by the court. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period of its entry and until an appeal is taken or during the pendency of an appeal. The provisions of Paragraph C of this rule govern the suspending, modifying, restoring or granting of an injunction during the pendency of an appeal.

B. **Stay on motion for new trial or for judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 1-059

NMRA, or of a motion for relief from a judgment or order made pursuant to Rule 1-060 NMRA, or of a motion for judgment in accordance with a motion for a directed verdict pursuant to Rule 1-050 NMRA, or of a motion for amendment to the findings or for additional findings made pursuant to Paragraph D of Rule 1-052 NMRA.

C. **Injunction and certain special proceedings.** When an appeal is taken from an interlocutory or final judgment granting, dissolving or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. In all actions of contested elections, mandamus, removal of public officers, quo warranto or prohibition, it shall be discretionary with the court rendering judgment to allow a supersedeas of the judgment, and if the appeal is allowed to operate as a supersedeas it shall be upon such terms and conditions as the court deems proper.

D. **Stay upon appeal.** When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in Paragraphs A and C of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the district court. The bond shall be conditioned for the satisfaction of and compliance with the judgment in full together with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award. The surety, sureties or collateral securing such bond, and the terms thereof, must be approved by and the amount fixed by the district court. If a bond secured by personal surety or sureties is tendered, the same may be approved only on notice to the appellee. Each personal surety shall be required to show a net worth at least double the amount of the bond. When the judgment is for the recovery of money, the amount of the bond shall be such sum as will cover the whole amount of the judgment remaining unsatisfied, plus costs, interest and damages for delay. In any event, in determining the sufficiency of the surety and the extent to which such surety shall be liable on the bond, or whether any surety shall be required, the court shall take into consideration the type and value of any collateral which is in, or may be placed in, the custody or control of the court and which has the effect of securing payment of and compliance with such judgment.

E. **Stay in special instances.** When an appeal is taken by the state or an officer or agency thereof, or by direction of any department of the state, or by any political subdivision or institution of the state, or by any municipal corporation, the taking of an appeal shall, except as provided in Paragraphs A and C of this rule, operate as a stay.

F. **Special rule for fiduciaries.** Where an appeal is taken by a fiduciary on behalf of the estate or beneficiary which the fiduciary represents, the amount of the bond and type of security shall be fixed by the court and, in fixing the same, due regard shall be

given to the assets under the control of the fiduciary and any bond given by such fiduciary.

G. **Writs of error.** Upon allowance of a writ of error, the district court which adjudged or determined the cause shall, unless the Supreme Court or the justice thereof issuing the writ shall otherwise order, have the same powers, authority and duties with reference to the supersedeas and stay as in the case of an appeal. The time within which supersedeas bond may be filed shall be the same as in the case of appeals, and shall run from the date the writ of error is allowed in lieu of the date notice of appeal is filed. The authority of the district court to extend such time shall be the same, and subject to the same limitations, as in case of appeal.

H. **Stay of judgment as to multiple claims or multiple parties.** When final judgment has been entered under the conditions stated in Paragraph B of Rule 1-054 NMRA, the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

[As amended, effective August 1, 1989; January 1, 1996; as amended by Supreme Court Order No. 08-8300-32, effective November 17, 2008.]

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For execution on judgment, *see* Section 39-4-1 NMSA 1978.

For supersedeas and stay, *see* Rule 12-207 NMRA.

For writs of error, *see* Rule 12-503 NMRA.

The 1996 amendment, effective January 1, 1996, made stylistic changes in Paragraphs A and C, substituted the second sentence of Paragraph D for "The bond may be given at any time within thirty (30) days after taking the appeal, except that the district court for good cause shown may grant the appellant not to exceed thirty (30) days' additional time within which to file such bond", and made a gender neutral change in Paragraph F.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-32, effective November 17, 2008, in Paragraph B, changed the reference from Paragraph B to Paragraph D of Rule 1-052 NMRA and in Paragraph H, changed the reference from Paragraph C to Paragraph B of Rule 1-054 NMRA.

Stay generally considered prospective. — Under the plain language of Section 39-3-23 NMSA 1978 and this rule, a stay is generally prospective rather than retroactive,

unless otherwise specified. City of Sunland Park v. N.M. Pub. Reg. Comm'n., 2004-NMCA-024, 135 N.M 143, 85 P.3d 267, cert. denied, 2004-NMCERT-002.

A finding that a stay is generally not retroactive is consistent with the prevailing common law. City of Sunland Park v. N.M. Pub. Reg. Comm'n., 2004-NMCA-024, 135 N.M 143, 85 P.3d 267, cert. denied, 2004-NMCERT-002.

A finding that a stay is generally not retroactive is consistent with several other jurisdictions that generally decline to give retroactive effect to a stay; the jurisdictions that give retroactive effect to a stay have done so through legislative enactment. New Mexico law appears to give prospective effect to stays unless otherwise provided. City of Sunland Park v. N.M. Pub. Reg. Comm'n., 2004-NMCA-024, 135 N.M 143, 85 P.3d 267, cert. denied, 2004-NMCERT-002.

Action during pendency of appeal. — The district court may act on matters of supersedeas and stay during the pendency of an appeal. In re Estate of Gardner, 112 N.M. 536, 817 P.2d 729 (Ct. App. 1991).

A bond or security is not mandatory when an application for a stay of execution is made and there has been no notice of appeal or motion to vacate. Trial court has inherent power under this rule to stay execution of a judgment temporarily in order to prevent injustice. Segal v. Goodman, 115 N.M. 349, 851 P.2d 471 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 146 et seq.; 30 Am. Jur. 2d Executions § 57 et seq.; 42 Am. Jur. 2d Injunctions § 348.

Prohibition as proper remedy to prevent enforcement of judgment which has been reversed or modified on appeal, or from which an appeal, with supersedeas or stay, is pending, 70 A.L.R. 105.

Right to have enforcement of judgment for costs enjoined or stayed pending final determination of case, 78 A.L.R. 359.

Right to stay without bond or other security pending appeal from judgment or order against executor, administrator, guardian, trustee, or other fiduciary who represents interests of other persons, 119 A.L.R. 931.

Motion for new trial as suspension or stay of execution or judgment, 121 A.L.R. 686.

Condition of bond on appeal not in terms covering payment of money judgment, as having that effect by implication or construction, 124 A.L.R. 501.

Another state or country, stay of civil proceedings pending determination of action in, 19 A.L.R.2d 301.

Necessity that person acting in fiduciary capacity give bond to maintain appellate review proceedings, 41 A.L.R.2d 1324.

Federal court in same state, stay of civil proceedings pending determination of action in, 56 A.L.R.2d 335.

Arbitration disqualified by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion, or fraud of arbitrators, 65 A.L.R.2d 755.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable, 79 A.L.R.2d 1352.

Power of court, in absence of statute, to require corporate surety on fiduciary bond in probate proceeding, 82 A.L.R.2d 926.

Mandamus, stay or supersedeas on appellate review in, 88 A.L.R.2d 420.

Effect of supersedeas or stay on antecedent levy, 90 A.L.R.2d 483.

Appealability of order staying, or refusing to stay, action because of pendency of another action, 18 A.L.R.3d 400.

4 C.J.S. Appeal and Error §§ 335, 409; 33 C.J.S. Execution §§ 152 to 193; 49 C.J.S. Judgments §§ 693 to 696.

II. STAY UPON APPEAL.

Time period to seek supersedeas bond. — The time period specified in Paragraph D of Rule 1-062 NMRA in which an appellant may seek a supersedeas bond prevails over the time period specified in Subsection A of Section 39-3-22 NMSA 1978. *Jones v. Harris News, Inc.*, 2010-NMCA-088, 148 N.M. 612, 241 P.3d 613.

Amount of supersedeas bond. — Because Rule 1-062(D) NMRA and Section 39-3-22 NMSA 1978 are not in conflict, bond was appropriately set according to the statute. Rule 1-062(D) provides for factors that must be considered by the court in determining the amount of a bond that will protect a judgment holder who must delay execution of the judgment pending appeal. Section 39-3-22 expands upon the purpose of Rule 1-062(D) by providing an alternative mechanism for ensuring that the holder of a judgment is adequately protected from any damage that may result from a stay of the judgment pending appeal. Grassie v. Roswell Hospital Corp., 2008-NMCA-076, 144 N.M. 241, 185 P.3d 1091.

Time limitations must be complied with. — Although a district court has the inherent power to stay execution of a judgment rendered, the party must show the existence of exceptional, equitable grounds justifying the granting of a stay when the statute or rule does not otherwise provide for such relief. A party may not, however, disregard the time

limitations of 39-3-22A NMSA 1978 and Paragraph D and then post a supersedeas bond or obtain a stay of execution. Long v. Continental Divide Elec. Coop., 117 N.M. 543, 873 P.2d 289 (Ct. App. 1994).

Where decision appealed from is for recovery other than fixed amount of money, and no damages have been adjudged against appellant, it is improper, upon affirmance, for the mandate to direct entry of judgment against sureties on the supersedeas bond. Perez v. Gil's Estate, 31 N.M. 105, 240 P. 999 (1925);(decided under former law).

Judgment being superseded not being money judgment, it was "inappropriate" upon affirmance to order judgment against the sureties on the bond. Burroughs v. United States Fid. & Guar. Co., 74 N.M. 618, 397 P.2d 10 (1964) (decided under Rule 9(1) of the former "Supreme Court Rules"), overruled on other grounds, Quintana v. Knowles, 113 N.M. 382, 827 P.2d 97 (1992).

Failure to file bond not prejudice to appellee. — Fact that no supersedeas bond was filed by appellant was not showing of prejudice to an appellee under former law sufficient to dismiss appeal. Young v. Kidder, 35 N.M. 20, 289 P. 69 (1930).

When remaining appellants unable to join in bond. — Where appeal was taken by all parties against whom joint and several judgment was rendered, and only one appellant filed cost or supersedeas bond, remaining appellants would not be permitted to join in such cost or supersedeas bond or file new bond after time limited by statute for giving of such bonds and appeal as to defaulting appellants would, on motion, be dismissed. Rogers v. Herbst, 25 N.M. 408, 183 P. 749 (1919) (decided under former law).

Fixing double amount of judgment. — Judgment in a mortgage foreclosure action for a total of $29,751.36, with interest from a certain date, and for costs, with a further provision for the advertisement and sale by a special master, a report of the sale, the deposit of the proceeds in court and entry of judgment for any deficiency was a plain money judgment to which provision for fixing supersedeas at double amount of the judgment applied. Samples v. Robinson, 58 N.M. 701, 275 P.2d 185 (1954) (decided under former law).

Modification of judgment not discharge sureties. — The fact that a judgment is modified, though affirmed in principle, does not discharge the sureties on the supersedeas bond. Benderach v. Grujicich, 30 N.M. 331, 233 P. 520 (1924) (decided under former law).

The inability to post a supersedeas bond may not operate to deny the right to a stay of a forfeiture judgment under the Controlled Substances Act. Mitchell v. City of Farmington Police Dep't, 111 N.M. 746, 809 P.2d 1274 (1991).

Suit for damages on supersedeas bond is permitted and this right is cumulative. Burroughs v. United States Fid. & Guar. Co., 74 N.M. 618, 397 P.2d 10 (1964) (decided

under Rule 9(1) of the former "Supreme Court Rules"), overruled on other grounds, Quintana v. Knowles, 113 N.M. 382, 827 P.2d 97 (1992).

Controlling consideration in determining liability turns on form of bond undertaking when considered in the light of the applicable statutes and rules. Burroughs v. United States Fid. & Guar. Co., 74 N.M. 618, 397 P.2d 10 (1964) (decided under Rule 9(1) of the former "Supreme Court Rules"), overruled on other grounds, Quintana v. Knowles, 113 N.M. 382, 827 P.2d 97 (1992).

Effect of declaratory judgment not superseded or stayed. — The trial court could base its summary judgment on the declaratory judgment in an independent proceeding, thus giving effect to a decision that was pending on appeal, because there was no showing that the declaratory judgment had been superseded or stayed. The judgment was in effect and could be enforced. Chavez v. Mountainair School Bd., 80 N.M. 450, 457 P.2d 382 (Ct. App. 1969).

No recovery had upon supersedeas bond given for declaratory judgment where it is not a money judgment. Savage v. Howell, 45 N.M. 527, 118 P.2d 1113 (1940) (decided under former law).

Rents covered, pending appeal, by bond. — A supersedeas bond covering damages and costs, if the parties failed to make good their plea, covered rents and profits, pending appeal, on real estate decreed to belong to plaintiff. Hart v. Employers' Liab. Assurance Corp., 38 N.M. 83, 28 P.2d 517 (1933) (decided under former law).

Filing appeal by state or its political subdivision triggers the automatic stay provisions of Section 39-3-23 NMSA 1978 and Paragraph E of this rule. City of Sunland Park v. N.M. Pub. Reg. Comm'n., 2004-NMCA-024, 135 N.M. 143, 85 P.3d 267, cert. denied, 2004-NMCERT-002.

Appeal by highway department operates as stay of employment reinstatement order. State ex rel. New Mexico State Hwy. Dep't v. Silva, 98 N.M. 549, 650 P.2d 833 (Ct. App. 1982).

Defendant may not rely on separate judgment stayed pending appeal. — Defendant charged with violations of local sign ordinance could not rely on judgment pending appeal in a separate case which held the ordinance unconstitutional since city's appeal of judgment automatically stayed court's decision; hence, his sign that did not comply with ordinance was not lawfully erected. City of Albuquerque v. Jackson, 101 N.M. 457, 684 P.2d 543 (Ct. App. 1984).

1-063. Inability of a judge to proceed.

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and

determining that the proceedings in the case may be completed without prejudice to the parties. The successor judge may recall any witness.

[As amended, effective January 1, 1995.]

ANNOTATIONS

The 1995 amendment, effective January 1, 1995, rewrote the rule heading which read "Disability of a judge" and rewrote the rule.

Successor judge's authority to enter findings of fact and conclusions of law prepared by predecessor. — A successor judge's lack of authority to enter findings of fact and conclusions of law prepared by his predecessor, when he had not heard any of the evidence, was not jurisdictional error nor could it be raised for the first time on appeal under the doctrine of fundamental error. Grudzina v. New Mexico Youth Diagnostic & Dev. Center, 104 N.M. 576, 725 P.2d 255 (Ct. App. 1986).

Replacement judge had judicial power to hear and determine defendant's motion for new trial where original judge had resigned after entering an order amending a decree of divorce. Gruber v. Gruber, 86 N.M. 327, 523 P.2d 1353 (1974).

Successor judge may not sign decision of initial judge. — Even though the initial trial judge prepared the findings of fact and conclusions of law, the successor judge had no power to sign and enter a decision in the case, where there was no decision written, signed or entered before the initial trial judge left the position. Pritchard v. Halliburton Servs., 104 N.M. 102, 717 P.2d 78 (Ct. App. 1986).

Law reviews. — For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 30 et seq., 248, 251.

Journalization by judge of finding or decision of predecessor, 4 A.L.R.2d 584.

Power of successor judge taking office during term time to vacate, etc., judgment entered by his predecessor, 11 A.L.R.2d 1117.

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

48A C.J.S. Judges §§ 161 to 185.

ARTICLE 8
Provisional and Final Remedies and Special Proceedings

1-064. Seizure of person or property.

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state.

ANNOTATIONS

Cross references. — For garnishment, *see* Sections 35-12-1 to 35-12-19 NMSA 1978.

For execution generally, *see* Sections 39-4-1 to 39-4-16 and 39-5-1 to 39-5-14 NMSA 1978.

For proceedings in aid of execution, *see* Section 39-4-3 NMSA 1978.

For levy and sale of livestock, *see* Sections39-6-1 to 39-6-4 NMSA 1978.

For replevin, *see* Sections 42-8-1 to 42-8-22 NMSA 1978.

For attachment generally, *see* Sections 42-9-1 to 42-9-39 NMSA 1978.

For exempt property generally, *see* Sections 42-10-1 to 42-10-13 NMSA 1978.

For liens on personal property, *see* Sections 48-3-1 to 48-3-29 NMSA 1978.

For agricultural landlords' liens, *see* Sections 48-6-1 to 48-6-16 NMSA 1978.

For surrender of property pending action to set aside preference to creditor, *see* Section 56-9-4 NMSA 1978.

For attachment in action to set aside preference, *see* Section 56-9-6 NMSA 1978.

For attachment after assignment for benefit of creditors, *see* Section 56-9-46 NMSA 1978.

For fraudulent conveyances, *see* Sections 56-10-14 to 56-10-25 NMSA 1978.

Constitutionality. — New Mexico's present replevin statutes comply with due process standards established by United States supreme court in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974), and are therefore constitutional.

First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

Law reviews. — For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Arrest §§ 73 to 91; 6 Am. Jur. 2d Attachment and Garnishment §§ 1 to 5, 7, 9, 10, 12 to 14, 45 to 70, 91 to 177, 179 to 216.

Leaving property in custody of debtor as abandonment of levy under attachment or execution, 6 A.L.R. 1412.

Waiver of privilege against or nonliability to arrest in civil action, 8 A.L.R. 754.

Debtor's arrest under body execution and discharge under Poor Debtors' Act as satisfaction of debt, 14 A.L.R. 505.

What constitutes nonresidence for purpose of attachment, 26 A.L.R. 180.

Construction and applicability of statute authorizing arrest in civil action for personal injury, 33 A.L.R. 648.

Wrongful attachment or garnishment of debt as conversion, 40 A.L.R. 594.

Foreign or interstate commerce, attachment or garnishment as interference with, 85 A.L.R. 1395.

Personal liability of party who places execution or attachment in hands of official for wrongful levy thereunder upon property of third person, 91 A.L.R. 922.

Intent to defraud or delay creditors within contemplation of attachment statute as inferable as matter of law from fact that debtor has removed or is about to remove property from the state without making adequate provision for his creditors, 92 A.L.R. 966.

Liability on attachment bond as affected by lack of levy or by invalid levy, 108 A.L.R. 917.

Sufficiency of affidavit for attachment respecting fraud or intent to defraud, as against objection that it is a merely legal conclusion, 8 A.L.R.2d 578.

Foreign attachment or garnishment as available in action by nonresident against nonresident or foreign corporation upon a foreign cause of action, 14 A.L.R.2d 420.

Appealability, prior to final judgment, of order discharging or vacating attachment or refusing to do so, 19 A.L.R.2d 640.

Validity of attachment of chattels within store or building other than private dwelling, made without removing the goods or without making an entry, 22 A.L.R.2d 1276.

What constitutes fraudulently contracted debt or fraudulently incurred liability or obligation within purview of statute authorizing attachment on such grounds, 39 A.L.R.2d 1265.

Recovery of value of use of property wrongfully attached, 45 A.L.R.2d 1221.

Posting of redelivery bond by defendant as waiver of damages for wrongful attachment, 57 A.L.R.2d 1376.

What sort of claim, obligation or liability is within contemplation of statute providing for attachment, or giving right of action for indemnity, before a debt or liability is due, 58 A.L.R.2d 1451.

Inclusion or exclusion of first and last days in computing the time for performance of an act or event which must take place a certain number of days before a known future date, 98 A.L.R.2d 1331.

Construction and effect of provision for execution sale on short notice, or sale in advance of judgment under writ of attachment, where property involved is subject to decay or depreciation, 3 A.L.R.3d 593.

Joint bank account as subject to attachment, garnishment or execution by creditor of one of the joint depositors, 11 A.L.R.3d 1465.

Attachment and garnishment of funds in branch bank or main office of bank having branches, 12 A.L.R.3d 1088.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution and foreclosure, 27 A.L.R.3d 863.

What constitutes malice sufficient to justify an award of punitive damages in action for wrongful attachment or garnishment, 61 A.L.R.3d 984.

Recovery of damages for mental anguish, distress, suffering or the like is action for wrongful attachment, garnishment, sequestration or execution, 83 A.L.R.3d 598.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one joint depositor, 86 A.L.R.5th 527.

Modern views as to validity, under federal constitution, of state prejudgment attachment, garnishment and replevin procedures, distraint procedures under landlords' or innkeepers' lien statutes, and like procedures authorizing summary seizure of property, 18 A.L.R. Fed. 223, 29 A.L.R. Fed. 418.

6A C.J.S. Arrest §§ 73 to 93; 7 C.J.S. Attachment §§ 1 to 61, 373 to 420.

1-065. Writs issued by district courts.

A. **Execution, possession and attachment.** Writs of execution, writs of possession issued pursuant to Section 42-4-12 NMSA 1978 and writs of attachment directed to land or an interest in land (other than rents, issues and profits thereof) may be issued by the clerk of the district court in proper cases without endorsement of approval of the district judge.

B. **Approval.** All writs issued by the district courts other than those enumerated in Paragraph A of this rule and Rules 1-065.1 and 1-065.2 NMRA may be issued only upon the express written approval of the district judge endorsed on the writ. All writs shall be signed by the clerk or deputy clerk of the district court and shall bear the court seal. In instances where written approval of the district judge is required, the procedure set out in Paragraphs C through I of this rule shall be followed.

C. **Application.** Application for the writ shall be by verified petition filed with the district court accompanied by the proposed form of writ with a copy of the petition appended as an exhibit.

D. **Contents.** The petition shall set forth the following:

(1) a statement of the facts showing venue and jurisdiction of the court in which the writ is sought, and the right or standing of the filing party;

(2) if the respondent is a public officer, board or tribunal purporting to act in the discharge of official duties, the names of the real parties in interest;

(3) the grounds upon which the petition is based and the facts required by the substantive law for issuance of the writ, stated in concise form; and

(4) a concise statement of the relief sought.

E. **Form.** The writ shall be in lieu of summons. The form of writ shall be in the name of the State of New Mexico, shall contain the caption of the case, the name and address of petitioner's attorney, if any, otherwise petitioner's address, shall direct the respondent or respondents to serve and file a responsive pleading within a time specified in the writ, and, if a date for hearing is set, the date, time and place when hearing will be held. The writ shall further state in concise form the relief sought, but other matters set forth in the petition, copy of which is annexed to the writ, need not be included in the writ. If the date

for service of a responsive pleading and the date for hearing are the same, the writ shall so state. No peremptory writ shall be issued unless a date, not later than ten (10) days after its issuance, is set for a hearing at which it may be challenged, and any hearing date so fixed may be advanced upon motion of any respondent.

F. **Responsive pleading; hearing.** The date set in the writ for responsive pleading or hearing shall be not earlier than seven (7) days following date of issuing the writ unless, from the verified petition or affidavit filed with the petition, the court shall determine that unreasonable loss or hardship is likely to result unless an earlier date is set, in which event determination of the court specifying the particular loss or hardship must be set forth in the writ.

G. **Seizure of property.** Prejudgment writs of attachment may be issued upon application of a party pursuant to Sections 42-9-1 through 42-9-39 NMSA 1978. No prejudgment writ may be issued directing the immediate seizure, sequestration or attachment of personal property, tangible or intangible, and no peremptory writ may be issued, without written or oral notice to the adverse party unless:

(1) it clearly appears from specific facts shown by affidavit or the verified petition that immediate and irreparable injury, loss or damage will result to the petitioner before the adverse party can be heard in opposition;

(2) if the party is a natural person, notice of a right to claim exemptions has been given in accordance with Paragraph J of this rule; and

(3) the petitioner's attorney certifies to the court in writing the efforts, if any, that have been made to give notice and the reasons supporting the petitioner's claims that notice should not be required. Further, no such writ may be issued except upon the giving of security, in amount and form satisfactory to the court, for the payment of such costs and damages as may be incurred or suffered by the adverse party; provided, however, that for good cause shown and to be recited in the writ, the court may waive the furnishing of security unless the same is otherwise required by law.

H. **Service.** Service of a copy of the writ, with copy of the petition annexed, shall be made upon all adverse parties forthwith. For purposes of this paragraph the term "adverse parties" shall include the real parties in interest required to be named in the petition pursuant to Subparagraph (2) of Paragraph D of this rule.

I. **Defenses; service.** In cases where the date set for serving a responsive pleading or for hearing is less than thirty (30) days after service all defenses, including those otherwise available by motion, shall be included in one single pleading and, if service by mail is utilized, service shall not be deemed complete until three (3) days after mailing. In all other cases the rules generally applicable to pleadings and service thereof shall govern.

J. **Exemptions; how claimed.** Exemptions of personal property provided by Sections 42-10-1 to 42-10-7 NMSA 1978 also apply to attachment proceedings. If the party is a natural person, notice of a right to claim exemptions shall be given. A claim of exemption may be filed and served in the same manner and time as required in execution proceedings. The petitioner may dispute the claimed exemption in the same manner and time provided for a dispute on a claim of exemption in an execution proceeding. If the petitioner disputes the claimed exemption, the court shall proceed in the manner provided for hearings on claims of exemptions in execution proceedings.

[As amended, effective January 1, 1996.]

ANNOTATIONS

The 1996 amendment, effective January 1, 1996, substituted "Rules 1-065.1 and 1-065.2" for "Rule 1-065.1" in Paragraph B; in Paragraph G, added the first sentence, inserted "prejudgment" in the second sentence, added Subparagraph (2) and redesignated former Subparagraph (2) as Subparagraph (3), deleted "or his attorney" following "adverse party" in two places, and substituted "the petitioner" for "the applicant" and "the petitioner's" for "the applicant's" and for "his"; and added Paragraph J.

Compiler's notes. — The rule purportedly conforms with the requirements of *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), as explained in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974). See also *Montoya v. Blackhurst*, 84 N.M. 91, 500 P.2d 176 (1972).

Constitutionality. — New Mexico's present replevin statutes comply with due process standards established by United States supreme court in Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974), and are therefore constitutional. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

Notice. — Good cause for waiver of notice for issuance of writ was shown where the plaintiff alleged that the subject assets had been previously traced and concealed before they could be seized, and plaintiff feared that the items would be moved again if the defendant was given notice of the writ. State v. Grossman, 113 N.M. 316, 825 P.2d 249 (Ct. App. 1991).

Writ of assistance was not invalid for failure to require a response or set a hearing date where it substantially put defendants on notice about the nature of the property to be seized and the reasons for the seizure. The functions of a summons, which the writ serves as, are to show that a defendant is within the power of the court and to give notice of the proceeding against him. State v. Grossman, 113 N.M. 316, 825 P.2d 249 (Ct. App. 1991).

Applicant for zoning variance indispensable party. — Under 3-21-9 NMSA 1978 and Paragraph D(2) of this rule, where the party bringing the appeal seeks to overturn a decision authorizing a zoning variance, the applicant for the variance is an indispensable or necessary party. State ex rel. Sweet v. Village of Jemez Springs, Inc., 114 N.M. 297, 837 P.2d 1380 (Ct. App. 1992).

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Civil Procedure," see 11 N.M.L. Rev. 53 (1981).

For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Availability of writ of prohibition or similar remedy against acts of public prosecutor, 16 A.L.R.4th 112.

1-065.1. Writs of execution.

A. **Issuance of writs of execution.** Unless the judgment has been stayed, the clerk of the court shall issue a writ of execution for seizure of property to satisfy a judgment on an underlying dispute:

(1) if the judgment debtor is not a natural person, at any time after the filing of the judgment; or

(2) if the judgment debtor is a natural person:

(a) upon filing of either a certificate by an attorney for the judgment creditor or an affidavit by the judgment creditor stating that:

(i) the judgment creditor served the judgment debtor with a notice of right to claim exemptions as required by this rule; and

(ii) the judgment debtor has not filed a claim of exemption for the property to be seized and sold as provided by this rule;

(b) upon entry of an order finding that the property to be seized and sold is not exempt from execution; or

(c) upon filing of a waiver of the right to claim a statutory exemption from execution. The judgment debtor's written waiver shall specifically describe the property that may be seized and sold to satisfy the debt.

B. **Service of notice of right to claim exemptions from execution.** If the judgment debtor is a natural person, unless a shorter time is ordered by the court, not later than ten (10) days prior to the date of seizure of property to be sold under a writ of execution, the judgment creditor shall serve upon each judgment debtor a notice of right to claim exemptions and a claim of exemption form in the following manner:

(1) if the judgment debtor has entered an appearance in the proceeding, service shall be made and proof of service filed with the court in the manner provided by Rule 1-005 NMRA;

(2) if the judgment debtor has not entered an appearance in the proceeding, service shall be made and return of service filed in the same manner as provided by Rule 1-004 for service of the summons and complaint; or

(3) if service cannot be made on the judgment debtor pursuant to Subparagraph (1) or (2) of this Paragraph, service shall be made on the judgment debtor in a manner reasonably calculated to ensure actual notice of the right to claim exemptions.

C. **Claim of exemptions from execution.** Within ten (10) days after service of a notice of right to claim exemptions, a judgment debtor who is a natural person may claim a statutory exemption by filing a claim of exemption form with the court.

D. **Service of claim of exemption.** At the time of filing of the claim of exemption, the judgment debtor shall serve a copy of the claim of exemption on the judgment creditor pursuant to Rule 1-005.

E. **Failure to file claim of exemption.** If the judgment debtor fails to file a claim of exemption within ten (10) days after service of the notice of the right to claim exemptions, the judgment debtor shall be deemed to have waived the right to claim an exemption.

F. **Dispute of claimed exemption.** Within ten (10) days after service of a claim of exemption on the judgment creditor pursuant to Paragraph D of this rule, the judgment creditor may dispute any claimed exemption and request a hearing. If the judgment creditor does not dispute a claimed exemption, the property shall be exempt and the judgment creditor may proceed against any other property as provided in Paragraph A of this rule. If the judgment creditor files a notice of dispute and request for hearing, the judgment creditor shall at the time of filing of the notice serve a copy on the judgment debtor.

G. **Notice of hearing on dispute.** If the judgment creditor files a notice of dispute and request for hearing, the court shall promptly give notice of the date and time of the hearing to the parties.

H. **Hearing on disputed claim of exemptions.** Within ten (10) days after the filing of a notice of dispute and request for hearing, the court shall hold a hearing on the disputed claim. At the hearing the court may determine the merits of the dispute or may postpone decision pending such discovery as may be required to determine the status of the property.

I. **Issuance and executions of writ.** A writ of execution issued pursuant to Paragraph A of this rule shall be served by the sheriff within sixty (60) days from the date issued. If an execution is not served within that time, upon request of the judgment creditor, a second or subsequent writ shall be issued by the clerk. A writ of execution issued pursuant to this rule may be served in the manner provided by law.

J. **Sheriff's sale.** A sale shall be conducted in the manner provided by law.

K. **Form of writs, notices and claim of exemptions.** Applications for writs of execution, writs of execution, answers, notices of right to claim exemptions, claims of exemptions, notices of dispute of claimed exemptions and request for hearing, and judgments shall be substantially in the form approved by the Supreme Court.

[Withdrawn and new rule adopted, effective January 1, 1996.]

ANNOTATIONS

Withdrawals. — Former Rule 1-065.1 NMRA, relating to garnishment and writs of execution, is withdrawn effective January 1, 1996.

Cross references. — For exemptions in civil actions, *see* Section 35-4-2 NMSA 1978.

For docketing money judgments, *see* Section 39-1-6 NMSA 1978.

For right to execution, issuance, levy and sale, *see* Section 39-4-1 NMSA 1978.

For sales under execution and foreclosure, *see* Section 39-5-1 NMSA 1978.

For forms on garnishment and writs of execution, *see* Rules 4-801 to 4-816 NMRA.

For writ of execution, *see* Rule 4-801A NMRA.

For notice of right to claim exemptions, *see* Rule 4-808A NMRA.

For claims of exemption, *see* Rule 4-803 NMRA.

For order on claim of exemption, *see* Rule 4-804 NMRA.

For notice of dispute and request for hearing, *see* Rule 4-810A NMRA.

The 1992 amendment, effective for cases filed in the district courts on or after July 1, 1992, rewrote this rule to the extent that a detailed comparison would be impracticable.

Constitutionality. — New Mexico provides for a prompt hearing to resolve exemption claims in execution as well as garnishment cases, and this portion of the post-judgment

execution procedures is constitutional. Aacen v. San Juan County Sheriff's Dep't, 944 F.2d 691 (10th Cir. 1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Garnishee's duty to give debtor notice of garnishment prior to delivery of money without judgment against the garnishee on the debt, 36 A.L.R.4th 824.

United States Postal Service as subject to garnishment, 38 A.L.R. Fed. 546.

1-065.2. Garnishment.

A. **Garnishment procedure.** After the filing of the judgment on the underlying dispute and upon application of the judgment creditor, the clerk of the court shall issue a writ of garnishment.

B. **Service of writ of garnishment.** A writ of garnishment issued pursuant to this rule shall be served by the judgment creditor on the garnishee wherever the garnishee may be found in the State of New Mexico. The writ shall be served and return of service filed in the same manner as provided by Rule 1-004 NMRA for service of the summons and complaint.

C. **Service of additional forms on garnishee.** In addition to the writ, the following forms shall be served by the judgment creditor on the garnishee:

(1) a copy of the application for writ of garnishment and the writ of garnishment; and

(2) unless the garnishment is for wages, a copy of the notice of right to claim exemptions and a copy of the claim of exemption form; and

(3) a copy of the answer by garnishee form approved by the New Mexico Supreme Court.

D. **Answer by garnishee.** The garnishee shall answer the writ of garnishment within twenty (20) days of service as required by Section 35-12-4 NMSA 1978.

E. **Appearance by garnishee.** A garnishee may appear in person in any garnishment proceeding. If the garnishee is a partnership, the garnishee may appear by one of its general partners. If the garnishee is a corporation an officer, director or general manager of the corporation may answer the writ; however, any other appearance shall be through an attorney representing the garnishee corporation. The court shall award reasonable attorney fees and costs to the garnishee.

F. **Service on judgment debtor by garnishee.** On or before the fourth business day following service of the writ of garnishment, the garnishee shall mail or otherwise deliver to each named judgment debtor or to the judgment debtor's attorney of record a

copy of the forms served on the garnishee by the judgment creditor pursuant to Paragraph C of this rule.

G. **Exemption from garnishment.** A judgment debtor who is a natural person:

(1) shall receive an exemption from garnishment of wages to the extent provided by law; and

(2) may claim a statutory exemption from garnishment other than wages by filing with the court a claim of exemption within ten (10) days after service by the garnishee of notice of the right to claim exemptions.

H. **Service of the claim of exemption.** The judgment debtor shall serve a copy of the completed and signed claim of exemption form upon the judgment creditor and the garnishee in the manner provided by Rule 1-005 NMRA.

I. **Failure to file claim of exemption other than wages.** If the judgment debtor fails to file a claim of exemption within ten (10) days after service of the notice of the right to claim exemptions, the judgment debtor shall be deemed to have waived the right to claim a statutory exemption other than wages.

J. **Notice of dispute.** Within ten (10) days after service on the judgment creditor of a claim of exemption, the judgment creditor may dispute any claimed exemption by filing a notice of dispute and request for hearing with the court. If the judgment creditor fails to file the notice of dispute and request for hearing within the time permitted, the judgment debtor's claim of exemption is granted. If the judgment creditor files a notice of dispute, the judgment creditor shall at the time of filing of the notice serve a copy of the notice of dispute and request for hearing on the judgment debtor.

K. **Notice of hearing on dispute.** If the judgment creditor files a notice of dispute and request for hearing, the court shall promptly give notice of the date and time of the hearing to the judgment creditor, garnishee and the judgment debtor. The judgment creditor shall serve a copy of the notice of dispute and request for hearing on the judgment debtor and the garnishee.

L. **Hearing.** A hearing on the claim of exemption shall be held within ten (10) days after the filing of a notice of dispute and request for hearing. At the hearing, the court must determine the merits of the dispute unless the court postpones decision pending such discovery as may be required to determine the status of the property.

M. **Judgment on writ of garnishment.** If a notice of dispute and request for hearing is filed pursuant to this rule, judgment on the writ of garnishment shall not enter until a hearing has been held on the dispute. If the court finds that the property is not exempt from garnishment, the court shall enter a judgment on the writ of garnishment requiring the garnishee to turn over to the judgment creditor the property or amount of money set forth in the judgment.

N. **Form of writs, notices and claim of exemptions.** Applications for writs of garnishment, writs, answers, notices of right to claim exemptions, claims of exemptions, notices of dispute of claimed exemptions and request for hearing, and judgments shall be substantially in the form approved by the Supreme Court.

[Approved, effective January 1, 1996; as amended, effective February 15, 1999.]

ANNOTATIONS

Cross references. — For application for writ of garnishment, *see* Rule 4-805 NMRA.

For writ of garnishment, *see* Rule 4-806 NMRA.

For answer by garnishee, *see* Rule 4-807 NMRA.

For notice of right to claim exemptions, garnishment, *see* Rule 4-808 NMRA.

For claims of exemption, *see* Rule 4-809 NMRA.

For notice of dispute and request for heraing, *see* Rule 4-810A NMRA.

For judgment on writ of garnishment and claim of exemption, *see* Rule 4-811 NMRA.

The 1999 amendment, effective for cases filed on and after February 15, 1999, inserted "and" at the end of Subparagraph C(2), and added Subparagraph C(3).

1-066. Injunctions and receivers.

A. **Preliminary injunctions; appointment of receivers; notice; bond; hearing.**

(1) No preliminary injunction shall be issued nor shall any receiver be appointed without notice to the opposite party.

(2) Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subparagraph shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

B. **Temporary restraining order; notice; hearing; duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

(2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten (10) days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period, except that, if a party adverse to the party obtaining a restraining order shall disqualify the judge who would otherwise have heard the matter, then the order shall be deemed extended until ten (10) days after the designation of another judge or until such earlier time as may be fixed by the judge so designated. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two (2) days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

C. **Security.** No restraining order, preliminary injunction or appointment of a receiver shall issue or occur except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, or whose property may be found to have been thereby wrongfully placed in the hands of a receiver so appointed; provided, however, that for good cause shown and to be recited in the order made, the court or judge may waive the furnishing of security.

D. **Security; proceedings against sureties.** Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the

clerk of the court, who shall forthwith mail copies to the sureties, if their addresses are known.

ANNOTATIONS

Cross references. — For injunctions pending appeal from judgment as to injunction, *see* Rule 1-062 NMRA.

For enjoining delinquent taxpayer from continuing in business, *see* Section 7-1-53 NMSA 1978.

For enjoining payment of salary in quo warranto proceeding for usurpation of office, *see* Section 44-3-6 NMSA 1978.

For actions against receivers for compensation, *see* Section 44-8-1 NMSA 1978.

For injunctions and restraining orders in labor disputes, *see* Sections 50-3-1 and 50-3-2 NMSA 1978.

For receiver in suit to set aside assignment in fraud of creditors, *see* Section 56-9-4 NMSA 1978.

For enforcement of public service commission orders by injunction, *see* Section 62-12-1 NMSA 1978.

For injunctions in actions against public service commission, *see* Section 62-12-2 NMSA 1978.

For restraining orders or injunctions against oil conservation commission or division, *see* Section 70-2-27 NMSA 1978.

For receivers for irrigation districts, *see* Sections 73-13-38 to 73-13-42 NMSA 1978.

Compiler's notes. — Paragraphs A, B and C are similar to former Trial Court Rule 105-1008 and Rule 65 of the Federal Rules of Civil Procedure.

Paragraph D is similar to Rule 65.1 of the Federal Rules of Civil Procedure.

Section is not confined to creditors' suits but is a procedural rule which applies to a wide variety of litigation situations. Torres v. First State Bank, 588 F.2d 1322 (10th Cir. 1978).

This rule is not applicable in criminal sentencing context. State v. Garcia, 2005-NMCA-065, 137 N.M. 583, 113 P.3d 406.

Injunction can only bind party. — No court can make a decree which will bind anyone but a party; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen. Allen v. McClellan, 77 N.M. 801, 427 P.2d 677 (1967), overruled on other grounds New Mexico Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

Rule contemplates notice and hearing for injunction. — The order of the district court allowing an appeal from ad valorem tax valuation and enjoining the state tax commission from certifying tax assessments to county assessors was an abuse of discretion, under the provisions of this rule, which require notice and contemplate a hearing. State ex rel. State Tax Comm'n v. First Judicial Dist. Court, 69 N.M. 295, 366 P.2d 143 (1961).

The essence of this rule is to preclude restriction of one's conduct or activities without first giving notice and a hearing to the one to be restrained. State v. Echols, 99 N.M. 517, 660 P.2d 607 (Ct. App. 1983).

And notice is necessary for consolidated hearing on injunction. — Failure of the court to notify the parties involved, either before or at time of consolidation, verbally or in writing, that consolidation is to take place is reversible error. Cook v. Klopfer, 86 N.M. 111, 520 P.2d 267 (1974).

Although it need not be written notice. — Subdivision (a)(2) (see now Paragraph A(2)) is derived from Rule 65(a)(2) of the Federal Rules of Civil Procedure, and it is required that a consolidation may not be ordered without some kind of notice to the parties; however, this notice need not be in writing so long as it is communicated to the parties involved. Cook v. Klopfer, 86 N.M. 111, 520 P.2d 267 (1974).

Subdivision (b) (see now Paragraph B) has safeguards necessary to meet due process requirements of the U.S. Const., as it orders an expeditious post-seizure hearing following an ex parte seizure order in a debtor-creditor situation. Torres v. First State Bank, 588 F.2d 1322 (10th Cir. 1978).

And consolidation which interferes with right to hearing on merits is error. — Procedural due process imposes some limits upon the rule that advancement and consolidation may be ordered without some kind of notice to the parties. The trial court may order advancement and consolidation, and in any manner, so long as it protects the parties' right to a full hearing on the merits. But where defendant requested that hearing be limited to a temporary restraining order, but trial court went further and heard evidence and closing arguments, whereupon it granted a permanent injunction against appellant, not only did the trial court fail to formally order the advancement and consolidation, but also because of the lack of effective notice defendant never had a chance to present testimony of crucial but absent witnesses for his case. For these reasons, and because it advanced and consolidated the case sua sponte, the trial court committed reversible error. Los Lunas Consol. School Dist. No. 1 v. Zbur, 89 N.M. 454, 553 P.2d 1261 (1976).

Granting of preliminary injunction without notice is not conclusive of probable cause. — Where an injunction is issued after the court is fully informed by proof taken and arguments presented on both sides, the granting of the injunction under those circumstances is conclusive of probable cause, but if a preliminary injunction is granted ex parte on the allegations of the bill, without notice to or hearing of the other side, and afterwards the injunction is dissolved, the granting of the preliminary injunction is not conclusive of probable cause. Bokum v. Elkins, 67 N.M. 324, 355 P.2d 137 (1960).

Denial of permanent injunction after entry of preliminary injunction. — The entry of a preliminary injunction did not prevent the trial court from denying entry of a permanent injunction after considering additional evidence at a final hearing. Insure N.M., LLC v. McGonigle, 2000-NMCA-018, 128 N.M. 611, 995 P.2d 1053.

Giving of security is not mandatory under Subdivision (c) (see now Paragraph C), but to a large extent is left to the discretion of the court. Rhodes v. State ex rel. Bliss, 58 N.M. 579, 273 P.2d 852 (1954).

And even erroneous failure to require security does not affect jurisdiction. — Although the issuance of a temporary restraining order without requiring security, absent a stated reason or for an improper stated reason, might well be error subject to reversal on appeal, such failure to require security does not render the order of the court without jurisdiction. Rhodes v. State ex rel. Bliss, 58 N.M. 579, 273 P.2d 852 (1954).

Injunction in private procurement process. — Injunctive relief may be available to a disappointed bidder in a private procurement process. *Orion Technical Res., LLC v. Los Alamos Nat'l Sec., LLC*, 2012-NMCA-097, ____ P.3d ____.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Injunctions §§ 1 to 8, 10, 14, 48, 49, 247, 264, 265, 285, 310 to 317, 327, 347, 373, 381; 65 Am. Jur. 2d Receivers §§ 97, 99 to 106.

Rule against collateral attack as applicable to temporary injunction, 12 A.L.R. 1165.

Right of invalidly appointed receiver to compensation as such, 34 A.L.R. 1356.

Partial dissolution of injunction as breach of injunction bond, 40 A.L.R. 990.

Liability apart from bond and in absence of elements of malicious prosecution for wrongfully suing out injunction, 45 A.L.R. 1517.

Liability of one procuring appointment for expenses of receivership, 68 A.L.R. 878.

Attorney's fees or other expenses incurred in unsuccessfully resisting appointment or attempting removal of receiver for corporation as proper claim against receiver, 89 A.L.R. 1531.

Criticism of court's appointment of receiver as contempt, 97 A.L.R. 903.

Restitution as remedy for wrongful injunction, 131 A.L.R. 878.

Constitutionality of statute or practice requiring or authorizing temporary restraining order or injunction without notice, 152 A.L.R. 168.

Ex parte appointment of receiver for partnership, 169 A.L.R. 1127.

Consent of court to tax sale of property in custody of receiver appointed by court, 3 A.L.R.2d 893.

Costs and other expenses incurred by receiver whose appointment was improper as chargeable against estate, 4 A.L.R.2d 160.

State court's injunction against action in court of another state, 6 A.L.R.2d 896.

Necessary parties defendant to independent action on injunction bond, 55 A.L.R.2d 545.

Duty to minimize damages for wrongful injunction, 66 A.L.R.2d 1131.

Appeal from order appointing, or refusing to appoint, receiver, 72 A.L.R.2d 1009.

Appeal from order discharging, or vacating appointment of, or refusing to discharge, or vacate appointment of, receiver, 72 A.L.R.2d 1075.

Court's lack of jurisdiction of subject matter in granting injunction as a defense in action on injunction bond, 82 A.L.R.2d 1064.

Propriety of appointing receiver, at behest of mortgagee, to manage or operate property during mortgage foreclosure, 82 A.L.R.2d 1075.

Appealability of order granting, extending or refusing to dissolve temporary restraining order, 19 A.L.R.3d 403.

Appealability of order refusing to grant or dissolving temporary restraining order, 19 A.L.R.3d 459.

Receiver's personal liability for negligence in failing to care for or maintain property in receivership, 20 A.L.R.3d 967.

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond, 30 A.L.R.4th 273.

Enforceability of sale-of-business agreement not to compete against nonsigner or nonowning signer, 60 A.L.R.4th 294.

Anticompetitive covenants: aerial spray dust business, 60 A.L.R.4th 965.

Construction and application of restrictive covenants to the use of signs, 61 A.L.R.4th 1028.

Federal receivers of property in different districts under 28 USCS § 754, 57 A.L.R. Fed. 621.

Who, under Rule 65(d) of Federal Rules of Civil Procedure, are persons "in active concert or participation" with parties to action so as to be bound by order granting injunction, 61 A.L.R. Fed. 482.

1-067. Deposit in court.

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing.

ANNOTATIONS

Deposit must be under order of court. — This rule contemplates that payments into court be made under order of the court. Foreman v. Myers, 79 N.M. 404, 444 P.2d 589 (1968).

And cannot make bad tender good. — Even when ordered by the court, payment to the clerk simply operates to keep a good tender alive; it cannot make a bad tender good. Foreman v. Myers, 79 N.M. 404, 444 P.2d 589 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Deposits in Court §§ 1 to 20.

Who bears loss of funds held by third person, or deposited in court, awaiting outcome of litigation, 2 A.L.R. 463.

What rights are waived by insurer who pays money into court, 2 A.L.R. 1680, 15 A.L.R. 1260.

Clerk of court or his bond as liable for money paid into his hands by virtue of his office, 59 A.L.R. 60.

Right to withdraw tender after money is deposited or paid in court to keep tender good, 73 A.L.R. 1281.

Payment into court or to clerk of court as affecting rights, liability and procedure in respect of lien of judgment creditor's attorney, 117 A.L.R. 983.

Executor's or administrator's personal liability for interest on legacies or distributive shares as affected by payment into court where payment is delayed, 18 A.L.R.2d 1384.

Rights as between vendor and vendee under land contract in respect of interest, 25 A.L.R.2d 951.

Condemnor's right, as against condemnee, to interest on excessive money deposited in court or paid to condemnee, 99 A.L.R.2d 886.

Funds deposited in court as subject of garnishment, 1 A.L.R.3d 936.

Appealability of order directing payment of money into court, 15 A.L.R.3d 568.

26A C.J.S. Deposits in Court §§ 1 to 9.

1-068. Offer of settlement.

A. **Offer of settlement.** Except as provided in this rule, at any time more than ten (10) days before the trial begins, any party may serve upon any adverse party an offer to allow an appropriate judgment to be entered in the action in accordance with the terms and conditions specified in the offer. A claimant may not make an offer of settlement under this rule until one hundred twenty (120) days after the filing of a responsive pleading by the party defending against that claim. If within ten (10) days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon such judgment may be entered as the court may direct. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

If an offer of settlement made by a claimant is not accepted and the judgment finally obtained by the claimant is more favorable than the offer, the defending party must pay the claimant's costs, excluding attorney's fees, including double the amount of costs incurred after the making of the offer. If an offer of settlement made by a defending party is not accepted and the judgment finally obtained by the claimant is not more favorable than the offer, the claimant must pay the costs, excluding attorney's fees, incurred by the defending party after the making of the offer and shall not recover costs incurred thereafter.

The fact that an offer has been made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of settlement, which shall have the same effect as an offer made before trial if it is served within a

reasonable time not less than ten (10) days prior to the commencement of hearings to determine the amount or extent of liability.

B. **Domestic relations actions excluded.** This rule shall not apply to domestic relations actions.

C. **Awards not cumulative.** In those cases where a claimant would be entitled to double costs under Rule 1-068 and also entitled to interest pursuant to the statute, the court should award double costs or interest plus the costs awarded to the prevailing party pursuant to Rule 1-054(D)(2) NMRA, but not both statutory interest and double costs.

[As amended, effective August 1, 2003.]

Committee Commentary for 2003 Amendment.

Rule 1-068 formerly was titled "Offer of judgment" and required that the accepting party "allow judgment to be taken against him for the money or to the effect specified in the offer." Rule 1-068 NMRA (superseded). Requiring that a judgment be entered for the amount of the agreed-upon offer was a disincentive to some litigants to make offers because those litigants preferred to make the Rule 1-068 offer, tender full payment of the amount of the offer and then obtain a dismissal of the lawsuit with prejudice pursuant to Rule 1-041(A) NMRA when the offer and tender were accepted. The rule now titles the procedure an "Offer of settlement" to make explicit that when either party makes an offer of settlement which is accepted, the party who thereby agreed to make a payment may tender full payment of the agreed-upon sum before a judgment is entered. When this is done, the court should enter a judgment of dismissal with prejudice rather than a money judgment in the amount specified in the offer of settlement. Because the form of judgment will depend upon whether full payment is tendered before the accepted offer results in a judgment, the offer of settlement shall not be conditioned on the form that the judgment might take, but only upon the substantive content of the settlement proposal.

This rule also applies to actions seeking relief other than money damages. *See e.g., Assoc. of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd.*, 58 P.2d 608 (Hawaii 2002) ("[F]ederal courts have overwhelmingly applied Rule 68 to cases dealing with equitable relief.").

Rule 1-068 previously permitted only a party defending against a claim to make an offer of judgment. At least sixteen states have rules that allow the claimant as well as the defending party to do so. Allowing either party to make offers of settlement increases the likelihood that settlement will occur and provides equality of opportunity to all parties to initiate the settlement process.

Rule 1-068 has always provided that when a defending party's offer of judgment is not accepted and the claimant fails to obtain a judgment more favorable than the offer, the

claimant must pay the costs of the defending party incurred after the making of the offer. The rule continues to provide this remedy. Rule 1-068 also now makes explicit what has been the universal construction of the rule - that when the claimant does not obtain a judgment more favorable than the offer, the claimant not only must pay the defending party's costs, but also is not entitled to its costs incurred after the making of the offer. *E.g., Crossman v. Maroccio*, 806 F.2d 329, 333 (1st Cir. 1986), cert. denied, 481 U.S. 1029 (1987); *see Moore's Federal Practice Digest* Par. 68.08[2] (3rd ed. 2002).

When a claimant's offer of settlement is declined and the claimant obtains a judgment greater than the offer, the appropriate sanction is more complicated. Because the claimant is normally entitled to costs if the claimant prevails in obtaining a judgment in any amount, *see* Rule 1-054(D)(1) NMRA, an award only of costs would not provide additional incentive for the defending party to accept the offer. To provide additional incentive, the rule provides that costs incurred by the claimant after the making of the offer of settlement shall be doubled and the doubled amount awarded as costs.

The plaintiff often has the opportunity for extensive investigation and preparation of the claim prior to filing suit. The claimant thus may be in a position to make an offer of settlement very early in the proceedings, before the defending party has had a fair opportunity through discovery to determine the relative merits of claimant's case. For this reason, the rule provides that an offer of settlement may not be made by a claimant until one hundred twenty days after the service of a responsive pleading by the defending party who thus has additional time to evaluate the offer before deciding whether to accept or reject it. For example, if the claimant is the plaintiff, the time for making an offer begins upon service of the answer by the defendant. If the claimant is a defendant who has filed a counterclaim, the time for making an offer begins upon service of the plaintiff's reply to the counterclaim. See Rule 1-007(A) NMRA.

"Costs" awardable pursuant to this rule are those provided for in Rule 1-054(D). Attorney's fees are not included in Rule 1-054(D), see Rule 1-054(E) NMRA, and are excluded from the cost-shifting provisions of this rule even if attorney's fees are included as costs for other purposes or in other contexts. *E.g.*, 28 U.S.C. Sec. 1988(b) (attorney's fees included as costs awardable in cases involving civil rights actions). While a cost award is mandatory under the conditions specified in Rule 1-068, the amount of those costs is separately determined by the trial court pursuant Rule 1-054(D). *See Key v. Chrysler Motors Corp.*, 2000-NMSC-010, 128 N.M. 739, 998 P.2d 575.

This rule does not apply to domestic relations actions because such actions frequently provide for the award of attorney's fees in the discretion of the court and this provides sufficient incentive for parties in domestic relations cases to seek to settle their disputes. The excluded "domestic relations actions" are those described in the Committee commentary to Rule 1-120.

A statute, Section 56-8-4(B) NMSA 1978, authorizes the court to award interest to a plaintiff under certain circumstances if the defendant fails to make reasonable and timely offers of settlement to the plaintiff. This statute operates differently from Rule 1-

068 in that the statute penalizes a defendant for not making offers rather than providing an incentive for plaintiffs to make offers of settlement. Nonetheless, awarding plaintiffs both double costs under this rule and interest pursuant to the statute is unduly punitive.

The broader terms "claimant" and "defending party" are used in the Rule instead of "plaintiff" and "defendant" because, for example, when a defendant files a counterclaim, the defendant also become a claimant and the plaintiff also becomes a defending party.

ANNOTATIONS

Cross references. — For computation of time, *see* Rule 1-006 NMRA.

For costs, *see* Rule 1-054 NMRA.

The 2003 amendment, effective August 1, 2003, substituted "settlement" for "judgment" in the rule heading and in the second undesignated paragraph in Subsection A; inserted the Subsection A designation in the first paragraph and the bold subcatchline and rewrote the former first paragraph which read "At any time more than ten (10) days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within ten (10) days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon such judgment may be entered as the court may direct. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer has been made but not accepted does not preclude a subsequent offer"; and inserted the first sentence in the second undesignated paragraph in Subsection A; and added Subsections B and C.

Compiler's notes. — This rule is deemed to have superseded 105-829, C.S. 1929 (Laws 1897, ch. 73, § 118; C.L. 1897, § 2685; Code 1915, § 4213), which was substantially the same.

This rule does not apply where judgment is entered in defendant's favor. — Apodaca v. AAA Gas Co., 2003-NMCA-085, 134 N.M. 77, 73 P.3d 215.

Offer is irrevocable for ten-day period. — A Rule 1-068 offer is irrevocable during the ten-day period provided by the rule, and a plaintiff can accept the offer any time during the period, regardless of whether the plaintiff has made a counteroffer to try to obtain a more favorable settlement. Shelton v. Sloan, 1999-NMCA-048, 127 N.M. 92, 977 P.2d 1012.

Offer of judgment is admissible only in proceeding to determine costs, and the submission of proposed findings and conclusions is such a proceeding. Aspen

Landscaping, Inc. v. Longford Homes of N.M., Inc., 2004-NMCA-063, 135 N.M. 607, 92 P.3d 53, cert denied, 2004-NMCERT-005.

"Judgment finally obtained". — The "judgment finally obtained" by plaintiff included prejudgment interest awarded by the court, where the damages were to compensate plaintiff for funds wrongfully held by defendant. Gilmore v. Duderstadt, 1998-NMCA-086, 125 N.M. 330, 961 P.2d 175.

Defendant's recovery of costs after plaintiff's rejection of settlement offer. — Defendants could recover their costs from the date of their rejected first offer of settlement, where the judgment ultimately recovered by plaintiff was not more favorable than the first offer. Dickenson v. Regent of Albuquerque, 112 N.M. 362, 815 P.2d 658 (Ct. App. 1991).

Untimely offer. — The defendant's attempted offer of judgment to the plaintiff was not sufficiently in advance of the trial to allow the plaintiff to respond before trial and was therefore untimely. Because the defendant's offer of judgment to the plaintiff was untimely, the plaintiff's subsequent attempt to accept the offer was properly rejected by the court. The fact of its untimeliness rendered the defendant's offer of judgment not effective under this rule, and, therefore, the cost shifting provision of this rule did not apply. Drake v. Trujillo, 1996-NMCA-105, 122 N.M. 374, 924 P.2d 1386.

Judgment less than offer. — If the judgment finally obtained is far less than the offer of judgment, the offeree is entitled to recover his pre-offer costs but is not entitled to post-offer costs and must also pay the offeror's post-offer costs. Dunleavy v. Miller, 116 N.M. 365, 862 P.2d 1224 (Ct. App. 1992), rev'd on other grounds, 116 N.M. 353, 862 P.2d 1212 (1993).

Meaning of "prevailing party". — Plaintiff who won judgment less than the offer of judgment proffered by defendant was, nonetheless, the "prevailing party" and entitled to costs from defendant. Gilmore v. Duderstadt, 1998-NMCA-086, 125 N.M. 330, 961 P.2d 175.

Inclusion of pre-offer costs. — Plaintiff's pre-offer costs in an automobile negligence action should have been added to her damage award to determine the amount of "the judgment finally obtained by the referee" under this rule, since the offer of judgment included all costs accrued to that point. Dunleavy v. Miller, 116 N.M. 353, 862 P.2d 1212 (1993).

Mutual assent as to form of judgment. — Where defendant made an offer of cash but expressly denied liability, and plaintiff accepted the offer but without the denial of liability, the court erred in entering defendant's form of judgment, since it failed to reflect mutual assent on the part of the parties; instead, the court should have accepted the plaintiff's form of judgment, since defendant was in the better position to ascertain the intentions of the parties. Pope v. The Gap, Inc., 1998-NMCA-103, 125 N.M. 376, 961 P.2d 1283.

Judgment silent as to liability. — Form of judgment which is silent as to the liability of defendant does not constitute a determination or admission of liability, and cannot be used against defendant in a subsequent proceeding. Pope v. The Gap, Inc., 1998-NMCA-103, 125 N.M. 376, 961 P.2d 1283.

Setting aside offer of judgment. — Rule 1-060B NMRA applies to a trial court's consideration of whether to set aside an offer of judgment made under this rule. Fuller v. Bachen, 1999-NMCA-130, 128 N.M. 151, 990 P.2d 825.

Ability to pay costs. — Where plaintiff recovers a judgment such that plaintiff is the prevailing party under Rule 1-054 NMRA, but does not recover as much as defendant's pre-trial offer, the award of costs is governed by Rule 1-068 NMRA, which makes mandatory the award of defendant's post-offer costs, although plaintiff is not precluded from recovering its pre-offer costs as the prevailing party. The ability of the party liable for costs to pay the costs is a factor that may be considered under Rule 1-054 NMRA where the court has discretion in the matter. But, because there is not discretion in the application of Rule 1-068 NMRA, the court cannot consider a party's ability to pay costs. Montoya v. Pearson, 2006-NMCA-097, 140 N.M. 243, 142 P.3d 11, cert. denied, 2006-NMCERT-____.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 23 et seq.

Warrant of attorney to confess judgment, necessity that amount be stated, 7 A.L.R. 735.

Sureties whose obligation is conditioned upon judicial determination of liability or rights of principal, judgment by consent, confession, or default of principal as affecting, 51 A.L.R. 1489.

Municipality's power to consent or confess to judgment against itself, 67 A.L.R. 1503.

Joint or several or joint and several character of warrant of attorney to confess judgment, signed by two or more, 80 A.L.R. 403.

Conditional sales contract, validity and effect of cognovit or warrant of attorney to confess judgment in, 89 A.L.R. 1106.

Confession under warrant of attorney, time within which application to reopen or set aside judgment by, may be made, 112 A.L.R. 797.

Warrant of attorney to confess judgment, judgment entered in sister state under, 39 A.L.R.2d 1232.

Constitutionality, construction, application and effect of statute invalidating powers of attorney to confess judgment or contract giving such powers, 40 A.L.R.3d 1158.

49 C.J.S. Judgments §§ 86 to 89, 188 to 192.

1-069. Judgment; supplementary proceedings.

A. **Examination; subpoena; hearing.** Upon request of the judgment creditor or a successor in interest, the clerk shall issue a subpoena directing any person with knowledge that will aid in enforcement of or execution on the judgment, including the judgment debtor, to appear before the district court to respond to questions concerning that knowledge. The subpoena shall be served in the same manner as other subpoenas except that it shall be served not less than three (3) days prior to the date the examination is to be conducted.

B. **Deposition in lieu of examination; other discovery.** In lieu of such an examination before the court, the judgment creditor or a successor in interest may obtain discovery from any person, including the judgment debtor, in any manner provided in these rules.

[As amended, effective January 1, 1997.]

ANNOTATIONS

Cross references. — For deposition procedure, *see* Rules 1-030, 1-031 and 1-032 NMRA.

For subpoenas under these rules, *see* Rule 1-045 NMRA.

For default judgments, *see* Rule 1-055 NMRA.

For stay of enforcement, *see* Rule 1-062 and Rule 12-207 NMRA.

The 1997 amendment, effective January 1, 1997, rewrote Paragraphs A and B and deleted former Paragraph C relating to deposition and notice.

Compiler's notes. — This rule is deemed to have superseded former Trial Court Rule 46-125, which had been deemed to supersede Laws 1931, ch. 129, both of which were substantially the same.

Subpoena issues only in connection with pending action. — This rule secures the attendance of the person desired to be examined as a witness by a subpoena, which is not an independent process, but issues only in connection with a pending action or proceeding. State ex rel. Howell v. Montoya, 74 N.M. 743, 398 P.2d 263 (1965) (decided under former law).

Supplementary proceeding deemed continuation of original case. — Supplementary proceeding in which judgment debtor is to be questioned concerning his ability to satisfy judgment is not a new or independent action but a continuation of the original case for the purposes of discovery in aid of the enforcement of the judgment.

State ex rel. Howell v. Montoya, 74 N.M. 743, 398 P.2d 263 (1965) (decided under former law).

Time for disqualification motion runs from original case. — Disqualification affidavit (38-3-9 NMSA 1978) filed after issue of subpoena directing judgment debtor to appear concerning his ability to satisfy a judgment previously entered against him is not timely under 38-3-10 NMSA 1978. State ex rel. Howell v. Montoya, 74 N.M. 743, 398 P.2d 263 (1965) (decided under former law).

Refusal to answer questions deemed contempt. — The district court can properly hold judgment debtor in contempt for his refusal to answer questions in the supplementary proceedings contemplated by this rule. State ex rel. Howell v. Montoya, 74 N.M. 743, 398 P.2d 263 (1965) (decided under former law).

Proceedings in aid of execution not stayed until bond filed. — A judgment plaintiff has a right to issue execution upon a judgment, or take such other proceedings as the law contemplates, in the absence of a supersedeas bond approved and filed in accordance with law. Llewellyn v. First State Bank, 22 N.M. 358, 161 P. 1185 (1916) (decided under former law).

Law reviews. — For symposium, "Equal Rights and the Debt Provisions of New Mexico Community Property Law," see 3 N.M.L. Rev. 57 (1973).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 364 et seq.

What courts or officers have power to punish for contempt, 8 A.L.R. 1576.

Necessity of new process to support proceedings supplementary to execution, 39 A.L.R. 1498.

Priority right of creditor who institutes supplementary proceedings over other creditors, in respect of property disclosed thereby, 92 A.L.R. 1435, 153 A.L.R. 211.

Constitutionality of statute providing for proceedings supplementary to execution, 106 A.L.R. 383.

Title to realty incidentally involved in proceedings supplementary to execution as affecting jurisdiction of justice's court or similar court, 115 A.L.R. 539.

Interest of vendee under executory contract as subject to execution, judgment, lien, or attachment, 1 A.L.R.2d 727.

Statutory provision respecting registration of mortgages or other liens on personal property in case of residents of other states as affecting priority of execution lien over lien of chattel mortgage or conditional sale of contract, 10 A.L.R.2d 764.

Part payment or promise to pay judgment as affecting time for execution, 45 A.L.R.2d 967.

Ruling on motion to quash execution as ground of appeal of writ of error, 59 A.L.R.2d 692.

Mere rendition or formal entry or docketing of judgment as prerequisite to issuance of valid execution thereon, 65 A.L.R.2d 1162.

Solid mineral royalty as real or personal property, 68 A.L.R.2d 728.

Interest of spouse in estate by the entirety as subject to levy of execution in satisfaction of his or her individual debt, 75 A.L.R.2d 1172.

Issuance on levy of execution as extending period of judgment lien, 77 A.L.R.2d 1064.

Perjury or false swearing as contempt, 89 A.L.R.2d 1258.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure, 27 A.L.R.3d 863.

33 C.J.S. Executions §§ 345, 423, 424.

1-070. Judgment for specific acts; vesting title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

ANNOTATIONS

Cross references. — For specific performance of contract for conveyance of realty, *see* Sections 42-7-1 to 42-7-4 NMSA 1978.

For conveyance of real estate by decree or master, *see* Section 47-1-12 NMSA 1978.

Rule operates only as to property within court's jurisdiction. — Where husband owned real property located in Florida that was acquired before his marriage to wife, the trial court ordered husband to list this property for sale, husband refused to sign the necessary documents, and the trial court appointed a special master to act in husband's stead, the trial court's appointment of the special master was in error; this rule was not designed to affect jurisdiction and generally operates only as to land within the jurisdiction of the court. Fenner v. Fenner, 106 N.M. 36, 738 P.2d 908 (Ct. App. 1987).

Judgment entered under this rule was not ex parte, where counsel was given notice to appear for hearing on his motion to set aside stipulation and on request by opposing counsel that judgment be entered based on stipulation, and judgment approving stipulation was entered in presence of counsel without objection. Marrujo v. Chavez, 77 N.M. 595, 426 P.2d 199 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 17 Am. Jur. 2d Contempt §§ 16, 77; 71 Am. Jur. 2d Specific Performance §§ 112 to 119, 223, 224.

Lis pendens in suit to compel stock transfer, 48 A.L.R.4th 731.

81A C.J.S. Specific Performance §§ 215 to 219.

1-071. Process in behalf of and against persons not parties.

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Judgments §§ 1025 to 1028.

49 C.J.S. Judgments §§ 693 to 696.

1-071.1. Statutory stream system adjudication suits; service and joinder of water rights claimants; responses.

A. **Joinder by sections.** If the court determines, upon its own motion or motion by a party, that the division of the stream system into subsections would promote the speedy and efficient prosecution of a stream system adjudication suit conducted pursuant to

Section 72-4-17 NMSA 1978, the court may order the plaintiff to join water rights claimants by stream system subsections in accordance with the division ordered by the court.

B. **Service and joinder.** Upon the court's order, the plaintiff shall join water rights claimants as defendants to an adjudication by serving them with a proposed consent order or other document requiring a response by the claimant. The proposed consent order or other document served on a claimant pursuant to this paragraph shall contain a conspicuous notification of the claimant's obligation to respond and such additional information about the adjudication as the court deems appropriate. The form of the foregoing documents shall be approved by the court. Service of the foregoing documents shall be made pursuant to Rule 1-004 NMRA, except that the summons shall be issued and signed by the plaintiff. Service of the foregoing documents or execution of the waiver of service shall join the claimant as a defendant to the adjudication, and no further order of the court shall be required for joinder.

C. **Responses.** Unless the court orders otherwise, claimants shall respond to any proposed consent order or other document served as set forth in Paragraph B of this rule within the deadlines set, and by the procedures ordered, by the court. A claimant who fails to respond to a proposed consent order within the time period set by the court may be subject to the entry of a default judgment pursuant to Rule 1-055 NMRA, which judgment will adjudicate the claimant's water rights as proposed by the plaintiff in the proposed consent order. If the document requiring a response is not a proposed consent order, the default judgment will adjudicate the claimant's rights as set forth in a hydrographic survey in compliance with Section 72-4-16 NMSA 1978, unless the court for good cause orders otherwise.

[Provisionally approved by Supreme Court Order No. 07-8300-13 for one year, effective June 13, 2007; provisionally approved by Supreme Court Order 08-8300 for one additional year, effective June 9, 2008; provisionally approved by Supreme Court Order No. 09-8300-015, for one additional year, effective June 9, 2009; provisionally approved by Supreme Court Order No. 10-8300-020, for one additional year, effective June 8, 2010; as amended by Supreme Court Order No. 11-8300-027, effective for new and pending cases on or after June 8, 2011.]

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-027, effective June 8, 2011, in Paragraph A, permitted the court to order the plaintiff to join claimants by stream system subsections in accordance with the division ordered by the court if the court determines that the division of the stream system into subsections will promote the prosecution of the adjudication, and in Paragraph B required that the consent order or other document served on a claimant contain a conspicuous notification of the claimant's obligation to respond and required the plaintiff to sign the summons.

1-071.2. Statutory stream system adjudication suits; stream system issue and expedited *inter se* proceedings.

A. **Stream system issue proceedings.**

(1) A stream system issue is any issue in a stream system adjudication suit conducted pursuant to Section 72-4-17 NMSA 1978 the resolution of which could directly affect the water rights of all or a significant number of water rights claimants, regardless of whether the claimants have been served and joined as defendants.

(2) At any time during the adjudication prior to the notice of commencement of *inter se* proceedings, any party may file a motion requesting that the court designate an issue as a "stream system issue". The motion shall include a short, concise description of the issue and the reasons why such a proceeding is necessary and identify the section or sections of the adjudication affected by the issue. The court *sua sponte* may consider designating a stream system issue.

(3) The court shall conduct a hearing to determine whether to designate an issue as a stream system issue. The court shall designate an issue as a stream system issue if

(a) the resolution of the issue could directly affect the water rights of all, or a significant number of, water rights claimants, whether served and joined as defendants or not; or

(b) the resolution of the issue in a manner that did not bind all water rights claimants on the stream system that have been joined or in the future might be joined, would create a substantial risk of the following:

(i) inconsistent or varying decisions of an issue the determination of which could directly affect the water rights of other defendants or claimants; or

(ii) a decision that, as a practical matter, would be dispositive of an issue relating to the subject matter of the adjudication and preclude other claimants similarly situated from challenging that decision.

(4) If the court designates an issue as a stream system issue, it shall enter an order defining the scope, timing and procedures to be followed in the stream system issue proceeding. Notice of the proceeding pursuant to Paragraph C of this rule shall be given to all claimants, regardless of whether they have been served and joined as defendants, in the sections of the stream system designated by the court. Unless the court orders otherwise or the parties otherwise agree, the movant requesting designation of the stream system issue shall provide the notice.

B. **Expedited *inter se* proceedings.**

(1) An expedited *inter se* proceeding is a proceeding in which a water rights claim is resolved in a stream system adjudication suit conducted pursuant to Section 72-4-17 NMSA 1978 both as between the plaintiff and the defendant and as among the defendant and other water rights claimants.

(2) The plaintiff or any claimant may file a motion requesting that the court designate an expedited *inter se* proceeding. The motion shall include a short, concise description of the defendant's claims and the reasons why such a proceeding is necessary. The court *sua sponte* may consider designating an expedited *inter se* proceeding.

(3) The court shall conduct a hearing to determine whether to conduct an expedited *inter se* proceeding, and may proceed if it finds that such a proceeding will promote judicial efficiency and expeditious completion of the adjudication. Among the factors the court shall consider are the following:

(a) whether failure to proceed will injure the party asserting the claim;

(b) whether proceeding will injure those parties opposing the claim; and

(c) the expense and delay resulting from the failure to proceed.

(4) If the court finds that the criteria for an expedited *inter se* proceeding exist, it shall enter an order defining the scope, timing and procedures to be followed in the proceeding. Notice of the proceeding pursuant to Paragraph C of this rule shall be given to all claimants, regardless of whether they have been served and joined as defendants, in the sections of the stream system designated by the court. Unless the court orders otherwise or the parties otherwise agree, the movant requesting designation of the expedited *inter se* proceeding shall provide the notice.

C. **Notice.** Notwithstanding Rule 1-004 NMRA, notice of a stream system issue proceeding or an expedited *inter se* proceeding shall be given in accordance with this paragraph. Notice of a stream system issue proceeding or an expedited *inter se* proceeding shall be given to all claimants, regardless of whether they have been served and joined as defendants, claiming water rights within the section or sections of the stream system identified by the court. Notice shall be given by first class mail with proper postage to all known claimants whose names and addresses are reasonably ascertainable. For all unknown claimants and claimants whose addresses cannot reasonably be determined, notice shall be given in a manner reasonably calculated under all the circumstances to apprise claimants of the proceeding and shall be approved by the court.

(1) To the extent they are relevant, the following records, if available, shall be consulted to identify persons who may claim the right to use waters of the identified section or sections of the stream system:

(a) an existing hydrographic survey, if sufficiently current to provide accurate information;

(b) the public records of the county assessor;

(c) the public records of the state engineer; and

(d) the public records of irrigation districts, acequias, water conservancy districts, and other water users' associations or commissions.

(2) Any claimant who desires to participate in a stream system issue proceeding or an expedited *inter se* proceeding shall file with the court and serve on the plaintiff a notice of intent to participate within the time prescribed by the court. Thereafter, the court shall conduct such scheduling conferences, hearings, and other proceedings as necessary to resolve the issues.

D. **Effect of proceeding.** Stream adjudications are special proceedings to determine the rights to use the waters of a stream system. An order resolving a stream system issue proceeding or an expedited *inter se* proceeding binds all water rights claimants regardless of whether they were served and joined as defendants, participated in, or received actual notice of the proceeding, provided notice was given in accordance with Paragraph C of this rule.

[Provisionally approved by Supreme Court Order No. 07-8300-13 for one year, effective June 13, 2007; provisionally approved by Supreme Court Order 08-8300 for one additional year, effective June 9, 2008; provisionally approved by Supreme Court Order No. 09-8300-015, for one additional year, effective June 9, 2009; provisionally approved by Supreme Court Order No. 10-8300-020, for one additional year, effective June 8, 2010; as amended by Supreme Court Order No. 11-8300-027, effective for new and pending cases on or after June 8, 2011.]

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-027, effective June 8, 2011, in Paragraph C, required that, notwithstanding Rule 1-004 NMRA, notice of a stream issue proceeding or an expedited *inter se* proceeding be given in accordance with Paragraph C and required that the court approve the notice given to unknown claimants and to claimants whose addresses cannot be reasonably determined.

1-071.3. Statutory stream system adjudication suits; annual joint working session.

A. **Joint working sessions in state adjudications.** Thirty (30) days before the end of each fiscal year, the judges, special masters, the state and other parties in each stream adjudication court shall coordinate and set a working session for the purpose of

discussing common issues among all pending stream adjudications and resource needs of each adjudication court. The judges presiding over state stream system adjudications shall invite judges and special masters presiding over federal stream system adjudications to participate.

B. **Report of state's priorities.** Thirty (30) days prior to the joint working session, the state shall file a report setting out the plaintiff's suggested priorities and its analysis of resources needed by the courts and the state for each adjudication pending in state court.

[Provisionally approved by Supreme Court Order No. 07-8300-13 for one year, effective June 13, 2007; provisionally approved by Supreme Court Order 08-8300 for one additional year, effective June 9, 2008; provisionally approved by Supreme Court Order No. 09-8300-015, for one additional year, effective June 9, 2009; provisionally approved by Supreme Court Order No. 10-8300-020, for one additional year, effective June 8, 2010; approved by Supreme Court Order No. 11-8300-027, effective for new and pending cases on or after June 8, 2011.]

Committee Commentary. — The annual joint working session is called to balance the demands of state and federal court adjudications with the personnel and financial resources available to the state engineer and the courts. While each adjudication court must manage its case to ensure expeditious resolution, case management plans must be realistic and based on current resource information. Each adjudication court must take care to monitor its case management to avoid unnecessarily undermining the progress in other pending adjudications.

Because of the prohibition against *ex parte* contacts between the state and the judiciary, and because other parties' substantive and procedural rights might be impacted by decisions reached in the joint working session, such sessions are to be held only after notice of the date, time and place.

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-027, effective June 8, 2011, ended the practice of annually, provisionally approving the rule and applied the rule to new and pending cases on or after June 8, 2011.

1-071.4. Statutory stream system adjudication suits; *ex parte* contacts; general problems of administration.

Subparagraph (7) of Paragraph B of Rule 21-300 NMRA of the Code of Judicial Conduct applies to stream adjudications, except that judges, special masters and members of their staff in accordance with this rule may communicate with the plaintiff with respect to matters not addressing the merits of any pending adjudication that relate to general problems of administration and management of a pending or impending adjudication or the accurate reporting of water rights claims in the court's records.

[Provisionally approved by Supreme Court Order No. 07-8300-13 for one year, effective June 13, 2007; provisionally approved by Supreme Court Order 08-8300 for one additional year, effective June 9, 2008; provisionally approved by Supreme Court Order No. 09-8300-015, for one additional year, effective June 9, 2009; provisionally approved by Supreme Court Order No. 10-8300-020, for one additional year, effective June 8, 2010; approved by Supreme Court Order No. 11-8300-027, effective for new and pending cases on or after June 8, 2011.]

Committee Commentary. — The unique nature of a stream system adjudication, including its complexity and size, require coordination between the courts and the state to effectively manage the adjudication. At the same time, the courts are regulated by the Code of Judicial Conduct's prohibition against *ex parte* communications concerning pending matters. This rule expressly permits the court to have limited *ex parte* contacts with the plaintiff for the purposes of general administration and management of the adjudication.

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-027, effective June 8, 2011, ended the practice of annually, provisionally approving the rule and applied the rule to new and pending cases on or after June 8, 2011.

1-071.5. Statutory stream system adjudication suits; excusal or recusal of a water judge.

Each water judge in each judicial district, including judges assigned to stream system adjudications, whether judges *pro tempore* or sitting judges, are designated by the chief justice of the Supreme Court. Paragraph E of Rule 1-088 NMRA applies and water judges cannot be excused peremptorily. If there is an excusal for cause or a recusal, the chief justice shall reassign the water right matter to another designated water judge.

[Provisionally approved by Supreme Court Order No. 07-8300-13 for one year, effective June 13, 2007; provisionally approved by Supreme Court Order 08-8300 for one additional year, effective June 9, 2008; provisionally approved by Supreme Court Order No. 09-8300-015, for one additional year, effective June 9, 2009; provisionally approved by Supreme Court Order No. 10-8300-020, for one additional year, effective June 8, 2010; approved by Supreme Court Order No. 11-8300-027, effective for new and pending cases on or after June 8, 2011.]

Committee Commentary. — This rule clarifies the applicability of Paragraph E of Rule 1-088 NMRA to water judges. Judges designated by the Supreme Court cannot be peremptorily excused.

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-027, effective June 8, 2011, ended the practice of annually, provisionally approving the rule and applied the rule to new and pending cases on or after June 8, 2011.

1-072. Appeal from magistrate courts in trial de novo cases.

A. **Right of appeal.** A party who is aggrieved by the judgment or final order in a civil action in the magistrate court may appeal, as permitted by law, to the district court of the county within which the magistrate court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the magistrate court clerk's office. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten (10) days after the date on which the first notice of appeal was served or within the time otherwise prescribed by this rule, whichever period expires last. The three (3) day mailing period set forth in Rule 1-006 NMRA does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the magistrate court clerk's office, shall be treated as timely filed. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed against the state, its political subdivisions or the nonprofit corporations authorized to be formed under the Educational Assistance Act [21-21A-1 NMSA 1978] in any such appeal.

B. **Notice of appeal.** An appeal from the magistrate court is taken by:

(1) filing with the clerk of the district court a notice of appeal with proof of service; and

(2) promptly filing with the magistrate court:

(a) a copy of the notice of appeal that has been endorsed by the clerk of the district court; and

(b) a copy of the receipt of payment of the docket fee.

C. **Content of the notice of appeal.** The notice of appeal shall be substantially in the form approved by the Supreme Court. A copy of the magistrate court judgment or final order appealed from, showing the date of the judgment or final order, shall be attached to the notice of appeal filed in the district court.

D. **Service of notice of appeal.** At the time the notice of appeal is filed in the district court, the appellant shall:

(1) serve each party or such party's attorney in the proceedings in the magistrate court with a copy of the notice of appeal in accordance with Rule 1-005 NMRA; and

(2) file proof of service with the clerk of the district court that a copy of the notice of appeal has been served in accordance with Rule 1-005 NMRA.

E. **Docketing the appeal.** Upon the filing of the notice of appeal and proof of service and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court.

F. **Jury trial.** Any party may demand a jury trial by filing a demand and paying the jury fees as provided by Rule 1-038 NMRA. A demand for jury trial shall be filed at the time the notice of appeal is filed in the district court, but not later than:

(1) thirty (30) days after service of the notice of appeal on each party to the action; or

(2) ten (10) days after the last pleading is filed, if additional pleadings are filed pursuant to Paragraph I of this rule.

G. **Record on appeal.** Within fifteen (15) days after the appellant files a copy of the notice of appeal with the magistrate court pursuant to Paragraph B of this rule, the magistrate court shall file with the clerk of the district court the record on appeal taken in the action in the magistrate court. For purposes of this rule, the record on appeal shall consist of:

(1) a title page containing the caption of the case in the magistrate court and the names and mailing addresses of each party or, if the party is represented by counsel, the name and address of the attorney;

(2) a copy of all papers and pleadings filed in the magistrate court;

(3) a copy of the judgment or order sought to be reviewed with date of filing noted thereon;

(4) any exhibits; and

(5) any transcript of the proceedings made by the magistrate court, either stenographically recorded or tape recorded. If the transcript of the proceedings is a tape recording, the magistrate court shall prepare and file with the district court a duplicate of the tape and index log.

Any party desiring a copy of the transcript of the proceedings shall be responsible for paying the cost, if any, of preparing such copy.

The magistrate court clerk shall give prompt notice to all parties of the filing of the record on appeal with the district court.

H. **Correction or modification of the record.** If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the magistrate court on motion, or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court.

I. **Pleadings.** The complaint and other pleadings filed in the magistrate court shall be the complaint and pleadings in the district court. An amended complaint may be filed within thirty (30) days after service of the notice of appeal. An amended complaint shall be served in the manner provided by Rule 1-004 NMRA of these rules. If an amended complaint is filed, a responsive pleading shall be filed within thirty (30) days and served as provided by these rules.

J. **Procedure on appeal.** Unless otherwise provided by this rule, all other Rules of Civil Procedure for the District Courts shall apply to appeals from the magistrate court.

K. **Stay of proceedings to enforce a judgment.**

(1) When an appeal is taken, the appellant may obtain a stay of the proceedings to enforce the judgment by posting a supersedeas bond with the clerk of the magistrate court as provided in the Rules of Civil Procedure for the Magistrate Courts.

(2) When an appeal is taken by the state, by an officer or agency of the state, by direction of any department of the state, by any political subdivision or institution of the state or by any municipal corporation, the taking of an appeal shall operate as a stay.

L. **Review of supersedeas.** At any time after an appeal is filed pursuant to Paragraph B of this rule, the district court may, upon motion and notice, review any action of, or any failure or refusal to act by the magistrate court dealing with supersedeas or stay. If the district court modifies the terms, conditions or amount of a supersedeas bond or if it determines that the magistrate court should have allowed supersedeas and failed to do so on proper terms and conditions, it may grant additional time within which to file in the district court a supersedeas bond complying with the requirements for a supersedeas bond set forth in the Rules of Civil Procedure for the Magistrate Courts. Any change ordered by the district court shall be certified by the clerk of the district court and filed with the magistrate court clerk by the party seeking the review.

M. **Rehearing.** A motion for reconsideration may be filed within ten (10) days after filing of the district court's final order. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

N. **Disposal of appeals.** The district court shall dispose of appeals by entry of an appropriate order disposing of the appeal. The court in its discretion may accompany the order with a formal or memorandum opinion. Opinions shall not be published and shall not be used as precedent in subsequent cases. A mandate shall be issued by the court upon expiration of whichever of the following events occurs latest:

(1) fifteen (15) days after entry of the order disposing of the case;

(2) fifteen (15) days after disposition of a motion for rehearing; or

(3) if a notice of appeal is filed, upon final disposition of the appeal.

O. **Remand.** Upon expiration of the time for appeal from the judgment or final order of the district court, if the relief granted is within the jurisdiction of the magistrate court, the district court shall remand the case to the magistrate court for enforcement of the district court's judgment.

P. **Appeal.** Any aggrieved person may appeal from a judgment of the district court to the New Mexico Supreme Court or Court of Appeals, as authorized by law in accordance with the Rules of Appellate Procedure. Any supersedeas bond approved by the magistrate court, or modified by the district court, shall continue in effect pending appeal to the Supreme Court or Court of Appeals, unless modified pursuant to Rule 12-207 of the Rules of Appellate Procedure.

[Adopted, effective January 1, 1996.]

ANNOTATIONS

Transcripts. — Because transcripts are designated separately from papers in the rules listing the contents of the record on appeal, transcripts are not “papers,” but transcripts that are properly admitted into evidence as exhibits may be part of the record on appeal. State v. Foster, 2003-NMCA-099, 134 N.M. 224, 75 P.3d 824.

1-073. Appeal from metropolitan court on the record.

A. **Right of appeal.** A party who is aggrieved by the judgment or final order in a civil action in the metropolitan court may appeal, as permitted by law, to the district court of the county within which the metropolitan court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the metropolitan court clerk's office. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten (10) days after the date on which the first notice of appeal was served or within the time otherwise prescribed by this rule, whichever period expires last. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the metropolitan court clerk's office, shall be treated as

timely filed. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed against the state, its political subdivisions or the nonprofit corporations authorized to be formed under the Educational Assistance Act [21-21A-1 NMSA 1978] in any such appeal.

B. **Notice of appeal.** An appeal from the metropolitan court is taken by:

(1) filing with the clerk of the district court a notice of appeal with proof of service; and

(2) promptly filing with the metropolitan court:

(a) a copy of the notice of appeal that has been endorsed by the clerk of the district court; and

(b) a copy of the receipt of payment of the docket fee.

C. **Content of the notice of appeal.** The notice of appeal shall be substantially in the form approved by the Supreme Court. A copy of the metropolitan court judgment or final order appealed from, showing the date of the judgment or final order, shall be attached to the notice of appeal filed in the district court.

D. **Service of notice of appeal.** At the time the notice of appeal is filed in the district court, the appellant shall:

(1) serve each party or such party's attorney in the metropolitan court proceedings with a copy of the notice of appeal in accordance with Rule 1-005;

(2) file proof of service with the clerk of the district court that a copy of the notice of appeal has been served in accordance with Rule 1-005 NMRA; and

(3) if evidentiary or factual matters are involved in the appeal, file with the clerk of the district court a certificate of the clerk of the metropolitan court that satisfactory arrangements have been made with the metropolitan court for preparation and payment for the transcript of the proceedings.

E. **Docketing the appeal.** Upon the filing of the notice of appeal and proof of service and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court.

F. **Record on appeal.** Within fifteen (15) days after the appellant files a copy of the notice of appeal with the metropolitan court pursuant to Paragraph B of this rule, the metropolitan court shall file with the clerk of the district court the record on appeal taken in the action in the metropolitan court. For purposes of this rule, the record on appeal shall consist of:

(1) a title page containing the caption of the case in the metropolitan court and names and mailing addresses of each party or, if the party is represented by counsel, the name and address of the attorney;

(2) a copy of all papers and pleadings filed in the metropolitan court;

(3) a copy of the judgment or order sought to be reviewed with date of filing noted thereon;

(4) any exhibits; and

(5) any transcript of the proceedings made by the metropolitan court, either stenographically recorded or tape recorded. If the transcript of the proceedings is a tape recording, the metropolitan court clerk shall prepare and file with the district court a duplicate of the tape and index log.

Any party desiring a copy of the transcript of the proceedings shall be responsible for paying the cost, if any, of preparing such copy.

The metropolitan court clerk shall give prompt notice to all parties of the filing of the record on appeal with the district court.

G. **Correction or modification of the record.** If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the metropolitan court on motion, or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court.

H. **Statement of appellate issues.** A statement of appellate issues shall be filed with the district court as follows:

(1) the appellant's statement shall be filed and served within thirty (30) days from the date of service of the notice of filing of the record on appeal in the district court; and

(2) the appellee's response shall be filed and served within thirty (30) days after service of the appellant's statement of issues.

I. **Appellant's statement of appellate issues.** The appellant's statement of appellate issues, under appropriate headings and in the order here indicated, shall contain:

(1) a statement of the issues;

(2) a summary of the proceedings which shall indicate briefly the nature of the case, the course of proceedings, and the disposition of the metropolitan court. The

summary shall include a short recitation of all facts relevant to the issues presented for review, with appropriate references to the record on appeal showing how the issues were preserved in the proceedings before the metropolitan court;

(3) an argument which shall contain the contentions of the appellant with respect to each issue presented in the statement of issues, with citations to the authorities, statutes and parts of the record on appeal relied upon. New Mexico decisions, if any, shall be cited; and

(4) a statement of the precise relief sought.

J. **Appellee's statement of appellate issues; response.** The appellee's response shall conform to the requirements of Subparagraphs (1) to (4) of Paragraph I of this rule, except that a statement of the issues or a summary of the proceedings shall not be made unless the appellant's statement of issues or summary of the proceedings is disputed or is incomplete.

K. **References in statement of appellate issues.** References in the statement of appellate issues shall be to the pages of the record on appeal or, if the reference is to a tape recording, the approximate counter numbers of the tape as shown on the index log shall be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be to the place in the record on appeal at which the evidence was identified, offered, and received or rejected.

L. **Length of statements of appellate issues.** Except by permission of the court, the argument portion of the appellant's statement of appellate issues shall not exceed eight (8) pages. Except by permission of the court, the argument portion of appellee's response shall not exceed eight (8) pages.

M. **Briefs.** Briefs may be filed only by leave of the district court and upon such conditions as the court may direct.

N. **Oral argument.** Upon motion of a party or on the court's own motion, the court may allow oral argument.

O. **Scope of review.** To preserve a question for review it must appear that a ruling or decision by the metropolitan court was fairly invoked, but formal exceptions are not required, nor is it necessary to file a motion for a new trial to preserve questions for review. Further, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party. This paragraph shall not preclude the district court from considering jurisdictional questions or, in its discretion, questions involving:

(1) general public interest; or

(2) fundamental error or fundamental rights of a party.

P. **Stay of proceedings to enforce a judgment.**

(1) When an appeal is taken, the appellant may obtain a stay of the proceedings to enforce the judgment by posting a supersedeas bond with the clerk of the metropolitan court as provided in the Rules of Civil Procedure for the Metropolitan Courts.

(2) When an appeal is taken by the state, by an officer or agency of the state, by direction of any department of the state, by any political subdivision or institution of the state or by any municipal corporation, the taking of an appeal shall operate as a stay.

Q. **Review of supersedeas.** At any time after an appeal is filed pursuant to Paragraph B of this rule, the district court may, upon motion and notice, review any action of, or any failure or refusal to act by the metropolitan court dealing with supersedeas or stay. If the district court modifies the terms, conditions or amount of a supersedeas bond or if it determines that the metropolitan court should have allowed supersedeas and failed to do so on proper terms and conditions, it may grant additional time within which to file in the district court a supersedeas bond complying with the requirements for a supersedeas bond set forth in the Rules of Civil Procedure for the Metropolitan Courts. Any change ordered by the district court shall be certified by the clerk of the district court and filed with the metropolitan court clerk by the party seeking the review.

R. **Rehearing.** A motion for reconsideration may be filed within ten (10) days after filing of the district court's final order. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

S. **Disposal of appeals.** The district court shall dispose of appeals by entry of an appropriate order disposing of the appeal. The court in its discretion may accompany the order with a formal or memorandum opinion. Opinions shall not be published and shall not be used as precedent in subsequent cases. A mandate shall be issued by the court upon expiration of whichever of the following events occurs latest:

(1) fifteen (15) days after entry of the order disposing of the case;

(2) fifteen (15) days after disposition of a motion for rehearing; or

(3) if a notice of appeal is filed, upon final disposition of the appeal.

T. **Remand.** Upon expiration of the time for appeal from the final order or judgment of the district court, the district court shall remand the case to the metropolitan court for enforcement of the district court's judgment.

U. **Appeal.** Any aggrieved person may appeal from a judgment of the district court to the New Mexico Supreme Court or Court of Appeals, as authorized by law in accordance with the Rules of Appellate Procedure. Any supersedeas bond approved by the metropolitan court, or modified by the district court, shall continue in effect pending appeal to the Supreme Court or Court of Appeals, unless modified pursuant to Rule 12-207 of the Rules of Appellate Procedure.

[Adopted, effective January 1, 1996.]

1-074. Administrative appeals; statutory review by district court of administrative decisions or orders.

A. **Scope of rule.** This rule governs appeals from administrative agencies to the district courts when there is a statutory right of review to the district court, whether by appeal, right to petition for a writ of certiorari or other statutory right of review. This rule does not create a right to appeal. For purposes of this rule, an "agency" means any state or local government administrative or quasi-judicial entity.

B. **Rule inapplicable.** This rule does not apply to:

(1) reviews from administrative agencies when there is no statutory right. If there is no statutory right of appeal or statutory right to writ of certiorari, an aggrieved person may be entitled to a constitutional review of an administrative decision or order pursuant to Rule 1-075 NMRA of these rules;

(2) appeals under the Human Rights Act. These appeals are governed by Rule 1-076 NMRA of these rules;

(3) the review of decisions relating to unemployment compensation claims under the Unemployment Compensation Law. Appeals from decisions involving unemployment compensation claims are governed by Rule 1-077 NMRA of these rules; and

(4) matters relating to water rights under Article XVI, Section 5 of the New Mexico Constitution.

C. **Filing appeal.** When provided or permitted by law, an aggrieved party may appeal a final decision or order of an agency by:

(1) filing with the district court a notice of appeal with proof of service that a copy of the notice has been served in accordance with Subparagraph (1) of Paragraph F of this rule; and

(2) promptly filing with the agency a copy of the notice of appeal that has been endorsed by the clerk of the district court.

D. **Content of the notice of appeal.** The notice of appeal shall specify:

(1) each party taking the appeal;

(2) each party against whom the appeal is taken;

(3) the name and address of appellate counsel if different from the person filing the notice of appeal; and

(4) any other information required by the law providing for the appeal to the district court.

A copy of the order or decision of the agency appealed from, showing the date of the order or decision, shall be attached to the notice of appeal filed in the district court.

E. **Time for filing appeals.** Unless a specific time is provided by law or local ordinance, an appeal from an agency shall be filed in the district court within thirty (30) days after the date of the final decision or order of the agency. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten (10) days after the date on which the first notice of appeal was served or within the time otherwise prescribed by this rule, whichever period expires last. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set forth in this paragraph. A notice of appeal filed after the announcement of a decision by an agency, but before the decision or order is issued by the agency, shall be treated as timely filed.

F. **Service of notice of appeal and arranging preparation of the record.** At the time the notice of appeal is filed in the district court, the appellant shall:

(1) serve each party or such party's attorney in the administrative proceedings with a copy of the notice of appeal in accordance with Rule 1-005 NMRA; and

(2) file a certificate in the district court that satisfactory arrangements have been made with the agency for preparation of and payment, if required, for the record of the proceedings.

G. **Docketing the appeal.** Upon the filing of the notice of appeal and proof of service and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed upon a state agency or a political subdivision of the state in any such appeal.

H. **Record on appeal.** Unless a different period is provided by law, within thirty (30) days after the filing of the notice of appeal with the agency pursuant to Paragraph C of this rule, the agency shall number consecutively and bind the pages of the record on appeal taken in the proceedings and file it in accordance with Rule 1-005 NMRA. For purposes of this rule, unless the parties stipulate to a partial designation of the record by

filing such a stipulation in the district court within five (5) days after the filing of the notice of appeal, the record on appeal shall consist of:

(1) a title page containing the names and mailing addresses of each party or, if the party is represented by counsel, the name and address of the attorney;

(2) a copy of all papers, pleadings, and exhibits filed in the proceedings of the agency, entered into or made a part of the proceedings of the agency, or actually presented to the agency in conjunction with the hearing, which shall be organized by date submitted to the agency beginning with the earliest paper or pleading;

(3) a copy of the final decision or order sought to be reviewed with date of issuance noted thereon; and

(4) the transcript of the proceedings, if any. If the transcript of the proceedings is an audio or video recording, the agency shall prepare and file with the district court a duplicate of the recording and index log. If the proceedings were stenographically recorded, the agency shall transcribe and file with the court those parts of the record specified by any party.

Any party desiring a copy of the transcript of the proceedings shall be responsible for paying the cost, if any, of preparing such copy. The agency shall give prompt notice to all parties of the filing of the record on appeal with the court.

I. **Correction or modification of the record.** If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the agency on request, or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court; provided, however, only those materials described in Paragraph H of this rule shall be made a part of the record on appeal.

J. **Statement of appellate issues.** A statement of appellate issues shall be filed with the district court as follows:

(1) the appellant's statement shall be filed and served within thirty (30) days from the date of service of the notice of filing of the record on appeal in the district court;

(2) the appellee's response shall be filed and served within thirty (30) days after service of the appellant's statement of issues; and

(3) if the appellee files a response, the appellant may file a reply to the appellee's response within fifteen (15) days after service of the appellee's response.

K. **Appellant's statement of appellate issues.** The appellant's statement of the appellate issues, under appropriate headings and in the order here indicated, shall contain:

(1) a statement of the issues;

(2) a summary of the proceedings, briefly describing the nature of the case, the course of proceedings, and the disposition in the agency. The summary shall include a short recitation of all facts relevant to the issues presented for review, with specific references to the record on appeal showing how the issues were preserved in the proceedings before the agency. A contention that a decision or finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing upon the proposition;

(3) an argument, which shall contain the contentions of the appellant with respect to each issue presented in the statement of appellate issues, with citations to the authorities, statutes and the record on appeal relied upon, and with a statement of the applicable standard of review. Applicable New Mexico decisions shall be cited. The argument shall set forth a specific attack on any finding, or such finding shall be deemed conclusive. A contention that a decision or finding of fact is not support by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence; and

(4) a statement of the precise relief sought.

L. **Appellee's response.** The appellee's response shall conform to the requirements of Subparagraphs (1) to (4) of Paragraph K of this rule, except that a statement of the issues or summary of the proceedings shall not be made unless the appellant's statement of issues or a summary of the proceedings is disputed or is incomplete.

M. **References in statement of appellate issues and response.** All references to the record on appeal in the statement of appellate issues and response shall be to specific page numbers or, if the reference is to an audio or video recording, to the specific counter numbers or time of the recording.

N. **Length of statements of appellate issues.** Except by permission of the court, the appellant's statement of appellate issues shall not exceed twenty-five (25) pages. Except by permission of the court, the appellee's response shall not exceed twenty-five (25) pages. Any reply to the appellee's response shall not exceed ten (10) pages.

O. **Oral argument.** Upon the filing of a request for hearing of either party or on the court's own motion, the court may allow oral argument. A party requesting oral argument shall file the request for hearing on or before the expiration of all response times under Paragraph J of this rule. If neither party requests oral argument within the time provided in this paragraph, the appellant shall promptly file a notice of completion of briefing to notify the court that the case is ready for decision by the court.

P. **Motions.** After the filing of the notice of appeal, at the option of a party, the following matters may be raised by motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) failure to join a party under Rule 1-019 NMRA;

(5) failure by the agency to issue a written decision that complies with Section 39-3-1.1(B) NMSA 1978;

(6) dismissal of the appeal on the ground that the agency decision does not constitute a final decision as defined in Section 39-3-1.1(H) NMSA 1978; and

(7) misjoinder of parties.

A motion filed pursuant to this paragraph shall not stay further proceedings unless the court orders otherwise.

Q. **Stay.** Upon motion, the district court may stay enforcement of the order or decision under review.

(1) **Contents of motion.** A motion for a stay pending appeal must:

(a) state that a request for stay was previously made to the agency and was denied, or explain why seeking a stay from the agency in the first instance would be impracticable;

(b) summarize the proceedings before the agency leading up to the action under review, to the extent necessary to inform the district court fully on matters relevant to the motion for stay;

(c) state the reasons for granting a stay and the facts relied upon to show that:

(i) the appellant will suffer irreparable injury unless a stay is granted;

(ii) the appellant is likely to prevail on the merits of the appeal;

(iii) other interested persons will not suffer substantial harm if a stay is granted; and

(iv) the public interest will not be harmed by granting a stay.

(2) **Attachments to motion.** A motion for stay shall include as attachments:

(a) any relevant portions of the administrative record that are available, including any statement by the agency regarding why a request to the agency to stay the action under review was denied; and

(b) any affidavits or other admissible evidence offered to establish the factors set forth in Subparagraph (1) of this paragraph.

(3) **Bond.** As a condition of granting a stay, the district court may require the posting of a bond or other appropriate surety.

R. **Standard of review.** The district court shall apply the following standards of review:

(1) whether the agency acted fraudulently, arbitrarily or capriciously;

(2) whether based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;

(3) whether the action of the agency was outside the scope of authority of the agency; or

(4) whether the action of the agency was otherwise not in accordance with law.

S. **Certification.** Upon the district court's own review, or in response to a motion for certification by any party within thirty (30) days of the filing of the notice of appeal and after allowing fifteen (15) days from service for response, the district court may, as a matter of judicial discretion, certify to the Court of Appeals a final decision appealed to the district court, but undecided by that court, if the appeal involves an issue of substantial public interest that should be decided by the Court of Appeals. In determining whether a case involves an issue of substantial public interest, the district court shall consider, but is not limited to, whether the case involves:

(1) a novel question;

(2) a constitutional question;

(3) a question of state-wide impact;

(4) a question of imperative public importance;

(5) a question that is likely to recur and the need for uniformity is great;

(6) whether an appeal from any district court determination is highly likely such that certification in the first instance would serve the interests of judicial economy and reduce the litigation expenses to the parties; or

(7) whether the case involves an important local question which should receive consideration from the district court in the first instance.

Upon the request of a party or on the court's own motion, the court may allow oral argument on the issue of certification. After receipt of the completed record, the district court shall notify the parties of its decision concerning certification as provided by Rule 12-608 NMRA.

T. **District court decision.** The district court, in its appellate capacity, shall issue a written decision, which may include:

(1) remanding the case to the administrative agency with specific instructions for further proceedings and determinations; the remand may also include instructions to make the case ripe for judicial review;

(2) reversing the decision under review, with a statement of the basis for the reversal as provided under Paragraph R of this rule; and

(3) affirming the decision under review, with a statement of the basis for affirmance.

U. **Rehearing.** A motion for rehearing may be filed within ten (10) days after filing of the district court's final order. The three (3) day mailing period set forth in Rule 1-006 NMRA does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

V. **Appeal.** An aggrieved party may seek review of an order or judgment of the district court in accordance with the Rules of Appellate Procedure.

W. **Conflict between statute authorizing appeal.** If there is a conflict between the time period for taking an appeal set forth in this rule and a statutory time period for taking an appeal, the statute granting the right to appeal to the district court shall control.

X. **Failure to comply with rules.**

(1) If an appellant fails to file a statement of appellate issues in the district court as provided by these rules, such failure may be deemed sufficient grounds for dismissal of the appeal by the district court.

(2) If an appellee fails to file a response as provided by these rules, the cause may be submitted upon the statement of appellate issues of appellant, and appellee may not thereafter be heard, except by permission of the district court.

(3) An appeal filed within the time limits provided in this rule shall not be dismissed for technical violations of this rule that do not affect the substantive rights of the parties.

(4) For any failure to comply with these rules or any order of the district court, the court may, on motion by appellant or appellee or on its own initiative, take such action as it deems appropriate in addition to that set out in Subparagraphs (1) and (2) of this rule, including but not limited to citation of counsel or a party for contempt, refusal to consider the offending party's contentions, assessment of fines, costs or attorney fees or, in extreme cases, dismissal or affirmance.

[Adopted, effective January 1, 1996; as amended, effective May 1, 2001; October 1, 2002; as amended by Supreme Court Order No. 08-8300-41, effective December 15, 2008.]

Committee Commentary. —

(re related actions)

There may be instances when other actions arising out of the same facts and circumstances are brought simultaneously in district court by one of the parties to an appeal under this rule. Such actions could include complaints for declaratory judgment, petitions for writs of mandamus, civil rights actions, and other actions to enforce various statutes or other rights. This rule does not address the district court's options for consolidating or otherwise addressing such actions in a manner that promotes judicial economy and compliance with these rules and substantive law.

(re transcripts)

If a written transcription is made of an audio or video transcript, and all the parties agree to its accuracy, the written transcription should be made a part of the record on appeal. In the event of any discrepancies between the official audio or video transcript and the written transcription, the audio or video transcript shall control.

(re citations to administrative rules)

Any references to administrative rules should be made by citation to the specific page in the record where the rule appears rather than to any other codification of the rule that may exist outside of the record on appeal.

(re applicability of Rule 1-007.1 NMRA)

Any motions filed pursuant to this rule are subject to the general rules governing motions in Rule 1-007.1 NMRA.

(re stays)

Consistent with the broad applicability of NMSA 1978, § 39-3-1.1 (1999) and the overall approach of Rule 1-074, paragraph Q of the rule is intended to apply in any case in which a party appealing to the district court from the action of an administrative agency seeks a stay of the action under review. The court has power, during the pendency of an appeal, to stay the agency action in appropriate circumstances. See Tenneco Oil Co. v. N.M. Water Quality Control Comm'n, 105 N.M. 708, 736 P.2d 986 (Ct. App. 1986). Whether to grant a stay rests in the sound discretion of the district court. Id. Cf. 5 U.S.C. § 705 (reviewing court may, "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury, . . . issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings").

An appellant may move for a stay at any time after filing the notice of appeal. Cf. Rule 1-062(D) NMRA (appellant in civil action may obtain stay of money judgment "at or after the time of filing the notice of appeal"). The motion is governed by the district court's regular procedures for motion practice.

Under the rule requiring exhaustion of administrative remedies, a party seeking a stay ordinarily would be expected to apply first to the agency involved. Tenneco Oil Co., 105 N.M. at 710, 736 P.2d at 988. Application may be made initially to the district court if prior recourse to the agency would be impracticable. Initial resort to the agency might be impracticable, for instance, if the agency had no procedure for granting a stay. A motion for a stay of agency action pending appeal must state that the agency previously had denied a request for a stay or must explain why requesting a stay from the agency initially would be impracticable. See Fed. R. App. P. 18(a)(2)(A).

The factors that a court must consider in deciding whether to stay agency action pending appeal are set forth in Tenneco Oil Co. See 105 N.M. at 710, 736 P.2d at 988. These factors have been widely accepted judicially. See 16A Charles A. Wright et al., Federal Practice and Procedure § 3964, at 401-02 n.13 (1999); Louis L. Jaffe, Judicial Control of Administrative Action 689 (1965). The court may weigh the factors, giving greater weight to one or another of them as the circumstances require. See Ohio ex rel. Celebrezze v. Nuclear Reg. Comm'n, 812 F.2d 288 (6th Cir. 1987). However, some showing as to each factor must be made before a stay can be granted. Tenneco Oil Co., 105 N.M. at 710, 736 P.2d at 988. Some courts hold that where a strong showing has been made as to the other three factors, a likelihood of success on the merits is sufficiently established if the appellant can show "serious questions" going to the merits. See, e.g., Celebrezze, 812 F.2d at 290 (internal quotation marks & citation omitted).

The administrative record may not be available to the district court when a motion for stay is made. The motion should concisely and accurately summarize the administrative proceedings to the extent they are relevant to the district court's consideration of the motion. If the agency's findings on disputed factual matters are at issue, the summary should include the substance of all the evidence presented to the agency relating to the disputed matters. See Nat'l Council on Compensation Ins. v. N.M. State Corp. Comm'n, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988) (under "whole record" review of agency

factfinding, court views evidence in light most favorable to agency decision but also considers any contravening evidence); Martinez v. S.W. Landfills, Inc., 115 N.M. 181, 184-85, 848 P.2d 1108, 1111-12 (Ct. App. 1993) (party challenging sufficiency of evidence to support agency action must set forth substance of all relevant evidence in brief and explain why evidence, viewed favorably to agency, on balance fails to support agency's decision).

The appellant may attach as exhibits to the motion any available, relevant parts of the agency record that would help inform the court with respect to the motion. Cf. Pinchiera v. Allstate Ins. Co., 2004-NMCA-030, ¶8, 135 N.M. 220, 86 P.3d 645 (party seeking writ of error to review district court ruling may attach to petition any relevant portions of record before district court); Fed. R. App. P. 18(a)(2)(B)(iii). If the agency has provided a statement of reasons why a prior request to the agency for a stay was denied, the agency's statement must be included as an attachment. Cf. Fed. R. App. P. 18(a)(2)(A)(ii). Any party may include affidavits or other admissible evidence to establish the factors relevant to a stay. Material submitted in support of or in opposition to a stay should not be deemed part of the record on appeal.

The court may condition relief on the posting of a bond or other security to protect the interests that might be adversely affected by a stay. Cf. Rule 1-062(C) NMRA (on appeal from injunction, appellate court may grant stay "upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party"); Rule 1-062(D) NMRA (supersedeas bond for stay of money judgment); Fed. R. App. P. 18(b).

Under New Mexico law an aggrieved party may, in some circumstances, bring an independent declaratory judgment action against an agency to challenge a disputed agency action as an alternative to pursuing an administrative appeal. See Smith v. City of Santa Fe, 2007-NMSC-055, 142 N.M. 786, 171 P.3d 300. New Mexico courts have applied the same factors in deciding whether to grant preliminary injunctive relief as apply to the question of granting a stay of administrative action under Tenneco Oil Co. See LaBalbo v. Hymes, 115 N.M. 314, 317-18, 850 P.2d 1017, 1020-21 (Ct. App. 1993).

(re certification)

NMSA 1978, §39-3-1.1(F) (1999) allows a district court to certify a final decision appealed to the district court from an administrative agency directly to the court of appeals if it involves an issue of substantial public interest that should be decided by the court of appeals. In drafting the proposed amendment providing standards for certification, the drafters considered Section 39-3-1.1, Rule 1-074 NMRA, Rule 12-608 NMRA, Wyoming's Rules of Appellate Procedures, Rule 12- Judicial Review of Administrative Action, specifically, W.R.A.P. Rule12.09 Extent of Review, and its enabling legislation.

The drafters found that the criteria set out in the Wyoming rule to be very helpful and believe that the same complements current New Mexico case law. The drafters also

incorporated specific language the court of appeals has utilized in defining “substantial public interest”. See Jicarilla Apache Nation v. Rio Arriba County Assessor, 2004-NMCA-055, 135 N.M. 630(case law suggests that an issue is one of “substantial public interest” when it raises a question of first impression that is likely to recur, and when the need for uniformity is great). Although the drafters initially discussed including “complex factual record” as one of the objective criteria a district court should consider in addressing “substantial public interest,” they ultimately concluded this is an argument to be made in the context of requesting certification, and not a separate objective criterion. For example, in support of a motion for certification, one could argue that an interest of judicial economy will be served where the record is voluminous and complex. Such an argument would be made in requesting relief pursuant to subparagraph S(6), i.e., “whether an appeal from any district court determination is highly likely such that certification in the first instance would serve the interests of judicial economy and reduce the litigation expenses to the parties.”

Finally, the drafters also reviewed a New Mexico Law Review Article, Seth D. Montgomery & Andrew S. Montgomery, Jurisdiction As May Be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico, 36 N.M. L. Rev. 215 (2006). The drafters felt that the article raised some interesting issues concerning statutory authorization. However, they ultimately concluded that the proposed amendment reflects objective criteria that the district court may utilize in assessing “substantial public interest,” and therefore the concerns raised in the article were not an issue.

(re submission for decision)

Upon completion of oral argument, or upon the notification of the district court that no party requests for oral argument, the case should be considered submitted for purposes of Rule 1-054.1 NMRA.

[As adopted by Supreme Court Order No. 08-8300-041, effective December 15, 2008.]

ANNOTATIONS

Cross references. — For the definition of "stenographic recording" or "stenographically recorded", *see* Rule 1-030.1 NMRA.

The 2001 amendment, effective May 1, 2001, in H(5), deleted "either stenographically recorded or tape recorded" following "if any" at the end of the first sentence, substituted "an audio or audio-video" for "a tape" in the second sentence, and added the third sentence; added J(3); substituted "fifteen (15) pages" for "eight (8) pages" in two places and added the last sentence in N; and rewrote T which formerly read, "An aggrieved party may appeal an order or judgment of the district court in accordance with the Rules of Appellate Procedure".

The 2002 amendment, effective October 1, 2002, substituted "of an order or judgment of the district court" for "by filing a petition for writ of certiorari" in Paragraph T.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-41, effective December 15, 2008, changed the title of Paragraph B from "Constitutional review by writ of certiorari" to "Rule inapplicable"; added Subparagraph (4) of Paragraph B; in Subparagraph (1) of Paragraph C, after "filing with the", deleted "clerk of the" and after "proof of service" added the remainder of the sentence; in the title of Paragraph F, added "and arranging preparation of the record"; deleted former Subparagraph (2) of Paragraph F, which provided for the filing of proof of service that a copy of the notice of appeal had been served in accordance with Rule 1-005 NMRA; in Subparagraph (2) of Paragraph F, after "preparation of and payment", added "if required" and after "if required, for the", deleted "transcript" and added "record"; in Paragraph H, in the first sentence, after "Paragraph C of this rule, the agency shall" changed "file with the clerk of the district court the record" to "number consecutively and bind the pages of the record", and after "appeal taken in the proceedings", added the remainder of the sentence, and in the second sentence, added the language between "For purposes of this rule" and "the record on appeal shall consist of:"; in Subparagraph (2) of Paragraph H, after "a copy of all papers, pleadings", added "and exhibits" and after "filed in the pleadings of the agency", added the remainder of the sentence; deleted former Subparagraph (4) of Paragraph H, which listed "any exhibits"; in relettered Subparagraph (4) of Paragraph H, in the first sentence, after "district court a duplicate of the", changed "tape" to "recording"; in Paragraph I, after "supplemental record transmitted to the district court", added the remainder of the sentence; in Subparagraph (2) of Paragraph K, in the first sentence, after "summary of the proceedings", deleted "which shall indicate" and added "describing" and after "presented for review, with" deleted "appropriate" and added "specific", and added the second sentence; in Subparagraph (3) of Paragraph K, in the first sentence, after "citations to the authorities, statutes and" deleted "parts of", after "record on appeal relied upon", added the remainder of the sentence, and added the third and the last sentences; in the title of Paragraph L, after "Appellee's", deleted "statement of appellate issues"; in the title of Paragraph M, after "appellate issues", added "and response"; changed Paragraph M from "References in the statement of appellate issues shall be to the pages of the record on appeal or, if the reference is to tape recording, the approximate counter numbers of the tape as shown on the index log shall be used" to the current language; in Paragraph M, deleted the former second sentence, which provided that reference to evidence the admissibility of which is in controversy shall be to the place in the record at which the evidence was identified, offered and received and rejected; in Paragraph H, in the first sentence, after "Except by permission of the court, the", deleted "argument portion of the" and in the first and second sentences, changed the page limitations from 15 pages to 25 pages; deleted former Paragraph O, which provided that briefs may be filed only by leave of the district court upon conditions specified by the court; in relettered Paragraph O, in the first sentence after "Upon", changed "motion of a" to "the filing of a request for hearing either" and added the second and third sentences; added Paragraphs P and Q; changed the title of Paragraph R from "Scope of review" to "Standard of review", in Paragraph R, changed the first sentence from "The district court may reverse the decision of the agency if" to "The district court shall apply the following standards of review"; added Paragraphs S and T; in Paragraph U, after "A motion for", changed "reconsideration" to "rehearing"; deleted former Paragraph S, which provided

criteria and conditions for granting a stay of enforcement of the agency's decision or order; and added Paragraph X.

Compiler's notes. — For scope of review of the district court, *see Zamora v. Village of Ruidoso Downs,* 120 N.M. 778, 907 P.2d 182 (1995).

Application of rule. — This rule, by its very terms, applies specifically to the review of administrative decisions in the district courts. Paule v. Santa Fe County, 2005-NMSC-021, 138 N.M. 82, 117 P.3d 240.

Motion denied by operation of law. — There is no provision within this rule which provides that a motion for reconsideration not acted upon by the district court within a certain amount of time is deemed denied by operation of law. Paule v. Santa Fe County, 2005-NMSC-021, 138 N.M. 82, 117 P.3d 240.

Writ of certiorari. — Review under this rule should be pursued in light of Rule 12-505 NMRA via a petition for writ of certiorari. Dixon v. State Taxation & Revenue Dep't MVD, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

Claims litigated in administrative proceedings barred by res judicata. — Where a municipal personnel board determined that the municipality had just cause to terminate plaintiff, because plaintiff failed to abide by the municipality's personnel rules and regulations and failed to provide valid documentation to support plaintiff's leave under the Family Medical Leave Act; plaintiff filed a civil complaint in district court that appealed the decision of the personnel board and alleged a claim for breach of implied employment contract; plaintiff based the breach of contract claim solely on the municipality's merit system ordinance, personnel rules and regulations, and collective bargaining agreement governing employment with the municipality; and the personnel board had jurisdiction over the breach of contract claim, res judicata prevented plaintiff from raising the breach of contract claim in the civil complaint. *Mascarenas v. City of Albuquerque*, 2012-NMCA-031, 274 P.3d 781.

Claims litigated in administrative proceedings precluded by collateral estoppel. — Where a municipal personnel board determined that the municipality had just cause to terminate plaintiff, because plaintiff failed to abide by the municipality's personnel rules and regulations and failed to provide valid documentation to support plaintiff's leave under the Family Medical Leave Act; plaintiff filed a civil complaint in district court that appealed the decision of the municipal personnel board and alleged violations of due process and abridgment of plaintiff's FMLA rights; the personnel board found that the municipality held an adequate pre-termination hearing and that plaintiff failed to provide valid documentation for FMLA leave to support plaintiff's absence from work; and the district court found that the hearing officer for the personnel board considered all the evidence presented; and during the personnel board hearing, both parties were represented by counsel, submitted exhibits and presented witness testimony, were entitled to subpoena witnesses and compel production of document, and submitted written briefs, collateral estoppel precluded litigation of the factual predicates of

plaintiff's due process and FLMA claims in district court. *Mascarenas v. City of Albuquerque*, 2012-NMCA-031, 274 P.3d 781.

Special use permit. — Where plaintiff properly sought a special use permit, it was reasonable for plaintiff to attempt an administrative resolution before proceeding to court and a review pursuant to 39-3-1.1 NMSA 1978 and this rule would have been limited to the narrow matter of the special use permit. Takhar v. Town of Taos, 2004-NMCA-072, 135 N.M. 741, 93 P.3d 762, cert. denied, 2004-NMCERT-006.

Correction or modification of record. — Paragraph I does not allow the addition of material to the record that was never presented to the administrative agency in the first instance. Martinez v. State Eng'r Office, 2000-NMCA-074, 129 N.M. 413, 9 P.3d 657, cert. denied, 129 N.M. 385, 9 P.3d 68 (2000).

Motion for rehearing. — Rule 1-006 A NMRA does apply to filing motions under Paragraph R of this rule. Garza v. State Taxation & Revenue Dep't., 2004-NMCA-061, 135 N.M. 673, 92 P.3d 685.

Motion was timely filed where excluding intermediate weekends and legal holidays, the tenth day after the order was entered on December 18, 2001, was January 3, 2002. Garza v. State Taxation & Revenue Dep't., 2004-NMCA-061, 135 N.M. 673, 92 P.3d 685.

Equity jurisdiction. — This rule did not deprive the district court of equitable jurisdiction to hear and issue an injunction in the context of an annexation appeal. State v. City of Sunland Park, 2000-NMCA-044, 129 N.M. 151, 3 P.3d 128, cert. denied, 129 N.M. 207, 4 P.3d 35 (2000).

Where district court considered case as appellate court, under this rule, it is appropriate to remand the appeal for the district court to consider the other issues in the first instance. Cerrillos Gravel Products, Inc. v. Board of County Comm'rs of Santa Fe, 2004-NMCA-096, 136 N.M. 247, 96 P.3d 1167, cert. granted, 2004-NMCERT-008.

Review under this rule in license revocation and denial of limited license cases is authorized by 39-3-1.1 NMSA 1978. Dixon v. State Taxation & Revenue Dep't MVD, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

Petition timely. — With regard to plaintiff private museum's appeal from the district court's order affirming the denial of a property tax protest appeal, because review of the district court's decision was by writ of certiorari under 39-3-1.1(E) NMSA 1978 and this rule, the appellate court treated the museum's docketing statement as a petition for writ of certiorari and accepted the petition as timely under Rule 12-505(C) NMRA. Georgia O'Keeffe Museum v. County of Santa Fe, 2003-NMCA-003, 133 N.M. 297, 62 P.3d 754.

Scope of appeal. — If a driver appeals issues that are within the statutory limits of a motor vehicles division hearing, and the driver also states claims that are beyond the

scope of such a hearing, the district court should consider each claim according to its appropriate standard of review and maintain the distinction between the court's appellate and original jurisdiction in rendering its decision. Maso v. State Taxation & Revenue Dep't, 2004-NMCA-025, 135 N.M. 152, 85 P.3d 276, cert. granted, 2004-NMCERT-002.

Standard of review on administrative appeal to district court. — District court acted outside its capacity as an appellate court by engaging in fact-finding when it determined, contrary to the determination of the county board of commissioners, that the administrative record supported a conclusion that a landfill was in a critical area as defined in the county ground water policy. Cadena v. Bernalillo County Board of County Commissioners, 2006-NMCA-036, 139 N.M. 300, 131 P.3d 687.

1-075. Constitutional review by district court of administrative decisions and orders.

A. **Scope of rule.** This rule governs writs of certiorari to administrative officers and agencies pursuant to the New Mexico Constitution when there is no statutory right to an appeal or other statutory right of review. For purposes of this rule, an "agency" means any state or local government administrative or quasi-judicial entity. This rule does not create a right to appeal or review by writ of certiorari. This rule does not govern appeals in matters relating to water rights under Article XVI, Section 5 of the New Mexico Constitution.

B. **Filing of petition for writ.** An aggrieved party may seek review of a final decision or order of an agency by:

(1) filing a petition for writ of certiorari in the district court with proof of service; and

(2) promptly filing with the agency a copy of the petition for writ of certiorari that has been endorsed by the clerk of the district court

C. **Petition; contents.** A petition for writ of certiorari shall contain:

(1) the grounds on which jurisdiction of the district court is based;

(2) a description of the proceedings of the agency relating to the petition;

(3) the names of the parties to the agency proceedings;

(4) a concise showing that the petitioner is entitled to relief; and

(5) a concise statement of the relief sought.

The petition shall have attached a copy of the final decision or order sought to be reviewed with the date of issuance noted thereon.

D. **Time for filing petitions.** A petition for writ of certiorari shall be filed in the district court within thirty (30) days after the date of final decision or order of an agency. If a timely petition for writ of certiorari is filed by a party, any other party may file a petition for writ of certiorari in the same proceedings within ten (10) days after the date on which the first petition was served or within the time otherwise prescribed by this rule, whichever period expires last. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set forth in this paragraph. A petition for writ of certiorari filed after the announcement of a decision by an agency, but before the decision or order is issued by the agency, shall be treated as timely filed.

E. **Service of notice of review.** At the time the petition is filed, the petitioner shall:

(1) serve each party or such party's attorney in the administrative proceedings with a copy of the petition in the manner provided by Rule 1-005 NMRA;

(2) file proof of service in the district court that a copy of the petition has been served in accordance with Rule 1-005 NMRA; and

(3) file a certificate in the district court that satisfactory arrangements have been made with the agency for preparation and payment for the transcript of the proceedings.

F. **Docketing the petition for writ.** Upon the filing of a petition for writ of certiorari and payment of the docket fee, if required, the clerk of the district court shall docket the petition in the district court. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed upon a state agency or a political subdivision of the state.

G. **Issuance of writ.** The court shall issue a writ of certiorari to review the action of the agency if:

(1) the petitioner has complied with the provisions of Paragraphs B through E of this rule; and

(2) the petition makes a prima facie showing that the court has jurisdiction over the agency, that the petitioner is entitled to relief and that the petitioner does not have a right to review by appeal

The granting of a writ of certiorari shall not automatically stay the proceedings before the agency. The petitioner shall serve the writ on the agency and all parties to the administrative proceeding by delivery or by certified mail.

H. **Record on review.** The writ of certiorari shall be substantially in the form approved by the Supreme Court and shall direct the agency to number consecutively the pages of the record on appeal taken in the proceedings and file it in accordance with Rule 1-005 NMRA within thirty (30) days after service of the writ on the agency or within such other period of time as the court may order. For purposes of this rule, unless the parties stipulate to a partial designation of the record by filing such a stipulation in the district court within five (5) days after the filing of the petition for the writ, the record on review shall consist of:

(1) a title page containing the names and mailing addresses of each party or, if the party is represented by counsel, the name and address of the attorney;

(2) a copy of all papers, pleadings, and exhibits filed in the proceedings of the agency, entered into or made a part of the proceedings of the agency, or actually presented to the agency in conjunction with the hearing, which shall be organized by date submitted to the agency beginning with the earliest paper or pleading;

(3) a copy of the final decision or order sought to be reviewed with date of issuance noted thereon; and

(4) the transcript of the proceedings, if any. If the transcript of the proceedings is an audio or video recording, the agency shall prepare and file with the district court a duplicate of the recording and index log. If the proceedings were stenographically recorded, the agency shall transcribe and file with the court those parts of the record specified by any party.

Any party desiring a copy of the transcript of the proceedings shall be responsible for paying the cost, if any, of preparing such copy. The agency shall give prompt notice to all parties of the filing of the record on review with the court.

I. **Correction or modification of the record.** If anything material to either party is omitted from the record on review by error or accident, the parties by stipulation, or the agency on request, or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court; provided, however, only those materials described in Paragraph H of this rule shall be made a part of the record on review.

J. **Statement of review issues.** A statement of the review issues shall be filed with the district court as follows:

(1) the petitioner's statement shall be filed and served within thirty (30) days from the date of service of the notice of filing of the record on review in the district court;

(2) the respondent's response shall be filed and served within thirty (30) days after service of the petitioner's statement of the review issues; and

(3) if the respondent files a response, the petitioner may file a reply to the response within fifteen (15) days after service of the response.

K. **Petitioner's statement of review issues.** The petitioner's statement of the review issues, under appropriate headings and in the order here indicated, shall contain:

(1) a statement of the issues;

(2) a summary of the proceedings, briefly describing the nature of the case, the course of proceedings, and the disposition in the agency. The summary shall include a short recitation of all facts relevant to the issues presented for review, with specific references to the record on review showing how the issues were preserved in the proceedings before the agency. A contention that a decision or finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing upon the proposition;

(3) an argument, which shall contain the contentions of the petitioner with respect to each issue presented in the statement of review issues, with citations to the authorities, statutes and the record on review relied upon, and with a statement of the applicable standard of appellate review. Applicable New Mexico decisions shall be cited. The argument shall set forth a specific attack on any finding, or such finding shall be deemed conclusive. A contention that a decision or finding of fact is not supported by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence; and

(4) a statement of the precise relief sought.

L. **Respondent's response.** The respondent's response shall conform to the requirements of Subparagraphs (1) to (4) of Paragraph K of this rule, except that a statement of the issues or a summary of the proceedings shall not be made unless the petitioner's statement of issues or summary of the proceedings is disputed or is incomplete.

M. **References in statement of review issues and response.** All references to the record on appeal in the statement of review issues and response shall be to specific page numbers or, if the reference is to an audio or video recording, to the specific counter numbers or time of the recording.

N. **Length of statements of review issues.** Except by permission of the court, the petitioner's statement of review issues shall not exceed twenty-five (25) pages. Except by permission of the court, the respondent's response shall not exceed twenty-five (25) pages. Any reply to the response shall not exceed ten (10) pages.

O. **Oral argument.** Upon the filing of a request for hearing of either party or on the court's own motion, the court may allow oral argument. A party requesting oral

argument shall file the request for hearing on or before the expiration of all response times under Paragraph J of this rule. If neither party requests oral argument within the time provided in this paragraph, the appellant shall promptly file a notice of completion of briefing to notify the court that the case is ready for decision by the court.

P. **Motions.** After the filing of the petition, at the option of a party, the following matters may be raised by motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) failure to join a party under Rule 1-019 NMRA;

(5) failure by the agency to issue a written decision;

(6) dismissal of the appeal on the grounds that the agency decision does not constitute a final decision; and

(7) misjoinder of parties.

A motion filed pursuant to this paragraph shall not stay further proceedings unless the court orders otherwise.

Q. **Stay.** Upon motion, the district court may stay enforcement of the order or decision under review.

(1) **Contents of motion.** A motion for a stay pending review must:

(a) state that a request for stay was previously made to the agency and was denied, or explain why seeking a stay from the agency in the first instance would be impracticable;

(b) summarize the proceedings before the agency leading up to the action under review, to the extent necessary to inform the district court fully on matters relevant to the motion for stay;

(c) state the reasons for granting a stay and the facts relied upon to show that:

(i) the petitioner will suffer irreparable injury unless a stay is granted;

(ii) the petitioner is likely to prevail on the merits of the appeal;

(iii) other interested persons will not suffer substantial harm if a stay is granted; and

(iv) the public interest will not be harmed by granting a stay.

(2) **Attachments to motion.** A motion for stay shall include as attachments:

(a) any relevant portions of the administrative record that are available, including any statement by the agency regarding why a request to the agency to stay the action under review was denied; and

(b) any affidavits or other admissible evidence offered to establish the factors set forth in Subparagraph (1) of this paragraph.

(3) **Bond.** As a condition of granting a stay, the district court may require the posting of a bond or other appropriate surety.

R. **Standard of review.** The district court shall apply the following standards of review:

(1) whether the agency acted fraudulently, arbitrarily or capriciously;

(2) whether based upon the whole record on review, the decision of the agency is not supported by substantial evidence;

(3) whether the action of the agency was outside the scope of authority of the agency; or

(4) whether the action of the agency was otherwise not in accordance with law.

S. **Certification.** Upon the district court's own review, or in response to a motion for certification by any party within thirty (30) days of the filing of the petition and after allowing fifteen (15) days from service for response, the district court may, as a matter of judicial discretion, certify to the Court of Appeals a final decision presented for review to the district court, but undecided by that court, if the matter involves an issue of substantial public interest that should be decided by the Court of Appeals. In determining whether a case involves an issue of substantial public interest, the district court shall consider, but is not limited to, whether the case involves:

(1) a novel question;

(2) a constitutional question;

(3) a question of state-wide impact;

(4) a question of imperative public importance;

(5) a question that is likely to recur and the need for uniformity is great;

(6) whether an appeal from any district court determination is highly likely such that certification in the first instance would serve the interests of judicial economy and reduce the litigation expenses to the parties; or

(7) whether the case involves an important local question which should receive consideration from the district court in the first instance.

Upon motion of a party or on the court's own motion, the court may allow oral argument on the issue of certification. After receipt of the completed record, the district court shall notify the parties of its decision concerning certification as provided by Rule 12-608 NMRA.

T. **District court decision.** The district court, in its appellate capacity, shall issue a written decision, which may include:

(1) remanding the case to the administrative agency with specific instructions for further proceedings and determinations; the remand may also include instructions to make the case ripe for judicial review;

(2) reversing the decision under review, with a statement of the basis for the reversal as provided under Paragraph R of this rule; and

(3) affirming the decision under review, with a statement of the basis for affirmance.

U. **Rehearing.** A motion for rehearing may be filed within ten (10) days after filing of the district court's final order. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

V. **Appeals.** An aggrieved party may seek review of an order or judgment of the district court in accordance with the Rules of Appellate Procedure.

W. **Failure to comply with rules.**

(1) If an appellant fails to file a statement of review issues in the district court as provided by these rules, such failure may be deemed sufficient grounds for dismissal of the appeal by the district court.

(2) If an appellee fails to file a response as provided by these rules, the cause may be submitted upon the statement of review issues of appellant, and appellee may not thereafter be heard, except by permission of the district court.

(3) An appeal filed within the time limits provided in this rule shall not be dismissed for technical violations of this rule that do not affect the substantive rights of the parties.

(4) For any failure to comply with these rules or any order of the district court, the court may, on motion by appellant or appellee or on its own initiative, take such action as it deems appropriate in addition to that set out in Subparagraphs (1) and (2) of this rule, including but not limited to citation of counsel or a party for contempt, refusal to consider the offending party's contentions, assessment of fines, costs or attorney fees or, in extreme cases, dismissal or affirmance.

[Adopted effective January 1, 1996; as amended, effective May 1, 2001; October 1, 2002; as amended by Supreme Court Order No. 08-8300-41, effective December 15, 2008.]

Committee Commentary. — *See* commentary to Rule 1-074 NMRA.

ANNOTATIONS

Cross references. — For the definition of "stenographic recording" or "stenographically recorded", *see* Rule 1-030.1 NMRA.

The 2001 amendment, effective May 1, 2001, in H(5), deleted "either stenographically recorded or tape recorded" following "if any" at the end of the first sentence, substituted "an audio or audio-video" for "a tape" in the second sentence, and added the third sentence; added J(3); substituted "fifteen (15) pages" for "eight (8) pages" in two places and added the last sentence in N; and rewrote T which formerly read, "An aggrieved party may appeal an order or judgment of the district court in accordance with the Rules of Appellate Procedure".

The 2002 amendment, effective October 1, 2002, substituted "of an order or judgment of the district court" for "by filing a petition for writ of certiorari" in Paragraph T.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-41, effective December 15, 2008, in Paragraph A, added the last sentence; in Paragraph H, in the first sentence, after “shall direct the agency to”, deleted “file the record on review with the clerk of the district court” and added “number consecutively the pages of the record on appeal taken in the proceedings and file it in accordance with Rule 1-005 NMRA” and in the second sentence, between “For purpose of this rule” and “the record on review shall consist of”, added the current language; in Subparagraph (2) of Paragraph H, after “a copy of all papers, pleadings”, added “and exhibits” and after “filed in the pleadings of the agency”, added the remainder of the sentence; deleted former

Subparagraph (4) of Paragraph H, which listed “any exhibits”; in relettered Subparagraph (4) of Paragraph H, in the first sentence, after “proceedings is an audio or”, deleted “audio” and after “district court a duplicate of the”, changed “tape” to “recording”; in Paragraph I, after “supplemental record transmitted to the district court”, added the remainder of the sentence; in Subparagraph (2) of Paragraph K, in the first sentence, after “summary of the proceedings”, deleted “which shall indicate” and added “describing” and after “presented for review, with” deleted “appropriate” and added “specific”, and added the second sentence; in Subparagraph (3) of Paragraph K, in the first sentence, after “citations to the authorities, statutes and” deleted “parts of”, after “record on appeal relied upon”, added the remainder of the sentence, and added the third and last sentences; in the title of Paragraph L, after “Respondent’s”, deleted “statement of appellate issues”; in the title of Paragraph M, after “review issues”, added “and response”; changed Paragraph M from “References in the statement of review issues shall be to the pages of the record on appeal or, if the reference is to a tape recording, the approximate counter numbers of the tape as shown on the index log shall be used” to the current language; in Paragraph M, deleted the former second sentence, which provided that reference to evidence the admissibility of which is in controversy shall be to the place in the record at which the evidence was identified, offered and received and rejected; in Paragraph N, in the first and second sentences, changed the page limitations from 15 pages to 25 pages; deleted former Paragraph O, which provided that briefs may be filed only by leave of the district court upon conditions specified by the court; in relettered Paragraph O, in the first sentence, after “Upon”, changed “motion” to “the filing of a request for hearing either” and added the second and third sentences; added Paragraphs P and Q; changed the title of Paragraph R from “Scope of review” to “Standard of review”, in Paragraph R, changed the first sentence from “The district court may enter an order reversing the decision of the agency if it finds that” to “The district court shall apply the following standards of review”; added Paragraphs S and T; in Paragraph U, after “A motion for”, changed “reconsideration” to “rehearing”; deleted former Paragraph S, which provided criteria and conditions for granting a stay of enforcement of the agency’s decision or order; and added Paragraph W.

Compiler's notes. — For scope of review of the district court, *see Zamora v. Village of Ruidoso Downs,* 120 N.M. 778, 907 P.2d 182 (1995).

Action of for damages. — An aggrieved employee, who has exhausted the employee’s administrative remedies, is not prohibited from bringing a common law action for damages by filing a complaint in district court. *Madrid v. Vill. of Chama*, 2012-NMCA-071, 283 P.3d 871, cert. denied, 2012-NMCERT-006.

Writ of certiorari was not required. — Where the municipality terminated plaintiff’s employment with the municipality; pursuant to the municipal ordinance, plaintiff timely appealed the termination to the municipal council; the municipal council held a post-termination hearing and terminated plaintiff; the ordinance did not state what administrative remedies were afforded to an aggrieved employee and did not expressly state that the remedies in the ordinance were exclusive or specifically prohibit direct civil

action in district court; and after receiving notice of termination, plaintiff filed a complaint in district court seeking damages for breach of implied contract, breach of the covenant of good faith and fair dealing, and wrongful discharge, plaintiff was not required to petition the district court for a writ of certiorari because plaintiff had no remedy to appeal, and the district court had subject matter jurisdiction over plaintiff's complaint because plaintiff was not foreclosed from bringing a direct action for damages against the municipality. *Madrid v. Vill. of Chama*, 2012-NMCA-071, 283 P.3d 871, cert. denied, 2012-NMCERT-006.

Statutory authority for appeal absent. — This rule relates to appeals to district court when there is no statutory authority for the appeal. Dixon v. State Taxation & Revenue Dep't MVD, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

Review of regulations adopted by the state engineer. — Rule 1-075 NMRA does not grant a right to appeal the adoption of regulations by the state engineer. *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2011-NMCA-014, 149 N.M. 386, 249 P.3d 924.

Challenge of driver's license revocation. — Driver's challenge of the revocation of his driver's license by motor vehicle division had to be in the form of a writ of certiorari, since his license was mandatorily revoked due to three DWI convictions and he had no other statutory means of appeal; because the remedy was a writ of certiorari, he was required to follow the jurisdictional requirements of this rule. Masterman v. State Taxation & Revenue Dep't, 1998-NMCA-126, 125 N.M. 705, 964 P.2d 869.

1-076. Appeals from Human Rights Commission.

A. **Scope of rule.** This rule governs *de novo* appeals from the Human Rights Commission, or "commission", to the district court.

B. **Filing appeal.** An appeal from the Human Rights Commission may be taken by filing a notice of appeal in the form of a complaint in the district court in the manner provided by these rules for the filing of a civil action in the district court. An appeal may be taken by:

(1) any aggrieved person, including the complainant, by an order of the commission; or

(2) if the director has served notice of a waiver of the complainant's right to hearing, by the complainant.

C. **Joinder or claims and parties.** In compliance with the provisions of Rules 1-018, 1-019 and 1-020 NMRA, a complaint filed pursuant to this rule may:

(1) include issues not raised in the Human Rights Commission proceeding; and

(2) join persons who were not parties in the Human Rights Commission proceeding.

If additional claims or parties are included in the complaint on appeal, service shall be made in accordance with Rule 1-004 NMRA.

D. **Time for filing appeals.** An appeal from the Human Rights Commission shall be taken within ninety (90) days from the date of service on the parties to the administrative proceeding of:

(1) the commission's order; or

(2) the director's or complainant's notice of waiver of the complainant's right to hearing before the commission.

If a timely notice of appeal is filed by a party, any other party may file a cross notice of appeal in the form of a cross-complaint within ten (10) days after the date on which the notice of appeal was served or within the time otherwise prescribed by this rule, whichever period expires last. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limit for filing a notice of appeal. A notice of appeal filed after the announcement of a decision by the commission, but before the decision or order is served by the commission, shall be treated as timely filed.

E. **Service.** A copy of the complaint or cross-complaint shall be served on all parties who appeared before the commission and on the commission in the manner provided by law.

F. **Docketing the appeal.** Upon the filing of the notice of appeal and payment of the docket fee, the clerk of the district court shall docket the appeal in the district court. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed upon a state agency or a political subdivision of the state in any such appeal.

G. **Transcript of proceedings.** Within ten (10) days after service of the notice of appeal, each party shall designate which part of the transcript of the proceedings of the Human Rights Commission, whether stenographically recorded or tape recorded, is to be filed in the district court. Within thirty (30) days after receipt from the parties of the designation of transcript, the Human Rights Division of the Labor Department shall file with the clerk of the district court the designated parts of the transcript of proceedings of the commission. If the transcript of the proceedings is a tape recording, the commission shall prepare and file with the district court a duplicate of the tape and index log.

H. **Rules applicable on appeal.** After service of the complaint in the manner provided by law, the Rules of Civil Procedure for the District Courts of New Mexico shall apply to and govern the procedure in the district court for de novo appeals from the Human Rights Commission.

I. **Jury trial.** Any party may demand a jury trial by filing a demand in the manner provided by Rule 1-038 NMRA.

J. **Rehearing.** A motion for reconsideration may be filed within ten (10) days after filing of the district court's final order. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

K. **Stay.** A party appealing a decision or order of the Human Rights Commission may petition the district court for a stay of enforcement of the order or decision of the commission. Upon notice to the commission and the parties and a hearing, the district court may grant a stay of enforcement of the order or decision of the commission.

L. **Appeal.** An aggrieved party may appeal an order or judgment of the district court in accordance with the Rules of Appellate Procedure.

[Adopted, effective January 1, 1996; as amended by Supreme Court Order 06-8300-12, effective June 12, 2006.]

ANNOTATIONS

The 2006 amendment, approved by Supreme Court Order 06-8330-12, effective June 12, 2006, in Paragraph D changed the time for taking an appeal from 30 to 90 days to conform the rule with the 2005 amendment of 28-1-13 NMSA 1978 to change the time for taking an appeal from 30 to 90 days.

1-077. Appeals pursuant to Unemployment Compensation Law.

A. **Scope of rule.** This rule governs appeals from final decisions of the board of review of the Workforce Transition Services Division or the secretary of the Department of Workforce Solutions pursuant to Section 51-1-8 of the Unemployment Compensation Law [Section 51-1-1 NMSA 1978].

B. **Filing appeal.** An appeal pursuant to Section 51-1-8 NMSA 1978 may be taken by an aggrieved person filing a notice of appeal in the form of a petition for writ of certiorari in the county in which the person seeking the review resides. The district court of any other county has jurisdiction to hear an appeal pursuant to this rule upon a determination by the district court where the petition is filed that, as a matter of equity and due process, venue should be in that county. The writ of certiorari shall contain a short statement of the proceedings and the grounds relied on for issuance of a permanent writ.

C. **Time for appeal.** An appeal in the form of a petition for writ of certiorari pursuant to this rule shall be filed in the district court within thirty (30) days from the date of the

final decision of the secretary or board of review. The three (3) day mailing period set forth in Rule 1-006 NMRA does not apply to the time limit for filing a notice of appeal.

D. **Docketing the appeal.** Upon the filing of the petition for writ of certiorari and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court. No individual claiming benefits shall be charged fees of any kind by any court or officer thereof.

E. **Service.** The petition for writ of certiorari shall be served by the petitioner on the Office of General Counsel of the Department of Workforce Solutions, the respondent former employer or employee and all other parties to the proceedings before the secretary or board of review.

F. **Petitioner's statement of appellate issues.** The petitioner shall set forth in the petition for writ of certiorari a statement of the appellate issues under appropriate headings and in the order here indicated:

(1) a statement of the issues;

(2) a concise summary of the proceedings which shall indicate briefly the nature of the case, the course of proceedings, and the disposition of the secretary or board of review. The summary shall include a short recitation of all facts relevant to the issues presented for review. The summary shall also state how the issues were preserved in the proceedings before the agency; and

(3) a statement of the precise relief sought.

G. **Response and record on appeal.** Upon the filing of a petition for writ of certiorari pursuant to this rule, the court shall enter a writ of certiorari provided by the petitioner directing the Department of Workforce Solutions to file the record on appeal within twenty (20) days from the date of service of the writ. The record on appeal shall include a copy of all reports, papers, pleadings and documents filed in the proceedings before the board of review or the secretary and a certified transcript of proceedings before the secretary or board of review. If the transcript of the proceedings is an audio recording, the Department of Workforce Solutions shall prepare and file with the district court a duplicate of the recording.

H. **Supersedeas.** No bond shall be required in an appeal to the district court pursuant to this rule.

I. **Hearing.** An appeal pursuant to this rule shall be heard in a summary manner and shall be given precedence over all other civil cases.

J. **Scope of review.** The district court shall determine the appeal upon the evidence introduced at the hearing before the board of review or secretary of the

Department of Workforce Solutions. The district court may enter an order reversing the decision of the board of review or the secretary if it finds that:

(1) the board of review or secretary acted fraudulently, arbitrarily or capriciously;

(2) based upon the whole record on appeal, the decision of the board of review or secretary is not supported by substantial evidence; or

(3) the action of the board of review or secretary was outside the scope of authority of the agency.

K. **Rehearing.** A motion for reconsideration may be filed within ten (10) days after filing of the district court's final order. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

L. **Appeal.** An aggrieved party may appeal an order or judgment of the district court in accordance with the Rules of Appellate Procedure.

[Adopted, effective January 1, 1996; as amended by Supreme Court Order No. 11-8300-012, effective April 18, 2011.]

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-012, effective April 18, 2011, changed references to the Labor Department and its divisions to reflect the change in name of the Department to the Department of Workforce Solutions; in Paragraph E, required that the petitioner serve the writ of certiorari on the respondent former employer or employee and eliminated the requirement that the writ of certiorari be served in accordance with Section 51-1-8 NMSA 1978; and in Paragraph G required the petitioner to provide a form of writ of certiorari when the petition is filed and increased the time to file the record on appeal.

Appellate review. — Employer had ample opportunity to present evidence in support of its contentions that employee was intoxicated, and failed to do so to the board of review's satisfaction. The test results were unaccompanied by any certification assuring that proper collection or testing procedures were followed, and the district court did not grant the board of review its proper authority to exclude evidence and substitute its own findings of fact for those of the hearing officer. Mississippi Potash, Inc. v. Lemon, 2003-NMCA-014, 133 N.M. 128, 61 P.3d 837.

ARTICLE 9
District Courts

1-078. Motion day.

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct and hearing of actions.

ANNOTATIONS

Cross references. — For assignment of cases for trial, *see* Rule 1-040 NMRA.

Simplification of litigation. — Motion provisions of the rules of procedure are construed to effect simplification of litigation, and to provide speedy determination of litigation upon its merits. Read v. Western Farm Bureau Mut. Ins. Co., 90 N.M. 369, 563 P.2d 1162 (Ct. App. 1977).

Time and place for disposition of motions should be established. — Court of appeals does not condone practice of attorneys permitting motions to rest in peace; disposition of motions is an important aspect of civil procedure and some reasonable time and place for hearing and disposition should be established by district courts. Read v. Western Farm Bureau Mut. Ins. Co., 90 N.M. 369, 563 P.2d 1162 (Ct. App. 1977).

Disposition of motions is an important aspect of civil procedure and some reasonable time and place for hearing and disposition should be established by district courts. Atol v. Schifani, 83 N.M. 316, 491 P.2d 533 (Ct. App. 1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Motions, Rules and Orders §§ 1, 7, 8, 22, 23.

60 C.J.S. Motions and Orders §§ 8, 37(1) to 37(3).

1-079. Public inspection and sealing of court records.

A. **Presumption of public access; scope of rule.** Court records are subject to public access unless sealed by order of the court or otherwise protected from disclosure under the provisions of this rule. This rule does not prescribe the manner in which the court shall provide public access to court records, electronically or otherwise. No person or entity shall knowingly file a court record that discloses material obtained from another court record that is sealed, conditionally under seal, or subject to a pending motion to seal under the provisions of this rule.

B. **Definitions.** For purposes of this rule the following definitions apply:

(1) "court record" means all or any portion of a document, paper, exhibit, transcript, or other material filed or lodged with the court, and the register of actions and docket entries used by the court to document the activity in a case;

(2) "lodged" means a court record that is temporarily deposited with the court but not filed or made available for public access;

(3) "protected personal identifier information" means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver's license number, and all but the year of a person's date of birth;

(4) "public" means any person or entity, except the parties to the proceeding, counsel of record and their employees, and court personnel;

(5) "public access" means the inspection and copying of court records by the public; and

(6) "sealed" means a court record for which public access is limited by order of the court or as required by Paragraphs C or D of this rule.

C. **Limitations on public access.** In addition to court records protected pursuant to Paragraphs D and E of this rule, all court records in the following proceedings are confidential and shall be automatically sealed without motion or order of the court:

(1) proceedings commenced under the Adoption Act, Chapter 32A, Article 5 NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Subsection A of Section 32A-5-8 NMSA 1978;

(2) proceedings to detain a person commenced under Section 24-1-15 NMSA 1978;

(3) proceedings for testing commenced under Section 24-2B-5.1 NMSA 1978;

(4) proceedings commenced under the Adult Protective Services Act, Sections 27-7-14 to 27-7-31 NMSA 1978;

(5) proceedings commenced under the Mental Health and Developmental Disabilities Code, Chapter 43, Article 1 NMSA 1978, subject to the disclosure requirements in Section 43-1-19 NMSA 1978;

(6) wills deposited with the court pursuant to Section 45-2-515 NMSA 1978 that have not been submitted to informal or formal probate proceedings. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Section 45-2-515 NMSA 1978;

(7) proceedings commenced for the appointment of a person to serve as guardian for an alleged incapacitated person subject to the disclosure requirements of Subsection I of Section 45-5-303 NMSA 1978; and

(8) proceedings commenced for the appointment of a conservator subject to the disclosure requirements of Subsection M of Section 45-5-407 NMSA 1978. The provisions of this paragraph notwithstanding, the docket number and case type for the categories of cases listed in this paragraph shall not be sealed without a court order.

D. **Protection of personal identifier information.**

(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court's judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a non-sanctionable decision. Protected personal identifier information shall not be made available on publicly accessible court web sites. The court shall not publicly display protected personal identifier information in the courthouse.

(2) The court clerk is not required to review documents for compliance with this paragraph and shall not refuse for filing any document that does not comply with this paragraph. The court clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.

(3) Any person requesting public access to court records shall provide the court with the person's name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification.

E. **Motion to seal court records required.** Except as provided in Paragraphs C and D of this rule, no portion of a court record shall be sealed except by court order. Any party or member of the public may file a motion for an order sealing the court record. Any party or member of the public may file a response to the motion to seal. The movant shall lodge the court record with the court pursuant to Paragraph F when the motion is made, unless the court record was previously filed with the court or good cause exists for not lodging the court record pursuant to Paragraph F. Pending the court's ruling on the motion, the lodged court record will be conditionally sealed. If necessary to prevent disclosure, any motion, response or reply, and any supporting documents, shall be filed in a redacted version that will be subject to public access and lodged in a complete, unredacted version that will remain conditionally sealed pending the court's ruling on the motion. If the court denies the motion, the clerk shall return any lodged court records and shall not file them in the court file.

F. **Procedure for lodging court records.** A court record that is the subject of a motion filed under Paragraph E of this rule shall be secured in an envelope or other appropriate container by the movant and lodged with the court unless the court record was previously filed with the court or unless good cause exists for not lodging the court

record. The movant shall label the envelope or container lodged with the court "CONDITIONALLY UNDER SEAL" and affix to the envelope or container a cover sheet that contains the information required under Rules 1-008.1 and 1-010 NMRA and which states that the enclosed court record is subject to a motion to seal. On receipt of a lodged court record, the clerk shall endorse the cover sheet with the date of its receipt and shall retain but not file the court record unless the court orders it filed. If the court grants an order sealing a court record, the clerk shall substitute the label provided by the movant on the envelope or container with a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)" and shall attach a file-stamped copy of the court's order. Unless otherwise ordered by the court, the date of the court order granting the motion shall be deemed the file date of the lodged court record.

G. **Requirements for order to seal court records.**

(1) The court shall not permit a court record to be filed under seal based solely on the agreement or stipulation of the parties. The court may order that a court record be filed under seal only if the court by written order finds and states facts that establish the following:

(a) the existence of an overriding interest that overcomes the right of public access to the court record;

(b) the overriding interest supports sealing the court record;

(c) a substantial probability exists that the overriding interest will be prejudiced if the court record is not sealed;

(d) the proposed sealing is narrowly tailored; and

(e) no less restrictive means exist to achieve the overriding interest.

(2) The order shall require the sealing of only those documents, pages, or portions of a court record that contain the material that needs to be sealed. All other portions of each document or page shall be filed without limitation on public access. If necessary, the order may direct the movant to prepare a redacted version of the sealed court record that will be made available for public access.

(3) The order shall state whether the order itself, the register of actions, or individual docket entries are to be sealed.

(4) The order shall specify who is authorized to have access to the sealed court record.

(5) The order shall specify a date or event upon which it expires or shall explicitly state that the order remains in effect until further order of the court.

(6) The order shall specify any person or entity entitled to notice of any future motion to unseal the court record or modify the sealing order.

H. **Sealed court records as part of record on appeal.**

(1) Court records sealed in the magistrate, metropolitan, or municipal court that are filed in an appeal to the district court shall remain sealed in the district court. The district court judges and staff may have access to the sealed court records unless otherwise ordered by the district court. Requests to unseal such records or modify a sealing order entered in the magistrate, metropolitan, or municipal court shall be filed in the district court pursuant to Paragraph I of this rule if the case is pending on appeal.

(2) Court records sealed under the provisions of this rule that are filed in the appellate courts shall remain sealed in the appellate courts. The appellate court judges and staff may have access to the sealed court records unless otherwise ordered by the appellate court.

I. **Motion to unseal court records.**

(1) A sealed court record shall not be unsealed except by court order or pursuant to the terms of the sealing order itself. A party or member of the public may move to unseal a sealed court record. A copy of the motion to unseal shall be served on all persons and entities who were identified in the sealing order pursuant to Subparagraph (6) of Paragraph G for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

(2) In determining whether to unseal a court record, the court shall consider the matters addressed in Subparagraph (1) of Paragraph G. If the court grants the motion to unseal a court record, the order shall state whether the court record is unsealed entirely or in part. If the court's order unseals only part of the court record or unseals the court record only as to certain persons or entities, the order shall specify the particular court records that are unsealed, the particular persons or entities who may have access to the court record, or both. If, in addition to the court records in the envelope or container, the court has previously ordered the sealing order, the register of actions, or individual docket entries to be sealed, the unsealing order shall state whether those additional court records are unsealed.

J. **Failure to comply with sealing order.** Any person or entity who knowingly discloses any material obtained from a court record sealed or lodged pursuant to this rule may be held in contempt of court or subject to other sanctions as the court deems appropriate.

[Adopted by Supreme Court Order No. 10-8300-004, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 10-8300-023 temporarily suspending Paragraph D for 90 days effective August 11, 2010; by Supreme Court

Order No. 10-8300-037, extending the temporary suspension of Paragraph D for an additional 90 days, effective November 10, 2010; by Supreme Court Order No. 11-8300-006, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011.]

Committee Commentary. — This rule recognizes the presumption that all documents filed in court are subject to public access. This rule does not address public access to other records in possession of the court that are not filed within the context of litigation pending before the court, such as personnel or administrative files. Nor does this rule address the manner in which a court must provide public access to court records.

Although most court records are subject to public access, this rule recognizes that in some instances public access to court records should be limited. However, this rule makes clear that no court record may be sealed simply by agreement of the parties to the litigation. And except as otherwise provided in this rule, public access to a court record may not be limited without a written court order entered in accordance with the provisions of this rule. Unless otherwise ordered by the court, any limitations on the public's right to access court records do not apply to the parties to the proceeding, counsel of record and their employees, and court personnel. While employees of a lawyer or law firm who is counsel of record may have access to sealed court records, the lawyer or law firm remains responsible for the conduct of their employees in this regard.

Paragraph C of this rule recognizes that all court records within certain classes of cases should be automatically sealed without the need for a motion by the parties or court order. Most of the classes of cases identified in Paragraph C have been identified by statute as warranting confidentiality. However, this rule does not purport to cede to the legislature the final decision on whether a particular type of case or court record must be sealed. Paragraph C simply lists those classes of cases in which all court records shall be automatically sealed from the commencement of the proceedings without the need for a court order. Nonetheless, a motion to unseal some or all of the automatically sealed court records in a particular case still may be filed under Paragraph I of the rule.

Aside from entire categories of cases that may warrant limitations on public access, numerous statutes also identify particular types of documents and information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, NMSA 1978, § 7-1-4.2(H) (providing for confidentiality of taxpayer information); NMSA 1978, § 14-6-1(A) (providing for confidentiality of patient health information); NMSA 1978, § 24-1-9.5 (limiting disclosure of test results for sexually transmitted diseases); NMSA 1978, § 29-10-4 (providing for confidentiality of certain arrest record information); NMSA 1978, § 29-12A-4 (limiting disclosure of local crime stoppers program information); NMSA 1978, § 29-16-8 (providing for confidentiality of DNA information); NMSA 1978, § 31-25-3 (providing for confidentiality of certain communications between victim and victim counselor); NMSA 1978, § 40-8-2 (providing for sealing of certain name change records); NMSA 1978, § 40-6A-312 (providing for limitations on disclosure of certain

information during proceedings under the Uniform Interstate Family Support Act); NMSA 1978, § 40-10A-209 (providing for limitations on disclosure of certain information during proceedings under the Uniform Child-Custody Jurisdiction and Enforcement Act); NMSA 1978, § 40-13-7.1 (providing for confidentiality of certain information obtained by medical personnel during treatment for domestic abuse); NMSA 1978, § 40-13-12 (providing for limits on internet disclosure of certain information in domestic violence cases); NMSA 1978, § 44-7A-18 (providing for limitations on disclosure of certain information under the Uniform Arbitration Act). However, Paragraph C does not contemplate the automatic sealing of such items. Instead, if a party believes a particular statutory provision warrants sealing a particular court record, the party may file a motion to seal under Paragraph E of this rule. And any statutory confidentiality provision notwithstanding, the court must still engage in the balancing test set forth in Subparagraph (1) of Paragraph G of this rule before deciding whether to seal any particular court record.

Paragraph D of this rule recognizes that certain personal identifier information often included within court records may pose the risk of identity theft and other misuse. Accordingly, Paragraph D discourages the inclusion of protected personal identifier information in a court record unless the court or a party deems its inclusion necessary for the effective operation of the court's judicial function. Although the decision to include protected personal identifier information in the court record is a non-sanctionable decision, the rule nonetheless prohibits public access to protected personal identifier information on court web sites and also prohibits the court from publicly displaying protected personal identifier information in the courthouse, which would include docket call sheets, court calendars, or similar material intended for public viewing.

The court need not review individual documents filed with the court to ensure compliance with this requirement, and the clerk may not refuse to accept for filing any document that does not comply with the requirements of Paragraph D. Moreover, the clerk is not required to screen court records released to the public to prevent the disclosure of protected personal identifier information. However, anyone requesting public access to court records shall provide the court with his or her name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification. The court may also consider maintaining a log of this information.

Paragraphs E and F set forth the procedure for requesting the sealing of a court record. Any person or entity may file a motion to seal a court record, and all parties to the action in which the court record was filed, or is to be filed, must be served with a copy of the motion. Any person or entity may file a response to the motion to seal the court record, but, if the person or entity filing the response is not a party to the underlying litigation, that person or entity does not become a party to the proceedings for any other purpose.

Ordinarily, the party seeking to seal a court record must lodge it with the court at the time that the motion is filed. A lodged court record is only temporarily deposited with the

court pending the court's ruling on the motion. Accordingly, a lodged court record is not filed by the clerk and remains conditionally sealed until the court rules on the motion. To protect the lodged court record from disclosure pending the court's ruling on the motion, the movant is required to enclose the lodged court record in an envelope or other appropriate container and attach a cover sheet to the envelope or container that includes the case caption, notes that the enclosed court record is the subject of a pending motion to seal, and is clearly labeled "conditionally under seal". If necessary to prevent disclosure pending the court's ruling, the motion, any response or reply, and other supporting documents should either be lodged with the court as well or filed in redacted and unredacted versions so that the court may permit public access to the redacted pleadings until the court rules on the motion.

Although a lodged court record is not officially filed with the court unless and until the motion to seal is granted, the clerk need not keep lodged court records in a physically separate location from the rest of the court file. In this regard, the rule does not purport to require the clerk to maintain lodged court records in any particular manner or location. As long as the lodged record is protected from public disclosure, each court retains the discretion to decide for itself how it will store lodged court records, and this rule anticipates that most courts will choose to store and protect lodged and sealed court records in the same way that those courts have traditionally stored and protected sealed and conditionally sealed court records filed with the court before the adoption of this rule.

When docketing a motion to seal, the clerk's docket entry should be part of the publicly available register of actions and should reflect that a motion to seal was filed, the date of filing, and the name of the person or entity filing the motion. However, any docket entries related to the motion to seal should avoid including detail that would disclose the substance of the conditionally sealed material before the court has ruled. If necessary to prevent disclosure, in rare cases, a court order granting a motion to seal may provide for the sealing of previous or future docket entries related to the sealed court records provided that the court's register of actions contains, at a minimum, a docket entry containing the docket number, an alias docket entry or case name such as *Sealed Pleading* or *In the Matter of a Sealed Case*, and an entry indicating that the pleading or case has been sealed so that anyone inspecting the court's docket will know of its existence.

If the court denies the motion to seal, the clerk will return the lodged court record to the party, it will not become part of the case file, and will therefore not be subject to public access. However, even if the court denies the motion, the movant still may decide to file the previously lodged court record but it then will be subject to public access.

If the court grants the motion to seal, it must enter an order in accordance with the requirements of Paragraph G. The order must state the facts supporting the court's decision to seal the court record and must identify an overriding interest that overcomes the public's right to public access to the court record and that supports the need for sealing. The rule itself does not identify what would constitute an overriding interest but

anticipates that what constitutes an overriding interest will depend on the facts of the case and will be developed through case law on a case by case basis. The rule further provides that the sealing of the court record must be narrowly tailored and that there must not be a less restrictive alternative for achieving the overriding interest. To that end, the rule encourages the court to consider partial redactions whenever possible rather than the wholesale sealing of pages, documents, or court files. Paragraph G also requires the court to specify whether any other matter beyond the court record (such as the order itself, the register of actions, or docket entries) will be sealed to prevent disclosure. The sealing order also must specify who may and may not have access to a sealed court record, which may include prohibiting access to certain parties or court personnel. In addition, the sealing order must specify a date or event upon which the order expires or provide that the sealing remains in effect until further order of the court. Finally, the order must list those persons or entities who must be given notice of any subsequently filed motion to unseal the court record or modify the sealing order.

Any court records sealed under the provisions of this rule remain sealed even if subsequently forwarded to the appellate court as part of the record on appeal. However, sealed court records forwarded to the appellate court as part of the record on appeal may be reviewed by the appellate court judges and staff unless otherwise ordered by the appellate court. Any other motions requesting modification to a sealing order in a case on appeal must be filed with the appellate court.

Motions to unseal previously sealed court records are governed by Paragraph I of this rule. A party or any member of the public may move to unseal a court record, and the rule does not provide a time limit for filing a motion to unseal a court record. Motions to unseal follow the same general procedures and standards used for motions to seal. A copy of a motion to unseal must be served on all persons and entities identified in the sealing order as entitled to receive notice of a future motion to unseal.

Although most court records should remain available for public access, when a court record is sealed under this rule, all persons and entities who do have access to the sealed material must act in good faith to avoid the disclosure of information the court has ordered sealed. That said, the protections provided by this rule should not be used to effect an unconstitutional prior restraint of free speech. But in the absence of a conflict with a countervailing First Amendment principle that would permit disclosure, any knowing disclosure of information obtained from a court record sealed by the court may subject the offending person or entity to being held in contempt of court or other sanctions as deemed appropriate by the court.

[Adopted by Supreme Court Order No. 10-8300-004, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 11-8300-006, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011.]

The 2011 amendment, approved by Supreme Court Order No. 11-8300-006, effective February 7, 2011, in Paragraph C, eliminated proceedings under the Uniform Parentage

Act from the class of cases in which court records are automatically sealed; and in Paragraph D, eliminated the former prohibition against including personal identifier information in court records without a court order, the prohibition against disclosing personal identifier information that the court orders to be included in a court record, and the exceptions to the prohibitions against the inclusion and disclosure of personal identifier information; and required the court and the parties to avoid including personal identifier information in court records unless they deem the inclusion of personal identifier information to be necessary to the court's function, prohibited the publication of personal identifier information on court web sites and by posting in the courthouse, and required persons requesting access to court records to provide personal information and identification.

1-080. Stenographer; stenographic report or transcript as evidence.

A. **Stenographer.** A master may direct that evidence be taken stenographically and may appoint a stenographer for that purpose. The fees of such stenographer shall be fixed by the court and may be taxed ultimately as costs, in the discretion of the court. Upon motion of a master or party or upon the court's own motion, the court may order that evidence be taken by other than stenographic means, in which event the order shall designate the manner of recording, preserving and filing the evidence, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

B. **Stenographic report or transcript as evidence.** Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

ANNOTATIONS

Cross references. — For appointment and powers of master, *see* Rule 1-053 NMRA.

For assessment of costs, *see* Rule 1-054 and Sections 39-2-1 to 39-2-14 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs §§ 1, 2, 59, 61.

20 C.J.S. Costs § 121; 32A C.J.S. Evidence § 1151.

ARTICLE 10
General Provisions

1-081. Remand to district court from federal court.

Whenever a cause shall have been removed from a district court to a United States court and thereafter remanded, judgment by default shall not be entered therein until the expiration of ten (10) days after service of notice upon defendants that the order remanding such cause has been filed. Within such time the defendants may move or plead as they might have done had such cause not been removed.

[As amended, effective August 1, 1988; January 1, 1996.]

ANNOTATIONS

The 1996 amendment, effective January 1, 1996, deleted "certiorari; employment security division cases" from the rule heading, and deleted former Paragraph B relating to appeals from the board of review of the employment security division.

Compiler's notes. — Paragraph A is deemed to have superseded former Trial Court Rule 105-804a which was substantially the same.

Former Paragraph B is deemed to have superseded former Trial Court Rule 1935-116-8 which was substantially the same.

Law reviews. — For article, "Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution," see 18 N.M.L. Rev. 525 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 Am. Jur. 2d Certiorari §§ 9, 13, 16, 18, 22, 32, 38, 45, 58, 63 to 68; 71 Am. Jur. 2d State and Local Taxation §§ 266 to 276.

Necessity of submitting to state court or judge petition and bond for removal to federal court, 45 A.L.R. 444.

Stage of case as determining whether application for removal from state to federal court is premature, 82 A.L.R. 514.

Availability of remedies other than direct appeal from or error to federal court under provision of federal statute denying appeal or writ of error from decision remanding to state court case removed to federal court, 114 A.L.R. 1476.

State statute permitting new action within specified time after judgment or decree not on the merits in a previous action, as applicable where either the first action or the new action was brought in or removed to a federal court, 156 A.L.R. 1097.

Constitutionality, construction and application of federal statutes providing that district courts may transfer any civil action to any other district or division where it might have been brought, 5 A.L.R.2d 1239, 10 A.L.R.2d 932.

Appealability of federal district court order denying motion to remand cause to state court, 21 A.L.R.2d 760.

Appearance for purpose of making application for removal of cause to federal court as a general appearance, 2 A.L.R.3d 965.

State order or judgment: status, in federal court, of judgment or order rendered in state court before removal of case, 2 A.L.R. Fed. 760.

When period for filing petition for removal of civil action from state court to federal district court begins to run under 28 USC § 1446 (b), 16 A.L.R. Fed. 287.

What constitutes ancillary, incidental or auxiliary cause of action, so as to preclude its removal from state to federal court, 18 A.L.R. Fed. 126.

Civil actions removable from state court to federal district court under 28 USC § 1443, 28 A.L.R. Fed. 488.

Effect upon jurisdiction of state court of 28 USC § 1446 relating to removal of cause to federal court, 38 A.L.R. Fed. 824.

14 C.J.S. Certiorari §§ 9, 10, 55, 56, 59, 98, 113, 116; 15 C.J.S. Commerce § 118(1); 73A C.J.S. Public Administrative Law and Procedure §§ 202 to 271; 77 C.J.S. Removal of Causes § 2 et seq.; 81 C.J.S. Social Security §§ 265 to 270, 282 to 288.

1-082. Jurisdiction and venue unaffected.

These rules shall not be construed to extend or limit the jurisdiction of the district courts of the state or the venue of actions therein.

ANNOTATIONS

Cross references. — For venue of civil actions, *see* Sections 38-3-1 to 38-3-11 NMSA 1978.

When question of venue not jurisdiction. — Where defendant moved for dismissal of action to enjoin him from trespassing on land situated in county in which action was brought and motion was filed in another county pursuant to a rule of district court governing both counties, a question of venue was raised rather than of jurisdiction. Heron v. Gaylor, 53 N.M. 44, 201 P.2d 366 (1948).

Right to have cause heard in court of proper venue may be lost unless seasonably asserted; and in that event, the court of trial having jurisdiction but not the proper venue may render a judgment binding on the parties. Heron v. Gaylor, 53 N.M. 44, 201 P.2d 366 (1948).

Law reviews. — For comment, "The Subject Matter Jurisdiction of New Mexico District Courts over Civil Cases Involving Indians," see 15 N.M.L. Rev. 75 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 27 et seq.; 77 Am. Jur. 2d Venue §§ 1, 3, 4, 10 to 31, 50 to 55.

Submission of cause to court which has no jurisdiction over a constitutional question as a waiver of suit question, 2 A.L.R. 1363.

Authorizing venue of action in particular place, court, or county, 69 A.L.R.2d 1324.

Prohibition as appropriate remedy to restrain civil action for lack of venue, 93 A.L.R.2d 882.

Change of venue as justified by fact that large number of inhabitants of local jurisdiction have interest adverse to party to state civil action, 10 A.L.R.4th 1046.

Venue in action for malicious prosecution, 12 A.L.R.4th 1278.

21 C.J.S. Courts § 130; 92 C.J.S. Venue §§ 1, 4 to 6, 78, 80, 81, 127, 129, 152.

1-083. Local rules.

A. **Approval procedure.** Each district court by action of the judge of such court, or of a majority of the judges thereof, may from time to time recommend to the Supreme Court local rules governing its practice in civil cases. Copies of proposed local rules and amendments shall be submitted to the Supreme Court and to the chair of the Supreme Court's Rules of Civil Procedure for the District Courts Committee ("the committee") for review. If the proposed local rule amends an existing local rule, a mark-up copy shall be submitted to the Supreme Court and the committee. The committee shall review any proposed local rule for content, appropriateness, style and consistency with the other local rules, statewide rules and forms and the laws of New Mexico, and shall advise the Supreme Court and the chief judge of the district of its opinion and recommendation regarding the proposed rules. Local rules and forms shall not conflict with, duplicate or paraphrase statewide rules or statutes. The civil procedure committee shall consult with the chief judge, or the chief judge's designee, regarding any revisions recommended by the committee. Following such consultation, the committee shall report its recommendations to the Supreme Court, and shall bring to the Court's attention any differences of opinion between the committee and the chief judge. No local rule shall take effect unless:

(1) approved by an order of the Supreme Court;

(2) filed with the clerk of the Supreme Court; and

(3) published in the bar bulletin or in the judicial volumes of the NMSA 1978.

B. **Definition.** A "local rule" whether called a rule, order or other directive, is a rule which governs the procedure in a judicial district in suits of a civil nature. An order, which is consistent with local rules, statewide rules and forms and the laws of New Mexico, that is entered in an individual case and served on the parties shall not be considered a local rule.

C. **Applicability.** This rule shall not apply to technical specifications for electronic transmission adopted by a district court to permit electronic transmission of documents to the court if the technical specifications are limited to the form of the documents to be transmitted and are consistent with any technical specifications approved by the Supreme Court and the provisions of Rule 1-005.2 NMRA of these rules.

[As amended, effective August 1, 1989; September 1, 1991; July 1, 1997; January 1, 1999.]

Committee Commentary. — Paragraph B exempts technical standards adopted by a district court for electronic filing pursuant to Rule 1-005.2 NMRA of these rules.

ANNOTATIONS

The 1991 amendment, effective for local district court rules governing practice and procedure in civil cases which are adopted or amended on or after September 1, 1991, in the introductory paragraph, added the third, sixth, and seventh sentences and, in the fifth sentence, substituted "one hundred twenty (120) days" for "ninety (90) days" and "unless the provisions of this rule have been complied with and the rule" for "until filed with the clerk of the supreme court"; and added Paragraphs A and B.

The 1997 amendment, effective July 1, 1997, designated the existing introductory language as Paragraph A and inserted the paragraph heading, designated former Paragraphs A and B as Subparagraphs A(1) and A(2), and added Paragraph B.

The 1998 amendment, effective November 10, 1998, substituted "Local rules" for "Rules by district courts" in the catchline; rewrote Paragraph A; added present Paragraph B; and redesignated former Paragraph B as Paragraph C, adding "and the provisions of Rule 1-005.2 of these rules" at the end.

Compiler's notes. — This rule, together with 38-1-1 and 38-1-2 NMSA 1978, is deemed to have superseded 105-1005, C.S. 1929.

The Rules of Civil Procedure prevail over conflicting local rules. H-B-S Partnership v. Aircoa Hospitality Services, Inc., 2008-NMCA-013, 143 N.M. 404, 176 P.3d 1136.

This rule authorizes district courts to establish rules of practice. Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969).

By means of this rule the supreme court has delegated to the district courts the power to promulgate rules, not inconsistent with the supreme court's regarding practice in the local courts. Spingola v. Spingola, 91 N.M. 737, 580 P.2d 958 (1978).

Trial courts have inherent power to alter local rules or make exceptions to their application when the ends of justice and efficient administration so require, but the failure to follow local rules cannot be upheld if such action is to the substantial prejudice of one of the parties to an action. James v. Brumlop, 94 N.M. 291, 609 P.2d 1247 (Ct. App. 1980).

Trial courts have supervisory control over their dockets as recognized by this rule. Birdo v. Rodriguez, 84 N.M. 207, 501 P.2d 195 (1972).

Division of work load allowed. — District Court Rule 8 which provided in part that "the assignment of cases to the several judges of the district will be varied in accordance with the work load" does not conflict with any statute or rule of the supreme court. Atol v. Schifani, 83 N.M. 316, 491 P.2d 533 (Ct. App. 1971).

Involuntary commitment hearings at commitment facilities. — Absent a showing by a "developmentally disabled" person that his substantive rights have in any way been abridged if his involuntary commitment hearing is not held at the county seat, the district court is not precluded from adopting the practice of holding such hearings at the commitment facility when, in its discretion, such practice would better serve the public convenience. 1979 Op. Att'y Gen. No. 79-20.

Authority of courts to affect substantive rights limited. — This section confers no authority upon the district court to limit the extent of the substantive right to disqualify judges by rule. Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969).

Law reviews. — For note, "Guidelines for Modification of Child Support Awards: Spingola v. Spingola," see 9 N.M.L. Rev. 201 (1978-79).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 22 et seq.

Violation of court rule by trial court as ground for new trial or reversal, 23 A.L.R. 52.

Power of court to prescribe rules of pleading, practice or procedure, 110 A.L.R. 22, 158 A.L.R. 705.

Construction and application of statutory requirement or rule of court that action should be brought to trial within specified time, 112 A.L.R. 1158.

Power of court to adopt general rule requiring pretrial conference, 2 A.L.R.2d 1061.

Court rules limiting amount of contingent fees or otherwise imposing conditions on contingent fee contracts, 77 A.L.R.2d 411.

Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial, 84 A.L.R.2d 1288, 15 A.L.R.4th 1127, 88 A.L.R.4th 711.

Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Validity and effect of local district court rules providing for use of alternative dispute resolution procedures as pretrial settlement mechanisms, 86 A.L.R. Fed. 211.

21 C.J.S. Courts §§ 124 to 134.

1-084. Bankruptcy proceedings; stay.

A. **Notice of stay.** A party shall file a written notice of any bankruptcy court stay that may affect the pending action upon becoming aware of the stay.

B. **Termination or modification.** A party shall file written notice of the termination or modification of any bankruptcy court stay that may affect the pending action upon becoming aware of the termination or modification.

[Approved, effective December 3, 2001.]

1-085. Judgments or orders on mandate.

A. **Party responsible.** Within thirty (30) days after an appellate court has sent its mandate to the district court, the prevailing party on appeal shall either:

(1) present to the court a proposed judgment or order on the mandate containing the specific directions of the appellate court; or

(2) if necessary, request a hearing.

B. **Service.** The proposed judgment or order on the mandate shall be served on all parties.

[Approved, effective September 27, 1999.]

1-086. Repealing and saving clause.

All rules of court relating to pleading, practice and procedure in judicial proceedings in the courts other than the Supreme Court of New Mexico heretofore adopted by the

Supreme Court and rules supplementary thereto, not herein contained shall remain in full force and effect unless superseded, modified or repealed by these rules.

ANNOTATIONS

Cross references. — For the rule-making authority of the supreme court, *see* Section 38-1-1 NMSA 1978.

For the effect to be given to rules of court, *see* Section 38-1-2 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 369, 387, 406, 422, 423.

Constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, to repeal or amendment by implication, 5 A.L.R.2d 1270.

82 C.J.S. Statutes §§ 94, 383, 384, 440.

1-087. Contest of nomination or election.

A. **Who may contest nomination or election.** As provided in Section 1-14-1 NMSA 1978, any unsuccessful candidate for nomination or election to any public office may contest the selection of the candidate to whom a certificate of nomination or a certificate of election has been issued.

B. **Procedure for contesting nominations or elections.** An action contesting a nomination or an election pursuant to Chapter 1, Article 14 NMSA 1978 shall proceed pursuant to this rule and to the Rules of Civil Procedure for the District Courts not inconsistent with this rule.

C. **Filing of verified complaint; time for filing; place of filing.** An action to contest a nomination or an election shall be commenced by filing a verified complaint of contest in the district court of the county where a party resides no later than thirty (30) days after issuance of the certificate of nomination or issuance of the certificate of election to the successful candidate. The party instituting the action shall be known as the contestant. The party against whom the action is filed shall be known as the contestee.

D. **Answer.** The contestee shall file and serve upon the contestant a verified answer within fifteen (15) days after service of the notice of verified complaint upon the contestee.

E. **Peremptory challenge to district court judge.** The statutory right to exercise a peremptory challenge to a district court judge pursuant to Section 38-3-9 NMSA 1978 and Rule 1-088.1 NMRA shall be exercised by filing an affidavit of disqualification on or

before the date when the answer is required to be filed pursuant to Paragraph D of this rule.

F. **Accelerated proceedings.** Proceedings to contest a nomination or election shall be advanced for hearing and decision.

G. **Preservation of ballots.** Either party to an election contest may secure the preservation of ballots pursuant to Section 1-14-6 NMSA 1978.

H. **Impoundment of ballots.** Either party to an election contest may petition the district court in the county in which the affected precincts are located for an order impounding ballots in one or more precincts in which the petitioner is a candidate. The district court shall issue appropriate orders, including an order of impoundment as provided in Sections 1-14-8 to 1-14-12 NMSA 1978.

I. **Recount or recheck of votes.** Either party to an election contest may apply for a recount or recheck of the votes cast in an election pursuant to Sections 1-14-14 to 1-14-18 NMSA 1978.

[Rule 87; approved, effective June 1, 1946; 1-087 SCRA; as amended, effective November 1, 2002.]

Committee Commentary. — Sections 1-14-1 to 1-14-21 NMSA 1978, provide that an unsuccessful candidate may challenge the result in an election or nomination contest. The statute also contains procedures for such contests. The statute creates a special statutory proceeding. *Montoya v. McManus*, 68 N.M. 381, 384, 362 P.2d 771, 773 (1961) (holding, under an earlier version of the Election Code, "an election contest is a special proceeding unknown to the common law."). The Rules of Civil Procedure for the District Courts apply to special statutory proceedings "except to the extent that ... existing rules applicable to special statutory ... proceedings are inconsistent" with the district court rules. Thus, the district court rules apply to election and nomination contests unless Article 14 contains inconsistent provisions.

Rule 1-087 was drafted to provide procedures consistent with Article 14. The rule, as initially promulgated, proved to be unsatisfactory for several reasons. First, by its terms it only applied to nomination contests, even though Article 14 applies to both nomination and election contests. Second, Rule 1-087 contained procedures for the appeal of nomination contests, a subject matter that should be covered by the Rules of Appellate Procedure, rather than by Rules of Civil Procedure for the District Courts.

In 2002, Rule 1-087 was redrafted to make it applicable to both election contests and nomination contests, to eliminate procedural rules governing appeals of judgments in election and nomination contests and to assure that procedures provided in the special statutory proceedings are incorporated into the rule in order to avoid conflict between the rules and procedures set forth in Article 14, *Procedural Provisions Unique to Election and Nomination Contests*.

Article 14 contains some procedural provisions that vary from the Rules of Civil Procedure for the District Courts. Because those statutory procedures apply to election and nomination contests, Rule 1-001 NMRA, the statutory procedures are incorporated into Rule 1-087, and control over general provisions of the rules that are inconsistent with Rule 1-087. Rule 1-087(B) explicitly so provides. Apart from the different procedures contained in Rule 1-087, the Rules of Civil Procedure for the District Courts apply to election and nomination contests brought pursuant to Article 14. *See* Rule 1-001 (Rules of Civil Procedure apply to extent not inconsistent with procedures established in special statutory proceedings); Section 1-14-3 NMRA 1978. ("The Rules of Civil Procedure apply to all actions commenced under the provisions of this section".)

Paragraphs C to F of Rule 1-087 incorporate procedural requirements contained in Article 14 into the Rules of Civil Procedure for District Courts, in order to prevent any conflict between Article 14 and the rules. Paragraph B of the rule provides that these sections apply to election and nomination contests rather than otherwise-applicable general provisions in the Rules of Civil Procedure for the District Courts. *See Eturriaga v. Valdez*, 109 N.M. 205, 784 P.2d 24 (1989) (thirty day requirement for filing an election contest contained in Article 14 cannot be modified by rule of court).

Rule 1-087(A) incorporates the statutory provision that provides to unsuccessful candidates the right to contest a nomination or election.

Not included in Rule 1-087 are the provisions of Section 1-14-13 NMSA 1978 which establish the burden of proof and provide certain remedies in election and nomination contests. These provisions, though applicable to election or nomination contests, are substantive in nature and thus do not belong in a rule of civil procedure. *See Gunaji v. Macias*, 130 N.M. 734, 741, 31 P.3d 1008, 1015 (2001) ("it is the procedure in an election contest which is exclusive, not the grounds and the remedy.")

Rule 1-087(G) incorporates a provision in Article 14 that allows a contestant in a pending election or nomination contest to preserve ballots by a procedure set forth in Section 1-14-6 NMSA 1978.

Rule 1-087(H) incorporates provisions in Article 14 that allows a contestant to petition the district court to impound ballots by a procedure set forth in Sections 1-16-8 to 1-14-12 NMSA 1978.

Rule 1-087(I) incorporates provisions in Article 14 that allow a candidate to apply for a recount or recheck of the votes that were cast. Sections 1-14-14 to 1-14-18 NMSA 1978. These provisions do not require that an election or nomination contest be pending in order to obtain relief and are incorporated in the rule simply to reflect that a contestant may seek this relief in conjunction with an election or nomination contest.

[Effective, November 1, 2002.]

ANNOTATIONS

Cross references. — For who may become primary candidate, *see* Section 1-8-18 NMSA 1978.

For limitation on challenges to primary nominating petitions, *see* Section 1-8-35 NMSA 1978.

For rule relating to appeals as of right, *see* Rule 12-201 NMRA.

For rule relating to appeals of actions challenging nominations, *see* Rule 12-603 NMRA.

Compiler's notes. — This rule was originally promulgated in pursuance of Laws 1943, ch. 86, § 10, which was repealed by Laws 1955, ch. 218, § 34.

There no longer exist any statutory provisions relating to the contest of primary elections alone. Provisions relating to the contest of elections generally are presently compiled as Sections 1-14-1 to 1-14-12 NMSA 1978.

The 2002 amendment, effective November 1, 2002, rewrote this rule to the extent that a detailed comparison would be impracticable.

Purpose. — The provisions of this rule are intended to resolve any controversy over primary election results prior to the general election. Eturriaga v. Valdez, 109 N.M. 205, 784 P.2d 24 (1989).

A primary election contest becomes moot, as a general rule, if not finally determined prior to the balloting in the general election. Eturriaga v. Valdez, 109 N.M. 205, 784 P.2d 24 (1989).

Late filing of appeal. — Because timely filing of an appeal is a mandatory precondition rather than an absolute jurisdictional requirement, a trial court may, under unusual circumstances, use its discretion and entertain an appeal even though it is not timely filed. The decision to dismiss an appeal is extreme and must be determined on a case-by-case basis. Trujillo v. Serrano, 117 N.M. 273, 871 P.2d 369 (1994).

Court error may excuse late appeal. — One unusual circumstance which would warrant permitting an untimely appeal is if the delay is a result of judicial error. To deny a party the constitutional right to an appeal because of a mistake on the part of the court runs against the most basic precepts of justice and fairness. Trujillo v. Serrano, 117 N.M. 273, 871 P.2d 369 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Elections §§ 2, 3, 101, 102; 26 Am. Jur. 2d Elections §§ 226, 412 et seq.

Necessity of selecting candidates for presidential elections at primaries, 153 A.L.R. 1066.

Power of election officers to withdraw or change their returns, 168 A.L.R. 855.

Determination of controversy within political party, 169 A.L.R. 1281.

Injunction against canvassing of votes and declaring result of election, 1 A.L.R.2d 588.

Admissibility of parol evidence of election officials to impeach election returns, 46 A.L.R.2d 1385.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 A.L.R.2d 482.

State court jurisdiction over contest involving primary election for member of Congress, 68 A.L.R.2d 1320.

Validity of percentage of vote or similar requirements for participation by political parties in primary election. 70 A.L.R.2d 1162.

29 C.J.S. Elections §§ 118(2), 119 (8 to 15), 121, 124, 126, 127, 245 to 322.

1-088. Designation of judge.

A. **Assignment of cases.** The judge before whom the case is to be tried shall be designated at the time the complaint is filed pursuant to local district court rule.

B. **Procedure for replacing a district judge who has been excused or recused.** In the event a district judge has been excused or recused, counsel for all parties may agree to a district judge to hear all further proceedings and if that district judge so agrees, the clerk of the district court shall assign the case to such district judge. In the event counsel for all parties do not stipulate upon a district judge to try the case or the district judge upon whom they agree refuses to accept the case, within ten (10) days, or in the event that one party notifies the clerk of the district court in writing that they will be unable to agree on a replacement district judge, the clerk shall assign a district judge of another division at random, in the same fashion as cases are originally assigned or pursuant to local district court rule. If all district judges in the district have been excused or recused, and the counsel for all parties have not agreed within ten (10) days on a judge to hear the case, the clerk of the district court shall notify the chief justice of the Supreme Court of New Mexico, who shall designate a judge, justice or judge pro tempore to hear all further proceedings.

C. **Automatic recusal.** If a civil proceeding is filed in any county of a judicial district by or against a judge or an employee of the district, no judge of the district may hear the matter without written agreement of the parties. If within ten (10) days after the proceeding is filed, the parties have not filed a stipulation designating a judge to preside over the matter, the clerk shall request the Supreme Court to designate a judge.

D. **Designation of temporary judge.** If a party is seeking an emergency order or a temporary restraining order pursuant to Rule 1-066 NMRA and all of the judges of a judicial district are ineligible to hear the matter or have recused themselves, the clerk shall immediately certify the case to the Supreme Court for designation of a judge to hear all matters in the proceedings until such time as a judge may be agreed upon by the parties or designated in accordance with this rule.

E. **Excuse of judge appointed by chief justice.** Any judge designated by the chief justice may not be excused except pursuant to Article VI, Section 18 of the New Mexico Constitution.

F. **Departure of judge designated by chief justice; transfer of cases.** When a judge designated to serve by the chief justice is no longer a member of the judiciary, the cases assigned to the judge shall remain on the docket of the judge's successor. The new judge may not be excused except pursuant to Article VI, Section 18 of the New Mexico Constitution.

[As amended, effective March 1, 2000; as amended by Supreme Court Order No. 09-8300-004, effective April 8, 2009.]

ANNOTATIONS

The 2000 amendment, effective for cases filed on or after March 1, 2000, redesignated former Paragraph C as Paragraph E and added Paragraphs C and D.

The 2009 amendment, as approved by Supreme Court Order 09-8300-004, 09-8300-004, effective April 8, 2009, added Paragraph F.

Law reviews. — For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and validity of state provisions governing designation of substitute, pro tempore, or special judge, 97 A.L.R.5th 537.

1-088.1. Peremptory challenge to a district judge; recusal; procedure for exercising.

A. **Limit on excusals or challenges.** No party shall excuse more than one judge. A party may not excuse a judge after the party has attended a hearing or requested that judge to perform any act other than an order for free process or a determination of indigency.

B. **Mass reassignment.** A mass reassignment occurs when one hundred (100) or more pending cases are reassigned contemporaneously.

C. **Procedure for excusing a district judge.** A party may exercise the statutory right to excuse the district judge before whom the case is pending by filing a peremptory election to excuse as follows:

(1) A plaintiff may file a peremptory election to excuse within ten (10) days after filing the complaint. A defendant may file a peremptory election to excuse within ten (10) days after the defendant files the first pleading or motion pursuant to Rule 1-012 NMRA.

(2) Any party may file a peremptory election to excuse within ten (10) days after the clerk mails a notice of reassignment on the parties or completes publication of a notice of a mass reassignment.

(3) In situations involving motions to reopen a case to enforce, modify, or set aside a judgment or order, if the case has been reassigned to a different judge since entry of the judgment or order at issue, the movant may file a peremptory election to excuse within ten (10) days after filing the motion to reopen, and the non-movant may file a peremptory election to excuse within ten (10) days after service of the motion to reopen.

D. **Notice of reassignment.** After the filing of the complaint, if the case is reassigned to a different judge, the clerk shall give notice of the reassignment to all parties. When a mass reassignment occurs, the clerk shall give notice of the reassignments to all parties by publication in the New Mexico Bar Bulletin for four (4) consecutive weeks. Service of notice by publication is complete on the date printed on the fourth issue of the Bar Bulletin.

E. **Service of excusal.** Any party electing to excuse a judge shall serve notice of such election on all parties.

F. **Recusal.** After the filing of a timely and correct exercise of a peremptory challenge, that district judge shall proceed no further. No district judge shall sit in any action in which the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a recusal in any such action. Upon receipt of notification of recusal from a district judge, the clerk of the court shall give written notice to each party.

[As amended, effective August 1, 1988; January 1, 1995; as amended by Supreme Court Order No. 07-8300-01, effective March 15, 2007; by Supreme Court Order No. 08-8300-38, effective December 15, 2008.]

Committee Commentary. — Reassignment of a judge usually occurs in individual cases in which a party has excused the judge or the judge recuses himself or herself. When this happens, the clerk easily can and does provide individual notice of the reassignment to the parties by mail.

When a judge retires, dies, is disabled, or the judge assumes responsibility for different types of cases (*e.g.*, from a criminal to a civil docket), large numbers of cases are reassigned and parties who have not previously exercised a peremptory recusal may choose to recuse the successor judge. Providing individual notice by mail to every party in each such case is administratively difficult, expensive and time consuming. Clerks sometimes provide notice of reassignment in an alternative manner—usually through publication in the New Mexico Bar Bulletin.

The 2008 amendment formally incorporates into Rule 1-088.1 NMRA the use of notice by publication in such a situation -- now identified as a "mass reassignment". The amended rule requires that the specified notice be published in four (4) consecutive issues of the New Mexico Bar Bulletin and provides that a party who has not yet exercised a peremptory recusal may do so within ten (10) days after the fourth and final publication.

When a judge's entire caseload is reassigned, the publication notice need not contain the caption of each affected case, but must contain the names of the initially-assigned judge and the successor judge.

There may be occasions when many, but not all, of a judge's cases are reassigned; for example when an additional judge is appointed in a judicial district and a portion of other judges' cases are assigned to the new judge. When this occurs, if the number of pending cases collectively reassigned exceeds one hundred (100), the 2008 amendment authorizes notice by publication. To assure that the parties have notice of which cases were reassigned, the court should either make a list available containing the title of the action and file number of each case reassigned, or not reassigned, whichever is less. The court may either publish such a list in the Bar Bulletin or publish a notice in the Bar Bulleting that directs the reader to the court's web site where the such a list will be posted.

Substituting publication for individual notice increases the chance that a party will not receive actual notice of a reassignment. Where actual notice is not achieved through publication, the trial court has ample authority to accept a late recusal. *See* Rule 1-006(B)(2) NMRA (providing that the court may permit act to be done after deadline has passed if excusable neglect is shown).

As with any other pleading filed in court, a peremptory election to excuse a judge must be signed by the party's attorney or, if the party is not represented by counsel, it must be signed by the party. *See* Rule 1-011 NMRA. All of the procedures for excusing a judge in Paragraph C are subject to the limitations in Paragraph A.

[Adopted by Supreme Court Order No. 08-8300-38, effective December 15, 2008.]

ANNOTATIONS

Cross references. — For procedure to disqualify, *see* Section 38-3-9 NMSA 1978.

The 1995 amendment, effective January 1, 1995, added the last sentence in Paragraph A, rewrote the introductory language of Paragraph B, rewrote Paragraph B(1), substituted "signed by any other party or that party's attorney , and filed within ten" for "by defendant or any other party, by filing a peremptory election to excuse within ten" in Paragraph B(2), and substituted "the judge's impartiality" for "his impartiality" and "and the judge shall file a recusal" for "and shall recuse himself" in the first sentence in Paragraph D.

The 2007 amendment, approved by Supreme Court Order 07-8300-01, effective March 15, 2007, amended Paragraph A to change "any discretionary act" to "any act"; amended Paragraph B to insert "and assignment of a judge" in Subparagraph (1)(a) of Paragraph B; to delete "assignment or" in Subparagraph (1)(b) of Paragraph B; and to add the first sentence of Paragraph D providing for automatic recusal of the judge if a timely and correct peremptory challenge is filed.

The 2008 amendment, approved by Supreme Court Order 08-8300-38, effective December 15, 2008, in Paragraph A, in the second sentence, added "attended a hearing or"; added new Paragraph B; relettered Paragraph B as Paragraph C; in Paragraph C, changed "filing with the clerk of the district court a peremptory election. The peremptory election to excuse must be:" to "filing a peremptory election to excuse as follows:"; in Subparagraph (1) of Paragraph C, deleted language which required the peremptory election to be signed by a party plaintiff or that party's attorney, added language which provides that a plaintiff may file a peremptory election after filing the complaint, and added the last sentence; in Subparagraph (1) of Paragraph C, deleted former items (a) and (b) which required the filing of the peremptory election within ten days after the later of the filing of the complaint and assignment of a judge or the mailing by the clerk of notice of reassignment of the case to a judge; in Subparagraph (2) of Paragraph C, deleted language which required the peremptory election to be signed by any other party or that party's attorney, added the language which provides that any party may file a peremptory election after the clerk mails a notice of reassignment on the parties or completes publication of a notice of a mass reassignment, and deleted language which provided that the peremptory election had to be filed by any other party or that party's attorney within 10 days after the later of filing the first pleading or motion pursuant to Rule 1-012 NMRA by that party or of mailing by the clerk of notice of assignment or reassignment of the case to a judge; added new Subparagraph (3) of Paragraph C; relettered former Paragraph C as Paragraph D; in Paragraph D, deleted "service of excusal" from the title and added the second and third sentences; designated the last sentence of former Paragraph C as Paragraph E and added the title; and relettered former Paragraph D as Paragraph F.

Judge acting as mediator and as hearing officer to impose sanctions. — Where a district judge appointed another district judge as a mediator to conduct a settlement conference; the mediator judge was subsequently appointed to hear motions for sanctions against one party for alleged bad faith participation in the settlement conference; the mediator judge heard the motions, made findings of fact, concluded that the party had conducted itself in bad faith at the conference, and entered an order

requiring the party to pay a sanction; and the appointing district judge independently reviewed the mediator judge's decision and came to its own independent conclusions regarding sanctions; the appointing judge did not abuse its discretion in appointing the mediator judge to hear the motions for sanctions. Carlsbad Hotel Associates, L.L.C. v. Patterson-UTI Drilling Co., 2009-NMCA-005, 145 N.M. 385, 199 P.3d 288, cert. granted, 2009-NMCERT-001.

Objection to jurisdiction by motor vehicle division waived. — Where, as soon as the motor vehicle division received notice of the hearing, it filed a notice of peremptory challenge pursuant to this rule, the division waived any objection to personal jurisdiction. Barreras v. N.M. Motor Vehicle Div., 2005-NMCA-055, 137 N.M. 435, 112 P.3d 296.

Objection to jurisdiction by motor vehicle division without merit. — Because the notice of peremptory challenge filed by the motor vehicle division was made by counsel in his capacity as "special assistant attorney general", any objection to personal jurisdiction based on a failure to serve the attorney general would be without merit. Barreras v. N.M. Motor Vehicle Div., 2005-NMCA-055, 137 N.M. 435, 112 P.3d 296.

Procedure for party plaintiff to file peremptory excusal of a district court judge is governed by this rule. Roberts v. Richardson, 2005-NMSC-007, 137 N.M. 226, 109 P.3d 765.

Peremptory excusal not timely filed. — Where plaintiff filed her complaint on March 14, 2003, at which time the clerk stamped the summons with the name of the judge assigned to hear the case, and plaintiff filed her notice of excusal of the judge on April 15, 2003, and the court clerk refused to honor the notice of excusal and wrote at the bottom, "not processed, untimely", plaintiff's peremptory excusal was not timely filed because plaintiff filed the peremptory election to excuse more than 10 days after the filing of the complaint. Roberts v. Richardson, 2005-NMSC-007, 137 N.M. 226, 109 P.3d 765.

Resident judges may not be disqualified by successive affidavits. Peoples v. Peoples, 72 N.M. 64, 380 P.2d 513 (1963).

Proceedings not suspended by filing disqualification. — Filing a disqualification of one of the resident judges does not mean that nothing can occur in the case until a new judge is stipulated into the case by counsel or, upon failure to stipulate, until a judge is named by the chief justice. Peoples v. Peoples, 72 N.M. 64, 380 P.2d 513 (1963).

No violation of right to due process. — Although procedure under 38-3-9 NMSA 1978 for certification as to party's failure to agree upon a judge was not followed, it was proper under N.M. Const., art. VI, § 15 for the chief justice to designate a district judge having proper jurisdiction to try the case; thus, there was no violation of defendant's right to due process. Lohbeck v. Lohbeck, 69 N.M. 203, 365 P.2d 445 (1961) (decided under prior law).

Matters hearable by disqualified judge. — A judge has no jurisdiction to hear a petition for preliminary injunctive relief after having been disqualified. A proceeding for a preliminary injunction is not a "mere formal act" such as has been contemplated to fall within the "preliminary matter" language of former Paragraph A. Borrego v. El Guique Community Ditch Ass'n, 107 N.M. 594, 762 P.2d 256 (1988) (decided under pre-1988 version of this rule).

Excusal not allowed for discretionary act. — An extension of time to answer or otherwise plead is a discretionary act, even if in response to the agreed motion or stipulation of the parties, and, therefore, disqualification of a judge who had granted such a motion was not allowed. JMB Retail Properties Co. v. Eastburn, 114 N.M. 115, 835 P.2d 831 (1992).

Only that party who requests a discretionary act will be precluded from later exercising a peremptory challenge. Saavedra v. Thomson, 114 N.M. 718, 845 P.2d 812 (1992).

Litigant's failure to oppose another party's motion seeking a discretionary act should not constitute an act by the nonmovant that itself invokes the discretion of the court; therefore, the litigant retained his right to exercise his peremptory excusal. Saavedra v. Thomson, 114 N.M. 718, 845 P.2d 812 (1992).

Only challenging party may appeal denial. — Where a party filed a peremptory challenge of the trial judge, the judge denied the challenge, and the challenging party did not appeal and was therefore not a party before the Court of Appeals, a different appealing party could not challenge the trial court’s action in refusing to honor the challenge. City of Sunland Park v. Santa Teresa Servs. Co., 2003-NMCA-106, 134 N.M. 243, 75 P.3d 843, cert. denied, 134 N.M. 179, 74 P.3d 1071 (2003).

Law reviews. — For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

For note, "Determining When a Party Gives Up the Right to Disqualify a Judge by Invoking the Discretion of a Court: *JMB Retail Properties Co. v. Eastburn*," see 24 N.M.L. Rev. 399 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 5 et seq., 86 et seq.

Journalization by judge of finding or decision of predecessor, 4 A.L.R.2d 584.

Time for asserting disqualification, 73 A.L.R.2d 1238.

Substitution of judge in a criminal case, 83 A.L.R.2d 1032.

Power of court to remove or suspend judge, 53 A.L.R.3d 882.

Disqualification of original trial judge to sit on retrial after reversal or mistrial, 60 A.L.R.3d 176.

Substitution of judge in state criminal trial, 45 A.L.R.5th 591.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

Laws governing judicial recusal or disqualification in state proceeding as violating federal or state constitution, 91 A.L.R.5th 437.

Disqualification of judge under 28 USCS § 455(b)(5)(iii), where judge or his or her spouse, or certain of their relatives, is known to have an interest that could be affected by the proceeding, 54 A.L.R. Fed. 855.

Disqualification of judge under 28 USCS § 455(b)(4), providing for disqualification where judge has financial or other interest in proceeding, 55 A.L.R. Fed. 650.

Mandamus as remedy to compel disqualification of federal judge, 56 A.L.R. Fed. 494.

48A C.J.S. Judges §§ 161 to 185.

1-089. Entry of appearance; withdrawal or substitution of attorneys.

A. **Entry of appearance.** When an attorney represents a party, the attorney shall file an entry of appearance, unless the court filed an order appointing the attorney. Filing a pleading pursuant to Rule 1-007 NMRA signed by an attorney constitutes an entry of appearance under this rule.

If an attorney's appearance is limited pursuant to Paragraph C of Rule 16-102 NMRA, the attorney shall:

(1) file an entry of appearance entitled "Limited Entry of Appearance" that identifies the nature of the limitation;

(2) note the limitation in the signature block of any paper the attorney files; and

(3) include in the signature block of any paper the attorney files an address where service may be made on the party.

B. **Withdrawal by court order required.** An attorney shall obtain a court order permitting withdrawal when:

(1) the attorney has appeared without limitation; or

(2) the attorney's appearance is limited pursuant to Paragraph A of this rule and the attorney has not completed the purpose of the representation. A copy of any order permitting an attorney to withdraw shall be filed with the clerk and served on all parties.

The court may place conditions on an order approving withdrawal as justice requires, such as directing the substitution of counsel with an accompanying written notice filed with the clerk and served on the parties or ordering the attorney withdrawing on behalf of a party to file with the clerk and serve on the parties a notice of an address where service may be made upon the party.

When an order permitting withdrawal will result in a party to an action not being represented by an attorney, the order shall reasonably advise that the unrepresented party shall have twenty (20) days to retain an attorney or be deemed to have entered an appearance pro se. The withdrawing attorney shall serve a copy of the order permitting withdrawal on the unrepresented party pursuant to Paragraph B of Rule 1-005 NMRA.

C. **Withdrawal upon completion of limited representation.** An attorney whose appearance is limited as set forth in Paragraph A of this rule and who has completed the purpose of the limited representation need not obtain a court order permitting withdrawal. Such an attorney shall file with the clerk and serve on all parties a notice of withdrawal or substitution of counsel. If an attorney ceases to act without complying with the provisions of this rule, upon motion of any party or upon the court's own motion, the court may enter an order requiring any actions that the court deems necessary.

D. **Service upon attorneys of record.** Attorneys of record shall continue to be subject to service for ninety (90) days after entry of final judgment. This rule does not preclude the earlier withdrawal of counsel as provided above.

E. **Service upon responding party.** In the event of further legal proceedings between the parties after the ninety (90) days have elapsed, the moving party shall effect service of process upon the responding party pursuant to Rule 1-004 NMRA.

[As amended, effective August 1, 1989; April 1, 2002; as amended by Supreme Court Order 08-8300-013, effective June 20, 2008.]

Committee Commentary. — The 2008 amendments to Rule 1-089 NMRA consist of new provisions applicable to situations when attorneys enter a limited appearance under Rule 16-102 NMRA as well as stylistic changes to bring the rule up to date with current practice. The rule now permits an attorney to enter a limited entry of appearance and provides specific procedures for withdrawal upon completion of the limited representation.

Previously, the rule provided for withdrawal once an attorney obtained written consent from the court and then provided notice. The 2008 amendments bring the rule into current practice by requiring a court order for withdrawal when an attorney appears

without limitation or the attorney's appearance is limited and the attorney has not yet completed the purposes of the limited representation.

The requirement of an order approving withdrawal triggers application of Rules 1-007 and 1-007.1 NMRA concerning written motions, as well as briefings and a hearing when the motion is opposed. Because the new provisions contemplate filing and service of an order permitting withdrawal of counsel, it is not necessary to file an additional notice of withdrawal or substitution. However, the rule specifically affords the court authority to require such additional notices as the court deems necessary.

In situations where an order allowing an attorney to withdraw will leave a party unrepresented, the written order must make specific reference that an unrepresented party has 20 days to retain counsel or will be deemed to appear pro se. The withdrawing attorney must serve the order on the attorney's former client pursuant to Paragraph B of Rule 1-005 NMRA. For further guidance, attorneys may wish to consult Rule 16-116 NMRA, which concerns declining or terminating representation.

ANNOTATIONS

Cross references. — For service and filing of pleadings and other papers, *see* Rule 1-005 NMRA.

For general provision for changing attorney, *see* 36-2-14 NMSA 1978.

For death or removal of attorney, *see* 36-2-15 NMSA 1978.

For withdrawal of attorney on appeal, *see* Rule 12-302 NMRA.

For the definition of a "pleading", *see* Rule 1-007 NMRA.

Compiler's notes. — This rule, as amended in 1979, is almost identical to Rule 2-108 NMRA.

The 2002 amendment, effective April 1, 2002, inserted "Entry of appearance" in the rule heading and added Paragraph A and renumbered former Paragraphs A through D as Paragraphs B through E.

The 2008 amendment, approved by Supreme Court Order 08-8300-013, effective June 20, 2008, added the second paragraph of Subsection A to provide for a limited appearance by an attorney; deleted former Subsection B and added a new Subsection B to provide the procedure for withdrawal by an attorney who has entered a general appearance or by an attorney who has entered a limited appearance but who has not completed the purpose of the limited appearance; deleted former Subsection C and added a new Subsection C to provide the procedure for withdrawal by an attorney upon completion of the purpose of a limited appearance; and added the Committee comment.

Notice to or consent of client not required to change attorney. — This rule does not require notice to or consent of the client. The plain meaning is that notice and consent are discretionary with the court. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971) (decided before 1979 amendment).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys at Law §§ 181 to 191.

Withdrawal or discharge of counsel in civil case as ground for continuance, 48 A.L.R. 1155.

Appealability of state court's order granting or denying motion to disqualify attorney, 5 A.L.R.4th 1251.

7A C.J.S. Attorney and Client §§ 218 to 233.

1-089.1. Nonadmitted and nonresident counsel.

A. **Nonadmitted counsel.** Except as otherwise provided in Paragraph C of this rule, counsel not admitted to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or country, may upon compliance with Rule 24-106 NMRA, participate in proceedings before New Mexico courts only in association with counsel licensed to practice law in good standing in New Mexico, who, unless excused by the court, must be present in person in all proceedings before the court. Nonadmitted counsel shall state by affidavit that they are admitted to practice law and are in good standing to practice law in another state or country and that they have complied with Rule 24-106 NMRA. The affidavit shall be filed with the first paper filed in the court, or as soon as practicable after a party decides on representation by nonadmitted counsel. Upon filing of the affidavit, nonadmitted counsel shall be deemed admitted subject to the other terms and conditions of this paragraph. A separate motion and order are not required for the participation of nonadmitted counsel. New Mexico counsel must sign the first motion or pleading and New Mexico counsel's name and address must appear on all subsequent papers or pleadings. New Mexico counsel shall be deemed to have signed every subsequent pleading and shall therefore be subject to the provisions of Rule 1-011 NMRA. For good cause shown, the court may revoke the privilege granted by this rule of any attorney not licensed to practice law in New Mexico to appear in any proceeding.

B. **Nonresident counsel licensed in New Mexico.** In order to promote the speedy and efficient administration of justice by assuring that a court has the assistance of attorneys who are available for court appointments, for local service, for docket calls and to prevent delays of motion hearings and matters requiring short notice, the court may require a nonresident counsel licensed to practice and in good standing in New Mexico to associate resident New Mexico counsel in connection with proceedings before the court.

C. **Discovery matters; counsel not licensed in New Mexico.** Counsel who are not New Mexico residents and who are not licensed to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or territory may, without associating New Mexico counsel, participate in discovery proceedings which arise out of litigation pending in another state or territory. However, in a specific proceeding, the court may require association of New Mexico counsel.

[As amended, effective October 15, 1986; January 20, 2005.]

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, in Paragraph A, substituted "country, may upon compliance with Rule 24-106 NMRA" for "territory may" in the first sentence, inserted the second, third, fourth, and fifth sentences, and relocated the former third sentence to be the present last sentence and substituted "by this rule" for "herein" in that sentence.

1-090. Conduct of court proceedings.

A. **Judicial proceedings.** The purpose of judicial proceedings is to ascertain the truth. Such proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice.

B. **Nonjudicial proceedings.** Proceedings, other than judicial proceedings, designed and carried out primarily as ceremonies, and conducted with dignity by judges in open court, may properly be photographed in or broadcast from the courtroom with the permission and under the supervision of the court.

1-091. Adopting procedural statutes.

All statutes relating to pleading, practice and procedure in judicial proceedings in any of the courts of New Mexico, existing upon the taking effect of the act of the eleventh legislature, approved March 13, 1933, (L. 1933, c. 84) [Section 38-1-1, 38-1-2 NMSA 1978], and all statutes since enacted by any session of the legislature relating to said subjects, or any of them except as any of said statutes heretofore may have been or hereafter may be amended or vacated by order of this court, shall remain and be in effect and have full force and operation as rules of court.

ANNOTATIONS

Cross references. — For the saving of former rules of court, *see* Rule 1-086 NMRA.

For effective date of laws, *see* N.M. Const., art. IV, § 23.

For the authority of the supreme court to promulgate rules, *see* 38-1-1 NMSA 1978.

For the effect given to procedural statutes, see 38-1-2 NMSA 1978.

Relationship to 38-1-1 and 38-1-2 NMSA 1978. — This rule dovetails with 38-1-1 and 38-1-2 NMSA 1978 and reflects a consistent intention on the part of the legislature and the supreme court that legislative rules relating to pleading, practice and procedure in the courts, particularly where those rules relate to court management or housekeeping functions, may be modified by a subsequent rule promulgated by the supreme court. Lovelace Medical Center v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991).

Law reviews. — For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

1-092. Nonstenographic recording.

The district court may, upon its own motion or the motion of a party, order that the record, or any part thereof, of any proceeding before it be made by other than stenographic means, in which event the order shall designate the portion or portions to be so made, and the manner of recording and preserving the same and may include other provisions to assure that the record will be accurate and trustworthy. Such other provisions may, but are not required to, include a provision for utilizing a court reporter to record the proceedings in addition to recording by other means.

1-093. Withdrawn.

ANNOTATIONS

Compiler's notes. — Pursuant to a court order dated May 31, 1989, this rule, relating to remedies on motion attacking sentence, was withdrawn effective for cases filed in the district courts on or after August 1, 1989.

1-094. Clinical education; university of New Mexico school of law.

A. **Purpose.** To permit a clinical program for the university of New Mexico school of law.

B. **Procedure.** Any law student admitted to the clinical program at the university of New Mexico school of law shall be authorized under the control and direction of the dean of the law school to advise persons and to negotiate and to appear before the courts and administrative agencies of this state, in civil and criminal matters, under the active supervision of a member of the state bar of New Mexico designated by the dean of the law school. Such supervision shall include assignment of all matters, review and examination of all documents and signing of all pleadings prepared by the student. The supervising lawyer need not be present while a student is advising a client or negotiating, but shall be present during court appearances. Each student in the program

may appear in a given court with the written approval of the judge presiding over the case and shall file in the court a copy of the order granting approval. The order approving the practice by such student shall be substantially in the form approved by the Supreme Court. The law school shall report annually to the Supreme Court.

C. **Eligible students.** Any full-time student in good standing in the university of New Mexico school of law who has received a passing grade in law school courses aggregating thirty (30) or more semester hours (or their equivalent), but who has not graduated, shall be eligible to participate in a clinical program if the student meets the academic and moral standards established by the dean of the school.

[As amended, effective May 1, 1986; January 1, 1995.]

ANNOTATIONS

The 1995 amendment, effective January 1, 1995, added the second to last sentence in Paragraph B, substituted "the student meets" for "he meets" near the end of Paragraph C, and deleted former Paragraph D, which provided that the rule shall be effective after May 15, 1970.

Law reviews. — For article, "Requiring a Live Client, In-House Clinical Course: A Report on the University of New Mexico Law School Experience," see 19 N.M.L. Rev. 265 (1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Conduct in respect of coaching law students as ground for disbarment, 31 A.L.R. 748.

1-094.1. Clinical education; out-of-state law school approved programs.

A. **Purpose.** To permit out-of-state law students to earn law school clinical law credit hours under the supervision of New Mexico attorneys.

B. **Practice permitted.** An eligible law student may advise persons, negotiate and appear before the courts and administrative agencies of this state, in civil and criminal matters, under the active supervision of a member of the state bar of New Mexico who has been admitted to practice law for at least five (5) years. Such supervision shall include assignment of all matters, review and examination of all documents and signing of all pleadings prepared by the student. The supervising lawyer need not be present while a student is advising a client or negotiating, but shall be present during court appearances. Each student in the program may appear in a given court with the written approval of the judge presiding over the case and shall file in the court a copy of the order granting approval and a copy of the dean of the law school's certificate required by Paragraph C of this rule. The order approving the practice by such student and the certificate of the dean of the law school shall be substantially in the form approved by the Supreme Court.

C. **Eligible students.** Any law student who is regularly enrolled in an American Bar Association accredited law school may participate in a clinical law program of that law school under the direction of a qualified lawyer of this state as provided in Paragraph B of this rule if the dean of such law school provides a certificate to the supervising lawyer:

(1) that the clinical law program complies with the current standards of the American Bar Association regarding "field placement programs";

(2) the student has received a passing grade in law school courses aggregating thirty (30) or more semester hours or their equivalent; and

(3) the student meets the academic and moral standards required of students enrolled at the institution.

D. **Additional student requirements.** Prior to participating in a clinical law program pursuant to the provisions of this rule, an eligible law student shall read and be familiar with the Rules of Professional Conduct and this rule.

E. **Certificate requirements.** In addition to the requirements set forth in Paragraph C of this rule, the certificate of the dean of an out-of-state law school shall specify the period during which the law student will participate in the clinical law program. Certificates shall be limited to terms not exceeding four (4) months.

[Adopted, effective January 1, 1995.]

1-095. Informal probate proceedings in probate court.

A. **Applicability of rule.** This rule shall apply to informal probate proceedings filed in the probate court.

B. **Initial pleadings.** At the time an informal probate proceeding is filed the probate court shall advise the clerk of the district court in writing of the style of the case and the names and addresses of the party filing the initial pleading and his attorney, if any. Upon the appointment of a personal representative in an informal proceeding, the probate court shall advise the clerk of the district court in writing of the names and addresses of the personal representative and his attorney, if any. When the informal probate proceeding is closed, the probate court shall furnish to the clerk of the district court a copy of the docket sheet for said proceeding showing all entries. The district court shall retain such information as a part of its records.

C. **Filing of documents.** After furnishing a copy of the docket sheet, the probate court shall, promptly upon the filing of any document with the probate court, cause to be furnished to the clerk of the district court notice of the type of document so filed and date of filing. If any such document shall evidence the appointment of a personal representative or any change in the name or address of a personal representative, the

notice shall include the name and address of the personal representative, or any change therein. The clerk of the district court shall enter such information on its copy of the appropriate docket sheet.

D. **Copies of documents.** The clerk of the probate court shall, upon request and payment of fees required by law, furnish a certified copy of any document filed in an informal probate proceeding in the probate court. The obligation of the clerk of the district court to issue certified copies is limited to copies of documents actually filed in the district court.

E. **Docket fee.** If application for informal probate of a decedent's estate has been filed with the probate court and a claimant presents a claim against the estate by filing claim with the district court pursuant to Section 45-3-804 NMSA 1978, the clerk shall require payment of the docket fee required for filing other civil cases and shall promptly furnish to the probate court a copy of such claim.

F. **Demand for notice.** If a demand for notice is filed with the clerk of the district court pursuant to Section 45-3-204 NMSA 1978, and an informal proceeding is then pending in the probate court, the clerk of the district court shall promptly furnish a copy of such demand to the clerk of the probate court. If at the time of filing such demand there is no proceeding pending in either the district court or the probate court, and an informal proceeding is thereafter brought in the probate court, the clerk of the district court shall promptly furnish a copy of such demand to the clerk of the probate court upon receipt of copy of the docket sheet provided for in Paragraph B of this rule. Further, upon being furnished the name and address of a personal representative, the clerk of the district court shall mail a copy of the demand to the personal representative as required by Section 45-3-204 NMSA 1978.

ANNOTATIONS

Cross references. — For statutory provisions relating to subject matter jurisdiction of district and probate courts and applications for informal probate, *see* Sections 45-1-302, 45-1-302.1 and 45-3-301 NMSA 1978.

1-096. Challenge of nominating petition.

A. **Complaint; filing deadline.** Court action challenging a nominating petition provided for in the Primary Election Law, Sections 1-8-10 through 1-8-52 NMSA 1978, shall be initiated by filing a complaint and request for expedited hearing no later than ten (10) days after the last day for filing the declaration of candidacy with which the nominating petition was filed. The plaintiff shall immediately deliver a copy of the complaint and request for expedited hearing to the assigned judge and to any subsequent judges appointed pursuant to Rule 1-088 NMRA or Paragraph G of this rule.

B. **Service of process.** The complaint shall be served in accordance with Rule 1-004 NMRA upon the proper filing officer as provided in Section 1-8-35(B) NMSA 1978 and as defined by Section 1-8-25 NMSA 1978, and the plaintiff shall, immediately after filing the complaint, also deliver a copy of the complaint and notice of hearing to the candidate whose nominating petition is challenged. Delivery shall be effected in the manner provided in Subparagraph (a) of Subparagraph (1) of Paragraph F of Rule 1-004 NMRA.

C. **Challenges to signatures; separate counts and specificity in complaint required.** If claim is made that any signature on a nominating petition should not be counted, the complaint shall

(1) specify in separate counts each signature so challenged;

(2) specify the grounds on which the signature is challenged as required by Paragraphs D and E of this rule;

(3) identify the line number and the page of the nominating petition where each such signature appears;

(4) attach a copy of the nominating petition upon which the signature appears; and

(5) attach any exhibits required by Paragraph D of this rule. If multiple signatures are challenged on one common ground only, notwithstanding Subparagraph (1) of this paragraph, those signatures may be challenged in one count that lists the signatures so challenged and otherwise satisfies the requirements of Subparagraphs (2), (3), (4), and (5) of this paragraph.

D. **Challenges based on duplicate signatures.** If any signature is challenged on the ground that the person signing has signed more than one nominating petition for the same office, or has signed one petition more than once, the complaint shall attach as an exhibit all nominating petitions containing such signatures and identify the page and line number on each such petition where the person is alleged to have signed.

E. **Challenges to the qualifications of the person signing the petition.** If any signature is challenged on the ground that the person signing is not qualified to sign the nominating petition, the complaint shall specify as to each signature:

(1) that the qualifications of the person signing the nominating petition are challenged because that person:

(a) was not a registered member of the candidate's political party ten (10) days prior to the filing of the nominating petition;

(b) failed to provide information required by the nominating petition;

(c) is not a qualified voter of the state, district, county or area to be represented by the office for which the person seeking the nomination is a candidate;

(d) is not of the same political party as the candidate named in the nominating petition as shown by the signer's certificate of registration; or

(e) is not the person whose name appears on the nominating petition;

(2) the voter registration records upon which the challenge relies;

(3) the name and address of each person who searched the voter registration records upon which the challenge relies;

(4) the date on which each search was made; and

(5) any variations in names, spelling or addresses for which search was made.

F. **Challenges to Nominating Petition.** If a nominating petition, or any page thereof, is challenged because it fails to comply with statutory requirements for the form of the nominating petitions, the complaint shall specify each challenged page of the nominating petition and each violation of statute on which the challenge is based.

G. **Waiver.** Objection to counting a signature and any ground for rejecting a signature shall be conclusively waived unless set out in the manner above provided within ten (10) days after the last day for filing the challenged nominating petition.

H. **Disqualification of judge.** The provisions of Paragraph C of Rule 1-088.1 NMRA notwithstanding, the plaintiff may exercise the statutory right to excuse the district judge assigned to the case by filing a peremptory election to excuse on the same day the complaint is filed. The plaintiff shall serve notice of the peremptory election to excuse at the same time that the complaint is served and delivered in accordance with Paragraph B of this rule. If more than one plaintiff is named in the complaint, the plaintiffs only may exercise one collective peremptory election to excuse the district judge. The candidate whose nominating petition is challenged may file a peremptory election to excuse the district judge within two (2) days after delivery of the complaint. In all other respects, Rule 1-088.1 NMRA governs the exercise of peremptory elections to excuse the district judge. If there is an excusal for cause or a recusal, the chief justice shall reassign the case to another judge, justice or judge pro tempore to hear all further proceedings.

I. **Hearing and decision.** Within ten (10) days after the complaint is filed, the district court shall hold a hearing and render a decision.

J. **Appeal.** The decision of the district court may be appealed to the Supreme Court in accordance with Rule 12-603 NMRA.

[As amended by Supreme Court Order No. 09-8300-040, effective November 10, 2009; by Supreme Court Order No. 12-8300-004, effective for cases filed on or after March 1, 2012.]

Committee commentary. — The time periods in this rule are to be computed under Section 1-1-22 NMSA 1978. The 2012 amendments to Paragraph C of this rule are intended to incorporate the Supreme Court's ruling in Charley v. Johnson, 2010-NMSC-024, ¶¶ 16 and 22, n 1 & 3, 148 N.M. 246, 233 P.3d 775.

[Adopted by Supreme Court Order No. 09-8300-040, effective November 10, 2009; as amended by Supreme Court Order No. 12-8300-004, effective for cases filed on or after March 1, 2012.]

The 2009 amendment, approved by Supreme Court Order No. 09-8300-040, effective November 10, 2009, in Paragraph A, in the title, added "filing deadline" after "Primary Election Law", added "Sections 1-8-10 through 1-8-52 NMSA 1979", and after "initiated by filing a complaint" added the remainder of the sentence; in Paragraph B, in the first sentence, at the beginning of the sentence, deleted "In addition to serving process on the" and added "The complaint shall be served in accordance with Rule 1-004 NMRA upon the proper", after "filing officer as provided in" added "Section 1-8-35(B)", after "NMSA 1978" deleted "Comp." and added "and as defined by Section 1-8-25 NMSA 1978, and", and after "immediately after filing the complaint" added "also", and in the second sentence, after "in the manner provided in" added "Subparagraph (b) of"; in Subsection C, in the title, after "challenges to signatures", deleted "should not be counted", in Subparagraph (1), after "specify" added "in separate counts", and after "each signature so challenged" deleted "and the specific", in Subparagraph (2), at the beginning of the sentence, added "specify the" after "on which", added "the signature", and after "is challenged" added "as required by Paragraphs D and E of this rule", and added Subparagraphs (4) and (5); in Paragraph D, in the title, after "Challenges", deleted "signator signed two petitions" and added "based on duplicate signatures", after "has signed more than one" added "nominating", after "the same office" added "or has signed one petition more than once", after "the complaint shall" added "attach as an exhibit all nominating petitions containing such signatures and", and after "line number on" changed "such other petition" to "each such petition where", and after "alleges to have signed" deleted "and shall attach such other nominating petition as an exhibit"; in Paragraph E, in the title, after "Challenges", changed "unqualified person signed" to "to the qualifications of the person signing the petition", after "If any signature" deleted "or signatures are", after "the person signing is not" deleted "a voter of the state, district, county or area to be represented by the office for which the person seeing the nomination is a candidate or on the ground that the person signing is not of the same political party as the candidate named in the nominating petition" and added "qualified to sign the nominating petition", after "the complaint shall" deleted "in a separate numbered paragraph, allege that the challenge is based on a diligent search of all registration records of the appropriate county and shall", added Subparagraph (1), Items (a) through (d) of Subparagraph (1), and Subparagraph (2), and in Subparagraph (3),

after "of each person" changed "making the search" to "who searched the voter registration records upon which the challenge relies"; and added Paragraphs G, H and I.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-004, effective March 1, 2012, provided for expedited hearings of complaints; permitted challenges of multiple signatures on a common ground to be stated in one count; required that a complaint challenging the qualification of a person to sign a petition allege that the person is not a qualified voter; provided for challenges to the form of a nominating petition; in Paragraph A, in the first sentence, after "initiated by filing a complaint", added "and request for expedited hearing" and added the second sentence; in Paragraph C, added the last sentence; in Item (c) of Subparagraph (1) of Paragraph E, at the beginning of the sentence, deleted "sufficient to determine that the person" and after "is", added "not"; and added Paragraph F.

Request for expedited hearing. — A complaint challenging a nominating petition should be accompanied by a request for an expedited hearing, and the matter should immediately be called to the attention of the judge assigned to the case. *Charley v. Johnson*, 2010-NMSC-024, 148 N.M. 246, 233 P.3d 775.

Notice to the candidate of the proceeding. — Time is of the essence in a proceeding challenging a nominating petition, and plaintiff must notify the candidate of the action by serving the complaint on the candidate's statutory agent for service of process and by immediately delivering a copy of the complaint and notice of hearing to the candidate. *Charley v. Johnson*, 2010-NMSC-024, 148 N.M. 246, 233 P.3d 775.

Challenged signatures must be set forth in a single count. — Each signature challenged by the plaintiff must be set forth in a separate count in the complaint, and if the signature is challenged on multiple grounds, each of those grounds must be set forth in the count for that signature. *Charley v. Johnson*, 2010-NMSC-024, 148 N.M. 246, 233 P.3d 775.

Rule not followed. — Where plaintiffs challenged the sufficiency and validity of defendant's nominating petition for magistrate judge; plaintiffs did not file a request for an expedited hearing when the complaint was filed or obtain a setting within ten days of the filing of the complaint; the complaint did not state who conducted the search of the voter registration records; the complaint did not set forth each challenged signature and the multiple grounds for challenging each signature as a separate count, but multiple signatures were grouped into single counts based on the type of challenge; plaintiffs did not attempt to deliver the complaint or a notice of hearing to defendant; and the county clerk testified summarily that the nominating petition had only eighteen valid signatures, but did not discuss each signature individually or explain why the county clerk concluded that the remaining signatures were invalid, the district court erred by removing defendant's name from the ballot. *Charley v. Johnson*, 2010-NMSC-024, 148 N.M. 246, 233 P.3d 775.

1-096.1. Review of election recall petitions.

A. **Scope.** This rule governs district court review of petitions to recall elected county officials as required by Article X, Section 9 of the New Mexico Constitution and challenges to petitions to recall local school board members as required by Section 22-7-12 NMSA 1978.

B. **Initiation of district court review.**

(1) Prior to circulating a petition for recall of an elected county official pursuant to the provisions of Article X, Section 9 of the New Mexico Constitution, the plaintiff seeking permission to circulate a recall petition shall file a complaint in the district court for the county where the recall is proposed. The complaint shall attach a copy of the proposed recall petition.

(2) Any person seeking to challenge a recall petition under the Local School Board Member Recall Act shall file a complaint in the district court for the county where the local school board is located within ten (10) days after the county clerk determines whether sufficient signatures have been submitted in accordance with the provisions of Section 22-7-9 NMSA 1978. The complaint shall attach a copy of the recall petition.

C. **Contents of complaint.** A complaint filed pursuant to the provisions of Paragraph B of this rule shall set forth:

(1) for the proposed recall of an elected county official, the factual allegations that the plaintiff asserts as grounds, as stated in the proposed recall petition, for determining that the elected county official committed malfeasance or misfeasance in office or otherwise violated the oath of office.

(2) for recall petitions concerning a local school board member:

(a) any challenges to the validity of signatures on the recall petitions;

(b) any challenges to the determination of the county clerk as to the minimum number of signatures; and

(c) any challenges to the sufficiency of the charges in the recall petition not previously considered by the district court under the provisions of Section 22-7-9.1 NMSA 1978.

D. **Challenges to signatures on local school board member recall petitions.**

(1) If a complaint alleges that any signature on the recall petition should not be counted, the complaint shall specify each signature so challenged and the specific ground on which it is challenged; it shall further identify the line number and the page of the recall petition where each such signature appears;

(2) If a complaint challenges any signature on the ground that the person signing has signed more than one petition for the same office, the complaint shall identify the page and line number on such other recall petition the person is alleged to have signed and shall attach such other recall petition as an exhibit;

(3) If a complaint challenges any signature on the ground that the person signing is not a registered voter of the county and school district represented by the local school member who is the subject of the recall petition, the complaint shall allege that the challenge is based on a diligent search of all registration records of the appropriate county and shall specify as to each challenged signature:

(a) the county where the search was made;

(b) the name and address of each person making the search;

(c) the date when each search was made; and

(d) any variations in names, spelling or addresses for which search was made.

E. **Service of process.** The plaintiff shall, immediately after filing the complaint, serve a copy of the complaint and notice of hearing to the county clerk, the person subject to the recall, and the person, group or organization initiating the recall petition. Service shall be effected in the manner provided by Rule 1-004 NMRA.

F. **Hearing.** Within ten (10) days after the complaint is filed in the district court, the court shall set a hearing and render a decision in accordance with the standards set forth in Article X, Section 9 of the New Mexico Constitution or Section 22-7-12 NMSA 1978, as applicable. At the hearing, the plaintiff, the county clerk, the official sought to be recalled, and the person, group or organization initiating the recall petition shall be given an opportunity to present evidence and argument as directed by the district court.

G. **Appeal.** Any party to the recall proceeding who is aggrieved by the decision of the district court may appeal to the Supreme Court in accordance with the provisions of Rule 12-603.

[Adopted by Supreme Court Order No. 09-8300-021, effective September 4, 2009.]

ARTICLE 11
Miscellaneous

1-097. Eminent domain; notice of presentation of petition; service.

Upon the filing of the petition in eminent domain, a copy thereof, together with a notice specifying the time when and place where such petition will be presented to the

court shall be served upon such owner. If any such owner has a usual place of abode in this state, but is absent therefrom, such notice and copy of petition may be served upon such owner by leaving a copy thereof at such usual place of abode with some person over the age of fifteen (15) years, residing at the usual place of abode of such owner, and informing such person that said notice is to be delivered to the owner upon whom such service is sought to be had. All such services made upon an owner in person within this state shall be made at least ten (10) days before the date specified for the presentation of such petition. Such services may be made by any disinterested person over the age of eighteen (18) years, and proof of the service shall be made by the affidavit of such person.

If the name or residence of any owner be unknown, or if the owners, or any of them, do not reside within the state, or cannot be found therein, and are not served with such notice as provided herein, notice of the time of hearing the petition, reciting the substance of the petition and the time and place fixed for the hearing thereof, shall be given by publication for three (3) consecutive weeks prior to the time of hearing the petition, the last publication to be at least three (3) days prior to such date, in a newspaper published in the county in which the proceedings are pending, if one is published in the county, and in a newspaper published in another county, having a general circulation in the county in which such proceedings are pending, if no paper is published in the county where said proceedings are pending. Personal service of such notice and copy of the petition out of the State of New Mexico at least twenty (20) days before the date specified for the presentation of the petition shall be equivalent to publication with respect to all persons so served. Return of such service shall be made by the affidavit of the person making the same.

ANNOTATIONS

Cross references. — For eminent domain proceedings, *see* Sections 42A-1-1 to 42A-1-33 NMSA 1978.

Compiler's notes. — This rule was formerly compiled as 25-902, 1941 Comp., and 22-9-2, 1953 Comp., and is deemed to have superseded Laws 1905, ch. 97, § 2, which is now compiled as 42-1-2 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62B Am. Jur. 2d Process § 59 et seq.

Service of process upon agent of party by estoppel or implication of law, 30 A.L.R. 176.

Is service of notice of process in proceeding to vacate or modify judgment to be made upon owner of judgment or upon the attorney, 78 A.L.R. 370.

Power of state to provide for service, other than personal, of process upon nonresident individual doing business within the state so as to subject him to judgment in personam, 91 A.L.R. 1327.

Delay in issuance or service of summons as requiring or justifying order discontinuing suit, 167 A.L.R. 1058.

Leaving process or notice at residence as compliance with requirement that party be served "personally" or "in person," "personally served," etc., 172 A.L.R. 521.

Necessity, in service by leaving process at place of abode, etc., of leaving a copy of summons for each party sought to be served, 8 A.L.R.2d 343.

Necessity and sufficiency of service of removal of nonresident trustee, 15 A.L.R.2d 610.

Immunity of nonresident defendant in criminal case from service of process, 20 A.L.R.2d 163.

Service of process on person in military service by serving person at civilian abode or residence, or leaving copy there, 46 A.L.R.2d 1239.

Service of process upon dissolved domestic corporation in absence of express statutory direction, 75 A.L.R.2d 1399.

Failure to make return as affecting validity of service or court's jurisdiction, 82 A.L.R.2d 668.

Place or manner of delivering or depositing papers, under statutes permitting service of process by leaving copy at usual place of abode or residence, 87 A.L.R.2d 1163.

Prohibition to restrain civil action because of defect or omission in service of process, 92 A.L.R.2d 247.

Inclusion or exclusion of first and last days in computing the time for performance of an act or event which must take place a certain number of days before a known future date, 98 A.L.R.2d 1331.

Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons, or the like, 6 A.L.R.3d 1179.

Civil liability of one making false or fraudulent return of process, 31 A.L.R.3d 1393.

72 C.J.S. Process § 26 et seq.

1-098. Withdrawn.

ANNOTATIONS

Withdrawals. — This rule, pertaining to the caption or heading on complaints and petitions for all civil or domestic cases filed in the district courts, is withdrawn effective for cases filed on or after March 1, 2000. For current rule, *see* Rule 1-008.1 NMRA.

1-099. District court civil filing fees.

A. **Docket fee.** Except as provided in Paragraph B or otherwise provided by law, a filing fee shall be collected in civil matters in the amount prescribed by law for the docketing of any cause, whether original or reopened or by appeal or transfer from a court of limited jurisdiction.

B. **Exceptions.** No docket fee shall be charged:

(1) for filing any paper within ninety (90) days after the final disposition of the case;

(2) if a docket fee has been previously paid or waived in the case, for filing a stipulated order or other request for action which may be performed by the clerk of the court pursuant to these rules, even if further action may be required by the judge;

(3) for the filing of a motion to correct a mistake in the judgment, order or record; or

(4) if a docket fee has been previously paid or waived in the case, for filing a motion to enforce a child support order.

C. **Miscellaneous fees.** The miscellaneous district court civil filing fees are as follows:

taking an acknowledgment of one person and affixing seal	$1.50
taking acknowledgments of additional persons at same time, each additional person	.75
single copy of records, per typewritten folio	.35
each additional copy of records ordered at same time, per typewritten folio	.35
copies of records reproduced by photographic process, per page	.35
certificate and seal authenticating any paper as true copy	1.50.

[As amended, effective January 1, 1989; April 1, 1989; September 27, 1999; August 1, 2001.]

Committee commentary. — If a docket fee has been previously paid or waived, a party may file a stipulated order at any time without paying a filing fee even though the signature of the judge is required. This permits the parties to agree to modifications of court orders such as custody orders.

ANNOTATIONS

Cross references. — For collection by clerk of the district court of fees for the record, *see* Section 39-3-25 NMSA 1978.

The 1999 amendment, effective September 27, 1999, in Subparagraph A(1) changed the filing of request for judicial action from 60 days to 90 days after the final disposition of the case; and rewrote Subparagraph A(2)(c) which read "the filing of any pleading to enforce a child support order entered in a domestic relations proceeding".

The 2001 amendment, effective August 1, 2001, added the exception at the beginning of Paragraph A; redesignated former provisions of Paragraph A as present Paragraph B, adding the introductory language, substituting "for filing any paper within ninety (90) days" for "'reopened case' means the filing of any request for judicial action ninety (90) days or more" in Subparagraph (1), substituting "if a docket fee has been previously paid or waived in the case, for filing a stipulated order or other request for action" for "'judicial action' shall not include any request for action by the court" in Subparagraph (2), and substituting the present provisions of Subparagraph (4) for "in a domestic relations proceeding, the filing of a motion to enforce a child support order or any stipulated order"; and redesignated former Paragraph B as Paragraph C.

1-100. Form of papers.

Except exhibits and papers filed by electronic transmission pursuant to Rule 1-005.2 NMRA of these rules, all pleadings and papers filed in the district court shall be: clearly legible; printed on one side of the page, on good quality white paper eight and one-half by eleven (8½ x 11) inches in size, with a left margin of one (1) inch, a right margin of one (1) inch and top and bottom margins of one and one-half (1½) inches; with consecutive page numbers at the bottom; stapled at the upper left hand corner; and, except for a cover page, shall be typed or printed using pica (10 pitch) type style or a twelve (12) point typeface. A space of at least two and one-half (2½) by two and one-half (2½) inches for the clerk's recording stamp shall be left in the upper right-hand corner of the first page of each pleading. The contents, except quotations and footnotes, shall be double spaced. Exhibits which are copies of original documents may be reproduced from originals by any duplicating or copying process which produces a clear black image on white paper on one side of each page. The size of any exhibits shall be their original size or any smaller size not less than eight and one-half by eleven (8½ x 11) inches.

[Adopted effective January 1, 1983; Misc. Rule 4; recompiled as 1-100 SCRA 1986; as amended, effective January 1, 1998; November 1, 2002.]

ANNOTATIONS

Cross references. — For citation format to appellate opinions, New Mexico Statutes Annotated, Court Rules and Uniform Jury Instructions, *see* Supreme Court Order dated January 12, 1998 following Rule Set 23, Supreme Court General Rules.

The 1997 amendment, effective January 1, 1998, rewrote the rule to such an extent that a detailed comparison is impracticable.

The 2002 amendment, effective November 1, 2002, substituted "printed on one side of the page" for "shall be" in the first sentence and inserted "on one side of each page" in the fourth sentence.

1-101. Reserved.

1-102. Deposit of litigant funds.

A. **Distinct accounts.** Litigant funds deposited with the district court shall be deposited in one or more accounts distinct from the court's general funds. Such funds shall be deposited in an interest bearing account appropriate for the type of deposit.

B. **Interest bearing accounts.** Funds deposited in an interest bearing account may be deposited only in a financial institution insured by the Federal Deposit Insurance Corporation or the Federal Savings & Loan Insurance Corporation. To the extent that the amount of funds deposited in any such account exceeds the maximum insured amount such excess must be fully secured in the same manner as provided in Section 6-10-16 NMSA 1978 Comp.

C. **Interest.** Interest on deposits shall inure to the benefit of the person entitled to the principal only:

(1) in proceedings when a single deposit of twenty-five thousand dollars ($25,000) or more is made for a minimum period of thirty (30) days and the court, upon the request and stipulation of the parties, so orders; or

(2) an eminent domain proceeding when the applicable statute provides for investment at interest for the benefit of a party.

D. **Records of clerk.** In any case in which interest is ordered to be paid to the litigant pursuant to Paragraph C of this rule, the clerk shall, before making payment, ascertain the amount of interest included in such payment and shall require the payee to furnish the payee's social security number or employer identification number, and the payee's mailing address. The clerk shall make and keep a record of the payee's name, number and mailing address and the amount of interest included in such payment.

E. **Administrative trust account.** Deposits other than those made pursuant to Subparagraph (1) or (2) of Paragraph C of this rule shall be made in a separate account designated the administrative trust account. The clerk shall distribute to the state

treasurer interest earned on the administrative trust account within ten (10) days after receipt by the clerk of each monthly statement dealing with such account.

1-103. Court interpreters.

A. **Duty of party.** All parties and attorneys shall promptly inquire and advise the clerk of the court as soon as practicable before a hearing of the need for an interpreter.

B. **Failure to comply.** If a party or attorney fails to comply with the provisions of this rule and the failure results in the postponement of a hearing, the court shall impose costs on the party or attorney.

[Approved, effective February 16, 2004.]

ANNOTATIONS

Cross references. – For local rules relating to interpreters, *see* LR1-206, LR2-112, LR3-112, LR3-513, LR4-204, LR5-1003, LR6-Form 2.01, LR7-010, LR8-205, LR9-108, LR10-022, LR13-204 and LR13-212 NMRA.

For the Court Interpreters Act, *see* Sections 38-10-1 to 38-10-8 NMSA 1978.

ARTICLE 12
Domestic Relations Rules

1-120. Domestic relations rules; scope.

Rules 1-120 to 1-127 NMRA provide additional rules for domestic relations actions.

[Approved, effective, November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

Committee Commentary. —

General

This part of the Rules of Civil Procedure for the District Courts recognizes that domestic relations cases are frequently filed by pro se litigants and that supplemental statewide rules and forms are needed for the effective administration of justice.

These rules and the Domestic Relations Forms supersede local rules and forms currently required by many judicial districts. The primary goal of these rules and forms is to provide uniformity in the practice of law in this state.

Scope of rules

As used in this rule, "domestic relations actions" includes:

(1) legal separations, Section 40-4-3 NMSA 1978;

(2) dissolution of marriage, Section 40-4-5 NMSA 1978;

(3) annulment, Section 40-1-9 NMSA 1978;

(4) spousal support, Section 40-4-7 NMSA 1978;

(5) child support, Sections 40-4-11 to 40-4-11.6 NMSA 1978;

(6) division or distribution of community or separate property or debts, Sections 40-2-1 to 40-2-9, 40-3-1 to 40-3-17 and 40-4-20 NMSA 1978;

(7) determination of paternity pursuant to the Uniform Parentage Act, Sections 40-11-1 to 40-11-23 NMSA 1978;

(8) actions brought pursuant to the Uniform Interstate Family Support Act, Sections 40-6A-101 to 40-6A-902 NMSA 1978;

(9) child custody actions pursuant to Sections 40-4-9 and 40-4-9.1 NMSA 1978 and actions brought pursuant to the Child Custody Jurisdiction Act, Sections 40-10-1 to 40-10-24 NMSA 1978 [repealed, now see Uniform Child-Custody Jurisdiction and Enforcement Act, 40-10A-101 to 40-10A-403 NMSA 1978.];

(10) actions brought pursuant to the Mandatory Medical Support Act, Sections 40-4C-1 to 40-4C-14 NMSA 1978; and

(11) actions brought pursuant to the Support Enforcement Act, Sections 27-2-32, 37-1-29, 40-4-15 and 40-4A-1 to 40-4A-16 NMSA 1978.

As used in this rule "domestic relations actions" does not include:

(1) termination of parental rights actions brought in the children's court;

(2) adoption of a child pursuant to Sections 32A-5-1 to 32A-5-45 NMSA 1978;

(3) adoption of an adult pursuant to the Adult Adoption Act, Sections 40-14-1 to 40-14-15 NMSA 1978;

(4) proceedings brought pursuant to the Grandparent Visitation Privileges Act, Sections 40-9-1 to 40-9-4 NMSA 1978 except mediation and attorney fee proceedings;

(5) proceedings brought pursuant to the Family Violence Protection Act, Sections 40-13-1 to 40-13-7 NMSA 1978;

(6) actions arising out of enforcement of the Parental Responsibility Act, Sections 40-5A-1 to 40-5A-13 NMSA 1978; or

(7) change of name proceedings brought pursuant to Sections 40-8-1 to 40-8-3 NMSA 1978.

ANNOTATIONS

Cross references. — For provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act, *see* Sections 40-10A-101 to 40-10A-403 NMSA 1978.

Compiler's notes. — Pursuant to a court order dated October 3, 2000, this rule was provisionally approved for twelve months effective November 1, 2000. Subsequently, by a court order dated October 29, 2001, this rule was approved and adopted in its final form, effective November 1, 2001.

1-121. Temporary domestic orders.

A. **Temporary domestic orders required.** Except as provided in this rule, in all original domestic relations actions where a summons has been issued, the court shall enter a temporary domestic order, unless:

(1) the action was filed by the state regarding child support; or

(2) otherwise ordered by the court.

B. **Approved form.** If a temporary domestic order is issued it shall be substantially in the form approved by the Supreme Court. Any prohibition or limitation on the parties not included in the Supreme Court approved form shall only be approved after notice and hearing by the court.

C. **Issuance.** Coincident with the issuance of summons, the clerk shall file a temporary domestic order, and deliver an endorsed copy of the order to the person obtaining the summons. The petitioner shall cause to be served an endorsed copy of the temporary domestic order on the respondent. If served with the summons and petition, the return of summons shall include a statement that the temporary domestic order was served with the petition.

D. **Effective date of temporary domestic orders.** The verification to the petition shall include a statement that the petitioner understands the content of the temporary domestic order. The temporary domestic order shall be binding upon the petitioner at the time the petition is filed and upon the respondent two (2) days after it is personally served on the respondent. Actions taken by either party that are contrary to the terms of

the temporary domestic order are subject to redress by the court, including costs and attorney fees.

E. **Applicability.** Unless the court orders otherwise, this rule shall not apply to domestic relations actions or proceedings filed:

(1) pursuant to Section 40-4-20 NMSA 1978 to divide or distribute property;

(2) after entry of the final order or decree;

(3) pursuant to the Uniform Interstate Family Support Act [40-6A-100 NMSA 1978];

(4) pursuant to the Uniform Parentage Act [40-11-1 NMSA 1978]; or

(5) as a third party custody action.

F. **Temporary restraining orders.** This rule shall not preclude a party from requesting the entry of a temporary restraining order under Rule 1-066 NMRA of these rules.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

Committee commentary. — Unless specific facts are shown by affidavit or in the verified petition that immediate and irreparable injury, loss or damage will result to the petitioner, the temporary domestic order will take effect two days after it is served. *See* Rule 1-066(B) NMRA.

The summons and petition may be served in accordance with Rule 1-004 NMRA.

ANNOTATIONS

Cross references. — For the Uniform Interstate Family Support Act, *see* Sections 40-6A-101 to 40-6A-903 NMSA 1978.

For provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act, *see* Sections 40-10A-101 to 40-10A-403 NMSA 1978.

For the Uniform Parentage Act, *see* Sections 40-11-1 to 40-11-23 NMSA 1978.

Compiler's notes. — Pursuant to a court order dated October 3, 2000, this rule was provisionally approved for twelve months effective November 1, 2000. Subsequently, by a court order dated October 29, 2001, this rule was approved and adopted in its final form, effective November 1, 2001.

1-122. Dissolution of marriage and Section 40-4-3 NMSA 1978 proceedings; interim order allocating income and expenses.

A. **Interim order allocating income and expenses.** Absent exceptional circumstances, during the pendency of a dissolution of marriage or Section 40-4-3 NMSA 1978 proceeding, community income and expenses shall be equally divided between the parties. Upon motion, separate income and expenses may also be divided if appropriate.

B. **Agreement by parties.** The parties may file a stipulation waiving the entry of an interim order allocating income and expenses.

C. **Allocation of income and expenses.** If the parties have not agreed to or waived entry of an interim order allocating income and expenses, at any time after commencement of the proceeding:

(1) a party may file a motion requesting the court to enter an interim order allocating income and expenses; or

(2) the court, on its own motion, may set a hearing to allocate income and expenses.

At least five (5) days prior to the hearing the parties shall be required to exchange the information set out in Domestic Relations Form 4A-122 NMRA.

D. **Modification of interim allocation.** Any party may file a motion to modify or supplement the interim order allocating income and expenses.

E. **Form of statements, orders and notices.** Interim monthly income and expense statements, interim orders allocating income and expenses, notices of hearing for a interim order dividing income and expenses and orders for production shall be substantially in the form approved by the Supreme Court.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

Committee Commentary. — There are two choices available for interim orders allocating income and expenses. A district court may:

(1) provide for an interim allocation of income and expenses upon motion of a party (Domestic Relations Form 4A-111); or

(2) unless waived by the parties at the time of the filing of the petition, provide for an interim allocation of community income and expenses in every proceeding by serving a notice in accordance with Domestic Relations Form 4A-121. Upon motion of a party, the court may also divide separate income and expenses.

The interim allocation or communication and expenses form, Domestic Relations Form 4A-122 NMRA, uses a fixed percentage of income to determine child support expenses. If the parties have a negative or minimal net spendable income, the court has the discretion to fashion an appropriate order.

ANNOTATIONS

Compiler's notes. — Pursuant to a court order dated October 3, 2000, this rule was provisionally approved for twelve months effective November 1, 2000. Subsequently, by a court order dated October 29, 2001, this rule was approved and adopted in its final form, effective November 1, 2001.

Allocation of community debt. — Because the district court had the authority to make an allocation as part of its power to make an interim order allocating community expenses, the district court did not abuse its discretion by allocating the community debt. Bursum v. Bursum, 2004-NMCA-133, 136 N.M. 584, 102 P.3d 651.

1-123. Mandatory disclosure in domestic relations and paternity actions; preliminary disclosure requirements.

A. **Duty to disclose.** Parties to domestic relations actions shall disclose to other parties relevant information concerning characterization, valuation, division or distribution of assets or liabilities, whether separate or community property, in any proceeding involving the distribution of property or the establishment or modification of child or spousal support as provided in this rule.

B. **Preliminary disclosure.** Unless otherwise stipulated by the parties and ordered by the court or otherwise ordered by the court:

(1) in every domestic relations action involving property and debt division or characterization, within forty-five (45) days after service of the petition, the parties shall serve a disclosure as provided in Domestic Relations Form 4A-122 NMRA. The disclosure shall contain:

(a) an interim monthly income and expense statement;

(b) a community property and liabilities schedule; and

(c) a separate property and liabilities schedule.

The statements and schedules shall substantially comply with Domestic Relations Forms 4A-122, 4A-131 and 4A-132 NMRA approved by the Supreme Court. The schedules shall be accompanied by a list of the documents utilized to complete the schedules.

(2) in actions concerning spousal support or child support, within forty-five (45) days of service of process on the opposing party, the petitioner or movant shall serve on the opposing party, and the opposing party shall serve on the petitioner or movant, an affidavit of disclosure containing the following information:

(a) federal and state tax returns, including all schedules, for the year preceding the request;

(b) W-2 statements for the year preceding the request;

(c) Internal Revenue Service Form 1099s for the year preceding the request;

(d) work-related daycare statements for the year preceding the request, if applicable;

(e) dependent medical insurance premiums for the year preceding the request, if applicable;

(f) wage and payroll statements for four months preceding the request; and

(g) in actions concerning modification of spousal support, a statement of income and expenses pursuant to Domestic Relations Form 4A-122 NMRA.

C. **Supplemental disclosure.** Sworn disclosure schedules shall be served in accordance with Rule 1-026 NMRA upon all parties, with copies to the trial court, at least five (5) days before trial.

D. **Child support worksheets.** In actions involving child support, the parties shall each complete a child support worksheet as provided by Section 40-4-11.1 NMSA 1978. The worksheets shall be served upon all parties, with copies to the trial judge, at least five (5) days before trial.

E. **Duty of the State as a party.** Under this rule, the State of New Mexico is required to produce only documents intended to be introduced at an evidentiary hearing, at least five (5) days prior to the hearing, unless otherwise prohibited by law.

F. **Failure to comply.** Failure to comply with this rule may result in the assessment of costs and attorney fees against the delinquent party or such other sanctions as the court deems appropriate.

[Approved, effective November 1, 2000 until November 1, 2001; approved. effective November 1, 2001; as amended by Supreme Court Order 06-8300-20, effective December 18, 2006.]

Committee Commentary. — In domestic relations actions, the parties are subject to the mandatory disclosure requirements set forth in this rule. The purpose of mandatory

disclosure is to decrease acrimony and mistrust between the parties, lessen legal fees and costs, emphasize fiduciary duties, assist parties to make honest, full and complete disclosure of the existence and value of assets, debts and income, and encourage the parties to restructure their relationships inexpensively, efficiently and respectfully. The parties should be mindful of these objectives in making their disclosures under these rules.

Although these disclosures are mandatory, this rule in no way limits permissible discovery pursuant to Rules 1-026 to 1-037 NMRA. The parties are free to avail themselves of all applicable discovery procedures unless the court orders otherwise.

As is typical with other discovery requests and responses, disclosures under this rule are not to be filed with the court. Rather, they are to be served upon the parties and the trial court as set forth in the rule. Certificates of service of the disclosure should be filed with the clerk pursuant to Rule 1-005 NMRA.

ANNOTATIONS

Cross references. — For the Supreme Court approved community property and liabilities schedule, *see* Domestic Relations Form 4A-131 NMRA.

For the Supreme Court approved separate property and liabilities schedule, *see* Domestic Relations Form 4A-132 NMRA.

Compiler's notes. — Pursuant to a court order dated October 3, 2000, this rule was provisionally approved for twelve months effective November 1, 2000. Subsequently, by a court order dated October 29, 2001, this rule was approved and adopted in its final form, effective November 1, 2001.

The 2006 amendment, approved by Supreme Court Order 06-8300-20 effective December 18, 2006, added a new Paragraph A; redesignated former Paragraph A as Paragraph B; amended Paragraph B to provide for a preliminary disclosure by the parties within forty-five (45) days after service of a petition in domestic relations actions and to specify the disclosures required by the rule; added Paragraph C to provide for sworn supplemental disclosure schedules; redesignated former Paragraph B as Paragraph D; amended Paragraph D to require service of child support worksheets on the trial judge; added Paragraph E relating to production of documents by the state; and redesignated former Paragraph C as Paragraph F.

1-124. Child custody; parenting plans; binding arbitration.

A. **Parenting plan required.** If a domestic relations proceeding involves custody or visitation of minor children, the parties shall attempt to agree upon and file a joint parenting plan pursuant to Section 40-4-9.1 NMSA 1978 within sixty (60) days of the filing of the petition for dissolution.

B. **Binding arbitration.** If the parties have not filed a parenting plan, the parties may agree to submit issues involving custody or visitation to binding arbitration pursuant to Section 40-4-7.2 NMSA 1978.

C. **Mediation.** If the parties have not agreed to a parenting plan or to binding arbitration pursuant to Paragraphs A or B of this rule, the court may refer the matter to family counseling or mediation prior to holding a hearing on child custody or visitation.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

ANNOTATIONS

Cross references. — For provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act, *see* Sections 40-10A-101 to 40-10A-403 NMSA 1978.

Compiler's notes. — Pursuant to a court order dated October 3, 2000, this rule was provisionally approved for twelve months effective November 1, 2000. Subsequently, by a court order dated October 29, 2001, this rule was approved and adopted in its final form, effective November 1, 2001.

1-125. Domestic Relations Mediation Act programs.

A. **Applicability.** This rule shall apply only to domestic relations proceedings which involve custody, periods of parental responsibility or visitation of minor children pending in a judicial district that has established a domestic relations mediation program pursuant to the Domestic Relations Mediation Act.

B. **Referral by court.** If the parties to a domestic relations action involving minor children have not filed a parenting plan pursuant to Section 40-4-9.1 NMSA 1978, unless binding arbitration is pending pursuant to Section 40-4-7.2 NMSA, the court may order the parties to:

(1) attend a general information session;

(2) meet with a counselor designated by the court;

(3) participate in mediation;

(4) participate in priority consultation pursuant to this rule; or

(5) participate in advisory consultation pursuant to this rule.

C. **Mediation; parenting plan.** If the court orders the parties to participate in mediation, if the mediation is successful, the counselor or mediator shall prepare a parenting plan which shall be submitted to the parties and their respective counsel for

approval. When the parenting plan has been signed it shall be submitted to the court for approval together with an order approving it.

D. **Priority consultation.** The court may refer the parties to a priority consultation pursuant to the Domestic Relations Mediation Act. Upon conclusion of a priority consultation, the consultant shall prepare written recommendations to the court which shall be filed with the court and served on the parties. If a party does not agree with the recommendations, within eleven (11) days of the filing of the priority consultation recommendations, the party shall file a motion specifically describing the reasons for the party's objections to the recommendations. The party's objections shall be served on all other parties. The opposing party may file a written response within eleven (11) days after the date of service of the objections. No reply may be filed. If no objections are filed within eleven (11) days after service of the recommendations, an order adopting the recommendations shall be entered.

E. **Advisory consultations.** The court may enter an order requiring the parties to submit to an advisory consultation. The order shall be substantially in the form approved by the Supreme Court. At the conclusion of an advisory consultation a report shall be prepared and served on each party.

The person preparing the report shall also prepare and file with the court written recommendations. The written recommendations filed with the court shall not contain the basis for the recommendations.

If a party does not agree with the recommendations, within eleven (11) days of the filing of the advisory consultation recommendations, the party shall file a motion specifically describing the reasons for party's objections to the recommendations. The party's objections shall be served on all other parties. The opposing party may file a written response within eleven (11) days after service of the objections. No reply may be filed. If no objections are filed within eleven (11) days after service of the recommendations, an order adopting the recommendations shall be entered.

F. **Confidentiality.** All communications made by any person who participates in mediation proceedings pursuant to this rule are confidential except that there is no protection for information derived from such communications which a participant is required by law to report to a law enforcement officer or state agency. The Mediation Procedures Act, Sections 44-7B-1 to 44-7B-6 NMSA 1978, shall apply to proceedings commenced under this rule.

G. **Conduct in domestic relations mediation programs.** The parties to a domestic relations mediation proceeding commenced under this rule are expected to participate in good faith, but sanctions shall not be imposed for failure to settle or compromise any claim or defense.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001; as amended by Supreme Court Order No. 09-8300-013; effective

May 18, 2009; by Supreme Court Order No. 10-8300-038, effective December 31, 2010.]

Committee Commentary. — The committee is aware that some judicial districts have non-disclosure and confidentiality local rules. The committee does not believe that this is a matter for local district court rules. Any local rules and forms containing good faith participation requirements shall conform to the provisions of this rule.

ANNOTATIONS

Cross references. — For statutory duty to report child abuse and neglect cases, *see* Section 32A-4-3 NMSA 1978.

For the Domestic Relations Mediation Act, *see* Sections 40-12-1 to 40-12-6 NMSA 1978.

Compiler's notes. — Pursuant to a court order dated October 3, 2000, this rule was provisionally approved for twelve months effective November 1, 2000. Subsequently, by a court order dated October 29, 2001, this rule was approved and adopted in its final form, effective November 1, 2001.

The 2009 amendment, approved by Supreme Court Order 09-8300-013, effective May 18, 2009, in Paragraph F, changed the title from "Privileges" to "Confidentiality"; and replaced "privileged" with "confidential" for communications made during mediation proceedings under this rule, and, replaced "privilege" with "protection" for information derived from these communications, which the law requires be reported to a law enforcement officer or state agency.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-038, effective December 31, 2010, in Paragraph F, added the last sentence and added Paragraph G; and in the committee commentary, added the last sentence.

1-126. Partial decrees.

A. **Limited to exceptional circumstances.** Partial decrees dissolving the marriage will be granted only upon a showing that exceptional circumstances exist.

B. **Motion contents.** The motion shall address the impact of entry of a partial decree on the parties and their children, including, but not limited to, medical coverage, child custody, income division, child support, spousal support and taxes paid by the parties.

C. **Entry of partial decree.** A partial decree may include provisions that the court deems necessary for the protection of the parties and their minor children.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

ANNOTATIONS

Compiler's notes. — Pursuant to a court order dated October 3, 2000, this rule was provisionally approved for twelve months effective November 1, 2000. Subsequently, by a court order dated October 29, 2001, this rule was approved and adopted in its final form, effective November 1, 2001.

1-127. Attorney fees in domestic relations cases.

A motion for attorney fees pursuant to Rule 1-054 NMRA shall include an itemization of time expended and an affirmation that the fees claimed are correctly stated and necessary. In awarding fees, the court shall consider relevant factors presented by the parties, including but not limited to:

A. disparity of the parties' resources, including assets and incomes;

B. prior settlement offers;

C. the total amount of fees and costs expended by each party, the amount paid from community property funds, any balances due and any interim advance of funds ordered by the court; and

D. success on the merits.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

ANNOTATIONS

Compiler's notes. — Pursuant to a court order dated October 3, 2000, this rule was provisionally approved for twelve months effective November 1, 2000. Subsequently, by a court order dated October 29, 2001, this rule was approved and adopted in its final form, effective November 1, 2001.

By presenting court with affidavit, mother sufficiently alerted the court's attention to her request for attorney fees and preserved this issue for appeal. Grant v. Cumiford, 2005-NMCA-058, 137 N.M. 485, 112 P.3d 1142.

Implementation of 40-4-7(A) NMSA 1978. — Rule 1-054 E NMRA and this rule appear to implement 40-4-7(A) NMSA 1978. Bursum v. Bursum, 2004-NMCA-133, 136 N.M. 584, 102 P.3d 651.

Attorney fees for California litigation. — A district court had jurisdiction to consider an award of attorney fees for California litigation involving child custody under 40-4-7 A NMSA 1978 and this rule guidelines. Bursum v. Bursum, 2004-NMCA-133, 136 N.M. 584, 102 P.3d 651.

District court is to consider a number of factors. Weddington v. Weddington, 2004-NMCA-034, 135 N.M. 198, 86 P.3d 623.

Consideration of parties' economic disparity. — It is appropriate for the trial court to consider the parties' access to financial resources when exercising its discretion in awarding attorney fees. Monsanto v. Monsanto, 119 N.M. 678, 894 P.2d 1034 (Ct. App. 1995).

In making its award of attorney fees, the trial court properly considered the economic disparity between husband and wife and the husband's access to financial resources through his family. Monsanto v. Monsanto, 119 N.M. 678, 894 P.2d 1034 (Ct. App. 1995).

Award of fees to husband. — Where the court was presented with evidence of husband’s attorney’s attempts to show wife that there was no basis for her motions, and the court was also aware of the total amount of attorney time expended and fees incurred by both husband and wife in the case, these factors support the award of attorney fees to husband. Weddington v. Weddington, 2004-NMCA-034, 135 N.M. 198, 86 P.3d 623.

Table Of Corresponding Rules

The first table below reflects the disposition of the former Rules of Civil Procedure for the District Courts. The left-hand column contains the former rule number, and the right-hand column contains the corresponding present Rule of Civil Procedure for the District Courts.

The second table below reflects the antecedent provisions in the former Rules of Civil Procedure for the District Courts (right-hand column) of the present Rules of Civil Procedure for the District Courts (left-hand column).

Former Rule	NMRA
1	1-001
2	1-002
3	1-003
4	1-004
5	1-005
6	1-006
7	1-007

Former Rule	NMRA
54	1-054
55	1-055
56	1-056
57	1-057
58	1-058
59	1-059
60	1-060

8	1-008
9	1-009
10	1-010
11	1-011
12	1-012
13	1-013
14	1-014
15	1-015
16	1-016
17	1-017
18	1-018
19	1-019
20	1-020
21	1-021
22	1-022
23	1-023
23.1	1-023.1
24	1-024
25	1-025
26	1-026
27	1-027
28	1-028
29	1-029
30	1-030
31	1-031
32	1-032
33	1-033
34	1-034
35	1-035
36	1-036
37	1-037
38	1-038
39	1-039
40	1-040
41	1-041
42	1-042
43	1-043
44	1-044
61	1-061
62	1-062
63	1-063
64	1-064
65	1-065
65.1	1-065.1
66	1-066
67	1-067
68	1-068
69	1-069
70	1-070
71	1-071
72	1-072
73	1-073
74	1-074
75	1-075
76	1-076
77	1-077
78	1-078
79	1-079
80	1-080
81	1-081
82	1-082
83	1-083
84	1-084
85	1-085
86	1-086
87	1-087
88	1-088
88.1	1-088.1
89	1-089
89.1	1-089.1
90	1-090
91	1-091
92	1-092
93	1-093
94	1-094
95	1-095

45	1-045
46	1-046
47	1-047
48	1-048
49	1-049
50	1-050
51	1-051
52	1-052
53	1-053
96	1-096
Misc. 1	1-097
Misc. 2	1-098
Misc. 3	1-099
Misc. 4	1-100
Misc. 5	1-101
Misc. 6	1-102

NMRA	Former Rule
1-001	1
1-002	2
1-003	3
1-004	4
1-005	5
1-006	6
1-007	7
1-008	8
1-009	9
1-010	10
1-011	11
1-012	12
1-013	13
1-014	14
1-015	15
1-016	16
1-017	17
1-018	18
1-019	19
1-020	20
1-021	21
1-022	22
1-023	23
1-023.1	23.1
1-024	24
1-025	25
1-026	26

NMRA	Former Rule
1-054	54
1-055	55
1-056	56
1-057	57
1-058	58
1-059	59
1-060	60
1-061	61
1-062	62
1-063	63
1-064	64
1-065	65
1-065.1	65.1
1-066	66
1-067	67
1-068	68
1-069	69
1-070	70
1-071	71
1-072	72
1-073	73
1-074	74
1-075	75
1-076	76
1-077	77
1-078	78
1-079	79

1-027	27
1-028	28
1-029	29
1-030	30
1-031	31
1-032	32
1-033	33
1-034	34
1-035	35
1-036	36
1-037	37
1-038	38
1-039	39
1-040	40
1-041	41
1-042	42
1-043	43
1-044	44
1-045	45
1-046	46
1-047	47
1-048	48
1-049	49
1-050	50
1-051	51
1-052	52
1-053	53
1-080	80
1-081	81
1-082	82
1-083	83
1-084	84
1-085	85
1-086	86
1-087	87
1-088	88
1-088.1	88.1
1-089	89
1-089.1	89.1
1-090	90
1-091	91
1-092	92
1-093	93
1-094	94
1-095	95
1-096	96
1-097	Misc. 1
1-098	Misc. 2
1-099	Misc. 3
1-100	Misc. 4
1-101	Misc. 5
1-102	Misc. 6